

SOUTH AFRICA / JUDGMENT

Seeletso and Another v Ntefeng and Others (UM 170/23) [2023] ZANWHC 157 (6 September 2023)

[2023] ZANWHC 157

COURT

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

UM 170/23

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION -

MAHIKENG

UM 170/23

Reportable:

YES

/ NO

Circulate

to Judges:

YES

/ NO

Circulate

to Magistrates:

YES / NO

Circulate

to Regional Magistrates:

YES / NO

In

the matter between: TIROYAONE
LEONARD SEELETSO
1ST APPLICANT
BOIKANYO
BABEDI
2ND APPLICANT
And
GAEATLOGE
EDWARD NTEFENG
1ST
RESPONDENT
KAGEELO
CORNELIA NTEFANG
2ND
RESPONDENT
SHERIFF
OF THE HIGH COURT,
NORTH
WEST PROVINCE
3RD RESPONDENT
MASTER

OF THE HIGH COURT: NORTH
WEST PROVINCE
4TH RESPONDENT

JUDGMENT

REDDY AJ

Introduction

- [1] The applicants approached this Court on an urgent basis on 24 August 2023, seeking relief in the following terms:
1. That this application be heard as one of urgency and that the non-compliance with the Rules of this court be condoned.
 2. That the third respondent be interdicted from executing the warrant of execution issued by the Registrar of this Court on the 09 June 2023 pending the M180/21 application for leave to appeal of an order dated 14th AUGUST 2023 and the application to set aside the title deed in application M340/23;
 3. That the Warrant of Execution issued by the Registrar of the court on the 09th June 2023 be stayed pending both the Application for leave to Appeal with the case number M180/21 and an application with the case number M340/23 to set aside the title deed relating to the property on question;

4. That the first and second respondents be ordered to pay the costs of this application on attorney and client scale.
- [2] This application for urgent relief has somewhat of a tortuous ligation history. To properly appreciate the relief sought in the present urgent application, a detailed and complete chronology is necessitated.

The parties

- [3] Being duly cognisant of the various applications that have engaged different Judges of this Division, which will be delineated infra, a convenient point of departure would be an introduction to the dramatis personae. For purposes of brevity, the parties will be cited as they are in this application.
- [4] The first applicant is Mr Tiroyaone Leonard Seeletso (“Seeletso”), an adult male attorney practicing under the name and style of TL Seeletso Attorneys, No 4[...] D[...] K[...] Street, Montshiwa, Mmabatho. Seeletso was nominated by the deceased Tikanyetso Margaret Malekutu (“the deceased”) as the Executor of her deceased

estate.

- [5] The second applicant is Boikanyo Babedi (“Babedi”), who is cited as an heir in the estate of the deceased. Seeletso and Babedi are referred to individually and collectively as the applicants in this judgment.
- [6] The first respondent and second respondents are Mr Gaeatloge Edward Ntefang, an adult male pensioner, and Mrs Kagelelo Cornelia Ntefang (“the opposing respondents”), who are married in community of property.
- [7] The third respondent is the Sheriff of the North West High Court, with its geographical location at James Watt Crescent, Industrial Site, Mahikeng. The Sheriff is duly authorized to execute the warrant of execution which is sought to be interdicted and stayed herein.
- [8] The fourth respondent is the Master of the High Court, North West Province, with its address at No.4[...] S[...] Street Mahikeng. The fourth respondent is the custodian of deceased estates. The unfinalized estate of the deceased, lies with this Master.
- [9] The opposing respondents entered a Notice of Intention to Oppose the relief sought in this application, followed by a Notice in terms of Rule 30 and Rule 30A of the Uniform Rules of Court (“the Rules”). The fourth and fifth respondents have not noted any opposition to the relief sought.

Chronology

- [10] The opposing respondents contend that they are the registered owners of the immovable property described as ERF 2[...] M[...] UNIT [...], REGISTRATION DIVISION J Q, THE NORTH WEST PROVINCE, IN EXTENT 457(FOUR HUNDRED AND FIFTY SEVEN SQUARE METRES, situated at 2[...] A[...] B[...] CLOSE, UNIT [...], MMABATHO (“the immovable property”).
- [11] The immovable property was initially registered in the name of the deceased. When the deceased’s husband passed away in 1993, she experienced financial distress. At this stage the deceased remained the registered owner of the immovable property.
- [12] With the deceased’s financial position on a steady decline she approached the opposing respondents with a proposal to purchase the immovable property. The opposing respondents acquiesced in the proposal by the deceased, resulting in the conclusion of a purchase agreement for the immovable property. The transfer of the immovable property was attended to by Messrs Koikanyang Attorneys, and subsequently transferred into the names of the opposing respondents in the Deeds Registry at the Deeds Office in Vryburg, on 4 February 2014. The opposing respondents accordingly assumed liability for the payment of all utilities in respect of the immovable property.
- [13] Given the dire circumstances of the deceased, the opposing respondents by way of an informal agreement, allowed the deceased a right of habitation of the immovable property until her death on 24 September 2020 when the informal agreement signalled the end of the right of habitation ex lege. The nub of the issue in this regard is that the right of habitation was not registered against the title deed.
- [14] Seeletso avers that he was appointed as the Executor of the deceased’s entire estate, which was bequeathed to Babedi, in terms of the deceased’s last will and testament. According to Seeletso he placed Babedi in possession of the immovable property. Babedi, in turn leased the immovable property to derive a financial benefit therefrom.
- [15] Based on their right to peaceful and undisturbed possession, the opposing respondents pursued spoliatory relief. This found favour with Petersen J, who on 18 November 2021[1] ordered inter alia, the first and second applicants to immediately give undisturbed access and possession to the opposing respondents in respect of the immovable property. The first and second applicants were ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, on an attorney and client scale. A little over a year later, on 4 November 2022, Petersen J granted leave to appeal to the Full Court of the Division. Ex facie the pleadings, the appeal was not prosecuted within the prescribed timelines. This axiomatically resulted in the appeal being deemed lapsed.
- [16] On 6 June 2023 the Registrar of this Court issued a warrant of ejectment. The warrant of ejectment came to the knowledge of Babedi on or around the second week of July 2023. As a result, the applicants launched the first urgent application predicated on the warrant of ejectment in which they sought to interdict the Sheriff of the High Court from executing the

warrant of ejectment, and to stay the warrant of ejectment pending finalization of the appeal under case number CIVAPPF09/23 (pursuant to leave being granted by Petersen J under case number M180/21), and an application under case number M340/23, in which the applicants seek to set aside the title deed relating to the immovable property.

- [17] The first urgent application came before Dewrance AJ on 14 August 2023 under case number M180/21. Dewrance AJ dismissed the first urgent application with costs on an attorney and client scale. On 15 August 2023, a request for reasons for the judgment was filed simultaneously accompanied by an application for leave to appeal to the Supreme Court of Appeal alternatively to the “Full Bench”. Dewrance AJ, in giving his order of 14 August 2023, made no declaration that reasons would be furnished to any of the parties on application in accordance with Rule 49(1)(c). The request for reasons on 15 August 2023, it must therefore be accepted is pursuant to Rule 49(1)(b) which provides:

“49 Civil Appeals from the High Court

1(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court’s order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.”

- [18] It is not clear whether Dewrance AJ handed down his reasons in a judgment delivered ex tempore. If he did, the request for reasons must therefore be construed as an application for the transcription of the record in which the reasons were furnished. If that is not correct, then, notwithstanding the absence of the reasons requested from Dewrance AJ, which in terms of Rule 49(1)(b) would be due within fifteen (15) days of the order of 14 August 2023, the applicants launched the present application on 25 August 2023, which the respondents take issue with.

- [19] The applicants take issue with what appears to be the main reason for the order of 14 August 2023, which is delineated as follows in the application for leave to appeal:

“Pending appeal before the full bench

5.The acting trial judge erred and misdirected himself to conclude that there was no appeal pending (when a condonation application and a reinstatement application which was to be heard by the full bench at the later stage and when anything heard by three judges in a full bench constitutes an appeal proceedings);”

The pending application for condonation and reinstatement of the
lapsed appeal

- [20] The applicants contend, premised on the ground of appeal against the order of Dewrance AJ as aforesaid, that the appeal against the judgment of Petersen J is pending and a condonation application to reinstate the appeal has further been made and is pending as well before this Court. Further, it is asserted that an application with case number M340/23 to set aside the title deed registered in the names of the opposing respondents, on the basis that the said immovable property was illegally and unlawfully transferred into their names, is pending in this Court. The gist of the applicants' version being that the opposing respondents in essence defrauded the deceased.
- [21] A perusal of the application before Dewrance AJ indicates that it was brought to the attention of that Court that a "Notice of Motion: CONDONATION FOR THE LATE FILING OF RECORD AND REINSTATEMENT OF APPEAL" was filed, which is enrolled for hearing on 27 October 2023. It is clear from this Notice that the applicants accept that the appeal has lapsed. The application for condonation for the late filing of the record and re-instatement of the appeal is what is pending before the Full Court and not the appeal. Notwithstanding the filing of the aforesaid Notice, it does not result in the lapsed appeal being reinstated. The status quo is that the appeal remains lapsed, and the merits or demerits of the appeal need not engage the attention of this Court.
- [22] The prospects of success of the application in case number M340/23, in light of the judgment of Petersen J, is a matter best left for consideration by the Full Court when it considers the application for condonation and reinstatement of the lapsed appeal. I therefore refrain from making any pronouncement on the application under case number M340/23.

The Rule 30/30A application

The respondents' approach

- [23] Before this Court, the opposing respondents elected not to file an answering affidavit, but instead invoking the procedural mechanism of Rule 30 and Rule 30A of the Rules of Court, in the following terms:

"First and second respondents Notice in terms of Rule 30 Read with Rule 30A

1. On 14 AUGUST 2023, applicants instituted an urgent application against the inter alia the First and Second Respondents (under case number M180/2021) in which the following relief had been applied for namely:
 - 1.1 That this application be heard as one of urgency and that the non-compliance with the Rules of this Court be condoned.
 - 1.2 That the Fourth respondent be interdicted from executing the warrant of execution issued by the Registrar of this Court on the 9th June 2023 pending both the Appeal with the case number CIVAPP FB09/23 and an application with the case number M340/23 to set aside the title deed relating to the property in question;

1.3 That the warrant of execution issued by the Registrar of this Court on the 9th June 2023 be stayed pending both the Appeal with the case number M340/23 to set aside the title deed relating to the property in

question;

1.4 That the First and Second Respondent be ordered to pay the costs of this application on an attorney and client scale;

1.5 Further and alternative relief.

2. A copy of the application and founding affidavit thereto (M180/2021) are attached hereto as annexure "A". The Registrar of the above Honourable Court is requested to avail M180/2021 to the Presiding Officer to which UM170/2023 is allocated, as the matters are closely intertwined.
3. On 14 August 2023 such application (M180/2021) had been dismissed with costs on an attorney and client by Dewrance AJ.
4. On 15 August 2023 the Applicants filed an Application for Leave Appeal against the order of Dewrance AJ referred to in paragraph 3 above.

See: Page 162-171 of paginated papers under case no. UM170/23

5. The Application for Leave to Appeal had not been heard yet, nor had a Judgment been made as to whether leave is granted to the Applicants to appeal, or not.
6. On 16 August 2023 the Applicants again instituted an urgent application (under case number UM170/23) in terms whereof the following relief is applied for, namely:

6.1 That this application be heard as one of urgency and the non-compliance with the Rules of this Court be condoned.

6.2 That the Third Respondent be interdicted from executing the warrant of execution issued by the Registrar of this Court on the 9th June 2023 pending the M180/21 Application for Leave to Appeal of an order dated 14th August 2023 and the application to set aside the deed in the application M340/23;

6.3 That the warrant of execution issued by the Registrar of this Court on the 9th June 2023 be stayed pending both the Application for Leave to Appeal with the case number M180/21 and an application with the case number M340/23 to set aside the title deed relating to the property in question;

6.4 That the First and Second Respondent be ordered to pay the costs of this application on an attorney and client scale;

6.5 Further and/or alternative relief.

7. The relief applied for in the dismissed application (M180/2021) are identical to the relief now sought in the Notice of Motion in (UM170/2023).

8. The filing of the application under UM170/2023 constitutes an irregular set due inter alia to following:

8.1 The dismissal of the urgent applicant under case number M180/21, renders this res judicata alternatively lis pendens.

8.2 The Notice of Motion do not contain a request to the Registrar to enrol the urgent application per the date and time as indicated to in the Notice of Motion.

8.3 The Applicants failed to comply with the Provisions of Rule 41(A)(2)(a), in that the Applicants did not file (together with this application), a notice indicating whether they agree to or oppose referral of the dispute to mediation.

8.4 The Applicants failed to comply to Practice Directive 9(1), which reads as follows:

8.4.1. "The name and telephone numbers (including cellular phone numbers) of the attorney filing documents in the Registrar's Office, must appear in the left bottom corner of the first page of such document."

8.5 In casu, merely the following appear in the left hand corner of the Notice of Motion:

"Filed by:

TL Seeletso Attorneys

Cell: 0[...]"

and not the specific name of the attorney who filed the documents.

9. The First and Second Respondents are prejudiced by the aforesaid irregular steps as:

9.1. The First and Second Respondents cannot file opposing papers, as in terms of Rule 30, no further steps to completion of the matter may be taken.

9.2 The First and Second Respondents cannot be expected, after successfully opposing the first urgent application,

to now, few days later, oppose the very same relief which had been dismissed on 14 August 2023. The impression is created that the Applicants merely want a second bite of the cherry, whilst opposing such application boils down a costly litigation exercise to the First and Second Respondents.

9.3. The First and Second Respondents are deprived from the Provisions of Rule 41(A)(2)."

The applicants' reply to the Rule 30 and Rule 30A

[24] The applicants' reply to the Rule 30 and Rule 30A Notice is as

follows:

1. Rule 30 which relates to an irregular step and Rule 30A which constitutes a non-compliance are related to action proceedings and not application proceedings on the following grounds:

1.1 In application proceedings, if a party fails to file an answering affidavit, the application proceeds unopposed and the notice to oppose is considered as a delaying tactic;

1.2 Where there is non-compliance or a question of law, an answering

affidavit must be filed as it is pre-emptory to raise a defense under oath. Rules 30 and 30A are notices which are subject to action proceedings whereas points in limine are defences under oath make out a defence.

1.3 I submit that Rule 6(5)(d)(ii) provides:

“any person opposing the grant of an order sought in the notice of motion shall within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents”.

1.4. I submit that since the answering affidavit is not filed, the urgent

application is unopposed and the first and second respondents cannot address the court from the bar. I submit that rules 30 and 30A raised by the first and second respondents are a mischief and a miscarriage of justice to the clients emanating from gross professional negligence.

2.2 I submit that the Uniform Rules are and the case law clear that the notices in terms of Rules 30 & 30A are related to action proceedings and not application proceedings and the as the result thereof, the rules 30 & 30A are purely the attempt to divert the urgent application alternatively the lack of the insight.”

[25] Can Rule 30 read with Rule 30A be raised in application proceedings?

The applicants contend that it is legally impermissible to do so. In particular, the applicants avow that the following discrepancies and unlawful procedure was adopted by the opposing respondents in terms of Rule 30 and Rule 30A.

[26] Firstly, the applicants contend that Rule 30 which relates to an irregular step and Rule 30A which constitutes a non-compliance, are related to action proceedings and not application proceedings. The applicants contend that in application proceedings, if a party fails to file an answering affidavit, the application proceeds

on an unopposed basis and the notice to oppose is considered a delaying tactic.

[27] Secondly, the applicants contend that, in instances where there is non-compliance or a question of law, an answering affidavit must be filed as it is peremptory to raise a defence under oath. Rule 30 and Rule 30A are notices which are subject to action proceedings whereas points in limine are defences under oath.

[28] Thirdly, the applicants contend that, on the issue of the absence of an answering affidavit, this urgent application is unopposed and the opposing respondents cannot address the Court from the bar.

[29] Finally, the applicants assert that Rules 30 and Rule 30A raised by the opposing respondents are a “mischief and a miscarriage of justice to the clients emanating from gross professional negligence.” This is a very serious allegation by the applicants through their legal representatives.

[30] Erasmus, in Revision Service RS 20, 2022, D1352 makes the following observation:

Subrule (1): ‘A party to a cause.’ Prior to the amendment of the subrule in 1987 the phrase ‘any cause’ was used and it was held that the words were used in the widest possible sense and referred to any judicial proceeding of whatsoever nature. It is submitted that the phrase ‘a cause’ in the present subrule has a similar wide meaning.¹⁰

(10 See also Ioannides NO v Master of the High Court (unreported, ECPE case no 74/2020 dated 20 October 2020) at paragraph [16].)

[31] In Olgar v Minister of Safety and Security 2012

(4) SA 127 (ECG) the following was said in respect of the words “any cause” in Rule 30(1):

“Prior to the amendment of Rule 30(1) in 1987 the phrase “any cause” was used. See Erasmus: Superior Court Practice at B1 – 189. In Participation Bond Nominees (Pty) Ltd v Mouton

(3) 1978 (4) SA 598 (W) Gordon AJ (as he then was) stated as follows at 515 D – E:

“In my view, the words ‘any cause’ are used in the widest possible sense and refer to any judicial proceeding of whatsoever nature (see Steytler N.O. v Fitzgerald 1911 AD 295 at 331).”

The submission is made in Erasmus, supra, at B1 – 189 that the phrase “a cause” in the present subrule has a similar

wide meaning. This submission is, in my view, with respect to the learned authors, clearly correct.”

[32] In Ioannides NO v Master of the High Court (74/2020)

[2020] ZAECPHC 39 (20 October 2020) at paragraph [16], a similar submission to that by Mr Leshilo was made regarding Rule 30/30A not being applicable to application proceedings and discounted by the Court with reference to Olgar:

“[16] Counsel for the third respondent submitted that there can never be an irregular step in application proceedings, but could advance no authority to support this submission. I cannot agree with this submission...” (my emphasis)

[33] It follows that Rule 30/30A does apply to application proceedings. I therefore turn to considering each of the irregular steps complained of by the opposing respondents.

The irregular steps complained of by the respondents

[34] As a result of the plethora of irregular steps complained of, each is dealt with reference to the law applicable

thereto. At the outset the contention that the use of different case numbers to mislead the Court, is of no moment and merits no further consideration.

[35] In respect of case numbers M180/2021 and UM170/2021, the opposing respondents contend that “the relief applied for in the dismissed application before Dewrance AJ are identical to the relief now sought in the Notice of Motion in UM 170/2023.” Whilst the relief in the application before Dewrance AJ and the present application, may at first glance appear to be mirror images, they are not identical. The application before this Court is for the suspension of the warrant of execution pending the final determination of the appeal against the judgment of Dewrance AJ of 14 August 2023. The essence of the relief before Dewrance AJ, was whether there was a pending appeal under case number M180/21.

[36] The opposing respondents further contend that the filing of the application under UM170/2023 constitutes an irregular step as the urgent application under case number M180/21 renders this matter *res judicata* alternatively *lis pendens*. In respect of the issue of the matter being *res judicata*, the applicants deal with the *exceptio rei judicata* as follows:

“

4.1 I submit that the urgent application as relied upon pending appeal FB9/23 was pleaded and decided upon on the 14th of AUGUST 2023 and on the 14th AUGUST 2023 and further setting aside of the title which such leave to appeal has not been decided to and remains pending.

4.2 In *MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd* (2008) ZASCA 21 2008(3) SA (SCA) paragraph 9 where the following was stated:

“It is clear that in our law that a defendant who has been absolved from the instance cannot raise the exception rei judicatae if sued again on the same cause of action: see Grimwood v Balls (1835) 3 Menz 448; Thwaites v Vam der Westhuysen(1888) 6 SC 259; Corbridge v Welch(1891-2) 9 SC 277 at 279, Van Rensburg v Reid 195 8 (2) SA 249 € at 252B-C; Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa 4 ed 1977 544 and 684, it was held in African Farms and Townships Ltd v Cape Town Municipality 1963(2) SA 555(A) at 563 G-H that the dismissal of an application (which ordinarily would be regarded as the equivalent to the granting absolution from the instance : Municipality of Christana v Victor 1908 TS 1117; Becker v Wertheim, Becker & Leveson 1943 (1) PH F34 (A) can give rise to the successful raising of the exceptio rei judicatae

where, regard being had to the judgment of the court which dismissed the application, the import of the order[was] clearly that on the issues raised the Court found against the appellant [which had been the applicant in the previous proceedings], and in favour of the respondent. It is thus clear that it is not the form of the order granted but the substantive question (did it decide the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits.”

4.3 I submit that even if a defense of *res judicata* could have been raised as a point in limine in an answering affidavit, the said defense could not have succeeded based on the pending leave to appeal.

.....”

[37] In *Smith v Porritt* [2007] ZASCA 19; 2008

(6) SA 303 (SCA) at paragraph [10], the following was said:

‘[10] Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become common place to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995

(1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, ‘unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals’.

[38] In *Democratic Alliance v Brummer* (793/2021) [2022] ZASCA 151 (3 November

2022) Goosen AJA summarises the exception *rei judicata* as follows:

“[13] The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous court is before another court for determination. This is so because if the same issue (eadem quaestio) was not determined by the earlier court, an essential requirement for a plea of res judicata in the form of issue estoppel is not met. There is then no scope for

upholding the plea. It does not, however, necessarily follow, that once the inquiry establishes that the same issue was determined, the plea must be upheld. That is so because the court considering the plea of issue estoppel is, in every case, concerned with a relaxation of the requirements of res judicata. It must therefore, with reference to the facts of the case and considerations of fairness and equity, decide whether in that case, the defence should be upheld.

- [14] This first component of the enquiry requires a careful examination of what issues of fact or law were decided by the first court. In *Boshoff v Union Government* (Boshoff), the following statement by Spencer-Bower in *Res Judicata*, was held to be a correct:

‘Where the decision set up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms.’

- [15] Where the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court. The exercise is not a mere mechanical comparison of what the two cases were about and what the court stated as its reasons for the order made. In *Boshoff*, for instance, the plaintiff had sued for damages arising from an unlawful cancellation of a lease and ejectment. The defendant raised

a plea of res judicata on the basis that the defendant had, in a prior action, obtained a judgment for ejectment. The prior order was obtained by default judgment. The court found that an order for ejectment could not have been granted unless the court had found that the cancellation of the lease was lawful. The order that was granted was read against the backdrop of the case as pleaded.

- [16] Whether the findings made by the court or the order(s) granted are correct is of no relevance. A prior determination of an issue, although wrong, may nevertheless support a plea of res judicata. As held in *African Farms and Townships Ltd v Cape Town Municipality* (African Farms)

‘Because of the authority with which, in the public interest, judicial decisions are invested, effect must be given to a final judgment,

even if it is erroneous. In regard to res judicata the enquiry is not whether the judgment is right or wrong, but simply

whether there is a judgment.’”

[39] In the absence of the requested written reasons of Dewrance AJ, this Court is hamstrung to render a pronouncement on res judicata.

[40] The judgment in Nestlé (South Africa) (Pty) Ltd v Mars Inc

[2001] ZASCA 76 is apposite to the lis pendens argument. In Nestlé the Supreme Court of Appeal describes the features of lis alibi pendens as follows:

“The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is 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 must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally.”

[41] In George Talbot Spencer and Others v Xolisa Kennedy Memani and Others SCA 675/2012 at paragraphs [14] and [15] Meyer AJA (as he then was) elaborates on lis alibi pendens states as follows:

“To refuse to allow the objection of lis alibi pendens simply because the plaintiffs in the action did not spell out the grounds upon which Memani and the trust rely in the dispute about which a declaration is sought would amount to an elevation of form over substance. The trial court will have to decide upon the very matters which the court a quo was asked to decide upon as far as the directorship of Memani is concerned. The pending earlier action and the later application involve the same parties...There are compelling reasons why the lis which was first commenced should be the one to proceed. A decision of application will not bring finality in the litigation between the parties but merely result in a piecemeal adjudication of the issues in dispute between them... Furthermore a weighty consideration is the one mentioned by Navsa JA in Socratous. This consideration is summarised as follows in the headnote of that judgment: ‘South African courts are under severe pressure due to congested court rolls and the defence of lis pendens must be allowed to operate in order to stem unwarranted proliferation of litigation involving the same based on the same cause of action and related to the same subject-matter’.”

[42] In Hassan & another v Berrange NO, 2012 (6) SA 329 (SCA) paragraph [19], Zulman JA further expressed the requirements for lis pendens in the following terms:

“Fundamental to the plea of lis alibi pendens is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause.”

[43] The main string in the bow of the opposing respondents, is lis pendens. There is no underscoring the underlying principle that there should be finality in litigation. Integral thereto is that litigation should not be replicated. What the opposing respondents lose sight of is that the application for condonation and the concurrent application for the reinstatement of the deemed lapsed appeal, is to be heard by the Full Court on 27 October 2023. To this end, it cannot be argued that there has been a revival of the application. In my view, the elephant in the room in the present application is the pending application for condonation and reinstatement of the appeal. This appeal may have the effect of rendering

the application for leave to appeal the order of Dewrance AJ moot. Logically, any application for leave to appeal the order of Dewrance AJ, will in all probability not be heard before 27 October 2023. Resultantly, lis pendens would not find application.

- [44] Rule 41A of the Uniform Rules of Court, came into effect on 9 March 2020. Rule 41A(2)(a) provides as follows:

“In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or

respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.”

- [45] The applicability of Rule 41A in the present application and similarly to the application before Dewrance AJ for that matter, is of no moment. These applications came before the Court not as “new applications” but applications flowing from finalised litigation emanating from the judgment of Petersen J. The logic of mediation in the face of a pending application for condonation and reinstatement of the appeal is questionable.

- [46] In respect of the failure to comply with Practice Directive 9(1), the Directive provides that:

“The name and telephone numbers (including cellular numbers) of the attorney filing documents in the Registrar’s Office must appear in the left bottom corner of the first page of such document.”

- [47] Whilst the contentions of Mr Scholtz are correct, this is not fatal to the substance of the application. It is a procedural defect which this Court may readily condone, and therefore deserves no further attention.

- [48] In the final analysis, all the complaints predicated on Rule 30 and Rule 30A has no merit and falls to be dismissed.

The way forward

- [49] Mr. Scholtz emphasised that the opposing respondents are prejudiced by the aforesaid irregular steps as alleged, and could not file an answering affidavit, as Rule 30 prevents the taking of further steps to the completion of the matter, if upheld. Mr Leshilo did not take any issue with the Rule 30 and Rule 30A being disposed of before the substance of the application on the merits could be ventilated. It would therefore be prudent and in the interest of advancing the audi alteram partem principle that the opposing respondents be afforded an opportunity to file opposing papers and the applicants be allowed a similar opportunity to reply thereto, under stringent time limits.

Costs

- [50] The issue of costs should consequently be reserved.

Order

[51] In the premises, the following order is made:

- (i) The Rule 30 and Rule 30A Notice is dismissed.
- (ii) The first and second respondents are allowed to file their answering affidavit/s within five (5) days of this order.
- (iii) The applicants are to file their replying affidavit/s within five (5) days of the delivery of the first and second respondents answering affidavit/s.
- (iv) The practice notes and short heads of argument for both parties are to be filed by no later than 22 September 2023.
- (v) The application is to be enrolled for hearing on the virtual platform on 28 September 2023.
- (vi) Costs are reserved.

A REDDY

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG

APPEARANCES

Counsel for the Applicants: Adv Leshilo Attorney for Applicant: T L Seeletso Attorneys NO. 484 DP Kgotleng Str Montshiwa, Mmabatho Counsel for 1st and 2nd Respondents: Adv H Scholtz Attorney for Respondent: Semaushu Attorneys 29 Proctor Avenue, Golf-view Mahikeng Date of Hearing 24 August 2023 Date of Judgment 06 September 2023

[1] Ntefang and Another v Seeletso and Others 2022 JDR 1999 (NWM)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2023/157.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/seeletso-and-another-v-ntefeng-unknown-topic-anwhc-2023>

Prepared on 10 October 2026 · Esheria