



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 3019/2023

In the matter between:

LAMROO (PTY) LTD

1st Applicant

ELRICH RUWAYNE SMITH N.O.

2nd Applicant

ELNA ELSA POHL N.O.

3rd Applicant

and

PETRUS ANDREAS THERON

1st Respondent

ESMÉ THERON

2nd Respondent

**ANY OTHER UNLAWFUL OCCUPIERS OF THE
FARMS KLIP PAN, HERTZOG, WATERPAN AND
UITKOMST, DISTRICT BUILT FONTEIN, FREE STATE
PROVINCE
TSWELOPELE LOCAL MUNICIPALITY**

3rd Respondent

4th Respondent

HEARD ON:

05 October 2023

BEFORE:

Chesiwe, J

DELIVERED ON:

This judgment was handed down in open court and given out electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 16h00 on 08 February 2024.

- [1] This is an application in which the Applicants seek an order against the First, Second and Third Respondents to vacate the farms within 20 days period.
- [2] Part A of the Notice of Motion was granted on 22 June 2023. The parties are before Court for Part B and the matter is opposed by the First, Second and Third Respondents.
- [3] The relief sought in Part B is set out in detail in the Notice of Motion (Application for Eviction).
- [4] The matter came before me for arguments on 5 October 2023 and I reserved judgment.
- [5] The dispute involves four farm lands, namely:
 - a) Portion 1 (Hou Moed) of the farm Waterpan 376, registration division Bultfontein, Free State Province;
 - b) The farm, Hertzog 44 registration division Bultfontein Free State Province;
 - c) Farm Klip Pan 247, registration division Bultfontein Free State Province;
 - d) Portion 2 (Mariasrust) of the farm Uitkomst 113, registration Division Thuinessen, Free State Province.
- [6] For purposes of this judgment, the properties referred to above, will hereafter be referred to as "the farms".

BACKGROUND

- [7] The farms were previously owned by Phillipus Abraham De Bruyn. The said Phillipus Abraham De Bruyn was sequestrated and the Second and Third Applicants were appointed as the trustees of the insolvent estate.
- [8] The Second and Third Applicants in terms of the Insolvency Act, had the duty to collect the assets in the insolvent estate and distribute the proceeds among the creditors, in order of preference as set out in the Insolvency Act 24 of 1936.
- [9] The Second and Third Applicant put the farms up for auction on 8 March 2022. The farms were put up for auction subject to a lease agreement. The bid in respect of the farms was too little and the farms were put up for auction on the same day without a lease agreement.
- [10] On 18 March 2022, the deponent of the founding affidavit, on behalf of the First Applicant signed an offer to purchase for an amount of R10 255 000,00 plus VAT. The offer to purchase was accepted by the Second and Third Applicants on 23 March 2022.
- [11] At the time of the auction, an offer to purchase was concluded. The First, Second and Third Respondents were occupying the farm. The Applicants concluded that after the registration of transfer into the names of the First Applicant, the First Applicant would take up occupation of the farms on date of registration and the First to Third Respondents would vacate the farms.
- [12] On 5 April 2022, the First Applicant's attorneys of record served a letter on First Respondent that he was in unlawful occupation of the farm and was required to vacate within 14 days from date of the letter.¹ Despite the aforesaid letters, the First, Second and Third Respondent failed and/or refused to vacate the farms.
- [13] On 17 April 2023, the deponent of the founding affidavit, personally contacted the First Respondent telephonically to enquire when he would vacate the farms.

¹ (Annexure FA 8.1 FA 8.2)

According to the deponent, the First Respondent gave an undertaking to vacate the farms on condition that the rouwkoop amount is repaid.

- [14] The issue for determination is whether the First to Third Respondents are in unlawful occupation of the farms in light of a lease agreement, that the First and Second Respondents allege has not been cancelled; whether the farms were sold without a lease agreement and whether the bid for selling the farms was higher than the outstanding mortgage value.
- [15] Counsel on behalf of the First Applicant, Adv. Els, submitted in oral arguments as well as written arguments that it is not in dispute that the First Applicant is the registered owner of the farms and has the necessary *locus standi* to institute the application; that the First to Third Respondents are in unlawful occupation and that the Respondents' defense of a long term lease agreement is not a valid ground as the mortgage bond registered over the property brought the lease agreement to an end. It was further submitted that there are currently workers on the farms, but the workers will remain until the necessary legal steps will be taken against the workers. Further that the eviction is only applicable to the First and Second Respondents.
- [16] Counsel on behalf of the First, Second and Third Respondents, Adv. van Staden, submitted in both oral and written arguments that the Respondents have a real right to stay on the farms as the First and Second Respondents have a lease agreement with the previous owner, Mr. De Bruyn, who was sequestered. Counsel submitted that the Respondents made an offer to buy the farms, but their offer was rejected by the Applicants as the amount offered by the Respondents was lesser than the mortgage bond. It was further submitted by Counsel that the farms were sold without the lease agreement even though the lease contract was not cancelled. Counsel further submitted that Applicants did not comply with Rule 41 A that parties are to mediate their dispute and that there are four farms, of which the Respondents only reside on one of these (Hertzog) and should therefore be allowed to occupy until the lease contract runs out.

- [17] The First Respondent filed a supplementary affidavit to his opposing affidavit without leave from the Court. The deponents to the founding affidavit also filed a replying affidavit to the supplementary affidavit. Counsel for the Applicant submitted that the Court ought to *pro-non scripto* and should not disregard the supplementary opposing affidavit and if the Court allows it, so should the replying to the supplementary affidavit of the Applicant be accepted.

Counsel for the Respondent submitted that the supplementary affidavit to the opposing affidavit be admitted as the supplementary affidavit was meant to clear issues that were not canvassed in the opposing affidavit.

- [18] A party seeking to introduce further affidavits in motion proceedings is seeking indulgence from the Court. It is trite that motion proceedings only allow founding affidavit, opposing affidavit and replying affidavit.
- [19] Rule 6(5)(e) of the Uniform Rules of Court clearly states that the Court has a discretion whether to allow further affidavits or not. The Court could only exercise its discretion only when an application to file further affidavits had been launched.

In **Ndlebe v Budget Insurance Limited** ², it was held that:

“It is upon the litigant who seeks to file further affidavits to provide an explanation to the satisfaction of the Court that it was not malicious in its endeavor to file further affidavit and that the other party will not be prejudiced thereby.”

- [20] In my view, the First Respondent gave a clear explanation that the supplementary opposing affidavit was to clear issues and the Applicant has already filed its replying affidavit. It would thus be fair to both parties and as the matter involves an eviction of the Respondents that the court allow both sets of affidavits. It would therefore be in the interests of justice that both supplementary affidavits are admitted as not to prejudice either party.

² (7457/2017) [2019] ZAGPJHC 320 (22 February 2019) at para [7]

[21] Now turning to the eviction application, the First Applicant's contention in the founding affidavit is that he bought the farms at an auction on 8 March 2022. The farms were put up for auction subject to a lease agreement. The bid for the farms was too little and the farms were put up for auction without the lease agreement. On 18 March 2022, the Applicants signed an offer to purchase the farms for an amount of R10 255 000, 00. The offer was accepted and subsequent, the farms were transferred to the name of the First Applicant.

HUUR GAAT VOOR KOOP

[22] The First and Second Respondents contend that by virtue of the Roman Dutch Law principle of "huur gaat voor koop" that the First Applicant is bound by the long lease agreement between the predecessor Phillipus Abraham De Bruyn and the Respondents.

[23] The Principle of "huur gaat voor koop" dictates that regardless of whether a lease agreement in respect of property which is sold in terms of a written or tacit agreement, the lease agreement supersede the sale of the property. This simply means the new owner of the property is not entitled to cancel the agreement based solely on the new ownership.

[24] The new owner will be bound by the material terms of the lease agreement. This principle is applied *ex lege* and it is for this reason the purchaser will step into the shoes of the landlord.³ The **Rental Housing Act 50 of 1999** section,⁴ provides that the landlord is entitled to cancel the lease agreement on condition that the leased agreement specify cancellation and also if the cancellation constitute unfair practices.

³(See Mignoel Properties (Pty) Ltd v Kneebone 219/88[1989] ZASCA 110 (22 September 1989)

⁴ Section 4(5)(c)

[25] In **Pizani and Another v First Consolidated Holdings (Pty) Ltd** ⁵, the Court held that:

“Appellant had by operation of law stepped into the shoes of the lessor and that upon transfer the relationship continued between the appellant and the lessee without the necessity of a formal cession of rights.”

[26] If a leased property is leased subject to a prior real right such as a mortgage bond registered before the lease was concluded, then such right may trump the “huur gaat voor koop” rule.

[27] This is in circumstances where the property is put up for auction in the execution process subject to the lease, but if the highest bid is not enough to cover the outstanding debt owed to the bank, the bank may insist that the property be auctioned free of the lease.

[28] The First Applicant stated in the founding affidavit that:

“If however the property encumbered by a pre-existing real right, in other words, if a mortgage bond was registered over the property before the lease agreement was entered into the property, must still be sold subject to the lease agreement, but if the proceeds of such sale are insufficient to repay the mortgage’s claim against the insolvent estate, the lease agreement shall automatically terminate and the property is sold without the lease agreement being applicable thereto i.e. free from the lease.” (See para 15 of the offer to purchase)

[29] The First Respondent contention in the supplementary opposing affidavit that the farms were not to sold in terms of 2 court orders dated 19 February 2021 and 19 April 2021, due to the legally binding lease agreement including the defense of “huur gaat voor koop” is misconstrued as the First Respondent understood that the property will only be sold subject to the lease agreement if the proceeds of the sale are sufficient to repay the mortgage claim. The farms were put up for auction

⁵ 1979 (1) SA 69 (A)

subject to the lease agreement, but were not sold for an amount sufficient to repay the amount due to Suidwes and were thus auctioned without the lease agreement.

[30] The issue of the lease agreement was addressed by the Master of the High Court in a correspondence dated 8 February 2021,⁶ that:

“Toestemming word in terme van artikel 18(3) saamgelees met artikel 80(bis) van die Insolvensiewet, wet 24 van 1936, soos gewysig verleen, dat die volgende bates voor die plaasvind van die tweede vergadering per publieke veiling verkoop kan word: ... onderworpe aan die voorwaarde dat sou iemand 'n voorkeurreg of die bates het daardie person ook toestemming verleen het tot die verkoping van die bates.”

[31] The First Respondent may have a real right to occupy the farms in terms the lease agreement. However, the First Respondent's offer to buy the farms was rejected as the amount was insufficient. Thus, the First Applicant as the new owner has the real right to be enforced against the Respondents to claim or repossess the properties that were leased. So, the Respondents' rights to occupy the farms in terms of the lease is not an absolute right.⁷

[32] In **United Building Society Ltd and Another N.O v Du Plessis**,⁸ the following was said:

“...should the property be put up for sale, either in execution or by the trustee in insolvency, the question is whether the highest bid or offer would suffice to cover the amount of the mortgage bond or not. If the price does cover the amount of the mortgage debt, then the property will be sold subject to the lease, but if that price does not suffice to cover the mortgage debt, then the property will be sold free of the lease, the lease thereby coming to an end.”

⁶ First Respondent's supplementary opposing affidavit

⁷ (See *Maphango and Another v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 SCA at para [21])

⁸ 1990 (3) SA 75 (W) at 80 E

[33] In this instance, the Respondents' offer was rejected as it did not cover the mortgage debt. Thus, the farms were sold free of a lease agreement.

The defense as raised by the First Respondent of "huur gaat voor koop" can therefore not stand and the Respondents are therefore in unlawful occupation and ought to vacate the farms.

[34] It is further noted, the court order of 19 April 2021 which ordered as follows:

"4. The relief granted in terms of paragraph 2, shall automatically lapse in the event the creditors in the insolvent estate of Phillipus Abraham De Bruyn, which estate is registered with the Master of the High Court under estate reference B35/2020, resolved at the second meeting of creditors that the farms listed in paragraph 2.1 to 2.4 are to be sold."

[35] The trustees being the Second and Third Applicants filed confirmatory affidavits, confirming the contents of the founding affidavit of the Applicant specifically with reference to para 11.4 to 11.5 which details the duties and responsibilities of the trustees and furthermore the mortgagee had insisted the farms be sold free from the lease agreement (Landbank). The bank may insist that the property be auctioned free from the lease, and it's at the bank's discretion as in this instance, Landbank insisted that farms be sold without lease agreement (See replying affidavit para 10.6).

[36] Therefore, the First Applicant is entitled to repossess the properties that were paid for and transferred and registered in its name. The sale of the farms therefore terminated the lease agreement.

[37] The Respondents' contention that the court ordered that Hertzog farm cannot be sold on auction as prayer 4 of the court order of 19 April 2021 is clear on the sale transaction of the farm Hertzog was an interim interdict and would lapse after the creditor in the insolvent estate had their second meeting.

- [38] The Respondents raised an issue that the First Applicant failed to comply with Rule 41A,⁹ which provides that parties are to prepare for mediation prior to approaching court. Sub-rule (2) (a) requires the Applicant to serve a notice in terms of Rule 41A whether applicant agrees or opposes to mediation and similarly the respondent is to file a notice stating whether he is agreeing or opposing that the matter be referred to mediation.
- [39] Counsel for the First Applicant submitted in oral argument that non-compliance with Rule 41A does not negate the First Applicant's matter and that the Respondents did not file Rule 31A. I am inclined to agree with Counsel for the First Applicant that the Respondents also failed to file a 31A notice
- [40] Counsel for the First and Second Respondent submitted that the parties are compelled to mediate their dispute and made reference to **Koetsioe and Others v Minister of Defense and Military Veterans and Others**¹⁰.
- [41] In **Kalagadi Manganese (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Others**¹¹, the Court defined the mediation in terms of Rule 41A as a voluntary non-binding prescriptive dispute resolution.
- [42] Given that Rule 41(A) mediation must be voluntary to be effective and to assist in resolving disputes speedily. However, Rule 41 A does not change the nature of mediation nor force an unwilling party to participate. It is obligatory in the sense that parties are to consider mediation. The purpose of Rule 41A is to *expedito* resolution in a dispute and to alleviate the courts' case load and is beneficial to parties. However, it does not compel or force the parties to attend mediation. An unwilling party to a mediation process would render the process useless.
- [43] Therefore, the Applicants unwillingness to mediate, does not take away the right to approach court to litigate the matter. The Respondents in raising non-

⁹ Erasmus Superior Court Practice

¹⁰ (12096/2021) [2021] ZAGPPHC 203 (6 April 2021)

¹¹ (2020/12468) [2021] ZAGPJHC 127 (22 July 2021)

compliance with rule 41A, should have also filed a Rule 30 notice, but failed to do so. Furthermore, in terms of Rule 41A (3)(b), a Judge, or a Case Management Judge cannot force the parties to mediate, but may direct the parties to consider mediation at any given point before the judgment, however mediation cannot be imposed or forced unto the litigants.

[44] In **Nomandela and Another v Nyandeni Local Municipality and Others**,¹² the Court held that the applicant's failure to comply with Rule 41A did not justify striking off the matter from the roll and proceeded with the matter.

[45] As mediation is a voluntary process, this Court would not have imposed it on the parties and further that there was no reason for this court to dismissed the matter based on non-compliance with Rule 41A.

COSTS

[46] The general rule is that costs follow the even. The First Applicant prayed for punitive costs on an attorney and client scale and the First and the Second Respondent prayed for the application to be dismissed with costs.

[47] Referring back to the mediation issue, had the Applicants complied with Rule 41A notice, the litigation costs would have been lesser as the lack of mediation would have saved the parties unnecessary legally costs. That is, the costs of the application might have been avoided had the parties gone for mediation. In my view there is no case made out for punitive costs against the First and Second Respondent. And indeed, had the parties attended mediation, litigation costs would not be exuberant. Thus, costs should be that each party pay its own costs.

¹² 2021 (5) SA 619 (ECM)

ORDER

[48] Accordingly, the following is ordered:

1. The First to Third Respondents are declared unlawful occupiers of the properties known as:
 - 1.1 Portion 1 (Hou Moed) of the farm Waterpan 376, registration division Bultfontein, Free State Province;
 - 1.2 The farm Hertzog 44, registration division Bultfontein, Free State Province;
 - 1.3 Remaining extent of the farm Klip Pan 247, registration division Bultfontein, Free State Province;
 - 1.4 Portion 2 (Mariasrust) of the farm Uitkomst 13, registration division Theunissen, Free State Province.
2. The First to Third Respondents are to vacate the following properties within 60 days from date of service of this order:
 - 2.1 Portion 1 (Hou Moed) of the farm Waterpan 376, registration division Bultfontein, Free State Province;
 - 2.2 The farm Hertzog 44, registration division Bultfontein, Free State Province;
 - 2.3 Remaining extent of the farm Klip Pan 247, registration division Bultfontein, Free State Province;
 - 2.4 Portion 2 (Mariasrust) of the farm Uitkomst 13, registration division Theunissen, Free State Province.
3. The sheriff of the Honourable Court is authorized and directed to evict the First to Third Respondents from the properties described in paragraph 2

above in the event of the First to Third Respondents failing to comply with paragraph 2 above.

4. The sheriff of the Honourable Court is authorized to obtain the aid of the South African Police Service in the event of him/her not being able to evict the First to Third Respondents from the properties mentioned in paragraph 2 above.
5. The First to Third Respondents are directed to remove their movable property and personal belongings from the properties in paragraph 2 above within 60 days from the date of service of this order.
6. Costs on a party and party scale.

Chesiwe, J

On behalf of the Applicants:

Instructed by:

Adv J. Els

Phatsoane Henney Inc.

BLOMFONTEIN

On behalf of the Respondents:

Instructed by:

Adv. van Staden

Van Schalkwyk & Partners

BLOMFONTEIN