

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Appeal case no. A316/2023

A quo case number: 2021-24785

Date of hearing: 6 October 2025

Date delivered: 14 April 2026

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) ~~REVISED~~

14/4/26

DATE

SIGNATURE

In the application between:

TJAART NICOLAAS BRITS

Appellant

and

HESTER PETRONELLA KLOPPER

First Respondent

GERT ROELF JACOBUS BRITS

Second Respondent

JUDGMENT

**SWANEPOEL J: (MNGQIBISA-THUSI J AND NYATHI J
CONCURRING)**

[1] The appellant sought judgment in the court a quo against the first respondent for the sum of R 1 833 334.34, which the appellant had paid to the first respondent as part-payment of the purchase price of an immovable property, namely, Portion 3 of the Farm Blesbokfontein, Registration Division I.R., The Province of Gauteng (“the property”).

[2] On 5 May 2017 the parties entered into a written instalment sale agreement in terms of which the appellant and the second respondent purchased the property from the first respondent. The appellant duly paid the sum of R 1 833 334.34 to the first respondent in consideration of the sale. It is common cause that the property is agricultural land within the meaning of the Subdivision of Agricultural Land Act, 70 of 1970 (“the Subdivision Act”).

[3] It is also now also common cause that the agreement was void *ab initio* in terms of the Alienation of Land Act, 68 of 1981 (“the Alienation Act”), as agricultural land may not be sold by way of an instalment sale agreement. The agreement is also void *ab initio* for non-compliance with section 3 (b) of the Subdivision Act, 70 of 1970.

[4] On 1 July 2017 the appellant took possession of the property. During October 2020 the appellant was advised that the agreement was void for non-compliance with the Alienation Act. The appellant’s attorney demanded repayment of the purchase price and interest on 20 October

2020, but was rebuffed. In a letter dated 18 March 2021 the first respondent accepted that the agreement was void and that restitution should be made. The first respondent, however, refused to return the purchase price on the grounds that the appellant had had use of the property for some four years, and that the appellant had allegedly been unduly enriched by its occupation of the property. In addition to the enrichment claim, the first respondent professed to have a damages claim, as a result of the appellant allegedly not maintaining the property. The result was that the first respondent refused to refund the monies.

[5] The appellant has also instituted action in the Magistrate's Court, claiming the sum of R 150 000, apparently as an enrichment claim for improvements allegedly made to the property.

[6] It is trite that in the event of an agreement being void, the parties have to restore possession to the other party of that which they have taken pursuant to the agreement. In these papers the first respondent accepted that restitution would be required. However, the first respondent took the following *in limine* points:

[6.1] That the matter is *lis alibi pendens*, due to the appellant issuing an action in the Magistrate's Court for payment resulting from the alleged unjust enrichment referred to above;

[6.2] That there is not a complete cause of action in that the appellant and the second respondent had not tendered the return of possession of the farm;

[6.3] That there is an irresolvable dispute of fact in that the parties disagree whether the agreement is void in terms of the Alienation Act, or the Subdivision Act.

[7] The Court a quo upheld the plea of *lis alibi pendens*, and ordered each party to pay its own costs. It is unclear on what basis the point *in limine* was upheld without the application being dismissed. Save for the points *in limine*, the first respondent has no defence to the application. The second and third points *in limine* can be quickly disposed of. As far as the incomplete cause of action is concerned, possession of the property has been restored to the first respondent. As for the second point *in limine*, it is, in my view, immaterial whether the agreement is void for non-compliance with either the Alienation or the Subdivision Act. The fact is that the parties agree that the agreement is void, with the result that there has to be restitution. There is no true dispute of fact.

[8] The first respondent argued that the claim has been brought under section 28 of the Alienation Act, and that it prescribes what relief may be sought in cases where an agreement is void for non-compliance with the Alienation Act. The first respondent contends that the Alienation Act requires a plaintiff to bring suit for all the relief that it seeks in one action.

[9] I do not understand section 28 to say so. Section 28 provides for the relief that a party seeking restitution pursuant to a void agreement may seek. It does not state either expressly, nor implicitly, that the relief must be sought in one action or application. It may be that a plaintiff might

be hit with the once and for all rule, if it were to seek payment in different actions, on the same cause of action. That is, however, not what the appellant has sought to do.

[10] The third point *in limine* requires more attention. The defence of *lis alibi pendens* is akin to the defence of *res judicata*. In respect of both defences, the elements of the defence are that the parties and the issue are the same¹. The rationale behind the defence is that it is undesirable to allow two different courts to decide the same issue independent of one another, either where a dispute is still pending (*lis alibi pendens*), or where the dispute has already been determined (*res judicata*).²

[11] On this issue the Court a quo held as follows:

“In principle, a matter is pending before another court involving the same parties on the same set of facts. Though in casu, it is to declare the agreement void ab initio resulting in the repayment of amounts paid and interest, and the other in the magistrates’ court is a damages claim. These claims emanate from the same set of facts and the agreement.”

[12] For the defence of *lis alibi pendens* to succeed, the first respondent has to demonstrate three elements:

[12.1] The litigation must be between the same parties;

[12.2] The cause of action must be the same;

[12.3] The same relief is sought in both matters.

[13] What is regarded as the same cause of action is answered in *Caesarstone (supra)*³:

"[20] Although not referred to by him, *Boshoff v Union Government* [1932 TPD 345] provided authority for Milne J's view in regard to the application of *res judicata*. Boshoff claimed damages from the government arising from the allegedly wrongful cancellation of a lease and his ejectment from a farm owned by the defendant. The plea of *res judicata* was based on proceedings for Boshoff's ejectment, founded on the lawful termination of the lease. After considering the authorities on what is meant by the 'same cause of action' Greenberg J concluded that this requirement would be satisfied in the circumstances described in the following passage from Spencer-Bower's *Res Judicata*⁴:

'Where the decision setup as a *res judicata* involves a judicial determination of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision is deemed to constitute an integral part of it as effectively as if it had been made so in express terms.'

[14] In *Smith v Porritt and Others*⁵ the enquiry was framed as follows:

"Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the exception *res judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements

that the relief claimed and the cause of action must be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed.”

[15] The parties in the two matters are the same. Are the issues for determination the same? In this application it is common cause that the agreement is void ab initio, an aspect that would have been at the heart of both cases had the issue not become agreed. In such a case, the matter would have been *lis pendens*. However, that issue is no longer in dispute. The relief now sought in this case is simple restitution, following from the fact that the agreement is void. In the Magistrate’s Court the appellant is seeking compensation for unjust enrichment on the basis that he allegedly made improvements to the property. In the Magistrate’s Court the appellant would have to prove that improvements were made, that he was impoverished by the improvements, and the extent to which the first respondent was enriched by the improvements.

[16] None of these issues arise in this case., nor is the same relief sought in the two matters. There is, therefore, no danger that this court might be deciding an issue that is also before another court for determination. The Court a quo did not, in my respectful view, ask the correct question. The question is not whether the same facts underpin the two matters, but whether an issue that is required to be determined in both cases, between the same parties, is the same.

[17] In the premises the third point in limine should also have been dismissed.

[18] As far as interest is concerned, it is my view that section 28 of the Alienation of Land Act is not applicable to this transaction. Consequently interest must run from date of demand. There are no special circumstances to justify the punitive costs sought by the appellant, despite the parties' vehement (and fruitless) attacks on one another.

[19] Therefore, I propose the following order:

[19.1] The appeal is upheld.

[19.2] The order of the Court a quo is amended to read as follows:

- "1. The sale of land agreement between the appellant and the respondents is declared to be invalid.
2. The first respondent shall pay the appellant R 1 833 334.34.
3. The first respondent shall pay interest at the applicable interest rate as it may be from time to time, from date of demand, being 20 October 2020, to date of payment;
4. The first respondent shall pay the costs of the application on Scale B."

[19.3] The first respondent shall pay the costs of the appeal on Scale B.


C SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:


N.P. MNGQIBISA-THUSI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:


NYATHI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Counsel for the appellant:

Adv. L Swart
Adv. W Venter

Instructed by:

Taute Bouwer & Cilliers Inc.

Counsel for the first respondent:

Adv. P Greyling

Instructed by:

Odendaal Attorneys

Heard on:

8 October 2025

Judgment on:

14
April 2026

undoubtedly cognate pleas and it follows that the elements required to establish the one are the same as the elements required to establish the other.”

³ At para [20]

⁴ At 350 to 351

⁵ 2008 (6) SA 303 (SCA) at para 10