



**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: 2713/2022

In the matter between:

CREZCO STEEL & HARWAREE TRADRES (PTY)LTD

Applicant

and

DAVID EDWIN BREEDS

1st Respondent

HILGARD LOUIS LIDDELL

2nd Respondent

RONDELL 107 (PTY) LTD

3rd Respondent

CORAM:

AFRICA, AJ

HEARD ON:

18 AUGUST 2022

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 13h00 on 5 October 2022.

JUDGMENT

INTRODUCTION

- [1] The applicant submits that it is the owner of certain livestock which the first respondent removed from the farm "Hulp", without the knowledge or consent of the applicant. At the time when this application was launched, the second respondent had possession of the sheep, which livestock has since been moved. The purpose of this application as alluded to, is a spoliation application alternatively, to temporarily retrieve the possession of the livestock pending the outcome of an action by way of summons which will be served presently.¹ The applicant submits that there is a real and present danger that the livestock will be alienated by the first respondent.
- [2] Applicant submits that the said livestock was unlawfully removed on or about 27 April 2022 and that the first respondent's claim that the livestock was purchased for or donated to him, is both false and baseless.
- [3] Applicant further argues that the livestock will be alienated by the first respondent as he cannot account for the lack of accrual since 2016 and at present the exact number of sheep is still unknown to applicant and further is the exact number of the cattle and their whereabouts still withhold from the applicant.²
- [4] In its answer, the first respondent submits that the application should be dismissed with costs because the applicant chose to launch this application, being fully aware of the fact that a serious dispute of fact exists regarding the ownership of the livestock. The first respondent termed this application so launched by applicant, as frivolous and without any merit.³

¹ Paragraph 5.3 of the founding affidavit.

² Paragraph 5.4 of the founding affidavit.

³ Paragraph 3.8 of the answering affidavit.

BACKGROUND

[5] It is common cause that the first respondent was married to the daughter of the deponent⁴, Mrs Appelgryn, who is the sole director of the applicant. During the course of the marriage, Mrs. Appelgryn decided to help the first respondent (her son-in aw), establish himself as a farmer.

[6] According to the applicant the third respondent (*"Rondell 107 (Pty) Ltd"*) was established, to purchase the farm Hulp, with the idea of conducting farming operations for the profit of both applicant and the first respondent and to repay the mortgage in full. However, as the third respondent could not obtain a loan from the bank, an oral agreement was concluded between Mrs Appelgryn and the first respondent that the applicant will not be involved in the farming operations. The terms of the oral agreement was concluded along the following lines:⁵

1. That the applicant will purchase the farm, Hulp, and it will be registered in its name.
2. The farm, at all relevant times is the property of applicant.
3. A mortgage will be registered over the farm.
4. The applicant will be responsible for the monthly payment of the mortgage bond.
5. The first respondent will manage the farm and he will earn a monthly salary.
6. The first respondent will at all reasonable times keep records and save the original source documents as proof of expenses.
7. It is the intention to farm with game (sables and other game) and the cultivation of cash crops.
8. Applicant will purchase the game, which will be kept on the farm.

⁴ Of the founding affidavit.

⁵ Paragraph 7.3 of the founding affidavit.

9. Applicant will be responsible for the expenses in connection with the farming operations whether it be to grow crops, pay salaries, purchase of animals, maintenance, upkeep of machinery, or costs of husbandry etc.
10. The consensus was that the first respondent should farm in such a fashion that a profit is made which in turn will repay the bond. First respondents' obligation was to generate enough profit to repay the mortgage bond over the farm in full.
11. The agreement was to establish a profitable farming operation. It was never intended to be charitable. It was raised by the first respondent that the farm cannot be immediately profitable. First respondent said that it will take about five years before an even-break situation can be reached. They then agreed to the time limit of five years.
12. First respondent had an option to purchase the farm after the mortgage had been fully paid, by profits derived from the farm.

[7] In divergence hereto, the first respondent submits that the applicant purchased the farm for first respondents' benefit and the agreement between himself and the applicant was the following:

1. The applicant will purchase the farm and it would be registered in the name of the applicant.
2. First respondent would be responsible to conduct the farming operation.
3. The applicant would be responsible for the payment of the mortgage bond registered over the farm.
4. The applicant would be responsible for the payment of all operating expenses until such time as the farm is profitable, which was estimated to be after a period of five years.
5. The applicant would purchase nine sable cows and one bull for the first respondent which would form the basis of the farming operations together with minor crops.

6. At the end of the ten-year bond period the first respondent would have the option to purchase the farm from the applicant for the original purchase price.
7. The first respondent would render an invoice to the applicant for an amount of R20 000,00 per month, which amount would enable him to cover his expenses for the period of five years.
8. It was contemplated that the first respondent would be able to cover his expenses and the running expenses of the farm after five years where after the R20 000,00 payment and the payment of the running expenses would cease.
9. No profit would be paid to the applicant and the applicant would obtain all tax benefits derived from the farm.

[8] The first respondent contends that when realizing that the game that was purchased would not produce enough profit to cover the expenses in the estimated five-year period, he approached the deponent and suggested that livestock should be purchased which would produce a profit much faster than the game. Hence the livestock never belonged to the applicant⁶, as it was never intended for the applicant to become involved in the farming operations.

[9] It is common cause that at the time when the first respondent and deponent decided to venture into a farming operation, the first respondent was still married to the deponents daughter, Zeldi.⁷ However, applicant submits that during 2017, the first respondent approached Mrs Appelgryn saying that farming operation must be broaden to include the farming of sheep and cattle. By the time the sheep was bought, the first respondent and Zeldi was already divorced. Further, that the sheep belonged to the company, who retained ownership of the livestock, including all the accrual derived from it. (proof of payment annexed marked annexure "AA2").

[10] The applicant contends that it only recently became evident that the first respondent has registered an identification mark with the Department of

⁶ Paragraph 28.5 of the answering affidavit.

⁷ Paragraph 2.6 of applicants heads of argument.

Agriculture, Land Reform and Rural Development during 2018 in his name without disclosing this fact to Mrs Appelgryn, who was always under the firm impression that the identification mark was registered in the name of the applicant.⁸ Applicant correctly points out that the livestock with this identification mark forms the core of the contention of the first respondent's ownership.

- [11] The first respondent however argue that the applicant was aware that the livestock was marked with his identification mark. To bolster his assertion, the first respondent states that the livestock was purchased when Mrs Appelgryn's daughter was still a Director of the applicant and therefore had full knowledge of the agreement that was concluded between the applicant and the first respondent and of the issue of ownership. Consequently, Zeldi Botha have deposed to a confirmatory affidavit confirming the terms and conditions⁹ of the agreement between the applicant and the first respondent as stated by the first respondent namely; That the purpose of the agreement was to enable the first respondent to own and operate a farming operation in his own name; That the game and livestock were purchased for the first respondent by the applicant to enable the first respondent to operate a farming operation for the benefit of himself and his family; that the first respondent is the owner of the game and livestock; that the applicant had knowledge that the livestock was branded with the first respondents' identification mark and that the certificate of registration was kept in Zeldi Botha's custody at the offices of the applicant.
- [12] In refuting this assertion¹⁰, the applicant deny that she was ever under the impression that the livestock would not be marked with the identification mark of the applicant as the applicant is the owner of the livestock as it was bought and paid for by the applicant. Further that it is clear from the certificate of registration ("AA3") that the copy of the said certificate, was made in such a fashion not to display the name of the party to which it was issued, in order for her not to take notice thereof. Mrs Appelgryn notes that the certificate was kept under the control of her daughter Zeldi Botha, who was one of the Directors at the time but there was however no resolution to the effect that the

⁸ Paragraph 7.8 of the founding affidavit.

⁹ Paragraphs 3.1 – 3.5 of the confirmatory affidavit.

¹⁰ At paragraphs 25.1 – 25.4 of the replying affidavit.

applicant authorised the first respondent to apply and register an identification mark in his own name.

- [13] In further fortifying the assertion that the relationship between the applicant and the first respondent has always been that of employer and employee, this court's attention is drawn to an extract of a letter dated 4 May 2022¹¹ in reply to a letter from first respondent's attorney, where it reads:

"We place on record that your client telephonically approached Mr. D Steyn on or about 27 April 2022 in order to purchase the sheep and some other movable property and pay therefore over a period of three years. Your client was advised to make an appointment with Mrs. Appelgryn to discuss his proposal with her and to fix a price. Your client had a consultation with Mrs. Appelgryn on the 28th of April 2022 at the office of Crezco Steel and Hardware Traders and made the same proposal however, Mrs. A Appelgryn advised your client to provide her with the exact number of sheep to determine a price and also requested Mr. D Steyn to provide her with the purchase price of the movable property that your client want to purchase". (emphasis added)

- [14] Ms Appelgryn stated that she was quite amenable to the fact that the first respondent may purchase the sheep and the cattle as it would have been preferable to applicant to cease the farming operation and to sell the farm.¹² Applicant argues that the first respondent would never have approached her with an offer to purchase, if he was already the owner of the livestock. It is denied that first respondent was anything but an employee and the sheep was purchased from August 2017 to March 2018, after first respondent's divorce from Mrs Appelgryn' daughter, in 2016. To further support the assertion of an employer/employee relationship, Mrs Appelgryn during January 2022 informed the first respondent that his salary would be reduced due to the fact that the farm has not shown any profit since 2015. (WhatsApp annexure "AA4").¹³ In response the first respondent accepted the reduction in salary. The first respondent on 26 April 2022 was informed that the farm will be sold due to the losses as it was evident that no profit will ever be forthcoming in the way

¹¹ Record page 81

¹² Record, page 29, paragraph 14.2.

¹³ Record, page 19, paragraphs 8.2 – 8.5.

that first respondent conducts the farming operation. (WhatsApp annexure "AA5").

[15] Applicant argues that the first respondent has at all times been employed as a manager and by January 2022, when the writing was on the wall, the first respondent accepted the reduction in salary. By then it was evident that the farming operations does not generate a profit to repay the mortgage bond in full, as he only managed to pay applicant the amount of R308 177.68, by then.

[16] In contesting the existence of an employer/employee relationship, the first respondent draws the attention of this court, firstly to a letter from his attorney dated 12 May 2022¹⁴, in response to applicant's letter dated 4 May 2022:

"Our client admits that he had a settlement discussion with both Mr. D. Steyn and Mrs Appelgryn regarding a possible purchase of the sheep. Our client however denies that he admitted that the sheep belongs to your client. As this was a settlement discussion in order to remedy the dispute between the parties, such a negotiation was a negotiation "without prejudice" to the rights of our client.

It is our instructions that during the heated discussions between our client maintained that the sheep belongs to him and that the offers to purchase the original number of sheep bought for him was merely a settlement proposal and in no way an admission that the sheep belongs to your client". (emphasis added)

[17] Secondly, the first respondent denied that he was ever paid a salary by the applicant.¹⁵ The first respondent states that he merely rendered the applicant with an invoice for services rendered, so that the amount of R20 000.00, could be deducted for tax purposes. Further, that the first respondent accepted the reduction in the amount of R20 000.00, as he understood that it was initially assumed that it would only be for a period of five years.¹⁶

[18] The first defendant argues that WhatsApp messages ("AA4 and OA2") where the words "salary" and Dave "Salaris", is placed in inverted commas, lends credence to the fact that the first respondent was never an employee, but simply a person who rendered invoices for services

¹⁴ Record, page 113.

¹⁵ Record, page 171 paragraph 35.1.

¹⁶ Record, page 172 paragraph 35.5.

rendered. Had the first respondent been an employee as contended, then applicant could easily have annexed salary slips, UIF or SARS records. Therefore, in the absence thereof, first respondent maintains that he was never an employee.

- [19] The applicant submits that WhatsApp message (“AA4”) refutes the argument that the applicant had no interest in the animals and first respondent’s assertion that he could do with the animals as he wishes. When the first respondent is so confronted, he responds by saying “I understand”. It is argued that it is peculiar why, if the first respondent was indeed the owner, would he react in this manner. Why would the first respondent not outright confront the applicant about what she wishes do with his sheep? The first respondent also did not inform the applicant in his WhatsApp response, when he is informed that the farm is not for rent, that he had already moved the sheep to the neighbouring farm of the second respondent. This behaviour on the part of the first respondent is argued as being sinister, as the farm “Hulp” was big enough to farm the sheep, but the moving of the sheep should be viewed as indicative of the obstruction of applicant to get to the sheep.
- [20] Applicant argues that it is entitled to the spoliation order or if applicant fails to prove a clear right, then the alternative, that applicant hold the livestock, pending the outcome of an action.
- [21] Applicant submits that when considering an application of this nature, that the Plascon-Evans Rule holds where factual disputes arise in circumstances where the applicant seeks final relief. Echoed in *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd*¹⁷ where the approach to factual disputes where a party moves for final relief in motion proceedings was authoritatively set out as follows:

“If the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by

¹⁷ 1957 (4) SA 234 (C) at 235.

the respondent together with the facts as alleged by the applicant that are admitted by the respondent, justify such an order”

[22] The court noted that there may be exceptions to this general rule, such as where the allegations or denials are so far-fetched, or clearly untenable that the court is justified in rejecting them on the papers.

[23] The first respondent argues that a court will dismiss an application if the applicant should have realised when launching this application that a serious dispute of fact, incapable of resolution on papers, was bound to develop. Further, that having regard to the inherent probabilities, the facts set up in contradiction by the first respondent, when considered, cast serious doubt upon the case of the applicant, hence the application should not succeed. Further, that there is even a dispute of fact with regard to the number of livestock, to be delivered. It is argued that the number of livestock, namely 450, is as alleged by the son of the second respondent, with no confirmatory affidavit deposed to. This calamity is captured in an extract of a letter dated 4 May 2022¹⁸, addressed to the second respondent;

“We confirm that Mr. HJ Booysen, Mrs Appelgryn and Mr. Potgieter attended to your farm yesterday to count the livestock (sheep) however, it was impossible to do so. Your son however, was also present, informed us that most of the livestock was counted and that it amounted to 450 sheep which includes lambs. He also advised us that there is still a number of sheep with lambs which needs to be counted, however, it will take time as you have to determine which lambs belong to which ewe.”

[24] In this regard, the first respondent, referred this court to the case of *Stern and Ruskin NO v Appleson*¹⁹ at 811 where it was stated that the property sought to be interdicted must be identifiable.

[25] In order to obtain a spoliation order, two allegations must be made and proved:

1. That the applicant was in possession of the property; and
2. That the respondent deprived him of the possession forcibly or wrongly against his consent.

¹⁸ Record, page 73.

¹⁹ 1951 (3) SA 800 (W).

- [26] With reference to the case of *Yeko v Qana*²⁰ applicant must show that she was in *de facto* possession at the time of being despoiled. In the case of *Mdlulwa and Another v Gwija and Others*²¹ it was stated that possession is the physical control by a person of a corporeal thing with the intention of keeping the control of it for his own benefit.
- [27] The requisites²² for the grant of an interim interdict, all of which must be present:
1. A clear right on the part of the applicant.
 2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted.
 3. A balance of convenience in favour of granting of the interim relief; and
 3. The absence of any other satisfactory remedy available to the applicant.
- [28] It has long been settled in our law that the granting of an interdict is discretionary.²³ The remedy of the interdict itself has been described as unusual.²⁴ This remedy is termed discretionary in the sense that a court may not grant an interdict in circumstances where there is an alternative remedy available to an applicant for an interdict and which may satisfactorily safeguard the right sought to be protected. Put differently the discretion of the court is bound up with the question whether the rights of the party complaining can be protected by an alternative and ordinary remedy.
- [29] The applicant maintains that the sheep and the cattle always remained the property of and in the possession of the applicant, as the owner. Further that the fraudulent registration of an identification mark by first respondent, does not prove ownership. The applicant submits that whilst negotiations with the first respondent was taking place, he (first respondent) had already moved the

²⁰ 1973 (4) SA 735 (A) at 739.

²¹ 1992 (3) SA 776 (TK) at 777.

²² *Setlogelo v Setlogelo* 1914 AD 221.

²³ *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T); *Burger v Rautenbach* 1980 (4) SA 650 (C) and *Grundling v Beyers* 1967 (2) SA 131 (W).

²⁴ *Transvaal Property Investment Co v SA Townships Mining and Finance Corp* 1938 TPD 521.

sheep and cattle, which automatically provides for the unlawful removal.²⁵ Applicant submits that it was both the lawful owner and was in undisturbed possession on the 26th of April 2022, until it was despoiled by the first respondent.

[30] The first respondent contends that the applicant purchased the livestock and game to enable him to conduct a farming operation, which is why he branded the livestock with his identification mark; so confirmed by Mrs. Appelgryn's daughter. Further to this, first respondent was in possession of and cared for the livestock at all material times, whilst Mrs. Appelgryn only visited the farm on two occasions, prior to the dispute arising, as she was never part of or involved in the farming operation. He states that when the livestock was delivered to the farm, possession thereof was given to him and he remained in possession of the livestock, until today. The first respondent denies that he unlawfully removed the livestock, as the livestock grazed on different farms forming part of the farming operation and was simply moved to winter grazing pastures as has been done for several years.²⁶ For grazing purposes, first respondent submits that the livestock was moved from Sinbaden to Trekpad, which farm is being leased for such purposes. First respondent submits that he only vacated the farm, due to the fact that Applicant decided to sell the farm.

[31] Applicant argues that the immense prejudice lies against the applicant, in that the first respondent owns nothing and if he sells the property of the applicant, the applicant will not only sustain a financial loss but also lose its movable assets. Further, that the first respondent can most certainly sell or dissipate any number of sheep and cattle and claim either that some of the sheep died or was stolen.²⁷ Applicant submits that the first respondent does not have the facilities or finances to maintain and look after the sheep, hence why he took them to second respondent. It is argued that it is patently clear that the first respondent has no intention to restore possession to the applicant, as applicant did everything in its power to avoid coming to court by way of

²⁵ Applicants heads of argument, page 10, paragraph 2.29.

²⁶ Answering affidavit, Record page 158, paragraph 18.3.

²⁷ Record page 45, paragraphs 23.3, 23.4, 23.5.

correspondence and negotiations, to resolve this matter. Applicant submits that the balance of convenience favours the applicant in all respects.

[32] First respondent, in answer submits that as the owner of the livestock, has he no intention of alienating or dissipating the assets. He states that the livestock will be kept safe and in good condition, pending any action. Further, that the applicant has an alternative remedy at its disposal being an action for the return of the livestock, alternatively, a claim for damages.

[33] In *Wightman t/a JW construction v Headfour (Pty) Ltd and Another*²⁸ Heher JA held that:

“A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.

[34] I agree with the statement that factual averments seldom stands apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.²⁹

[35] What is evidently clear to this court is that there is a real attempt by the first respondent, to grapple with all the relevant factual allegations, as made by applicant.

[36] In respect of the final relief sought, this court, in resolving to refer a matter to evidence, has a wide discretion.³⁰ In every case the court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence. Courts should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of *viva voce* evidence.³¹ This notice of motion comprises in totality 318 pages, testament to the wide-range of factual disputes.

[37] The court makes an order in the following terms:

²⁸ [2008] (3) SA 371.

²⁹ Unravelling the Plascon-Evans rule by Anja Hofmeyr and Liëtje van Schalkwyk, article dated 26 October 2021

³⁰ *Lombard v Droprop* CC 2010 (5) SA 1 SCA.

³¹ *Sewmungal and Another NNO v Regent Cinema* 1977 (1) SA 814 (N) at 820F.

1. It is the view of this court that the matter be referred to trial as the dispute of facts is incapable of resolution on the papers and are too wide-ranging for resolution by way of referral to oral evidence.
2. Costs of the application follows the result of the action.



AFRICA, AJ

APPEARANCES:

COUNSEL FOR THE APPLICANT:

Adv. Grewar
Instructed by:
HJ Booysen Attorneys Inc.

COUNSEL FOR 1st RESPONDENT:

Adv. Els
Instructed by:
Niemann Grobbelaar