IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Reportable

Case No: 1817/19

In the matter between:

LEFIFI STEPHENS MAHLABE **APPLICANT**

And

CHARLES AREND FISCHER N.O **FIRST RESPONDENT**

JENNIFER ANNE FISCHER N.O **SECOND RESPONDENT**

NEIL CARLISLE CURRIE N.O **THIRD RESPONDENT**

Heard: 19 August 2019

Delivered: 18 October 2019

Phatshoane ADJP, Williams J and Sieberhagen AJ

JUDGMENT

PHATSHOANE ADJP

[1] This is an appeal against the whole of the judgment and order of the Court *a quo*, per Stanton AJ, handed down on 02 March 2018 directing Mr Lefifi Stephens Mahlabe, the appellant, to remove his cattle and/or livestock from Vaalboshoek, Windsorton and Vaalkop Farms, situated in the district of Barkly West ("the farms"), within 10 days from the date of the order;

further authorising Charles Arend Fischer N.O, Jennifer Anne Fischer N.O, and Neil Carlisle N.O, the first to the third respondents, in their capacities as the Trustees of Charles Fischer Farming Trust (IT2014/1997), to remove the said livestock from the farms and shelter it elsewhere should the appellant fail to comply with the order.

[2] In the appeal the appellant seeks an order setting aside the order of the Court *a quo* and substituting it with an order dismissing the application, alternatively, that the application be stayed pending the outcome of the action instituted on 16 July 2013 under Case No: 767/2013. The appeal is with leave of the Supreme Court of Appeal which was granted on 08 October 2018.

[3] The litigation is entangled in twist and turns. It concerned the eviction of the appellant's cattle and/or livestock from the farms but has now transmogrified into the acquisition and disposal of the farms which is characterised by internal conflicts on the part of members of the Dirisanang Small Farmers Communal Property Association ("the CPA"). Chief amongst the controversies falling for consideration is whether the Court *a quo* was correct in ordering the appellant to remove his cattle and/or livestock from the farms in light of the allegations that Lerospot (Pty) Ltd ("Lerospot"), which sold the farms to the Charles Fischer Farming Trust ("the Trust"), acquired the said properties from the CPA through unlawful and fraudulent means.

[4] The CPA was established and registered on 22 June 1998 pursuant to s 8(3) of the Communal Property Association Act, 28 of 1996, for purposes of acquiring, holding and managing property. The appellant intimates that in compliance with the registration documents of the CPA its first committee, constituted by the following members, was elected to manage its affairs: Rev L S Mahlabe (the appellant), as the chairperson, Mr Montshabatho, as the deputy chairperson, Mrs Tlhaloganyo as the

Treasurer, Mrs Gabanakgosi, Mr Sekgame, Mr Joseph Kgang, Mr Vaaltyn, Mr Barends, Mr Majola and Mr D Greef.

[5] The government purchased, for the CPA, the farms together with some livestock including horses, ostriches, tractors, and other farming implements from a certain Mr Percy Douglas Lloyd, referred to as Mr Douglas in the papers, sometime in 1998. Mr Douglas also privately sold some of his livestock, which did not form part of the batch purchased by the government to members of the community of Warrenton, Magogong and Ganspan. The appellant, who is a beneficiary of the CPA, intimates that he initially bought two head of cattle whereas a certain Mr Tselane, also a beneficiary of the CPA, purchased one beast from a committee of the CPA. As at present Mr Tselane has 56 herd of cattle while the appellant, has approximately 18, which are still roaming the farms.

[6] The CPA had about 384 beneficiaries when the farms were purchased. Some disagreements relating to the running of its affairs emerged in 2008 which resulted in the intervention by the Department of Rural Development and Land Reform (DRDLR). Further attempts made to resolve the CPA's problems came to naught. Its meetings were not regularly held in 2011 and its difficulties became profoundly insurmountable.

[7] On 01 October 2012 the CPA alienated the farms to Lerospot which took transfer on 14 December 2012. The appellant explained that the CPA's signatories to the Deed of Sale of the farms, Mr Simon Kgomogadio, Ms Mary Selaledi and Ms Selinan Rakgoete, were not mandated to sign because they were not committee members of the CPA and did not have a Power of Attorney to pass transfer. It anecdotally came to his attention during 2013 that the CPA's farms were sold to Lerospot for approximately R6 million. He then informed DRDLR, Kimberley, of the problem. This led to DRDLR appointing a firm of attorneys to assist the CPA to reverse the transaction.

[8] On 22 May 2013 under Case No 767/13 the CPA obtained an interim order prohibiting Lerospot, Tobie Myburg Afslaers CC, Statusfin Finansiële Dienste (Pty) Ltd and Mr Simon Kgomogadio, the respondents in that application, from transferring the farms under Deed of Transfer number: T3466/12 pending the determination of an action by the CPA for an order setting aside the transfer of the said properties which action the CPA was ordered to institute within 30 days from the date of the confirmation of the interim order.

[9] The interim order referred to in the preceding paragraph was discharged by agreement between the parties on 07 June 2013. This notwithstanding, the CPA instituted action against Lerospot on 16 July 2013 under the same Case No: 767/2013 challenging, as it were, the validity of the sale of the farms to Lerospot. It avers at para 6.1 of its Particulars of Claim that it neither intended nor authorised the transfer of the farms to Lerospot. These allegations are, without more, denied by Lerospot, Mr Simon Kgomogadio, Ms MM Selaledi and Ms MS Rakgoete, the first to the fourth defendants in the action. They questioned the *locus standi* of the CPA on the basis that it was allegedly dissolved in 2012 in terms of clause 23 of its constitution. They further contest the authority of those bringing the action on its behalf. To this end, these defendants served and filed with the Court a Notice in terms of Uniform Rule 7(1) placing in dispute the authority of those acting on behalf of the CPA and barring them from so acting until they satisfy the Court that they were authorised to act.

[10] In the action the CPA seeks a declarator, *inter alia*, that the transfer of the properties to Lerospot was unlawful and void *ab initio*; that Lerospot sign all documents and take all necessary steps to retransfer the farms to the CPA; further ancillary relief is also sought.

[11] The action has not been diligently prosecuted. The defendants' plea and their Notice in terms of Rule 7(1) were filed on 08 November 2013, almost

six years ago. At the date of the filing of the replying affidavit to the present application no response had been delivered by the CPA to the defendants' Notice in terms of Rule 7(1). I interpose to mention that the Trustees are not parties to the action. I accept that the appellant recently intervened as the second plaintiff in the action as counsel informed us from the bar. However, the Notice of Intervention by the appellant is not apparent from the record of the action which I have had the benefit of perusing. Nothing turns on this.

[12] On 23 June 2014 the Trustees of Charles Fischer Farming Trust ("the Trust") purchased Vaalboshoek and Vaalkop Farms from Lerospot for an amount of approximately R20 million. The Trust took occupation of the farms during September 2014 which were transferred by the Registrar of Deeds on 31 October 2014 by virtue of the Deed of Transfer No: T2110/2014. Mr Charles Arend Fischer, the deponent to the founding papers, explained that shortly after taking occupation it became apparent that the appellant's cattle were grazing on the farms. When he discussed "the situation" with the appellant he informed Mr Fischer that he was a beneficiary to the farms; he was entitled to make use of the land; and had lodged a dispute with the Department of Land Affairs. Mr Fischer says that he afforded the appellant two years to finalise the dispute he filed with the Department of Land Affairs. The two years indulgence was also premised on the Deed of Sale between Lerospot and the Trust in terms of which Lerospot was given a period of two years within which to evict the alleged unlawful occupiers from the farms. The grace period lapsed during September 2016. The appellant refused to remove his livestock from the farms. Mr Fischer is of the view that the Trust, as the registered owner of the property, is entitled to the undisturbed possession and exclusive use thereof.

[13] The appellant submitted that the sale of the farms by Lerospot to the Trust was tainted and unlawful because the CPA had initially disposed of the properties in a fraudulent manner to Lerospot. This is gainsaid by the Trust.

[14] In another twist the appellant brought an application in terms of s 19(b)(c) of the Superior Courts Act, 10 of 2013, that he be granted leave to introduce new evidence on appeal which he says he did not have when he filed the answering affidavit in the main application for eviction.

[15] The new evidence is to the effect that the decision taken on behalf of the CPA to sell and transfer the farms to Lerospot was tainted by fraud in that, *inter alia*, the individuals who voted in favour of the motion to dispose of the properties were deceased when the decision was taken. He says that he can now produce credible evidence to show that the individuals who were on the list and alleged to have signed the attendance register were deceased on the date of the meeting where a decision was taken to deregister the CPA; that the persons who signed the document, purportedly selling the property, and claiming to have been properly elected could not have been elected at such a meeting as the dead tell no tales; that Mr Simon Kgomogadio, who was purportedly the Chairperson of the CPA committee, was an imposter and not lawfully elected because on the date of the meeting to elect him and other CPA committee members he had already written a letter, giving himself out to be the chairperson of the CPA, to a certain Mr William Diphahe, a tracing agent.

[16] The Trustees are opposing the application for the admission of new evidence on the basis that it is difficult to accept that the information was not available at the time of filing the answering affidavit; the evidence is inadmissible hearsay and does not comply with s 19 and 20 of the Civil Proceedings Evidence Act, 25 of 1965; that an Appellate Court will accept new evidence under exceptional circumstances if such evidence is

relevant to the issues in dispute. It was contended for the Trust that these requirements were not satisfied for the Court to grant the indulgence sought.

[17] The Court *a quo* correctly identified that the issue for determination was the ownership of the immovable properties (the farms). It held that the trite principle is that ownership would be properly proven by the production of the relevant title deeds. Insofar as the Trust produced the relevant title deed to the farms the Court found that it could not be disputed that it was the registered owner thereof. The Court was of the view that Clause 5.2.2 of the Trust Deed confirmed the absence of fraud on the part of the Trust where it stipulates: "*Die koper boekstaaf dat die koper daarvan bewus is dat die verkoper tans in 'n regsgeding betrokke is met die onregmatige okkupeerders van die Dirisanang Small Farmers Communal Property Association ter afsetting van die onregmatige okkupeerders en die afwysing van 'n aksie deur die Dirisanang Small Farmers Communal Property Association.*" The Court held that in the absence of any allegation that the transaction between Lerospot and the Trust was tainted by fraud it could not conclude that it was not the intention of Lerospot to sell the immovable properties to the Trust and that the Trust intended to obtain ownership thereof.

[18] The Court further found the underlying agreement between Lerospot and the Trust and the subsequent registration of the transfer of the immovable properties in the name of the Trust to have been valid. It reasoned that any right that the appellant may have had to occupy the farms ceased to exist when the CPA was divested of its ownership of the property. It concluded that the appellant failed to establish that he was vested with some enforceable right that entitled him to remain in occupation of the farms. The Court was unpersuaded that the appellant raised real, genuine, or bona fide disputes of facts which could not be resolved on the papers as

they stood. As already alluded to, it made an order that the appellant remove his cattle and/or livestock from the farms.

[19] The appellant is a beneficiary to the government's land distribution scheme of 1998 in terms of which certain portions of the farms were availed to the communities of Warrenton, Magogong and Ganspan through the CPA to accommodate and rear their livestock. His cattle grazed and is still roaming the farms since 1998. It is against this background that the application for eviction ought to have been considered by the Court *a quo*.

[20] Our law does not expressly guarantee the impeachability of a registered deed.[1] The SCA made it plain that where an underlying sale agreement was tainted by fraud, the registration of transfer would not divest the seller of ownership of the immovable property concerned.[2] This principle was laid down as follows in *Nedbank Ltd v Mendelow and Another NNO*:[3]

> '[12] It is trite that where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds register. Registration is 'intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office'. And it is a source of information about those rights. But registration does not guarantee title, and if it is effected as a result of a forged power of attorney or of fraud, then the right apparently created is no right at all.
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> [13] This court has recently reaffirmed the principle that where there is no real intention to transfer ownership on the part of the owner or one of the owners, then a purported registration of transfer (and likewise the registration of any

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[1] Silberg and Schoeman's The Law of Property, fifth edition, LexisNexis, Butterworths, p 236.
[2] *Meintjes NO v Coetzer and Others* 2010 (5) SA 186 (SCA) at 190 paras 9-10; *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) at 104-105 para 25; *Nuance Investments (Pty) Ltd v Maghilda Investments (Pty) Ltd 2016 JDR 2255* (SCA) at para 47
[3] 2013 (6) SA 130 (SCA) at 135C-G paras 12-13

other real right, such as a mortgage bond) has no effect. In *Legator McKenna Inc and Another v Shea and Others* [2010 (1) SA 35 (SCA) paras 21 and 22] Brand JA confirmed, first, that the abstract theory of transfer of ownership applies to immovable property, and, second, that if there is any defect in what he termed the 'real agreement' — that is, the intention on the part of the transferor and the transferee to transfer and to acquire ownership of a thing respectively — then ownership will not pass despite registration. Thus while a valid underlying agreement to pass ownership, such as a sale or donation, is not required, there must nonetheless be a genuine intention to transfer ownership. This principle was unanimously approved in *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* [1941 AD 369] and has been followed consistently since then."

[21] In the summary of the article "*Met andermanskalf mag jy nie ploeg nie, en andermansgoed kan jy nie verpand nie*"[4] under the heading "*The Property of another cannot be pledged or mortgaged unless with the owner's consent*" the following seminal remarks are made:

'The registration of transfer of immovable property pursuant to a fraud perpetrated on the legitimate owner is an empty gesture with no legal consequences as far as the material real rights of the parties involved are concerned. Unless the owner forms the subjective *animus transferendi domini* the formal completion of the transfer formalities and even the administrative registration of the transfer in the deeds office remain an ineffective paper exercise. No real right of ownership vests in the transferee as a consequence of such a pretence. Registration does not guarantee title, and if it is effected as a result of a feigned power of attorney or of an outright fraud thanks to a falsified signature of the rightful owner, the right apparently created, is no right at all.'

[4] 2014 TSAR 45 JC Sonnekus – Professor in Private Law University of Johannesburg.

[22] The principles established in the above decisions and authorities cited apply squarely to the present matter. The import is simple. If it can be established that the title to the transferee, in this case Lerospot, was secured through some fraudulent means ownership would not have validly passed to it. This was a key issue in dispute which the Court *a quo* was enjoined to determine. To the extent that the Court did not consider this principal question it erred. The determination of the issue relating to the intention to sell and acquire the farms between the CPA and Lerospot was, in my view, antecedent to the residual question whether the Trust was the legitimate title holder of the farms. The Court *a quo*'s finding that any right that the appellant may have had to occupy the farms ceased to exist when the CPA was divested of its ownership of the property does not take into account that the issues pertaining to the acquisition of the land by Lerospot were highly contested, in particular the mandate of those who signed the Deed of Sale on behalf of the CPA was brought into question.

[23] Section 12(1) of the Communal Property Association Act, 28 of 1996, provides that an Association may not dispose of or encumber or conclude any prescribed transaction in respect of the whole or any part of the immovable property of the association, or any real rights in respect thereof, without the consent of the majority of members present at a general meeting of members. Clause 11 of the constitution of the CPA mirrors what is set out in s 12 as follows:

> '11. MEMBERS RIGHT TO SELL THEIR RIGHTS/INTEREST
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> 11.1 The members may not sell or dispose of their rights in any way whatsoever without the written consent of the entire committee of the Association.
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> 11.2 The Association can only furnish such member or members with their written consent if all the members were consulted in one general

meeting and a quorum was available and a 70% majority of such members present had consented thereto.

11.3 A member may subject to the above rules [sell] his shares/interest/rights to the Association.'

[24] Viewed contextually within the ambit of s 12 of Act, 28 of 1996, read with Clause 11 of the CPA constitution, there can be no question that there are serious issues to be tried in this litigation. These include: whether the representatives of the CPA were properly mandated to transfer the farms to Lerospot; whether the representatives of the CPA, who purported to sell the farms to Lerospot, were duly elected and/or eligible to serve as representatives of the CPA; whether Lerospot validly acquired the ownership of the farms and could consequently validly transfer ownership to the Trust; whether the alleged decision by the CPA to transfer the immovable properties to Lerospot was duly supported by an inclusive decision making process; whether the alleged decision by the CPA to transfer the immovable properties to Lerospot was made with the consent of the stipulated majority of the CPA's members; and whether the alleged transfer of the immovable properties to Lerospot was done in accordance with the relevant prescripts and the CPA's constitution.

[25] To the questions above there are serious disputes of fact emerging on the papers. The Court *a quo* correctly noted, albeit belatedly in its ruling on the application for leave to appeal, that the grounds of appeal related to the disputes of fact in respect of the transaction between the CPA and Lerospot. In terms of the well-established *Plascon-Evans* rule[5] where in motion proceedings disputes of fact arise on the affidavits, a final order can 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

[5] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H - I

the latter, justify such order. The application procedure was not designed to resolve material factual disputes which ought to be resolved through the leading of oral evidence and require factual resolution.

[26] There is no indication on the papers that any of the parties at any stage sought leave from the Court *a quo* to refer the matter to oral evidence. It is generally undesirable that a Court *mero motu* orders a referral. In *Joh-Air (Pty) Ltd v Rudman*[6] the Court cautioned against this as follows:

> 'It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence or trial *mero motu*, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because: he may not want to be involved in the cost thereof; his prospects of success, after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6(5)*(g)* to be invoked.'

[27] In my view, to resolve this application under the prism of the *Plascon-Evans* rule may lead to considerable injustice. The Court *a quo* incorrectly determined that the appellant did not raise real, genuine, or bona fide disputes of fact. The veracity of the issues in dispute as foreshadowed in the papers would require to be properly tested. Referring the application to oral evidence is inescapable.

[28] The issues raised in the action proceedings conflate somewhat with the issues raised in this application. The parties cited in the action are the CPA, as the plaintiff, whereas Lerospot and others, are the defendants. As already alluded to, the Trust (represented by its Trustees) is not cited as a

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[6] 1980 (2) SA 420 (T) at 428 – 429C

party in the action although, in my view, it has a direct and substantial interest in the outcome of that litigation. In this application Lerospot and the CPA are not cited as parties. On the view I take, all the issues stemming from this application, that ought to be referred to oral evidence, should be consolidated with the action proceedings under Case No 767/13. Regard being had to the fact that the action proceedings stagnated, I am of the view that, this application and the action be placed before a case-flow management judge to prevent any further undue delay.

[29] On the question of the introduction of new evidence on appeal the appellant mentioned *en passant* that he intervened in the action and would place the evidence before the trial Court for its final determination of the matter as that evidence will canvass material facts which are not only relevant to the present application but also to the pending action; and that the evidence would also prove that the sale of the farms was unlawful and should be set aside.

[30] On account of my conclusion that there are disputes of fact not soluble on the papers little purpose will be served in determining the application in respect of the admission of new evidence. This is so because the suggested new evidence seems directly linked and relevant to the issues in dispute which ought to be referred to oral evidence. Similarly the probative value of the new evidence ought to be tested through oral evidence. It would therefore be pragmatic that the new evidence should also serve before the same Court.

[31] On the question of costs: ordinarily the application to admit new evidence on appeal has a bearing on costs which, to my mind, should be reserved for determination at the hearing in due course of the oral evidence.

[32] From the foregoing analysis, the appeal should succeed with costs. I make the following order.

Order

1. The appeal is upheld with costs which shall include the costs of the application for leave to appeal in the Court *a quo* and the Supreme Court of Appeal.

2. The order of the Court *a quo* is set aside and substituted with the following:

   "1. The application is referred to oral evidence on the following issues:

   1.1 whether the representatives of the Dirisanang Small Farmers Communal Property Association ("the CPA") were properly mandated to transfer the immovable properties to Lerospot (Pty) Ltd ("Lerospot");

   1.2 whether the representatives of the CPA, who purported to sell the immovable properties to Lerospot, were duly elected and/or eligible to serve as representatives of the CPA;

   1.3 whether Lerospot validly acquired the ownership necessary to transfer the said ownership to the Charles Fischer Farming Trust ("the Trust');

   1.4 whether the alleged decision by the CPA to transfer the immovable properties to Lerospot was duly supported by an inclusive decision-making process;

   1.5 whether the alleged decision by the CPA to transfer the immovable properties to Lerospot was made with the *consent of the requisite majority of the CPA's members; and*

1.6 whether the alleged transfer of the immovable properties to Lerospot was done in accordance with the relevant legislation and the CPA's constitution.

2. All the affidavits exchanged between the parties shall serve as the pleadings at the hearing/trial in due course.

3. The evidence to be adduced shall be that of any witness whom the parties, or either of them, may elect to call, with rights of subpoena and production of documents under subpoena.

4. The costs of the application are reserved for determination at the hearing of oral evidence."

3. The costs of the application for the admission of new evidence on appeal are reserved for determination at the hearing of oral evidence.

4. The application under Case No: 1817/2017 is hereby consolidated with the action instituted under Case No: 767/2013.

5. The Registrar of this Court is directed to refer the application and the action referred to in para 4 to judicial case-flow management.

MV Phatshoane ADJP

Williams J and Sieberhagen AJ concur in the judgment of Phatshoane ADJP

APPEARANCES:
FOR THE APPLICANT: Adv T Makoti

Instructed by Engelsman Magabane Attorneys.

FOR THE RESPONDENTS: Adv JG Van Niekerk SC

Instructed by Haarhoffs Inc.