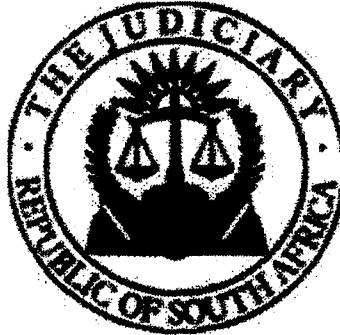


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A3079/2016

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE

DATE

12 MAY 2017

In the matter between:

UMFOLOZI MEWS BODY CORPORATE

APPELLANT

and

JACOBUS HEYNEKE

RESPONDENT

JUDGMENT

WINDELL J:**INTRODUCTION**

[1] The appeal before us has its origin in the judgment of the learned Acting Magistrate, Mr SD Motsoeli of the Magistrate Court Roodepoort, on 11 January 2016.

[2] The appeal is against the Magistrate's whole judgment and order wherein he upheld a special plea of *lis pendens* and dismissed the application.

[3] The appellants brought a substantive application for condonation as they failed to file their heads of argument within the prescribed time limits. The application for condonation was not opposed and the late filing of the papers was condoned.

FACTUAL BACKGROUND

[4] The appellant is the Body Corporate of Umfolozi Mewz, ("the Body Corporate"), a sectional title residential complex in Roodepoort. The respondent is a registered owner of one of the units in Umfolozi Mewz. The Body Corporate is duly registered as such at the Deeds Office, and the Sectional Titles Act No 95 of 1986 ("the Act") is applicable. In terms of Section 35 of the Act, a scheme shall, as from the date of establishment of the body corporate, be controlled and managed, subject to the Act, by *inter alia* management and conduct rules.

[5] On 7 May 2015 the trustees of the Body Corporate instituted legal proceedings against the respondent for his failure to comply with the rules of the Body Corporate. A summons was issued against the respondent under case number 4486/15. In terms of the particulars of claim the Body Corporate is, amongst other things, seeking an order interdicting the respondent from continuously causing a nuisance based on various grounds set out in the particulars of claim.

[6] Four months later, on 22 September 2015, and while the abovementioned action was still pending, the Body Corporate launched an application against the respondent in the same court, interdicting him from continuously causing a nuisance

or conducting himself in an ill founded and unlawful manner by publishing false and inaccurate information of the trustees, the Body Corporate and its managing agent and from including all members in its communications which communications is directed to discredit the trustees, the Body Corporate and its managing agent.

[7] In the application proceedings the respondent raised the dilatory plea of *lis pendens* by way of a *point in limine*. The court *a quo* upheld the special plea and dismissed the application for interdictory relief.

[8] A competent order for a court hearing and determining a special plea of *lis pendens* is either to uphold the special plea and to direct that the application or action in respect of which it is raised is stayed pending the outcome of the prior identified litigation, or to dismiss the special plea with costs. It was therefore not competent for the court *a quo* to dismiss the application for Interdictory relief with costs, when all the court *a quo* was deciding was the special plea of *lis pendens*.

LIS PENDENS

[9] It is trite that a party relying on a defence of *lis pendens* must prove that the litigation is between the same parties, the relief sought is the same in both pieces of litigation and the relief sought is based upon the same cause of action i.e the same wrongful conduct.¹ If all three requirements are met, the court retains a discretion to stay the later proceedings or to allow latter proceedings to proceed if it deems it just and equitable to do so, or if the balance of convenience favours it.²

¹ Wolff NO v Solomon 1898 15 SC 297 at 306

² Janse van Rensburg and Others NNO v Steenkamp and Another 2010 (1) SA 649 (SCA) at 663 D-F

[10] It is common cause that the litigation in the action and the application is between the same parties; in respect of which the same relief is sought. The issue to be decided is whether the cause of action or subject matter is the same.

PLEADINGS

[11] In deciding whether the cause of action is the same, the particulars of claim in the action must be compared to the averments made in the founding affidavit in the application procedure.

[12] In the summons issued by the appellant, it seeks to interdict the respondent in respect of the following contraventions of the Body Corporate's Conduct Rules, which it contends cause nuisance:

- Keeping two dogs contrary to Clause 1.6 of the Body Corporate's Conduct rules;
- Allowing dogs to run free on the common property, where they regularly attack other members and visitors as well as defecate on the common property contrary to Clause 16 of the Body Corporate's Conduct rules ;
- Parking his vehicle and trailer in a no parking zone without written consent, contrary to Clause 3.1 of the Body Corporate's Conduct rules;
- Installing canvas over a veranda area of his unit without written permission, contrary to Clauses 4.1 and 4.3 of the Body Corporate's Conduct rules;
- Planting various types of vegetation and shrubs and placing various implements in conflict of Clauses 5.1 and 5.5 of the Body Corporate's Conduct rules;

- Causing a cement slab to be put down, upon which he erected a steel structure, without obtaining written permission, contrary to Clauses 5.3 and 5.4 of the Body Corporate's Conduct Rules;
- Installing an illegal cable connection in conflict of Clause 12 of the Body Corporate's Conduct rules;
- Conducting a business from his unit in contravention of Clause 22.3 of the Body Corporate's Conduct Rules;
- Effecting unauthorized alterations to the landscaping of the common property;
- Having an absolute disregard for any rules and regulations and continuously threatening and harassment of the trustees.

[13] In the application for interdictory relief the Body Corporate complains of the following:

- The respondent continually communicates with the members of the Body Corporate as well as third parties and in his communications he includes false and inaccurate information about the trustees aimed at misleading the recipients and disrupting the management of the Body Corporate.
- The respondent publishes false and inaccurate information about the trustees and property managers of the Body Corporate;
- Since the institution of the action the respondent increased his unlawful behaviour and continued to discredit the trustees, despite receiving a demand from the Body Corporate.
- The respondent meddled in the painting of the complex which includes attempts by the respondent to convince members not to pay their special levies for the painting.

CONCLUSION

[14] In *National Sorghum Breweries v International Liquor Distributors*³ the court held as follows:

"The mere fact that there are common elements in the allegations made in the two suits does not justify the exceptio – one must look at the claim in its entirety and compare it with the first claim in its entirety. If this is done in the present case, the differences are so wide and obvious that one simply cannot say that the same thing was claimed in both suits or that the claims were brought on the same grounds."

[15] The question that should therefore be asked in the circumstances is the following: Will the same issue in the application be finally disposed of in the action? The action and the application both seek interdictory relief against the respondent and both suits make mention of the fact that the respondent is "a nuisance". If the pleadings in the respective suits are however examined as a whole, the subject matter in the respective suits is completely different. If the particulars of claim are compared with the averments in the application, it is clear that the issue under consideration in the application will not be finally laid to rest in the action.

[16] It is apparent from the factual bases upon which each of the action and application are based that the cause of action or subject matter is not the same.

[17] In the result the following order is made:

1. The appeal is upheld with costs

³ 2001(2) SA232 (SCA) at par[5]

2. The court a quo's judgment is set aside and replaced with the following:

"The special defence of lis pendens is dismissed with costs".



L WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree



T SIVENDU

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Attorney for Appellant :

Richards Attorneys

Counsel for Appellant:

Advocate Antony Bishop

Attorney for Respondent :

LP Baartman Attorneys

Counsel for Respondent:

Advocate D.M Pool

Date of hearing:

2 May 2017

Date of judgment:

12 May 2017