

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO.: 8876/2014

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO
(3)	REVISED: YES / <del>NO</del>
<div style="display: flex; justify-content: space-between;"> <div> <u>5/10/16</u> DATE         </div> <div>  SIGNATURE         </div> </div>	

11/10/2016

In the matter between:

TUSK CONSTRUCTION SUPPORT SERVICES (PTY) LTD

FIRST PLAINTIFF

NURCHA MANAGEMENT SERVICES (PTY) LTD

SECOND PLAINTIFF

NATIONAL URBAN RECONSTRUCTION AND HOUSING AGENCY THIRD PLAINTIFF

and

DR SOMADODA PARTICK MAYIBONGWE FINENI N.O.

FIRST DEFENDANT

DR GCWALISILE CYNTHIA KABANYANE N.O.

SECOND DEFENDANT

MOROKA ISAAC BUTCHER MATUTLE N.O.

THIRD DEFENDANT

MZAMO MICHAEL MLENGANA N.O.

FOURTH DEFENDANT

MATSHIPSANA MERIAM MOLALA N.O.

FIFTH DEFENDANT

TLHOSTE ENOCH MOTSWALEDI N.O.

SIXTH DEFENDANT

NANDISELE FLAVOUR THOKO MPUMLWANA N.O.

SEVENTH DEFENDANT

PHELISA NKOMO N.O.

EIGHT DEFENDANT

RASHID AMOD SADECK PATEL N.O.

NINTH DEFENDANT

ZAKHELE ALEX TUMMY ZITHA N.O.

TENTH DEFENDANT

ZANDILE QUEENETTE LAVINIA MDHLADHLA N.O.

ELEVENTH DEFENDANT

Heard: 11 February 2016

Delivered 11 October 2016

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JUDGMENT

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A.A.LOUW J

**Introduction**

[1] This case was set down for trial on 11 February 2016.

[2] The defendants have a special plea of *lis alibi pendens* wherein they ask that the plaintiffs' claim be dismissed. This is of course incorrect as such a plea cannot lead to dismissal but nearly a stay of proceedings of the second action until the first action has been finalised.

[3] The plea is that under case number 27188/2012 the parties as well as the subject matter are the same.

[4] This was conceded by counsel for the plaintiff. He said that all the elements of a plea of *lis alibi pendens* exist. Nevertheless he argued that in the light of considerations of fairness, convenience and justice I should allow this case to proceed to trial and not the 2012-case.

[5] The law is stated in *Caesarstone SDOT-YAM Ltd v World of Marble and Granite 2000 CC and Others*<sup>1</sup>. I quote two passages from this judgment:

*"The evidential burden of establishing facts justifying the court in exercising that discretion in favour of a plaintiff against which a plea of lis pendens has properly been raised, lies with the plaintiff, in this case WOMAG."*<sup>2</sup>

*"In exercising its discretion considerations of fairness and convenience are fundamentally important. I agree with Coetzee DJP in Kerbel v Kerbel that once the requisites for a plea of lis pendens are established the court should be inclined to uphold it, because it is undesirable for there to be litigation in two courts over the same issue."*<sup>3</sup>

[6] Thus I have to exercise a discretion based on considerations of fairness and convenience. The only factor bearing on this, which counsel could argue was that this case is ready to proceed to trial whilst the first case is not. From the bar he told me that the first case is being handled by different attorneys from those in the second case. I cannot see how this makes it more convenient for the second case to proceed. The plaintiffs have to decide who will represent them as attorneys and see to it that these attorneys have both files. If it is so that counsel in the present case have done a lot of preparation, there is nothing which can stop the plaintiffs from using the same counsel in proceeding with the action in the first case.

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<sup>1</sup> 2013(6) SA 499 (SCA)

<sup>2</sup> paragraph 34

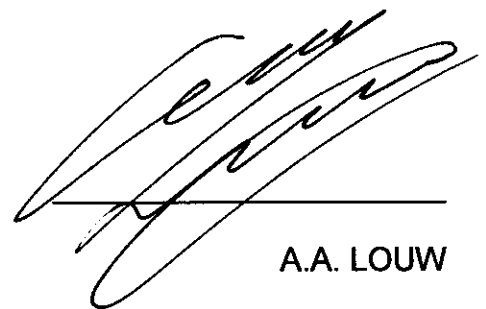
<sup>3</sup> Paragraph 36

[7] I can find no reasons of convenience or fairness which justify this case to continue. Why the plaintiffs issued a second action against the same parties in respect of the same cause of action is beyond me.

[8] This action will therefore be stayed until finalisation of the first action.

[9] I order as follows:

1. The special plea of *lis alibi pendens* is upheld with costs, such costs to include the wasted cost occasioned by the postponement of the case.
2. This case, 8876/2014 is stayed pending the final determination of the action in this court under case number 27188/2012.

A handwritten signature in black ink, appearing to be 'A.A. Louw', written over a horizontal line.

A.A. LOUW

Judge of the High Court