FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1726/2011

In the matter between:-

MRS MARIA ALETTE DE BRUYN N.O.	1st Applicant
MRS MARTHA ELIZABETH DE BRUYN N.O.	2nd Applicant
MR MICHIEL WILHELM GERHARDUS VOGES N.O.	3rd Applicant

and

MR JOHANNES CHRISTIAAN KOTZE N.O.	1st Respondent
MR GRAHAM CORBETT COETZEE N.O.	2nd Respondent
MR JOHANNES CHRISTIAAN KOTZE N.O.	3rd Respondent
MR GRAHAM CORBETT COETZEE N.O.	4th Respondent
TOBIE MYBURGH AFSLAERS CC	5th Respondent

HEARD ON: 23 JUNE 2011

DELIVERED ON: 28 JULY 2011

JUDGMENT

H.M. MUSI, JP

[1] On 14 April 2011 Kruger J granted a rule *nisi* in this matter, which was returnable on 26 May 2011. On the latter date the rule *nisi* was by agreement extended to 23 June 2011 in order to allow the respondents time to file their answering

affidavit and for the applicants to reply thereto, if so minded. The parties filed the relevant affidavits and the matter came before me for hearing.

[2] The rule *nisi* provides as follows:

"**IT IS ORDERED THAT:**

1. The forms, service and time periods provided for in the rules be dispensed with and the matter be heard as one of urgency in terms of Rule 6(12);
2. A rule *nisi* do issue calling upon the Respondents and all interested parties to appear to show cause, if any, on **Thursday 26 MAY 2011** om **09:30**, as to why the following order should not be made final:-

2.1 An order directing the First and Second Respondent to immediately deliver to the Applicant sheep as described in the lease agreement dated **25 AUGUST 2007** namely:-

2.1.1 *55 Dormeer ewe in lamb;*
2.1.2 *21 Dormer ewe in lamb;*
2.1.3 *130 Meat Merino ewe in lamb;*
2.1.4 *22 Meat Merino ewe in lamb;*

2.2 An order directing the First and Second Respondent to immediately delivered to the Applicant, sheep as described in the lease agreement dated **25 September 2007** namely:-

2.2.1 76 Dormer ewe;

2.2.2 59 lambs;

2.2.3 3 Merino Ram;

2.3 An order interdicting and restraining Fifth Respondent from including the sheep in the sale of the FARM SKERMERING also known as FARM 214 PORTION 2, REGISTRATION DIVISION BLOEMFONTEIN held under title deed T2055/2004 ("the farm") scheduled to take place on 15 April 2011;

2.4 That the First and Second Respondent be ordered to pay the costs of this application;

3. Prayers 2.1, 2.2 and 2.3 shall operate as an interim interdict pending the return day;

4. Copies of the interim order is served upon the Respondents by the Sheriff of the Court;"

[3] The application had been brought on the basis of urgency, the purpose of which was firstly, to ensure that the sheep forming the subject of the dispute were not sold alongside the farm Skemering on which the applicants had believed they were kept (prayer 2.3). The second purpose was to secure the return of the sheep (prayers 2.1 and 2.2). Although prayers 2.1, 2.2 and 2.3 were to operate as an interim interdict pending the return day, it has had no effect since the sheep have not been delivered to the applicants and it turns out that they were not kept on Skemering. Paragraph 2.4 of the rule *nisi* has according fallen away and the dispute now centres on prayers 2.1 and 2.2. The applicants insist on a final order for delivery of the sheep (restitutionary interdict) whereas the respondents argue that the applicants have not made out a case for final relief. It is

common cause that for the applicants to succeed, they must satisfy all the requirements of a final interdict.

[4] This dispute arises from two similar agreements of lease entered into by and between Ida de Bruyn Trust, which is represented in these proceedings by its trustees, the first, second and third applicants, on the one hand, and Jo-Marie Trust, represented in these proceedings by its trustees, the first and second respondents, on the other hand. Ida de Bryun Trust leased to Jo-Marie Trust a total of 366 sheep for definite periods, which expired during August and September 2010. I should point out at this juncture that the first and second respondents have also been cited as third and fourth respondents in their capacities as the trustees of another trust called the Skemering Trust. It is a trust that owns the farm Skemering on which it had been thought the sheep were kept. The third, fourth and fifth respondents were cited only as interested parties and no order was sought against them. The basis on which these latter three respondents were cited has since fallen away and they will not feature any further in this judgment. I shall henceforth refer to the

applicants collectively as the applicant, this being reference to the Ida de Bruyn Trust and shall refer to the respondents collectively as the respondent, this being reference to the Jo-Marie Trust.

[5] The main ground on which the application is opposed centres on the interpretation of the last part of clause 4 of the lease agreements, which reads as follows:

> "Die HUURDER moet op die verstrykingsdatum dieselfde getal lewende hawe wat in dieselfde toestand en kondisie en van ongeveer dieselfde ouderdom is as wat die lewende hawe was met die aangaan van die ooreenkoms, **aan die VERHUURDER terugbesorg, of die aanvanklike kapitale bedrag terugbetaal** op die kapitale bedrag." (My emphasis)

[7] It is common cause that the respondent chose to keep the sheep and to pay their value; that the applicant had agreed to accept payment and also acceded to the various requests for extension to enable the respondent to raise the amount due. Mr. Greyling, who appeared for the respondent, argued that the clause created an option and submitted that since

the applicant agreed to accept payment, a binding agreement came into being whereby the applicant forfeited the right to claim return of the sheep. Counsel submitted that the only claim that the applicant now has, is for damages. In this regard counsel argued that the applicant should have issued summons instead of proceeding by way of motion.

[8] The applicant disputed that the clause provides for an option. Mr. Johnson, who appeared for the applicant, argued that the clause provided the respondent with two choices: either to return the sheep or to pay their value, either of which had to be exercised at the date of expiry of the lease. If it chose to keep the sheep, it had to pay and it could not keep the sheep whilst not paying. Counsel argued that the fact that the applicant gave the respondent an indulgence to raise funds did not detract from the applicant's entitlement to demand return of the sheep if the respondent failed to raise the capital amount.

[9] Quite clearly the matter turns on the interpretation of the clause and the principles governing interpretation of written

contracts apply. The first and foremost enquiry is to ascertain the intention of the parties. In this regard the language used in the document is to be given its ordinary, grammatical meaning unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the document. See **COOPERS & LYBRAND AND OTHERS v BRYANT** 1995 (3) SA 761 (A) at 767 E – F. Words used in the contract should not be considered in isolation, but must be viewed in the context of the particular clause and the contract as a whole, bearing in mind the nature and purpose of the contract. See **COOPERS & LYBRAND**, *supra*, at 767 I – 768 B; **FEROX INVESTMENTS (PTY) LTD v BLUE DOT NURSERY CC t/a JASMINE PLANT & BIRD CENTRE** [2006] 1 ALL SA 17 (O) par. [7]. Now interpretation of a written contract is an enquiry to be undertaken by the court and extrinsic evidence is allowed only insofar as it may contextualise the contract. See **KPMG CHARTERED ACCOUNTANTS (SA) v SECUREFIN LTD AND ANOTHER** 2009 (4) SA 399 (SCA) par. [39].

[10] *In casu* the common cause facts sufficiently contextualise the

contract and there is no need to resort to any further evidence. In the premises, it makes no difference that the applicant chose motion proceedings.

[11] The following are common cause facts or are not disputed:

11.1 The periods of both leases expired in August and September 2010.

11.2 The respondents did not return the sheep to the applicant, but chose to keep them and promised to pay their value.

11.3 The capital amount that is payable to the applicant in lieu of the return of the sheep is R415 359,32.

11.4 The applicant agreed to accept payment and even agreed to let the respondents sell the sheep in order to raise the capital amount.

11.5 The respondent has to date been unable to pay the capital amount or any portion thereof.

11.6 The respondent is still in possession of the sheep or some of them.

[12] A reading of the clause in the context of the contract as a whole renders the construction advanced on behalf of the respondent untenable. It would lead to a continuation of the present impasse where the respondent keeps the sheep

without paying for them, something that the parties could not have intended. In my view, the interpretation that accords with the language of the contract read as a whole and its purpose, is the one advanced on behalf of the applicant. The operative word is “verstrykingsdatum”, the date of expiry of the lease. This word features throughout clause 4 and stipulates what must be done at the expiry of the lease term: either the lessee returns the sheep or pays their value. The return of the sheep or payment of their value must transpire at the date of expiry. That means that if the lessee decides to keep the sheep, but fails to pay, it is in breach of the contract and the lessor will be entitled to demand either the return of the sheep or payment of their value. The fact that the lessor has given the lessee an extension of time to raise the capital amount, does not detract from its right to claim the return of the sheep if the lessee fails to pay. This conclusion is fortified by clause 14.3 relating to the granting of indulgences and extensions. The argument that the relevant clause has created an option is, in my view, without merit. If the parties had intended to create an option, they would have said so. As it is, the word option (opsie) does not even appear in the clause.

[13] I note that the respondent claims in its answering affidavit that some of the sheep are no longer there for one or another reason, something that had not been disclosed to the applicant. This, however, makes no difference. The lease agreement does not demand return of exactly the same sheep, but stipulates return of the same number of sheep of comparable type, condition and age and in terms of clause 13.1 the respondent carried the risk relating to the theft of death of the sheep.

[14] In the premises the following order is made:

1. The first and second respondents are directed to immediately deliver to the applicants sheep as described in the lease agreement dated 25 August 2007 namely:

“2.1.1 55 Dormer ewe in lamb;
2.1.2 21 Dormer ewe in lamb;
2.1.3 130 Meat Merino ewe in lamb;
2.1.4 22 Meat Merino ewe in lamb.”

2. The first and second respondents are directed to immediately deliver to the applicants sheep as described in the

lease agreement dated 25 September 2007 namely:

"2.2.1 76 Dormer ewe;

2.2.2 59 lambs
2.2.3 3 Merino Ram."

3. The first and second respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

H.M. MUSI, JP

On behalf of first, second and third applicants: Adv. J.M.C. Johnson
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of first, second, third and fourth respondents: Adv. P. Greyling
Instructed by:
Steenkamp De Villiers & Coetzee
BLOEMFONTEIN

/sp