

HELD AT MASERU

In the matter between:

SUNNY HARDWARE (PTY) LTD
t/a KHUBETSOANA HARDWARE

APPLICANT

AND

LEOMILE LEROTHOLI
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

1st RESPONDENT
2nd RESPONDENT

JUDGMENT

DATE: 30/10/2012

The plea of lis pendens as a defence - Review of arbitral proceedings - On the ground that the Arbitrator committed an irregularity by proceeding to hear a matter when there was already another one instituted by the complainant on the same cause of action still pending - Requisites of the plea of lis pendens considered - Whether proven - Court finds the applicant to have failed to prove that the two matters were between the same parties - DDPR award should stand.

1. The facts in this case are fairly straightforward. It is common cause that the 1st respondent herein initially instituted proceedings before the Directorate of Dispute Prevention and Resolution (DDPR) in A0595/10 where she was represented by the office of the Labour Commissioner in terms of **Section 16 (b)** of the **Labour Code Order, 1992**. The Section empowers Labour Officers to:

institute and carry on civil proceedings on behalf of any employee, or the employee's family or representative, against any employer in respect of any matter or thing or cause of action arising in connection with the employment of such employee or the termination of such employment.

The office represented the 1st respondent in his initial action AO595/10 but later withdrew their representation by an undated letter which appears to have been received by the DDPR on 4th August, 2010. Following this withdrawal the 1st respondent subsequently filed fresh proceedings in A0938/10 in her personal capacity. The matter was heard and disposed of. It is this award that is the subject of the present review application.

2. Applicant's Counsel contended that it was irregular for the learned Arbitrator to have determined this later referral when the initial matter was still pending. As far as he is concerned he has a right to raise a plea of *lis pendens* because both matters involved same parties and were founded on the same cause of action. He contended that the 1st respondent ought to have been estopped by the DDPR from filing a fresh matter following the withdrawal of representation by the office of the Labour Commissioner. Applicant's Human Resources Manager averred in paragraph 5 of his founding affidavit that "***the Labour Commissioner and him (viz., the 1st respondent) were the same party in A0595/10.***" Counsel submitted that the learned Arbitrator ought to have disposed of A 0595/10, the initial referral, and not proceeded with A 0938/10. It is on this basis that applicant's Counsel is seeking the review, correction and setting aside of the DDPR award in A0938/10.

3. In reaction, 1st respondents Counsel contended that the learned Arbitrator had committed no irregularity in as much as referral No. A 0595/10 had not been finalised. He based his defence on four issues, namely;

- (i) Even if the matter could have involved same parties, and founded on the same cause of action since there was no judgment in A 0595/10, applicant's objection could not stand;
- (ii) That the applicant has not shown what prejudice he has suffered or stands to suffer by the disposal of A 0938/10. He insisted that an averment in this regard ought to have been made in applicant's affidavit;
- (iii) That the learned Arbitrator's attention had not been drawn to the fact that there was a matter still pending concerning the same parties and based on the same cause of action; and lastly
- (iv) That the applicant has no prospects of success on the merits, and this application is mainly aimed at delaying the disposal of this case.

THE COURT'S ANALYSIS

4. If an action is already pending between the same 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 the objection of *lis pendens* can stand. It depends on whether the same suit is in fact pending elsewhere. According to ***H. Daniels in Beck's Theory and Principles of Pleading in Civil Actions***, Butterworths, 6th ed., at p. 157 the other case “***must be pending elsewhere between the same parties concerning the same thing and founded on the same cause of action.***” In order for the plea of *lis pendens* to succeed, the following essential elements must be met;

- (i) the two actions must have been between the same parties or their successors in title;
- (ii) must concern the same subject matter; and lastly
- (iii) that it must be founded upon the same cause of action/complaint.

For these principles see ***Hebstein & Van Winsen in the Civil Practice of the Supreme Court of South Africa - 4th ed., 1997 p. 249***. Applying the principles to the case before us, the issue becomes whether when A0938/10 was heard there was any other case pending involving the same parties, on the same subject matter and founded on the same cause or complaint pending elsewhere. This Court had an opportunity to consider the plea of *lis pendens* in ***Kemaketse Tsiu v Nthane Brothers & the DDPR LC/REV/30/10 (www.lesotholii.org)***

5. There was no dispute that there were two referrals *viz.*, A0595/10 and A938/10. The question becomes whether they involved the same parties and were founded on the same cause of action. The plea of *lis pendens* resembles that of *res judicial* except that in the latter the initial case must have been disposed of. As aforementioned, applicant's Human Resources Manager averred in paragraph 5 of his founding affidavit that the 1st respondent and the Labour Commissioner were one and the same parties in AO595/10. The Court was however not told in whose name the initial case was instituted. It therefore made it very difficult to ascertain whether the parties in AO938/10 were the same as in AO 595/10. It is unfortunate that the applicants failed to attend the DDPR hearing and also lost on the rescission application. Assuming the parties were the same it is likely that the learned Arbitrator went ahead to dispose of the second matter not aware that there was another case pending.

On the above considerations, the plea is not allowed and the Court orders that the DDPR award in AO938/10 be allowed to stand. It is to be complied with within thirty (30) days of the handing down of this award.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 30th DAY OF OCTOBER, 2012.

**F.M KHABO
DEPUTY PRESIDENT OF THE LABOUR COURT**

**L. RAMASHAMOLE
MEMBER**

I CONCUR

**S. KAO
MEMBER**

I CONCUR

**FOR THE APPLICANT:
FOR THE RESPONDENT:**

**ADV., N.T. NTAOTE
ADV., L.F. MALEKE**