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

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

Case number: 4428/2022

In the matter between:

JOHANNA JACOMINA ROETS N.O.

First Applicant

DIRK DANIEL ROETS N.O.

Second Applicant

ANNA CORNELIA VAN ROOYEN N.O.

Third Applicant

[In their capacities as trustees of the Pieter Hendrik Bam Testamentary Trust also known as the Johanna Jacomina Roets Testamentary Trust, MT[...]]

And

THE TRUSTEES FOR THE TIME BEING OF
THE HENRICO TRUST (IT 1756/01)

Respondent

HEARD ON:

01 DECEMBER 2022

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 16 MAY 2023 at 16H00.

- [1] The applicants as trustees of Pieter Hendrik Bam Testamentary Trust also known as the Johanna Jacomina Roets Testamentary Trust (the Trust) which owns the farm Louis Meyer situate at number 1[...], Harrismith in the Free State Province (the farm) seek an order directing the respondent to remove all its cattle and property from the farm within 14 days of the date of this order and to restore the said farm to the Trust in the same good order and condition as it was when received by the respondent.

- [2] At the inception of the Trust, the trustees were the first applicant, Petrus Jakobus Venter (Venter) and the late Martha Johanna Bam duly appointed on 25 September 2020. On 6 June 2022 Venter and Bam were replaced with the second and third applicants respectively.

- [3] The respondent's cattle occupy a portion of the farm in terms of a cattle grazing lease agreement. The circumstances under which the grazing lease agreement was concluded including its provisions are in dispute.

- [4] It is the applicants' case that initially, the respondent grazed its cattle on the farm in terms of an oral agreement concluded between the respondent represented by Hermanus Bernadus Swart (Swart) and the first and second applicants' son Dirk Daniel Roets (Roets junior) in terms of which the respondent would graze its cattle on the farm for the winter season of 2021 in exchange of providing transport services to Roets junior until 1 September 2021 whereafter, the respondent would be obliged to pay rental in that regard.

- [5] The oral agreement was extended till end February 2022 then on 1 March 2022 the Trust sold the farm to Sandvelt Trust (Sandvelt). Transfer of the farm was registered on 8 July 2022 and occupation of the farm was supposed to be

given to Sandveldt on 01 September 2022 however, despite the expiry of the oral agreement and the respondent having been timeously informed of the sale of the farm the respondent has refused to remove its cattle and its belongings from the farm as a result, the Trust has been unable to hand over occupation of the farm to Sandveldt. Instead, the respondent relies on a written lease agreement (the lease) signed by first applicant and Swart on 19 November 2021 in terms of which the respondent leased the portion of the farm for a period of three (3) years ending in August 2024.¹

- [6] The applicants dispute the validity and enforceability of the lease on the grounds that the first applicant signed the lease “thoughtlessly,” she was not aware that she was signing a lease, she had no intention to bind the Trust with a lease as that would have impeded the sale of the farm and, pursuant to the conclusion of the lease, the first applicant was informed by the erstwhile co-trustees that she and also Roets junior were not entitled to “haphazardly” conclude lease agreements which bind the Trust without the knowledge and consent of the co-trustees. In order to enable the respondent to obtain alternative grazing land the oral agreement was ratified and extended to 31 August 2022 while the written lease was deemed to be invalid and unenforceable.
- [7] The applicants further state that the respondent was duly informed about the invalidity of the written lease despite. A series of correspondences (about fifteen (15) letters and emails)² was exchanged between the respective attorneys from 01 February 2022 to 23 August 2022 in an attempt to resolve the matter but they did not yield any favourable result as the respondent insisted that the applicants should honour the lease.
- [8] The respondent’s answering affidavit is deposed to by Smit. At para 1.5, he declares that:

¹ Annexure “FA5” of the applicants’ founding affidavit.

² Annexures “FA7.1” to FA7.15” of the applicants’ founding affidavit.

*"I depose to this affidavit in my capacity as duly authorized Trustee of the **Henrico Trust.**"*

And at para 1.6. he states thus:

*"I am duly authorized to oppose this application and to depose to this affidavit on behalf of my fellow Trustees as more fully appears from the resolution which is annexed hereto as **Annexure "OA1"**.*

- [9] Subsequent to the filing of the answering affidavit, the respondent filed an application for leave to amend the answering affidavit by replacing the resolution annexed to the answering affidavit as Annexure "OA1" with a resolution marked as Annexure "X". According to the respondent, Annexure "OA1" refers to the authorization to conclude the lease agreement and not to the authorization to oppose these proceedings therefore it was erroneously attached on the answering affidavit. The correct resolution in this regard is Annexure "X".
- [10] I hold the view that this amendment does not constitute a substantial amendment of the answering affidavit, it is merely intended to cure the error of referring to an incorrect document. The applicants are thus not prejudiced by the replacement of annexure "OA1" with Annexure "X." I consequently determine this application in favour of the respondent, the relief sought is accordingly granted.
- [11] The application is opposed on the grounds that it is clear from the papers that there is a material dispute of facts relating to the circumstances under which the written lease was concluded. It is the respondent's case that the applicants' contention that when the first applicant signed the lease she was not aware that she was signing a lease and that she also had no authority to bind the Trust is a mere fabrication aimed at avoiding liability to Sandveldt for failing to hand over occupation of the farm.

- [12] The respondent states that the oral agreement concluded with Roets junior was not in respect of cattle grazing on the farm but on Roets junior's maize crops. The agreement was indeed concluded in April 2021 for the winter period in return for the transport services provided by the respondent to Roets junior and later extended to 1 September 2021. On 12 November 2021 Swart presented a written lease agreement to the first applicant in terms of which the respondent leased the farm for a period of five (5) years. On the request of the first applicant the duration of the lease was amended to a period of three (3) years with a proviso that the rental due will escalate by 7% annually. The lease was duly signed by the first applicant in the presence of both Swart and the second applicant on 19 November 2021. Furthermore, the erstwhile co-trustee the late Bam, was also present when the terms of the lease were discussed. There is accordingly a clear dispute of facts on this issue which cannot be resolved on the papers, the applicants should have proceeded by way of action proceedings and not application proceedings. The application ought to be dismissed on this score.
- [13] The respondent further states that the Trust is estopped from denying that the first applicant was authorised to sign the lease agreement for the reason that: the Trust represented by words and conduct that the first applicant was duly authorised to do so and that the trustees authorised the conclusion of the lease agreement; the respondent was also informed by the first applicant that she was authorised to conclude the lease agreement on behalf of the Trust and at no stage was the validity of the lease disputed the respondent was not only permitted to occupy the leased portion of the farm the applicants accepted the rental payments for the first 12 months of the lease agreement and even requested the respondent to make an advance payment in the amount of R50 000.00 in respect of the 6 months of following year on 17 January 2022.
- [14] In the alternative, the respondent contends that the first applicant had the ostensible authority to bind the Trust in terms of the lease in that, there was presentation by words or by conduct of her authority, the representation was made by the Trust in the form such that the principal would reasonably have

expected that outsiders would act on the strength of it. The respondent reasonably relied on the said representation and has been consequently prejudiced by the reliance on the representation.

[15] On the facts of this matter, the existence of the written grazing lease agreement is not in dispute. The applicants have provided contradictory versions for disputing its validity and enforceability. In the founding affidavit it is alleged that the first applicant was not aware that she was signing a lease agreement whilst it is also averred that it was brought to the attention of the first applicant that the lease was invalid due to lack of authorization by the co-trustees. On the other side, the respondent's opposing affidavit raises a genuine and *bona fide* dispute of facts with regard to the circumstances which gave rise to the conclusion of the lease namely that; the first applicant was aware that she was signing a lease agreement and she signed with the intention to bind the Trust as she was duly authorized to do so.

[16] It was held in *National Director of Public Prosecutions v Zuma*³ at para 25 that:

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of facts arise on the affidavits, a final order can only be granted only if the facts averred in the applicant's (Mr Zuma) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[17] Based on the array of the correspondences exchanged between the parties' legal representatives (Annexures "FA7.1" to FA7. 15") it is clear that at the time the applicants launched these proceedings they were well aware that a material dispute of facts might arise in relation to these disputed facts, they

³ **[2009] ZASCA 1; 2009 (2) SA 277** (SCA).

nevertheless choose to proceed with this matter by way of motion proceedings confining themselves to have the prevailing disputes of facts decided on the affidavits alone. I hold that the dispute of facts raised by the respondent are worthy to be accepted for the determination of the issues between the parties.

- [18] In this matter the respondent's version that the lease is extant is also corroborated by the written lease agreement, annexure "FA5" duly signed by the first applicant and it provides thus:

27

HERNICO TRUST 'FA5'

BTW: [REDACTED] 54S REG NR: [REDACTED]

TEL: [REDACTED]

E-mail: [REDACTED]

Posbus: [REDACTED]

Warden

9890

HUURKONTRAK

Tussen

JOHANNA JACOMIENA ROETS TESTAMENTERE RUST
REGISTRASIE MT [REDACTED]
PLAAS LOUIS MEYER
JOHANNA JACOMIENA ROETS
ID [REDACTED] 085
(Bekend as Verhuurder)

En

HERNICO TRUST
REGISTRASIE IT [REDACTED]
HERMANUS BERNARDUS SWART
ID [REDACTED]
(Bekend as Huurder)

Hiermee word die ooreenkoms tussen bostaande "Verhuurder" en Huurder as volg gemaak:

1. 390ha (hektar) teen R300 (DrieHonderd Rand) per ha(hektar) halfjaarliksvooruitbetaal 1 September 2021 tot 30 Augustus 2024.
2. Eskalerasie van huurbedrag sal 7(sewe)% per jaar beloop.
3. Hernico Trust sal eersteopsie verskef word om huurkontrak te hernu na Augustus 2024 (3 jaar).

GETEKEN TE Warden OP 17/11/2021

VERHUURDER GETUIE 1 GETUIE 2
 JG ROETS

GETEKEN TE Warden OP 12/11/2021

HUURDER GETUIE 1 GETUIE 2
 HB SWART

- [19] *Ex facie* the provisions of clause 3, makes it clear that the respondent is entitled to graze its cattle on the farm until 31 August 2024.

[20] The principle applicable where the validity of a contract is disputed by a party on the grounds that the signatory was not aware of the contents of the agreement when it was signed is trite: A person who signs a contract is taken to be bound by what appears above their signature whether or not they had read the agreement or not before signing it and would thus be liable to perform the terms of the agreement. Accordingly, it is for the first applicant to explain the circumstances under which she appended her signature on the agreement. The fact that she did not read it or that she signed it “thoughtlessly” does not constitute a valid defence to avoid liability arising from a contract.⁴

[21] The onus is thus on the applicants to prove that the Trust had not authorized the first applicant to act on its behalf in concluding the written lease. In the applicants’ founding affidavit a bare denial of the first applicant’s authority to conclude the lease on behalf of the Trust is asserted. It was pointed out in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*⁵ at para 23 that:

“...the fact that trustees have to act jointly does not mean that the ordinary principles of the law of agency do not apply. The trustees may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but whether a particular trustee has the ostensible authority to act on behalf of the other trustees is a matter of fact and not one of law.” See also *Moraitis Investments (PTY) LTD and Others v Montic Dairy (PTY) LTD*⁶ quoting with approval *Nieuwoudt including Thorpe and Others v Trittenwein and Another*⁷ where it is stated that:

“unless the trust deed otherwise provides, the trustees must act jointly. They may however authorise a third party, including one of their number, to act on their behalf and conclude agreements that bind the trust.”

[22] *In casu*, except to argue that there is no general resolution adopted by the Trust authorising the first applicant to act on behalf of the Trust there was not

⁴ *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at pages 715-6.

⁵ **2004 (3) SA 486 (SCA)** ([2004] 1 All SA 396).

⁶ **2017 (5) SA 508 (SCA)** paras 23 and 33.

⁷ **2007 (2) SA 172 (SCA)** ([2006] ZASCA 30) para 9.

even attempt to file the trust deed which regulates how the affairs of this Trust are to be conducted specifically, with regard to the first applicant's authority or lack thereof to conclude lease agreements on behalf of the Trust.

[23] I am not persuaded that the applicants have made out a case in support of the averments that the lease agreement is tainted to warrant the relief sought by the applicants. I conclude that on the available facts, it has been established that the Trust is bound by the lease agreement.

[24] For the all these reasons, I make the following order:

(1) The application is dismissed with costs.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicants:
Instructed by:

Adv. A Sander
Van Aardt & Van der Walt

BLOEMFONTEIN

Counsel on behalf of Respondent:
Instructed by:

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EG Cooper Majiedt Inc.

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