

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 5994/2018

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE: <u>27/11/19</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

ONVERDIENT (PTY) LTD

FIRST APPLICANT

DANIEL JOHANNES SMIT (JNR)

SECOND APPLICANT

AND

TRIPLE OPTIONS TRADING 641 CC

FIRST RESPONDENT

ANNELIZE SMIT

SECOND RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The deponent of the founding affidavit Daniel Johannes Smit (Snr) is married to the second respondent Annelize Smit, and the second applicant Daniel Johannes Smit (Jnr) is their son. The three are the directors and shareholders of the first applicant Onverdiend (Pty) Ltd. The first applicant owns the farm Waterval (the farm). Smit (Snr) and the second respondent are at present going through an acrimonious divorce, which is not yet finalized.
- [2] The first applicant has sold a portion of the farm to Jacobus Christofel Van Staden known as Koot during 2016. Koot and the second respondent are members of Triple Option Trading 641 CC, the first respondent. The principal place of business of the second respondent is on the farm. The second applicant as well as the second respondent are staying on the farm. The first applicant is also conducting its business on the farm.
- [3] According to the applicants, the second respondent is refusing them and the staff of the first applicant entry on the farm. The applicants in their founding affidavit have stated that the first respondent has rented the farm from the first applicant for a monthly rental of R 25 000.00 for several years. The applicants have stated that there was no written lease agreement between the first applicant and the first respondent, but that the lease was documented in the minutes of the meeting of directors. According to the applicants, the first respondent has defaulted in rental payments and owes the first applicant an amount of R742 500.00.
- [4] On the 17th September 2018, the applicants through their attorneys wrote a letter to the first respondent notifying it of the cancellation of the lease agreement and also attaching the schedule and breakdown of the alleged rental that was due and owing. The alleged rental that was due was for the period

August 2016 to March 2018 at a fixed monthly rental of R 25 000.00 plus 14% VAT up to March 2018, and from April 2018 to September 2018 plus VAT of 15%. As per the notice, the first respondent was required to vacate the farm by the 30th September 2018 should it fail to pay the outstanding amount.

- [5] The first respondent did not vacate the farm on the due date. That resulted in the applicants launching an urgent application which had part A and B. In part A they were seeking orders that the respondents be interdicted from carrying farming activities with immediate effect and also to stop the harvesting of peaches or any fruits on the section of the farm; that the respondents allow the applicants and its staff access to the farm to harvest peaches; that the respondents hand over to the first applicants any peaches that it had already picked; and that the respondents allow the second applicant access to his house on the farm.
- [6] In part B, the applicants are seeking orders that the first respondent immediately vacate the farm, failing which the sheriff be authorised to evict it from the premises; and that the first respondent be ordered to pay the applicants the sum of R 742 500.00 being the outstanding rentals due until 30th September 2018. The applicants in their founding affidavit have stated that they are not evicting the second respondent from the farm as her access to the property will still be discussed in the pending divorce action.
- [7] The respondents are opposing the applicants' application. In their answering affidavit they have denied the existence of the lease agreement between the first applicant and the first respondent. They have further stated that they never agreed to pay rent for the farm and/or orchards in the amount of R 25 000.00 per month. They further stated that the minutes of the meeting of directors dated

17th March 2017 state that the rental for the peach orchards would be R 25 000.00 per month, payable yearly, yet the invoice attached to the letter of the alleged cancelation of the lease agreement calculates arrear rent from August 2016.

- [8] According to the second respondent, after she and Smit (Snr), have instituted divorce proceedings, they reached an amicable settlement agreement on the 15th November 2014. The divorce matter has been set down for the 17th February 2020. In terms of the settlement agreement, she will remain on the farm and obtain ownership of the farm. The respondents have stated in their answering affidavit that in terms of the settlement agreement the first respondent would continue to conduct peach farming operations on the farm. The respondents submitted that the application for eviction by the applicants is a breach of the settlement agreement.
- [9] On the 15th October 2018 the matter was struck off the roll of the urgent court due to lack of urgency. In this court counsel for the applicants submitted that the issue which the court must decide is whether there was a lease agreement; if it is found that there was a lease agreement, whether it was cancelled; and if there was no lease agreement what rights did the respondents have. It is the applicants' contention that if the respondents are farming on the farm, they would have been permitted to do so by way of a lease agreement.
- [10] The applicants' counsel has submitted that a meeting was held on the 17th March 2017 wherein a resolution was taken by directors that action be taken against the first respondent with regard to the outstanding rentals owed to the first applicant. He further submitted that the lease agreement was entered into some years back and the first respondent has not been paying rent since its

inception. According to the applicants, part of the outstanding rental has prescribed and they are claiming only a portion of it.

- [11] The respondents submitted that the alleged lease agreement did not have full details; and that in their founding affidavit, the applicants have merely stated the first respondent rented the farm from the first applicant for a rental amount of R 25 000.00 per month for several years. It is the respondents' contention that the first respondent was not represented at the meeting of the 17th March 2017 wherein the alleged resolution was taken. The respondents submitted there are material disputes of fact that warrants the dismissal of the application or a referral for oral evidence.
- [12] The applicants' eviction application of the first respondent is based on the alleged lease agreement which the respondents dispute its existence. According to the applicants it was an oral agreement. However, the applicants did not provide full details of the alleged lease agreement as they have failed to state when the agreement was entered into, for how long, and what happens in case breach. The minutes of the 17th March 2017 is not helpful as the first respondent was not part of that meeting and was also not represented at the meeting. On the other hand, the second respondent has stated that she and Smit (Snr) have signed a settlement agreement during 2014 wherein it was agreed that she would remain on the farm in order to obtain ownership of the farm, and further that the first respondent will continue with its operations of peach farming on the farm.

- [13] It is the respondents' contention that this matter cannot be decided on papers since there is material dispute of fact. In **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**¹ Hefer JA said:

"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. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the facts averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averments. When facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence), if they be not true or accurate but, instead of doing so, rests his case on a bare denial the court will generally have difficulty in finding that the test is satisfied"

- [14] The respondents are not making bare denials, they have attached an alleged settlement agreement between the second respondent and Smit (Snr) wherein it was agreed that the second respondent is going to take ownership of the farm after the divorce is finalized. According to the second respondent as part of the terms of the settlement agreement, the first respondent was to continue farming peaches on the farm. Whether this settlement agreement is valid or not is not an issue that I am called upon to decide on it.

- [15] On the other hand the alleged oral lease agreement which the applicants relies on has no full details. That on its own is an indication that the dispute in relation to the eviction of the first respondent will not be decided on papers as they stand. That is also complicated by the settlement agreement between Smit (Snr) and the second respondent. If indeed the settlement agreement is valid

¹ 2008 (3) SA 371 (SCA) at 375 G-I

and the parties have agreed that the first respondent must continue farming peaches on the farm, what will be the basis to evict it.

[16] In **National Director of Public Prosecutions v Zuma**² Harms DP said:

"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 fact arise on the affidavits, a final order can only be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be difficult 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 papers. "

[17] I agree with the respondents' counsel that a real, genuine and *bona fide* dispute of fact in relation to the eviction of the first respondent exist. The issues which the respondents have raised are not just bald denials, but have been substantiated with concrete evidence and the court cannot just simply reject them.

[18] The applicants have launched their application with the knowledge that the alleged oral lease agreement lacks full details and also that there is a signed settlement agreement which is between Smit (Snr) and the second respondent. That settlement agreement has a serious impact on the applicants' application. In my view, the applicants were fully aware that with regard to eviction of the first respondent, there were disputes of material facts which cannot be resolved by way of motion proceedings.

² 2009 (2) SA 277 (SCA) at 290 D-F

- [19] It is trite that an applicant who elects to proceed by way of motion proceedings despite being aware that a serious dispute of fact was bound to develop, runs the risk that the application may be dismissed with costs. It is not proper that an applicant should commence proceedings by way of motion with knowledge that the dispute of fact might arise. (**See Room Hire Co (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd**)³
- [20] Turning to the spoliation claim by the second applicant, there are two factors requisite to found a claim for an order for restitution of possession on an allegation of spoliation. The first is that the applicant was in possession and, the second that he has been wrongfully deprived of that possession and against his wish. (**See Scoop Industries Pty) Ltd v Langlaagte Estate and G. M Company Ltd (In vol. Liq)**)⁴
- [21] Both parties are in agreement that the second applicant was living in separate house at the farm with the permission from the first applicant which owns the farm. The applicants alleges that the second applicant was chased away from the farm by the second respondent as the second applicant was supporting Smit (Snr) in his running of the business. However, the applicants did not give details as to when he was chased out of the farm.
- [22] The second respondent in her answering affidavit has denied that she had chased away the second applicant. According to her, the second applicant has left on his own volition during November 2015. The applicants in their replying affidavit has merely denied the contents of the paragraph without correcting the respondents as to when he was allegedly chased out of the farm. In my view,

³ 1949 (3) SA 1155 (TPD)

⁴ 1948 (1) SA 91 (W) at 98-99

the date of November 2015 remains unchallenged. If indeed he was chased out of the farm by the second respondent, the only date that appears in the papers is that of November 2015 which the applicants did not dispute. That date is more than two years before the launching of the application.

[23] In **Le Richie v PSP Properties CC and Others**⁵ Yekiso J said:

“As a general rule a possessor who alleges that he has been dispossessed of a right should act within a reasonable time to have his possession restored. If the applicant delays for more than a year before bringing his application, there would have to be special circumstances present to allow such an applicant to proceed with his application.

[24] The applicants have brought their application more than two years after the alleged act of spoliation. They did not present any special circumstances why they should be allowed to proceed with their application. On that point alone their spoliation application stands to fail.

[25] With regard to the interdict relating to the peach harvest, the application is moot as it was in relation to the harvesting season that was ending November 2018. The court has a discretion to deal with the matter if the merits of the case raises a discrete issue of public importance that will have an effect on future matters. **(See Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others)**⁶. In the present case none of the issues in relation to the interdict raises a discrete issue of public importance that will have an effect on future matters. Therefore, in relation to the interdict of the peach harvest, it stands to fail on the ground of mootness.

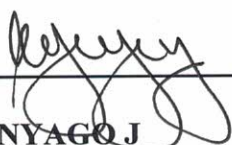
⁵ 2005 (3) SA 189 (C) at 189 E-F

⁶ 2013 (3) SA 315 (SCA)

[26] Since in this application the applicants were aware at the time when they launched their application that a material disputes of fact might ensure in relation to the eviction application, and also that in relation to the spoliation they are required to present special circumstances but has failed to do so, in my view, the appropriate order will be to dismiss the application instead of referring it for oral evidence.

[27] In the results I make the following order:

27.1 The applicants' application is dismissed with costs on party and party scale which costs will include the employment of a senior counsel.



MF. KGANYAGO J
JUDGE OF HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

**COUNSEL FOR 1ST AND 2ND APPLICANT : ADV ROSALIND J.
STEVENSON**

INSTRUCTED BY : DDKK ATTOERNEYS

COUNSEL FOR 1ST AND 2ND RESPONDENTS : ADV L KELLERMANN SC

INSTRUCTED BY

: HAMEL ATTORNEYS

DATE OF HEARING

: 24 OCTOBER 2019

DATE OF JUDGEMENT

: 27TH NOVEMBER 2019