IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO:7266/2019

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

In the matter between:

POLOKWANE LOCAL MUNICIPALITY **APPLICANT**

AND

PLK CHISANYAMA BUSINESS ENTERPRISE **RESPONDENT**

JUDGMENT

KGANYAGO J

[1] The applicant is the owner of the property described as Portion of Portion 10 Sterkloop 688 LSS known as Waterland (the premises). The applicant has leased the premises to the respondent.

[2] The respondent was in arrears with the payment of the municipality services, rates, rental and taxes in respect of the premises. On 8th April 2019 the applicant and respondent concluded a written agreement in relation to how the respondent was to settle its arrears. Part of the terms of the agreement were that the respondent was supposed to settle its arrears in full within a period of twelve months.

[3] On 2nd July 2019 the applicant gave the respondent a written notice informing the respondent that it was in breach of the lease agreement that it had signed on the 25th November 2016 in relation to payment of monthly rental, rates and taxes. In terms of the notice, the respondent was given fourteen working days within which to remedy the alleged breach. In reply to the notice, the respondent through its attorneys per letter dated 17th July 2019 conceded that its rental payments were not up to date, but that as per the agreement of the 8th April 2019 it had twelve months within which to settle its arrears. The respondent further notified the applicant that it was paying as per the arrangement, and also that it was ahead with its payment of arrears.

[4] On 25th July 2019 the applicant gave the respondent a written notice notifying the respondent of the termination of the lease agreement with immediate effect. The respondent in that notice was notified to vacate the premises with immediate effect upon receipt of the notice.

[5] On 26th July 2019 the applicant disconnected electricity supply on the premises. That resulted in the respondent launching an urgent application on 1st August 2019. The purpose of the urgent application was to interdict, review and set aside the applicant's decision to discontinue electricity supply on the

premises. On 6th August 2019 the respondent obtained an order interdicting and restraining the respondent from implementing a decision to cancel and/or repudiate an agreement concluded between the parties on 8th April 2019 in respect of the outstanding municipality services on the premises pending the finalization of the review application. When the present application was argued in this court, the respondent's review application had not yet been finalized.

[6] On 28th October 2019 the applicant launched the present application seeking an order for confirmation of the cancellation of the lease agreement, and that the respondent and all other persons occupying the premises be ejected. The applicant avers that the respondent was given several indulgence to settle its arrears and the final one been that of the 8th April 2019. As at 8th April 2019 the respondent's outstanding balance was R 439 551-72 and was given an incentive of R 66 228-02 which left a balance of R 373 323-91. In terms of their arrangements, the respondent was supposed to pay that amount over a twelve months' period on monthly instalments of R 31 110-30 with effect from 30th April 2019. That these monthly instalments had to be paid in addition to the normal monthly account.

[7] According to the applicant, the respondent had failed to honour the agreement as in April 2019 it paid R 15 000-00, did not pay in May, and in June 219 it paid R 100 000-00. On 2nd July 2019 the applicant gave the respondent notice to remedy the breach within 14 working days of receipt of the notice. On 17th July 2019 the respondent's attorneys replied to their notice wherein the respondent's acknowledged that it was not up to date with its rental payments. The applicant submitted that on 25 July 2019 it notified the

respondent of the termination of the lease agreement and that by then the respondent's arrears amounted to R 408 887-25. That on the 25th July 2019 the respondent paid R 70 000-00 and on 26th July 2019 the applicant proceeded to block further purchases of prepaid electricity by respondent. That on 31st July 2019 the respondent made a further payment of R 60 000-00.

[8] It is the applicant's contention that the agreement between the parties that was entered on 8th April 2019 was only an indulgence to the respondent for it to pay the amounts in arrears in respect of the premises. The applicant submitted that even if the agreement of 8th April 2019 is reviewed and set aside, it will not have any effect on the cancellation of the lease agreement that was cancelled in terms of the notification letter dated 25th July 2019. According to the applicant, as at the date of launching of the present application, the outstanding amount was R 235 518-69. That on 3rd September 2019 the applicant's attorneys had notified the respondent that due to the cancellation of the lease agreement, it was in unlawful occupation of the premises and that it must vacate the premises by not later than the 30th September 2019.

[9] The respondent in its answering affidavit has raised the defence of *lis pendens.* The respondent avers that after the applicant had discontinued and restricted electricity supply to the premises on 26th July 2016, the respondent launched an urgent application for the review and setting aside of the applicant's decision to discontinue and restrict the electricity supply on the premises. The respondent succeeded in obtaining an urgent interim relief for the restoration of the electricity supply on the premises pending the final

determination of the review proceedings. As per the interim relief that the respondent had obtained, the applicant was also interdicted and restrained from implementing a decision to cancel and/or repudiate the subsequent agreement in relation to the payment of outstanding rates and taxes in respect of the premises.

[10] It is the respondent's contention that the issue as to whether the applicant is entitled to act upon the respondent's failure to keep-up with the payment of the outstanding rates and taxes of the premises has been dealt with by the interim relief. It is further the respondent contention that the issue whether they should be evicted or not is still subject of the review application wherein they have obtained an interim relief. The respondent submit that the present proceedings should therefore be stayed pending the finalization of their review application.

[11] With regard to the merits the respondent submits that the lease agreement provides for payments of rental in the amount of R 31 000-00 per month, and rates, water, taxes and electricity would be paid for in terms of a regime applicable to those specific items. It is the respondent's contention that it was never in the contemplation of the parties that the rental fee shall be an amount of rates, taxes, water and electricity and R 31 000-00. The respondent submit that the water and electricity were paid for on the basis of pre-paid merchandising, whilst rates and taxes were paid on the basis of a separate invoice.

[12] The respondent avers that with regard to the outstanding rates and taxes on the premises, the applicant's officials have already taken a decision to

restructure the outstanding arrears, and that the said decision was valid and binding between the parties. The respondent further submits that if the applicant is of the view that there is something untoward with the decision to restructure payment, the applicant should bring a review application to set aside that decision.

[13] The respondent avers that the applicant had incorrectly allocated all payments received from the respondent into the rates and taxes account of the premises. The respondent submits that its rental payments in terms of lease agreement have never been outstanding. It is the respondent's contention that the only outstanding payment were in respect of municipality rates and taxes. The respondents submit that the payment arrangement it had with the applicant stifle any complaint of non-payment preceding the date on which the payment arrangement was agreed upon between the parties.

[14] In its replying affidavit the applicant stated that the respondent's review application relates to payments of outstanding rates and taxes, whilst their application relates to confirmation of the cancellation of the lease agreement between the parties. It is the applicant's contention that the order of the 6th August 2019 was interdicting a decision to cancel and/or repudiate an agreement concluded with the respondent on 8th April 2019 in respect of the payment of the outstanding municipality services account of the respondent's premises and that it should be distinguished from the rental agreement in terms of which the respondent occupies the premises. The applicant has also attached to its replying affidavit latest reconciliation of the respondent's account for the period April 2019 to March 2020.

[15] It is not in dispute that the applicant and respondent on 25th December 2016 entered into a lease agreement in terms of which the respondent leased the premises from the applicant at a monthly rental of R 31 000-00. In terms of the lease agreement the respondent was also responsible for payments of electricity and water charges, assessment rates and taxes, service levies, licence fee, other payable and municipality services rendered according to tariffs determined from time to time in connection with and in respect of the business operation. It was also a material term of the lease agreement that the supply of electricity shall not form part of the lease agreement save as may be provided for or agreed upon in a separate written agreement.

[16] The respondent was not up to date with its payment to the applicant which resulted in the parties concluding three agreements on different occasions. In terms of said three agreements, the respondent was given indulgence by way of rebates and schedule for payment of the amount in arrears. The first indulgence was given to the respondent per the written agreement of 20th October 2017, and by then the outstanding amount after rebate was R 315 866-79. The respondent did not settle the amount as agreed and that led to the second written agreement of 26th January 2018 and the outstanding amount after the rebate was R369 814-53. Again the respondent failed to pay the outstanding amount as agreed and that led to the third agreement that was concluded on 8th April 2019 and by then the outstanding amount after rebate was R 373 232-91. As per the 8th April 2019 agreement the respondent was supposed to settle its arrears over a period of twelve months, which would have been until the 7th April 2020.

[17] As at July 2019 the applicant was not satisfied in the manner in which the respondent was paying its outstanding arrears. That led to the applicant on 2nd July 2019 addressing a letter to the respondent informing the respondent that it was in breach of clause 7 and 28 of the lease agreement. The respondent was given 14 working days within which to remedy the breach. On 25th July 2019 the applicant notified the respondent that the lease agreement has been terminated and that it must vacate the premises with immediate effect. On 26th July 2019 the applicant terminated the electricity supply on the premises which the respondent was leasing. That led to the respondent obtaining an interim interdict against the applicant.

[18] The interim interdict read as follows:

> "1. The respondent is interdicted from implementing a decision to cancel and/or repudiate an agreement concluded with the applicant, on 8th April 2019, in respect of the payment of the outstanding municipality services account of portion of portion 10 Sterkloop 688 LSS, known as Waterland, pending the finalization of the review application.
>
> 2. The respondent is forth with directed to restore the electricity supply and municipality services to the abovementioned premises, pending the finalization of the review application.
>
> 3. The costs shall be the costs in the cause of the review application."

[19] On 3rd September 2019 the applicant through its attorneys notified the respondent that the respondent review application has got nothing to do with the decision to cancel the lease agreement and that the respondent must vacate the premises by 30th September 2019. The respondent failed to vacate the premises and that led to the applicant launching the present application.

[20] The question is whether the respondent's plea of *lis pendens* will succeed in this matter. It is trite that the requisite for a successful plea of *lis pendens* are that two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint.

[21] In **Caesarstone Sdat-yam v World Market and Gravite 2000**[1] Wallis JA said:

> "On this basis the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case. *Boshoff* was followed in a number of cases in provincial courts, but was regarded as controversial because it was thought to import into South African law the English principles of issue estoppel. It is unnecessary to explore that controversy because this Court laid it to rest in **Kommissaris van Binnelandse Inkomste v ABSA Bank Beperk.** There, Botha JA held that *Boshoff* was based on the principles of our law. He said that its *ratio* is that the strict requirements for a plea of *res judicata* of the same cause of action and that the same thing be claimed, must not be understood in a literal sense and as immutable rules. There is room for their adaptation and extension based on the underlying requirement that the same thing is in issue as well as the reason for the existence of the plea."

[22] It is the applicant's contention that the interim order obtained by the respondent on 6th August 2019 relates to payment of outstanding rates and taxes, and further that the respondent review application does not concern the applicant's decision to cancel the lease agreement. According to the applicant, in terms of the agreement of 8th April 2019, the respondent was supposed to settle the balance of R 373 323-91 in twelve monthly instalments of R 31 110-30, and that those instalments were to be paid in addition to the

[1] 2013 (6) SA 499 (SCA) at para 21

normal monthly account. The applicant in its founding affidavit has stated that all payments due by the respondent it in respect of the premises, which were rental, rates and taxes and municipal services were consolidated into one account of which on the applicant's system they allocated the respondent a new account number. Therefore, the normal monthly account which the respondent was supposed to pay in addition to the monthly instalments as per the agreement of the 8th April 2019 was for rental, rates and taxes and other municipal services.

[23] The applicant has further stated that by the end of June 2019 the respondent's outstanding arrears should have been R 279 993-01, but that the respondent paid R 15 000-00 in April 2019 and R 100 000-00 in June, leaving a total outstanding balance of R 508 887-25. The applicant further stated that the outstanding balance of R 508 887-25 was inclusive of the normal monthly account. As per applicant's founding affidavit, the respondent's constant failure to adhere to the provisions of the lease agreement and indulgences led it addressing a letter to the respondent on 2nd July 2019 giving the respondent fourteen working days within which to remedy the alleged breach. Even in that letter of 2nd July 2019 the respondent is notified that it is in breach of payment of rental, rates and taxes. In the alleged termination letter the respondent is being notified that the lease agreement has been terminated on the basis of the respondent's failure to pay monthly rental, rates and taxes by the 7th of every month and also its failure to update its arrears as per the payment arrangements.

[24] It is clear that the rates and taxes cannot be separated from the rental since as per the applicant's own version, they have been consolidated into one

account. The alleged termination letter of the 25th July 2019 also does not separate the rates and taxes from the rental, but has been cited jointly as the reasons for termination of the lease agreement. The disconnection of the electricity supply on the premises was as results of the alleged cancelation of the lease on the 25th July 2019. The alleged cancelation letter does not specify how much rental was due, and how much was due for rates and taxes, but gives a globular amount of R 408 887-25 since it relates to one consolidated account.

[25] When the respondent obtained the interim order, it was in relation to one consolidated amount which the respondent had twelve months within which to settle the arrears whilst at the same time paying the normal account. In my view, there is no merits in the applicant submission that the respondent's review application relates to payment of outstanding rates and taxes only. The court order of the 6th August 2019 relates to one consolidated account of the respondent which comprise of rentals, rates and taxes and other municipal services.

[26] The purpose of the interim order was to interdict and restrain the applicant from implementing a decision to and /or repudiate an agreement of the 8th April 2019 pending the finalization of the review application. The agreement of the 8th April 2019 was valid for twelve months. The applicant had launched the application at hand during October 2019. By then the review application was not yet finalized, and even at the date when this application was argued, it had not yet been finalized. Since the respondent's account has been consolidated, and the applicant relies on the letter dated 25th July 2019 as the termination letter, and that letter contains a consolidated outstanding amount,

in my view, the determination of the review application which is still pending involve the question that is necessary for the determination of the present application as most of the annexures in the review application are the same as with the present application. The respondent was also making one payment for one consolidated account. In my view, the respondent has satisfied the requirements of *lis pendens*.

[27] The agreement of 8th April 2019 was valid for twelve months. When this application was argued, that agreement had long expired. Ordinarily when a plea of *lis pendens* is upheld, the proceeding will be stayed until the finalization of the pending proceedings. The interim order of the 6th August 2019 was valid until the expiry of the agreement of the 8th April 2019. It will therefore serve no purpose to stay the proceedings as the agreement that led to the obtaining of the interim order had lapsed.

[28] Despite notifying the respondent of its intention to terminate the lease agreement and even after allegedly cancelling the lease agreement, the applicant allowed the respondent to continue making further payments. As per respondent's payment history, it reflects that the respondent made the following further payments on 2nd July 2019 paid R 100 000-00, 25th July 2019 paid R 70 000-00, 31st July 2019 paid R 60 000-00, October 2019 paid R 98 000-00, November 2019 paid R 55 000-00, December 2019 paid R 84 870-00, January 2020 paid R 86 000-00 and February 2020 paid R 130 000-00. Adding the respondent's further payments shows that as at October 2019 when the applicant launched its application for confirmation of cancellation of the lease agreement, the respondent has paid R 443 000-00 and was still left with six months before the expiry of the 8th April 2019 agreement. The alleged

termination letter of the 25th July 2019 shows an outstanding amount of R408 887-25. Therefore, as at October 2019 the respondent was having manageable arrears whilst still having six months within which to settle its arrears.

[29] Under the circumstance, even though the 8th April 2019 agreement had lapsed which renders interim order of the 6th August 2019 ineffective, the applicant is still not entitled to the relief it is seeking as it had compromised its claim by accepting further payments from the respondent, which further payments have substantially reduced the arrears with six months still to go before the lapse of the agreement. The further payments by the respondent had substantially remedied the breach which led to the letters of the 2nd July 2019 and 25th July 2019 addressed to it.

[30] In the results I make the following order:

30.1 The applicant's application is dismissed with costs.

KGANYAGO J

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARENCES

COUNSEL FOR APPLICANT	**: ADV JAL PRETORIUS**
BRIEFED BY	**: MOHALE INCOPORATED**
COUNSEL FOR RESPONDENT	**: ADV MANALA ME**
BRIEFED BY	**: LEGODI ATTORNEYS**
DATE HEARD	**: 03 FEBRUARY 2021**
DATE DELIVERED	**: 2ND MARCH 2021**