


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

29/7/16

CASE NO: 66933/2015

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED.
	
SIGNATURE	DATE
	29/7/2016

In the matter between:

NEDBANK LIMITED

APPLICANT

and

HERMANUS PHILLIPUS KLOPPERS

RESPONDENT

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J U D G M E N T

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MALI J

- [1] The applicant a financial service provider, herein seeks an interim order to attach and seize four motor vehicles in the possession of the respondent pending finalisation of an action pending before this Court as well as a second action pending in the Randburg Magistrate's Court.
- [2] The basis of the applicant's case is that it has cancelled all four of the instalment sale agreements between the applicant and the respondent. The applicant's purpose for seeking the relief is for the safe keeping of the said vehicles.
- [3] The respondent has raised two points *in limine*, firstly that the affidavit of the applicant's deponent is defective because the deponent stated in her founding affidavit that she is a major female and later stated **he** knows and understands... It is not disputed by the respondent that the said point *in limine* has not been raised in its answering affidavit. The said point *in limine* is only raised for the first time in the heads of argument.
- [4] The respondent relies on **ABSA BANK LTD v BOTHA NO AND OTHERS**<sup>1</sup>. The respondent's reliance on Absa's *supra* is misplaced because the case dealt with affidavits supporting summary judgment applications. Because of the nature of the summary judgment applications.

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<sup>1</sup> 2013 (5) SA 563 (GNP)

- [5] Having regard to the above the first point *in limine* must fail.
- [6] The second point *in limine* raised by the respondent is that the matter is *lis pendens* because the applicant on 20 October 2015 applied for summary judgment against the respondent. The application for summary judgment is based on the same cause of action and seeks the return of the same vehicles sought for safe keeping in the present application. The application was postponed.
- [7] It is trite law that in order to succeed with a plea of *lis alibi pendens* four requirements have to be complied with, namely:-
- Pending litigations;
  - Between the same parties or their privies;
  - Based on the same cause of action;
  - In respect of the same subject matter.
- [8] In **NESTLE (SOUTH AFRICA) (PTY) LTD v MARS INC**<sup>2</sup>, it is held;
- "The defence of lis alibi pendens share 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*

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<sup>2</sup> 2001 (4) SA 542 (SCA)

*adjudicate upon it, the suit must generally be brought to its conclusion before the tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally."*

[9] In **GEORGE TALBOT SPENCER AND OTHERS v XOLISA KENNEDY MEMANI AND OTHERS**<sup>3</sup>, Meyer AJA stated the following:

*" ... 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 the 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*

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<sup>3</sup> SCA 675/2012 at paragraphs 14 and 15

*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'."*

- [10] The applicant does not dispute that there are pending litigations between the applicant and the respondent. On the applicants own version it seeks interim relief because of the pending litigation in respect of the same cause of action.
- [11] The applicant's argument that the matter is not *lis pendens* is that it seeks a different relief from what is sought in the summary judgment. The applicant submits that in the summary judgment the applicant seeks a final relief and in the present application it seeks an interim relief.
- [12] The applicant further referred the court to **GELDENHUYS v KOTZE**<sup>4</sup>. The principle established in Geldenhuys is that the court has judicial discretion not to apply *lis pendens* based on the merits of the case. To state the obvious Geldenhuys was decided in a different time. As stated in George Talbot Spencer above, the weight consideration regarding the congestion of our courts rolls is a reality today. Even on application of Geldenhuys *supra* the discretion do not apply *lis pendens* should be cautiously exercised

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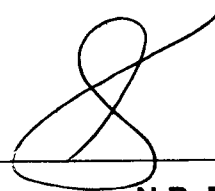
<sup>4</sup> 1964 (2) SA 617 OFSD

[13] Furthermore, I find nothing in law to the effect that despite meeting all the requirements of *lis pendens*, a difference in relief should be a consideration.

[14] In the result the *point in limine* is upheld.

[15] I therefore make the following order;

15.1 The application is dismissed with costs.

  
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**N.P. MALI**  
**JUDGE OF THE HIGH COURT**

Counsel for the Applicant:

Instructed by:

Adv. J P van den Berg

VHI ATTORNEYS

Counsel for the Respondent:

Instructed by:

Adv. J M Prinsloo

STRAUSS DE WAAL ATTORNEYS

Date of Hearing:

Date of Judgment:

19 April 2016

29 July 2016