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: 4679/2021

In the matter between:

ONEGRAIN (PTY) LTD Applicant

And

PETRUS ANDREAS THERON First Respondent

FIRSTRAND BANK LIMITED t/a WESBANK Second Respondent

ELRICH RUWAYNE SMITH *N.O.* Third Respondent

ELNA ELSA POHL *N.O.* Fourth Respondent

CORAM: MATHEBULA, J

HEARD ON: 02 DECEMBER 2021

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII on 11 March 2022. The date and time for hand-down is deemed to be 11 March 2022 at 16h15.

Introduction

[1] The applicant in this matter has brought an application for an order for delivery of movable property ("property") mentioned in the notice of motion. In the alternative the applicant seeks an interim order that pending the outcome of an action to be instituted, the first respondent be interdicted and restrained from disposing, alienating, encumbering, utilising or operating the aforementioned property for its purposes and functions.

Parties

[2] The applicant is described as a private company with limited liability and shareholding registered in accordance with laws of the Republic. The founding and answering affidavits are deposed to by Mr Jacobus Johannes Botha (Mr "Botha") who is the husband of its sole director Me Telana Botha. The first respondent is a farmer and businessman of Bultfontein. He is the husband of the sole director of an entity called Josme (Pty) Ltd. The second respondent is a finance house registered as a bank in accordance with the company laws. On the strength of the founding papers, it is for all intents and purposes the owner of the property in dispute. The third and fourth respondents are joint trustees of the insolvent estate of Phillips Abraham De Bruyn (Mr "De Bruyn"). Apparently the property in dispute is on his farm called Hertzog in the district of Bultfontein owned by Mr De Bruyn. The farm is an asset of the insolvent estate. No order is sought against the second to fourth respondents. They are merely cited as parties who may have an interest in the matter.

Factual background

[3] It is necessary to set out factual background to the dispute. There is a long history of litigation between the applicant Mr Botha and the first respondent over the same property. On 13 May 2021, Majozi AJ granted a spoliation order in favour of the first respondent under case number 642/2021. The applicant deemed the spoliation application, judgment and order significant to these proceedings and requested that the file be made available to me by the

Registrar of this court. In the oral submissions, both counsel referred extensively to the spoliation application. My judgment is drawn exclusively from the papers before me under case number 4679/2021.

[4] Sometime in June 2020, the applicant entered into a written instalment sale agreement ("the agreement") with the second respondent for the disputed property. The first instalment was payable on/or before 7 August 2020 and the last one on/or before 7 July 2024. This is stipulated in the payment schedule. The terms and conditions of clause 4.2 of the agreement expressly provides that ownership of the property remained with the second respondent until the last instalment has been paid. Also clause 7.2 provides that the goods may not be given, sold, loaned, let, pledged or transferred to any person without the written approval of the second respondent. The same clause provides that the applicant should not allow the goods to be subject to any attachment or legal claim by a third party. In simple terms it means that there cannot be competing claims until the last instalment is paid.

[5] It is common cause that the property was utilised in the business of sifting grain and cleaning of teff involving applicant and an entity called Josme (Pty) Ltd whose director is the wife of the first respondent. What is apparent is that the implementation of the agreement was between Mr Botha and the first respondent. The negotiations and actual running of the business venture was driven by them using business entities which on paper were driven by their wives. Mr Botha denies the existence of the partnership agreement between the applicant and the first respondent. In response, the first respondent alleges the establishment of an "informal" partnership between Mr Botha and himself. He contends that the agreement with the applicant and Mr Botha envisaged that the property will eventually be acquired by the partnership. However, the relations between them soured and it has come to the end. He alleges that the property was bought with the funds from the partnership. Therefore, he lays claim on them.

Arguments

[6] I now turn to the arguments raised by both counsel on behalf of the parties which must be repeated. Mr Synman intimated that the first respondent is relying on the existence of a partnership which has ended but nothing has been done to dissolve it despite the lapse of a substantial period. He pointed out that the property was in the possession of the first respondent and not the partnership. He also pointed out that there was credible evidence on affidavit that the first respondent was using the property for his own benefit and not for the so called partnership. His argument is that on the papers, there is overwhelming evidence that there was no partnership between the applicant and first respondent.

[7] In the alternative, counsel for the first respondent referred to the admission by Mr Botha on paragraph 64.5.2 of the founding affidavit that a joint venture for teff cleaning operation was established between the parties. This he submitted, is self-evident on the schedule of payments indicating payments made to various parties from the proceeds or fees for services rendered. This bolsters the contention that there was a partnership in existence.

[8] The mainstay of the case for the first respondent is that there are glaring, real, genuine, and *bona fide* dispute of fact in the papers. This was foreseeable on the part of the applicant that this matter cannot be adjudicated on the papers. It was pointed out that the applicants premised its ownership or right to possession on the instalment sale agreement with the second respondent. The applicant, being aware that this document is disputed, failed or neglected to set out the requirements for a vindicatory claim. The contention is that the applicant has failed to allege the seller from whom the property was purchased from. On this basis, the application must be dismissed with costs.

Discussion

[9] What remains to be discussed is various decisions and principles of law that the parties drew to my attention. In this matter, the applicant seeks a delivery for the delivery or return of the property purchased on credit from the second respondent. Counsel placed reliance on two (2) passages from the judgement of Cloete J writing for the undivided bench in **Fedsure Life Assurance v Worldwide African Investment Holdings**[1] where he said the following:

> "There are two exceptions to the requirements set out in *Eriksen*. They occur in applications for interim relief pending vindicatory and '*quasi-vindicatory'* actions. A vindicatory action has been categorised as one in which the plaintiff claims delivery of specific property as owner or lawful possessor; and an action has been categorised as '*quasi-vindicatory*' when delivery of specific property is claimed under some legal right to obtain possession (*Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 810 *in fine* - 811; *UDC Bank Ltd v Seacat Leasing and Finance Co (Pty) Ltd and Another* 1979 (4) SA 682 (T) at 688G - H). I do not wish to be detained by terminology. In all such cases it has been settled law in this Division for over half a century that '(T)he court is entitled to ensure that the thing shall be preserved until the dispute is decided finally' - *per* Tindall J in *Mathews v Mathews* 1936 TPD 124 at 128.
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> The two exceptions are the following: the applicant need not allege irreparable loss inasmuch as there is a presumption, which may be rebutted by the respondent, that the injury is irreparable - *Maroudus v Curich* 1924 WLD 249 at 250, *Ogilvie Flour Mills Co Ltd v H F Picot & Co Ltd (in Liquidation)* 1927 WLD 146 at 150 and *Stern* at 813B - C; nor need the applicant show that it has no other satisfactory remedy - *Cowen & Hammond v Campbell* 1906 TH 191."

[10] There is no doubt despite protests from the first respondent that the applicant is the lawful possessor of the property which has been purchased from the second respondent. There are no factual basis upon which the first respondent is denying this fact except that he desires to do so. The copies of the agreement and annexures are *prima facie* proof behind this finding. The

[1] Fedsure Life Assurance v Worldwide African Investment Holdings 2003 (3) SA 268 (W) at paras 27 and 28.

argument that the seller is unknown or unidentified is bereft of any merit. It is patently clear in the papers. Somehow the first respondent acknowledges that payment for the property is made from the offers of the alleged partnership. Further that it was agreed by the applicant, Mr Botha and himself that the property will eventually form part of the assets of the partnership. The question is when? Clearly if anything once full payment has been made.

[11] The first respondent also placed reliance on the decision of the court in **Concor Construction (Cape) (Pty) Ltd v Santam Bank Ltd**[2] as a proposition that the applicant has failed to make out a case against him. It is self-evident that this reliance was misplaced. What the applicant argued that it must be alleged and proved by the applicant in order to succeed, was the crux of the argument on behalf of the appellant in that matter. The court stipulated the requirements for passing ownership of movables by delivery These are the following: (i) the transferor had to be capable of transferring ownership; (ii) delivery had to be effected by the transferor with the intention of transferring ownership and taken by the transferee with the intention of accepting ownership; and (iii) there had been payment where the sale was a cash sale.

[12] Having set out these principles. It is settled how that a person cannot transfer more rights than he has. The applicant cannot give more than he has. The owner or titleholder of the property is the second respondent and that will remain until the last instalment has been paid. Therefore, there can be no talk of the property belonging to any partnership. The parties relevant to the instalment sale agreement is the applicant and the second respondent to the exclusion of all others. The instalment sale agreement specifically provides that the applicant must keep possession and control of the property as well as keep it in good condition. It cannot be clearer than that.

[13] Perhaps the strongest argument on behalf of the first respondent is that he is/was in a partnership with Mr Botha. In our law there are three essential

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[2] Concor Construction (Cape) (Pty) Ltd v Santam Bank Ltd 1993 (3) SA 930 (A).

elements of a partnership. Firstly, each party must bring something into it. That can be skill or money or labour. Secondly, the said partnership should be carried to the joint benefit of both parties. Thirdly, the common object should be to make profit.[3]

[14] I now turn to consider whether the alleged partnership satisfies these requirements. At the onset, I hold the view that there is no evidence to sustain this allegation. What is apparent is that there were business dealings between the applicant and business entity called Josme (Pty) Ltd. That is also apparent on the document titled summary of payments attached to the opposing papers.[4] That is distinct entity from the first respondent and its sole director is his wife. It may well be so that affairs are to a great extent handled by him. However, it is a juristic person in accordance with the laws of the Republic having its own legal personality. It is not the case for the first respondent that the applicant is the *alter ego* of Mr Botha.

[15] The applicant deliberately withheld the details of the alleged partnership. Instead he resorted to fancy descriptions and labelled it an informal partnership. These are three (3) different types of partnerships namely ordinary, anonymous and commanditarian partnership. The elements of a partnership have been discussed in preceding paragraphs. Despite diligent search, I did not find anything called informal partnership and its characteristics in our law. It is safe to conclude that the aforementioned legal concept does not exist.

[16] Clearly, the first respondent alleges the existence of a partnership but is unable to demonstrate the existence of its essential elements. The first respondent alleges that the partnership has ended. However, as correctly pointed out by the counsel for the applicant, nothing has been done to dissolve it. The first respondent continues to utilise the property for his own benefit. The payments for the property to the second respondent are not

[3] Buffers v Mncora 2012 (4) SA 1 SAC at para 5F.
[4] Page 152 of the Paginated Papers

being effected. He appears to be in no hurry to move towards its dissolution. The overwhelming evidence is that there was no partnership between the applicant and the first respondent.

[17] The first respondent also raised the point that there are *bona fide* dispute of fact in the papers. He stated that not only was it foreseeable but the matter cannot be decided on the papers as they are. Counsel relied on the often quoted judgment of **Wightman t/a JW Construction v Headfour (Pty) Ltd**[5] to illustrate that the applicant's papers did not only fail to define the relevant issues but has not seriously and unambiguously addressed the disputed facts.

[18] There is absolutely no need at all to strain on this contention. The first respondent is attacking side issues instead of the nub of the application. The issue for determination is centred around ownership or possession of the property and existence or non-existence of the partnership. Informal or otherwise. The dispute of fact alleged by the first respondent is not of such a nature that will give rise to wide ranging factual enquiries. There is no possibility of any real or substantial questions of fact arising that may lead to this matter incapable of being adjudicated on the papers. My conclusion is that the contention about the existence of the dispute of fact lacks merit.

[19] Delivering the property to the applicant does not extinguish any claim that the first respondent might have against the applicant. It is by no means definitive of the rights of the parties. This order is intended to preserve the property and does not in any manner prejudice the first respondent.

[20] I make the following order: -

20.1. The first respondent is ordered and directed to deliver or surrender control to the applicant the property described as Annexure "A1" and

[5] Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (2) ALL SA 512 (SCA) at para 12.

"A2" read with Annexure "A3" as well as "B1", "B2", "B2", "B3", "B4" and "B5" attached to the Notice of Motion within three (3) days of this order.

20.2. Should the first respondent fail to do so, the Sheriff, Bultfontein or any Sheriff in whose jurisdiction the property may be found is authorised and directed to take possession and control and hand the same to the applicant.

20.3. The costs of this application are to be paid by the first respondent.

M.A. MATHEBULA, J

Counsel on behalf of Applicant:	Adv. C Snyman
Instructed by:	McIntyre Van Der Post Attorneys
	BLOEMFONTEIN
Counsel on behalf of the First Respondent:	Adv. A Sander
Instructed by:	Badenhorst Attorneys
	BLOEMFONTEIN
Counsel on behalf of the Second Respondent:	No Appearance.
Counsel on behalf of the Third Respondent:	No Appearance.
Counsel on behalf of the Fourth Respondent:	No Appearance.

/TKwapa