

SOUTH AFRICA / JUDGMENT

# Eravin Construction CC v Twin Oaks Estate Development (Pty) Ltd (1573/10) [2012] ZANWHC 27 (29 June 2012)

[2012] ZANWHC 27

## COURT

North West High Court, Mafikeng

## BEFORE

A M Kgoele

## CASE / FILE NUMBER

1573/10

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**Source record****IN THE NORTH WEST HIGH****COURT****MAFIKENG****CASE NO.:1573/10**

In the matter between:      ERAVIN CONSTRUCTION CC  
                                                 .....PLAINTIFF  
and  
                                         TWIN OAKS ESTATE  
                                         DEVELOPMENTS (Pty) Ltd ..DEFENDANT  
                                         CIVIL MATTER  
                                         KGOELE J  
                                         DATE OF HEARING : 11  
                                         JUNE 2012  
                                         DATE OF JUDGMENT : 29  
                                         JUNE 2012

FOR THE APPELLANT :      Advocate A.B. Rossouw SC

FOR THE RESPONDENT :      Mr W.B. Van Heerden

**JUDGMENT****KGOELE J:**

[1] The plaintiff instituted action against the defendant (Twin Oaks Developments (Pty) Ltd under the above-mentioned case number for payment of an amount of R258 498.77 plus interest and costs. The plaintiff's cause of action is based on an agreement that was entered into during March

2008. The case currently serves before this court.

[2] The plaintiff had previously instituted an action against Twin Oaks Estate Property Owners Association and CVR Mining Supplies CC under case number 2718/08 for payment of the same amount based on substantially the same cause of action with the matter mentioned in the paragraph 1 above.

[3] The defendant raised a special plea of *res alibi pendens*. The defendant pleads that the plaintiff had previously instituted action under case number 2718/2008 on the same cause of action and facts. Defendant therefore request this court to issue an order that the current proceedings be stayed pending the outcome and finalisation of the matter initially instituted, alternatively until plaintiff has withdrawn one of the pending matters and paid the cost thereof,.

[4] It is common cause that the action under the case number 2718/2008 has not been withdrawn by the plaintiff. The plaintiff had also conceded to the fact that the cause of action and the relief sought in the aforementioned actions are substantially the same.

[5] It is trite law that in order to succeed with a plea of *lis alibi pendens* four requirements have to be complied with, namely:-

Pending litigations;

Between the same parties or their privies;

Based on the same cause of action;

In respect of the same subject matter.

[6] Accordingly, the first, the third and the fourth requirements has been complied with by the defendant.

[7] The only material difference between these two cases is that the defendant in the one case is cited differently to that in the other matter. This is also common cause between the parties.

- [8] In the light of the afore-mentioned, this Court is called upon to adjudicate this matter on the basis that Twin Oaks Development (Pty) Ltd (the defendant in the instant matter) and Twin Oaks Estate Property Owners Association (the defendant in the other action) are different entities / parties.
- [9] Thus the only issue before the court is whether a plea of *res alibi pendens* can be raised successfully where the parties / entities (in this case the defendants) in the two actions are not the same.
- [10] Counsel for the defendant submitted that the “same parties” requirement does not connote “identical parties” therefore similar parties may very well suffice.
- [11] He maintained that of utmost pertinence is the fact that the shareholders and directors of the defendant in the initial matter are the same as those in the current one. Accordingly such natural persons are identified by implications in both matters. He referred this court to the matter of *Man Truck and Bus (SA) (Pty) Ltd v Dusbus Leasing CC and Others 2004 (1) SA 454 (W)* where 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”.

- [12] In light of the afore-mentioned the defendant’s counsel submitted that the fact that the shareholders and directors of both companies are one and the same, the two actions pertains to the “same parties” albeit that they are not the “identical parties”.
- [13] The plaintiff’s counsel on the other hand submitted that there is no evidence of whatsoever nature before the court that Twin Oaks Developments (Pty) Ltd is privy to or can, in law, be identified with Twin Oaks Estate Property Owners Association and CVR Mining Supplies CC.
- [14] Further that the decision which the defendant heavily relied on during arguments, that of *Cook and Others v Muller 1973(2) SA 240 (NPD)*, is no authority for the proposition that the parties do not have to be the same. On the contrary, the parties in the Muller case were exactly the same in both actions.
- [15] Lastly that the defendant’s counsel further relies on a passage that appears on page 246 A-B of the Muller case for the proposition that the parties / entities need not be the same. According to him this portion of the judgment renders no support to the defendant’s contention. He maintained that this quotation deals with the court’s discretion in debarring a person from ventilating a dispute already decided against him. Furthermore, that this passage and the authorities cited by Milne J simply do not deal with *lis alibi pendens*. This much, according to him, is clear from page 245 (reading from the penultimate sentence) of the judgment. Lastly that, the Muller case instead supports the plaintiff’s contention that the

parties must be the same.

- [16] It is trite law that precedent and principles pertaining to res judicato applies to matters involving lis alibi pendens as their requirements to succeed therewith are the same. The case of Marks and Kenter vs Van Diggelen, 1935 TPD 29 at 37 supports such contention where the court held:-

*“It is clear from Voet, 44.2.7, that the requisites of the defence of lis pendens and res judicato, in relation to the identity of the issue and parties, are the same”.*

- [17] In Nestle (South Africa) Pty Ltd v Mars Inc 2001 (4) SA 542 (SCA) 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”.

- [18] The Nestle matter as referred to above in fact places an obligation upon the plaintiff to drive the matter to finality rather than to willy-nilly issue out summons time and again without thought for the time and costs aspects necessarily included therein.

- [19] If conduct of this nature is allowed, our court rolls will become more and more congested. This aspect of congestion was discussed in Socratous v Grindstone Investment 2011 (6) SA 325 (SCA) where the court held:-

*“South African courts are under severe pressure due to congested court rolls, and 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”.*

- [20] The defendant’s submission that there is no evidence before this court that Twin Oaks Development (Pty) Ltd is privy to or can, in law, be identified with Twin Oaks Estate Property Owners Association and CVR Mining Supplies CC is far-fetched.

- [21] Amongst the documents discovered in this matter there are all the pleadings under case no 2718/08. On page 9 of the index thereof there is a Copy of a Cipro Search document wherein it is stated that Daniel Francois Malan and Jacques Malan are directors of Twin Oaks Country Estate Property Owners Associaton, a section 21 company. On the same breath, there is in the index of the current matter 1573/10 on page 16, a copy of Cipro Search document for the company Twin Oaks Development (Pty) Ltd, wherein the directors thereof are also referred to as Jacques Malan and Daniel Francois Malan.

- [22] In light of the afore-mentioned, I agree with the submission of the defendant that the shareholders and directors of both companies are one and the same and therefore the two actions pertain to the ‘same parties’ albeit that they are not “the identical parties.”

[23] I find the quotation that the defendant's counsel referred to in the case of Man Truck above apposite in this matter.

[24] After carefully reading the Muller case referred to and also relied on by the defendant, I am of the view that the plaintiff counsel's submission that the Muller case is no authority for the proposition that the parties do not have to be the same and further that it renders no support to the defendant's contention consequently falls away due to lack of merit.

[25] The following was held in the Muller case:-

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

Returning to the facts of the present case, it seems clear that, had the plaintiffs not instituted this action, and had the defendant obtained judgment in his favour in the proceedings in the Witwatersrand Local Division, and the plaintiffs had thereafter instituted this action which they have now instituted, they would inevitably have been met by a plea of res judicata and as a plea of lis alibi pendens is, in the words of GREENBERG, J., a cognate defence, it is, in my view, clear that it is not a prerequisite that the defendant should have been a defendant in the proceedings in the Witwatersrand Local Division."

[26] The principles behind a plea of lis alibi pendens and res judicata are, like in estoppel also founded on public policy to avoid a multiplicity of actions in order "inter alia" to conserve the resources of the courts and litigants.

[27] Consequently I come to the conclusion that the four requirements that need to be complied with in order to succeed with a plea of lis alibi pendens are present in the circumstances of this matter.

[28] The plaintiff issued summons against the defendant without proceeding and further withdrawing the first one, issued the second summons for the same amount based on the same cause of action against the same defendant. The current proceedings are thus vexatious to say the least. This court is left with no option but to demonstrate its displeasure in the way the plaintiff conducted the proceedings in this court by ordering a punitive scale in as far as costs is concerned.

[29] The following order is thus made:-

29.1 The special plea by the defendant is upheld;

29.2 The current proceedings are stayed pending the finalisation of the initial proceedings under case no. 2718/08, alternatively pending the plaintiff's withdrawal of the initial action under case no 2718/08 and payment of the defendants costs in respect thereof;

29.3 The plaintiff is ordered to pay the costs on an attorney and client scale.

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A M KGOELE

JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE PLAINTIFF : Nienaber & Wissing Attorneys

FOR THE DEFENDANT : Van Rooyen Tlhapi Wessels Attorneys

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