



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: **19022/2017**

In the matter between:

TSIU VINCENT MATSEPE N.O First Plaintiff

CHAVONNES BADENHORST ST CLARE COOPER N.O Second Plaintiff

JUNITA CAROLINA KLOPPERS-LOURENS N.O Third Plaintiff

**(in their capacity as joint liquidators of OK Kloof Plase CC
in liquidation)**

and

KRISTOFFEL HENDRIK FOURIE N.O First Defendant

HEINIE FOURIE N.O Second Defendant

**(in their capacity as duly appointed trustees of the
Kwartelrivier Trust, I[...])**

MELKBRON BOERDERY CC Third Defendant

EDMUND ELS Fourth Defendant

Date heard: 10 December 2025

Judgment delivered: 27 January 2026

JUDGMENT

(APPLICATION FOR ABSOLUTION FROM THE INSTANCE)

GOLDEN, AJ:

1. The plaintiffs are the duly appointed liquidators of OK Kloof Plase CC (“*OK Kloof*”). They have two main claims as well as a number of alternative claims against the defendants. The main claim is based on the *rei vindicatio*, alternatively the *actio ad exhibendum* for, (i) the return of dairy cows, alternatively the value thereof and (ii) the return of sheep, alternatively the value of the sheep. The plaintiffs also seek the setting aside of certain dispositions in terms of Sections 26, 29 and 31 of the Insolvency Act, 24 of 1936 (“*the Act*”). For purposes of this judgment, I do not need to set out or address the various alternative claims in detail.
2. The subject matter of the action is what is commonly referred to as a consumption for loan agreement, a lease agreement for the lease of livestock (in this case, cows and sheep) which the lessee uses in order to earn an income. The current legal position is that ownership of the livestock passes to the lessee pursuant to the agreement. There does not appear to be disagreement among counsel that this is the legal effect of the agreement. There is, however, disagreement in relation to the facts underlying the action as to whether these agreements had been cancelled and/or validly terminated, which, according to the first and second defendants, the trustees of the Kwartelrivier

Trust ('the Trust') and the fourth defendant, Mr Els, brought an end to the lessee's ownership. Ownership is central to the plaintiffs' claims as liquidators of the O.K Kloof Plase CC insolvent estate.

3. The plaintiffs have presented their evidence and have closed their case. Save for the third defendant who has since settled with the plaintiffs, the Trust and the fourth defendant, Mr Els, now apply for absolution from the instance. They contend that the plaintiffs have failed to present a case to which they need to answer.
4. The effect of the grant of absolution is that the plaintiff is non-suited. Absolution should thus be granted sparingly.
5. The test for absolution was first set out in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409H and subsequently confirmed in *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC).
6. The Supreme Court of Appeal in *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) confirmed the test for absolution as follows:

*"The test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."*¹

7. Thus, the test is not whether the evidence led establishes what would finally be required to be proved at the end of the trial for the plaintiff to succeed on a balance of probabilities.
8. Harms JA in *Gordon Lloyd Page* amplified the test as follows:

¹ *Gordon Lloyd Page & Associates v Francesco Rivera & another* 2001 (1) SA 88 (SCA) at paragraph [2].

*“This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff ... As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one ... Having said this, absolution at the end of the plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice.”*²

9. The plaintiffs must make out a *prima facie* case to survive absolution.
10. Central to the plaintiffs’ claims, is the issue of the ownership of the cows and the sheep which were the subject of a consumption for loan agreement. The conclusion of these agreements is not in dispute. The plaintiffs, as the liquidators of OK Kloof, contend that they on behalf of the insolvent estate are the owners of the livestock given that the various lease agreements concluded between the parties were loans for consumption, and that the legal position is that ownership passes upon delivery of the livestock to the lessee. The defendants do not dispute that ownership is transferred pursuant to such a contract and upon delivery of the livestock.
11. The nature of the loan for consumption contract was explained in *Keyter N.O. v Keevy* (CA311/2017) [2018] ZAECGHC, a decision of the full bench of the Eastern Cape Division of the High Court, Grahamstown. The judgment confirms that ownership does not vest in the lessor but in the lessee or the possessor, and what the lessor retains is a personal right to claim the delivery of livestock of equal number and value to that which had been delivered to the lessee at the commencement of the lease.³
12. The plaintiffs led evidence on the lease agreements which were concluded between OK Kloof and the Trust in respect of the lease of 275 dairy cows. They also led evidence of the lease concluded between OK Kloof and Melkbron, the third defendant

² *Ibid* at paragraph [2]

³ *Keyter N.O. v Keevy* (CA311/2017) [2018] ZAECGHC at paragraph [20]

(who has since settled with the plaintiffs) in respect of the lease of 440 sheep and the lease agreement between the fourth defendant and OK Kloof for the lease of 554 sheep.

13. These agreements are not disputed, and the first, second and fourth defendants accept as a matter of law, that OK Kloof as the lessee became the owner of the livestock pursuant to the delivery of the animals.
14. Given that the plaintiffs rely on the *rei vindicatio*, they must prove as the liquidators of the insolvent estate in relation to the Trust and the claim for the dairy cows: (i) that OK Kloof was the owner of the dairy cows and, (ii) the Trust is or was in possession of the dairy cows. The *rei vindicatio* is aimed at the return of the livestock, alternatively, the value thereof. They also rely on the *actio ad exhibendum* which requires, in addition to ownership, that the defendants were in possession of the livestock knowing that OK Kloof was the owner of the livestock and that the loss of possession was *mala fide*. This of course applies to the claims in respect of the cows and sheep.
15. The defendants contend that the loan for consumption agreements were validly terminated and/or cancelled by the time that OK Kloof was declared insolvent. Counsel for the Trust, Mr de Wet, argued that these loan for consumption agreements were no longer extant at the time that the plaintiffs' cause of action arose which is fatal to the plaintiffs' claims. Counsel for the fourth defendant, Mr Fehr, supports this argument.
16. According to the Trust, the livestock was returned by OK Kloof to the Trust *before* 14 July 2016 given the mutual cancellation of the lease agreements. It contends that there was no lease for consumption as at 14 July 2016. Mr de Wet also argued that there was a repudiation of the agreements given that Kotze (on behalf of OK Kloof) was unable to feed the livestock.

17. According to the Trust, OK Kloof was not the owner of the sheep at the time that the cause of action arose, which the plaintiffs have not established in their evidence, and that accordingly, the Court can grant absolution against them in respect of the sheep loan for consumption agreement. They rely on the fact that Kotze owned and personally operated the dairy, not OK Kloof.
18. Mr Fehr argued that the plaintiff has pleaded that OK Kloof is still the owner of the sheep, and that the loan for consumption agreement was never terminated between OK Kloof and Els. Counsel argued that the plaintiffs have not led any evidence of any transaction or agreement with Els, and that there was no evidence of any disposal between Els and OK Kloof. Accordingly, no case against Els has been presented. Like the Trust, Mr Fehr argued that it is the value of the lease that should be claimed, not the value of the livestock, and that the lease is an asset in the insolvent estate.
19. The Trust also takes the point that the plaintiffs' pleadings are deficient, including that they have not pleaded that the leases were not cancelled, and that for the plaintiffs to succeed, the leases must have been extant. Counsel for the Trust argued that it is the lease which is an asset in the insolvent estate, but which was not pleaded by the plaintiffs for them to rely on any disposition in terms of the Act.
20. I am not persuaded that the defendants should be absolved from the instance.
21. In my view, the plaintiff has at least made out a *prima facie* case which the defendants are required to answer.
22. My reasons are briefly as follows.

EVALUATION

23. There is no disagreement that ownership of the livestock passes to the lessee in terms of a consumption for loan agreement. This is the legal position. The plaintiffs have led evidence as to the conclusion of these agreements, which agreements are not disputed by the defendants. The plaintiffs have accordingly, in my view, established *prima facie* at least, the first element of its *rei vindicatio* claim notwithstanding the defendants' position that the agreements were validly terminated and/or cancelled.
24. Counsel for the plaintiffs, Ms McChesney, contended that ownership cannot be transferred back to the lessors, which is effectively what the defendants contend. She argued that the lessor has a personal right in the event of a cancellation and/or breach of the agreement. Support for her contention is the judgment of *Keyter*.
25. The evidence which has been led demonstrates that there was movement of the livestock from OK Kloof to the defendants at various times pre and post the meeting of 14 July 2016, when it was unequivocally conveyed to Kotze and his wife on their farm that AFGRI would be proceeding with OK Kloof's liquidation. The evidence which has been led demonstrates that Kotze was in a very difficult financial position for some time before the meeting on 14 July 2016 and was aware that OK Kloof was in deep trouble financially. The difficulties did not only turn on the fact that Kotze could not feed the livestock, but also that Kotze was unable to pay the rental for the farms which he had leased to house the livestock. The livestock (both cows and sheep) were moved around the time that OK Kloof could not meet its financial obligations, when there was engagement between AFGRI and Kotze as to how to resolve the debt owed to AFGRI, and when Kotze was told that AFGRI was now going to proceed with the liquidation of OK Kloof. The cows were moved between 18 and 21 July 2016 immediately after the meeting on 14 July 2016 when Kotze was informed that AFGRI would proceed

with OK Kloof's liquidation. The application for liquidation was launched on or about 25 July 2016 and the order granted on 28 July 2016. The timing of the events which occurred and the movement of the livestock are important factors which this Court cannot ignore.

26. The meeting which Kotze had with the trustees of the Trust allegedly prior to 14 July 2016 where the lease was purportedly cancelled calls for an answer and/or explanation by the first and second defendants as to their involvement in the discussion, what was in fact discussed and whether the lease was indeed terminated and/or cancelled. What motivated Kotze to return the livestock to the defendants and what motivated their acceptance of the livestock goes to the heart of the claims. These are relevant issues which call for an explanation, and which must be interrogated in the trial when the defendants present their evidence, should they elect to do so. Given the events leading up to 14 July 2016, and immediately thereafter involving the liquidation of OK Kloof, the defendants are required to explain and to answer as to their involvement in the movement and/or possession of the livestock.
27. The issue as to whether the consumption for loan agreements was validly terminated and/or cancelled is a legal question which I can only appropriately determine at the conclusion of all the evidence. But this does not detract from the *prima facie* case which the plaintiffs have presented, and which calls for an answer.
28. The plaintiffs have presented a *prima facie* case also in relation to sections 26, 29 and 31 of the Insolvency Act 24 of 1936 where they seek the setting aside of certain dispositions. This claim is not dependent on the cancellation and/or termination of the consumption for loan agreements and fall to be proven in terms of the requirements of the Insolvency Act.

29. I find that the first, second and fourth defendants should not be absolved from these claims. The plaintiffs have presented at least a *prima facie* case in relation to the issue of ownership of the livestock and in respect of the setting aside of dispositions in terms of the Insolvency Act.
30. Absolution is accordingly refused and the application is dismissed.
31. The first, second and fourth defendants shall jointly and severally pay the plaintiffs' costs on Scale C.

TJ GOLDEN
Acting Judge of the High Court of South Africa
Western Cape Division, Cape Town

APPEARANCES:

On behalf of the Plaintiffs:

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On behalf of the First and Second Defendants:

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