SWANDALE PROPERTIES (PRIVATE) LIMITED
versus
VENENCIA MADAKE
and
MUNICIPALITY OF HARARE

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 10 November, 2011 and 18 January 2012

Opposed Application

F M Katsande, for the applicant
S Simango, for the first respondent
No appearance for the second respondent

MUTEMA J: In the instant case the applicant seeks the following order as per the draft order:

"It is ordered that:

1. The cancellation with effect from 20 August 2010 of the lease agreement entered into between the applicant and the first respondent be and is hereby confirmed.
2. Within 10 (ten) days of the service of the order on her, the first respondent and all those claiming through her shall vacate with their belongings stand 1089 Tynwald, Harare.
3. Within the same 10 days of the service of the order on her the first respondent shall at her expense demolish any structures and remove the rubble thereof of those structures which she may have erected on the property and did so without the approval of the second respondent.
4. Failing compliance the leave be and is hereby granted to the applicant to demolish the said structures and remove the rubble the cost of which the applicant shall recover from the first respondent.
5. The first respondent shall bear the costs of this application".

This application was filed on 29 April, 2011.

Apparently, prior to the current application being lodged, on 8 July, 2010 in the magistrates' court under case number 6599/10, the applicant and other co-respondents had

lost an application for an interdict by the first respondent against them. The applicant and the other co-respondents had subsequently appealed to this court against the magistrates' court judgment under case number CA 484/10. When this application first came before me on 29 September, 2011 I queried the propriety of it being heard when the appeal was still pending since this had the potential of achieving two conflicting outcomes. Mr *Katsande* had the good sense of withdrawing that appeal.

On 10 November, 2011 Mr *Simango* raised a pertinent point in *limine* viz, that of *lis alibi pendens*. His contention was that the same matter is pending before this court under case number HC 4826/10. Apparently what the applicant had done was that apart from lodging the appeal alluded to *supra*, it had also instituted contempt of court proceedings against the first respondent in case number HC 4826/10 premised on the first respondent's continuance of construction activities of the stand in question without leave to execute pending the appeal against the magistrate's judgment alluded to above.

The draft order in HC 4826/10 is couched as follows:

"It is ordered that:

(a) The respondent be and is hereby found to be in contempt of court in that having been served with the Notice of Appeal in CA 484/10 dated 9 July 2010 against the judgment of the learned magistrate in case 6599/10 dated 8 July 2010, without sanction of the court she seized and took occupation of the disputed property wilfully and intentionally defying the suspension of the magistrates' court judgment by virtue of the appeal to the High Court.
(b) The respondent be and is hereby ordered to be committed to prison for a period of 30 days.
(c) The warrant of committal to prison will be suspended on condition that within 24 (twenty four) hours of the service of the order on her, she and all those claiming through her shall vacate with their belongings stand 1089 Tynwald, Harare.
(d) The respondent shall pay the costs of his (sic) application."

Opposing the point in *limine* Mr *Katsande* advised that HC 4826/10 was heard by CHIWESHE JP and the judgment therein was (is) still pending. He argued that the pre-requisites for *lis alibi pendens* are similar to those for *res judicata*, namely that proceedings

in the other court must be between the same parties, that the same question must arise and that there must be the same cause. He further argued that the appeal has since been withdrawn and that the cause in case HC 4826/10 was contempt of court and the relief sought was committal to prison for 30 days suspended on condition the first respondent desisted from occupying the property pending appeal. In *casu*, so the argument went, the relief sought is different, viz cancellation of the lease and her eviction. Eviction and contempt are not synonymous. For this peroration, he relied on the case of *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (SC) at 316 C.

Herbstein and van Winsen in *The Civil Practice of the Superior Courts in South Africa* 3rd ed at pp 269-270 the learned authors say about the defence of *lis alibi pendens*:

> "If an action is already pending between the parties and the plaintiff therein 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 a different court, it is open to such defendant to take the objection of *lis pendens*, i.e. 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 in the first action."

The discretion is exercised for the sake of equity and convenience: *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC).

Regarding the same principle, the case of *Towers* v *Chitapa* 1996 (2) ZLR 261 (HC) is also apposite. In that case it was held that in order for the matter to be encompassed under the defence of *res judicata*, the proceedings relied upon must have been between the same parties or their privies and the same issue must arise in the subsequent proceedings that were decided upon in the previous proceedings. This latter requirement was now interpreted expansively so as to permit the possibility of the defence being successfully invoked in respect of an issue determined as part of the *ratio decidendi*. Although the defendant was not a party to the previous litigation, she was asserting a right derived through the party who was the defendant in the previous litigation. Although the same cause of action was not relied on in the previous proceedings, relief of the same type was nevertheless sought in both cases. Additionally, despite the differences in the cause of action in the two cases, there was still an identity of question arising. The doctrine of *res judicata* therefore applied in the present case.

Applying the foregoing legal principles to the present case it goes without quarrel that in both suits, viz HC 4826/10 and HC 2877/11 the parties are the same – both the present applicant and the first respondent do feature as the main actors. The facts in the *Wolfenden*

case *supra* are distinguishable from the present litigation. Therein the maintenance court had found that the respondent was not the father of the minor child hence was not liable to maintain it. While a subsequent suit was fatal to the appellant's claim for out of pocket expenses in consequence of the seduction (since the respondent was not responsible for her pregnancy) it was still open to her to claim general damages for seduction since the issue of whether or not the respondent had had sexual intercourse with her and whether or not she was a virgin at the time was not decided by the maintenance court.

Although there may be differences between contempt of court and cancellation of a lease in the two litigations relief of the same type is nevertheless being sought in both cases and it is the main thrust of what the applicant desires, viz vacation of stand 1089 Tynwald, Harare by the first respondent and all those claiming occupation through her. There is therefore an identity of question arising in both suits despite the differences in causes of action and other ancillary reliefs being sought.

It behoves me to utter some strictures concerning the applicant's improper conduct of embarking upon a multiplicity of suits regarding the same subject matter. There was the appeal against the interdict against it by the magistrate's court, the application for the contempt of court as well as the present one for cancellation of the lease and eviction which were all current at some stage. This is undesirable for not only does it clog the courts unnecessarily but has the potential of yielding conflicting and confusing results to the detriment of the smooth administration of justice.

In order to avoid or curtail this multiplicity of actions and in the exercise of my discretion for the sake of equity and convenience the present application is hereby stayed pending the outcome of the decision in case HC 4826/10. In view of the applicant's improper conduct alluded to *supra* it is ordered to pay the first respondent's wasted costs.

F M Katsande & Partners, applicant's legal practitioners
Nyikadzino, Koworera & Associates, 1st respondent's legal practitioners