

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date... 23/05/2019	

CASE NO: HCA 03/2018

In the matter between:

NKUNA TRADITIONAL COUNCIL**APPELLANT**

and

SOLLY MOAGI**RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] This is an appeal against the judgment and order granted by the Magistrate Court at Ritavi on 11 August 2017 in terms whereof the Respondent's point *in limine* was upheld and the Appellant's application dismissed with costs on an attorney and client scale. In the Court *a quo* the Respondent raised three points *in limine*, namely, *lis alibi pendens*, *res judicata* and jurisdiction as to monetary value.
- [2] The Court *a quo* handed down the judgment and order only in respect of the *lis alibi pendens* although all the three points *in limine* before the Court were argued by the parties' legal representatives. This Court, sitting as a Court of appeal is enjoined to exercise its powers in terms section 173 of the Constitution of the Republic of South Africa, 1996 to regulate its own process and in the interest of justice to hear argument and give judgment in respect of the other two points *in limine* left out by the Court *a quo*.
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Factual Matrix

[3] On or about 17 February 2017 Greater Tzaneen Municipality ("the Municipality") initiated application proceedings in the Ritavi Magistrate Court against the Respondent under case No 73/2017 seeking the following relief:

- 3.1. Restraining the Respondent from threatening the employees of the Municipality from carrying out construction next to Nkowankowa cemetery at Mohlabas Location 567 LT; and
- 3.2. An order authorizing the removal of fences erected by the Respondent.

The application was heard by Magistrate (Mr) Moosa on the 19 May 2017 and he ruled that the value of the land forming subject matter of the proceedings exceeds the jurisdictional limit of the Magistrates' Court. Accordingly the Respondent's point *in limine* as to jurisdiction was upheld.

[4] During June 2017 the Municipality (as the First Applicant) and the Appellant (as the Second Applicant) jointly initiated proceedings in the High Court, Polokwane under case No 4124/2017 against the Respondent. The relief sought was essentially the same as that sought

by the Municipality in the Ritavi Magistrate Court. The application was enrolled for hearing on the 20 June 2017.

- [5] On the 20 June 2017 the matter was removed from the roll by agreement between the parties and for purposes of settlement negotiation. The Court granted an order to that effect. However the parties did not arrive at any settlement. The application was subsequently withdrawn by the Applicants on the 21 July 2017. A notice of withdrawal was served and filed at Court.
- [6] On the 6 July 2017 the Appellant instituted proceedings against the Respondent in the Ritavi Magistrate Court under case No 357/2017, which is the subject of this appeal. On 14 July 2017 the Respondent filed an answering affidavit raising three points *in limine*, namely, *lis alibi pendens*, *res judicata* and jurisdiction as to value of the property. The *lis pendens* point relates to the fact that the High Court case was allegedly still pending. The *res judicata* was to the effect that the matter was already adjudicated upon and finalised by Magistrate (Mr) Moosa on the 19 May 2017 when he at the same time made a ruling that the Magistrate Court does not have jurisdiction to hear the matter, regard being had to the value of the property in dispute.

Issues to be determined

[7] The following are the issues to be determined by this Court:

7.1. Was there *lis* pending between the parties with regard to the High Court Case No 4142/2017 and Magistrate Court Case No 357/2017? Does the upholding of a *lis pendens* point *in limine* call for a dismissal of the application?

7.2. Are the points *in limine* of *res judicata* and jurisdiction as to the monetary value of the property appropriate regard being had to the judgment and order of Magistrate Moosa on 19 May 2017?

Submissions and Discussion

[8] The Court *a quo* upheld the point *in limine* of *lis alibi pendens* having made a finding that the High Court matter was still pending. It is common cause that the High Court case was withdrawn by the Appellant on the 21 July 2017. This is before the Court *a quo* made the finding and delivered its judgment and order on 11 August 2017. Clearly when the Court *a quo* heard the matter the High Court case was no longer any case pending between the parties. The learned Magistrate *a quo* erred. He does not seem to appreciate the difference between removal of the matter from the roll and withdrawal of the proceedings. When a matter is removed from the roll it can still be reinstated for hearing but when the

matter is withdrawn and a Notice of Withdrawal is served and filed to that effect, the matter has reached finality.

- [9] The learned Magistrate was under the wrong impression that the parties are obliged to negotiate a settlement because it was so ordered by the High Court on 20 June 2017. According to the Magistrate the parties were still to come back to the High Court after settlement negotiation. The learned Magistrate erred in this regard. The effect of the Notice of Withdrawal is that the matter has reached finality between the parties. It is wrong for the Court *a quo* to hold that a notice of withdrawal filed after a preliminary point of *lis pendens* has been raised by the Respondent, does not have the effect of terminating the proceedings so withdrawn. See **Starita v Absa Bank Ltd and Another 2010 (3) SA 443 (GSJ)** at para [7].

- [10] Furthermore the Court *a quo* erred in dismissing the Appellant's application upon upholding the *lis pendens* point *in limine*. As a defence, a special plea of *lis alibi pendens* is merely a dilatory one, if it is upheld the usual practice is to stay the proceedings in the one matter and not to dismiss the matter. It is trite law that *lis alibi pendens* does not, if successfully invoked, put an end to the plaintiff's or applicant's case.

Rather, it allows for the staying of the later matter pending the final determination of the earlier matter. See **Keyter NO v Van Der Muelen and Another 2014 (5) SA 215 (ECG)** at [10].

[11] The Respondent's point *in limine* of *res judicata* was based on the assertion that the Appellant's claim was finally adjudicated upon by Magistrate Moosa on the 19 May 2017 under case number 73/2017 in that the Appellant "was a privy" of the Municipality. The Court *a quo* erred in this regard. It is clear from the papers filed of record in the Magistrate Court that the Appellant was not a party in the proceedings initiated under case number 73/2017 at Ritavi Magistrate Court.

[12] Mr Mtebule, Counsel for the Appellant correctly submitted that the defense of *res judicata* cannot be successfully invoked against the Appellant in *casu*. He referred to the decided case of **Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)**, which I find instructive.

Fagan AJA at page 651 had this to say:

"..... two essential principles of law that had to be borne in mind, viz (1) that a judgment cannot be pleaded as *res judicata* against someone who was not

a party to the suit in which it was given, and (2) that the Court should not make an order that may prejudice the rights of parties not before it”.

[13] The Appellant and the Municipality are different persons in this case. The only instance at which the defence of *res judicata* may be successfully raised against the Appellant is when the privity (between the two) has been established. On this aspect Mr Mtebule, with reference to the **Amalgamated Engineering Union case**, *supra*, gave the following as categories of a party and privity:

a deceased and his heir, a principal and his agent, a person under curatorship and his curator, a pupil and his tutor, a creditor and debtor in respect of a pledged article if the debtor gave the article in pledge after losing a suit in which a third party claimed it, a purchaser and seller, if the seller has won or lost the action.

Needless to say that the position of the Appellant and the Municipality in *casu* falls short of the above categories of privity.

[14] The judgment of Magistrate Moosa did not deal with the merits of the case. It dealt only with the issue of jurisdiction as to the value of the property. The relief sought by the Municipality in that case (No 73/2017) was a restraining order against the Respondent and the removal of a

fence. The Magistrate order was thus not final and definitive of the rights of the parties. Therefore a defence of *res judicata* is inappropriate in the circumstances.

[15] On the issue of jurisdiction, The Respondent asserts that the Court *a quo* does not have jurisdiction to adjudicate on this matter on the ground that the value of the farm as a subject matter in this application is above R 500 000.00 which is above the jurisdictional limit of the Magistrates' Court.

[16] Section 29(1)(g) of the Magistrates' Court Act, No 32 of 1944 ("the Act") provides:

"(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in.....

(g) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette".

Section 29(1)(g) determines jurisdiction in respect of **actions** not **applications**. The nature of proceedings in the present case is an application for an interdict and not action proceedings where the value of

the property in dispute is in issue. The Magistrate Court has jurisdiction to hear interdict proceedings in terms of section 30 thereof.

[17] In **Le Roux v Le Roux and Others 1980 (2) SA 632 (C)** at 633A, Williamson J said that:

"To regard the market value of the property as the sole test is not only illogical but also lead to unreal and ridiculous situations. Take for example the case of a dispute concerning a servant's room on the roof of a large block of flats....It would be absurd to have regard to the value of the entire block of flats when all that is in issue is one room".

See also **Botha v Andrade and Others 2009 (1) SA 259 (SCA)**.

[18] The issue to be considered in determining if the claim or value of the dispute falls within the jurisdictional limit determined by the Minister is not the market value of the farm in *casu* but the value of the Respondent's occupation.

The onus is on the Respondent to show that the value of his right to occupation of the farm exceeds the monetary jurisdiction. His mere assertion that it is so, does not assist the Respondent.

Conclusion

[19] The Court *a quo* erred in upholding the point *in limine* of *lis alibi pendens* and declining to pronounce an order in respect of the other points *in limine*, namely *res judicata* and jurisdiction as to monetary value of the property in dispute. The appeal should therefore succeed.

[20] I accordingly grant the following order:

20.1. The appeal is upheld with costs.

20.2. The order of the Court *a quo* is set aside and replaced with the following order:

“The points *in limine* are dismissed with costs”.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

I agree



**L G P LEDWABA
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES

Heard on	: 17 May 2019
Judgment delivered on	: 23 May 2019
For the Appellant	: DD Mtebule
Instructed by	: Mohlaba & Moshwana Inc
For the Respondent	: In Default