IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 23/2020
CIV/APN/119/2017
CIV/APN/127/2017

HELD AT MASERU

In the matter between

MAQACHA KHOALI	**APPELLANT**

And

HIS WORSHIP MR SELEBELENG	**1ST RESPONDENT**
TIISETSO LEMPE	**2ND RESPONDENT**
VUSI LEMPE	**3RD RESPONDENT**
CLERK OF COURT MOKHOTLONG MAGISTRATE COURT	**4TH RESPONDENT**
COMMISSIONER OF POLICE	**5TH RESPONDENT**
O/C MAPHOLANENG POLICE STATION	**6TH RESPONDENT**
MINISTER OF JUSTICE	**7TH RESPONDENT**
ATTORNEY GENERAL	**8TH RESPONDENT**

CORAM: P T DAMASEB AJA
M H CHINHENGO AJA
N T MTSHIYA AJA

HEARD: 22 OCTOBER 2020
DELIVERED: 30 OCTOBER 2020

Summary

In considering instant appeal, Court observed that in application proceedings, (a) it is irregular to cite unnecessary parties - costs of service upon such parties should be disallowed as mark of disapproval; (b) it is a salutary practice to ensure that every

application to court should bear a its own case reference number even if such application is of an interlocutory nature, (c) interim orders granted must be timeously confirmed, discharged, or extended, if not, they lapse - record of each such matter should indicate clearly whether interim order is extant;

Appellant appealing against dismissal of application to High Court where court upheld special plea that matter pending in magistrate's court; Facts of case generally unclear and judge failing to set out in detail the particular respects in which matter in High Court is same as matter in magistrate's court;

Several preliminary objections having been raised, including lis pendens and absence of jurisdiction, judge erring in finding lis pendens properly raised and failing to deal with objection to jurisdiction which could have been dispositive of the matter in magistrate court -failure amounting to improper exercise of discretion;

Appeal upheld - danger of lower court deciding matter on one only of several preliminary highlighted - remittal of matter where decision thereon is set aside inevitable;
On costs- order of costs on attorney and client scale not justified and set aside on appeal

CHINHENGO AJA :-

JUDGMENT

Introduction

1. On or about 11 April 2018, the appellant instituted *ex parte* urgent proceedings in the High Court (CIV/APN/151/2018) against the respondents, but more specifically the 2nd and 3rd respondents, as I shall instantly show. In the main she sought orders that –

> "3. The 2nd and 3rd respondents are interdicted, prohibited and restrained from:
>
> 3.1.1 Damaging, entering, occupying, taking control or being in possession of the property occupied by the applicant as contemplated in the interim order of Mokhotlong Magistrate Court dated 19th October 2012;
>
> 3.1.2 Demanding top up of the purchase price for the landed property in issue, threatening, threatening to assault, intimidating, by way of violent action or otherwise instigating others to assault, threaten or intimidate any of the applicant's staff, customers workmen, contractors and/or representatives;
>
> 3.1.3 It is ordered that the applicant be restored *ante omnia* to the occupation of the place pending finalisation of this Honourable Court.

4. The Magistrate for the District of Mokhotlong [Mr Selebeleng] and her clerk of court are ordered to dispatch the record of proceedings in CC48/2012 to this Honourable Court seven days after service of this application and/or order.

5. An order reviewing and setting aside the proceedings in CC 48/2012) as irregular and of no legal effect."

2. The other orders that the applicant sought in her notice of motion at paragraphs 6, 7 and 8 are a duplication of the orders sought in paragraph 3. At paragraph 9 she seeks an order that the Court directs the Police to "ensure that they take all reasonable steps to prevent any damage to persons and property over Plot N0. 45244-040 Mapholaneng in the District of Mokhotlong." No relief is sought against the 7th and 8th respondents, the Minister of Justice and the Attorney General.

3. The application was heard by Mohkesi AJ (as he then was) on 11 December 2018. He delivered judgment on 14 February 2019. He dismissed the application with costs on attorney and client scale, on the ground that, in his opinion, the matter was pending in the Mokhotlong Magistrate Court. He thus held that the plea of *lis alibi pendens* was well taken by the respondents. Aggrieved at the dismissal, the appellant appealed. The primary issue before this Court is whether the

learned judge was correct in holding that the plea of *lis alibi pendens* was validly taken.

4. The appellant's grounds of appeal are six in number. They are:

> "1. The court *a quo* erred in dismissing the appellant [applicant]'s application upon holding the *lis alibi pendens* point *in limine* instead of allowing for a stay of the later order of the 6th April 2018 pending the final determination of the matter that remains seized with the Mokhotlong Magistrate Court particularly in view of the operative order of the 19th October 2012.
>
> 2. The court *a quo* erred with regard to the basis and context within which it determined the scope of *lis pendens* as a point of law.
>
> 3. The court *a quo* erred in holding that the procedure by which the matter was instituted was incorrect and that the case ought to have been dismissed on that basis.
>
> 4. The court *a quo* erred in dismissing the application on the ground of *lis pendens* only without pronouncing itself on the point of jurisdiction which had been argued extensively.

5. The court *a quo* erred in failing to pronounce itself of [on] the final nature and effect of the order of 6th April 2018, which had been granted by the court that was obviously functus officio and which indirectly reviewed the order of 19th October 2012.

6. The court *a quo* erred in awarding costs to the 1st and 2nd respondents on an attorney and own client scale."

5. Counsel for the appellant conceded that those of the grounds of appeal that do not speak to the primary issue before this Court, in particular the third and fourth grounds of appeal, are irrelevant for present purposes. The focus of this Court shall therefore be on whether or not the learned judge was correct in upholding the plea of *lis alibi pendens*.

Unnecessary citation of parties

6. The real respondents in this matter are the 2nd and 3rd respondents. The 1st and 4th were cited for the purpose of producing the record of proceedings in the magistrate's court. The others were cited for no apparent reason.

7. The citation of persons or entities that are not necessary parties or necessary for the determination of a matter is an ingrained habit in the practice of the law in this country and one very difficult to uproot. When, for instance, the Attorney

General is cited as a party representing the Government there is no need to also cite separately the departments of government involved in the dispute or Ministers or permanent secretaries. The unnecessary citing of parties however is done routinely and no amount of disapproval will, it seems, persuade litigants and their lawyers from the needless inclusion of entities and individuals that should not be parties to litigation. The Police and police officials are routinely cited as respondents in civil litigation presumably to ensure enforcement of orders of court by them, yet it is trite that civil court orders are enforced by the messenger of court in the magistrate's court or by the sheriff or his deputy in the High Court. The police are only invited to assist where the designated civil officers require their assistance in enforcing civil judgments when obstructed in carrying out their duties. The respondents took up this point in their answering affidavit where they correctly point out that the citation of the 5th and 6th respondents, the Commissioner of Police and the Officer in Charge of Mokhotlong Police Station is irregular because they have no interest in the matter. They could well have said the same thing about the 7th respondent, the Minister of Justice. The courts should disallow costs of service of process on unnecessary parties. That way, perhaps, the habit of citing all and sundry may abate. In this appeal the real respondents are just the 2nd and 3rd respondents and reference to respondents in this judgment will be to the two of them only, unless the context otherwise requires.

Unsatisfactory handling of matter and delay in delivering justice

8. The handling of this matter by the courts is such that one is justified in taking the view that the wheels of justice move intolerably slowly. Its history is generally depressing, to say the least. In 2012 the appellant instituted proceedings in Case No. 48/2012 seeking urgent interim relief that the respondents be "restrained and interdicted from taking control of [appellant's] business premises and/or site situate at unnumbered plot at Mapholaneng". The final order sought by the appellant in those proceedings was one "interdicting [the respondents] from holding themselves out as owners of the field and/or immovable property adjacent to the field of Tlaka Motate at Mapholaneng." The record of proceedings in CC48/2012 was not part of the record of proceedings in the High Court nor is it in this Court. There is no clarity as to the property in dispute: the appellant states that it is one property now known as Plot N0. 45244-040; the respondents seem to say there are two pieces of land involved - one in respect to which the appellant claims occupation as from before 2012 and the other, the "immovable property adjacent to the field of Tlaka Motate at Mapholaneng." Whether there is one or there are two properties does not really matter for purposes of dealing with this appeal. I will accordingly refer to the piece of land in dispute as Plot N0. 45244-040.

Litigation preceding High Court application

9. It is necessary to set out the history of the litigation before the High Court application was heard and determined. That will assist in a consideration of the reasons for which the learned judge *a quo* dismissed the application on the basis of the plea of *lis alibi pendens*.

First and main application - Case No. CC 48/2012

10. The first and main litigation commenced in the magistrate court in Case No. CC 48/2012. The record of proceedings of that case was not produced before the High Court or before this Court. The affidavits in the High Court proceedings however show that on 19 October 2012 the magistrate at Mokhotlong, Her Worship HL Selialia, granted an interim order in that case prohibiting the respondents from taking control of Plot N0. 45244-040, which was then occupied and apparently used for business purposes by the appellant. That interim order features prominently in this appeal. I reproduce it:

> "IT IS ORDERED THAT:
>
> "That a *rule nisi* be issued returnable on the 25th October 2012 at 9:30 am or so soon thereafter as the matter may be heard for an order in the following terms calling upon the respondents to show cause, if any, why the following shall not be made a final order:

1.(a) The periods and modes of service be dispensed with on account of urgency of this matter.

(b) First and Second Respondents should not forthwith be restrained and interdicted from taking control of Applicant's business premises and/or site situate at unnumbered plot at Mapholaneng pending finalization of this matter.

(c) Interdicting 1st and 2nd Respondents from holding themselves out as owners of the field and or immovable property adjacent to the field of Tlaka Motate at Mapholeneng.

2. Granting applicant further and/or alternative relief.

3. Costs in the event of opposition.

4. That prayers 1(a) and (b) operate with immediate effect as the interim order pending the final determination of this Application."

11. The return day for the *rule nisi* was 25 October 2012. It is clear that the interim order prohibited the respondents from taking control of Plot N0. 45244-040 and from holding themselves out as owners of the plot until the *rule nisi* was either confirmed or discharged. It is impossible to tell whether

or not the *rule nisi* has been extended by the magistrate's court since the date of issue. Ordinarily a *rule nisi* that is not confirmed or discharged or extended, lapses. The parties however seem to hold the view that the *rule nisi* is still in force. They both make no issue of this. We are constrained to deal with this matter on the basis that the *rule nisi* and the interim relief granted are extant

12. It is common cause that the main application in CC48/2012 was eventually heard on 23 November 2016 by Her Worship Makarabei who reserved judgment and has not delivered judgment to date.

Second application – May 2014

13. The second application was one by the respondents in May 2014 pursuant to which the Magistrate Court at Mokhotlong, His Worship Mr Selebeleng, granted certain interim relief to the respondents. The application was commenced as an urgent *ex parte* application and not allocated a different case reference number. I will refer to it as "the May 12014 application". Its record of proceedings is also not available. In that application, the respondents obtained an order stopping the appellant from developing Plot No. 45244-040 until that application was finalised. It is important to emphasise, for purposes of deciding the primary issue before this Court, that the interim relief granted to the

respondents amounted to no more than prohibiting the appellant from developing the plot. It reads:

> "(a) Respondent and/or persons authorised by her shall not be interdicted from working and/or making any developments on an unnumbered plot situated at Mapholaneng which belonged to the late Jan Lempe (Plot No. 45244-040) pending the outcome hereof."

14. The *rule nisi* with the above interim relief has apparently not also been confirmed, discharged or extended. There is a dispute whether the parties mutually abandoned that *rule nisi* and the interim relief. The appellant says they did and the respondents dispute it. The appellant contends that the abandonment of the order of 8 May 2014 opened the way for the magistrate to hear the main application in CC48/2012. The respondents do not agree. In the absence of the record of proceedings it is not possible to say what happened in that case with any degree of certainty. It would be ill-advised and unsafe to rely on the parties' contradictory averments in that regard.

Third application - April 2018

15. The third application is one that was lodged by the respondents in 2018. It was also an urgent *ex parte* application. It was again heard by His Worship Selebeleng

who granted another interim order in favour of the respondents on 6 April 2018 requiring the appellant to cease trading or carrying on business from Plot N0. 45244-040 and also requiring her to remove therefrom structures, including a container/caravan, that she had put thereon. This application was also not given a different case reference number. I will refer to it as "the April 2018 application". The magistrate granted the following interim relief –

> (a) Respondent shall not be interdicted from carrying on any business on an unnumbered site situated at Maphalaneng which belongs to the late Jan Lempe pending the outcome [hereof].
>
> (b) Respondent shall not be directed to remove all temporary structure(s) she erected on the site herein concerned pending the outcome of the main application in CC: 48/12 which is pending before this honourable court.

16. It is this third application and the interim relief granted therein that prompted the appellant to lodge the application to the High Court, the decision of which is now on appeal. Again, for purposes of this appeal, it must be noted that the interim relief granted to the respondents was merely to stop the appellant from conducting business on Plot N0. 45244-

040 and directing her to remove structures that she had put thereon pending the finalisation of that application.

17. At the pain of repeating myself I must again observe that the record of proceedings before this Court does not have any indication that the three interim orders have all either been confirmed, discharged or extended. While judgment in the main application before Mokhotlong Magistrate Court has been reserved, there is no way of telling whether the three interim orders are still in force. Ordinarily interim orders with specified return dates lapse if the return day is not extended or the interim orders are not confirmed or discharged. There is no evidence on record that the parties or the presiding magistrates ensured that the interim orders granted are finalised. I will however assume that they have not lapsed because the parties have not contended either way.

Order of High court to produce record in magistrate court

18. When the High Court dealt with the application that resulted in this appeal, it issued an order on 17 May 2018 that the record, presumably that of the April 2018 application, be produced. The order refers to the record in CC48/2012 but it in fact relates to the April 2018, which was not allocated a different case reference number. The record of proceedings was not produced. It appears the learned judge ignored that omission and went ahead to hear the application before him and dispose of it despite the fact that a part of the

final order sought was the setting aside the decision of the lower court upon review. The order requiring the production of the record reads –

> "IT IS ORDERED THAT:
>
> 1.The Magistrate for the district of Mokholong [Mr. Selebeleng] and/or his clerk dispatch the record of proceedings in CC 48/12 to this Honourable Court within 7 days of receipt of this order.
>
> 2. The proceedings in Mokholong under CC 48/12 are stayed pending finalization hereof."

19. The learned judge's failure to insist on the production of the record of proceeding, as he had ordered could well have contributed to the way he dealt with the application before him.

Requisites for plea of *lis pendens*

20. Where a party has taken the objection of *lis pendens* the determination thereof will depend on a number of considerations. Herbstein and van Winsen in the *Civil Practice of the Superior Courts in South Africa* 4 ed. say at p 249 :

> "If an action is already pending between the 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."

21. The requisites for a successful plea or defence of *lis pendens* are therefore that the two actions must have been between the same parties or their successors, concerning the same subject matter and founded upon the same cause of action. The determination whether the objection is properly taken can only be properly made by a resort to, and analysis of, the pleadings.

Issue between the parties in magistrate court and High Court

22. The dispute between the appellant and the respondents in the magistrate's court, is essentially over the appellant's right of occupation of Plot N0. 45244-040 and its ownership. Ownership however does not appear to be a matter of immediate concern to the appellant and even the respondents. In her founding affidavit in the High Court the appellant states the reason for her application thus:

"The purpose of this application is to recognize and protect my rights of occupation in respect of the property described as Plot No. 45244-040, Mapholaneng, against invasion by the 2nd and 3rd respondents. In addition, I seek interdictory protection against further unlawful conduct and acts of violence by the 2nd and 3rd respondents or their supporters who have denied me ownership and access to my premises and threatened further interference and physical violence against persons associated with me and my property."

23. She also explains the basis of her claim to the property as follows:

"The place in issue was subsequent to the order of this Honourable Court dated 19 October 2012 surveyed as fully shown on Plot No 45244-040… their [2nd and 3rd respondents] late father allocated me the place in issue in terms of the deed of sale dated 27th January 2011. It has the seal of the chief stamp."

24. The May 2014 application was based on an allegation that the appellant was developing Plot No. 45244-040 before the matter pending in that court (CC48/2012) was finalised. The April 2018 application was based on the allegation that

the appellant had moved on to the Plot, put up a container/caravan thereon and was carrying on business therefrom. The interim orders prohibited the appellant, in the case of the May 2014 application, from "from working and/or making any developments" on the Plot and, in the case of the April 2018 application, from "carrying on any business" and directing her "to remove all temporary structure(s) she erected" on the Plot. The May 2014 interim order did not seek to remove the appellant from the Plot but only to stop her from developing it. The April 2018 interim order went much further and not only prohibited her from carrying on business at the Plot, but also directed her to remove the temporary structures she had erected thereon. The latter interim order effectively took away her occupation of the Plot. She averred that the messenger of court moved onto the land on 7 April 2018[1] and authorised the respondents to take control of the Plot. This is not disputed by the respondents. She was forced to leave her trading stock worth some M23 000.00 at the Plot. She was effectively removed.

25. The appellant's main contention in the High Court was that the 1st respondent had no legal basis for granting the *ex parte* orders of May 2014 and April 2018, in particular the latter order, which is to the effect that "the structure from which I conduct my trading business be removed or demolished" and that she be prohibited from carrying on her business on the Plot. She complained that the interim orders

[1] Para 10 answering affidavit

have final effect although they purport to grant only interim relief and, as such, they are irregular in that they were made in disregard of the interim order of 19 October 2012 in terms of which the respondents were interdicted from taking control of her business premises pending the finalisation of the matter wherein Magistrate Makarabei reserved judgment. She stated that in the main application, CC48/2012, the respondents conceded that their late father had transferred his rights over the property to her but, notwithstanding that concession, the respondents sought and obtained the interim relief in April 2018 before a different magistrate. Further she averred that the magistrate, Selebeleng, did not have jurisdiction to grant the April 2018 interim order in light of the existing order of 19 October 2012 issued by Magistrate Selialia, who was not only a magistrate of parallel jurisdiction, but also senior to him. Additionally, the April 2018 interim order negates the order of 19 October 2012 and in effect constitutes a review of Senior Magistrate Selialia's order. In her search for immediate relief the appellant prayed the High Court to dispose of her application in the absence of the record in CC:48/12 because -

> "For the record, the only available pleadings in this case are the exchanged affidavits attached above such that this Court is at liberty to decide this matter without dispatch of the record which may take long to be dispatched given the compromised position of the Clerk

of Court. The issue here is a narrow one of jurisdiction and I have rightly taken it on review."

26. The allegation against the Clerk of Court arises from the fact that the appellant is of a very strong opinion that the Clerk colluded with the respondents when the respondents' two *ex parte* urgent applications were lodged without the record of proceedings in CC48/2012 being placed before the presiding magistrate. She alleged that the Clerk created dummy files for use by the magistrate in order to hide the true position disclosed in the main file. This complaint was the subject matter of a strongly worded letter by appellant's counsel to the Clerk of Court on 25 April 2018.

Preliminary issues and contentions in High Court

27. The respondents raised five preliminary issues for the High Court to consider before dealing with the merits of the appellant's application, namely, *lis alibi pendens,* absence of jurisdiction, lack of a proper cause of action and availability of an alternative remedy. The learned judge took up for consideration the special plea of *lis alibi pendens* only and, after finding against the appellant on that issue, dismissed the application in its entirety.

28. The respondents' contentions on the merits paint a slightly different picture to that painted by the appellant.

They maintain that the interdicts of May 2014 and April 2018 are only interim in nature and not final, and are operative pending the judgment in the main case, CC:48/12. They aver that

> "the present matter [arising from the interim order of 6 April 2018] relates to land which had not been occupied all along and which the Applicant occupied during Easter Holidays of this year against an order of Court which had interdicted him (sic) from occupying or making developments on the said land pending the outcome of the matter in the court *a quo*. Applicant violated this order by erecting a caravan on the said land hence the proceedings herein concerned. Applicant has failed to disclose this material aspect and is guilty of material non-disclosure."

29. The respondents disputed the appellant's contention that the two interim orders in their favour contradict the terms of the interim order of 19 October 2012 or that they abandoned the order of 8 May 2014[2]. They strongly assert the first point as follows-

> "… The recent order [that of 6April 2018] does not invalidate the October 2012 order. Neither does it invalidate [the] May 2014 order. All that it does is to maintain [the] *status quo* pending the outcome of the

[2] Para 9.1 answering affidavit

main application in CC:48/12 as the court is yet to determine the rights of the parties in the site. This order does not amount to a review of the earlier order/orders."[3]

30. The respondents also deny that they have occupied the disputed piece of land and state that the business operations of the appellant were closed by the messenger of court. Further, they contend that the appellant did not satisfy the requirement for the issuance of an interdict, whether temporary or final.

Approach of High Court

31. The pleadings which the court had to consider in its determination of the application before it indicate that, pursuant to the order of 19 October 2012, the appellant was secured in her occupation of the Plot. As earlier stated, the judge made an order requiring the production of the record in the magistrate's court. It does not appear from the record before us that that record was availed to him. For some reason he did not insist that the record of proceedings be availed to him. It is also clear from his judgment that the judge did not hear oral submissions from the parties. He

[3] Para 7.9 answering affidavit

states categorically that he proceeded to write the judgment "on the basis of heads of argument filed of record."[4]

32. The learned judge briefly outlined some of the facts in the application before him and then focussed his attention on one issue only. He said-

> "[7] To the applicant's founding affidavit, the respondent have raised the following points *in limine*, viz,
>
> (a) *Lis pendens*
> (b) jurisdiction
> (c) cause of action
> (d) presence of alternative relief.
>
> [8] Because of the view I take of this matter, only *lis pendens* will be considered. It is common cause that the application with similar prayers to the current one is pending before the Mokhotlong Magistrate Court."

33. The learned judge then proceeded to deal with the special plea of *lis alibi pendens* by setting out the law, and then concluded:

> "*In casu*, two matters are pending before the Mokhotlong Magistrate Court, *viz*,
>
> (i) the main matter of interdict which is pending judgment;

[4] Para [2] of judgment

(ii) the *ex parte* interdict application which the applicant had opposed, and has as yet to be argued.

While the main matter of interdict is still pending judgment, as already said, it cannot be fair or convenient for this court and to the parties to deal with essentially the same issues which are pending decision in the court *a quo*. In respect of *ex parte* interdict application, it will be observed that the applicant is seeking its review when it is still pending closure of pleadings and argument. This court, in respect of both these matters has not been shown the existence of "just and equitable" considerations justifying it to become seized with this matter while CC48/2012 in the main and *ex parte* interdict application are still pending judgment and argument respectively before the court *a quo*. In the exercise of my discretion therefore, this application ought to be dismissed on the basis of these reasons."

34. The learned judge then considered the issue of costs and, having found that the application before him was vexatious for the reason that the appellant instituted proceedings in the High Court "when judgment on the same matter is pending before the magistrate court …" and "the 2nd and 3rd respondents were put to unnecessary expense and inconvenience of having to defend this matter", he dismissed

the application and ordered the appellant to pay costs on attorney and client scale.

Analysis

35. The main application (CC48/2012) instituted by the appellant was heard on 23 November 2016 and judgment was reserved. That judgment has not been handed down to date. As already stated, the learned judge disposed of the matter before him on a consideration of the issue of *lis pendens* only. It is apparent from his judgment that he relied solely on the papers before him including the written heads of argument filed by the parties. The record before us on *lis pendens* is a short paragraph in the answering affidavit which reads-

> "The matter where applicant seeks to interdict 2nd and 3rd respondents in dealing with the site subject-matter herein is still pending in the Mokhotlong Magistrate's Court in CC:48/12. That matter has been argued and is still pending judgment. Applicant is now duplicating the said matter by seeking interdict once again before this Honourable Court."[5]

36. The learned judge found this submission or averment to be valid hence he upheld the contention that the special plea was properly raised. It was necessary for the learned judge to have clearly set out the reasons that he found that the matter

[5] Para 3 answering affidavit

before him was the same matter as that in the magistrate's court. A declaration without substantiation is not sufficient, especially in a matter such as this where even the respondents did not think that the matters were the same, having regard to what they stated as appear at 28 above. The question that must be answered is, having regard to the pleadings filed of record, was the matter before the High Court the same matter as the one in respect of which the magistrate reserved judgment. If indeed the learned judge was referring to the main matter in CC48/2012, it being the only matter in respect of which the defence of *lis pendens* could conceivably be raised against the appellant, then quite clearly the matter before him was not the same. The relief sought in the former was protection against interference with appellant's occupation and the appellant succeeded on that score. The relief sought in the High Court application was intended to restore occupation to the appellant which he lost as a result of the April 18 interim order.

37. Looking at the matter from another perspective, we have here an appellant, who, as a result of the April 2018 interim order lost occupation of the Plot she had hitherto occupied, had her business operations brought to a halt and was forced to leave behind her valuable merchandise as a result of the magistrate's interim court order. She then approaches the High Court for restoration of occupation granted to her by the interim order of 19 October 2012 and, six years later, is denied to her by the interim order of April

2018 in circumstances where she complained, among other irregularities, about lack of jurisdiction on the part of the court that granted the April 2018 interim order and seeks a review thereof. She is then hit by a plea of *lis pendens* in a matter she contended that the presiding magistrate had no jurisdiction. If anyone was liable to be unsuited by such a plea, it could well have been the respondents who, in the April 2018 application, secured relief that tended to negate the relief granted on 19 October 2012. In my view the learned judge should have interrogated the appellant's claims on the merits in order to establish what exactly had transpired between the parties, in particular, whether the magistrate in the April 2018 had jurisdiction, whether the appellant was in occupation of the Plot and whether, altogether, the issues raised before him had no substance. Where an objection to jurisdiction has been raised, as in this case, it is an objection that must be addressed because, if indeed the magistrate did not have jurisdiction, that would have been the end of the matter before the magistrate. In exercising his discretion in a case such as this, the learned judge should have recognised that absence of jurisdiction removes a matter from a court completely. In my view the learned judge not only wrongly applied the objection of *lis pendens* against the appellant but, more importantly, he improperly exercised his discretion by avoiding a consideration of the objection to jurisdiction, which would have rendered every other objection irrelevant.

38. There are other matters to take into account in order to decide whether the matters are the same such that the special plea becomes applicable. The examination of the relief granted to the appellant in CC48/2012 and that granted in the May 2014 and April 2018 applications that I have undertaken above shows that the matters before the High Court and the magistrate court were not the same. The interim order did not, in essence, prohibit the appellant from developing the Plot which she alleged belonged to her, although it may have been ill-advised for her to carry on development activities on the Plot in light of the dispute over ownership thereof. On the facts, however it is not even clear that the putting up of a container/caravan constituted a development.

39. The May 2014 interim order granted interim relief prohibiting the appellant "from working and/or making developments" on the Plot. What is glaringly clear is that the respondents were prompted into seeking the May 2014 interim order by the fact that, whereas the expectation was that the appellant would not develop the Plot until the ownership dispute was resolved, she, to the contrary, was going ahead with developing it.

40. The April 2018 granted interim relief to the respondents prohibiting the appellant "from carrying on any business" at the Plot and requiring her "to remove all temporary structures she erected on the site concerned pending the outcome of the

main application in CC:48/12." The temporary structures are not clearly defined but it appears they consisted of the container/caravan placed on the land by the appellant. It cannot be contested that the issues for determination in these matters are different. The interim relief in CC48/2012 stopped respondents from taking control of Plot No. 45244-040. The interim order of May 2014 stopped the appellant from carrying on developments on Plot No. 45244-040 until the ownership wrangle was resolved in the main application, CC:48/12. And the April 2018 interim order, which appears to be the one relevant to this appeal, sought to stop the appellant from carrying on her business, which issue had been resolved in her favour by the interim order of 19 October 2012. The April 2018 also, and more devastatingly, removed the appellant from the Plot and stopped her trading activities.

41. The interim order of 6 April 2018, no doubt, effectively gave the respondents control of the premises, hence the appellant's business operations were closed, the very matter that the appellant had forestalled by order of 19 October 2012. The interim order of 6 April 2018 also required the appellant to remove temporary structures that she had placed on the Plot. The respondents thus obtained an interim order that was not related to the order of 8 May 2014 but that was encompassed by the earlier interim order of 19 October 2012 which prohibited the respondents from taking control of the appellant's business premises. All considered, it becomes apparent that the purpose of the application

resulting in the interim order of 6 April 2018, was to undo what had been done by the interim order of 19 October 2012.

42. On receipt of the *ex parte* order of 6 April 2018 the appellant was faced with two situations to grapple with. First, the magistrate court had, for more than 5 years, failed to hand down a judgment which she hoped would have established, once and for all, her right to occupy and use, if not to own, Plot No. 45244-040. Second, whereas she held an interim order entitling her to remain in occupation of and to use the disputed Plot and prohibiting the respondents from taking control of her business premises, the 6 April 2018 interim order frustrated this right. It seems to me she had no option but to approach the High Court for relief, especially in light of her contention that the magistrate had no jurisdiction to hear the matter. And the relief that she sought was designed to ensure that the respondents would be permanently stopped from interfering with her business operations on Plot No. 45244-040 until magistrate Makarabei delivered judgment in case No. CC:48/12.

43. As earlier stated, the issue for decision is whether the matter she brought to the High Court was the same matter as that in which judgment was pending or the same matter as the April 2018 application. I do not think so. I have shown that the matter culminating in the interim order of 19 October 2012 was concerned with prohibiting the respondents from interfering with her business operations on Plot No. 45244-

040 until the issue of her entitlement to occupy and use the plot or the ownership thereof was finally decided. The interim order of 6 April 2018 sought to render the 19 October 2012 order inoperative. The magistrate's court was obviously acting to the prejudice of the appellant in granting the orders in favour of the respondents whilst at the same time that court was not finalizing the main matter before it.

44. The respondents' affidavits before the High Court show that the respondents did not believe that the same matter as in the April 2018 application was before that court. In the answering affidavit they state the following in relation to the appellant's contention that the magistrate who gave the interim order of 6 April 2018 had no jurisdiction because the same matter was before magistrate Makarabei,–

> *"The said objection is not valid as the Order objected to relates to events that occurred during Easter holidays of the year 2018 and has nothing to do with the Order obtained by Applicant in 2012. In addition, the 2012 Order did not confer any rights on Applicant. All it did was to interdict us from interfering with the land herein concerned pending the determination of the rights of parties thereto.* Whereas I note the attached affidavits to applicant's papers, I deny that the Applicant has rightly taken a review. She has already filed these papers in the court a quo. She is therefore estopped from stopping and having the said proceedings reviewed."

[**italics are mine for emphasis**]

45. It is clear from the above that the respondents were of the view that the cause of action in their application resulting in the order of 6 April 2018 was different from those in the main application in CC:48/12. The appellant approached the High Court in order to render the 6 April 2018 interim order inoperative because, in her view, it went contrary to the order of 19 October 2012. Her main contention, which the learned judge did not consider, was that the magistrate who granted the order of 6 April 2018 had no jurisdiction to make that order which contradicted the interim order of a fellow and more senior magistrate of parallel jurisdiction.

46. I am in agreement with the appellant's first ground of appeal that the judge erred in upholding the special plea of *lis pendens* and should have, on review, considered the issues raised by the appellant, in particular the objection to jurisdiction in relation to 6 April 2018 application. There is substance in the contention that the judge below should have pronounced himself on the issue of jurisdiction which had been canvassed in the papers before him. If he had, I have no doubt he would have arrived at a different decision.

47. The appellant's fifth ground of appeal, that the interim order of 6 April 2018 was in effect a final order in that it effectively stopped the appellant from conducting business on the premises, and therefore occupying and using the Plot,

when the furthest it should have gone as such order was merely to prohibit the appellant from putting in place the structures.

48. I am accordingly satisfied that the learned judge in the court below erred in holding that the special plea was well taken. Had he addressed the issue of jurisdiction he possibly would have come to a different conclusion. On the particular facts of this case I am satisfied that the judge erred in not considering that crucial issue. The appeal on must therefore succeed.

49. I must observe that there is always a danger in a lower court disposing of a matter on a preliminary point and thereby avoiding to decide the other issues raised by the parties. If the upper Court sets aside the lower court's decision on appeal on the single issue considered, *lis pendens* in this case, it will have no option but to remit the matter to the judge concerned to deal with the other issues. I must further observe that if this judgment lacks clarity, it is because of the confusion induced by lack of records of proceedings, a multiplicity of interim orders without any indication that they were extended or have lapsed, and the failure to give separate case reference number to applications arising from the main application, thereby making it extremely difficult to understand which application is referred to in what context.

50. The last issue for consideration is that of costs. I do not agree with the conclusion that the appellant instituted vexatious litigation. As I have stated above she had to deal with the determination of a court that had stopped her business activities by prohibiting her from carrying on her trading activities at the Plot and requiring her to remove structures that she had put up thereat. That, in my view, cannot be vexatious litigation and does not merit an adverse costs order on attorney and client scale. In relation to the costs of appeal, the manner in which counsel for the appellant handled this appeal was not altogether satisfactory. Additionally, this Court granted the appellant an indulgence in regard to the late noting of the appeal, as explained in the following paragraphs. Had the Court not done so, the result would have been a striking off the roll of the appeal. In these circumstances I think that the appellant should not be awarded costs of the appeal.

Condonation

51. Before concluding, I must say a word or two about applications for condonation by the parties. We granted those applications.

52. At the commencement of the hearing each of the parties applied for condonation for either the late filing of heads of argument or of the record of proceedings. Those respective

applications were not opposed and we grant them. However the appellant's counsel did not raise upfront the issue of the appellant's failure to note the appeal in time. He accordingly did not apply for condonation or for leave to do so out of time. When the Court pointed this out to him he was at sixes and sevens as to how to respond to the issue. He then made an application for condonation from the bar. The respondents had, in their heads of argument, adverted to that issue but did not raise it when the Court dealt with the condonations applications that were mutually consented to.

53. Appellant's counsel gave an explanation that seemingly accounts for the confusion that may have in part resulted in the noting of the appeal out of time. He said that, after initially handing down his judgment on 14 February 2019, the learned judge, in what appears to me to be a strange and unusual move, "recalled the judgment" and only finally delivered it on 19 March 2020, albeit he confirmed his earlier judgment. Counsel was however unable to explain why, after the judgment was finally released, it took the appellant about four months to file the notice of appeal. The appeal was noted on 23 July 2020. The rules of this Court provide that such notice should be filed within six weeks of the delivery of judgment.

54. I have considered the general lethargy with which the courts have handled this matter, the delay by the magistrate in delivering judgment in CC48/2012, the unusual move by

the learned judge of recalling his judgment and then re-issuing it at a later date and the multiplicity of interim orders in a matter that should have been easily and speedily disposed of back in 2012. These developments were liable to cause confusion to everyone. I have also considered the lack of verve with which the respondents' counsel made his submissions on the appellant's failure to note the appeal in time and the general power of this Court in terms of Rule 17(4) to give any judgment or make any order that the circumstances may require. The Court was satisfied that it was proper in the circumstances of the case to allow the appeal to be heard despite the late noting of the appeal. I should however commend appellant's counsel's for conceeding that should the Court have refused to indulge the appellant and allowed counsel to make the application from the bar, then the appeal stood to be struck off the roll.

55. The order I make is that -

(a) The appeal succeeds and the order of the High Court is set aside.

(b) This matter is remitted to the learned judge of first instance to determine the issues raised by the parties in notice of motion and in the affidavits in their entirety.

(c) The costs in the High Court shall be determined by the judge upon remittal.

(d) Each party shall bear its own costs of appeal.

MH CHINHENGO

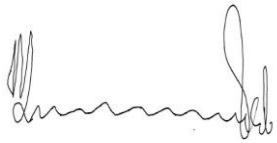
ACTING JUSTICE OF APPEAL

I agree:

PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree:



DR P MUSONDA

ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV C J LEPHUTHING

FOR RESPONDENTS: ADV J T MOLEFI