

SOUTH AFRICA / JUDGMENT

Futshane v King Sabata Dalidyebo Municipality and Others (1529/2013) [2014] ZAECMHC 38 (14 November 2014) [2014] ZAECMHC 38

COURT

Eastern Cape High Court, Mthatha

BEFORE

R W N Brooks

CASE / FILE NUMBER

1529/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION-MTHATHA)

CASE

NO: 1529/2013

Heard

on: 11 November 2014

Delivered

on: 14 November 2014

In

the matter between:

NONZWAKAZI
FUTSHANE
Applicant
and
KING SABATA DALINDYEBO
MUNICIPALITY
First Respondent
THE MUNICIPAL MANAGER,
KSD MUNICIPALITY Second
Respondent
THE SHERIFF OF THE
HIGH COURT, MTHATHA
Third Respondent
REGISTRAR
OF DEEDS, MTHATHA
Fourth Respondent

JUDGMENT**BROOKS AJ:**

- [1] On 26 June 2013 the applicant launched the present application. Primarily, it seeks an order declaring all warrants of execution and re-issued writs issued by the first and second respondents against the applicant's immovable property unlawful and setting them aside accordingly. The applicant also seeks an interdict preventing the respondents from issuing any writ in future against her immovable property if that writ is connected to the allocatur under case number 1429/08.
- [2] As ancillary relief, the applicant also seeks orders prohibiting the holding of any sale in execution of her immovable property, or the advertisement of such sale, in either instance consequent upon the present execution process, or the transfer of the applicant's immovable property to any third party as a consequence of an unlawful sale of the applicant's immovable property.
- [3] The applicant also seeks the costs of the application. She seeks the payment of those costs by the first and second respondents jointly and severally, but asks that such an order be extended to embrace the third and fourth respondents in the event of their opposition to the relief claimed.
- [4] The application is opposed by the first and second respondents only.
- [5] As they are entitled to do, the respondents filed a notice in terms of the provisions of rule 6 (5) (d) (iii) of the Uniform Rules of Court, setting out their objection to the application on a point of law. No answering affidavit was filed of record. The respondents appear to rely exclusively on the notice in terms of the subrule. In such circumstances, the allegation in the applicant's founding affidavit must be taken as established facts by the court.[1]
- [6] The objection raised by the respondents on a point of law is one of *lis alibi pendens*. The notice identifies that the applicant makes reference in the founding affidavit to an earlier application brought as a matter of urgency against the respondents under case number 941/2012 and annexes a copy of that application to the founding affidavit.

The complaint identifies further that the applicant stated in the founding affidavit that the application brought under case number

941/2012 was struck from the roll. The notice urges the court to adopt the view that in the circumstances where the applicant fails to state that that application was finalised or withdrawn, it remains pending. Accordingly, the complaint is that the present application cannot proceed in the face of the continued existence of the proceedings under case number 941/2012. A comparison of the two applications would reveal that substantially the same relief is claimed in each on the same cause of action, and that the parties are the same in each application. On the basis of the established principles which make up a plea of *lis alibi pendens*, the present

application must be dismissed. The notice in terms of the subrule also seeks an order that the applicant pay the costs on the scale as between attorney and client.

- [7] The underlying principle of the defence of *lis alibi pendens* is well established. Both the defence of *lis alibi pendens* and the defence of *res judicata* have the 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 should generally be brought to its conclusion before that tribunal and should not be replicated. So too will a suit not be permitted to revive once it has been brought to its proper conclusion. The same suit between the same parties should be brought once and finally.[2]
- [8] Ms Nyobole, who appeared on behalf of the applicant, was in agreement with Mr Zilwa, who appeared on behalf of the respondents, that the parties to the application brought under case number 941/2012 were the same as the parties in the present application. However, she did not agree that the cause of action and the relief sought was the same in each matter. In essence, it was the argument of Mr Zilwa that a comparison of both matters demonstrated that the requirements for a successful plea of *lis alibi pendens* were met.
- [9] Of primary importance in the resolution of this issue is a consideration of the current status of the application brought under case number 941/2012. Both Mr Zilwa and Ms Nyobole agree that there is a difference between a matter being simply removed from the roll and a matter being struck from the roll.

In the former circumstances, it is open to either party to simply re-enrol the matter for hearing; in the latter circumstances, it is necessary for the applicant to file an explanatory affidavit in order to re-enrol the matter for hearing. Unless this step is taken to re-invigorate the matter, it is for all intents and purposes dormant.

- [10] There is no agreement between the parties on the implications of this dormant status when consideration is given to the application under case number 941/2012 for the purposes of determining the plea of *lis alibi pendens*. Mr Zilwa contends that the matter was only struck from the roll of urgent applications, therefore remaining on the ordinary roll. Ms Nyobole contends that no such distinction is drawn, that there is only one roll and that the application was struck from the roll. In my view, this submission reflects the reality about the manner in which an urgent application becomes enrolled. Whilst special procedures are in place for the initial enrolment of an urgent application, the roll onto which it is placed is not a special roll, but the ordinary roll; only the circumstances peculiar to any application which may render it urgent clothe it with any form of special status.
- [11] Consequently, I am of the view that it cannot be said of a matter which is struck from the roll that it remains pending thereafter. The state of dormancy which shrouds any matter which has been struck from the roll militates against any further attention being given to that matter in the absence of special steps being taken by the applicant to reinvigorate the matter and to secure its return to the roll. It seems to me to be an irresistible and logical requirement that for a matter to qualify for consideration under a plea of *lis alibi pendens* it

must be a matter which is pending in the sense that it remains enrolled and requiring the attention of the tribunal before which it has been placed, or at least can simply be re-enrolled by either party without any special step being required to reinvigorate the matter.

- [12] It follows that I am of the view that the dormant status of the application brought under case number 941/2012 disqualifies it for consideration under the plea of *lis alibi pendens* which is effectively raised by the respondents' notice in terms of rule 6 (5) (d) (iii).
- [13] Even if I were wrong in the conclusion at which I have arrived, in my view the plea of *lis alibi pendens* must fail in this matter for other reasons. Whilst it is so that the parties in both matters are the same, in my view there are

significant differences in other areas. Firstly, central to the applicant's cause of action in this matter is the complaint

that the warrants of execution and re-issued writs which have been issued against her immovable property have been issued without the issue of a pre-requisite order from a judge declaring that immovable property to be executable. It is well established that this is a necessary precursor to any execution process against immovable property.[3] The absence of this jurisdictional requirement was not a feature in the cause of action relied upon in the application brought under case number 941/2012. Moreover, that application concerned itself with issues arising out of reliance by the respondents upon a single warrant of execution; the present matter is concerned with issues arising from their reliance upon the same warrant of execution, but the scope of the application is broader in that it targets reliance upon that warrant of execution, together with other writs which were issued and served well after the date upon which the application under case number 941/2012 was commenced. In addition, the relief claimed in the present matter is much broader than the scope of the relief in the earlier application. Accordingly, it cannot be said that the same suit between the parties has now been duplicated.

- [14] It is perhaps appropriate to observe, at this point, that even if I were wrong on both points upon which I have determined that the plea of *lis alibi pendens* cannot succeed, that plea does not constitute an absolute bar to the present application proceedings. The court remains vested with a discretion to allow the present application to proceed if that would be more just and equitable in the circumstances.[4]
- [15] Were I to be called upon to exercise that discretion, I would be inclined to allow the present application to proceed. In my view, that would be more just and equitable in the circumstances than requiring the applicant to file an explanatory affidavit in a quest to reinvigorate and re-enrol the application brought under case number 941/2012, to then seek leave to amend the notice of motion in that matter and to file a supplementary affidavit dealing with all the events that have occurred subsequent to the date of issue of that application and to introduce the central cause of action which is absent therefrom.

- [16] Accordingly, from whichever perspective, I am of the view that the complaint of *lis alibi pendens* raised by the respondents in their notice under rule 6 (5) (d) (iii) is without merit and falls to be dismissed.
- [17] I turn now to consider the applicant's entitlement to relief in the present matter. No answering affidavit having been filed, the allegations made in the founding affidavit are to be accepted as the correct factual basis upon which consideration must be given to the entitlement to the relief claimed.[5] In my view, all the activity on the part of the respondents which is identified in the founding affidavit is tainted by the single allegation that no order of court declaring the applicant's immovable property executable was obtained before a warrant of execution was issued against that property. In light of this all pervading condition of illegality, it becomes unnecessary to analyse the factual matrix in any greater detail. In my view, the applicant is entitled to the relief which she claims in the circumstances of this matter.
- [18] The following order will issue:
1. An order is granted in terms of prayers 1, 2, 3, 4, 5, 6 and 7 of the notice of motion dated 25 June 2013;
 2. The first and second respondents are directed to pay the costs of the application jointly and severally, the one paying the other to be absolved.

R W N BROOKS

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Applicant:

Ms Nyobole instructed by

Messrs Dandala Associates

No 10 Tshezi Building

Madeira Street

MTHATHA

1ST & 2ND Respondents: Mr H Zilwa instructed by

X M Petse Incorporated

445-4th Floor

Development House

York Road

3RD & 4TH Respondents: No Appearance

- [1] Boxer Superstores Mthatha & Another v Mbenya 2007
- (5) SA 450 (SCA) 425F-G; ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009
- (2) SA 512 (D) 514I-J
- [2] Nestlé (South Africa) (Pty) Ltd v Mars Inc 2001
- (4) SA 542 (SCA) para [16]; Socratous v Grindstone Investments 134 (Pty) Ltd [2011] JOL 26874 (SCA) para [13].
- [2] Nestlé (South Africa) (Pty) Ltd v Mars Inc 2001
- (4) SA 542 (SCA) para [16]; Socratous v Grindstone Investments 134 (Pty) Ltd [2011] JOL 26874 (SCA) para [13].
- [3] Gundwana v Steko Development CC & Others 2011
- (3) SA 608 (CC)
- [4] Yekelo v Bodlani 1990
- (3) SA 970 (TK) 973D
- [5] Note 1

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