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REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 2017/0039645

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
11/6/2019
DATE SIGNATURE

In the matter between:

GLORIA NTOMBIYOXOLO PERREIRA

Applicant

And

LAVESHAN CHETTY

First Respondent

STAND [...] HURLINGHAM EXTENSION 5 CC

Second Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Third Respondent

JUDGMENT

BOKABA AJ

1. In these proceedings the Applicant seeks the following relief; that

“1.1 Pending the determination of this application;

1.1.1 that the first and second respondents be interdicted and restrained from taking any steps to alienate or encumber the property situate at Stand [...] Hurlingham, corresponding to [...], Hurlingham Extension 5, registration division I.R., Gauteng Province, under Deed of Transfer No. 11276/90 (“the property”);

1.1.2 the first and second respondents be interdicted and restrained from pursuing the eviction of any occupiers of the property;

1.1.3 that the proceedings in this Court under case no. 2016/14158 be stayed;

1.2 *A declarator that the applicant is the owner of a 100% members' interest in the second respondent;*

1.3 *An order directing the first respondent to do all things necessary and sign all documentation to effect the re-registration at the CIPC of the 100% members' interest in the second respondent to the applicant."*

2. The applicant seeks the above relief based on claims that she is the owner of the 100% members' interest in the second respondent, Stand [...] Hurlingham Extension 5 CC, the close corporation. The CIPC records show that the 100% interest in the close corporation was registered in the name of the first respondent, Mr Chetty, with effect from 19 April 2002 and that the applicant was deregistered as a member on that date. The applicant further alleges that there was no basis in fact or in law for the registration of her 100% members' interest into the name of the first respondent. It is common cause that the close corporation is the owner of stand [...], Hurlingham, Johannesburg.

3. It is also common cause that the first respondent purchased the members' interest in stand [...] at the sale in execution that was held on 25 February 2002 following a judgement that was granted against Carlos Perreira, whom the applicant says was married to her in community of property at some point. The applicant claims that the

Sheriff of the High Court for the district of Soweto East, who had attached the right, title and interest in the close corporation had no right or entitlement to attach the applicant's interest in stand [...], the close corporation. She asserts further that at the sale in execution, the Sheriff appears to have sold Carlos Perreira's members' interest in the close corporation when in fact Mr Perreira did not have such an interest.

4. It is undisputed that on or about 26 April 2016 the first respondent, Mr Chetty, on behalf of the second respondent, brought an eviction application against Mr Perreira before the High Court under case number 14158/2016. In that application the close corporation sought to evict Mr Carlos Perreira and those occupying the property, being stand [...] Hurlingham, on the basis that the first respondent had purchased the members' interest at the sale in execution conducted by the Sheriff of Johannesburg West during the course of 2001 or 2002 and that he was the sole member of the close corporation. It is also common cause that on 13 June 2017 the Honourable van der Linde J handed down judgement in terms of which he ordered the applicant and Mr Carlos Perreira and those occupying the property on their behalf to be evicted.
5. The applicant and Mr Carlos Perreira filed an application for leave to appeal against the judgement and order of van der Linde J on 28 July 2017. That application for leave to appeal is still pending.

DEFENCES RAISED BY THE FIRST RESPONDENT

6. The current application is opposed by the first and second respondents. The first respondent and second respondents have raised four defences against the relief sought by the applicant in these proceedings.

7. First, the plea of res judicata. The first respondent asserts that the current application is based on the same set of facts as those already decided by van der Linde J and involves the same parties as those in the eviction application.

8. Second, the first respondent has raised a plea of non-joinder asserting that the applicant has alleged in her founding affidavit that the Sheriff of Johannesburg West had no right or entitlement to attach the applicant's members' interest in the close corporation and could not have sold the applicant's members' interest at the sale in execution and that the Sheriff had erroneously completed the CK2 documents in terms of which the members' interest in the close corporation was transferred to the first respondent. The first respondent contends in this regard that the Sheriff has a material interest in the outcome of this application as the Sheriff has been accused of irregularly transferring the members' interest in the close corporation. The first respondent states that failure by the applicant to join the Sheriff in these proceedings is a material non-joinder.

9. The third defence raised by the first respondent is that the applicant does not allege or produce any document to prove that the participants at the sale in execution, being the Sheriff and the first respondent, had any prior knowledge of any members' interest transfer to the applicant nor that either the Sheriff or the first respondent had acted mala fide at the time of sale in execution. According to the first respondent there is no allegation in the applicant's papers that he was not a bona fide purchaser of the members' interest in the close corporation.
10. Lastly, the first respondent asserts that the applicant has already provided the facts in terms of which the eviction order of the 2016 application was decided and now seeks to circumvent the 2016 eviction application which is pending in the application for leave to appeal. The first respondent contends in this regard that the current court is not sitting as a court of appeal and therefore the relief sought by the applicant in these proceedings is incompetent.
11. The first respondent has annexed to his answering papers, some of the papers in the eviction application together with the transcript of the hearing in the eviction application.

THE PREVIOUS LITIGATION INVOLVING EVICTION

12. It is common cause that during April 2016 the first respondent brought an application for eviction against Mr Carlos Perreira, the applicant and all of those who occupied the property. The first respondent's application for eviction was premised on assertions that the first respondent was the sole member of the close corporation and that the close corporation was the owner of the property and Mr Carlos Perreira and the applicant were in unlawful occupation of the property. In the application for eviction the first respondent stated that he had purchased the members' interest at the sale in execution conducted by the Sheriff of Johannesburg West during the course of 2001 and following on that he was appointed as a sole member of the close corporation on 19 April 2002.
13. Mr Carlos Perreira deposed to an affidavit in defence of the eviction application. That affidavit was supported and confirmed by the applicant, Ms Gloria Perreira.
14. In the answering affidavit in the eviction application, which forms part of the pleadings of the current proceedings, Mr Carlos Perreira stated that his wife, the applicant, has never resigned from the close corporation and was in fact the sole member of the close corporation since 2002. Furthermore, Mr Carlos Perreira stated that he and the applicant were the only occupiers who resided on the property and

that the applicant was the sole member and owner of the close corporation.

15. The Court per van der Linde J made an order that Mr Carlos Perreira together with the applicant and any person holding occupation through or under them, be evicted from the property, being No. [...], Hurlingham Extension 5 held under Deed Title Number T11276/1990 and that Mr Carlos Perreira and the applicant and any person holding occupation under or through them are to vacate the property on or before the 31 July 2017. This order is dated 13 June 2017.

16. During the course of oral submissions before this Court, I was handed a copy of the judgement delivered by van der Linde J on 13 June 2017. The judgement makes it clear that in the eviction application, there was no dispute that it was the close corporation that owned the residential property concerned. What was in dispute was whether Mr Chetty, the first respondent in this matter, or the applicant owned the members' interest in the close corporation. The judgement also reflects that Mr Carlos Perreira and the applicant denied that Mr Chetty became the sole member of the close corporation on 19 April 2002. It is also noted in the judgement that Mr Carlos Perreira contended that his wife, the applicant, had never resigned from the close corporation and was still in fact the sole member and had been such a sole member of the close corporation since 2002.

17. It is clear from the judgement that the primary issue before Court revolved around the membership of the close corporation. In particular, whether the applicant in these proceedings or the first respondent held the 100% members' interest in the close corporation.

18. Van der Linde J ultimately found that the close corporation had put up documents which prima facie emanate from CIPC and which prima facie show that a sale in execution had resulted in the transfer of members' interest to Mr Chetty, the first respondent in these proceedings. The Court, per van der Linde J, made an order as reflected in paragraph 15 above.

19. On or about 28 July 2017 Mr Carlos Perreira filed notice of application for leave to appeal against the judgement and order of van der Linde J. Some of the grounds for leave to appeal were as follows, that:
 - 19.1. Mr Carlos Perreira had raised a material dispute of fact pertaining to Mr Chetty's membership of the close corporation and in that regard Mr Carlos Perreira had stated that his ex wife, Gloria Ntombiyoxolo Perreira, had never resigned as a member of the close corporation and that she was in fact the sole member of the close corporation since 2002;

- 19.2. Mr Carlos Perreira had no knowledge of the legal proceedings that had led to the sale in execution at which Mr Chetty bought the interest in the close corporation.

The defence of exceptio re judicata

20. The res judicata doctrine prohibits the reconsideration of a case already finally determined by a Court. As stated by the Constitutional Court:

“The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter.”¹

21. The defence of res judicata raised by the first respondent in these proceedings accordingly calls for an examination of the issues that were before Court in the eviction proceedings together with the issues that arise in the current litigation proceedings.
22. In the current proceedings, the applicant claims that she is the owner of the 100% members' interest in the close corporation. Based on

¹ *Thwala v S* 2019 (1) BCLR 156 (CC), at paras 10 and 16.
See also – *S v Molaudzi* 2015 (8) BCLR 904 (CC).

that the applicant seeks an order that the first and second respondents be interdicted and restrained from pursuing eviction of any occupiers of the property and from taking any steps to alienate or encumber the property. In addition, the applicant seeks that the proceedings in the previous litigation involving eviction be stayed.

23. As highlighted by the Supreme Court of Appeal, *res judicata* deals with a situation where the same parties are in dispute over the same cause of action and the same relief. In that regard, the SCA has summarised the current state of the law in respect of *res judicata* as follows –

“Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio res 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 judgement. 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 enquiry whether an issue of fact or law was an essential element of the judgement 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 commonplace 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 ... Relevant considerations will include questions of equity and fairness not only to the parties themselves but also 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'."*²

24. The crux of the issue in the current proceedings is around the ownership or membership of the close corporation, which in turn is the owner of the property. The applicant claims that she is the owner of the 100% members' interest in the close corporation and has been such a member since 2002. She claims further that there was no

² *Aon South Africa (Pty) Ltd v Van den Heever NO and Others* 2018 (6) SA 38 (SCA), at paras 22 and 23.

basis in fact or in law for the registration of her 100% members' interest into the name of the first respondent on 19 April 2002.

25. In the previous litigation proceedings involving eviction the Court identified the primary dispute as being whether the first respondent, Mr Chetty, or Mrs Perreira, the applicant, owns the members' interest in the close corporation. The Court in the previous proceedings, in its judgement, was satisfied that the first respondent, Mr Chetty, is the sole member of the close corporation and based on that fact, granted an order evicting the Perreiras from the property.
26. During the hearing before this Court counsel for the applicant contended that the current proceedings are dissimilar to the previous proceedings. The contention was that the relief sought before this Court is one of re-transfer or re-registration of the 100% members' interest in the close corporation into the name of the applicant. For that reason, so the contention went, the res judicata doctrine is of no application.
27. Counsel for the applicant however conceded that the claim for re-transfer or re-registration of the members' interest could have been raised, but was for unknown reasons, not raised in the earlier eviction proceedings. The concession was, in my view, well-made as it was open to the applicant to bring a counter-application for such a relief in

the eviction proceedings. That, the applicant and Mr Perreira failed to do.

28. In my view, to grant the relief sought by the applicant in these proceedings will be entirely inconsistent with the findings made by the Court in the previous proceedings involving eviction.

29. I conclude that the claim and the relief sought by the applicant in these proceedings will involve the reconsideration of the very issues that were determined by the Court in the previous litigation involving eviction.

30. The current proceedings involve the same parties, the same cause of action, i.e. membership or ownership of the close corporation and in my view, the same relief. Even if the relief sought by the applicant in these proceedings is somehow different from the relief that was sought in the previous proceedings, I am satisfied that the elements of res judicata in the form of issue estoppel are present.³

Lis pendens

31. There is one other obstacle to the relief sought by the applicant. It is based on the doctrine of *lis pendens*. The issue of the membership of the close corporation also remains a live dispute in the application

³ *AON South Africa (Pty) Ltd v van den Heever NO and Others* (supra).

for leave to appeal, which is pending. In the application for leave to appeal, the applicant has asserted that Mr Chetty's membership of the close corporation is a material dispute of fact that must be resolved by way of evidence.

32. In *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*,⁴ Wallis J expelled the doctrine of *lis pendens* as follows:

“[2] As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.”

⁴ 2013 (6) SA 499 (SCA), at paras [2] and [3].

[3] *The plea bears an affinity to the plea of res judicata, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from Voet 44.2.7:*

*'Exception of lis pendens also requires same persons, thing and cause. - The exception that a suit is already pending is quite akin to the exception of res judicata, inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of res judicata in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.'*⁵

33. In broad terms the requirements for the application of the doctrine of *lis pendens* are the following:

⁵ *Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA) para 13. Its origins are to be found in the Digest 44.2 sv De Exceptione Rei Iudicatae.

- 33.1. pending litigation;
 - 33.2. between the same party;
 - 33.3. based on the same cause of action; and
 - 33.4. in respect of the same subject-matter.
34. The *lis pendens* doctrine bears the same elements as the res judicata doctrine. The principal issues that the applicant seeks to have determined in these proceedings are similar to those that are pending before Court in the application for leave to appeal.
35. It is for the court hearing the application for leave to appeal to determine whether the applicant's grounds of appeal, including the dispute relating to the membership of the close corporation, carry a reasonable prospect of success such that another court would come to a different conclusion. The effect of this Court determining this issue would be to incorrectly pre-empt the finding of that court. This Court is also not sitting as a court of appeal. It is impermissible, in my view, for the applicant to pursue claims and relief in a separate application before this Court when an application for leave to appeal is pending before another court on the same issues.

36. Given the conclusion I have reached, it is not necessary to determine the remaining defences to the application. The application must be dismissed with costs.

37. I accordingly make the following order:

37.1 The application is dismissed with costs.

TJB BOKABA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

For Applicant:

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