REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 22011/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

6 May 2022

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Applicant**

and

TSHEOLA DINARE TOUR AND TRANSPORT
BROKERS (PTY) LIMITED **Respondent**

Summary: Application for a final winding-up. *Plea lis pendens*- the requirements restated- not applicable because the causes of action in the two applications are different. In the first application the cause of action based *rei vindication* and the second application is based on final winding-up for inability to pay debt. Court has discretion to refuse the granting of *lis pendens* even when the requirements thereof are satisfied.

JUDGMENT

MOLAHLEHI J

[1] This is an application in which the applicant seeks an order for the final winding up of the respondent on the ground that the respondent is unable to pay its debts in the course of its business. As will appear below, in addition to these proceedings the applicant has instituted other proceedings which are still pending before this court for amongst others the return of the goods that are the subject of the dispute between the parties. Those proceedings will be referred to as “the first application” and the present as “the second application.”

[2] The respondent, whose answering affidavit was filed late, opposed the application. There appears to be no reason why the late filing of the answering affidavit should not, in the interest of justice, be condoned.

The background facts

[3] The dispute between the parties arose from the written instalment agreements concluded between them from 12 September 2017 to 24 July 2019. The respondent purchased certain vehicles from the applicant in terms of the agreements. The conditions of the sale of the cars are set out in the instalment agreements and includes the following:

> (a) The applicant was and would remain the owner of the vehicles for the duration of the instalment sale agreement.
>
> (b) Ownership of the vehicles would pass to the respondent only once the respondent had paid the applicant all amounts owed to it and had complied with its obligations in terms of the instalment sale agreement.

[4] Furthermore, the instalment agreements set out the circumstances under which default of the terms of the agreement would occur, and that included the following:

> "13.6.1. The respondent was to fail to make payment of any amount payable to the applicant under the instalment sale agreement on the due date for such payment;
>
> 13.6.2. The respondent was to breach any of the terms and conditions of the instalment sale agreement and fail to remedy such breach within the time period specified in the applicant's written notice to do so.

[5] In the event of the respondent defaulting the applicant would be entitled amongst others to give the respondent written notice of such default, requesting them to rectify the default within ten business days, or commence legal proceedings against the respondent.

[6] The applicant alleges in its founding affidavit that the respondent failed to make payments as required by the instalment agreements. Thus, on 16 July 2020, its attorneys of record demanded payment of the arrears, including availing the vehicles for inspection. The respondent, having failed to rectify its default; the applicant cancelled the agreements on 11 August 2020.

[7] Following the cancellation of the agreements, the applicant instituted proceedings against the respondent under case number 24819/2020 for the return of the vehicles. The said proceedings are still pending before this court.

[8] The applicant contends that the full amount of the outstanding payment in respect of each of the agreements became due and payable upon the cancellation.

[9] The total arrears as of 2 March 2020, when the applicant reminded the respondent of the need to settle its debt, was R494 620.77. Various written exchanges were made between the deponent of the founding affidavit and members of the respondent, including Ms Mazibuko. The essence of the applicant's request in the email exchanges was for the respondent to provide information as to how it intended dealing with the arrears.

[10] Having failed to find a solution to resolve the issue of the arrear payment, the applicant escalated the matter to its attorneys of record and instructed them on 16 July 2020 to issue the default notices to the respondent. At the point of sending the default notices the arrear amounts according to the applicant were in the sum of R1 745 571.91.

[11] The first case filed by the applicant is filed under case number 24819/2020 and was instituted on 10 September 2020. The applicant, in that case, seeks amongst others, the following order:

> (a) The cancellation of the twenty-one credit agreements concluded with the respondent.

(b) The return of the motor vehicles sold to the respondent in terms of the credit agreement.

(c) The applicant be granted leave to apply to this court on the same papers duly supplemented for an order that the respondents be ordered to pay the difference between the value of the vehicles and the amount that the respondent may have paid at the time of the cancellation of the agreements.

[12] As indicated in paragraph 1 above, the applicant in the present matter seeks an order for a final winding up of the respondent on the basis that it (the respondent) is unable to pay its debt in the ordinary course of business.

[13] The respondent opposed the application and raised two points in *limine*. The points in *limine* are:

(a) *lis pendens*, and

(b) applicant's failure to allege relevant facts, dealing with the security it has due to the value of the goods that are subject of the litigation.

The requirements for *lis pendens*

[14] The three requirements for a successful reliance on the plea of lis pendens are:

1. The litigation is between the same parties;

2. That the cause of action is the same; and

3. That the same relief is sought in both sets of proceedings.

[15] It has been held that the plea of *lis pendens* shares similar features to the defence of *res judicata* because their underlying consideration is to ensure finality in litigation. Once a suit has been instituted, it should be finalised before that court before another can be instituted by the same parties relating to the same cause of action.[1]

[16] The doctrine of *lis pendens* was explained in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*,[2] by Wallis J 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*.
>
> *[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*

[1] See Nestle (South Africa) (Pty) Limited vs Mars Inc 2001 (4)(SA) 542 (SCA).

[2] [2013] ZASCA 129; 2013 (6) SA 499 (SCA).

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.'"

[17] However, it does not follow that the plea of *lis pendens* will serve as a bar to hearing the matter simply because the above requirements have been satisfied. The court has the discretion whether or not to stay the proceedings or to hear the matter depending on what is just and equitable to do in the circumstances, including consideration of the balance of convenience.[3]

[18] In Ferreira v Minister of Safety and Security and Another,[4] the court in quoting with approval what was said in *Loader v Dursot Bros (Pty) Ltd,*[5] the effect of *lis pendens* said the following:

> "It is clear on the authorities that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings because it is prima facie vexatious to bring two actions in respect of the same subject matter. The court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist . . . ."

[19] In Eksteen v Road Accident Fund,[6] Petse AD, as he then was, after confirming the above principle held that:

> "[53] . . .When a court upholds a plea of *lis alibi pendens* it has the discretion to stay one or other of the two actions. A court is vested with such discretion because it is prima facie vexatious to bring two actions in respect of the same subject matter.
>
> [54] The high court before which the second action was pending undoubtedly enjoyed a wide discretion to determine whether the interests of

[3] See Ferreira v Minister of Safety and Security and Another, [2015] ZANCHC 14 at paragraph 8.

[4] Ferreira v Minister of Safety supra.
[5] 1948 (3) SA 136 (T) at 138.
[6] (873/2019) [2021] ZASCA 48

justice dictated that the second action should be allowed to proceed. The high court did not delve into this aspect in its judgment."

[20] In the present matter the respondent raised several complaints regarding documentation about the contracts, which the plaintiff relied upon in the first application. The applicant relied on the same documents in the present proceedings. The main complaint of the respondent is that it had never been afforded access to the original instalment documents by the applicant.

Concerning the *lis pendens* point the respondent contends that the second application is based on the same cause of action as that in the first application in that it involves the determination of the same question, which is substantially determinative of its outcome.

[21] It is common cause that the both the applications the applicant relies on (a) the cancellation of each of the instalment agreements and the return of the vehicles, (b) the full payment of the amount due in respect of the vehicles.

[22] In my view, the *lis pendens* point raised by the defendant is unsustainable for the following reasons. It is not in dispute that the essential elements upon which the applications are based on the instalment agreements and the cancellation thereof by the applicant. However, this does not mean that the outcome of the first application is determinative of the outcome in the present matter or vice versa.

[23] In my view, the applicant's success in the first application will not result in the extension of the debt. In other words, the defence of *res judicata* cannot sustain if, after the return of the vehicles applicant was to persist with the demand for the payment of the outstanding debt. Put in another way, the cause of action for the payment of the debt owing under the instalment agreement would not be nullified by the return of the vehicles. The legal force to pay what is due to the applicant remains despite the success or the failure in the first application

[24] In brief, the plea of *lis pendens* is unsustainable because the cause of action in each application is different. The relief sought in the present application is based

on the winding up of the respondent in terms of Chapter 14 of the Companies Act,[7] on the basis that in the first application, the respondent is unable to pay its debt under the instalment agreements. As indicated earlier, the first application is based on the return of the vehicles in which it is averred the respondent is in unlawful possession thereof.

[25] It seems that it would be unjust to stay the proceedings in the present matter, even if it was to be accepted that the cause of action in both applications are the same.

[26] It is trite that the discretion to refuse to grant the winding-up order is rarely exercised and always depends on special circumstances.[8] There is no dispute in the present matter that the respondent is still indebted to the applicant, the amount of which is significant.

Alleged failure to disclose security

[27] The respondent contends that the applicant should have disclosed the value of the vehicles as that serve as security for its indebtedness. This point is also unsustainable, in my view. There is no principle that I am aware of requiring an applicant in the winding-up application to disclose the value of the goods that are subject to an instalment agreement. In these proceedings, the applicant is not seeking the return of the vehicles and payment of the arrears it is seeking the final winding up of the respondent.

[28] There is no dispute that, in terms of the agreement, the vehicles remain the applicant's property, pending the settlement of the debt. In any case, on the facts, as they stand the applicant is not in a position to indicate the value of the vehicles which are under the control and possession of the respondent. The respondent is refusing to return the vehicle to the applicant.

---

[7] Act number 71 of 2008.

[8] See Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd (542/16) [2017] ZASCA 24 (24 March 2017) at paragraph [12], where the SCA held that: “The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a ‘very narrow one’ that is rarely exercised and in special or unusual circumstances only.”

[29] For the above reasons, I find that the second point raised by the applicant is unsustainable.

Commercial insolvency.

[30] It is common cause that the respondent fell into arrears in January 2022. The certificate of balance, which has not been disputed, reflects the full outstanding balance as of 3 August 2021, as being R5 402 341.93. The respondent has not provided evidence to disprove its indebtedness to the applicant. In relation to the issue of indebtedness, the correspondence between the parties shows that the respondent made an undertaking to cooperate with the applicant in sorting out the debt payment, but this never materialised up to the point when the applicant decided to institute these proceedings.

[31] The provision for the winding-up of a company by order of the court is governed by section 346 (1), which has to be read with section 344 of the Act. Section 344 sets out the circumstances in which a court may wound-up by a company. To succeed in the winding-up application, the applicant has to establish one or the other grounds listed in that section. In the present matter, the circumstances relied upon by the applicant is provided for under section 344(f) of the Act.

[32] In terms of section 345 (c) of the Act, the company is deemed to be unable to pay its debts when an applicant is able to show to the satisfaction of the court that the company is unable to pay its debts. I have already mentioned that the court has the power to grant a winding-up order exercising its discretion.[9].

[33] In light of the above I find no special circumstances that would justify not exercising my discretion in favour of granting the relief sought by the applicant in the notice of motion. I am thus satisfied that the applicant has made out a case for the winding up of the respondent.

Order

[9] F & C Building Construction Co (Pty) Ltd V Macsheil Investments (Pty) Ltd 1959 (3) SA 841 (D) at 844.

[34] In the circumstances the following order is made:

1. The respondent is hereby placed under a final winding-up order in the hands of the Master of the High Court of South Africa.

2. The costs to be in the winding up of the respondent.

E MOLAHLEHI J

Judge of the High Court of South Africa, Gauteng Local Division, Johannesburg

Representation

For the applicant:	Adv. B Hitchings
Instructed by:	Martins Weir- Smith Inc.
For the defendant:	Adv. N Lombard
Instructed by:	Moodi & Robertson Attorneys
Hearing date:	2 March 2022
Delivered:	6 May 2022.