

NKULULEKO MABHENA

versus

PG INDUSTRIES [ZIMBABWE] LIMITED

and

PG ZIMBOARD PRODUCTS [PRIVATE] LIMITED

and

PG INDUSTRIES [ZIMBABWE] LIMITED GROUP C.E.O, N.O

and

JAMES BANDA PERSONALLY AND N.O

HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 15 JULY AND 23 JULY 2015

Opposed application

Applicant in person

Advocate Mangwaliba for respondents

MAKONESE J: This is an application for contempt of court. The applicant is seeking an order in the following terms:

“IT IS HEREBY ORDERED THAT

1. 1st, 2nd, 3rd and 4th respondents be and are hereby declared to be in contempt of court in respect of court orders under case numbers HH115/02, HB 25/07, HC 2797/11, and HB 1/02.
2. 1st, 2nd, 3rd and 4th respondents are hereby ordered to purge their contempt by complying with the judgments of this court as granted in favour of applicant under case numbers HC 8044/00, HC 3793/04, HC 2797/11 and HC 292/09 within 10 days of service of this order upon them.
3. Failure of (2) above, 1st, 2nd, 3rd and 4th respondents shall each be fined US\$100 on each and every order and for each day they remain in contempt, until they fully comply with the judgments of this court as listed in (2), above.
4. 1st, 2nd, 3rd and 4th respondents be and are hereby ordered to pay the costs of this application.”

In a rather long and rumbling founding affidavit, applicant prays that all the respondents be ordered to be in contempt of several court orders. In summary, applicant was dismissed from 1st respondent but was subsequently reinstated to the position of Executive Director, marketing, following a ruling by KAMOCHA J, under case number HB 1/12. Upon reinstatement, applicant was paid his outstanding salaries and backpay from the time of his unlawful termination. Applicant was advised that the position to which he had been reinstated no longer existed within the structures of first and second respondents. Applicant was advised that he would be retrenched and negotiations commenced.

Applicant was duly retrenched and was paid his retrenchment package. He was, however aggrieved with the retrenchment package and has since challenged the process in the courts. Further, applicant was aggrieved with the manner in which he was reinstated to Zimboard Products (Pvt) Limited. He has since brought action under case number HC 2094/14 seeking, *inter alia* that respondents as cited be found to be in contempt of court in so far as the order to reinstate him is concerned. It is common cause that applicant has brought numerous court applications against the respondent from as far back as the year 2000. The respondents have brought a petition of perpetual silence by way of an interlocutory application under case number HC 2094/14. That matter is still pending.

Pointe in Limine

The respondents in this matter plead *lis alibi pendens* as the relief being claimed by applicant herein is also subject of the matter under case number HC 2094/14 in this court. The respondents contend that the matter before this court under case number 2094/14 and the instant matter involve the same parties and substantially the same subject matter. The applicant may not, therefore approach this court for substantially similar relief before the proceedings under case number HC 2094/14 are disposed of and resolved.

The applicant did not dispute that there are proceedings pending in this court in relation to the same subject matter and involving the same parties. He conceded that the matter was not

properly before the court but was not prepared to have his application dismissed. He did not proffer any valid reasons for his stance.

It is the finding of this court that there is merit in the point *in limine* raised by respondents. The defence of *lis alibi pendens* is based on the proposition that where a dispute between the parties is being litigated elsewhere, it is inappropriate for it to be litigated in the court or tribunal in which the plea is raised.

The position on the law is set out in, The Civil Practice of the Supreme Court of South Africa, 4th Edition, by the authors, Van Winsen, at page 249 as follows:

“If an action is already pending between parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or in a different court, it is open to the defendant to take the objection of *lis pendens*, that is, that another action respecting the identical subject matter has already been instituted, whereupon the court in its discretion may stay the second action pending the decision of the first.....

A defence of *lis pendens* depends upon the existence of pending earlier action.”

Additionally, the respondents plead *res judicata* as the subject matter of the instant application has already been determined in the judgment of KAMOCHA J, under HB 1/12. In this judgment, KAMOCHA J, dismissed the relief for contempt of court. The court made a finding that the respondents had complied with the court orders referred to by the applicant. There is no doubt that in the present case the applicant is either simply trying his luck or is simply harassing the respondents. Such conduct by applicant cannot be permitted by this court.

In the result, the court makes the following order:

1. The application be and is hereby dismissed.
2. Applicant is ordered to pay the costs of suit.

Mawere and Sibanda respondents' legal practitioners