



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

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

Case no: **3898/2021**

In the matter between:

THOMAS FRANCOIS BRINK

Applicant

and

FREDERICK WHITE DELL

1st Respondent

THE REGISTRAR OF DEEDS BLOEMFONTEIN

2nd Respondent

CORAM: JP DAFFUE J

HEARD ON: 07 MARCH 2022

DELIVERED ON: 07 MARCH 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 07 March 2022.

- [1] I have been allocated the applicant's application for leave to appeal for adjudication in so far as Loubser J who dealt with the main application is on long leave.
- [2] The applicant's application to have a notarial lease agreement ("the lease") declared validly cancelled was dismissed with costs. The unsuccessful applicant and owner of the farm, subject to the lease, now applies for leave to appeal to the Supreme Court of Appeal, alternatively the full bench of this division.

- [3] Reliance is placed on both s 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013. It is submitted that the applicant has good prospects of success on appeal, but more importantly, leave should be granted for some other compelling reason as provided for in sub-section 17(1)(a)(ii). In this regard the applicant relies on *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*,¹ ie that a compelling reason includes either an important question of law or a discrete issue of public importance that will have an effect on future disputes.
- [4] The applicant relies on breach of contract by the first respondent and tenant of the farm based on transgression of two separate clauses of the lease, to wit clause 4.2 and 4.10 and his consequent valid cancellation of the lease.
- [5] The applicant mainly focuses on the following issues:
- 5.1 The 1st respondent fails to keep the farm free of any undesirable weeds and Slangbos in particular and also fails to prevent the spreading thereof on the farm in contravention of clause 4.2;
- 5.2 The 1st respondent allows overgrazing of the farm contrary to proper agricultural practices contrary to clause 4.10.
- [6] The applicant not only relies on the Conservation of Agricultural Resources Act ("CARA"),² and its regulations, but also on s 24 of the Constitution. This last-mentioned legislative instrument stipulates that everyone has the right to have the environment protected.
- [7] The application was dismissed based on the presence of factual disputes and how these should be adjudicated in motion procedure. The court relied on the *Plascon Evans* principle. It held that the 1st respondent's version should prevail. It found in respect of over-grazing that there was a real dispute and that the 1st respondent's version could not be dismissed as fictitious or without any merit.³

¹ 2020 (5) SA 35 (SCA) at para 2

² 43 of 1983

³ Judgment para 26

In respect of the Slangbos issue, it held that Slangbos was most probably already present at the start of the lease and that the 1st respondent was adhering to the obligation to prevent the spreading of Slangbos, bearing in mind the controlling steps taken by him.⁴ The court held that the applicant knew beforehand that the 1st respondent would resist the application, and exactly on which grounds, as these were fully disclosed in correspondence between the attorneys.⁵

- [8] Harms DP, writing for a unanimous bench, held in *NDPP v Zuma*⁶ at para 26: “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 may be different if the respondent’s version consists of bald 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.”
- [9] I allowed the parties an opportunity to file further heads of argument which are not normally required in applications of this nature. Additional heads were filed. The applicant has not raised any other issues than those already raised in the main application, although the point was pertinently raised that the matter should have been decided in favour of the applicant based on the facts that are common cause.
- [10] Although the presence of Slangbos on the farm may be common cause, this must be seen in perspective and considering the totality of the evidence based on the *Plascon Evans* principle. Such occurrence is not unique to the farm and *ex facie* the papers this is a severe problem in particularly the Eastern Free State where the farm is situated. Loubser J accepted that Slangbos was present on the farm at the start of the lease. There was no reason to doubt the version of the 1st respondent in this regard which is actually corroborated by the applicant’s expert. Does this mean that the 1st respondent had to ensure that the farm was free of Slangbos at any given moment and if this was not the case, that the lessor might cancel the lease? In order to properly interpret the lease

⁴ Judgment para 30

⁵ Judgment para 32

⁶ 2009 (2) SA 277 (SCA) at paras 26

one has to consider the language used, the purpose of the clause and all relevant factors present when the lease was entered into. An unbusiness-like interpretation is not called for. I am not convinced that there are reasonable prospects of success that another court would find that the 1st respondent is in breach of the lease in so far as there is a presence of Slangbos on the farm which was also the case at the start of the lease. I cannot imagine that another court may reasonably find that the clause could be interpreted on the basis of a serious breach allowing for cancellation if there are (merely for the sake of an example) one, two or three Slangbos plants on the farm, which perhaps had been there initially, but were not destroyed within a particular time limit.

- [11] I am not persuaded that another court would find that a real and bona fide dispute has not arisen pertaining to the steps taken to remove Slangbos on the farm. The 1st respondent has taken specific steps and there is no reasonable possibility that another court would find that he should not, for example, resort to burning the Slangbos which is not pertinently prohibited in the regulations.

- [12] Although the 1st respondent may be criticised for adopting a rotation system on the particular farm in conjunction with other farms, his evidence and methodology could not be rejected as far-fetched and false. Again, there was no reason to reject his version. There are also no reasonable prospects that another court would come to a different conclusion.

- [13] It is correct, as submitted by Mr Wannenbourg, that the court is bound to also consider whether there is some other compelling reason why leave to appeal should be granted. However, the court stated in *Caratco*⁷ that this aspect cannot be considered without considering the merits which remain vitally important.⁸

- [14] The applicant's counsel knew that he was between the devil and the deep blue sea during the oral argument before Loubser J and therefore requested a referral of the matter to trial or oral evidence on what he describes to be a

⁷ Supra in para 2 of the judgment

⁸ See also *Ramakatsa and Others v African National Congress and Another* (Case No. 724/2019) [2021] ZASCA 31 (31 March 2021) at para 10

narrow issue, ie the breach of the two provisions of the lease.⁹ Such a request was made belatedly during the oral argument, but there was no reason to adhere thereto, bearing in mind the applicant's knowledge of the 1st respondent's stance prior to litigation and the enormity of the evidence to be led and particularly the cross-examination in respect thereof, in order to establish if the 1st respondent was in breach of the lease to such an extent that it entitled the applicant to cancellation. It is no doubt not a matter of a simple black or white. There are numerous issues to be dealt with such as the interpretation of the lease, the alleged breach and perhaps even the severity thereof, the different approaches to removing Slangbos, bearing in mind the problems experienced over a huge area in the Eastern Free State, and also modern farming methods based on for example rotation of cattle as explained by 1st respondent, a farmer with years of experience.

[15] I have not been convinced that a court of appeal would reasonably arrive at a conclusion different to that of Loubser J. There are no reasonable prospects to grant leave to appeal under sub-section 17(1)(a)(i) and I am also not convinced that there is some other compelling reason why the matter should be sent on appeal as provided for in sub-section 17(1)(a)(ii).

[16] Consequently, the following order is issued:

The applicant's application for leave to appeal is dismissed with costs.



J P DAFFUE J

On behalf of the Applicant	:	Adv WF Wannenburg
Instructed by	:	Kramer Weihmann Inc Bloemfontein

On behalf of the 1 st Respondent	:	Adv WJ Groenewald
Instructed by	:	Claude Reid Inc Bloemfontein

⁹ See para 57 of his present heads of argument