



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3855/2021

In the matter between:

TRANSNET SOC LIMITED

Applicant

SCHOEMANPARK GOLF AND RECREATIONAL CLUB

Respondent

HEARD ON: 18 NOVEMBER 2021

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 10 March 2022.

- [1] On 7 September 2011 the parties concluded a four year written lease agreement expiring on 28 February 2015 in terms of which the respondent leased the applicant's business premises situated at Sub 83 Bloemfontein number 654 as well as portion of remainder of erf 1964 in Bloemfontein for purposes of operating a golf club for recreational purposes.

- [2] The lease agreement provided the applicant with an option to treat the lease as a month to month tenancy upon its expiry, terminable by the applicant on a one month's prior notice to the lessee.
- [3] In this opposed application, the applicant seeks the eviction of the respondent from the said premises on the grounds that the lease agreement is defunct, it was cancelled on 30 October 2018 on account of the respondent's breach of the agreement by failing to pay the monthly rental in the amount of R9 406 851.80. Annexure "T2" is a copy of the applicant's letter of demand for payment dated 23 August 2018 and Annexure "T3" is the cancellation notice which required the respondent to vacate the premises within 30 days of receipt of the said notice.
- [4] It is the applicant's case that notwithstanding the cancellation of the lease the respondent remains in occupation of the premises therefore, the respondent and all those who occupy the premises through the respondent must be evicted from the premises.
- [5] The application is opposed on the ground of *lis pendens*, the invalidity of the cancellation of the lease and that the debt is disputed. In the respondent's answering affidavit, a counterapplication is incorporated in terms of which an order is sought that the applicant must provide the applicant with the record of proceedings and the reasons for its decision to terminate the lease agreement.

Lis alibi pendens

- [6] It is the respondent's case that there is pending litigation between parties involving exactly the same cause of action and the relief sought by the applicant. During 2020 the applicant issued summons against the respondent under case number 2891/2020 for arrear rentals and ejectment. The action was defended and it is currently pending.

- [7] Annexed on the said summons is a rule 41A(2)(a) notice in terms of which the applicant proposed the referral of the dispute to mediation on the basis that it was capable of being settled. Mediation did not succeed due the applicant's failure to honour the process.
- [8] The respondent further states that by agreement between the parties, the dispute was referred to arbitration. In the applicant's statement of claim filed in the arbitration proceedings the applicant seeks an award declaring that the respondent is in breach of the lease agreement and that the lease is cancelled. An order rectifying certain provisions of the lease agreement and payment of arrear rentals together with arbitration costs is also sought.
- [9] The Arbitration proceedings are also pending and it is in that regard, that the respondent submits that this application is *lis pendens* it ought to be dismissed merely on that score.
- [10] On the other side, the applicant in its replying affidavit denies that the application is *lis pendens* merely on the basis that in this application the applicant seeks the ejectment of the respondent from the leased premises while in the statement of claim filed in the arbitration proceedings the applicant seeks payment of the arrear rentals therefore, the relief sought in these two matters do not arise out of the same cause of action.
- [11] I disagree with the applicant's contentions. It is not in dispute that the proceedings in this application involve the same parties that are also embroiled in the arbitration proceedings. Despite having taken the liberty of attaching a copy of the arbitration statement of claim to the replying affidavit (Annexure "RA1"), the applicant has deliberately overlooked the fact that the cause of action relied upon by the applicant in the said claim is the respondent's alleged breach of the lease agreement which is a similar *causa* in these proceedings. Furthermore, in both these proceedings the applicant seeks declaratory orders for the cancellation

of the lease agreement. See prayer 1 of the notice of motion and prayer 2 of the arbitration's statement of claim. Ejectment is an ancillary relief pursuant to the cancellation of the lease.

[12] It is also important to note that the fact that there are other pending proceedings arising from a summons issued by the applicant based on the same cause of action and seeking a similar relief, to wit: the ejectment of the respondent is not in dispute. I'm thus persuaded that the proceedings that are pending in the action and also in the arbitration proceedings do not only involve the parties involved in this application but the proceedings are also based on the same cause of action and in respect of the same subject matter.

[13] It is trite that the underlying principle of the doctrine of *lis alibi pendens* is that where a dispute involving the same parties is litigated elsewhere it must be finalized in that forum and not replicated in another forum as that may result in different courts pronouncing on the same issue with the risk that they may reach differing conclusions.¹ In the circumstances, I decide the objection of *lis pendens* in favour of the respondent.

[14] In my view this ruling is dispositive of the matter. The costs shall follow the result.

[15] The following order is made:

1. The application is dismissed with costs.

NS DANISO, J

APPEARANCES:

Counsel on behalf of the Applicant:

Adv. X. Hilita

Instructed by:

McIntyre van der Post Attorneys

¹ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC 2013 (6) SA 499 (SCA) paras 18-30.*

Counsel on behalf of the Respondent:
Instructed by:

BLOEMFONTEIN

Adv. SJ Reinders

Van Wyk & Preller Inc.

BLOEMFONTEIN