



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: Electronic reporting only
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

.....

DATE

.....

SIGNATURE

Appeal case no: A3084/16

In the matter between:

TIRO TSOTETSI N.O.

Appellant

and

**DOREEN BUSISIWE RADEBE
EKURHULENI METRO MUNICIPALITY**

1ST Respondent
2ND Respondent

Case Summary: *Exceptio rei judicatae* - a respondent who has been absolved from the instance cannot raise the *exceptio rei judicatae* if sued again on the same cause of action.

Lis pendens - Courts are not entitled to raise the issue of *lis pendens* unless the defendant or respondent pleads it specifically - an order absolving a defendant or respondent from the instance concludes and disposes of the proceedings, if not set aside – such proceedings do not remain pending and *lis pendens* finds no application.

JUDGMENT

MEYER J (KAIRINOS AJ concurring)

[1] This is an appeal against an order of the Palm Ridge Magistrates' Court (Magistrate SM Masango) on 22 July 2016, in an application brought by the appellant, Mr Tiro Tsotetsi, in his capacity as executor of the estate of the late Ms Roster Nozipho Nkwanyane, who died on 9 January 2009 (the deceased), against the respondent, Ms Doreen Busisiwe Radebe, and the Ekurhuleni Metro Municipality (Ekurhuleni). No relief was claimed against Ekurhuleni. Mr Tsotetsi sought the eviction of Ms Radebe from an immovable property situated in Katlehong, which property is registered in the name of the deceased. Ms Radebe only raised the *exceptio res judicatae* as a point *in limine* in her answering affidavit. The court *a quo* upheld the point *in limine* with costs, although it appears that it rather upheld a defence of *lis pendens*.

[2] Mr Verral Desmond Tsotetsi (snr) is the father of Mr Tsotetsi, the appellant. The deceased, prior to her death, was his common law wife. Two children were born from their union, Mr Tsotetsi being one. On 23 September 2009, Mr Tsotetsi (snr) was appointed by the Master of the High Court as the executor in the estate of the deceased. It was ascertained that the deceased was the registered owner of the property in question and that Ms Radebe was residing in the property. Unbeknown to Mr Tsotetsi (snr), or the two children born from their union, the property was awarded to the deceased as a state-subsidised dwelling, commonly referred to as an RDP house. Ms Radebe claimed to have purchased the property from the deceased, although registration and transfer of the property into her name had not been effected by the time of the deceased's death. The issues surrounding Ms Radebe's claim to be in occupation of the property are not presently relevant. Ultimately, on 26 March 2014, a written agreement of 'lease-to-buy' was concluded between Mr Tsotetsi (snr) in his official capacity and Ms Radebe, in terms whereof the property was leased to Ms Radebe for a fixed period, commencing on 1 February 2014 until 31 January 2015. Clause 5.3 of the lease-to-buy agreement provided thus:

‘The lessee must have bought the house before the expiry of the lease period at the purchase price of R300 000.00 failing which the lessor will sell same to a willing buyer at a higher price without any hindrances from the lessee.

Ms Radebe did not purchase the property prior to the expiration of the lease.

[3] On 8 April 2015, Mr Tsotetsi (snr), in his capacity as executor of the deceased estate, instituted an application under case no. 2786/15 in the Palm Ridge Magistrates’ Court against Ms Radebe and Ekurhuleni in which he sought the eviction of Ms Radebe from the property. Similarly, no relief was claimed against Ekurhuleni. Ms Radebe opposed the application and filed an answering affidavit. A replying affidavit followed, and the matter was argued before the learned magistrate, Mr ET Mosese, who referred the matter to trial. Mr Tsotetsi (snr) testified and he called Mr Tsotetsi and his sibling to testify regarding his nomination as executor of the deceased estate - the regularity of his appointment being placed in issue by Ms Radebe. Once the case for the deceased estate had been closed, Ms Radebe applied for absolution from the instance. On 30 November 2015, the learned magistrate Mosese absolved Ms Radebe from the instance, with costs (the earlier eviction application).

[4] Mr Tsotetsi (snr) was replaced by Mr Tsotetsi as the executor of the deceased estate in the light of the controversy surrounding his appointment. Letters of executorship were issued to Mr Tsotetsi by the Master of the High Court. In that official capacity, he, on 2 March 2016, instituted a fresh application against Ms Radebe and Ekurhuleni in the Palm Ridge Magistrates’ Court under case no. 1513/16, in which application the eviction of Ms Radebe is sought on the same grounds as in the earlier eviction application. Ms Radebe opposed the application and filed a very short answering affidavit in which she only raised the defence of *res judicata* as a point *in limine*. She states:

‘The Applicant’s case is based on the same cause of action which was brought by the Applicant’s Attorney of record before the same court on the same subject matter. This Applicant was a witness in the application for eviction under case number 2786/2015 which was dismissed (*sic*) with costs on party and party scale by the Above Honourable Court. This is a double jeopardy application and the Applicant’s grounds to bring this application is based on similar cause of action as the former.’

[5] This application, which forms the subject-matter of this appeal, was heard by the learned magistrate Masango in the Palm Ridge Magistrates' Court. In upholding the point *in limine* with costs, he held as follows:

'Coming to the defense of *res-judicata*. As the court indicated above, it is satisfied that the parties are the same, the cause of action is the same, the subject matter is the same, relief sought is the same.

The previous application was determined by absolution from instance. I agree with the applicant and disagree with the respondent. Absolution from the instance is not a final determination.

If this being the position, that means in essence that the previous matter is still pending, has not yet been finally determined if we agree that absolution from the instance is not a final determination.

Therefore the court cannot here the related new matter when the old one is still pending before court. The respondent raised the point of law of *res-judicata*.'

The learned magistrate then referred to an authority which is to the effect that the elements required to establish the plea of *res judicata* are the same as those required to establish the plea of *lis pendens*, and concluded thus:

'Therefore the conclusion to be drawn is that the previous matter is still pending. That being the case, therefore, there were options available to the applicant to bring the said previous matter to finality.'

[6] One of the elements required to establish the plea of *res iudicata* is that the judgment or order must be final and definitive on the merits of the matter. (See *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A); *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2006 (6) SA 68(C).) An absolution order is not a final order on the merits for purposes of the *exceptio rei judicatae*. In *United Enterprises Corporation v STX Pan Ocean Company Ltd* [2008] (3) All SA 111 (SCA) para 9, Farlam JA said the following:

' . . . It is clear that in our law a defendant who has been absolved from the instance cannot raise the *exceptio rei judicatae* if sued again on the same cause of action: see *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuyzen* (1888) 6 SC 259; *Corbridge v Welch* (1891-92) 9 SC 277 at 279; *Van Rensburg v Reid* 1958 (2) SA 249 (E) at 252B-C [also reported at [1958] 2 All SA 319 (E) – Ed]; Herbstein and Van Winsen, *The Civil Practice of the Supreme*

Court of South Africa, 4ed 1997 at 544 and 684. It was held in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563G-H [also reported at [1963] 3 All SA 20 (A) – Ed] that the dismissal of an application (which ordinarily would be regarded as the equivalent to granting absolution from the instance: *Municipality of Christiana v Victor* 1908 TS 1117, *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A)) can give rise to the successful raising of the *exceptio rei judicatae* where, regard being had to the judgment of the court which dismissed the application, “the import of the order [was] clearly that on the issues raised the Court found against the appellant [which had been the applicant in the previous proceedings], and in favour of the respondent”. It is thus clear that it is not the form of the order granted but the substantive question (did it decide on the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits.’

[7] In the earlier eviction application, Ms Radebe, without leading evidence, applied for an order of absolution from the instance at the close of the case for the deceased estate. The learned magistrate Mosese did not grant judgment in favour of Ms Radebe but, instead, absolved her from the instance. The import of that order was not that the learned magistrate found against the deceased estate and in favour of Ms Radebe on the issues raised. The learned magistrate did not hear the evidence of Ms Radebe and of any other witness whom she might have wished to call. It cannot be said, therefore, that that decision was final and definitive on the merits of the matter.

[8] Courts are not entitled to raise the issue of *lis pendens* unless the defendant or respondent pleads it specifically. (See *Kerbel v Kerbel* 1987 (1) SA 562 (W).) It was thus not open to the learned magistrate Masango to raise the issue. Furthermore, the learned magistrate, in my view, was wrong in holding that the previous eviction application was still pending and that *lis pendens*, therefore, found application. The order of the learned magistrate Mosese in the earlier eviction application absolved Ms Radebe from that instance and she was also granted her costs of opposing the application. That order concluded and disposed of the earlier application; it was never set aside. Mr Tsotetsi, in his official capacity, therefore, was at liberty to institute the fresh eviction application that forms the subject of this appeal, against Ms Radebe.

There was no longer a *lis* pending between them and *lis pendens*, therefore, found no application.

[9] In the result, the following order is made:

1. The appeal succeeds with costs.
2. The order of the learned magistrate, Mr M Masango, issued on 22 July 2016 under case no. 1513/2016 is set aside and replaced with the following order:
'The point *in limine* is dismissed with costs.'

P.A. MEYER
JUDGE OF THE HIGH COURT

I agree

G. KAIRINOS
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	20 August 2018
Date of judgment:	4 September 2018
Counsel for the Appellant:	Adv NM Mtsweni
Instructed by:	Butelezi Attorneys
Counsel for Respondent:	Adv TJ Mngomezulu
Instructed by:	Mngomezulu Attorneys, Germiston