

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 16/05/2005

Case number: 31225/04

OELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: /NO.

(2) OF INTEREST TO OTHER JUDGES: /NO

In the matter between: (3) REVISED.

GEROTEK TEST FACILITIES

Applicant

and

NEW GENERATION AMMUNITION (PTY) LTD

Respondent

JUDGMENT

Applicant seeks an order that the Respondent is ordered to vacate the business premises at Elandsfontein, Pretoria West which it is leasing from the Applicant within seven days of the order. The Applicant seeks an order that the Respondent pays an amount of R367 576.20 as well as interest thereon at 15.5 % *a tempore morae* and costs on a scale as between attorney and client.

It is common cause that the Respondent entered into a rental agreement with Gerotek Test Facilities (Pty) Ltd on 4 October 1999 with an option to renew the lease annually. This option was exercised by Respondent as provided for in the written agreement.

Gerotek Test Facilities was sold to Armscor. The effective date of the sales agreement was 1 April 2003. Applicant in the present proceedings is Gerotek Test Facilities which is owned by Armscor Business (Pty) Ltd.

The Respondent is claiming *lis alibi pendens*. Applicant instituted an action against the Respondent under case number 124750/2003 in the Magistrate's Court. Applicant's case in the Magistrate's Court is that the contract entered into with Gerotek Test Facilities (Pty) Ltd was not renewed at the end of September 2003 alternatively that it was cancelled on 13 May 2003 by Plaintiff in the action. This cancellation was confirmed in the written notice dated 26 August 2003. Applicant relies on the very same facts for the eviction of the Respondent in the Magistrate's Court. The Magistrate Court's action was postponed on 27 July 2004 and set down for hearing on 17 January 2005.

The proceedings in the Magistrate's Court has not yet been finalised and is presently part heard where the Respondent is under cross examination. The Respondent is contesting the Applicant's *locus standi* both in the Magistrate's Court action as well as in the application before this Court. This Court has to decide whether the plea of *lis pendens* is a valid plea. If it is a valid plea, then the application should be dismissed and the matter be heard in the Magistrate's Court. The simple issues in the Magistrate's Court is the payment of arrear rental for the occupation of the property. This is also claimed in this application and in both matters the eviction of

the Respondent is claimed.

The proceedings in the Magistrate's Court are still pending and evidence has already been led in that matter. The question is now whether this Court should grant an order which would then stop the proceedings in the Magistrate's Court as well. The matter in the Magistrate's Court will be proceeding in September 2005 where it has been set down for two days for hearing. Why did the Applicants not withdraw the matter in the Magistrate's Court but are proceeding with the matter in the High Court whilst the matter in the Magistrate's Court is still pending? The requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of a plea of *res judicata* which in turn are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint. In this matter it is quite clear that the two actions are between the same parties or their successors in title, it concerns the same subject matter and is founded upon the same cause of complaint.

The action and application are between the same two parties, regarding the cancellation of a lease, the eviction from the premises of the Respondent and a claim for arrear rent. In both cases the *locus standi* of the Respondent is an issue.

The question is whether the commencement of this application is vexatious in the

light of the pending matter in the Magistrate's Court. The Court does however have a discretion to decide whether this application should be stayed pending the decision in the Magistrate's Court and whether it should proceed.

In both this application and the action the Magistrate's Court the *locus standi* of the Applicant is in issue. Evidence has already been led in the Magistrate's Court. The issue of *locus standi* can be dealt with much more thoroughly in an action than in an application where the parties are required to lead evidence and can be cross-examined.

Where this matter deals with the eviction of the Respondent from the property as well as a claim for arrear rentals or damages, this court is of the opinion that *lis pendens* can be pleaded as set out above, unless the balance of convenience and equity favours the Applicant. ***Loader v Dursot Bros (pty) Ltd 1948 (3) SA 13***
Roper J said:

" ... *that the balance of convenience and of equity is in favour of allowing the case to proceed.* "

The Court has to take all the facts of the matter into consideration. In ***Geldenhuis v Kotze 1964 (2) SA 167 0 on 168 and 169*** the Court find "*sal deur m.i buitengewone billik- of gerieflikheidsoorweging voorgele moet word.*" In

***Richtersveld Community v Alexor Ltd and Another* 2002 (1) SA 227 on 343** the Court referred to *Friedrich Kling GmbH v Continental Jewellery Manufacturers* 1993 (3) SA 76 C at 87 D - H where two actions were instituted by the same plaintiffs against the same defendants on the same facts. In that case the Plaintiffs undertook to withdraw the prior action and to pay the Defendants' costs therein and then to proceed with the action. That undertaking persuaded the Judge to dismiss the defence of *lis pendens* and to allow the latter action to proceed.

In the present matter there has been no such an undertaking by the Applicant. There has been no indication of what will happen if the matter should proceed. In ***Van As v Appollus en Andere* 1993 (1) SA 606 C** the Court found that convenience and equity should be considered.

Evidence has already been led in the Magistrate's Court and the matter is part heard, the same questions have to be resolved especially regarding the *locus standi* of the Applicant which is a factual issue. This Court is of the opinion that the matter in the Magistrate's Court has to proceed. There can be no reason for the present application to proceed whilst the matter in the Magistrate's Court has gone so far. It is not just and equitable to come to this Court complaining about the slow movement of the matter or the slow procedure in the Magistrate's Court. The Applicant chose to issue summons in the Magistrate's Court and cannot remedy the delay in finalising the case by bringing this application to the High Court, thereby

circumventing the Magistrate's Court action. It has been set down for two days in September 2005 on which it will hopefully be concluded. The Court therefore finds that the balance of equity and convenience is not in favour of the Applicant. If all the circumstances are taken into consideration the application should be dismissed.

Therefore the application is dismissed with costs.

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