



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 no: 4343/2021

In the matter between:

INGEROP SOUTH AFRICA (PTY) LTD

Applicant

and

BLOEM WATER

First Respondent

THE MINISTER OF WATER AND SANITATION

Second Respondent

Neutral Citation: Ingerop South Africa (Pty) Ltd v Bloem Water & 1 Other
(4343/2021)

Coram: Van Zyl, J

Heard: 12 September 2024

Delivered: 12 March 2025

Summary:

Application for payment of debt based on acknowledgement of debt. Alleged unlawful contract. Earlier review application which deals with the same dispute between the same parties removed from the roll due to absence of Court's jurisdiction not a final outcome and review remains pending where there is an application in terms of section 27(1)(a) of the Superior Courts Act, 10 of 2013. Point *in limine* of *lis pendens* upheld. Application is stayed pending the final adjudication of the review application.

ORDER

1. The point *in limine* of *lis pendens* is upheld and the application is stayed pending the final adjudication of the review application issued under case number 5403/2022.
2. The costs of the application stand over for later adjudication.

JUDGMENT

Van Zyl, J

[1] The applicant approached Court by means of application proceedings ('the application') in which the following relief as set out in the Notice of Motion is being sought:

- '1. Judgment be granted against the First Respondent for payment:
 - 1.1 in the amount of R35,102,773.17 (incl VAT); and
 - 1.2 interest on the aforesaid amount at the rate of 10,5% per annum *a tempore morae*;
2. The First Respondent be ordered and directed to pay the costs of this application on the scale as between attorney and own client;
3. Further, other and/or alternative relief.'

Background:

[2] I do not intend to repeat a complete summary of the background facts as set out in the affidavits of the respective parties. I will only refer to the main aspects relevant to the application.

[3] The applicant ('Ingerop') issued the application on 20 September 2021 and it is being opposed by the first respondent ('Bloem Water') The second respondent ('the Minister') filed a Notice to Abide on 22 November 2022.

[4] The application was instituted against Sedibeng Water, a water board which was established in terms of section 28 of the Water Services Act, 108 of 1997. On 26 July 2022 the Minister disestablished Sedibeng Water and transferred the staff, assets and liabilities of Sedibeng Water to Magalies Water and Bloem Water. On 1 August 2022 Bloem water took over the rights and obligations of Sedibeng Water, part of which include the Vaal Gamagara Water Supply Scheme ('the project').

[5] The application emanates from a contract concluded between Sedibeng Water and Ingerop on 7 April 2017 in terms of which Ingerop was appointed to render certain consulting engineering and project management services for and on behalf of Sedibeng Water in relation to the project. Ingerop avers that Sedibeng Water (now Bloem Water) breached the terms of the contract and is owing Ingerop the amount of R35 102 773.17 (including VAT), together with interest thereon.

[6] Bloem Water is opposing the application on the basis that the tender process followed by Sedibeng Water which resulted in the appointment of Ingerop was not in compliance with section 217 of the Constitution of the Republic of South Africa, 1996, read together with the Public Finance Management Act, 1 of 1999, the Preferential Procurement Policy Framework Act, 5 of 2000 and the Supply Chain Management Policy of Sedibeng Water. It is consequently the case of Bloem Water that the decision of Sedibeng Water to have appointed Ingerop could not have been arrived at through a fair, lawful and transparent process. It needs to be mentioned that Bloem Water filed its answering affidavit to the application only on 29 August 2024.

[7] Bloem Water is also opposing the application on the basis of a '*legality self-review*' ('the review') to set aside the decision of Sedibeng water to have appointed Ingerop to attend to the project and to have the contract referred to above, set aside on the same basis as the opposition to the application. The said review was instituted on 31 October 2022 under case number 5403/2022. I will return to the review.

[8] On 30 December 2021 Sedibeng Water instituted action proceedings against Ingerop for the payment of R65 894 027.16 for alleged unjustified payments made to it emanating from the aforesaid contract concluded between Sedibeng Water and

Ingerop. The action is being defended by Ingerop and at the date of the hearing of the application, the action proceedings were still pending.

The review application:

[9] In terms of the review application Bloem Water is seeking/sought, *inter alia*, the following relief:

- '1. The decision and conduct of the erstwhile water board, Sedibeng Water, in purportedly appointing *alternatively* purportedly extending the appointment of the first respondent for the provision of project management services . . . be reviewed and set aside;
2. Declaring that the decision and conduct of the erstwhile water board, Sedibeng Water, in purportedly appointing *alternatively* purportedly extending the appointment of the first respondent for the provision of project management services . . . beyond 14 November 2019, is invalid, unlawful and unconstitutional;
3. Declaring the letter of Sedibeng Water's erstwhile water board acting chief executive, dated 25 August 2021, is invalid, null and void *ab initio*;

[10] On 5 February 2024 Musi, JP made the following order in the application:

'The matter is kept in abeyance pending the outcome of the Rule 53 Review in case 5403/2022.'

[11] Bloem Water dealt in its answering affidavit filed in the application with the review and its further course and the alleged consequences thereof, as follows:

- '74. The review application is duly opposed by the Applicant and is still pending.
75. On 22 April 2024, the First Respondent instituted an interlocutory application for leave to file a supplementary affidavit ("**application for leave**"). This application was duly opposed by the Applicant.

76. The review application was subsequently set down for hearing on 29 and 30 July 2024.
77. On 29 July 2024, the Court sought to resolve preliminary issues prior to it considering the review application. The Court heard the application for leave, as well as the Applicant's point in limine regarding the Court's jurisdiction to hear the matter.
78. The Court, pursuant to a mistake common to the parties on the manner in which proceedings would proceed, heard the application for leave. The Court then handed down an order for the dismissal of the said application for leave.
79. Thereafter, the Court considered the Applicant's point in limine regarding the Court's jurisdiction.
80. Having considered argument from the parties, the Court found that it did not have jurisdiction to entertain the matter. To this end, the Court's finding that it had no jurisdiction rendered the Court's earlier order to dismiss the application for leave is a mistake, alternatively void. A copy of the Court's Order is attached hereto as annexure "AA14".
81. In order to correct the Court's Order, the First Respondent has instituted an application to vary the Court's Order, as well as have the review application duly transferred to the Gauteng Local Division of the High Court of South Africa. I attach hereto a copy of the Notice of Motion of the said application, as annexure "AA15".

FIRST POINT IN LIMINE – LIS PENDENS

83. The review application is still pending and has not been disposed of.
90. Applying these principles to the facts of this case, it is quite apparent that the decision of Sedibeng Water to appoint the Applicant could not have been arrived at through a fair, lawful and transparent process.

91. The determination of the review application has a direct impact on the relief sought by the Applicant before this Honourable Court. As such it would not be convenient, nor equitable in the circumstances for these proceedings to continue whereas the review application is still pending.
92. There is accordingly litigation pending between the parties on the same cause of action and in respect of the same subject-matter.
93. Wherefore the First Respondent prays that the Applicant's present application be stayed pending the final determination of the review application, as well as an order for the Applicant to pay the First Respondent's costs.'

[12] Mr Makgato, assisted by Mr Qithi, appearing on behalf of Bloem Water, submitted that the Order in respect of the lack of jurisdiction in respect of the review and its subsequent removal from the roll, does not constitute an '*outcome*' of the review as stated in the Order of Musi, JP. The finding in respect of the lack of jurisdiction merely delays the outcome of the review and is not a finding on the merits thereof; similar to a special plea which is a dilatory plea. '*Outcome*' is to be considered objectively to mean after the final adjudication on the merits of the review, including a possible appeal process.

[13] Mr Troskie, appearing on behalf of Ingerop, submitted that the finding of lack of jurisdiction is not similar to a dilatory plea, since a finding of lack of jurisdiction has the result that the review constitutes a nullity. The only further Order which can still be made in relation to the review, is one of a procedural nature. He therefore submitted that the finding in relation to a lack of jurisdiction and the removal of the review from the roll, constituted the '*outcome*' of the review as referred to in the Order of Musi, JP.

[14] Section 27(1) of the Superior Courts Act, 10 of 2013 ('the Act'), reads as follows;

'(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings—

(a) should have been instituted in another Division or at another seat of that Division; or

- (b) would be more conveniently or more appropriately heard or determined—
 - (i) at another seat of that Division; or
 - (ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.'

[15] DE van Loggerenberg, *Erasmus: Superior Court Practice*, at OS, 2023, D-248 & RS 4, 2024 D-249, contains the following insightful discussion on section 27(1)(a) of the Act, with reference to applicable authority. In order to read it in perspective, I deem it necessary to quote it quite extensively [footnotes omitted]:

'**General.** Section 9 of the now repealed Supreme Court Act 59 of 1959 provided for the removal of civil proceedings from one High Court to another upon application by any party to such proceedings if such proceedings could be more conveniently or fitly heard or determined by the other court. Section 3 of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001, which came into operation on 5 December 2001, and was repealed by s 55(1)(a) of the present Act, contained a similar provision but added another ground for removal, viz that the proceedings should have been instituted in another High Court. The reasons for the overlapping of the provisions of s 9 of the Supreme Court Act 59 of 1959 and s 3 of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001 were unclear.

In *Ngqula v South African Airways (Pty) Ltd* the Supreme Court of Appeal held that as a removal was permitted by the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001, it might follow that a party deprived of its right to object to the court's jurisdiction in consequence of the case having been transferred to a court having jurisdiction, could not complain of either the loss of its plea to the jurisdiction or the loss of any advantage that would otherwise flow from that plea being upheld, such as the acquisition of a defence of prescription if the plaintiff instituted action afresh. The Supreme Court of Appeal held that so viewed, the legislation provided a means for overcoming challenges to the jurisdiction of the different High Courts by treating such challenges as procedural in character, but that the possibility that, for purposes of prescription, the institution of proceedings in a court not possessing jurisdiction might be regarded as ineffective to interrupt prescription, could not be ruled out. The Supreme Court of Appeal held that in such a case the transfer might properly be treated as if it were the commencement of a fresh action constituting an effective interruption.

In a long line of cases decided under s 9(1) of the now repealed Supreme Court Act 59 of 1959 and the similarly worded predecessors to that section in earlier legislation, it was held that a court that had no jurisdiction to decide a particular case, also had no jurisdiction to deal with that case by transferring it to another court.

In *Road Accident Fund v Rampukar*; *Road Accident Fund v Gumede* the Supreme Court of Appeal held that s 3(1)(a) of the (now repealed) Interim Rationalisation of High Courts Act 41 of 2001 was intended to alleviate the predicament of the litigant who mistakenly (and regardless of the reason for the mistake) instituted civil proceedings in the incorrect High Court by granting that High Court the discretion to come to the aid of the litigant and order the removal of those proceedings to the correct High Court. The court held that s 3(1)(a) did not bestow the transferring court with jurisdiction to entertain and decide the main dispute; all it did was to afford the transferring court the limited jurisdiction to transfer the matter to the court with proper jurisdiction under s 19(1) of the (now repealed) Supreme Court Act 59 of 1959 to determine the disputes between the parties.' [My emphasis]

[16] From the aforesaid discussion it is in my view evident that an Order that a particular Division of the High Court does not have jurisdiction to adjudicate a matter and there is an application pending for the matter to be removed to another Division which does have jurisdiction, such matter cannot be considered to have been disposed of. The matter remains pending in the first Division pending the adjudication of the application in terms of section 27(1)(a).

[17] Therefore, in my view, the Order in relation to the lack of jurisdiction and the subsequent removal from the roll did not constitute the "outcome" of the review as referred to in the order of Musi, JP. The said Order of Musi, JP is therefore still valid and in force. The application is consequently, already for this reason, to be stayed pending the final adjudication of the review application issued under case number 5403/2022.

First point *in limine* in the application - *Lis pendens*:

[18] Mr Makgato referred to the judgment of *Wingprop (Pty) Ltd V Bahlekazi and Others* (28781/2021) [2023] ZAGPJHC 526 (19 May 2023), para 12 where the Court stated as follows in respect of *lis pendens*:

'*Lis alibi pendens* is a dilatory defence in which a respondent seeks a stay of proceedings on the basis that there is pending prior litigation between the same parties, based on the same cause of action, in respect of the same subject matter. The party raising this defence bears the onus of proving these requirements. Moreover, a court cannot grant a stay to a respondent who has not pleaded *lis alibi pendens*.'

[19] The doctrine of *lis pendens* was explained in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* (741/12) [2013] ZASCA 129; 2013 (6) SA 499 (SCA); [2013] 4 All SA 509 (SCA) (26 September 2013), paras 2 – 3 as follows:

[2] As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.

[3] The plea bears an affinity to the plea of *res judicata*, which is directed at achieving the same policy goals. Their close relationship is evident from the following passage from Voet 44.2.7:

'Exception of *lis pendens* also requires same persons, thing and cause. - The exception that a suit is already pending is quite akin to the exception of *res judicata*, inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of *res judicata* in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.'

[20] The issue regarding the legality of the appointment of Ingerop in respect of the project or the extension of its appointment and hence the legality of the contract, already forms the subject matter in dispute between the same parties in the review. It must be for the same reason that the attorney of Ingerop was of the view that the application and Sedibeng's (Bloem Water's) action proceedings could and should not substantively dealt with before the hearing of the review. This was expressly stated by the attorney of Ingerop in paragraph 2 of the letter dated 12 January 2024, addressed to the attorneys of Bloem Water, attached to the answering affidavit as annexure 'AA20'. The Order by Musi, JP followed subsequent hereto.

[21] Although the application was filed before the review, the practical fact is that the answering affidavit of Bloem Water has only been filed after the hearing of the review and the review, therefore, served before Court before the application. It is consequently not correct, as stated in the replying affidavit of Ingerop, that *'it was the issues raised in the review application that could have been subject to being dismissed on the basis of lis pendens solely because the review came to exist after this application'*.

[22] Although Ingerop complains about the late filing of the answering affidavit of Bloem Water, Ingerop did not and is not seeking any relief from Court in relation thereto.

[21] The following was stated at paragraph 15 of the replying affidavit of Ingerop and also submitted on its behalf:

'Thirdly, and in any event, the issues which were dealt with in the review stand in stark comparison to the issues to be determined in this application. The review concerned inter alia the alleged unlawful award of a contract to the Applicant. This application concerns only the First Respondent's failure to comply with two acknowledgements of debt it gave. The issues are not the same.'

[23] However, at paragraph 106.2 of the answering affidavit of Bloem Water, Bloem Water specifically stated as follows in response to Ingerop's reliance on the acknowledgements of debt:

'The purported admission of debt and undertakings made by officials of Sedibeng Water, upon which the Applicant seeks to base its claim, are the subject of the review application.'

[24] Furthermore, Mr Troskie is relying on *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), as confirmed by the Constitutional Court in *Mamadi v Premier, Limpopo and Others* 2024 (1) SA 1 (CC). In the last-mentioned judgement the Court confirmed at paragraph 32 as follows:

'Administrative decisions, until set aside by a court, exist in fact and have legal consequences.'

[25] In this regard the following is stated at paragraph 21.6 of the replying affidavit of Ingerop:

'I am furthermore informed that, even if it was to be found that the award and extension of the contract were invalid due to some administrative shortcoming, until such time as it had been set aside by a Court of competent jurisdiction, the award and extension of the contract existed in fact and it had legal consequences.'

[26] The aforesaid is exactly why the review is to be finally adjudicated upon before the application. Otherwise, the relief sought and the findings made in the application will be final in effect, whilst the legality of the appointment or extension of appointment of Ingerop already forms the subject matter of the review. It may result in a situation where two different Courts will pronounce on the same issue, potentially reaching different conclusions.

[27] In my view the point *in limine* of *lis pendens* is to be upheld and the application is to be stayed pending the final adjudication of the review application issued under case number 5403/2022.

Other issues raised in the application:

[28] Considering my aforesaid findings, I deem it unnecessary to deal with the further issues raised in the application.

Costs:

[29] In my view the final adjudication of the review may have a substantive impact on the application and its outcome. The Judge who will eventually be presiding over the application after the finalisation of the review, will be in a better position to adjudicate the issue of costs than what I am.

[30] I consequently consider it fair to both parties that the costs of the application stand over for later adjudication.

Order:

[31] The following order is made:

1. The point *in limine* of *lis pendens* is upheld and the application is stayed pending the final adjudication of the review application issued under case number 5403/2022.
2. The costs of the application stand over for later adjudication.


 C. VAN ZYL, J

Appearances

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