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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: CA62/2022

In the matter between:

D[....] B[....]1

Appellant

And

N[....] B[....]2

Respondent

JUDGMENT

BESHE J:

[1] The appellant, who was the plaintiff in the court *a quo*, sued the respondent out of the East London Magistrates Court for the return of a motor vehicle (*rei vindicatio*). In response thereto, the respondent raised a special plea of *lis alibi pendens* which was upheld by the court *a quo*. This is an appeal against that decision which is not opposed.

[2] The following facts were common cause as would appear from the pleadings:

The parties have been married to each other out of community of property but subject to the accrual system since 27 March 2010. On 14 April 2010 appellant

purchased the motor vehicle that was the subject of the proceedings in the court *a quo*, a Ford Fiesta with registration numbers and letters HNJ 932 EC.

Respondent has been using the said motor vehicle since 2010.

During 2020, respondent instituted divorce proceedings against the appellant which proceedings are still pending before the Regional Court, East London.

Respondent took the motor vehicle with her upon moving out of the parties' marital home.

The motor vehicle is registered under appellant's name.

[3] Respondent, (as defendant) pleaded that the appellant purchased the motor vehicle as a gift for her. This is denied by the appellant. Respondent also raised a special plea of *lis alibi pendens* on the basis that the motor vehicle in question forms part of the accrual of the estates of the parties that is still to be determined during the pending divorce action. In other words, the extent of the accrual, if any, in respect of the parties' estates is still to be determined by the divorce court. The Magistrate held that the respondent had met the requirements for a successful *les alibi pendens* defence and effectively upheld the special plea.

[4] The appeal is premised on the ground that the court *a quo* erred in effectively ruling that the ownership of the motor vehicle in question is a matter that is serving before the divorce court. Further, it being submitted that the cause of action in the divorce action is entirely different from the dispute as to the ownership of the vehicle concerned. Consequently, the requirements of the special plea of *lis alibi pendens* were not met by the respondent.

[5] The Magistrate in the court *a quo* did not, in so many words pronounce herself on whether the requirement that the cause of action must be the same in both proceedings has been met. Nor did she express why she was of the view that all the requirements for a *lis pendens* plea to be successful have been met, including one

relating to the same cause of action. The Magistrate expressed the view that the motor vehicle in question forms part of the accrual system, and that the divorce court is better placed when calculating the accrual of the parties' estates to determine which party owns the vehicle. In doing so, that court will consider the parties' respective claims regarding ownership of the motor vehicle.

[6] It is trite that it is inappropriate for a dispute (*lis*) between the parties to be litigated in two different courts. Put differently, if there is pending litigation between the parties in respect of the same subject matter in one jurisdiction, the defendant / respondent may raise the plea of *lis pendens* in the other jurisdiction where the matter is instituted, entitling him to a stay of the latter proceedings.

[7] For a plea of *lis alibi pendens* to be successful, the following requirements must be met:

- (i) *There must be pending litigation;*
- (ii) *between the same parties;*
- (iii) *based on the same cause of action;*
- (iv) *in respect of the same subject matter.*¹

It is common cause that the pending divorce action is between the same parties as in the proceedings under consideration.

[8] Appellant asserts that the proceedings before the court *a quo* were not in connection with a divorce action but were concerned with ownership of a motor vehicle and not the division of the parties' estates. It may well be so, but the appellant in his heads of argument seems to acknowledge that should the motor vehicle in dispute form part of the accrual system, the respondent will only have a claim in respect thereof when the marriage between the parties is dissolved. Appellant acknowledges that the motor vehicle forms part of the assets that will be considered for purposes of calculating accrual, but that the divorce court will not likely determine who the owner is and whether it should be returned to the

¹ Keyter v Van Der Meulen 2014 (5) SA 215 ECG at 217 paragraph [10].

appellant.² This talks to the requirement that the cause of action must be the same in both actions. In ***Hassan and Another v Berrange N.O.***³ the *lis pendens* plea was described as follows: “Fundamental to the plea of *lis pendens* is the requirement that the same plaintiff has instituted action against the defendant for the same thing arising out of the same action.” In ***Cook and Others v Muller***,⁴ it was stated that it is not necessary in order to raise the plea, that the person raising it should have been the defendant in the other proceedings. In ***Caesarstone Sdot-Yam v World of Marble and Granite***,⁵ the court warned against a strict application of three requirements of the special plea as this would generate a negative response. The court went on to say:⁶

“[21] On this basis the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case. *Boshoff* was followed in a number of cases in provincial courts, but was regarded as controversial because it was thought to import in South African law the English principles of issue estoppel. It is necessary to explore that controversy because this court laid it to rest in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk*. There Botha JA held that *Boshoff* was based on the principles of our law. He said that its ratio that the strict requirements for a plea of res judicata of the same cause of action and that the same thing be claimed, must not be understood in a literal sense and as immutable rules. There is room for their adaptation and extension based on the underlying requirement that the same thing is in issue as well as the reason for the existence of the plea.”

[9] In light of what was stated in the ***Caesarstone*** matter hereinabove, can it be said that the Magistrate *a quo* misdirected herself in making the finding she made in this regard, namely that the requirements of a *lis pendens* plea have been met?

² Paragraph 43 of appellant’s heads of argument.

³ 2012 (6) SA 329 SCA at paragraph 19 F.

⁴ 1973 (2) SA 240 SCA at 245 E-F.

⁵ 2013 (6) SA 499 SCA at 507 [19].

⁶ *Caesarstone supra* at paragraph [21].

[10] It is also trite that the two actions need not be identical in form. The requirement of “the same cause of action” is satisfied if the other case involves the determination of some point of law which will be *res judicata* in the action sought to be stayed or objected to.⁷

[11] A court has a discretion whether or not to order stay of proceedings on the basis of the plea of *lis pendens*. The Magistrate in the court *a quo* exercised her discretion in favour of the respondent by upholding the special plea.

[12] The court in ***Loader v Dursot Bros (Pty) Ltd***⁸ with respect to the discretion to stay proceedings or hear the matter despite earlier pending proceedings had this to say:

“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”

[13] This leads to the question whether interference with the court *a quo*’s exercise of discretion in this regard is warranted or justified. In ***Trencon Construction v Industrial Development Corporation***⁹ the Constitutional Court had this to say:

“[87] This Court has, on many occasions, accepted and applied the principles enunciated in *Knox* and *Media Workers Association*. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without

⁷ Erasmus Superior Court Practice 2nd Edition, Van Loggerenberg, Volume 2 D1-280.

⁸ 1948 (3) SA 136 (T) at 138.

⁹ 2015 (5) SA 245 at 269-70 paragraphs [87] and [88].

first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.

[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—

‘judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.’

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.”

[14] In my view, the issue of ownership of the motor vehicle will still be a live one during the divorce proceedings, when the marriage is ultimately dissolved. This is in view of the fact that respondent also claims ownership of the vehicle on the basis that it was given to her by the appellant as a gift. Should this be the case, the provisions of *Section 5 (2) of the Matrimonial Property Act*¹⁰ apply, namely that: In the determination of the accrual of the estate of a spouse a donation between spouses, other than a donation *mortis causa*, is not taken into account either as part of the estate of the donor or a part of the estate of the donee.

[15] In light of what has been said earlier in this judgment and the authorities cited herein, I am unable to say that the Magistrate in the court *a quo* did not exercise the discretion vested in her judicially or that it had been influenced by a misdirection.

[16] Accordingly, the appeal is dismissed with costs.

¹⁰ Act 88 of 1984.

N G BESHE
JUDGE OF THE HIGH COURT
Rugunanan J

I agree.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

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