



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **8th January 2021** Signature: _____

CASE NO: 24535/2020

DATE: 7TH JANUARY 2020

In the matter between:

JUST AGRONOMICS GROUP (PTY) LIMITED

Applicant

and

AFROPULSE 466 (PTY) LIMITED

First Respondent

HISTOMARK (PTY) LIMITED

Second Respondent

CLARK, WAYNE ROBERTS N O

Third Respondent

SERVIGRAPH 42 CC (In Business Rescue)

Fourth Respondent

Coram: Adams J

Heard: 23 & 24 November 2020 – The 'virtual hearing' of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 8 January 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 8 January 2021.

Summary: Opposed application – Interdict – generally – temporary interdict for a preservation order – when granted – right *prima facie* established – balance of convenience – application granted –

ORDER

- (1) The applicant's application for leave to amend dated the 1st of October 2020 is granted and the notice of motion be and is hereby amended as per the 'Amended Notice of Motion', being annexure 'A' to the said application.
 - (2) Pending the final determination of Part B of the applicant's application, Histomark (Pty) Ltd ('Histomark') and Servigraph 42 CC (in business rescue) ('Servigraph'), jointly and severally, the one paying the other to be absolved, are directed to pay within ten days from the date of this order an amount equivalent to the proceeds of the sale of a quantity of 900 tonnes of yellow maize, into the trust account of ENSafrica (Edward Nathan Sonnenbergs Inc, Account Held with First National Bank, Account Number 621 1678 8582, Swift Code FIRNZAJJ, Branch Code 250655), to be held in escrow.
 - (3) The first, second and third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this application, including the costs consequent upon the employment of two Counsel.
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JUDGMENT

Adams J:

[1]. The applicant in this matter, Just Agronomics Group (Pty) Limited ('JAG'), conducts a farming business on certain portions of a farm in the Westonaria district known as Waterpan ('the farm'), as does Servigraph 42 CC (in business rescue) ('Servigraph'), represented in these proceedings by the third respondent,

Wayne Robert Clark ('Clark'). Until recently the second respondent, Histomark (Pty) Limited ('Histomark') leased the farm from the South African government. The second respondent, Afropulse 466 (Pty) Limited ('Afropulse'), claims to be the new lessee of the farm, the lease between Histomark and the Government having allegedly been cancelled and a new lease having been concluded with Afropulse.

[2]. The real *dramatis personae* in this drama, which plays itself out on the farm, are Mr Johan Byliefeldt, who is the sole director and shareholder of the applicant, Mr Johan (Joe) Lategan and Mr Phillip Jacobs, who were both previously shareholders and directors of the applicant and who are at present shareholders and directors of Histomark. This application and the previous litigation between these three individuals appear to me to be an ongoing and energy zapping battle for the soul of the applicant. As for Afropulse, one of its directors and shareholders is a Mr Werner Lategan, who is the brother of Mr Joe Lategan. It is in the context of these inter relationships that the facts and conclusions drawn from those facts should be understood.

[3]. During July 2020 the applicant's entire crop of yellow maize, which it had planted and which by then was ready to be harvested, was 'hijacked' by either Afropulse, Histomark or Servigraph or any combination of these three entities. At first the maize was stored in grain dams on the farm as part of all of the Maize harvested on those portions of the farm, including that belonging to Servigraph. However, in the end and in a somewhat clandestine fashion all of the maize was sold off to a third party entity, supposedly on behalf of a creditor of Servigraph and on behalf of Histomark. All the same, the applicant's crop of maize disappeared like mist before the sun, and in these proceedings the applicant hopes to receive compensation from any and/or all of the liable parties for its loss. In the interim, the applicant requires a preservation order to preserve the proceeds of the sale of its maize.

[4]. This is an application, comprising two parts, which was initially brought on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court. However, on the 7th of October 2020, the matter was struck off the Urgent Court roll for lack

of urgency. In Part A, the applicant in essence asks (in a roundabout way) that Histomark and Servigraph be ordered to pay, jointly and severally, into an Escrow account an amount equivalent to the proceeds of the sale of their 900 tons of yellow maize to an unidentified third party. This amount, so the applicant prays, should be held in escrow pending the hearing and the final adjudication of part B of the application, in which the applicant applies for judgment against Afropulse, Histomark and Servigraph, jointly and severally, for payment of the sum of R2 781 000, representing the value of their 900 tons of yellow maize stolen from them by the respondents.

[5]. I interpose here to note that the main relief claimed by the applicant is in fact for delivery by Afropulse, Histomark and Servigraph of the 900 tons of yellow maize, alternatively, for payment of the proceeds of the sale of this quantity of maize. In view of the developments shortly before the institution of the motion court proceedings, notably the fact that, by all accounts, the maize had been sold and delivered to a third party by the 4th of September 2020, this relief was not pursued with any vigour during the hearing of the application on the 23rd and the 24th of November 2020. Instead, the court was urged to grant an order as prayed for in part A of the amended Notice of Motion, which was formulated as relief alternative to the main relief claimed as per the amended notice of motion.

[6]. The main issue to be determined in this part A of the application is whether the proceeds received by the respondents from the distribution of the maize should be placed in escrow pending the determination of the disputes referred to above. Those issues relate primarily to the applicant's entitlement to the proceeds of the sale of its maize and whether the written lease agreement concluded, according to Histomark between it and the applicant is authentic and/or valid and enforceable. Closely linked to these issues is the dispute between the applicant and Histomark as to whether the latter is entitled to the proceeds of the sale of the maize on the basis of a cession and pledge of the maize in terms of the lease agreement. This issue, implicating the legal principles relating to cession and pledge, would be the primary aspect requiring adjudication in part B of the application.

[7]. Whether or not the applicant is entitled to an order that the proceeds of the distribution of the maize be placed in escrow should be decided against the factual backdrop in this matter, which I succinctly summarise in the paragraphs which follow. However, before dealing with the salient facts in the matter and embarking on an assessment of the merits of the application, I need to deal with a number of preliminary issues raised mainly by Mr Clark, in his official capacity as the Business Rescue Practitioner of Servigraph, and also by Histomark.

[8]. The applicant applies for leave to amend its notice of motion and on the 1st of October 2020 had given notice of intention to do so. Histomark and Mr Clark object mainly on technical grounds to the said application to amend, which is aimed, according to the applicant, at bringing in line the relief claimed with developments which occurred after the issue of the application. As I have already indicated, those developments related to the fact that, unbeknown to the applicant, Afropulse, Histomark and Servigraph had rather underhandedly allowed the applicant's crop of yellow maize to be spirited away during early September 2020 so much so that by the 4th of September 2020 same had been sold and delivered to a third party. It therefore became necessary for the applicant to amend and reformulate the relief it sought so that it remained relevant and to counter the apparent endeavours by the respondents to undermine the applicant and to scupper its cause of action.

[9]. The primary object of allowing an amendment is to ensure a proper ventilation of the dispute between the parties and to determine the real issues between them, so that justice may be done. See: *Cross v Ferreira* 1950 (3) SA 443 (C) at 447. It is settled law that an amendment will not be allowed only where it will cause the other side such prejudice as cannot be cured by a costs order or, where appropriate a postponement. As was said in *Moolman v Estate Moolman* 1927 CPD 27 at 29:

'[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

[10]. Mr Leech SC, who appeared on behalf of the applicant, contended that the amendment for the most part was occasioned by the conduct of Afropulse and Histomark in secretively spiriting away the maize in breach of an undertaking and to avoid the proceedings. Therefore, so he submits, a refusal to grant the applicant leave to amend would tacitly condone such conduct.

[11]. I find myself in agreement with this submission. The applicant's application always was about its entitlement to the maize and the concomitant entitlement to the value in the event that the maize is rendered unavailable. There can therefore not be any talk of any prejudice to any of the respondents as a result of the amendment.

[12]. The applicant also sought to include reference to Servigraph, which received notice of these proceedings as the papers were served on Mr Clark in his capacity as a business rescue practitioner of Servigraph, and in that capacity Mr Clark has filed an answering affidavit which contains information purportedly derived from the members of Servigraph.

[13]. Accordingly, I am of the view that there is no merit in any of the objections by the respondents to the application for leave to amend. An order amending the applicant's notice of motion therefore stands to be granted.

[14]. Secondly, Mr Clark contends *in limine* that the applicant has instituted proceedings without the consent of the business rescue practitioner or the court in contravention of section 133 of the Companies Act 71 of 2008. There is no merit in this legal point. On a plain reading of the Act, section 133 is not applicable *in casu*. Section 133 provides as follows:

'133 General moratorium on legal proceedings against company

- (1) During business rescue proceedings, no legal proceeding, including enforcement action against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –
 - (a) with the written consent of the practitioner;
 - (b) with the leave of the court and in accordance with any terms the court considers suitable."

[15]. As rightly contended by Mr Leech, the moratorium applies only where the claim is for property lawfully in the possession of the corporation in business rescue. In proceedings for property unlawfully in possession of the corporation, the moratorium does not apply and the proceedings are permissible, without consent. The possession of the maize in this matter was unlawful, and accordingly the moratorium in section 133 does not apply. This point *in limine* is therefore dismissed.

[16]. Lastly, Mr Clark, who is cited *nomine officio* in his representative capacity as the business rescue practitioner of Servigraph and defends the proceedings in that capacity, contends *in limine* that the applicant failed to cite Servigraph as a party to the proceedings because the citation 'does not bring or place Servigraph before court', and 'Servigraph, its creditors and other affected persons have a direct and substantial legal interest in the relief sought'.

[17]. This point should be rejected, if for no other reason, on the basis that in the administration of justice form should never be elevated above substance. As was said in *Gainsford NO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) para 14:

'As stated above, Mailula J was correct ... to have regard to the provisions of s 386(5), which demonstrate that liquidators act in the stead of the company in liquidation. A distinction between the *locus standi* accorded to the company in liquidation and that of its liquidators acting in their representative capacity, is pedantic or illusory. To disqualify liquidators properly appointed from acting on behalf of a company in liquidation would truly be elevating form above substance.'

[18]. Although concerned in that case with liquidators, there is in principle no difference as between a company in liquidation and one in business rescue in these circumstances. The business rescue practitioner in terms of section 140(1)(a) of the Companies Act 'has full management control of the company in substitution for its board and pre-existing management'.

[19]. I therefore conclude that where the business rescue practitioner is cited in his representative capacity, the company is properly before the Court. Mr Clark's legal point is therefore rejected.

[20]. That brings me back to the merits of the application and the facts of the matter which by and large are common cause or not seriously challenged. And even in those instances where the applicant's version is contested, certain facts can be and are accepted by me on the basis of the principles enunciated in *Webster v Mitchell* 1948 (1) SA 1186 (W). After all, the relief sort by the applicant in this part of the application is in the nature of interim interdictory relief, which requires that the applicant demonstrates *inter alia* that it has a *prima facie* right to the relief claimed. It is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial.

[21]. On the instruction of Afropulse, the applicant's yellow maize, which was planted and cultivated on its portions of the farm, was harvested without its consent or knowledge on or about 5 July 2020. The instruction to harvest the applicant's maize was given by Afropulse to a Mr Naude, a member of Servigraph. This means that the maize was harvested by Servigraph on instructions from Afropulse, at the same time that Servigraph was harvesting its own maize on the farm. On the evidence before me, it appears that the 5th of July 2020 was the first time that Afropulse, according to the knowledge of the applicant, entered the fray. Up to that point, the applicant had no dealings with Afropulse, and was blissfully unaware of its existence. One of the directors of Afropulse is one Mr Werner Lategan, who is the brother of one of the directors of Histomark, Mr Joe Lategan. On the 8th of July 2020 and 'out of the blue' the applicant's attorneys received a letter from the attorneys representing Afropulse, confirming that their client (Afropulse) was not involved in the dispute between the parties and that they did not intend to become involved. In my view, this disclaimer by Afropulse has a distinctly hollow ring to it – their entering the scene at this particular point in time seems too much of a coincidence. Moreover, no explanation and no details are furnished as to why Afropulse was at the receiving end of what can only be described as an extremely generous donation by Histomark to it of the former's rights, title and interest to the lease agreements

with the government. A reasonable inference to be drawn is that Afropulse was part and parcel of an elaborate scheme to deprive the applicant of its lawful entitlement to the proceeds of its assets, being the crop of yellow maize, and to ensure that the applicant has no recourse against the wrongdoers.

[22]. This communiqué plays a pivotal role in this matter and I think it apposite to quote extensively from it. Importantly, as regards the applicant's maize, the attorneys of Afropulse had this to say:

- '4 Our client is currently the new landlord of the property known as Waterpan 292 IQ portion 1, 9 and 32 on which Servigraph 42 CC (in business rescue) is the tenant.
- 5 It is our instruction that a portion of approximately 75ha has been planted with yellow maize to which your client now seems to claim ownership and which ownership seems to be the subject of the current dispute.
- 6 Our client confirms that it has given instructions to Decker Naude to harvest the 75ha of yellow maize and for same to be stored in the silos on the property.
- 7 Our client has no intention to trade with the crop and we confirm that it will be kept in the silos pending the outcome of the dispute pertaining to ownership of the crop.
- 8 Once ownership has been established our client will agree to the release of the crop provided the harvesting cost and any further possible expenses has been paid which our client had to incur.
- 9 It has also been brought to our attention that Just Agronomics Group (JAG) is currently in business rescue and as such we urgently need confirmation that you have been mandated on behalf of the business rescue practitioner to write the letter under discussion.'

[21] It was also during this time that the attention of the applicant was drawn to the fact that there was in existence a lease agreement between it (the applicant) and Afropulse, which incorporated a cession and pledge in terms of which the applicant had purportedly ceded and pledged in lieu of rental due to Afropulse its crops. I'll revert to this aspect of the matter later on in the judgment.

[22] The applicant's maize, after being harvested, was mixed with maize belonging to Servigraph and the mixed maize was stored in grain dams on Waterpan farm. It can safely be assumed that, at that stage, the applicant's maize was in the possession of Afropulse and Servigraph. As already indicated, Afropulse gave an express undertaking in no uncertain terms that no maize would

be released to any party pending the determination of the dispute regarding applicant's right to the maize. Towards the end of August 2020, Servigraph was removing the maize from the grain dams on the farm, having taken it upon themselves to deal with all of the mixed maize as if it belonged to them.

[23] On the 4th of September 2020 Afropulse, having reached some sort of an agreement with Histomark, released and delivered to Histomark the maize despite the undertaking given by Afropulse to the applicant that it would not release the maize to any party pending the final determination of the dispute. Afropulse had released the maize to Histomark, on payment by Histomark of the harvesting and storage costs incurred by Afropulse.

[24] The 17th of September 2020 – some thirteen days after delivery to Histomark of the maize by Afropulse – was the first time that the applicant was made aware of the fact that Histomark was then laying claim to the applicant's maize on the basis of a cession and pledge by the applicant in favour of Histomark in terms of a lease agreement concluded between them on the 5th of June 2019 – which Afropulse should have known to be disputed by the applicant.

[25] On the 8th of September 2020 the applicant caused its urgent application to be issued and served. As already indicated, only after the issue of the urgent application – on 17 September 2020 – did the applicant become aware of the fact that Histomark, purportedly acting on the strength of a cession and pledge in its favour by the applicant in respect of all its crops, had taken possession by self-help of the applicant's maize and on-sold it to a third party. That put paid to the applicant's prayer that the court orders a return to it of its 900 tons of yellow maize – leaving the applicant to persist only with its claim for relief for the preservation of the proceeds of the sale of the maize.

[26] The final chapter in the long and tedious saga, before the applicant proceeded with the issue of the urgent application, was therefore the events of the 4th of September 2020, when Histomark sold the applicant's maize 'to a third party which had a silo number and who could sell the maize and make payment to [them]'.

The Law and its Application *in casu*

[27] Pending the final determination of part B of this application, the applicant seeks an order in terms of which Histomark and Servigraph, jointly and severally, are directed to deliver to it (the applicant) 900 tonnes of yellow maize, which it would be permitted to sell to Unigrain with the proceeds to be paid over into an attorneys' trust account, to be held in escrow. As I have already indicated, on the evidence before me, due to recent events this type of relief is no longer sustainable as these respondents are no longer in possession of the maize. An order to that effect would therefore be moot.

[28] In the alternative, the applicant applies for an order, pending final determination of part B of the application, that Histomark and Servigraph, jointly and severally, are directed to pay any proceeds of the sale of 900 tonnes of maize into an attorneys' trust account, to be held in escrow.

[29] At this stage the applicant accordingly applies for interim relief in the nature of a preservation order in respect of the proceeds of the sale of their yellow maize. The aforesaid interim interdictory relief is sought pending the final determination of Part B of the application, in which the Court will be asked to determine the authenticity of the sublease agreement, incorporating a cession and pledge, allegedly concluded between the applicant and Histomark, as well as the validity and the enforceability of same. This issue, to be determined in part B, is closely linked and flows naturally into the issue as to whether the applicant is entitled to the value of the disputed maize sold ultimately by Histomark.

[30] The requirements for the granting of interdictory interim relief are well established. They are: - (a) a prima facie right, though open to some doubt; (b) a well-grounded apprehension of irreparable harm, if the interim relief is not granted and final relief is granted; (c) the balance of convenience should favour the granting of the interim interdict; and (d) no alternative remedy. These requirements should be considered holistically, and none of it must be considered in isolation.

[31] In that regard, I have already referred to *Webster v Mitchell* 1948 (1) SA 1186 (W), in which this court (Clayden J) held as follows at pg 189:

'From the Appellate Division cases to which I have referred I consider that the law which I must apply is that the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is 'prima facie established though open to some doubt' that is enough.

If the phrase used were 'prima facie case' what the Court would have to consider would be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief. Although the grant of a temporary interdict interferes with a right which is apparently possessed by the respondent, the position of the respondent is protected because, although the applicant sets up a case which prima facie establishes that the respondent has not the right apparently exercised by him, the test whether or not temporary relief is to be granted is the harm which will be done. And in a proper case it might well be that no relief would be granted to the applicant except on conditions which would compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere.'

[32] In the present case the applicant says that it was the owner of 900 tonnes of yellow maize, which it had planted and grown and which it was entitled to harvest and collect at the beginning of July 2020. After the harvesting of the maize, the applicant intended to sell and probably would have sold its maize at

the prevailing market price, which they say was R3 090 000 per tonne = R2 718 000.

[21] None of the parties seriously disputes the applicant's right to have harvested, collected and disposed of the maize. Importantly, Histomark cannot be heard to dispute this – it cannot seriously challenge these averments in view of the fact that its claim to take possession of the maize is based on a cession and pledge, which is entirely contingent upon the applicant's right in and to the maize. There is also no dispute that the maize was harvested, collected and stored on the instructions of Afropulse, without the knowledge or consent of the applicant. The maize was in the possession of Afropulse and Servigraph until it was released and delivered by Afropulse to Histomark, who apparently on-sold it. Afropulse, Histomark and Servigraph have therefore clearly infringed the applicant's rights.

[33] The applicant's right to dispose of their yellow maize was infringed by the respondents in that they, so the applicant states, stole it. As I have already indicated, there is not much dispute about the foregoing allegations by the applicant, and it follows, in the absence of further considerations that the applicant indeed has a *prima facie* right on which its application for an interim interdict can and should be founded. In other words, these allegations, uncontested and unchallenged as they are, certainly in my view establish *prima facie* that the applicant is the owner of 900 tonnes of yellow maize, and has the right to claim repossession of it from the respondents, alternatively the fair market value thereof on the basis of the *condictio furtiva*.

[34] I have then to consider to what extent that case is put in doubt by the allegations of the respondents, especially Histomark. As indicated above, Histomark says that it is entitled to the appropriation of the yellow maize belonging to the applicant on the basis of a Cession and Pledge incorporated in a written Lease Agreement concluded with the applicant on the 5th of June 2019.

[22] The existence and enforceability of the cession and pledge are disputed by the applicant for the simple reason that the purported sublease (containing the cession and pledge) was not disclosed by Mr Jacobs or Mr Lategan at the time

that Mr Byliefeldt became a member of the applicant during August 2019. In fact, the very first time that reference was made by Histomark to the alleged written lease agreement was during July 2020 – after there had already been a plethora of litigation between the stakeholders in the applicant and only after it became apparent to Mr Lategan and Mr Jacobs that they were fighting a losing battle in their attempts to wrestle back control of the applicant from Mr Byliefeldt, who they probably resented for having taken over what was in essence their company before Mr Byliefeldt's involvement in it after August 2019.

[23] Moreover, so the applicant contends, the rental obligation allegedly owed by it under the written lease agreement was significant and out of kilter with a market related rental payable for the use of the farmland. This point is furthermore bolstered by the fact that the rental payable by Histomark to the government in terms of the written leases amounted to approximately R100 000 per annum compared to the R3 410 910 claimed by Histomark as being rental payable for the period from approximately July 2019 to July 2020.

[24] Additionally, so the applicant contends, Histomark has failed dismally to demonstrate that the aforesaid rental payable by the applicant was accounted for in its books of account, income tax returns and annual financial statements. I understand the applicant's point to be that this confirms that the lease agreement is a simulated agreement, which is not binding and unenforceable. In my view, there is merit in this submission.

[25] During October 2019 Mr Byliefeldt, in his personal capacity, had concluded a sublease with Histomark in respect of a portion of the farm, which fact is wholly incompatible with the existence and terms of the alleged written lease between the applicant and Histomark, which incorporates the Cession and Pledge. This lease was also signed on the 5 June 2019 by Mr Jacobs and Mr Lategan, who represented the applicant and Histomark respectively. At the time, Mr Jacobs and Mr Lategan were not directors of either the applicant or Histomark, which places further doubt on the validity and enforceability of the said agreement.

[26] In light of these facts, and having regard to the inherent probabilities, it is my considered view that it cannot be said that the facts set up in contradiction by

Histomark cast serious doubt on the case of the applicant. I therefore do not believe that the applicant should not succeed in obtaining temporary relief – its right, in my judgment, is *prima facie* established, albeit only open to 'some doubt', if at all. The point is that the main dispute between the parties should be left to trial and the applicant's right should be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.

[27] I am also bolstered in this conclusion by considerations relating to the legal principles applicable to the case presented by Histomark and the facts set up by them in contradiction to the applicant's case. I do not intend dealing with those issues in detail as they are best left for adjudication in part B of the application. Suffice to state that the wording of the Cession and Pledge and the legal principles applicable do not necessarily lend itself to an interpretation which favour the case of Histomark.

[28] The relevant provision of the alleged written sub-lease between the applicant and Histomark reads as follows:

'The Lessee does hereby irrevocably and *in rem suam* cede and pledge ... all of its right, title and interest, claim and demand in and to all crops ... which the Lessee may now or at any time hereafter have planted or harvested ...

... ..

the Lessor ... shall be entitled to take possession of such Crops ... to give effect to the terms of this cession

... ..

'... possession of these crops is vested in the Lessor'.

[29] So, for example, Mr Leech submitted that the plain language refers to an impossibility in so far as it refers to 'the planted crops'. The crops are not separate things and cannot be the object of any rights etc. The crops effectively do not exist, the lessor cannot be in possession and the crops cannot be pledged, and a corporeal thing cannot be ceded. To the extent that the sublease purports to create real rights by permitting the lessor to 'apply for surrender, to realise or otherwise deal with the Crops in its absolute discretion' it is invalid unless registered. In that regard, see: *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 (4) SA 174 (F) at 178C-D.

[30] I find myself in agreement with these submissions. The cession and pledge could only have contemplated crops planted and harvested by the lessee. I also agree with the submission by Mr Leech that the cession and pledge purports to provide personal rights that supersede the real rights of the land owner (which requires registration). The land owner owns the crops and the lessor (Histomark) cannot 'realise or otherwise deal with the Crops in its absolute discretion'. It is therefore so that the sublease can only apply to maize harvested by the applicant.

[31] I reiterate that, in my judgment, the applicant has a *prima facie* right to relief against the respondents. In my view, the doubt cast by Histomark on the case set out by the applicant is, on the above facts and legal considerations, not considerable. Which version will eventually be held to be the truth is in any event a matter with which I cannot now concern myself.

[32] I am of the opinion therefore that the applicant has established a right to the degree necessary for the obtaining of an interim interdict, and infringement of that right.

[33] I come then to deal with the harm which might be suffered by any of the parties. On the evidence before me, the applicant has unlawfully been deprived of 900 tonnes of yellow maize belonging to it. The maize has been sold to third parties and the applicant requires that the proceeds of the sale be preserved. Now if this is done, if the proceeds of the sale of 900 tonnes of yellow maize is preserved and held in an Escrow account, the prejudice to Histomark and Servigraph consists only in the delay of receipt by them of the proceeds of the sale in the event it being found that the applicant is not entitled to those proceeds. That may cause harm to the Histomark and Servigraph, if eventually it is found that the applicant is not entitled to the proceeds of the sale of 900 tonnes of maize, but that harm is not nearly as great in my view as the harm which might be caused to the applicant if the respondents were allowed to appropriate the proceeds, if the applicant is later found to have been entitled to same.

[34] As rightly pointed out by the applicant, Servigraph is in business rescue and Histomark has no assets other than the lease agreements with the

Government, which reportedly have now been cancelled, leaving the entity devoid of any property worth executing against.

[35] Normally the Court acts on the balance of convenience. If there is greater possible prejudice to the respondent an interim interdict will be refused. See *Crossfield & Son Ltd v Crystallizers Ltd* 1925, WLD 216 at p. 223. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant the interdict will be granted, subject, if they can be imposed, to conditions which will protect the respondent – see *Hillman Bros (West Rand) (Pty) Ltd v van den Heuvel* 1937 WLD 41 at pp 44-46.

[36] The balance of convenience favours granting the interdictory relief. Histomark and Servigraph stand to suffer no prejudice if the proceeds from the sale of the maize (regardless of whether it is the sale of the maize by Histomark or Servigraph) are paid over and held in trust until the final determination of the relief sought in Part B of the application.

[37] I therefore conclude that the applicant has met the requirements for an interim interdict. On the evidence before me, it is clear that there is no more of the applicant's maize left in possession of either Histomark or Servigraph. There would therefore be no point in ordering them to return to the applicant any of its maize. The correct order would be that Histomark and Servigraph pay over the proceeds of the sale of the maize so that same can be placed in escrow, pending the determination of the dispute as to its right in and to the maize.

[38] The respondents also contend that the quantity of yellow maize which is the subject of this dispute is not 900 tonnes as claimed by the applicant. It is, so they claim, far less. I disagree. The applicant makes out a very convincing case, supported by the evidence of an expert witness, that they would have harvested and collected at least 900 tonnes of maize, which they would have on-sold to buyers waiting in the wings. What the respondents do in contradiction to the applicant's case is far from convincing. Histomark, for example, furnishes no details relating to the sale of the maize, other than the fact that it was sold to a third party – they do not say who this third party is, what the quantity of the maize sold and delivered was, how much they received for the maize. Also, no

documentary proof relating to the transaction is furnished – no invoices, no receipts and no correspondence with the buyer are produced. The inference to be drawn from this, which of necessity would be one adverse to the respondents, is that the tonnage maize realized was as claimed by the applicant, namely 900 tonnes.

[23]. I am therefore persuaded that the applicant's application for an order as prayed for in part A should be granted and that it is entitled to the interim interdictory relief in a slightly modified form.

Costs

[39] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[40] I can think of no reason why I should deviate from this general rule.

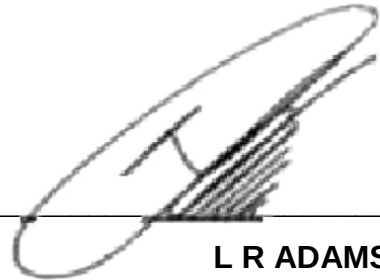
[41] I therefore intend awarding costs against the respondents, jointly and severally, the one paying the other to be absolved, in favour of applicant.

Order

Accordingly, I make the following order: -

- (1) The applicant's application for leave to amend dated the 1st of October 2020 is granted and the notice of motion be and is hereby amended as per the 'Amended Notice of Motion', being annexure 'A' to the said application.
- (2) Pending the final determination of Part B of the applicant's application, Histomark (Pty) Ltd ('Histomark') and Servigraph 42 CC (in business rescue) ('Servigraph'), jointly and severally, the one paying the other to be absolved, are directed to pay within ten days from the date of this order an amount equivalent to the proceeds of the sale of a quantity of 900 tonnes of yellow maize, into the trust account of ENSafrica (Edward Nathan Sonnenbergs Inc, Account Held with First National Bank, Account Number 621 1678 8582, Swift Code FIRNZAJJ, Branch Code 250655), to be held in escrow.

- (3) The first, second and third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this application, including the costs consequent upon the employment of two Counsel.

A handwritten signature in dark ink, appearing to be 'L R ADAMS', written over a horizontal line.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	23 rd November 2020 – in a ‘virtual hearing’ during a videoconference on the <i>Microsoft Teams</i> digital platform
JUDGMENT DATE:	8 th January 2021 – judgment handed down electronically
FOR THE APPLICANT:	Adv Q G Leech SC, together with Advocate J L Griffiths
INSTRUCTED BY:	Edward Nathan Sonnenbergs Inc, Sandton
FOR THE FIRST RESPONDENT:	No appearance
INSTRUCTED BY:	Gildenhuys Malatji Attorneys, Pretoria
FOR THE SECOND RESPONDENT:	Adv Sandra Strauss
INSTRUCTED BY:	Frik Van Schalkwyk Attorneys, Pretoria
FOR THE THIRD AND FOURTH RESPONDENTS:	Adv Steven Van Rensburg SC
INSTRUCTED BY:	Brooks & Braatvedt Attorneys, Johannesburg