FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3369/2013

In the matter between:-

JOHAN WILLEM ERASMUS	1st Applicant
HENDRINA MAGDALENA ERASMUS	2nd Applicant
SCHALK WILLEM JONKER	3rd Applicant
JOHANNES PETRUS VAN NIEKERK	4th Applicant

and

PIERRE DE VILLIERS BERRANGE N.O.	1st Respondent
TSUI VINCENT MATSEPE N.O.	2nd Respondent
FIFEHEAD FARMING PARTNERSHIP	3rd Respondent
DOWNIBROOKE PROPERTIES (PTY) LTD	4th Respondent
THE TRUSTEES OF THE EVERFAIR TRUST	5th Respondent
BADEN MUNGO SMYTHE	6th Respondent
THE TRUSTEES OF THE VAUQULIN FAMILY TRUST	7th Respondent

HEARD ON: 29 AUGUST 2013

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 10 SEPTEMBER 2013

I INTRODUCTION

[1] This is an opposed urgent application concerning 86 Holstein cows ("the cows"). The major role players are the four applicants and in particular the first applicant, Johan Willem Erasmus, a farmer of the farm Weltevrede (also known as Rasdal) district Koppies on the one hand and the two provisional trustees of the insolvent estate of the Kirkdale Trust ("the trust"), cited as the first and second respondents in this application on the other. For sake of convenience I shall refer to these two respondents as the trustees.

[2] Third to seventh respondents were cited as such as applicants believed that they might have a possible interest in the relief sought in the circumstances set out more fully herein. They have not given notice of their intention to oppose the application and no relief is sought against them. The third respondent, the Fifehead Farming Partnership ("Fifehead") is mentioned in particular insofar as it played a role in the sequestration proceedings preceding the present application and I shall refer to its involvement later herein.

THE RELIEF CLAIMED

[3] On Wednesday, 21 August 2013, applicants issued their application claiming the following relief:

3.1 That the non-compliance with the rules regarding service, as well as time-limits and any other non-compliance with the Court Rules, be condoned and that the matter be heard as urgent in terms of Uniform Rule 6(12)(a);

3.2 That the first and second respondents are ordered to immediately return the 56 Holstein cows (identified with a specific brand) and the 30 Holstein cows (identified with a certain different brand) in their possession or under their control to the first to fourth applicants by delivering the said cows to me (sic) at my (sic) farm "Weltevrede" (more commonly known as "Rasdal") in the district of Koppies, Free State Province;

3.3 That the first and second respondents are ordered to pay the costs of this application on a scale as between attorney and client;

3.4 In the event of any of the Third to Seventh Respondents opposing this application, that such a respondent is also ordered to pay the costs of this application on the scale as between attorney and client;

3.5 Further and/or alternative relief as the Honourable Court may decide to be appropriate.

I should add that the applicants begged leave to hand from the Bar at the hearing of the application an amended notice of motion claiming that applicants sought delivery of the said cows to the first applicant at his farm Weltevrede, more commonly known as Rasdal. No substantial amendment was sought and it was not opposed. It is apparent from the papers and the initial notice of motion that first applicant is in fact the driving force behind the application.

[4] The application papers were served on the respondents by email and on Tuesday, 27 August 2013, answering affidavits were filed. The following day replying affidavits were filed and the next day, i.e. 29 August 2013, the application was heard. Advocate P. Zietsman SC appeared for the applicants and Advocate G.M.E. Lotz SC for first and second respondents. Not surprisingly, and due to the time constraints, both parties were forced to approach me in respect of certain housekeeping matters, seeking my leave to accept certain confirmatory affidavits which came to hand late as well as the amended notice of motion referred to above. There was no objection and I accepted these documents. I must also point out that although counsel presented cogent arguments, I was not provided with written heads of argument and both counsel referred to the minimum of authority in support of their arguments. This necessitated extra research and consequently this judgment will be delivered a few days later than anticipated.

THE ISSUES

[5] Before I deal with the material background, it is apposite to indicate what the issues are. At the onset I requested Mr

Zietsman to indicate the legal basis or bases of applicants' claim. He indicated that the answer was quite simple and that applicants rely on spoliation. Alternatively and only insofar as I might find against applicants in this regard, they rely on *rei vindicatio*. I indicated to Mr Zietsman that the notice of motion did not contain a prayer for the setting aside of the warrant issued by the Magistrate of Koppies in accordance with the provisions of s 69(3) of the Insolvency Act, 24 of 1936, which was obtained by the trustees and in terms whereof first applicant was dispossessed of the cows. He made it clear that he was not going to ask for such relief as he deemed it unnecessary.

[6] Mr Lotz was quite surprised to learn that applicants relied on spoliation which he regarded as a completely new *causa*. He was of the view that the application was clearly couched to deal with the merits of ownership in respect of the cows and that procedurally speaking, I should not even have allowed Mr Zietsman to argue spoliation. In a nutshell applicants' version is that they have been in undisturbed possession of the cows, that the trustees have dispossessed them unlawfully and the trustees are presently in possession of the cows.

[7] Evidence was also tendered by applicants to indicate that the cows were purchased by each of them respectively on different occasions and at different purchase prices from the trust prior to its insolvency, that the purchase prices were paid and that the cows were delivered to them. Although

the cows were leased from different lessors by the trust from time to time, the agreements of lease provided in each case a right to the trust as lessee to sell cows from time to time. Consequently, so they aver, ownership of the cows vests in them.

THE FACTUAL MATRIX

[8] The factual background is contained in the application papers and to a certain extent few issues are really in dispute. I refer to the following:

8.1 First applicant is a farmer of the farm Weltevrede (Rasdal) district Koppies. Second applicant is his wife with whom he is married out of community of property. Third applicant is an adult male residing in the town of Koppies. Fourth applicant is referred to as a farmer, but is residing in the town of Koppies.

8.2 The trustees are the provisional trustees of the insolvent estate of the trust which was provisionally sequestrated on 25 July 2013 on application of Fifehead, the third respondent in this application. A final sequestration order was issued on 22 August 2013.

8.3 At all relevant times hereto the trustees of the trust were Cornelius Andries Petrus Loggenberg (Loggenberg), his wife Mary-Jane Loggenberg and a so-called independent trustee, Mr Ebenhaézer Kriek (Kriek), an attorney of Parys. On 22 July 2013, three days prior to the granting of the provisional sequestration order, Kriek resigned as trustee of the trust. Loggenberg is a role-player in other legal entities referred to later herein and he is in particular the sole director of a private company, Kirkdale (Pty) Ltd, which also features in this application.

8.4 Third to seventh respondents have entered into written lease agreement with the trust in terms whereof Holstein cows were leased to it. Apparently, and according to the investigations by the trustees so far, there are many more cattle owners who leased cows to the trust. It is not necessary to deal with this aspect further, save to refer to my remarks *infra.* Third respondent is a farming partnership, fourth respondent is a private company, fifth and seventh respondents are trustees of family trusts and sixth respondent is a private person. Applicants rely on these lease agreements, some of which have not been signed by all the parties thereto, or at all, for the trust's entitlement to sell the cows to them. The trustees deny that the trust was entitled to sell cows, particularly not wholesale and in the circumstances evident from Loggenberg's *modus operandi*. They aver that the evidence overwhelmingly shows that Loggenberg was the mastermind behind the trust's fraudulent conduct. The ostensible purpose of the trust was to conduct a dairy milking operation for which purpose these agreements were concluded in terms whereof owners of cows (investors) were induced to part with possession of their cows, but instead of utilising the cows for the purpose for which they were leased, these cows were sold, many of them immediately after lease agreements were entered into. I shall deal with this aspect again *infra*.

8.5 Although applicants aver that they received possession of the cows against payment of the purchase prices to the trust, it is apparent, even on their own version that no payments were made to the trust, alternatively that they failed to prove such payments to the trust. Instead payments were made into the bank account of Kirkdale (Pty) Ltd and an account that has not been identified. For instance, and to mention just one example, first applicant's version that he paid R300 000,00 to the trust in June 2012 in respect of the thirty cows purchased by him is not supported by the documentation relied upon. Payments were in fact made to the bank account of Loggenberg's company, Kirkdale (Pty) Ltd. It is unnecessary to deal further with the version pertaining to the purchase of the cows by the various applicants, save insofar as I shall consider these transactions again *infra*. Fact of the matter is that, as Mr Lotz has indicated, applicants have endeavoured to make out a case on the merits that they are entitled to delivery of the cows based on their alleged ownership.

8.6 It is applicants' case that the cows purchased by second, third and fourth applicants were thereafter leased to first applicant and that these cows were all in possession of first applicant ever since such transactions until he was dispossessed.

8.7 On 14 August 2013, i.e. after the provisional sequestration order was issued and the appointment of the trustees as provisional trustees, they *inter alia* obtained a search warrant from the magistrate in Koppies in accordance with the provisions of s 69(3) of the Insolvency Act. The same day the warrant was served on first applicant and the 86 cows, the subjects of this application, were removed from his farm Weltevrede (also known as Rasdal). Applicants elected not to attach the founding affidavit filed with the Koppies magistrate in support of the application in terms of s 69(2), but the founding affidavit used in a similar application before the Vereeniging magistrate pertaining to different cows and different farms where cows were also held. Mr Zietsman made certain submissions in this regard and I shall deal with that *infra*. It is apposite to state at this stage that although detailed averments were made in this affidavit pertaining to the fraudulent scheme embarked upon by the trust and Loggenberg, applicants elected not to deal with these damning averments at all. This is strange insofar as Mr E.A.L. Muller, an attorney of Potchefstroom, who was the legal representative of the trust during July 2013, as will be shown later herein, is now also the applicants' attorney of first instance in this application.

8.8 Applicants aver that they have a clear right to the cows, emphasising that they rely on their alleged ownership and the trustees' infringement of this right.

8.9 The trustees rely on the fact that Kriek, as independent trustee, was never consulted about the sale of cows and that the trustees did not agree to or authorise their sale. In reply applicants rely on the fact that Kriek himself drafted agreements of lease, which was presented in evidence, but not signed by anyone, indicating that Loggenberg in his personal capacity as lessee would be entitled to sell cows under certain conditions.

8.10 The founding affidavit of Willem Andries Pretorius, ("Pretorius") Fivehead's deponent in the sequestration application, was attached to the answering affidavit and confirmed upon oath by Pretorius. He made serious and damning allegations pertaining to the fraudulent scheme embarked upon by Loggenberg and the trust. Pretorius' investigations indicated that up to 5 000 herd of cattle were involved and have gone "missing" resulting in a potential loss to investors/lessors of approximately R30 million. In July 2013, a few days prior to the provisional sequestration order, Pretorius met with attorney E.A.L. Muller of Potchefstroom acting on behalf of the trust. Muller advised Pretorius as follows: The cows in the possession of the trust had contracted contagious abortion and had to be slaughtered, but the money was “gone”. Also, a “payment plan” agreement had been entered into with another investor/lessor, one Vauqulin (a trustee of the seventh respondent in this application), who met with Muller earlier that same day. Furthermore, neither Loggenberg, nor his trust had any assets, but Loggenberg’s family intended to set up a sheep farming operation and offered to pay the Fifehead Farming Partnership of Pretorius from the profits of this farming venture and a written proposal would be presented to Pretorius. Nothing came from this. This version has not been contested, either in the sequestration application, or in reply in this application. In particular, applicants failed to file any affidavit from Loggenberg or his wife in an effort to deny these serious allegations.

8.11 Jesaja Alexander Erasmus (Erasmus), the farm manager of the trust, largely confirms the version of Pretorius and the trustees. According to him approximately 1000 cows subject to lease agreements were sold during the period May 2012 to July 2013.

8.12 It is indicated by the trustees that on first applicant's own version he purchased 30 Holstein cows from the trust, which were the subject of lease agreements entered into during May 2012. This purchase took place in June 2012, barely one month after the trust took possession of the cows.

8.13 Just after the provisional sequestration order the sheriff made his inventory. He found a paltry 31 cows in possession of the trust.

8.14 Approximately 90% of the cows in possession of the applicant have been over-branded.

8.15 It is apparent that representatives of the third and fourth respondents, namely Pretorius referred to above and Shane Pinchen respectively, visited or attempted to visit the farm Kirkdale on a regular basis to inspect their dairy cows. The manner in which Loggenberg instructed his farm manager, Erasmus, to tag random cows with identification tags of the lessor who came to inspect the cows, is hair-raising. Once the one lessor would leave the farm, his tags would be removed and the cows retagged in preparation for the inspection by the other lessor. Care was taken that lessors did not arrive at the farm simultaneously.

8.16 It is evident that Loggenberg instructed the purchaser of milk, Tip Top Full Cream Milk, to make payments for milk delivered by the trust to entities such as Kirkdale (Pty) Ltd., Millika (Pty) Ltd and the Andre Loggenberg Trust. During February 2013 to July 2013 the sum of R1,1 million was so deposited into the bank account of this lastmentioned trust.

8.17 In reply applicants rely on the fact that the trustees brought their application in terms of s 69 of the Insolvency Act for the purpose of obtaining possession of cows leased by the trust from various lessors. However, the trustees were only entitled to obtain possession of cows belonging to the insolvent estate of the trust, but on the trustees' own version the cows never belonged to the trust. However and although applicants accept that the magistrate of Koppies granted the warrant, they aver that "this does not mean that they (the trustees) are entitled to remain in possession of the relevant cows".

8.18 Finally, applicants reiterate in reply that the trust was entitled to sell cows in accordance with the provisions of the various agreements of lease.

<u>SPOLIATION AND SECTION 69(3) OF THE INSOLVENCY ACT 24 OF 1936</u>

[9] As indicated *supra*, Mr Zietsman, when confronted at the onset to explain the legal basis of applicants' claim, submitted that he relied on two bases, to wit

(a) that the trustees obtained possession of the cows unlawfully and therefore the mandament van spolie is applicable as spoliation had taken place. In order to substantiate this submission, he argued that the trustees obtained the warrant in terms of s 69(3) of the Insolvency Act unlawfully.

(b) Secondly, and only if it is found that no spoliation has taken place, applicants rely on the *rei vindicatio* as it is submitted that a proper case has been made out that they purchased the cows from the trust, paid the purchase price and obtained possession thereof. I deal firstly with spoliation.

[10] It is common cause that a total of 86 cows were in possession of first applicant until their removal on 14 August 2013 in terms of a warrant obtained by the trustees in terms of s 69(3) which authorised the removal of the cows belonging to the insolvent estate of the trust. These cows are presently in possession of the trustees. Innes CJ stated the rule pertaining to spoliation in the followings terms in **Nino Bonino v De Lange** 1906 TS 120:

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable."

See also **Yeko v Qana** 1973 (4) SA 735 (AD) at 739B – G; **Makhubedu and Another v Ebrahim** 1947 (3) SA 155 (TPD) at 160 and 169 – ejection following upon a judgment valid at the time was found not to be spoliation - and **Ntai and Others v Vereeniging Town Council and Another** 1953 (4) SA 579 (AD) at 590 – no action can be brought against messenger or the party instructing the messenger for carrying out a writ as long as the writ stands.

[11] The mandament van spolie (spoliation order) is a possessory remedy which offers temporary relief. The applicant must allege and prove the following only, i.e.

(a) that he or she was in possession of the property; and

(b) that he or she was illicitly ousted from such possession.

See: Badenhorst *et* al, Silberberg and Schoeman's **The Law of Property**, 5th ed, p 288 - 294; C G van der Merwe, **Sakereg**, 2nd ed, p 129.

[12] In Afrikaans the type of possession is referred to as "vreedsame en ongestoorde besit" and in English it is described as "peaceful and undisturbed possession". The defences that may be raised are limited, one being that the dispossession was not unlawful or illicit.

[13] The purpose of the mandament van spolie is to restore the *status quo ante, i.e.* the unlawfully deprived possession and

to prevent a person who asserts that he or she has a real right to particular property in possession of another to resort to self-help, instead of taking recourse to a court of law. In deciding a spoliation application proper, the merits of the case, i.e. the rights of the parties pertaining to the property, are never considered.

[14] In **Sillo v Naude** 1929 AD 21 at 26 the Appellate Division found that by setting the machinery of the Pound Ordinance into motion in terms whereof cattle of the appellant were impounded, the respondent merely invoked the aid of the law and could not be said to have taken the law into his own hands. Consequently appellant's appeal was dismissed as the Court found that no spoliation occurred.

[15] In order to develop his argument Mr Zietsman relied on s 18(3) of the Insolvency Act and submitted that the trustees were not entitled to launch the proceedings in terms of s 69 as they did not have any authority from the High Court to do so. In fact, he pointed out that the trustees opposed the present application and were represented by counsel without authority from the Court contrary to the provisions of s 18(3), although he did not want to make an issue of such lack of authority pertaining to the present proceedings. I may add that this caused me to consider the specific issue during argument and after hearing Mr Lotz as well, and without objection from Mr Zietsman, I authorised the trustees belatedly to oppose applicants' application. I shall deal *infra*

with the argument pertaining to court authorisation in relation to s 69.

[16] Mr Zietsman also argued that in terms of s 69 the trustees had to present evidence upon oath that the relevant cows belonged to the insolvent estate of the trust and that they were in the district of Koppies. He argued that these cows never belonged to the trust and that the trustees did not have the power to apply s 69. Finally, he argued that the magistrate should have applied the *audi alteram partem* rule and should not have granted the warrant without allowing the applicants the opportunity to answer the allegations of the trustees. On his version the cows were not hidden and the magistrate would never have granted the warrant if applicants were given the opportunity to respond.

[17] On his appointment the insolvent estate becomes vested in the provisional trustee and remains so vested until the appointment of a trustee. This is trite. Subject to certain exceptions a provisional trustee has all the powers and is subject to all the duties of a trustee. Although a provisional trustee is not in the business of winding-up of the insolvent estate, or the sale of assets or the institution of legal action as his primary tasks, he is duty bound to take physical control of the estate assets and to preserve same for creditors until a trustee is appointed.

See: **<u>Goodwin Stable Trust v Duohex (Pty) Ltd and Another</u>** 1998 (4) SA 606 (C) at 620 F and Mars, **The**

Law of Insolvency in South Africa, 9th ed, p 316, Meskin, **Insolvency Law,** par 5.6.7, p 5.24 and s 69(1) of the Insolvency Act.

There is no doubt that s 69(3) of the Insolvency Act is a valuable tool in the hands of the trustee, including the provisional trustee, the primary object of which is to enable such a trustee to collect and take control of assets reasonably believed to belong to an insolvent estate which are being concealed or withheld.

See: **<u>Cooper NO v First National Bank of SA Ltd</u>** 2001 (3) SA 705 (SCA) at paras [22] and [23] p 713D – 713E and s 69 of the Insolvency Act.

[18] S 69 of the Insolvency Act reads as follows:

"**69 Trustee <u>must take charge</u> of property of estate**

(1) A trustee <u>shall</u>, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section *nineteen*, <u>take into his possession</u> or under his control <u>all movable property</u>, books and documents <u>belonging to the estate</u> of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.

(2) If the trustee has <u>reason to believe</u> that any such property, book or document is <u>concealed</u> or otherwise <u>unlawfully</u>

withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document. (emphasis added)

(4) …"

[19] It is important to note that a magistrate confronted with an application for a search warrant, does not finally determine any legal entitlement to any property or item envisaged in s 69, as he is merely called upon to apply his mind as to whether a warrant should be issued and not to deal with the merits such as ownership. In **Cooper NO v First National Bank of SA Ltd** *supra* at pp 714 B – 715 A the Supreme Court of Appeal found that although there is no express provision in s 69(3) requiring notice to an affected person or affording a right to be heard, one would need to have regard to the facts of each particular case to determine whether the *audi alteram partem* principle should have application. I must point out that the facts in that judgment differ completely from the facts *in casu* and in any event the Supreme Court of Appeal had to deal with an appeal against

an order of the High Court setting aside a search warrant, which is not the situation *in casu*, as I have indicated from the onset. In order to enlighten the reader as to the mischief that s 69 is designed to combat, it is apposite to refer to the minority judgment of Marais JA in **Cooper**, *loc cit*, at paras [8] – [15], pp 720 – 722. S 69(3) does not require the magistrate to make findings regarding e.g. ownership or to decide a legal issue as he or she does no more than to decide whether there are reasonable grounds for suspecting that an asset is concealed or otherwise unlawfully withheld from the trustee. Marais JA's reliance on the *dictum* of Lord Devlin by Marais JA in **Hussein v Chong Fook Kam [Shaaban Bin Hussein and Others v Chong Fook Kam and Another]** [1970] AC 942 (PC) at 948 to the effect that suspicion in its ordinary meaning is a statement of conjecture or surmise where proof is lacking for purposes of considering s 69(3) is apposite. Again, and although I am not asked to set aside the warrant obtained by the trustees, it is apparent that in the present circumstances the trustees were fully entitled to approach the court without giving notice to applicants.

[20] I return briefly to Mr Zietsman's submissions pertaining to s 18(3). This subsection reads as follows:

> "(3) A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings

> and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct."

The main aim of s 18(3) is to protect creditors against liability for costs incurred by provisional trustees and dissipation of assets by their ill-conceived litigation.

See: **Lane and Another NNO v Dabelstein and Others (Lane and Another NNO Intervening)** 1999 (3) SA 150 (CPD) at 163B – C and **Warricker and Another NNO v Liberty Life Association of Africa Ltd** 2003 (6) SA 272 (WLD) at para [5], p 276F – J; **Patel v Paruk's Trustee** 1944 AD 469 at 475.

[21] I have asked counsel to provide me with authority as to whether a provisional trustee needs to obtain authorisation from the High Court to launch proceedings in terms of s 69, as Mr Zietsman submitted, or whether such authorisation is not required as Mr Lotz submitted. Again the issue may be of academic value insofar as a warrant was indeed issued and there is no application before me for setting aside same, but in my view logic dictates that, bearing in mind the overall duties of provisional trustees and the nature of the proceedings in terms of s 69, the authorisation of the court in terms of s 18(3) is not required. Consequently the trustees did not have to approach the High Court for such authorisation before invoking s 69. Hefer J (as he then was)

made the following observation pertaining to hire-purchase goods and s 84 of the Insolvency Act in **Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of "The Village" and Others** 1981 (3) SA 97 (D & CLD) at 101G – H:

> "A trustee who does not have possession of the assets of the estate has not exercised the right nor indeed carried out the duty which he has in terms of s 69 (1) of the Act to reduce all the movable property belonging to the estate into his possession or under his control. He may exercise that right against anyone in respect of any movable property belonging to the estate, and he may do so specifically for the purpose of being able to comply with a demand for delivery of hire-purchase goods in terms of s 84 (1). There is thus no question of not being able to comply with such a demand: if the trustee does not have possession, he can and must obtain it." (emphasis added)

This judgment found approval in the Free State in **Morgan en 'n Ander v Wessels NO** 1990 (3) SA 57 (OPD) at 65D - G and **Venter NO v Avfin (Pty) Ltd** 1996 (1) SA 826 (AD) at 835A – G.

[22] The term "legal proceedings" appearing in s 18(3) is not defined in the Insolvency Act. It is unthinkable that a trustee who is obliged to take control of assets belonging to an insolvent estate, even by obtaining a warrant for that purpose, has to approach the High Court as a matter of course for authorisation to apply s 69. The Appeal Court found that generally speaking a party commences legal

action when he issues summons or starts motion procedure, for the purpose of obtaining a declaratory order, whether or not he also seeks consequential relief.

See: **SZ Tooling Services CC v SA Eagle Insurance Co Ltd** 1993 (1) SA 274 AD at 278 A. Refer also to the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 and **S v Sitebe** 1965 (2) SA 908 (NPD). Therefore the application for a warrant in terms of s 69 should not be regarded as the institution of legal proceedings referred to in s 18 (3).

[23] Finally I have to deal with the allegation that the cows do not and did not belong to the trust at any stage and that the trustees could not utilise s 69. Again the issue appears to be immaterial insofar as first applicant was dispossessed based on the warrant issued and there is no application for setting aside same. However I deal with the issue as follows: "*Movable property*" is defined in s 2 of the Insolvency Act as "*every kind of property and every right or interest which is not immovable property*" and "*property*" is defined as "*movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fideicommissary heir or legatee*". The insolvent trust conducted a dairy business and in order to operate this business it *inter alia* leased several hundreds of Holstein cows from various lessors for periods ranging from eighteen months to five years. The trust had the right to utilise this herd of cows to generate income through milking,

but it was also entitled to the offspring – the progeny – born of the cows during the lease agreements. Although the lessors retained ownership in the cows leased, the insolvent estate surely had an interest in the cows insofar as it would be entitled to keep the cows as milk producing assets during the respective lease periods. As such, those rights in the cows fall within the definition of property and movable property referred to above and afforded the trustees the opportunity to apply for a warrant in terms of s 69. The evidence to which I have referred *supra* entitled the trustees to apply for a warrant insofar as there were at the very least reasonable grounds for suspecting that the cows, which for purposes of the relevant section belonged to the insolvent estate, were concealed or unlawfully withheld from the trustees.

[24] Having said all the above, there is in my respectful submission no doubt that applicants failed to prove the second requirement for the mandament van spolie, i.e. that first applicant, not to speak of the other three applicants who were not even in possession of the cows, was unlawfully deprived of possession of the cows. The trustees did not take the law into their own hands, but acted as was expected of them and utilised the proper procedure provided for in the Insolvency Act by obtaining a search warrant in terms of s 69.

THE RELIANCE ON THE *REI VINDICATIO*

[25] As indicated above, Mr Zietsman argued in the alternative, should I find that a lawful attachment had taken place, that applicants had proven that they were entitled to be placed in possession of the cows based on the *rei vindicatio.* He argued that a *prima facie* case had been made out to the effect that the trustees of the trust had the *ius disponendi*, the right to sell the cows and that ownership has passed to the applicants based on the abstract system of ownership transfer in this country. He relied on CG van der Merwe, *loc cit* at pp 301 – 313.

[26] Mr Zietsman also submitted that the trustees and third to seventh respondents ought to be estopped from relying on a defence that the trust did not give valid title of ownership to applicants. He placed reliance on **Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd** 1994 (3) SA 188 (AD) and **Kia Motors (SA) (Edms) Bpk v Van Zyl en 'n Ander** 1999 (3) SA 640 (OPD). In these two matters the respective owners' reliance on the *rei vindicatio* to obtain possession of their motor vehicles from the purchasers failed based on the principles of estoppel. They knew when they handed their vehicles to the particular second hand car dealers that they would put them on the floor with the aim of selling them. The trust was not in the business of auctioneer or cattle trader, but operated a dairy farm. The facts in both judgments are totally distinguishable from the facts *in casu* and as Mr Lotz argued, applicants failed dismally to show that anyone or more of these parties was or were negligent in the process. It is not applicants' case that they were

handed copies of the lease agreements by Loggenberg and that they established through perusing these documents that the trust had the right to sell the leased cows. I would be surprised if that was their viewpoint, especially insofar as the reasonable person studying these lease agreements would not have come to the conclusion that the trust as lessee could sell milk producing cows wholesale, as happened *in casu*.

[27] As indicated, attorney Kriek who at all relevant times was an independent trustee of the trust, was unaware of the various transactions in which his co-trustee, Loggenberg, sold cows destined to be utilised for producing milk in the dairy business of the trust wholesale and probably in doing so settled outstanding rentals, the day to day production costs of the operation and also unlawfully channelled funds to other entities controlled by Loggenberg. In doing this, Loggenberg not only unlawfully utilised capital to settle expenditure, but probably committed fraud. It is clear that trust income was channelled to Loggenberg's private company Kirkdale (Pty) Ltd and at least two other entities. Applicants could not legally become owners of the various cows in the said circumstances for the reasons set out *infra*. It is common cause that they obtained possession of the 86 cows from Loggenberg. What is not common cause is whether applicants were totally innocent purchasers unaware of Loggenberg's financial predicament and his fraudulent actions. The trustees should be allowed proper opportunity to conduct interrogations in this regard. This should be the

case even if my application of the law as discussed and applied *infra* is wrong. Another aspect that appears to be clear from the papers is that applicants failed to prove that the purchase prices in respect of the various transactions were paid to the trust. There is nothing wrong with a seller instructing a purchaser to settle the seller's debt with a third person and to make payment directly to that third person. *In casu* and bearing in mind the onus of proof, applicants failed to prove that the purchase prices were in fact paid to the rightful entity, to wit and on their version, the trust.

[28] Trustees must act jointly unless the trust deed otherwise provides.

See: **Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk** 2004 (3) SA 486 (SCA) at paras [19] – [22], p 494 and **Thorpe and Others v Trittenwein and Another** 2007 (2) SA 172 (SCA) at para 9, p 176.

It is apparent that attorney Kriek at least, did not act with Loggenberg when the transactions were entered into and Loggenberg's wife probably also did not act as such. It is not applicants' case that Kriek and Loggenberg's wife acted with Loggenberg when delivery of the cows was effected. It is also not their case that Loggenberg acted with their express or tacit authority, although it was argued that there was ostensible authority. It appears from the overall evidence that Loggenberg acted on his own at all relevant times. As indicated, no affidavit was obtained from Loggenberg and the relevant trust deed was not placed before me. Consequently the necessary deduction to be made is that the various sales entered into between applicants and Loggenberg are invalid. Such underlying transactions being invalid, the next question to be answered is whether ownership has passed when delivery was effected based on the abstract system of ownership transfer. The authorities are clear. The delivery of movables and transfer of immovable property can validly be effected notwithstanding the invalidity of the underlying transactions.

See: **Legator McKenna Inc and Another v Shea and Others** 2010 (1) SA 35 (SCA) at parr 21 and 22, p 44 and **Meintjies NO v Coetzer and Others** 2010 (5) SA 186 (SCA) at parr 8 - 10, p 190 and **Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others** 2011 (2) SA 508 (SCA) at par 12.

[29] Contrary to Mr Zietsman's submission that even if there was a defect in the underlying transactions with specific reference to the fact that all the trustees did not act jointly, the validity of the various transactions are beyond doubt insofar as ownership has passed in accordance with the abstract system when delivery took place, Mr Lotz, on the other hand argued that there was not a mere defect in the underlying transactions, but that the very act of transfer of ownership was defective in each case as the transferor, Loggenberg, did not have the required power. In my view Mr Zietsman's reliance on CG van der Merwe *loc cit* is not supported by the

author at all. Van der Merwe is clear that the transferor must be legally competent to transfer the real right of ownership as nobody can transfer more rights than he or she has acquired. This is described as the "golden rule" of the law of property.

See: Badenhorst *et al* at p 72 and further where the authors also emphasise that transfer must be effected by the holder of the real right or by a duly authorised agent on his or her behalf. I conclude this aspect in finding that there was indeed a material defect in the real agreements insofar as Loggenberg acted without authority and consequently, ownership in the cows did not pass to applicant notwithstanding delivery. See: **Legator McKenna** *supra* at par 22.

[30] Mr Lotz submitted that even if the applicants were innocent I cannot close my eyes for the fraudulent scheme devised by the trust and Loggenberg in particular. However he submitted that bearing in mind the over-branding of the cows as testified to by Pretorius, which occurred prior to the granting of the provisional sequestration order, the applicants are not as innocent as they allege to be. Mr Lotz correctly argued that the nature of the proceedings, i.e. application procedure, should be taken into consideration and bearing in mind the **Plascon-Evans**-rule, the application should be adjudicated based on the facts stated by the respondents, together with those facts stated by the applicants which are not denied. I have done so in arriving at the conclusions *supra.*

RELIEF

[31] In summary, having considered the application based on the version of respondents together with the undisputed statements of applicants and the authorities quoted I am satisfied that applicants have not proven that they are entitled to the cows, either based on the Mandament van Spolie, or the *rei vindicatio.* The application should be dismissed and there is no reason why respondents' costs should not be borne by applicants jointly and severally. Even if I am wrong in this regard, it is apparent from the papers and the urgency with which the application was brought that further investigations will have to be conducted to establish what exactly transpired here. Both Muller and Loggenberg will obviously have to be examined and the same applies to applicants. In the meantime the trustees have a statutory duty to keep the cows in their custody and take care of them. No such duty is cast upon anyone else, including the applicants. I must mention that Mr Lotz did not ask in the alternative for an order staying the application pending the outcome of interrogations, but merely asked that the application be dismissed with costs and the applicants be ordered to pay the costs jointly and severally, the one to pay the others to be absolved.

ORDER

[32] Therefore the following order is issued:

32.1 The application is dismissed with costs, the applicants to pay the costs jointly and severally, the one to pay the others to be absolved.

J.P. DAFFUE, J

On behalf of applicants:	Adv P. Zietsman SC Instructed by: EAL Muller Attorney c/o Graham Attorneys BLOEMFONTEIN
On behalf of first and second respondents:	Adv G.M.E. Lotz SC Instructed by: Ven Nemeth & Hart Inc c/o Kramer Weihmann Joubert BLOEMFONTEIN

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