

PETHAL INVESTMENTS (PVT) LTD
versus
ERIC ANTHONY ROSEN
and
ELIZABETH ROSEN

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 06 November 2015, 20 November 2015 and 24 March 2017

Opposed matter

Adv J. Wood, for the applicant
T.K. Hove, for the respondents

CHIWESHE JP: This matter was referred to trial as a stated case. The statement of agreed facts reads:

- “1. Plaintiff entered into a written lease agreement on or about December 2009 with a company called Eric Rosen (Pvt) Ltd t/a Motor Action, in terms of which plaintiff leased to the former its premises known as 65 Harare Street, Harare.
2. The defendants bound themselves as sureties and co-principal debtors for the due payment of all amounts due to plaintiff from Eric Rosen (Private) Limited, ‘the company’.
3. The company vacated the premises on 16 May 2014, leaving amounts outstanding in respect of arrear rentals, and also rates. The parties have agreed that the amount which the company owes to the plaintiff in respect of arrear rentals and rates is a total of US\$21 863.13. Plaintiff and defendant have both admitted this amount.
4. In Magistrates Court case number 23330/14, the plaintiff had initially issued summons against the company in respect of the same amounts, based on the lease agreement. The Company subsequently went into provisional liquidation before finalisation of that matter, and the plaintiff could not proceed. While the company was still under provisional liquidation the plaintiff issued summons in the High Court, against the defendants as sureties, based on the deed of suretyship they had signed. After the summons in the High Court had been issued the company then came out of liquidation because the provisional liquidation was not confirmed.
5. The defendant has filed a special plea of *lis alibi pendens* in this present matter on the basis that the company has been sued in the Magistrates Court at Harare and that the matter is still pending and has not been resolved in the lower court.

6. The plaintiff has proceeded with its claim against the defendants on the basis that the present defendants and the company are separate persons.”

The sole issue that falls for determination is whether the special plea of *lis alibi pendens* should be upheld. In order to succeed in that defence the defendants must satisfy the following requirements:

- (a) that there is litigation pending between the same parties
- (b) that the pending litigation is with regards the same subject matter, and
- (c) that the cause of complaint is the same in both proceedings.

See *O’Shea v Chiunda v Chiunda* 1999 (1) ZLR 333 (S).

Mr *T.K. Hove*, for the defendants, has submitted the following arguments in support of the special plea. The lease agreement relied upon by the plaintiff in the proceedings before the Magistrates Court is the same document cited in support of the claim before this court. The amount claimed in the lower court is the same as that claimed in this court. Because the prayer and the supporting document are the same in both courts, Mr *Hove* argues that the plaintiff’s conduct is akin to forum shopping. It is further argued that should the plaintiff wish to proceed in this court it should first withdraw the proceedings in the magistrates court. Failure to do so results in a multiplicity of actions which can only be cured by a plea of *lis pendens*. In any case, in terms of the lease agreement, the parties consented to the jurisdiction of the Magistrates Court.

On her part Adv *Wood* for the plaintiff has raised an interesting argument. She submits that the defendants are being sued not in terms of the lease agreement but in terms of a deed of surety signed by them. This is a separate document altogether. For that reason the cause of action is different. Similarly the parties in the magistrates court are not the same parties before this court. It is further submitted that the parties before this court were not signatory to the lease agreement and for that reason are not bound by the provisions of clause 23 thereof in terms of which the parties consent to the jurisdiction of the magistrates court. It is further argued that should the plaintiff succeed in this court, the proceedings in the magistrates court would automatically fall away. By deduction the converse should also apply, namely success in the magistrates court would render the present proceedings before this court untenable. For these reasons, argues Adv *Wood*, it is not necessary for the plaintiff to withdraw the claim in the magistrates court in order to sue the defendants in this court. Mr *Hove* argues that this approach on the part of the plaintiff confirms the charge of “forum shopping”. He further argues that the deed of suretyship signed by the defendants

cannot be divorced from the main document (that is the lease agreement) because the two are inextricably linked. It reads;

“We the undersigned hereby jointly and severally and (as) co-principal debtors and sureties, guarantee the due performance of all obligations to pay damages if they arise) owed by Eric Rosen (Pvt) Ltd to Pethal Investments (Pvt) Ltd in terms of the agreement of lease in respect of 65 Harare Street, Harare.....”

I agree with Adv *Wood* that the cause of action in the magistrates court arises from the lease agreement whilst the cause of action before this court arises out of a deed of suretyship. In other words the respondents guaranteed the due performance by Eric Rosen (Pvt) Ltd, (t/a Motor Action) of its obligations in terms of the lease agreement between it and the applicant. Thus the respondents are not parties to the lease agreement itself. I conclude therefore that the requirements for the special plea of *lis alibi pendes* have not been met. Accordingly the defendants’ special plea cannot succeed. It is hereby dismissed.

Assuming I am wrong in so dismissing the special plea, there are practical considerations to be decided in the plaintiff’s favour. The plaintiff only abandoned the proceedings in the magistrates court because same were no longer tenable, the company, Eric Rosen (Pvt) Ltd, having been placed under provisional liquidation. The institution of fresh proceedings in the High Court under those circumstances could not have been out of mischief or for purposes of forum shopping. Secondly not much purpose would be served by redirecting the parties back to the magistrates court, moreso as the defendants have not in principle denied liability. There must be finality in litigation. An order of this court will conclude the present proceedings before this court and extinguish any claims that the plaintiff might otherwise have pursued in the magistrates court.

The defendants have admitted that Eric Rosen (Pvt) Ltd owes \$21 863.13 in terms of the lease agreement. As sureties they admit liability in that amount.

Accordingly judgment must be and is hereby entered against the defendants jointly and severally, the one paying the other to be absolved;

- a) In the sum of \$21 863.13.
- b) Interest thereon at the prescribed rate from date of issue of summons to date of full and final payment.
- c) Costs of suit.

Dhlakama B. Attorneys, plaintiff’s legal practitioners
Muzenda & Partners, defendants’ legal practitioners