REPUBLIC OF SOUTH AFRICA

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

CASE NO: 40927/2021

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

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DATE
SIGNATURE

In the matter between:

WATERFALL EQUESTRIAN ESTATE Applicant

v

MABUNDA MAKENSA SOLLY RISIMATI N.O First Respondent

MABUNDA NHLAMULO CINDY N.O Second Respondent

Neutral citation: *Waterfall Equestrian Estate v Mabunda Makensa Solly Risimati and Others* (Case No. 40927/2021) [2023] ZAGPJHC 375 (25 APRIL 2023)

J U D G M E N T

MAHALELO, J:

[1] The applicant is the owner of the property known Portion 675 (a portion of portion 580) of the farm Waterfall No 5, registration division IR, measuring 1,2331 m2 (the property) in extent. He seeks an order against the respondents in their capacities as the trustees of the Makhensa Family Trust (the trust) for payment of R1436 197. 54 in respect of municipal charges allegedly due to the City of Johannesburg (COJ) in respect of the property leased to the trust by the applicant in terms of a notarial deed of lease.

[2] The respondents deny that the trust is liable on the basis that the correctness of the amount claimed by COJ for water and rates in respect of the leased property is disputed and an objection was raised with the COJ in this regard. The respondents content that the objection has not been fully resolved.

[3] The respondents also deny liability on the basis that there is no valid cession and or delegation of the lease agreement to the trust.

[4] The summary of the factual background to the application is as follows: On 11 September 2012 the applicant and the respondents concluded a written lease agreement in respect of the property. The lease is a 99 year lease that has been registered against the title deed of the property. On or about November 2014 the respondents ceded their rights and title in respect of the property to the Trust, the two respondents are the only trustees of the said Trust.

[5] It was a term of the agreement that the respondents would be liable to pay for municipal rates and charges directly to the City of Johannesburg(COJ)[1]

[1] Cause 5 of the lease agreement.

[6] The applicant alleged that the respondents failed to pay the municipal rates and charges and in October 2020 the applicant instituted an action against the respondents in their personal capacities as the lessees of the property under case number 27232/2020 claiming payment of the arrear charges levied for rates and taxes, water and other charges for services provided to the respondents by virtue of their ownership of the property in the amount of R1886 935, 64 on the COJ account in respect of the property. The respondents filed their notices of opposition to the action and also filed a plea. Pursuant to the delivery of the plea, the applicant took no further steps to advance the matter. The COJ effected adjustments to the respondents' account which had the effect of granting the respondents credit of R780 000,00.

[7] On the 26 August 2021 the applicant launched the current application against the respondents in their capacities as trustees of the trust. As indicated above the order sought in the application is for payment of municipal arrears for services provided to the respondents relating to the same property. In the application the applicant claims the amount of R1436 197,54. The respondents raised two points *in limine* in opposition to the application.

[8] The first point *in limine* is that of *lis alibi pendens*. The respondents alleged that the relief claimed in the action proceedings is similar to that claimed in this application. It is further alleged that the parties in this application are the same as in the action proceedings. The cause of action as well as the subject matter of the litigation are also the same. It is the respondents' submission that this application should be stayed until the final

determination is made with regard to the issues raised in the action proceedings.

[9] The second point *in limine* is that of dispute of facts. Because of the view I take on the matter it is not necessary for me to decide this point at this time.

[10] With regard to the point *in limine of lis alibi pendens*, the applicant argued that the point in limine has no merit because the respondents in the application are cited *nomine officii*, are the nominal respondents representing the trust and they are not cited in their personal capacities. It is the applicant's contention that the requirements of the same parties is therefore not met. The applicant submitted that this court should exercise its discretion to hear the application despite the alleged pending action on the basis of the consideration of fairness and convenience. It was submitted that the court should prevent the respondents, who do not have a *bona fide* defence to the applicant's claim, from continuing to occupy the premises without paying for basics such as water, rates and sewerage.

[11] In so far as the defence of *lis alibi pendens* is concerned, a party wishing to raise the point of *lis alibi pendens* bears the *onus* of alleging and proving the following:

(a) Pending litigation.

(b) Between the same parties or their privies.

(c) Based on the same action.

(d) In respect of the same subject matter.

[12] The institution of further proceedings between the same parties relating to the same matter of dispute which is pending, is *prima facie* vexatious[2]. If a specific issue has been raised in previous litigation, which is inextricably bound to further litigation, the Court retains a discretion to stay the new proceedings.[3]

[13] In *Association of Mineworkers and Construction Union v Ngululu Bulk Carriers (Pty) Ltd*[4] *(in Liquidation)* the Court recognised that *lis pendens* is intended to prevent duplication of legal proceedings. It held at paragraph 26 that:-

> *"once a claim is pending in a competent court, a litigant is not allowed to initiate the same claim in different proceedings. For a lis pendens defence to succeed, the defendant must show that there is a pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter. This is a defence recognised by our courts for over a century."*

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[2] *Painter v Strauss* 1951(3) SA 307 (O).

[3] *Kerbel v Kerbel* 1987(1) SA 562 (W).

[4] 2020] ZACC 8; 2020 (7) BCLR 779 (CC)

[5] [2001] ZASCA; [2001] 4 All SA 315(

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[14] In *Nestle (South Africa) Pty Ltd v Mars Inc*[5] the court held that:

> *"the defence of lis alibi pendens shared features in common with the defence of res judicata because they shared the common underlying principles that there should be finality in litigation. Once a suit has been commenced before a tribunal competent to adjudicate upon it, the suit should, generally, be brought to a conclusion before that tribunal and should not be replicated."*

[15] In *Cook and Others v Muller*[6] the following was said:

> "*It is clear from this passage that the plaintiff in Wolff's case had been the defendant in the Transvaal High Court and had accordingly filed a claim in reconvention. The Court nevertheless held that lis alibi pendens could properly be raised. Even if this does not strictly constitute a defence of lis alibi pendens, it is clear that the Court may, in the exercise of its discretion in controlling the proceedings before it, debar a person from ventilating a dispute already decided against him under the guise of an action against another party. See Burnham v Fakheer, 1938 N.P.D. 63. Although the previous proceedings had not even been between the same parties, the court there held that for the respondent to attempt to re-try an issue which had already been decided merely by changing the form of his action was an abuse of the processes of the Court, and was vexatious. See also Niksch v Van Niekerk and Another,*

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6 1973(2) SA p241(N)

1958 (4) S.A. 453 (E) at page 456, and the English decision of Reichel v Magrath, (1989) 14 A.C. 665 (H.L.).”

[16] In Man Truck and Bus (SA) (Pty) Ltd v Dusbus Leasing CC and Others[7] it was held that: -

“*the requirements of ‘same persons’ did not mean only the identical individuals who were parties to the earlier proceedings, but included persons who, in law, were identified with the parties to the proceedings. Whether someone had to be regarded as a so-called privy, or as being identified with the parties, depended upon the facts of each particular case.”*

[17] The following remarks made in Caesarstone Sdot-Yam Ltd v World Marble and Granite 2000 CC & Others[8] re-emphasize what was said in the matter of Cook above:

“43. The solution lies in a point made by Milne J in Cook, when he said: 'Even if this does not strictly constitute a defence of lis alibi pendens, it is clear that the Court may, in the exercise of its discretion in controlling the proceedings before it, debar a person from ventilating a dispute already decided against him under the guise of an action against another party.”

[18] The Court in *Caesarstone* did not make a final finding on the issue of “*same persons*”. It does however appear, by the following *obiter* remarks that the concept of “*same persons*” extends beyond the scope of “*identical persons”.*

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[7] 2004(1) SA p454(W)
[8] [2013](6) SA 499(SCA); [2013] 4 All SA 509(SCA)

> "*It may be that the requirement of 'the same persons' is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.*"

[19] It is contended that the action was instituted against the respondents in their personal capacities. The applicant argued on this basis that the parties in the action proceedings are not the same as in this application. This argument is fallacious. The central issue in both proceedings is the amount owed to the COJ for municipal charges in respect of the leased property. Determination of this issue does not depend on the capacity in which the respondents are cited. If the defendants in the action are successful on this central issue, the trustees will be entitled to raise a defence of *res judicata* in the present application. It is important to note that the defendants in the action, as the lessees do not dispute their liability to the COJ. They only dispute the correctness of the amount calculated. Judgment in the action will dispose of the dispute between the parties. It is common cause that the respondents in their personal capacity concluded a notarial deed of lease with the applicant.

[20] The respondents live in the property and are therefore consumers

of the services provided by COJ. Both respondents are trustees of the Makhensa Family Trust and the controlling minds behind the trust. It is the first and second respondents who built a house in the leased property, the trust derived its rights from the respondents in their personal capacities as they are the original lessees and the trust will be their successor- in title. In light of the aforementioned, I find myself in agreement with the respondents that the requirement of same parties is met. This is so because the trust is represented by the first and second respondents. The trust derived its rights and obligations in the lease agreement from the respondents as the original lessees.

[21] As indicated in *Ceaserstone supra*, there is sufficient commonality between the trust and the respondents to satisfy the requirement of same parties, more so that the respondents are beneficiaries of the lease, as they live in the property and consume services provided by the COJ.

[22] The requirements of *lis pendes* are therefore met.

[23] In the result I make the following order:

1. The application under case number 40927/2021 is stayed pending the final determination of the action instituted by the applicant under case number 27232/2020.

2. The applicant to pay the costs.

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M B MAHALELO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was delivered electronically by circulation to the parties' legal representatives by e-mail and uploading onto CaseLines. The date and time of hand down is 25 April 2023 at 10h00.

APPEARANCES

FOR THE APPLICANT:	**ADV ANDREW RUSSEL**
INSTRUCTED BY:	**FABER GOERTZ ELLIS AUSTEN INC.**
FOR THE RESPONDENTS:	**ADV R B MPHELA**
INSTRUCTED BY:	**MOLOSI ATTORNEYS**
DATE OF HEARING:	**15 NOVEMBER 2023**
DATE OF JUDGMENT:	**25 APRIL 2023**