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

CASE NO: 1703/2020
Date heard: 18 November 2021
Date delivered: 7 December 2021

In the matter between

OUDE WONING BOERDERY (PTY) LTD	**Applicant**
Vs	
T.J. STANDER N.O. **(THE KATOT'S TRUST)**	**First Respondent**
WILLEM JACOBUS NIENABER N.O. **(THE KATOT'S TRUST)**	**Second Respondent**
T.J. STANDER	**Third Respondent**
ELIZABETH MARIANA STANDER N.O. **(THE KATOT'S TRUST)**	**Fourth Respondent**

JUDGMENT

LOWE J

INTRODUCTION

1. The Katot Trust (hereinafter referred to as the trust or as Respondents for convenience) is the owner of the farm Buffelsvlei in Aliwal North. The farm is predominantly a lucerne farm but the exact extent of that lucerne yield is disputed.

2. On 1 September 2019 Applicant, as lessee, and the trust, as lessor, concluded an oral agreement of lease at a monthly rental Applicant to "enjoy the use of the lucerne …" and was *inter alia* obliged to keep the "equipment in good working order", or so says Applicant.

3. The trust's version is that an oral agreement of lease was indeed concluded, later reduced to writing (TJ3) but unsigned containing the agreed terms.[1]

4. The papers are, to say the least, unfocused, and being a spoliation application contain many unnecessary averments, which take the matter no further. These allegations need not be considered, the matter being based solely upon spoliation.

5. There are many disputes of facts surrounding the contents of the lease, most of which are simply denied in reply and must, on the Plascon-Evans test be determined in Respondents' favour (for the purposes of the application), insofar as they are in fact relevant which in many instances they are not.

6. Applicant alleges that "during January"[2] it cancelled the "contract" due to various misrepresentations, and that no written agreement could be reached, it then demanding "return of its property" which Respondents failed to do. The alleged misrepresentations are said to be as to the extent of the lucernce fields and water use.

7. Respondents allege that Applicant is in breach of the lease agreement and is indebted to the trust, and not entitled to return of its "property left on the trust's farm".

8. "The property" referred to would appear to be that set out in letter OWB3, this clarified in due course in the papers where it is common cause as to the identity of the movable property referred to and demanded. Applicant fails to set out the factual basis upon which its possession of the property at the time of spoliation is

[1] It appears that this written document was later slightly amended with two small changes as finally agreed TJ4, according to Respondents.
In fact the lessee hired the farm and equipment referred to in the written version of the lease year by year to 31 August 2024. This is not out of step with the Applicants version of the oral lease agreement alleged, that it would have the "use" of the established lucerne, roughly 40 hectares in extent.
[2] Presumably January 2020. The circumstances of Applicant leaving the farm (thought this is not alleged at all) and why and where and in what circumstances it left "its property" on the farm is not explained.

alleged to rest. The facts in this regard are sparse to say the least, and at best and vague.

9. In amplification hereof, the trust denies being in possession of certain of those listed assets, it admitting however that it has in its possession, and has failed to return the following:

> "9.1 a Lavenda baler;
> 9.2 a fertilizer spreader;
> 9.3 a Herbicide sprayer;
> 9.4 a Gallignani baler and slasher;
> 9.5 21 irrigation pipes"

10. This is admitted in reply.

11. Having conceded that it has possession of the moveable assets aforesaid the trust sets out that it has refused to return these to Applicant until Applicant had settled its indebtedness to the trust, alleging an agreement subsequently concluded that the trust would become owner thereof as that indebtedness remained.

12. This is in effect admitted by Applicant save to say that it was not indebted to the trust and it disputes the alleged agreement that the trust would become owner thereof by agreement, the indebtedness not having been paid.

13. Importantly the trust alleges that on 8 January 2020 Applicant agreed that the trust would retain the property left on the farm as security for the debt as follows:

> "27.7 On 8 January 2020 the Applicant represented by Johan Potgieter agreed that the Trust could retain the property left on the farm as security for its indebtedness to the Trust.

27.8 On or about 16 January 2020, the Applicant represented by Johan Potgieter agreed that the amount of R65 000,00 due to the Trust in for electricity would be paid to the Trust immediately and that the balance of R60 000,00 would be paid three days later. It was further agreed that all the outstanding amounts, would be paid within the next three months. (sic)

27.9 The Applicant agreed further that if it did not pay the full amount outstanding within 6 months, the Trust would be entitled to retain the assets and set the value thereof off against the amount the Applicant Since this date the only amount paid by the Applicant is that of approximately R14 000 for VAT. (sic)

27.10 The Applicant remains indebted to the Trust, owing an amount in excess of R1 575 588,26 as detailed below."

14. The Applicant's reply hereto amounts to a bare denial of the above allegations.

15. In summary then on the Plascon-Evans approach it must be accepted that Applicant was indebted to Respondents and an agreement reached that the assets would be retained as security for a debt owed by Applicant to Respondents, and if not paid within six months, that the trust would retain the assets and set off the value thereof against the debt Applicants still owed at all times relevant.

THE PROPER APPROACH TO FINAL INTERDICTORY RELIEF

17. The requirements for a final interdict are: a clear right; injury actually committed or reasonably apprehended; no other suitable alternative remedy.

18. Motion proceedings such as this are not designed to resolve factual disputes. Unless concerned with interim relief, such applications are all about the resolution of legal issues based on common cause facts. In the absence of special

circumstances they are not used to resolving factual issues because they are not designed to determine probabilities.

19. In *Plascon Evans Paint Ltd v Van Riebeeck Paints* (*Pty*) *Ltd* 1984 (3) SA 623(A) at 634–635 [also reported at [1984] 2 All SA 366 (A) – Ed], the rule was established that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched, all so clearly untenable that the Court is justified in rejecting them merely on the papers. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at [26] [also reported as *National Director of Public Prosecutions v Zuma* (*Mbeki and another intervening*) [2009] 2 All SA 243 (SCA) – Ed].

20. It should be emphasised that whilst generally undesirable to attempt to decide an application on affidavit where there are material facts in dispute, it is equally undesirable for a court to take all disputes of fact at face value which would enable a Respondent to raise fictitious issues of fact in avoidance. It is necessary then to examine the alleged disputes and determine whether they are real or can be satisfactorily resolved without the aid of oral evidence.

21. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) at [13] [also reported at [2008][2 All SA 512 (SCA) – Ed] the following was said:

> "A real genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is

> no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court would generally have difficulty in finding that the test is satisfied. I say generally because factual averments seldom stand apart from a broader matrix of circumstances, all of which need to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them."

22. As in this matter neither party sought the referral of disputes to oral evidence. I am entitled to deal with the application on the undisputed facts. Thus if notwithstanding that there are facts in dispute, I am satisfied that Applicant is entitled to relief in view of the facts stated by Respondents together with the facts in Applicant's affidavits, which are admitted or have not been denied, I am entitled to make an order giving effect to such finding. The onus plays no role in this. In so doing a robust approach may be taken in certain circumstances to decide the issues on the affidavits. This must be cautiously adopted as the disputes on affidavit in an application should not be settled on the probabilities solely. In practice a robust approach is adopted only where the allegations on one or other side, are so clearly false or intrinsically improbable that a court could say that an oral hearing would not disturb the balance of probabilities. *Civil Procedure in the Supreme Court*: *Harms* B56-B-64.

THE BASIS OF THE APPLICATION

23. A spoliation order is final and not interim relief.

24. Physical possession, and not the right to possession, is what is protected. This means that an Applicant must show peaceful and undisturbed possession at the date of spoliation. Applicant must also allege and show the unlawful deprivation of possession by Respondent (that is without the Applicant's consent or due legal process).[3] Thus the remedy is available where a person has been deprived unlawfully of the possession of property. The person deprived must have had control over the property at the time of dispossession. Thus an Applicant must show peaceful and undisturbed possession of the property and that there was the unlawful deprivation of possession. If an Applicant consented freely to give up possession there is no spoliation.

25. The crucial issues in the matter are:

    25.1 The basis set out for the relief sought by Applicant;

    25.2 Whether Applicant was in peaceful and undisturbed possession of the Moveables at the time ofdispssession;

    25.3 That Applicant being in such possession was unlawfully deprived thereof (wrongfully) in the sense of being so deprived without Applicant's consent (or due legal process)[4]

[3] Kgosana v otto [1991] 3 All SA 665 (W), 1991 (2) SA 113 (W); Impala Water Users Association v Lourens NO [2004] 2 All SA 476 (SCA), 2008 (2) SA 495 (SCA); Ivanov v North West Gambling Board and others [2012] 4 All SA 1 (SCA), 2012 (6) SA 67 (SCA), 2012 (2) SACR 408 (SCA); Yeko v Qana [1973] 4 All SA 512 (A), 1973 (4) SA 735 (A); Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Dept. of Education & Culture Services 1996 (4) SA 231 (C); Street Pole Ads Durban (Pty) Ltd v Ethekwini Municipality [2008] 3 All SA 182 (SCA), 2008 (5) SA 290 (SCA); Sillo v Naude 1929 AD 21; Ntai v Vereeniging Town Council [1953] 4 All SA 358 (A), 1953 (4) SA 579 (A); George Municipality v Vena [1989] 2 All SA 125 (A), 1989 (2) SA 263 (A)

[4] George Municipality v Vena (supra)

26. In my view Applicant launched a confusing and unfocused application based in spoliation claiming that Applicant "had undisturbed possession of certain property" of which it was "illegally deprived" by the trust and was, "spoiled in its possession" (sic). The factual basis underlying these conclusions is however not set out in my view in any satisfactory or acceptable way.

27. The founding affidavit fails to even allege, let alone prove, that the trust was in fact in possession of the moveable assets referred to at the time of the dispossession thereof.[5]

28. Applicant alleges that it cancelled the lease (during January 2020) but fails to deal with the issues relevant to its possession of the assets at the time of cancellation or having vacated the property or the circumstances in which it left the moveable assets claimed thereon none of which is set out or alleged.

29. The answering affidavit sets out clearly that the movables were left on the farm by Applicant which is not disputed in reply[6]. This impacts on the first requirement of a spoliation application being peaceful and undisturbed possession.[7]

30. In reply Applicant simply says, in this regard, that the trust refused to return the movables until the debt claimed was settled.

31. Nowhere are the facts alleged by Applicant, relevant to the fact that it was in undisturbed possession and was deprived thereof without its consent. On the contrary there is no suggestion that Applicant was in possession at all after having vacated the property. Applicant alleges that on cancellation it "immediately demanded return of its property", which was refused.

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[5] See footnote 2 above
[6] Answering affidavit para 15.2, 27.7
[7] In reply Applicant says: 9.3 page 121: The property was not left on the farm. At the time when the Applicant made an endeavor to remove the property the Respondents jointly and severally refused to return it to the Applicant. This is of itself confusing and creates at best a dispute of fact.

32. The letter of demand OWB3 is similarly to be understood in this regard.

33. The alleged dispossession occurred then in January 2020, the trust alleging agreement having been reached between the parties on 8 January 2020 that it would retain the property left on the farm, as security for its indebtedness to the trust.

34. This is dealt with in reply as follows:

> "15.1 It is admitted that Mr. Johan Potgieter approached Mr. Stander on the 8th January 2020 in claiming Applicant's property.
> 15.2 It is denied that the Respondents has any legal claim against the Applicant and or its property."

35. It seems to me then that Applicant has several difficulties in a spoliation claim.

36. It is physical possession, not the right to possession that is protected.[8]

37. In this matter as to spoliation, Applicant fails to allege or prove the facts to establish that it was in peaceful and undisturbed possession of the moveables, but rather it appears that it left same on the farm in the trust's possession.

38. Secondly the high water mark as to deprivation of possession by the trust is the allegation that it refused to return same on demand. This is not such as to establish dispossession in the sense required.

39. In any event, a fundamental difficulty is created as Respondent alleges consent to its retention of the property, given by Applicant as security for the debt, the

[8] Impala Water Users Association (supra)

dispossession then (if it is such which I doubt) being with Applicant's consent on the Plascon-Evans test.

40. In the result the necessary elements of a spoliation action are not established and the application falls to be dismissed.

41. Costs must follow the result.

ORDER

42. It is ordered that:

1. The application is dismissed
2. Applicant is to pay the Respondents' costs.

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M.J. LOWE

JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant: Adv. Grewar
Instructed by: Nolte Smit Inc, Tyne Kingwill

Appearing on behalf of the Respondents: Adv. Sephton
Instructed by: Neville Borman and Botha Attorneys, Mr. Powers