REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

Case no: 5067/2015
Date heard: 17 November 2015
Date delivered: 19 November 2015

In the matter between:

KWANE CAPITAL (PTY) LTD
(previously) LAMAN FINANCIAL SERVICES (PTY) LTD **Applicant**

vs

THE PORT ST JOHNS MUNICIPALITY **Respondent**

Summary : Applicant herein filed an urgent application to Court which was heard by a Judge who reserved judgment. When the applicant was of the view that the judgment was not forthcoming, it filed a second application. The respondent objected to the applicant's second application on grounds that the matter is *lis pendens*. The Court removed the second application from the roll on the grounds that the first application is still pending.

JUDGMENT

TSHIKI J:

[1] In this matter, the applicant has filed an application seeking an order in the following terms:

"[1.1] that the applicant's non-compliance with the Rules of the above Honourable Court relating to forms and service be condoned and that this application be heard as a matter of urgency in terms of Rule 6 (12).

[2] That, pending the final determination of the matter under case number 5067/2015, the respondent be:

[2.1] interdicted from using the machinery, equipment and items referred to in the schedule attached marked “A” (“the goods”);

[2.2] ordered to store the goods in a place for safekeeping;

[2.3] ordered to allow the applicant or Barloworld access to the goods in order for the goods to be maintained; and

[2.4] ensure that the goods are comprehensively insured, noting applicant’s interest in the goods;

[3] that the respondent provide proof that the goods are comprehensively insured, noting applicant’s interest in the goods within 2 working days of the granting of this order;

[4] that in the event that the respondent fails to comply with paragraphs 2 and 3 of this order, the Sheriff (or his/her deputy) is authorised to access to any property on which the goods are situated and to collect the goods in order for them to be returned to the applicant forthwith;

[5] that the respondent pay costs of this application in the event that it is opposed;

[6] further and/or alternative relief.”

[2] After the papers for both applicant and respondent were filed, the matter was then enrolled for argument. The applicant’s papers were filed so was the set of papers of the respondent. It was then enrolled for argument on the motion court of the 17th November 2015.

[3] When the case was argued, *Mr Crookes* appeared for the applicant and *Mr Malunga* represented the respondent.

[4] During argument *Mr Malunga* raised a point *in limine* which, in my view, is dispositive of the matter as I had the *prima facie* view that the same application is pending before another Judge.

[5] According to *Mr Malunga* the same application was argued before Bloem J whose judgment is still reserved. Therefore, *Mr Malunga* submitted to the Court that the matter is *lis pendens* alternatively it is *sub-judicare*. For those reasons, according to *Mr Malunga*, this Court is barred from entertaining the application because the judgment in this matter is pending before another Judge. This is so, because the same issues that had been raised for argument before me in this case were dealt with and argued on the 8th October 2015 under the same case number as it is in this case and are still pending.

[6] *Mr Crookes* contended that the case in issue in this matter is a different case altogether. He did not elaborate on this issue.

[7] In the first place if the applicant had decided to pursue a different cause or had decided to file a completely different cause altogether it would not have used the same case number. At the instance of the applicant a different case number would have been issued by the registrar's office.

[8] To make matters worse, the contents of the applicant's notice of motion which was filed on the 29th September 2015 are not, in the context, different from those of the applicant in the current application. Those contents of the notice of motion read:

> "[1] That the applicant's non-compliance with the Rules of the above Honourable Court relating to forms and service be condoned and that this application be heard as a matter of urgency in terms of Rule 6 (12).
>
> [2] That the respondent be ordered forthwith to allow the Sheriff (or his/her deputy) to collect the machinery, equipment and items referred to in the schedule attached marked "A" ("the goods") including allowing the Sheriff access to any property on which the goods are situated in order for those goods to be returned to the applicant forthwith.
>
> [3] That the South African Police Services be directed to assist the Sheriff in carrying out clause 2 above, should this be necessary.
>
> [4] That the respondent be ordered to pay costs of recovering and transporting the goods to the applicant.
>
> [5] That in the event of the matter being postponed, pending the determination of the relief above, the respondent be:
>
> [5.1] interdicted from using the goods;
>
> [5.2] ordered to store the goods in a place for safekeeping;
>
> [5.3] ordered to allow the applicant or its representatives access to the goods in order for the goods to be maintained;
>
> [5.4] ordered to issue the goods comprehensively, noting applicant's interest in the goods;
>
> [6] That the respondent pay costs of this application on the attorney and own client scale.
>
> [7] Further and/or alternative relief."

[9] The applicant's evidence in its entirety, as gleaned from its founding affidavit deals with the same issues as those of the initial application. I say so because:

[9.1] the applicant interdicts the respondent from using the machinery, equipment and items referred to in schedule marked "A" (the goods);

[9.2] the order seeks to have the goods stored in an place of safekeeping;

[9.3] that the applicant or Barloworld should be allowed access to the goods in order for the goods to be maintained;

[9.4] that the goods must be comprehensively insured with a view to satisfy the applicant's interest in the goods;

[9.5] that the respondent be ordered to pay costs of recovery and transporting of the goods to the applicant and that the respondent be interdicted from using the goods.

[10] Having said the above, there is no difference between the issues as well as the evidence supporting them, in both applications being the one heard before Bloem J on the 8th October 2015 and the other that was presented before me.

[11] The plea that there is pending litigation between the same parties on the same cause of action may be raised by special plea but in appropriate circumstances also by way of application for a stay of the action. The Court will only stay an action or application on the ground that there is already an action or application pending between the same parties or their successors in title. The first action or application must be based on the same cause of action and in respect of the same subject matter as the second one under discussion.

[12] In my view, only where the trial Court has pronounced its decision would the plea of *lis pendens* be dismissed. The Court has a discretion whether or not to exercise the plea of *lis pendens*. [See ***Clipsal Australia (Pty) Ltd and Others v Gap Distributors and Others*** 2010 (2) SA 289 (SCA)]

[13] The underlying principle of the defence of *lis alibi pendens* was aptly stated by Nugent AJA (as he then was) in ***Nestlé (South Africa) (Pty) Ltd v Mars Inc*** 2001 (4) SA 542 (SCA) at 548 para [16] as follows:

> "The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it,, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally."

[14] The above principle can only be achieved when the same dispute between the same parties is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions [***Nestlé (South Africa) (Pty) Ltd v Mars Inc*** *supra* at 549 para 17 B-C]

[15] It follows, therefore, that the exception of *lis pendens* can only succeed if the same suit under discussion in the second Court has already started to be mooted before another Judge between the same litigants about the same matter and on the same cause.

[16] In the present case the same case was argued before another Judge after which he reserved his judgment. It, therefore, means that the case was finalised save for the judgment of the Court. In my view, it would not be in the interests of justice to proceed with this matter in such circumstances. If I allow the same case to proceed before me when it had been argued before another Judge, that would not

be in the interest of justice. If the applicant is of the view that the first Judge who heard the case is delaying the judgment it has other remedies which include putting pressure on the Judge who reserved the judgment and inform him of the problems occasioned by the delay in finalising the outcome of the case. In my view, it would not be in the interests of justice to allow another Court to read the papers, listen to argument and thereafter proceed to write his or her judgment in the circumstances. It is definitely undesirable that the same issue should be the subject of litigation before two different Judges of the same division even if both have jurisdiction to deal with the matter, unless good reason is shown that the Court where the application was first commenced should not be allowed to carry on with the proceedings. In this case, the case before Bloem J has advanced up to the stage of judgment meaning that it is at its last stages. It would be in the interests of justice to have it finalised by the Judge who first heard it. [See ***Kerbel v Kerbel*** 1987 (1) SA 562 (W)]

[17] I do not agree with *Mr Crookes* that the only issues before Bloem J were those vindicatory in nature. As I have said above the issues before Bloem J are the same as those that are served before this Court.

[18] South African Courts already recognise that they are under severe pressure due to congested court rolls. Therefore, the defence of *lis alibi pendens* must be allowed to operate in order to stem unwarranted proliferation of litigation involving the same parties based on the same cause of action and related to the same subject matter. [***Socratous v Grindstone Investments*** 2011 (6) SA 325 (SCA) para 16].

[19] *Mr Malunga* has applied for costs on the scale as between attorney and client. According to him the applicant who was represented throughout the proceedings should have known that his case was argued before the first Judge on the same cause of action. This should not have happened and at least not at the expense of the respondent who has no control of that process. I agree that the applicant should be ordered to pay costs on the punitive scale.

[20] In the result, I grant the following order:

[20.1] The applicant's second application is hereby removed from the roll.

[20.2] The applicant is ordered to pay the respondent's costs of these proceedings on the scale as between attorney and client.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

For the applicant	:	Adv Crookes
Instructed by	:	Neville Borman and Botha GRAHAMSTOWN Ref: Mr Powers

For the respondent	:	Adv Malunga
Instructed by	:	Dold and Stone GRAHAMSTOWN

Ref: Mrs Wolmarans / Mrs du Preez