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.
	…………………….
	…………………….

CASE NO: HCAA01/2017
12/5/2017

In the matter between:

PACIFIC BREEZE TRADING 53 (Pty) Ltd **APPELLANT**

and

BAREND DANIEL MARIAS **1ST RESPONDENT**

MARIA SUSANNA MARIAS **2ND RESPONDENT**

TZANEEN LOCAL MUNICIPALITY **3RD RESPONDENT**

JUDGMENT

<u>MAKGOBA JP</u>

[1] This is an appeal against the judgment and order of Ndlokovane AJ in terms of which the *point in limmine* of *lis alibi pendens* raised by the First and Second Respondents against the Appellant's application was upheld and it was ordered that the application for the eviction of the First and Second Respondents from the Appellant's farm is stayed pending the finalization of the action instituted by the First and Second Respondents in the Gauteng Division of the High Court, Pretoria in case number 65785/11, as well as that the costs of the application be paid by the Appellant.

[2] The appeal before us is with leave of the Court *a quo.*

[3] The order that the Appellant sought in the Court *a quo* and seeks in this appeal is the following:

3.1. That the First and Second Respondents presently occupying the premises known as PORTION 5 OF THE FARM LETABA DRIFT, REGISTRATION DIVISION LT, LIMPOPO PROVINCES in extent of 93,5949 hectares held by Deed of Transfer

T 72731/2005 and also known as Letaba Drift, Georges Valley 21G, Georges Valley Road, district of Tzaneen, Limpopo (hereinafter called "the property") be declared not to be in lawful possession of the property, declared to have no legal right to occupy the property and that they currently occupy the property unlawfully, and further that the amount of R 1 000 000.00 security provided by the Appellant is sufficient to suspend the alleged lien claimed by the First and Second Respondents over the property;

3.2. First and Second Respondents presently occupying the property, vacate the property within 30 days from date of this order.

3.3. That the First and Second Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the application on the scale as between attorney and client, which cost order is to include the reserved costs of 6 September 2016.

[4] The following chronological summary of relevant facts and / or events, which are either common cause or not disputed, provides the background to the eviction application brought by the Appellant in the Court *a quo* :

4.1. The Appellant is the owner of the immovable property, PORTION 5 OF THE FARM LETABA DRIFT, REGISTRATION DIVISION LT, LIMPOPO PROVINCES in extent of 93, 5949 hectares held by Deed of Transfer T 72731/2005 and also known as Letaba Drift, Georges Valley 21G, Georges Valley Road, district of Tzaneen, Limpopo (hereinafter called "the property"). The property is a commercial farm of avocados and bananas with improvements thereon that includes a dwelling house and some other buildings on the property.

On 3 December 2010 the Appellant entered into a written agreement of sale with the First and Second Respondents ("the Respondents") in terms whereof the Appellant sold the property to the Respondents. The Respondents paid the first few instalments due in terms of the Deed of Sale and took occupation of the property for farming purposes during December 2010 and for residential purposes also on 1 March 2011;

4.2. The Respondents, by then in occupation of the property, failed to comply with the provisions of clause 21 of the Deed of Sale in that they suspended or stopped all payments towards the agreed purchase price. On 14 September 2011 the Appellant gave the Respondents a written notice in terms of clause 10 of the written agreement that the Respondents were in breach of the sale agreement and that upon failure to rectify the breach the agreement would be cancelled.

It is common cause that the Respondents failed to rectify the breach. On 31 October 2011 the Appellant properly cancelled the sale agreement in writing. The cancellation is common cause and no legal reason remained for the Respondents to remain in occupation of the property other than the lien that is allegedly claimed to exist.

4.3. It is common cause that on 16 November 2011 the Respondents, as Plaintiffs, sued out a summons in the High Court, Gauteng Division, Pretoria under case number 65785/2011. In their action the Respondents sought the following relief against the Appellant:

4.3.1. a declaratory order that the Deed of Sale entered on 3 December 2010 is declared *void ab initio;*

4.3.2. an order to compel the Appellant to repay the amounts paid towards the purchase price in instalments totaling R 530 000.00;

4.3.3. an order that the Appellant must pay the Respondents R 1 000 000.00 in compensation for useful and necessary improvements made to the property in that the Respondents (as Plaintiffs) farmed the land, repaired the land and effected improvements and necessary renovations to the farm.

4.4. The Appellant, as Defendant, not only pleaded to the claims, but also instituted counterclaims against the Respondents. In the counterclaim the Appellant claimed, *inter alia* the following:

4.4.1. eviction of the Respondents from the property and return of possession and occupation of the property with all its fixtures and fittings to the Appellant;

4.4.2. an order that the Respondents sign any document and do all that is necessary to deliver and / or re–cede the right to take water from a water resource in terms of section 21(a) of the National Water Act 36 of 1998 to the Appellant;

[5] As a result of the common cause facts outlined above, there exists no sale agreement in respect of the property since at least 31 October 2011 when same was cancelled by the Appellant. The Respondents are holding over and they remain in unlawful occupation of the property ever since 31 October 2011, but allege a lien exists enabling them to proceed with this occupation.

[6] The action instituted by the Respondents against the Appellant in Gauteng Division, Pretoria, is still pending (for almost six years). It has been set down for trial about three times and was postponed on all occasions. On the other hand the Respondents remain in occupation of the property and continue to benefit from their farming activities on the farm. It is common cause that they do not pay any rental or any form of compensation to the Appellant. The Appellant continues to service his mortgage bond with ABSA Bank in an amount of R 22 000.00 per month in respect of the property.

[7] On 4 May 2016 the Appellant instituted the present application proceedings in the Court *a quo* in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998 ("the PIE Act") for the eviction of the Respondents from the property. The Respondents opposed the application and raised a special plea of *lis alibi pendens* which was upheld by the Court *a quo.* It is against this background that the present appeal is before us.

[8] There are two issues to be decided in this appeal:

8.1. whether the Court *a quo* was correct in upholding the plea of *lis alibi pendens* and thus ordering the stay of the proceedings pending the finalization of the pending action in Gauteng Division, Pretoria.

and

8.2. whether the Respondents have a valid lien on the property justifying their continued occupation until compensated by the Appellant as the owner of the Property.

[9] As to the requirements of the plea of *lis alibi pendens,* the Respondents in the Court *a quo* had the onus to show the following:

9.1. pending litigation;.

9.2. between the same parties;

9.3. based on the same cause of action;

9.4. in respect of the same subject - matter.

Once these requirements have been established a factual presumption arises that the second proceedings are *prima facie* vexatious and the party who instituted the second / new proceedings bears the onus of convincing the Court that the new proceedings are not vexatious. The Court has an overriding discretion to order a stay of the proceedings.

[10] In **Caesarstone Sdot – Yam Ltd v. World of Marble and Granite 2000 CC and Others 2013 (6) SA 499 (SCA)** the issue on appeal was whether the requirements for the plea were met, and, if so, whether there were nonetheless grounds for the SCA to exercise its discretion to refuse a stay, or if the requirements of the plea were not met, whether there was another basis on which to stay the proceedings. The Court held that as for the requirement of the same cause of action, this could be relaxed if the circumstances justify doing so. It would be relaxed in such an instance to require that the central issue be the same in both proceedings. Similarly, the requirement that the relief claimed had to be the same could be relaxed where the circumstances supported doing so.

[11] In the present case the Appellant bears the onus to show that the second proceedings are not vexatious. To do that it had to show and satisfy the Court that, despite the fact that all the factual elements (listed in sub – paragraphs 9.1 to 9.4 above) are present,

the balance of convenience and equity are in favour of the second proceedings to proceed.

See : **Geldenhuys v. Kotze 1964 (2) SA 167 (O)**

It is clear on the authorities that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings because it is *prima facie* vexatious to bring two actions in respect of the same subject - matter. The Court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist.

See in this regard:

Loader v. Dursot Bros (Pty) Ltd 1948 (3) SA 136 (T) AT 138

Geldenhuys v. Kotze supra and

Ntshiqa v. Andreas Supermarket (Pty) Ltd 1997 (1) SA 184 (TK) at 192 A / B - C

[12] The Court's overriding discretion must be guided by whether the balance of convenience and equity is in favour of allowing a case to proceed.

Levenberg AJ in **Nordbak (Pty) Ltd v. Wearcon (Pty) Ltd and Others 2009 (6) SA 106 (W) at 114H – 115A** said the following:

*"The Respondents' Counsel drew my attention to **Geldenhuys v. Kotze 1964 (2) SA 167 (O)** as being the case that indicated the manner in which a Court should exercise its discretion in deciding whether or not to allow an action or application to proceed in the face of a pending action appertaining to the same subject - matter. I am not going to analyse all the factors contained in **Geldenhuys v. Kotze.** Ultimately the Court must be guided by whether the balance of convenience and equity is in favour of allowing the case to proceed.*

*It emerges from **Geldenhuys v. Kotze** that another important factor that should be considered in determining whether or not to allow the second action or application to proceed is whether the Respondents have a proper defence to the action. If the Respondents do not have a bona fide defence, there is very little reason to allow the plea of lis alibi pendens to succeed."*

[13] In the case before us in this appeal I am of the view that both convenience and equity require that the Appellant's application be dealt with and that the defence of *lis alibi pendens* not be acceded to. I say this for the following reasons:

13.1. The Respondents do not have a proper or *bona fide* defence on the merits. They rely on the alleged lien they have on the property but as will be shown later in this judgment such a lien does not exist or could not be established on the papers filed of record. The Respondents have not offered any defence or even a *bona fide* defence to continue their occupation of the property.

13.2. The pending action in the Gauteng Division of the High Court has being dragging on for almost six years with no indication that it will be finalised shortly or at all. The Appellant is being prejudiced in that it does not receive any rental from the Respondents' continued occupation of the property.

13.3. The Appellant continues to pay a monthly amount of R 22 000.00 to ABSA Bank in respect of the mortgage bond over the property whilst the Respondents continue to benefit from the farming activities and without compensating the

Appellant. The equities scream out in favour of the Appellant in this case.

13.4. The facts set out in the Appellant's founding affidavit are in the main not contested and largely of common cause. It is therefore convenient for the Court to dispose of this matter at this stage. There is no reason why the Appellant's final relief should be withheld from it at this stage. A stay of the proceedings will only keep the Appellant out of its rights for longer.

13.5. The determination of the issues between the parties at this stage will relieve the parties as well as the Court of the obligation to hear extensive evidence in a future trial in Pretoria traversing the same subject-matter as was traversed in this application.

13.6. Even in the event of a finding of the Court *a quo* that all the minimum requirements for *lis alibi pendens* were present, the present application should have been found to be vexatious and that the continuation of the present application will cause injustice before the present application could have been stayed.

The Court *a quo* should have considered the aspect of vexatious and found positively that the present application is indeed vexatious **before** deciding whether to stay the proceedings or not. The Court *a quo* failed to do so.

13.7. When no positive finding is made by a Court on the facts that the application is indeed vexatious or frivolous and that the continuation may cause injustice, the application should not be stayed.

See : **Belmont House (Pty) Ltd v. Gore and Another NNO 2011 (6) SA 173 (WCC) at [17] [18] & [19]**

The authors of **Herbstein & Van Winsen, The Civil Practice in the High Court of South Africa, 5th Ed. at 306** explains the Court's inherent jurisdiction to stay proceedings in relation to *lis alibi pendens* as follows:

"The power to do so will be exercised sparingly and only in exceptional cases. This should be done with great caution and only in clear cases. Proceedings will be stayed when they are vexatious or frivolous or when their continuance, on all circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one of the other parties…."

[14] Accordingly, the Court *a quo* should have exercised its discretion and permitted the Appellant to go on with its application for eviction in these proceedings, notwithstanding the overlap between the relief sought in this application against the Respondents and that sought against the Appellant in the Gauteng Division, Pretoria action.

[15] Mr Klopper, Counsel for the Appellant submitted, as a further ground of appeal, that the Court *a quo* erred in finding that all the requirements of a plea of *lis alibi pendens* have been satisfied. Counsel argued that one of the essential requirements for the issue of *lis alibi pendens* to be present and to be considered, namely that the cause of action in the present application and the cause of action in the Appelant's counterclaim in the Gauteng Division action under case number 65785/2011 is the same, is clearly absent, in that the different causa is certainly not the same.

[16] Counsel further argued that the basis or cause of action of the present application is referred to the statute, namely the PIE Act wherein the Appellant sought an order that the Respondents be evicted from where they permanently reside in a dwelling house on

the Appellant's property. The Appellant's counterclaim in the Gauteng Division under case number 65785/2011 is a *rei vindicatio* for possession of the Appellant's commercial farm and the water rights attached thereto. I agree with Counsel that the present application for eviction of the Respondents from the dwelling house is in terms of section 4 of PIE Act and the *rei vindicatio* action in the Gauteng Division where the Appellant sues for the return of possession of the commercial farm and water rights attached thereto, are very distinctive.

[17] The present application focus on the dwelling house and the requirements for the present application is determined by statute, namely the provisions of the PIE Act whereas in comparison the requirements for the *rei vindicatio* is determined by the common law and relates simply to possession of property. The Court *a quo* erred in not considering the different causa, but simply determined incorrectly that the present application and the Appellant's counterclaim in the Gauteng Division involves the same property and therefore found incorrectly that the defence of *lis alibi pendens* must be present.

[18] The Court *a quo,* on a correct application of the facts and a correct identification of the different relief requested, should have found that the requirements of *lis alibi pendens* were not all present and should have dismissed the Respondents' point *in limmine* of *lis alibi pendens.* On this leg alone, the appeal stands to be upheld.

[19] I proceed to deal with the issue as to whether the Respondents have a valid lien justifying them to remain in occupation of the property.

[20] The Respondents, in their action instituted in the High Court, Gauteng Division, Pretoria, claim compensation in the amount of R 1 000 000.00. The claim is based on alleged enrichment of the Appellant as the owner of the property for alleged useful and necessary improvements made to the immovable property. The Respondents allege that this claim creates a lien which is a defence against being evicted from the immovable property of the Appellant. The existence of the lien is vehemently disputed by the Appellant.

[21] In their particulars of claim in the action instituted in the Gauteng Division, Pretoria the Respondents claim that the improvements to the immovable property is based on the fact that they

a. Farmed the land

b. Repaired the land; and

c. Effected improvements and necessary renovations to the farm.

In their answering affidavit in the present application the Respondents' claim for the alleged improvements to the property is now for

a. Fertilizer, Chemicals, Irrigation Costs, Fittings and Pipes, land clearing and land development, fuel and water : R 932 991.00

b. Labour and small tools Costs : R 953 191.00

c. Nursery Costs : R 30 133.00

d. Vehicle Costs : R 350 386.00

The total amount for the alleged lien is R 2 226 701.00. This is more than double the amount of R 1 000 000 claimed in the pending action in Gauteng Division, Pretoria.

[22] The new version regarding the alleged expenses is also vehemently disputed. None of the alleged expenses referred to in the “new” version constitute improvements to the immovable property. All the aspects listed by the Respondents in an attempt to support the argument of the existence of an enrichment lien are simply production expenses incurred by the Respondents who farmed on the Appellant’s property. This much was conceded by Mr Booysen, Counsel for the respondents.

[23] For a valid enrichment lien to exist, the minimum requirement is that the amounts must have been used for improvements to the immovable property. The party that claim that such improvements were effected is burdened with the onus to prove that the owner was indeed unjustifiably enriched. In my view the Respondents dismally failed in this regard.

See: **Brooklyn House Furnishers (Pty) Ltd v. Knoetze and Sons 1970 (3) SA 264 (A) AT 270 H and**

Wynland Construction (Pty) Ltd v. Ashley – Smith en Andere 1985 (3) SA 789 (SCA) at 812 h – 813 B.

[24] In *casu* the Respondents must prove the existence of the lien to support their claim that the Appellant has been enriched. As indicated above there is no evidence that the Appellant was enriched in any amount at all. It is trite law that if a party fails to prove unjust enrichment no lien can follow.

See: **Buzzard Electrical (Pty) Ltd v. 158 Jan Smuts Avenue Investments (Pty) Ltd 1996 (4) SA 19 (A).**

I accordingly make a finding that no enrichment claim exists in favour of the Respondents and no enrichment lien exists or could ever came into existence in favour of the Respondents.

[25] The Appellant has, notwithstanding there existing no basis for the alleged lien, provided security in the amount of R 1 000 000.00 for any claim based on enrichment by the Respondents. Despite the security furnished, the Respondents failed to comment thereon but persisted in their unlawful occupation of the property.

It is an established principle that the owner of the property subject to a right of retention (lien) or alleged but disputed right of retention may defeat the lien by furnishing adequate security. The amount of security is in the discretion of the Court.

See: **Sandton Square Finance (Pty) Ltd and Other v. Vigiloti and Another 1997 (1) SA 826 (WLD).**

[26] In the event I am wrong in my finding that a lien does not exist in favour of the Respondents in this matter, I am of the view that the Appellant has provided adequate security to substitute the alleged but disputed lien. Consequently the alleged lien must be uplifted and is hereby uplifted. This then entails that the Respondents must be evicted from the property.

[27] The dispute between the Appellant and the Respondents in this matter arise from the written sale agreement entered into on 3 December 2010. There are certain terms of the written agreement that prohibit the respondents as purchasers from claiming compensation from the Appellant as the seller in respect of whatever expenses the Respondents might have incurred in connection with the property.

The following are such provisions in the agreement:

27.1. Clause 20.1 thereof stipulates that the Respondents, as purchasers of the property, must at their own expense and without any recourse to the Appellant as a seller, maintain in good order and condition the immovable farm property.

27.2. Clause 20.2 stipulates that the Respondents must do all necessary repairs and maintenance work related to the property and if they fail to do so, the Appellant may have it done and reclaim the costs thereof from the Respondents.

27.3. Clause 20.3 stipulates that the Respondents as purchasers of the property, shall make no alterations or improvements to the property without written permission of the Appellant as the owner. No such written permission was ever requested by the Respondents and of course no such permission was ever given by the Appellant.

27.4. Clause 20.3 further stipulates that the Respondents shall not be entitled to any compensation from the Appellant as the owner and the seller of the property for any improvements of whatsoever nature that the Respondents may have caused to the property.

[28] The Respondents are accordingly barred by the contractual terms of the agreement from instituting any claim for compensation against the Appellant.

[29] In the result the appeal should succeed and I accordingly grant the following order:

1. The appeal is upheld with costs.

2. The order of the Court a quo is set aside and substituted with the following order:

2.1. The plea of *lis alibi pendens* raised by the Respondents is dismissed with costs, such costs to include the costs reserved on 6 September 2016;

2.2. That the First and Second Respondents presently occupying the premises known as PORTION 5 OF THE FARM LETABA DRIFT, REGISTRATION DIVISION LT, LIMPOPO PROVINCES in extent of 93,5949 hectares held by Deed of Transfer T72731/2005 and also known as Letaba Drift, Georges Valley 21G, Georges Valley Road, district of Tzaneen, Limpopo (hereinafter called "the property") is declared to be in unlawful possession of the property, declared to have no legal right to occupy the property and that they currently occupy the property unlawfully, and further that the amount of R 1 000 000.00 security provided by the Appellant is sufficient to suspend the alleged lien claimed by the First and Second Respondents over the property;

2.3. That the First and Second Respondents presently occupying the property, vacate the property within a period of 30 days from the date of this order;

2.4. That in the event of the First and Second Respondents presently occupying the property fail to vacate the property within 30 days from the date of this order, the Sheriff of this Court is authorised to, with the help and assistance of the South African Police Services if required, carry out the eviction of the First and Second Respondents presently occupying the property, who fail to voluntary vacate the property within 30 days from the date of this order.

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

I agree

A M L PHATUDI
JUDGE OF HIGH COURT, LIMPOPO DIVISION, POLOKWANE

I agree

M F KGANYAGO
JUDGE OF HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	**:**	**28 April 2017**
For Appellant	**:**	**Adv. J C KLOPPER**
Instructed by	**:**	**DMB Attorneys** **c/o Corrie Nel & Co**
For Respondents	**:**	**Adv. P V Z Booysen**
Instructed by	**:**	**Coetzer Attorneys** **c/o Du Toit Swanepoel Steyn & Spruyt Attorneys**