REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/11/16.

CASE NO: **63867/2015**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

.....
SIGNATURE

15/11/16.
DATE

NUECHTERN, MICHAEL HELMUT **APPLICANT**

AND

CONNOWAY, HERMANUS PHILLIPUS **FIRST RESPONDENT**

FLYCATCHER CASTLE CC (In liquidation) **SECOND RESPONDENT**

JUDGMENT

THOBANE AJ,

[1] The applicant seeks an order compelling specific performance arising out of a written agreement concluded between the applicant, first respondent and liquidators of the second respondent, on 17 February 2014. The orders sought can be summarized as follows;

1.1. That the first respondent be ordered to give his full participation to enable the second respondent's liquidators to arrange an auction in respect of the second respondent, immovable property known as erf 1468, Graskop Township, Registration division K.T., Mpumalanga;

1.2. That the first respondent be ordered to sign the necessary documents to transfer his undivided half share in the said property;

1.3. That should the first respondent fail to sign the transfer documents within 10 days the sheriff of the district of Graskop and Sabie be authorized and be ordered to sign those documents on behalf of the first respondent;

1.4. Costs on an attorney and client scale.

[2] The applicant contends that being a co-owner of immovable property together with the first respondent and whereas the parties at the Lydenburg Magistrate Court, concluded a settlement agreement in terms of which the second respondent as well as the parties immovable

property was to be sold, the court is being approached to give effect to the said settlement agreement in view of the first respondent's unwillingness to do so. The first respondent in opposing the application has raised two points *in limine.* Firstly, that there is pending litigation, before this honourable court under case number 33454/2013, in terms of which an order is sought to terminate the parties' joint ownership of the immovable property. That a second dispute that is pending before court is for the termination and sequestration of the universal partnership between the parties. In those proceedings it seem parties have pleaded and have filed counterclaims against each other. Secondly, the first respondent contends there exists material disputes of fact that can not be resolved on affidavit only. The first respondent characterizes these disputes as involving the parties' immovable property, their joint estate and in particular how the proceeds thereof should be distributed. First respondent further states that it is the selfsame disputes of fact that prevented the implementation of a settlement agreement.

[3] Some material facts that give rise to the dispute are common cause.

3.1. The applicant and the respondent are co-owners of immovable property known as erf 1468 Graskop Township, Registration Division K.T. Mpumalanga. The property is also known as 4 Hugenote Street, Graskop.

3.2. The second respondent was established by both the applicant and the first respondent with the intention to transfer the immovable property to it and thereafter use the immovable property to run a guest house. The property in 3.1., above, was registered in the name of both the applicant and the first respondent.

3.3. On 17 February 2014 at the Magistrate's Court, Lydenburg, the first respondent, the provisional liquidators of the second respondent and the applicant entered into a written settlement agreement. The material terms of the agreement, *inter alia*, are said to be the following;

3.3.1. That the second respondent be sold, together with the property situated at 4 Hugenote Street, Graskop, Mpumalanga, as a going concern;

3.3.2 That the second respondent has a claim in respect of the property at 4 Hugenote Street, Graskop.

3.3.3. That the first respondent and the applicant will be afforded an opportunity to market the property as going concern through the use of estate agents for a period of 4 (FOUR) months, after which, if unsuccessful;

3.3.4. That the going concern, the guest house, will be sold on auction by the liquidators at a price subject to confirmation and the proceeds will be paid into the attorneys of the claimants' trust account, which will be invested, until such time as claims are proven and the liquidators instruct the attorneys to pay the money to the claimants.

3.4. The immovable property could not be sold. The reasons for the collapse of the intended sale are however in dispute.

3.5. On 24 February 2015 the first respondent's legal representatives wrote a letter to the trustees and to the applicant notifying them that they hold instructions and have the intention to launch a high court application for the liquidation of the partnership that existed between applicant and the first respondent. I pause to indicate that applicant and the first respondent were in a love relationship that was for some reason terminated. It was further stated on behalf of the first respondent that pending such application, the following would obtain;

"....

....

(2) That the agreement entered into on 17 February 2014 was but for other reasons giving our client the right to resile from same: inter alia not adhered to especially in respect to clauses 1.2 to 1.6 thereof and as such the agreement is hereby cancelled;

(3) To institute proceedings for the said liquidation within thirty days hereof and to request the liquidators and Mr. Nuechtern to undertake not to proceed with any further action pending the institution of the said legal proceedings and to keep all actions in abeyance inclusive of:

a. The auction of the assets of the liquidated close corporation; and

b. The assets of the said partnership i.e. Erf 1468 Graskop; and

c. The litigation between the parties under case number 33454/2013."

3.6. The letter further stated that should the applicant not give such an undertaking, the first respondent would launch an application to stay all proceedings pending finalization of the application.

3.7. The applicant did not give the sought undertaking.

3.8. It is further common cause, from the reading of papers, that the first applicant proceeded to launch the threatened application.

The first point *in limine*

[4] *Lis pendens* is a defence that there is pending litigation between the same parties on the same cause of action. In ***Nestle (South Africa) (Pty) Ltd v Mars Inc 2001(4) SA 542 (SCA)*** at paragraph 16 the court stated that;

> *"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".*

[5] It is trite that the first respondent bears the onus of alleging and proving the requirements of *lis pendens,* namely;

5.1. that there is pending litigation;

5.2. between the same parties or their privies;

5.3. based on the same cause of action, and

5.4. in respect of the same subject matter.

[6] Case number 33454/2013, in this court, is between the same parties. As I understand it, the pending matter is for termination of the parties' joint ownership in the immovable property, the guesthouse, as well as an order that the proceeds from the sale of the immovable property be divided equally between the first respondent and the applicant.

[7] The first respondent further points to the fact that there is another pending matter in which the order sought is the *"termination and sequestration of the universal partnership that exists between applicant and second respondent".* It is not in dispute that in that matter the applicant has sought to join the second respondent as a second defendant. The applicant states in paragraph 8 of his founding affidavit that;

> *"I have filed a special plea, a plea on the merits and a counterclaim. In my special plea I have pointed out to the first respondent that the second respondent should be joined as a defendant in the main action"*

[8] The applicant states that there is no pending application, in responding to the contention by the first respondent that there is a second pending matter in this court. Specifically applicant states that there is no pending application for the "liquidation of the second respondent". It is indeed so that there appears to be no pending application for the liquidation of the second respondent or for the liquidation of the parties' business. There can be none because it is undisputed that the second respondent is in liquidation and liquidators have been appointed. Nowhere in the first respondent's papers does the first respondent contend that there is a

pending application to liquidate the second respondent. In seeking to impute such an interpretation, the applicant misconstrues the contention. The second pending matter therefore is about the dissolution of the universal partnership between the applicant and first respondent. That much is clear from the papers.

[9] The question that begs an answer is whether these two matters, which must be evaluated in accordance with the requirements in para 5, above, clear the bar. Yes both of the matters are pending and there seems to be no qualms about the fact that they are between the same parties. The determining factors therefore will be whether or not the cause of action is the same and also whether these matters relate to the same subject matter. In case number 33454/2013 the order sought is that the ownership of both the applicant and the first respondent in the immovable property be terminated. In *casu* the order sought is firstly that the first respondent be ordered to give his full participation to facilitate the auction to be conducted by liquidators of the second respondent. The second order sought is that the first respondent be ordered to sign transfer documents once the auction has taken place, in the alternative, that the sheriff be authorized to sign such transfer documents. The order sought in *casu* is a manifestation of or flows from termination of ownership of the immovable property. It is only when parties are *ad idem* that the property be sold that any of them would have to attach his signature to the transfer documents. It is not disputed that the immovable property is to be sold. To concretize such consensus, the parties concluded a tripartite written agreement at the magistrate court, in terms of which the method for disposal of the immovable property was by way of estate agents involvement and thereafter by way of an auction.

[10] The term "cause of action" was defined in ***McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16*** at 23 as

> *"..."every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

[11] In ***Evins v Shield Insurance Co Ltd 1980 [2] SA 814 A*** at 825G it was said that "cause of action "... is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action."

[12] In summary, the following, gleaned from common cause facts and facts contained in the affidavits must be accentuated; that the parties were in a universal partnership, their partnership came to an end, during the subsistence of that partnership they purchased immovable property from which they ran a business of a guesthouse, they also formed and registered an entity (second respondent) primarily to operate the guesthouse, in 2013 under case number 33454/2013, the first respondent issued an action in terms of which he sought an order for the sale of the immovable property as well as the equal division of the proceeds therefrom, the applicant brought an application for a mandamus, in the vent the property is sold, for the cooperation of the first respondent.

[13] The applicant contends that an action wherein the first respondent seeks an order that the property be sold and that the proceeds therefrom be divided equally between the parties, is distinct and different to an application wherein the applicant seeks an order that the first respondent give his co-operation to actuate the sale, whatever form the sale takes. There is in my view no doubt that the action pending in this court relates to the same subject matter, namely, the immovable property and the sale thereof. It is further my view that the cause of action is the same. Closely scrutinized, the applicant seeks in this application, couched in the form of a mandamus, the co-operation of the first respondent. There has been no reason advanced why such co-operation can not be secured in the pending application, in light of the fact that the parties are *ad idem* that the immovable property must be sold and the proceeds thereof be shared equally between them.

[14] The applicant seems to be concerned that the first respondent is abusing court processes. Applicant is of the view that the first respondent has no intention to seriously pursue the litigation that he instituted in case number 33454/2013. A litigant is not without remedy in circumstances where a fellow litigant institutes proceedings and fail to pursue them seriously. Such remedy certainly does no lie in the aggrieved litigant instituting an application of his own, as the applicant has done.

[15] The headnote in ***Socratous v Grindstone Investments 134 (Pty) Ltd 2011 (6) SA 325 (SCA)***, is apt;

> *"courts are a public resource under severe pressure — congested court rolls prejudiced by repeated litigation involving the same*

parties, based on the same cause of action and related to the same subject matter – court ought not to have decided the merits"

The second point *in limine*

[16] A party that relies on a defence that there are material or genuine disputes of fact, is under obligation to clearly articulate the reasons why he holds that view and must set out in detail what those disputes of fact are. In ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*** the Supreme Court of Appeal eloquently set out what is a dispute of fact and the approach to be adopted when confronted thereby. Heher JA said;

> *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A*

litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[17] The first respondent points to two issues which he contends are disputes of fact in this matter. Firstly, that there is a long existing "feud" between him and the applicant as a result of which there is disagreement about the manner of distribution of the proceeds from the sale of the immovable property. Secondly, that the first respondent disputes the validity of an agreement signed by the parties at magistrates court. The issue therefore is whether the two points raised are genuine disputes of fact. The manner of distribution of the proceeds from the sale of the immovable property is in my view not a dispute of fact for the simple that the parties are in agreement that the proceeds have to be distributed equally between them. The contention that distribution of the proceeds from the sale of the immovable property is a dispute of fact is without merit. There is however merit in the contention that the validity of the agreement is disputed. In a letter dated 24 February 2015, before current proceedings were initiated, first respondent's legal representatives advised that the agreement, on which the applicant bases this application, is being cancelled. It was

easily foreseeable that seeking a mandamus based on an agreement that is being disputed was always going to raise disputes that can not be resolved in motion proceedings.

[18] The approach in these matters is trite having been so articulately set out in and has come to be referred to as the Plascon-Evans rule. In ***National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA)*** at paragraph 26 the court, in restating the rule, said:

> *"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

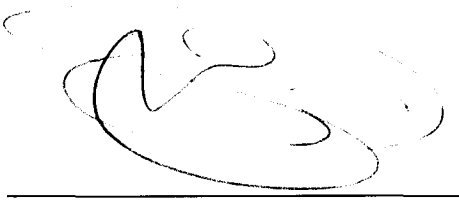
[19] I am accordingly of the view that whereas the first part of this point *in limine*, namely, that the "feud" between the parties is a dispute of fact is not sustainable. The second one to the effect that the agreement is disputed, is not bald, fictitious, far fetched, implausible or untenable. It

is in my view good in law.

[20] In the result, the points *in limine* are upheld.

[21] I therefore make the following order;

1. The application is dismissed with costs.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT