

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

Case No.: **1779/2022**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

TSWELOPELE LOCAL MUNICIPALITY

Applicant

and

TIKWE FARMING (PTY) LTD

1st Respondent

PAULUS MANYATSE SEBILO

2nd Respondent

SHERIFF OF BULTFONTEIN

3rd Respondent

JUDGMENT BY: VAN RHYN, J

HEARD ON: 9 JUNE 2022

DELIVERED ON: 29 AUGUST 2022

[1] The applicant is the Tswelopele Local Municipality, a local municipality duly established in terms the provisions of section 155 of the Constitution, under whose jurisdiction the town of, amongst others, Hoopstad in the Free State falls. The applicant brought an urgent application against first and second respondents with the purpose of, *inter alia*, interdicting first and second respondents from harvesting, alternatively alienating any crops already harvested. In the further alternative and in the event of the crops having been harvested and alienated, that the proceeds thereof be paid to the third respondent, being the Sheriff.

[2] The applicant sought a *rule nisi* pending the hearing of part B of the application, to perfect its hypothec over the crops and movables which may be found on Camp K and Camp L of Erf 17003, Hoopstad (the property). It is common cause that the applicant is the registered owner of the property. The application was issued on 14 April 2022 and was set down for hearing on 16 April 2022.

[3] On 16 April 2022 the urgent application was removed from the roll. On two further occasions, the 22nd April 2022 and 29th April 2022, the matter was also removed from the roll. On 2 June 2022 the matter was postponed to 9 June 2022 when it ultimately came before me for hearing. The applicant apparently abandoned its efforts to proceed with the urgent application and on 22 April 2022 filed its amended Notice of Motion in terms whereof a *rule nisi* be issued calling upon the first and second respondents to show cause why the following order should not be made final:

“2.1 The applicant’s tacit hypothec held over the crops and movables on Camp K and Camp L, Erf 17003, Hoopstad, Free State Province (“hereinafter referred to as “the Erf”) be perfected by authorising the Third Respondent to enter the Erf and to attach the crops and movables which may be found thereon to the value of R1 854 000.00 (One Million eight Hundred and Fifty Four Thousand Rands), as well as legal costs, and the reasonable costs of harvesting and safeguarding the crops and movables (if any), estimated at R650 000 (Six Hundred and Fifty Thousand Rands);

2.2 That the first and Second Respondents are interdicted and restrained from harvesting any crops, and removing any movable assets, from the Erf;

2.3 That the Applicant be authorized to timeously harvest and alienate any crops on the Erf so attached by the Third Respondent and that the proceeds thereof, pending the finalization of this application and an action referred to in paragraph 4, be paid into the trust account of the applicant's attorney with details....

2.4 In the alternative to paragraph 2.3 above, that the Applicant be authorized to timeously harvest any crops on the Erf so attached by the Third Respondent and to keep same in storage at a suitable facility pending the finalization of this application and an action referred to in paragraph 4;

2.5 That the First and Second Respondents be ordered to pay the costs of this application;

3. That the relief sought in prayers 2.1 -2.5 operate as an interim interdict with immediate effect pending the finalization of this application and an action referred to in paragraph 4;

4 The Applicant is ordered to institute its action for appropriate relief within 10 days of the date of this final order"

[4] The application is opposed by the first and second respondents. The first respondent is Tikwe Farming (Pty) Ltd, a private company situated at Hoopstad and the second respondent is the director of the first respondent. The application is opposed by the respondents on the basis of the following preliminary points:

4.1 The application is defective on the basis of the lack of *locus standi* of the deponent to the founding affidavit;

4.2 The application is premature as the applicant failed to comply with the provisions of rule 41A(2)(a) for the referral of the dispute to mediation;

4.3 The applicant seeks an inappropriate remedy as the relief sought will have no practical effect or result.

[5] As to the merits of the application, the first and second respondents contend that the allegation that they are in arrears with the rental under the lease agreement in respect of the property is disputed and therefore there is no tacit hypothec upon which the relief sought by the applicant could be granted. The respondents furthermore argue that the applicant has failed to meet the requirement for the grant of an interim interdict.

[6] The founding affidavit by the applicant is deposed to by Matiro Rebecca Ellen Mogopodi (the “first deponent”), the Municipal Manager of the applicant. The first deponent states that she is duly authorised to depose to the affidavit on behalf of the applicant by virtue of her position as the accounting officer of the applicant and for being responsible for the administrative affairs of the applicant. The first issue *in limine* is that the application is defective because the first deponent lacks authority to institute the proceedings on behalf of the applicant. The applicant furthermore filed a replying affidavit, deposed to by Boitshoko Percival Dikoko, the Director: Technical Services and appointed in the position as Acting Municipal Manager (the “second deponent”) of the applicant.

[7] In the second deponent’s replying affidavit it is stated that he is duly authorised to depose to the affidavit on behalf of the applicant by virtue of his position as the Acting Municipal Manager who has been delegated the authority to handle litigation proceedings on behalf of the applicant. Furthermore, insofar as the municipal manager’s authority to represent the applicant in these proceedings is concerned, the applicant during 2006 delegated certain functions to the office of the municipal manager as set out in annexure R1 to the second deponent’s affidavit. On this basis, the challenge regarding the authority to represent the applicant, is addressed by the applicant.

[8] Mr Merabe, counsel on behalf of the first and second respondents and with reference to the matter **K2011148986 South Africa (Pty) Ltd v State Information**

Technology Agency SOC & Others¹ argued that even though it is declared under oath that, as the municipal or acting municipal manager, they are duly authorised to depose to the affidavits filed in this application, that does not clothe the deponents with the necessary authority to bring the application on behalf of the applicant.

[9] When a juristic person commences proceedings some evidence should be placed before the court to show that it has been resolved to institute those proceedings.² Unlike an individual, a juristic person can only function through its agents and take decisions by the passing of resolutions. For this reason, an attorney instructed to commence proceedings by an official of a juristic person would not necessarily know whether the juristic person had resolved to do so, nor whether the necessary formalities had been complied with regarding the passing of the necessary resolutions.³ To prevent unauthorised persons litigating under the guise of a juristic person, a deponent must be duly authorised to institute the proceedings in question.⁴ The responsibility is heightened for public institutions.⁵

[10] Rule 6 of the Uniform Rules of Court provides that the applicant's authority to apply for the relief (the applicant's *locus standi*) should be established in the founding affidavit and not in the replying affidavit. The deponent to the affidavit need not be authorised by the party concerned to depose to the affidavit, it is the institution of the legal proceedings that must be authorised by the applicant⁶.

[11] The first and second respondents did not, in raising the aforementioned *point in limine*, challenge the first and second deponents' authority to depose to the affidavits. The challenge is whether this application was instituted with the necessary authority from the municipal council of the applicant and thus not instituted *ultra vires*. In **Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd**⁷ an objection *in limine* was raised on the basis that there was no proper proof before

¹ Case Number 3996/2019 High Court, Free State Division, per Naidoo J and Chesiwe J, delivered on 18 August 2020, [2020] JOL48167 (FB)

² Mall (Cape) (Pty) Ltd v Merino Ko-operasie Beperk 1957 (2) SA 347 (C) at 351H -352A.

³ Mall at p 351-352; Pretoria City Council v Meerlust Investments (Pty) Limited 1962 (1) SA 321 (AD).

⁴ FirstRand Bank v Fillis 2010 (6) SA 565 (ECP) paras 12 and 13.

⁵ Mohamed and Another v President of the Republic of South Africa and Others 2001 (3) SA 893 (CC) 2001 (7)

BCLR 685 (CC) at para 69.

⁶ Ganes v Telecom Namibia (Ltd) 2004 (3) SA 615 (SCA) at 624.

⁷ 1972 (4) SA 249 (CPD).

court that the application had been duly authorized by the applicant. The court rejected the contention by the applicant that it was implied in the affidavit of the managing director, who was also the majority shareholder, and upheld the *point in limine* to the effect that there was no proper proof that the application had been duly authorised.

[12] **Corbett J** (as he then was) held as follows in **Griffiths & Inglis (Pty) Ltd**

“In the present case the founding affidavit makes no express mention of authorization by the Company acting through its board of directors. The question of authority has been challenged in the opposing affidavit, and thus the onus is upon the applicant to show that the application has been authorised by the directors of the company. In as much as no contrary evidence had been placed before the Court by the Respondent, the minimum of evidence to use the words of Watermeyer J in Malls’s case will suffice.”⁸

[13] In **Pretoria City Council v Meerlust Investments Ltd**⁹ it was held as follows:-

“The question of authority having been raised, the onus is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorised by the Council; that it is the Council which is prosecuting the appeal, and not some unauthorized person on its behalf (cf. *Mall (Cape) (Pty) Ltd. v. Merino Ko-operasie Bpk.*, 1957 (2) S.A. 347 (C) at pp. 351-2). As was pointed out in that case, since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned. In order to discharge the above mentioned onus, the petitioner

⁸ at 252F.

⁹ 1962 (1) SA 321 (AD) at 325.

ought to have placed before this Court an appropriately worded resolution of the Council.”

[14] In the present matter the applicant has failed to prove that the Municipal Council of the applicant authorized the current proceedings and therefore the *point in limine* raised by the first and second Respondents should be upheld.

[15] Despite the *point in limine* having been upheld, which justifies a dismissal of the applicant’s application, I now proceed to deal with the third point regarding the appropriateness of the relief sought by the applicant. I deem it in the interest of justice and the parties concerned, that this application for perfection of its hypothec over crops and movables be dealt with.

[16] On behalf of the applicant, it was argued that the applicant has the right to attach the movables found on the property, which consists of an irrigation system on each of the two separate sections of land, Camp K and Camp L and any crops still to be found on the property. Regarding the presence of the irrigation system, Mr. Naidoo, on behalf of the applicant, argued that the Sheriff will be tasked to ascertain whether the irrigation system has been attached to the land, and if so in which way or whether it can be removed at all. The Sheriff has the task and/or responsibility to decide whether the irrigation system(s) is a permanent fixture to the property.

[17] On behalf of the first and second respondents, Mr. Merabe argued that a lessor’s hypothec only attaches to movable property present on the leased premises or movables attached while in transit to a new destination subsequent to the removal from the premises.¹⁰ It is common cause that the during April 2022 the first and second respondents had already commenced with harvesting of the crops. The first and second respondents contend that at the time when this matter was heard during June 2022, there were no crops and movables on Camp K and Camp L, accordingly the applicant’s application has been overtaken by events.

[18] Mr. Naidoo argued that even if most of the crops had been removed, which fact is confirmed in the report compiled by a land surveyor, C J Nortjé of Matlhoko &

¹⁰ “Mortgage and Pledge” LAWSA VOL 17, part 2 (2nd Ed 2008) para 439.

Nortjé Geomatics of Bloemfontein, filed subsequent to the applicant's replying affidavit, any crops still available on the land may be attached. The report by the land surveyor is dated 17 May 2022.

[19] The landlord's tacit hypothec is a common law protection which a landlord may implement to collect arrear rentals from tenants and thus provides a lessor with security for a lessee's arrears¹¹. This provision allows a landlord to sell the tenants immovable goods that are on the leased premises if the tenant fails to pay the rent.¹² The hypothec only becomes legally enforceable when a court order is obtained. Before a court order is granted, the tenant may at any time remove the movable goods from the leased premises. The hypothec lapses when the goods are removed from the leased premises, whether or not the person who removed such goods was aware of the hypothec.¹³

[20] It was averred by the applicant that the lease agreement commenced on 1 September 2006 with a termination date of 31 August 2016. The first rental instalment amounted of R32 148.00, VAT inclusive and was due on the date of commencement of the lease agreement. The annual rental payable by the first respondent was payable on the first day of September each year, to be calculated as per the schedule attached to the agreement. The first respondent was furthermore liable to pay the rates and taxes for the year 2006 where after the applicant would communicate the amount due and payable by the first respondent for the rates and taxes before the date upon which such amounts had to be paid.

[21] During 2008 the applicant resolved to extend the period of the lease agreement by a further fifteen years and to include an option to purchase the leased premises. The addendum containing the amendments were duly signed by the representative of the applicant and the second respondent, acting on behalf of the first respondent. The applicant contends that the first respondent fell into arrears during January 2007 by not effecting payment of the annual rent. Letters of demand in respect of Camp K and Camp L, respectively, were dispatched to the first and second respondents by hand on the 21st and 29th April 2022, The applicant avers

¹¹ Eight Kaya Sands v Valley Irrigation Equipment 2003 (2) SA 459 (T).

¹² Webster v Ellison 1911 AD 73 at 86.

¹³ Webster v Ellison (supra) at 88.

that the letters of demand were ignored by the first and second respondents causing the applicant to cancel the lease agreement. The amount due in respect of the lease agreement, in respect of both Camp K and Camp L, is R 886 980.99

[22] The first and second respondents dispute liability for any rental under the lease agreements and asserted that a decision was taken by the applicant during 2008 to allow the applicant and other “emerging, small, black farmers”, to farm on the leased premises without having to pay rent until their businesses have become sustainable. The respondents therefore deny the correctness of the statements appended to the applicants founding affidavit pertaining to the amount due in respect of the arrear rentals.

[23] On 18 April 2022, the first and second respondents’ attorney addressed a letter to the attorney acting on behalf of the applicant, *inter alia*, denying the amount claimed in respect of arrear rental and that the applicant is therefore entitled to cancel the lease agreement on the basis of arrears due and payable. Furthermore, it is alleged on behalf of the first and second respondents that a significant amount in respect of the rental claimed by the applicant has prescribed.

[24] First and second respondents therefore contend that the applicant should have instituted action proceedings based on the contents of the letter from the first and second respondents’ attorney and on the basis that the calculation of the arrear rentals has been placed in dispute prior to the launching of this application. The relief sought will have no practical effect or result because of the fact that the remedy is requested upon misinformation that the crops are still available which, due to the lapse of time, has now become moot.

[25] In reply, the applicant contends that it is denied that a substantial portion of the claim has prescribed and, in any event, prescription of any portion of the applicant’s claim is irrelevant for the purposes of the hypothec proceedings. It was furthermore argued that, as is evident from the land surveyor’s report, crops are still visible from the photographs on a small portion of the leased premises during May 2022. The applicant intends an action to be instituted against the first and second respondent. The intended action will be based upon a claim for payment of the

arrear rental. It is contended in the replying affidavit that “the parties may then fully ventilate their disputes regarding the claims for arrear rental” during the trial.

[26] From the contents of the statements appended to the founding affidavit in respect of Camp K and Camp L, it appears that an amount of R 221 493.80 and an amount of R194 904.95, respectively, had been in arrears since 2016. The amount due is now in excess of R800 000.00 in respect of both camps. It appears from the contents of the statements that, for several years, no rental was levied. Only interest and interests on the property rates were levied. It appears as if rent was levied in the amount of R26 235.09 and R23 086.89 for Camp K and Camp L, only in respect of 2018 to 2019 and for 2020, in the amounts of R 26 235.09 and R23 086.89 in respect of the two camps. It is therefore unclear whether the rent allegedly due was indeed levied as contended by the applicant as it does not appear from the statements.

[27] I point out that in view of the dispute of fact on the papers on the material issue of whether or not the first respondent was in arrears with the rental, the contention that the first respondent was granted an indulgence on the basis of being a small and emerging farmer and the issue of prescription of the rental claimed by the applicant, which in accordance with the “Plascon- Evans Rule” (Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd¹⁴ must be resolved in favour of the first and second respondent. In my view, due the fact that the crops on the property have undoubtedly been removed from the property, the applicant, in any event did not succeed in establishing a tacit hypothec. Regarding the presence of the irrigation system, I cannot agree with the argument proffered by Mr. Naidoo referred to in paragraph 16 above, that the Sheriff shall be tasked to decide or rule on the question whether the irrigation system is a permanent fixture or not. The applicant will have to convince the court that same is not a permanent fixture in order to remove same in terms of the hypothec it has.

[28] There is no reason why the costs should not follow the event.

ORDER:

¹⁴ 1983 (3) SA 623 (A) at 634E – 635C.

[29] In the result it is ordered that:

1. The application is dismissed with costs.

VAN RHYN, J

On behalf of the Applicant:

Instructed by:

Adv K NAIDOO

NGWANE ATTORNEYS

BLOEMFONTEIN

On behalf of the 1st and 2nd Respondent:

Instructed by:

Adv J MERABE

HORN & VAN RENSBURG

ATTORNEYS

BLOEMFONTEIN