CITY OF HARARE
versus
KANDRICK INVESTMENTS PRIVATE LIMITED
and
RUFARO MARKETING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA & MUSITHU JJ
HARARE, 13 July 2023 and 16 September 2024

Civil Appeal

A Moyo with N B *Nyathi*, for the applicant
T Tabana, for the respondent

MUSITHU J: This is an appeal against the whole judgment of the Magistrates Court handed down by Magistrate L Ncube at Harare in case number on HREC-CG 4050/22 on 23 November 2022.

The Factual Background

On 7 April 2022, the first and second respondents entered into a lease agreement in terms of which the second respondent leased to the first respondent, premises known as Machipisa Bar and Silver Room Tarven, Stand 4292, Machipisa, Harare (hereinafter referred to as the property or the premises). The monthly rental was US$3, 500.00 to be paid monthly before the first day of the month. The duration of the lease was ten years, and it was set to expire on 31 March 2032. According to the first respondent, the lease authorised the lessee to renovate the premises.

The first respondent renovated the existing double storey building by plastering it and erecting a new roof. All the designs were approved and supervised by an engineer in the appellant's employ. The developments were accordingly done in terms of plans that were approved by the appellant herein. All stages of the construction work were inspected and approved by the appellant's officials.

On 17 October 2022, the appellant issued a notice of its intention to evict the first defendant from the premises as well demolish the structures that had been put up. The threat to demolish the structures was made on the basis that these were erected illegally without

approved plans. The appellant's notice prompted the first respondent to approach the court *a quo* with an *exparte* application for a prohibitory interdict.

Proceedings in the court *a quo*

The application for the interdict was opposed by the appellant herein. The notice of opposition raised a preliminary point of *lis pendens*. It was averred that a similar to the application before the court *a quo* was pending before this court under HC 7416/22. That matter was heard on an urgent basis on 4 November 2022, and a provisional order was granted by this court per CHINAMORA J on that date. That provisional order was pending before this same court for confirmation. The matter involved the same parties and the same cause of action (interdict). The present matter had therefore been overtaken by events.

Concerning the merits, it was averred that the lease agreement between the first and second respondents was invalid because the appellant had not authorised the leasing of the property to the first respondent. The lease agreement between the first and second respondent was therefore null and void. The approvals of the structural changes to the property had been revoked by the appellant when it became aware of the illegal lease.

The court *a quo* granted the relief sought by the first respondent. The court dismissed the preliminary point on *lis pendens,* determining that it had been improperly taken as it did not preclude a party from instituting proceedings in another court. As regards the merits of the matter, the court determined that the validity of the lease agreement was not an issue. The way the appellant had conducted itself was improper. The appellant could not cancel the lease agreement between the first and second respondents when it was not party to that lease agreement. It was only the second respondent that could cancel its lease agreement with the first respondent. The court further determined that even if the second respondent did not have authority to sublet the premises, the appellant could not evict the first respondent from the premises without a court order.

The court *aquo* also established that the threats made by the appellant to evict the first respondent on 48 hours' notice were not hollow. The appellant had not denied making those threats. The court determined that the appellant was acting unlawfully in making the threats of eviction and the demolishing of the property without a court order. It was on that basis that the court *a quo* determined that the first respondent had managed to satisfy the requirements for the granting of the interdict sought.

Proceedings before this court

Agrieved by the decision of the court *a quo*, the appellant approached this court on appeal on the following grounds:

> "1. The court *a quo* erred in law in by dismissing the point *in limine* on *lis pendens* in proceeding to determine the matter which was pending in the High Court thereby creating a possibility of conflicting judgments on the same issue.
> 2. The court a quo grossly and irrationally erred in fact amounting to a misdirection in law by granting a final interdict by relying on an illegal lease between the 1st and 2nd Respondent yet appellant as the owner of the land had not authorised the lease.
> 3. The court *a quo* erred in law by disregarding the Appellant's by-laws that empower the appellant to issue and enforce the demolition notices for illegal occupation of appellant's land or premises."

Based on the above grounds of appeal, the appellant sought the setting aside of the judgment of the court *a quo*, and its substitution with an order dismissing the application for a final interdict, as well as the setting aside of the interim relief granted by the court. The appellant also sought an order of costs against the first respondent.

At the commencement of the oral submissions, Mr *Tabana* for the first respondent submitted that the appeal was not properly before the court as it was filed out of time. The judgment of the court *a quo* was handed down on 23 November 2022, and the appeal was only filed on 21 December 2022. The appeal was therefore out of time by two days and no condonation had been sought by the appellants. The appeal was therefore fatally defective and ought to be struck off the roll.

In response, Mr *Moyo* for the appellant denied that the appeal was of time, arguing that it had been filed within the 21 days permitted by the rules of court. Following the counter submissions by the appellant's counsel, Mr *Tabana* abandoned the preliminary point.

The preliminary point was clearly devoid of merit because order 31 r (1)(1) of the Magistrates Court Rules, provides that an appeal may be noted within twenty-one days after the date of the judgment appealed against. The twenty-one days only lapsed on 22 December 2022, meaning that the appeal was filed timeously with a day to spare.

Submissions on the grounds of appeal and the analysis

I now turn to the grounds of appeal hereunder.

That the court *a quo* erred in law in by dismissing the point *in limine* on *lis pendens* in proceeding to determine the matter which was pending in the High Court thereby creating a possibility of conflicting judgments on the same issue.

Mr *Nyathi* who was coappearing for the appellant submitted that the court *a quo* erred in dismissing the preliminary point on *lis pendens*, as there were similarities between the order it granted, and the interim relief granted between the same parties by CHINAMORA J on 4 November 2022.

In response, Mr *Tabana* submitted that the cause of action in the matter before the court *a quo* was different from the cause of action in the matter that was heard and determined by CHINAMORA J in HC 7416/22. According to counsel, the proceedings before CHINAMORA J were for a *declaratur*, which the court *a quo* had no jurisdiction to grant. Further, the provisional order granted by CHINAMORA J was a consent order, which the appellant herein appealed against to the Supreme Court under SC 637/22. The court was urged to dismiss the preliminary point for lack of merit.

The provisional order granted by CHINAMORA J at the instance of the first respondent herein reads as follows:

> "That pending the finalisation of this matter, the 1st respondent is restrained and interdicted as follows:
> 1. The 1st respondent and all those claiming through it be and are hereby interdicted from interfering with the applicant's rights of occupation pertaining to the leased premises, namely Stand 4292 Machipisa, Harare.
> 2. The first respondent be and is ordered not to demolish or evict the applicant except with an order of court."

On the return date, the first respondent wanted the court to grant the following relief:

> **"IT IS DECLARED THAT:**
> 1. The letter by the first respondent dated 20th October 2022 is of no force and effect.
>
> **Consequently**
> 2. Applicant has full entitlement to the use of Stand 4294 Machipisa in terms of a valid lease agreement between it and second respondent.
> 3. First respondent is interdicted from interfering with applicant's use and enjoyment of Stand number 4292 Machipisa except in terms of an order of court.
> 4. First respondent to bear costs of suit on a higher scale between legal practitioner and own client.
> 5. Interim Relief Granted."

At the conclusion of the proceedings in the court *a quo*, on 23 November 2022, the court granted the following order:

> **"It is hereby ordered that:**
> (a) The application for an interdict be and is hereby granted.
> (b) The interim order is hereby confirmed as the final order.
> (c) The 1st Respondent and those acting through them be and are hereby interdicted from demolishing or evicting the applicant without a court order.
> (d) 1st Respondent to pay costs on an ordinary scale."

Authors *Herbstein and Van Winsen* in their book The Civil Practice of the High Courts of South Africa[1], made the following pertinent observations about a plea of *lis pendens*:-

> "*Lis pendens* is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court…
> A plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject matter. The court reserves a discretion in the matter even if all the essentials of the plea are present and may in spite of that fact consider 'whether it is more just and equitable or convenient that it [the action against which the special plea is advanced] should be allowed to proceed. It often happens that the court will decide that the *lis* which was first commenced should be the one to proceed, but this is not an immutable rule."

At the time that this appeal was argued before us, the appeal against the decision of CHINAMORA J, was pending before the Supreme Court. The parties counsel agreed that the preparation and handing down of this judgment be stayed pending the determination of the appeal pending before the Supreme Court. On 22 November 2023, we received a letter from the first respondent's counsel advising that the appellant's appeal to the Supreme Court had been withdrawn.

In the Supreme Court matter, the appellant was the City of Harare, the same appellant in this matter. The first respondent in that matter is the first respondent herein. The second respondent is the same second respondent herein. The matter before CHINAMORA J was concerned with the same property, which was also the subject of the dispute in the court *a quo*. What triggered the approach to the High Court in HC 7416/22, as well as the court *a quo,* was the same letter of 17 October 2022, which carried the threats of demolition of the property and the summary eviction of the first respondent from the premises. In his ruling, the learned magistrate in the court *a quo*, dealt with the preliminary point of *lis pendens* as follows:

> "However, it should be noted that *lis pendens* does not prevent the other party from instituting proceedings at another court. It is therefore my view that the point *in limine* taken by the 1st Respondent does lack merit."[2]

[1] Fifth Edition Vol 2 at p 605
[2] Page 7 of the record of proceedings

It is clear to us that the learned magistrate did not apply his mind to the issue before the court. His sentiments contradicted the position of the law, which seeks to avert the unnecessary multiplicity of proceedings and the potential for conflicting decisions. There are similarities in the final order granted by the court *a quo* and the interim relief granted by CHINAMORA J. Paragraph (c) of the order of the court *a quo* interdicted the appellant herein and those acting through it from demolishing or evicting the applicant without a court order. Paragraph 2 of the interim relief granted by CHINAMORA J restrained the appellant from demolishing or evicting the first respondent herein from the premises without a court order.

Although the application in the court *a quo* was filed first, it was only argued after CHINAMORA J had granted the interim relief on 4 November 2022. The ruling being appealed against was only granted on 23 November 2023. It must have been clear to the learned magistrate that the same relief that was being sought before him had already been granted by a superior court, albeit, on a temporary basis. On the return date, the first respondent also sought the confirmation of that interim relief. Under those circumstances, the court ought to have proceeded with caution and stayed the proceedings before it or removed them from the roll pending the resolution of the High Court matter.

In its heads of argument, the first respondent also argued that the matter before the court *a quo* was one for a prohibitory interdict, while the one before this court was one for a *declaratur* and consequential relief, which the lower court had no jurisdiction to hear and grant.

The first respondent's submission, with respect, does not reflect the correct position of the law. Section 14(1)(g) of the Magistrates Court Act states as follows:

> "**14 When court has no jurisdiction**
> (1) No court shall have jurisdiction in or cognisance of any action or suit wherein—
> (*a*) ……
> ……; or
> (*g*) a declaration is sought as to any existing, future or contingent right or obligation, <u>where the person seeking the declaration does not or cannot claim any relief</u> consequential upon such declaration…:" (Underlining for emphasis)

Section 14(1)(g) of the Magistrates Court Act can be juxtaposed against s 14 of the High Court Act[3], which states as follows:

> **"14 High Court may determine future or contingent rights**

[3] *[Chapter 7:06]*

> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

From our reading of the above provision, our view is that the Magistrates Court is only endowed with jurisdiction to grant a *declaratur,* if there is a concomitant claim for consequential relief. That Magistrates Court does not have jurisdiction to grant a *declaratur,* where a litigant does not or cannot claim consequential relief pursuant to such declaration. On the other hand, s 14 of the High Court Act permits the High Court to grant a *declaratur,* even in those circumstances where no consequential relief can be claimed pursuant to such a *declaratur*. Thus, the powers of the High Court to grant a *declaratur* are unlimited, whereas those of the Magistrates Court are limited to those instances where consequential relief can also be claimed pursuant to that *declaratur*. The two courts therefore enjoy concurrent jurisdiction to grant a *declaratur,* only to the extent that consequential relief is also sought pursuant to that *declaratur*.

A perusal of the terms of the final order sought by the first respondent herein as the applicant in HC 7416/22, shows that it was also seeking consequential relief pursuant to the granting of the *declaratur* that the appellant's letter of 17 October 2022, was of no force or effect. The first respondent's claim for a *declaratur* could therefore be competently entertained by the court *a quo* as it was accompanied by the concomitant claim for consequential relief.

This court determines that the withdrawal of the Supreme Court appeal that was challenging the interim order granted by CHINAMORA J, leaves that provisional order extant and binding unless it is discharged. The likelihood of conflicting decisions was therefore not a remote possibility. For the foregoing reasons the court determines that there is merit in the first ground of appeal. Having reached that conclusion, it was unnecessary to traverse the merits of the dispute, whose determination must be stayed pending the resolution of the matter under HC 7416/22.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with no order as to costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:
   (a) The preliminary point raised by the appellant that the matter was *lis pendens* under HC 7416/22, succeeds.

(b) The proceedings before this court pending under HRE C-CG 4050/22, are hereby stayed pending the determination of the matter pending under HC 7416/22.

(c) There shall be no order as to costs.

MUSITHU J:……..

TSANGA J:……AGREES

Gambe Law Group, legal practitioners for the appellant
Tabana & Marwa, legal practitioners for the 1st respondent