

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 084385/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
26 AUGUST 2024	
DATE	SIGNATURE

In the matter between:

NUHARVEST (PTY) LTD

First Applicant

JARED DEAN PETERS

Second Applicant

TANNER ARON PETERS

Third Applicant

and

ADEL DOREEN MCQUARRIE N.O.

Respondent

(In her nominal capacity as the court appointed Receiver
of the assets of the Dennis Ronald Peters Will Trust)

JUDGMENT

YACOOB J:

[1] The second and third applicants ("Jared" and "Tanner") are the sons of Dennis Ronald Peters, who died in 2001 when both his sons were minors.¹ They are the

¹ It must be noted that at the time the age of majority was 21.

beneficiaries of a trust created in terms of the will of Mr Peters senior, the Dennis Ronald Peters Will Trust (“the Trust”). Until 2020 Jared and their mother were trustees of the Trust.² The Trust was created to hold assets on behalf of and for the benefit of Jared and Tanner until they became each entitled to their shares of the assets in terms of the Will, on attaining the age of thirty-three.

- [2] In March 2020, pursuant to litigation instituted by Jared to remove his mother as a trustee, in which his mother brought a counter-application to remove Jared, the trust was dissolved and the respondent, Ms McQuarrie, was appointed Receiver and Liquidator of the Trust’s assets. At the time Jared, who is the younger, had not yet turned thirty-three, but he did so at the end of that year. Ms McQuarrie was nominated by Jared for the appointment.
- [3] The first applicant, Nuharvest, was incorporated in September 2020, with Jared and Tanner equal shareholders. The fresh produce business of Tanner Estates and its assets, which was at the time the only income producing entity in the Trust, was transferred to Nuharvest in March 2021. This transfer was intended to include the immovable property on which the fresh produce was cultivated and from which the business was, and is, run, but it did not. The reason was a concern about the tax liability the transfer of the property, valued at R30 million, would attract.
- [4] There are five immovable properties in the Trust, which are the subject of this urgent application. It is common cause that they have a combined value of approximately R35 million. It is also common cause that, in order to minimise the tax liability on the transfer of the remainder of the Trust property to Jared and Tanner, the properties would be transferred to Nuharvest in exchange for shares in Nuharvest, in accordance with section 42 of the Income Tax Act, 58 of 1962.
- [5] While discussions and negotiations were taking place about the best way in which to liquidate the Trust property, Nuharvest continued to successfully run the Tanner Estates business. It is common cause that the business was successful and not in any difficulty in the ordinary course. It is also common cause that there

² Jared alleges in his founding affidavit that Tanner was also a trustee, but it is clear from the judgment of Manoim AJ (as he then was) that Tanner was never a trustee.

was full cooperation between Jared and Ms McQuarrie until about February 2024. It is also common cause that certain of the properties (it is not disclosed which) are already bonded to ABSA for loans advanced to the business. It is not disclosed to what extent the properties are bonded, or whether the loans were advanced to the business before or after transfer to Nuharvest.

- [6] In February 2024, Nuharvest concluded a supply agreement with KFC, in terms of which Nuharvest will supply fresh produce to KFC. According to the applicants the KFC agreement requires Nuharvest to make significant investments in machinery and working capital to be able to service the agreement. In other words, Nuharvest was not able to service the KFC agreement on the basis of its productivity as it was at the time it entered into the agreement. Nuharvest then approached ABSA for finance, but ABSA agreed to provide a further loan facility to Nuharvest of R10 500 000 (R10,5 million) on condition that the properties are all transferred to Nuharvest before the loan facility is made available.
- [7] Ms McQuarrie, as liquidator and receiver, however, refused to finalise the transfer until provision was made for the Trust's liabilities. According to her, these liabilities, which are made up of the Trust's existing tax liability, plus the tax which will result from the transfer of the properties, as well as her fees, will amount to over R11 million. The applicants dispute this, saying that the basis on which Ms McQuarrie has calculated her fees is disputed, that the existing tax liability has been disputed with SARS, and that the amount of tax liability Ms McQuarrie contends will attach to the transfer of the properties is unlikely to be as much as she has alleged. They do not suggest a different amount or a different basis for the calculation.
- [8] The applicants contend that Ms McQuarrie is being obstructive, by not accepting their own guarantee that they will shoulder these liabilities, alternately their tender of a bond over two of the properties (which together are worth less than half of the amount that is supposedly implicated). They contend that, by insisting on a bank guarantee, Ms McQuarrie is being obstructive. They contend also that Ms McQuarrie is being disingenuous by suggesting that, absent a bank guarantee, she does not have the power to transfer the properties as it would amount to an early distribution.

- [9] Nuharvest, Jared and Tanner approach this court on an urgent basis for an order that Ms McQuarrie do all things necessary to transfer the properties to Nuharvest, within five days of the order, alternately, that the court declare that Ms McQuarrie has the power to do so, that Nuharvest provide a guarantee for the Trust's liabilities, and that Nuharvest register a mortgage bond on the two identified properties in favour of the Trust as security for the liabilities of the Trust.
- [10] The basis on which they contend that the application is urgent is that they require the transfer to secure the finance from ABSA, to perform in terms of the KFC agreement. They make some allegations about how many people the business employs and so on, but there is no evidence that the performance in terms of the KFC agreement is vital to the survival of the business. On the contrary, the evidence is that the business was thriving before the KFC agreement was entered into. There is no evidence of what the difference in production is between what the business was producing before the KFC agreement was entered into, and what it has to be after the KFC agreement, or of when ABSA requires the properties to be available for the finance to be made available. Finally, there is no evidence of by when Nuharvest needs the finance. The court is expected simply to accept Jared's say so that the matter is urgent because Nuharvest has to perform and needs the finance.
- [11] Ms McQuarrie opposes the application on the basis that it is not urgent, and that the application is without merit.
- [12] According to Ms McQuarrie she advised the applicants on 7 March that a guarantee would have to be issued to cover the liabilities before transfer could take place. The applicants, on the other hand, contend that, until 26 June 2024, they were unaware that the guarantee required had to be a bank guarantee. They assumed the guarantee could be simply a guarantee that they themselves would undertake to pay the liabilities.
- [13] I am satisfied that the applicants have not established urgency. It is clear the transfer of the properties became urgent for the applicants in at least March 2024, if at all, and that the bone of contention between the parties was provision for the Trust's liabilities before transfer could take place. Jared's allegation that it only

became clear on 26 June 2024 that a bank guarantee was required is, at best, naïve. Where Nuharvest could not even secure working capital of R10,5 million from its bank without obtaining transfer of the Trust properties, a guarantee from Nuharvest for liabilities of over R11 million would be almost worthless. It must have been clear to Jared, as a businessman, that more would be required.

[14] In addition to the fact that the applicants have not acted with any apparent urgency, the relevant timelines in terms of which the court can evaluate the urgency have not been set out. It is by now well established that urgency is not there for the taking. Even accepting that commercial urgency is a valid reason to approach the urgent court, an applicant still has to make out a proper case for urgency, and to justify every departure from the rules. The applicants have not done that. The founding affidavit is vague about what makes the matter urgent.

[15] In addition, the applicants approach the court on extreme urgency. The respondent was given truncated time periods within which to respond. No attempt was made to justify this at all. The applicants have failed to demonstrate any real loss or damage which would result had they not imposed the very short time periods they did impose, and had they not set the matter down in the week they chose to have the matter heard.

[16] Certainly the attempt to gain the sympathy of the court by listing the so-called hardships suffered by the people associated with Nuharvest are misplaced. Firstly, many of these allegations are simply hearsay. Secondly, even taken on face value, it appears from these allegations that Nuharvest overextended itself on the basis of funds to which it did not yet have access, and now approaches the court claiming urgency. This does not, in my view, entitle the applicants to jump the queue. Any loss established is “not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public”.³

[17] It was submitted for Ms McQuarrie that the complete failure of the applicants to justify the urgency they have claimed justifies the dismissal of the application as

³ *IL & B Marcow Caterers (Pty) Limited v Greaterman SA Limited & Another; Aroma Inn (Pty) Limited v Hypermarkest (Pty) Ltd & Another* 1981 (4) SA 108 (C) at 114B.

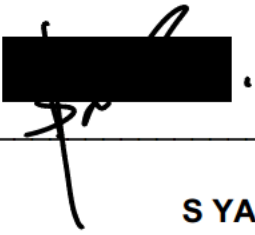
a mark of the Court's displeasure, especially as the applicants would not be non-suited, since they would be entitled to institute the application again properly in the ordinary course. Reliance for the submission was placed on *Vena v Vena and Another NO*.⁴

[18] In this case I do not believe it is necessary to dismiss the application as a mark of the Court's displeasure. Striking the matter from the roll is sufficient, and still obtains the necessary costs order for the respondent. I also do not see why the applicants should have the privilege of starting the application again from a clean slate, which in my view is what a dismissal would give them.

[19] Both the applicants and the respondent were agreed that the complexity of the matter warranted that costs be awarded on scale B.

[20] For the reasons set out above, I make the following order:

1. The application is struck for want of urgency.
2. The applicants are to pay the costs, jointly and severally, the one paying the other to be absolved, on scale B.



S YACOOB
JUDGE OF THE HIGH COURT
JOHANNESBURG

⁴ 2010 (2) SA 248.

For the Applicant: P Bosman
Instructed by: Brand Potgieter Incorporated

For the Respondent: M T A Costa
Instructed by: Reenen van Reenen Inc

Date of Hearing: 14 August 2024

Date of Judgment: 26 August 2024