

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2573/2014

In the matter between:-

VKB LANDBOU LIMITED

Applicant

and

NICOLAAS PETRUS UYS N.O.

First Respondent

STEPHANUS SOLOMON WEYERS N.O.

Second Respondent

NICOLAAS PETRUS UYS

Third Respondent

COENRAAD HENDRIK VAN DEN BERG

Fourth Respondent

HEARD ON: 13 JUNE 2014

JUDGMENT BY: KRUGER, J

DELIVERED ON: 19 JUNE 2014

- [1] The matter came before me as an urgent application on Saturday morning, 7 June 2014. It concerns two farms in the district of Vredefort over which applicant holds a bond and the fourth respondent, C H van den Berg is the lessee and the N & J Trust the mortgagee and lessor. On Friday 6 June 2014 Keith Francis Ward, who purchased the farms on a private auction on 16 April 2014, and who is also the owner of the farm adjacent to the farms sold, saw the third respondent transporting a large number of

workers to the farms who were harvesting the crops on the farms. I granted a *rule nisi* prohibiting the third and fourth respondent to harvest the crops with return day 19 June 2014. The fourth respondent filed an answering affidavit and anticipated the return date under Rule 6(8) to 7 June 2014. The applicant filed a replying affidavit on 12 June, and I heard the matter on 13 June 2014.

- [2] The applicant cited only the third and fourth respondents in this application, but the names of the first and second respondents are mentioned in the heading to avoid confusion. The respondents are described as the third and fourth respondents. There has been previous litigation between the parties involving the farms which are the subject of this application. The first and second respondents have in previous litigation been the two trustees of the N & J Trust which is the owner of the farms in question and the mortgagor in respect of the applicant, who is the mortgagee, having advanced monies to the trust. The competing rights of the applicant as bondholder and the fourth respondent as lessee comprise the dispute in this case.
- [3] The case has a long history. On 23 March 2010 the applicant granted a covering bond to the N & J Trust over the farms Shaftfontein 726 and Bellary 724, district of Vredefort for R6 million. The trustees of the N & J Trust were Nicolaas Petrus Uys and Stephanus Solomon Weyers. The trust defaulted in the repayment of the bond and applicant brought an application in this court for payment. The applicant and the two trustees entered into a settlement agreement on 13 February 2013 in terms whereof the

trustees undertook to pay the outstanding debt of R6 738 968,52 plus interest before 31 March 2013. The settlement agreement provided that if the trust defaulted in payment the full balance would immediately be payable, and judgment for the debt could immediately be granted and that the farms would be declared executable immediately. Clauses 2.3 and 2.4 of the settlement agreement are important and provide that in the event of default:

- “2.3 dat Applikant die onroerende eiendomme hierbo na verwys onmiddellik ooreenkomstig die bepalinge van die Verbandakte sal verkoop welke onder andere sal insluit dat dit per privaatveiling verkoop word ter delging of gedeeltelike delging van die Skuld;
- 2.4 die Trust bevestig dat die verkoping van die gemelde onroerende eiendomme geensins inbreuk sal maak op sy regte onder andere kragtens Artikel 26 van die Grondwet 108 van 1996 en of enige ander verblyfregte van watter aard ookal nie;”

On 14 February 2013 that settlement agreement was made an order of court.

- [4] The trust defaulted on the order and the registrar granted judgment on 22 May 2013, declaring the property executable. Paragraph 6 of the registrar’s order reads:

- “6. Dat die Applikant die bovermelde onroerende eiendom onmiddellik ooreenkomstig die bepalinge van die verbandakte sal verkoop, welke onder andere sal insluit dat dit per privaat veiling verkoop sal word ter deling van/of gedeeltelike delging van die skuld”.

- [5] An auction was arranged in terms of the judgement. The Trust and the third respondent applied to have the auction stayed. Applicant lodged a counter application for confirmation of the judgment and leave to sell the farms. On 18 June 2013 the court gave a judgment in terms whereof the trustees were ordered to pay the outstanding debt to the applicant before 31 August 2013, and the farms were again declared specially executable, but the right of the applicant to hold an auction was suspended until 31 August 2013. Paragraph 8 of the judgment provided as follows:

“8 The first respondent [VKB] shall be entitled to re-advertise the aforesaid trust properties for sale in execution of this judgment either by public or private auction in terms of the covering bond 1815/2010 at any time after 31 August 2013, should the first and the second applicants still be in default.”

The two trustees and the third respondent applied for leave to appeal, which application was dismissed with a special costs order on 5 December 2013.

- [6] The properties were sold on 16 April 2014 on a private auction. Clause 10.1 of the special conditions of sale provides:

“10.1 Die koopsaak sluit in ongeveer 286 hektaar aangeplante mielies. Die Koper sal slegs geregtig wees om met die mielies te handel sodra die kooppprys betaal en/of versekureer is ooreenkomstig klousule 3 hiervan.”

- [7] The applicant attaches to the founding affidavit a writ of execution issued by the registrar of this court on 21 May 2014 (a month after the sale) authorising the sheriff to attach the farms and sell them in execution on a public auction. In the answering affidavit the fourth respondent says that it is difficult to understand this procedural step by the applicant, because at that stage the applicant had already sold the properties by means of a private auction. In the replying affidavit the applicant says the private auction did not exclude any attachment in execution by any judgment creditor, including the applicant. In argument counsel did not make much of this warrant, save that Mr Grobler, for the fourth respondent pointed out that the warrant dated 21 May 2014 refers specifically to a public auction. The warrant follows the wording of the Rules of Court and in particular with reference to Rule 46, dealing with sales in execution.
- [8] The lease agreement on which the fourth respondent relies was entered into on 1 September 2012 between the trustees of the N & J Trust and the fourth respondent. It was a four year lease running from 1 September 2012 to 31 August 2016. The bond on which applicant relies was registered on 23 March 2010. On 22 May 2013 the registrar granted judgment on the bond and declared the property executable and directed that the property could be sold by private auction. On 18 June 2013 the trust applied for an order staying the sale in execution, and the court directed that the putting into operation of the judgment was stayed until 31 August 2013. The farms were again declared specially executable, and

the applicant was authorised to sell them by public or private auction if the full debt was not paid by 31 August 2013.

- [9] The main contention advanced by Mr Grobler on behalf of the fourth respondent is that the properties could not legally have been sold *sans* the lease agreement because the sale amounted to a private contract. The fourth respondent's case is that the sale was not a sale in execution, and therefore the rule *qui prior est in tempore potior est in jure* does not apply. As authority for this proposition Mr Grobler relies on **Syfrets Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central, and Another, Schoerie NO v Syfrets Bank Ltd and Others** 1997 (1) SA 764 (D). In the **Syfrets** case it was common cause that the sale in execution took place pursuant to Rule 46(10). Combrink J points out that under that Rule immovable property attached in execution must be sold by public auction. The learned judge (at 770 I – 771 A) says that Rule 46(10) uses the phrase public auction as meaning the type of auction well known in our common law. The **Syfrets** case dealt with the effect of the winding up of a company on property attached and sold in execution by the sheriff before the winding-up.

- [10] Mr Grobler also refers to **Absa Bank Ltd v Universal Pulse Trading Figures 45 (Pty) Ltd and Others** 2011 (5) SA 80 (WCC). In that case Absa wanted cancel a sale in execution of immovable property by the sheriff. Absa had instituted action against the first and second respondents and obtained judgment and an order declaring the properties executable. The sheriff arranged a sale in

execution. Unbeknown to the sheriff Absa entered into a private sale with the fifth respondent. The sheriff's sale in execution proceeded. After bidding had started, a representative of Absa requested him to cancel the sale, which the sheriff refused to do because bidding had already started. The sheriff sold the property to the fourth respondent. Absa now requested the court to review and set aside the actions of the sheriff in so selling the property. The court concluded that when the sheriff sells the property in execution he does not act as agent of the judgment creditor but does so as an executive of the law (at par [8] with reference to the **Syfrets** case). The court concluded that after bidding had started, it was no longer open to the sheriff to stop the sale (par [16]). The **Absa** case, as well as the **Syfrets** case concerned the nature of a sale in execution by the sheriff. In this case the parties agreed and the court ordered that the sale could take place by private or public auction. Mr Pretorius informed me that a public sale is one held by the sheriff. A private auction is where the creditor arranges the sale. It is not in dispute that in this case a private auction was held. There is no merit in Mr Grobler's reliance on Rule 46 for the proposition that sales in execution have to be held by public auction. In this case the court ordered that the sale could be done by way of private auction.

- [11] The case relied on by Mr Pretorius, **Lubbe v Volkskas Bpk** 1991 (1) SA 398 (O) concerned a situation where the court (at 409 A-B) confirmed the principle that a later contract of lease cannot prejudice the rights of a bondholder. Smuts JP points out that if that were to happen, there would be extremely detrimental effects

for investors, if fixed property could, after registration of a bond, be encumbered by a lease or a *ius retentionis*. That is the present situation. The applicant's mortgage bond cannot be prejudiced by the later lease of the fourth respondent. In **United Building Society Ltd and Another NO v Du Plessis** 1990 (3) SA 75 (W) at 80 E – F the court held that a lease that came into being on a date after the registration of the mortgage bond, is a real right which ranks after a mortgage bond, and it cannot prejudice the rights of the mortgagee. The fact that the applicant chose to realise payment under its mortgage bond by a private sale, as authorised by the court, cannot alter the nature of the real right it was enforcing.

- [12] Mr Grobler's main contention is that because it was not a public auction, the sale was merely an execution of the creditor's personal rights, and one is not dealing with competing real rights. It is an ingenious argument. The fact is that both the rights of a bondholder and those of a tenant are real rights. They operate on the footing of publicity. Because the bondholder's rights are registered in the deeds office, the fiction applies that everyone is aware of them. In this case it is no secret that the fourth respondent knew about the bond because the trust was taken to court on the bond already in May 2013. In his answering affidavit the fourth respondent explains that he was present at the auction and he explains how the property was first put up for sale subject to the lease, and when no suitable offer was received, it was then offered without the lease. Execution was done in terms of a court order, not at the whim of the creditor. The enforcement of the real

right, the bond, can take place by means of a public auction and also by a private auction (or possibly other means) if the parties so agree and, as was an additional step in this case, the court directed that a private sale was competent to enforce the applicant's rights. The nature of applicant's right is not determined by the nature of the realisation of that right. A right under a mortgage bond is a real right. The fact that the court gave authority that the right could be realised by a private sale, does not alter the nature of that right. It remains a real right, and is stronger than another real right, the lease, which came into being later than the registration of the mortgage bond.

- [13] There is no merit in the opposition of the fourth respondent. The actions of the fourth respondent, by starting to harvest the crops late on a Friday afternoon, at a time before the moisture content of the crops was ideal for harvesting, points to the fact that the fourth respondent was attempting to gain an advantage to which he is not entitled. The fourth respondent may have a claim against the lessor, but there is no such claim before me now. The applicant sold the property and the crop, it is expressly so stated in the conditions of sale. The *rule nisi* should be confirmed with costs.

ORDER

1. The *rule nisi* granted on 7 June 2014 is confirmed and the fourth respondent is directed to pay the costs of this application.

A. KRUGER, J

On behalf of applicant:

Adv J.J. Pretorius

Instructed by:

Christo Dippenaar Attorneys

BLOEMFONTEIN

On behalf of 4th respondent:

Adv S. Grobler

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