



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not reportable

Case no: 5384/2017

In the matter between:

LEJAMO CONSTRUCTION CC

Applicant

and

AMATOLA WATER BOARD

Respondent

JUDGMENT

Govindjee J

[1] The applicant, as plaintiff, instituted action against the respondent, as defendant, for the payment of five payment certificates totalling R7 373 629.23, together with interest and costs ('the action'). Although the respondent delivered a plea and counterclaim during July 2018, it paid the capital sums between June to October 2019. What remains is the issue of interest and costs of suit, resulting in this application. The issues to be decided are whether the application should be

granted, or whether the defence of *lis alibi pendens* operates in a manner that results in the dismissal or stay of the application.

[2] The contractual terms in operation are not in dispute. The clause relevant to interest provides that:

'In the event of failure by the Employer to make the payment by the due date, he shall pay to the Contractor simple interest, at the prime overdraft rate, as charged by the Contractor's bank, on all overdue payments from the date on which the same should have been paid to the date when payment is effected, without prejudice to the Contractor's other rights under this contract or by law.'

[3] The applicant's calculation of interest on the five payment certificates, amounting to R1 634 715.79, is not in dispute. The respondent, in addition to raising *lis pendens*, denies that the applicant is entitled to costs.

[4] The principle of finality in litigation demands that legal suits are brought only once and litigated to conclusion rather than being replicated in fresh proceedings.¹ Four requirements must be met for the *lis alibi pendens* defence to be successful. They are that:²

- a. There is litigation pending
- b. Between the same parties
- c. Based on the same cause of action and
- d. In respect of the same subject-matter.

[5] It may be accepted that the respondent has succeeded in proving each of these requirements. The application follows a pending action between the parties based on the same cause of action and in respect of the same subject-matter.³ While the main claims have been paid, the interest and costs claimed in the summons have not been satisfied and the action has not been withdrawn.⁴

¹ *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16. Similarly, the defence *res judicata* is based on the non-revival of a suit brought to its proper conclusion.

² See *Keyter NO v Van der Meulen and Another* 2014 (5) SA 215 (ECG) ('Keyter') para 10.

³ It is not necessary for the action and application to be identical in form, and, in any event, this requirement may be relaxed if the circumstances support this: DE van Loggerenberg *Erasmus: Superior Court Practice* RS 17 (2021) D1-280A.

⁴ See AC Cilliers and C Loots *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of South Africa* (5th Ed) (2009) ch 20-p606. The successful invocation of *lis alibi*

[6] But that is not the end of the matter. *Lis alibi pendens* does not have the effect of an absolute bar to these proceedings.⁵ Although presumed as vexatious, the applicant has the opportunity, and bears the burden, of satisfying the court that, despite all the elements of *lis alibi pendens* being present, a discretion should be exercised to proceed with these proceedings.⁶ That discretion is determined with regard to what is just and equitable, and considering the balance of convenience.⁷ That determination requires some reference to the action.⁸

[7] The principles distilled by Plasket J in *Keyter* have been consistently applied by the High Court. In *Ferreira v Minister of Safety and Security and Another*,⁹ for example, the point was dismissed because of an absence of prejudice and because the matter had been delayed for too long. Considerations of justice and equity and the balance of convenience favoured the holistic determination of the dispute and no purpose would be served by staying part of the relief when the issues were intertwined.¹⁰ In *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC*,¹¹ Sardiwalla J placed emphasis on s 34 of the Constitution in determining what was 'just and equitable'.¹²

[8] In considering what is just and equitable in this instance, the starting point must be that the main *lis* between the parties has been extinguished and that only

pendens does not put an end to an applicant's case. It allows for the staying of the latter matter pending the final determination of the earlier matter. Once the earlier proceedings are finalised, however, the later proceedings are terminated by the defence of res judicata: *Keyter* supra fn 2 para 10.

⁵ *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) ('*Loader*') at 138.

⁶ *Keyter* supra fn 2 para 12.

⁷ *Loader* supra fn 5 at 139.

⁸ *Keyter* supra fn 2 para 15.

⁹ *Ferreira v Minister of Safety and Security and Another* [2015] ZANCHC 14 para 10.

¹⁰ Also see *Dintsi and Another v Van Breda and Another* [2019] ZALCC 29 paras 10.3-10.5 and *Land and Agricultural Development Bank of South Africa v Engelbrecht NO and Another* [2020] ZALMPPHC 43 paras 17-20.

¹¹ *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* [2018] ZAGPPHC 884 ('*Acacia Leasing*') para 7.

¹² S 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. It should be noted that the copy of the judgment accessed on SAFLII appears to be incomplete. Paragraphs 8-10 of the judgment appear to have been omitted. It must also be noted that s 34 appears to have been invoked for the benefit of the applicant on the basis that 'in the absence of proof to the contrary, to stay the proceedings would be infringing on the applicant's right in terms of section 34.' See *Acacia Leasing* *ibid*.

the ancillary issues of interest and costs remain. The clause in the contract makes provision for payment of interest and the interest calculation is not in dispute. The respondent's basis for opposing the payment of costs is unclear and amounts to a bare denial. The main basis advanced for launching the present application is cost-effectiveness in bringing to finality matters that were ancillary to the action, bearing in mind that the respondent is a state entity utilising public funds. On my reading, it is in the interests of justice to do so in this manner, rather than staying the application so that peripheral matters may be resolved in a pending trial. This is particularly because the main issue has effectively already been resolved in favour of the applicant and because no cogent basis has been advanced for the need to determine any disputes about interest or costs through the action. This approach does not, in my view, limit the constitutional right to access to court. As Plasket J indicated in *Keyter*, it may be added that this approach finds support in Uniform Rule 34(7) in cases where there has been acceptance of an offer or tender.

[9] In these circumstances, considerations of justice, equity and the balance of convenience favour the determination of the merits of the application despite the pending action. The *lis alibi pendens* defence is therefore unsuccessful. That aside, there is no basis on the papers not to award the applicant the relief sought in the application and thereby bring the matter to finality.

Order

[10] The following order will issue:

1. The respondent shall make payment to the applicant in the sum of R1 634 715.79

2. The respondent shall make payment of interest to the applicant on the sum of R1 634 715.79, at the prevailing legal rate of interest, from 14 days of the date of this order until date of final payment.
3. The respondent shall pay the applicant's costs of suit of the main action between the parties.
4. The Respondent shall pay the costs of the application.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 9 June 2022
Delivered: 10 June 2022

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