

SOUTH AFRICA / JUDGMENT

Ackerman v Collect NO and Others ; Ackerman v Collect NO and Others (234/2017; 1650 /2017) [2020] ZAECGHC 57 (26 May 2020) [2020] ZAECGHC 57

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

234/2017; 1650/2017

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION, GRAHAMSTOWN
CASE
NO. 234/2017
In the matter

between:

DIRK JACOBUS
ACKERMAN
Plaintiff
and
DENWILL COLLETT
NO
First Defendant
NOLA COLLETT
NO
Second Defendant
CARMEN
RENÉ ACKERMAN
NO
Third Defendant
HELETTE PRETORIUS
NO
Fourth Defendant
DIRK JACOBUS
ACKERMAN
Fifth Defendant
CRAIG COLLETT

NO
Sixth Defendant
ROELOF
CILLIERS CRAUZE NO
Seventh Defendant
CASE
NO. 1650 /2017
In the
matter between: DIRK
JACOBUS
ACKERMAN
Plaintiff
DENWILL COLLETT
NO
First Defendant
CARMEN RENè
ACKERMAN
NO
Third Defendant
HELETTE
PRETORIUS
NO
Fourth Defendant

JUDGMENT

Bloem J.

- [1] These are two consolidated actions, the evidence in respect of both having been heard at the same time. The first and second defendants are husband and wife. They are the third and sixth defendants' parents. The plaintiff and the third defendant are husband and wife since 7 February 1996. The fourth defendant is the second defendant's sister. The fifth defendant is the plaintiff. The seventh defendant is a practising chartered accountant. All the defendants have been cited in their capacities as trustees of the Dick Collett (for Carmen) Trust (the trust or the Carmen Trust). The plaintiff is no longer a trustee of the Carmen Trust.[1]
- [2] In case number 234/2017, which was instituted during January 2017, the plaintiff claimed the sum of R2 981 559.00 from the defendants. HhHe alleged that during March 2012 he lent the sum of R3 100 000.00 to the trust which thereafter made partial payment to him, leaving a balance in the sum claimed. The defendants did not deny that the trust owed the sum claimed to the plaintiff. However they instituted a counterclaim against the plaintiff wherein they pleaded that in terms of an oral agreement concluded during December 2014 between the plaintiff and the first defendant, the plaintiff would lease, on an interim basis, the trust's farms, Harveya and Culmstock, and the livestock, farming machinery and equipment thereon (the interim agreement or interim lease). They alleged that a term of the interim agreement was that, upon the termination of the

lease, the plaintiff would restore to the possession of the trust the same number of livestock of the same breed, age and sex and all the farming machinery and equipment that he received at the commencement of the lease. The defendants pleaded that they cancelled the interim agreement on 25 November 2015. In their amended counterclaim the defendants pleaded that at the commencement of the lease the trust placed the plaintiff in possession of livestock to the value of R6 709 300.00, but after the cancellation of the interim lease they recovered livestock to the value of R4 018 800.00. The difference in value which they

claimed from the plaintiff was R2 690 500.00. In addition, the defendants claimed the sum of R750 000.00 from the plaintiff, being the difference between the monthly rental of R25 000.00 paid by the plaintiff to the trust and the fair

market monthly rental that they claimed the plaintiff should have paid to the trust over 15 months. The defendants accordingly

alleged that the plaintiff owed to the trust the sum of R3 440 500.00.[2] The trust's claim for R458 941.00[3] represented the difference between what the defendants alleged the plaintiff owed the trust (R3 440 500.00) and what the trust owed him (R2 981 559.00). During the trial the defendants abandoned a claim under case number 234/2017 for the reasonable replacement costs of items of farming machinery and equipment that they claimed the plaintiff failed to return to the trust.

[3] In case number 1650/2017, which was instituted during April 2017, the plaintiff claimed from the defendants, in their aforesaid capacities as trustees, delivery of his alleged livestock, farming implements and movable assets, alternatively payment of their value, being R3 133 600.00, R108 000.00 and R313 500.00 respectively, the delivery of wool bins, wool presses, wool shears, alternatively payment of their value of R173 200.00, the delivery of wool, alternatively payment of its value of R368 000.00 and R1 858 072.00 for future loss of income over a period of three years. The defendants denied that the plaintiff was the owner of the livestock that he claimed, admitted that the trust was in possession of some of the farming implements claimed by him but denied that he was the owner thereof. They also denied the value that the plaintiff placed on the farming implements. Regarding the movables, the defendants tendered the return of some of them to the plaintiff, pleaded that others were fixtures to the land and could accordingly not be returned to the plaintiff and denied that the plaintiff was the owner of the remaining itemised movables. In respect of the plaintiff's claim for the delivery of wool or the value thereof, the defendants

admitted in their plea that the sheep in possession of the trust were shorn but denied that the plaintiff was the owner of the sheep. They pleaded that he accordingly had no claim in that regard. The defendants denied that the plaintiff had a claim for loss of income.

[4] The defendants also instituted a counterclaim in case number 1650/2017 which was identical to the counterclaim in case number 234/2017.

However, despite having admitted the interim agreement in case number 234/2017 the plaintiff surprisingly denied it in his plea to the counterclaim in case number 1650/2017. Instead he pleaded that he leased Culmstock farm, 900 ewes and 60 cows from the trust for a period of five years at a rental of R25 000.00 per month. He also pleaded that during May 2015 the Harveya Trust[4], represented by him, concluded a lease agreement with the defendants for the lease of Culmstock farm, 900 ewes and 60 cows.[5] Strangely, the plaintiff nevertheless admitted in that plea that the defendants cancelled the interim agreement on 25 November 2015. In his opening address Mr Cole, counsel for the plaintiff who appeared with Mr Miller, admitted that the plaintiff concluded the interim agreement.[6] In this regard he stated inter alia that:

“... it is also admitted, it is common cause as pleaded by the trust that in December of that same year, of 2014 it was orally agreed that the Plaintiff on an interim basis and pending negotiation and conclusion of a written agreement of lease would lease the farm, Culmstock and Harveya and all of its livestock, machinery and equipment. So we know the starting point is that he was going to take over the management and lease the farms and the livestock and equipment. Your Lordship, sees that the plea is for R25 000.00 a month was the agreed rental fees. In paragraph 6 it is also common cause what is being pleaded, it is admitted, that at the end of the lease the Plaintiff, Mr Ackerman would be obliged to restore the same number of livestock, breed, age and sex that he got from the trust at the commencement and its machinery and equipment at the end of the lease. It is pleaded that it would end in 5 years’ time. So a lot of this is common cause fortunately and then it is also admitted that the Defendants cancelled the agreement of lease in November 2015.”

- [5] The undisputed facts are that since 1992 the plaintiff worked for three years for his grandfather on his farm, Groot Rooiwal in the district of Venterstad, before he started farming for his own account on Klein Rooiwal Farm, an adjacent farm which he leased from his grandfather. After the plaintiff married the third defendant they lived on Klein Rooiwal Farm. During March 1999 the trust purchased Groot Rooiwal Farm from the plaintiff’s grandfather for the sum of R700 000.00.

As part of the purchase price the first defendant paid the sum of R300 000.00 to the plaintiff’s grandfather. The plaintiff paid the remaining R400 000.00 to his grandfather at R6 000.00 per month. The plaintiff thereafter repaid the sum of R300 000.00 to the first defendant. The plaintiff was able to make the above payments because, by agreement, he lived and farmed on Harveya Farm without paying any rental to the trust.

- [6] Toward the end of 2011 the plaintiff sold Klein Rooiwal Farm and the trust sold Groot Rooiwal Farm to the government as a unit. At the beginning of 2012 the trust purchased Harveya Farm (Harveya) in the district of Middelburg from Keith Trollip for the sum of R8.1m. The plaintiff lent the sum of R3.1m to the trust to assist it to purchase Harveya. The trust paid the remaining R5m to Mr Trollip. The sale of Harveya included the sale of livestock for an additional sum of R642 000.00. On 1 March 2012 the plaintiff and the third defendant moved to Harveya. He took his farming machinery and movables along and he started farming. During late 2013 and early 2014 the trust purchased Culmstock Farm (Culmstock) from Kenneth Southey for R12.5m. The sale of Culmstock included the sale of

livestock for an additional sum of approximately R1.8m.

[7] The first defendant sold Kransdraai Farm in the district of Bethulie (Kransdraai) during early 2014. At the same time the Craig Trust and the Carmen Trust also sold properties owned by them in that district. The first defendant's evidence was that he ran not only his own farming operations at Kransdraai but also the farming operations of the Craig and Carmen Trusts. He ran them as a unit. Accordingly reference to Kransdraai or Bethulie should hereinafter be read as reference to farms and farming operations of the first defendant as well as the Craig and Carmen Trusts. After the sale of Kransdraai the first defendant transported livestock and farming equipment from Kransdraai to Harveya. It is common cause on the pleadings in case number 234/2017 that during May 2014 the plaintiff and the first defendant agreed that the trust and the plaintiff's farming businesses would be managed together by the plaintiff. The plaintiff assumed responsibility for the conduct of the farming business of the trust and his farming business on Harveya and Culmstock already during April 2014.

[8] The success or otherwise of the plaintiff's claim for the delivery of livestock, farming machinery and equipment and wool or the payment of the monetary value thereof depends largely on whether or not he has been able to prove his ownership thereof and, if so, the quantum of his claim(s). Regarding the livestock, the plaintiff's claim was that, at the time of the

issue of summons in case number 1650/2017, he was the owner of 1 111 Merino ewes, 16 rams, 23 young rams which were not marked, 16 lambs, 8 Nguni cows with calves, 3 dairy cows with calves and 2 young Bonsmara bulls which were in the possession of the trust. The claim in that regard amounted to R3 133 600.00. Save for a few cattle, the defendants denied that the plaintiff was the owner of the livestock which he claimed. Had the parties documented the number of livestock they had when the interim lease commenced and how many livestock were returned at the termination of that agreement, the task of establishing whether the trust must deliver livestock to the plaintiff or vice versa would have been relatively straightforward. However, that was not the case. The oral and documentary evidence must be assessed for a determination to be made in that regard.

[9] The first defendant was incapable of being of any assistance to the court regarding the number of livestock belonging to the trust at any stage in the history of the various farms. From his evidence and from the affidavits that culminated in the orders granted by Pickering and Lowe JJ respectively (which will be dealt with hereunder), it is apparent that he was the one who, on behalf of the Carmen Trust and other trustees, deposed to affidavits. He must have consulted with the defendants' legal representatives in preparation of those affidavits. In a letter dated 8 March 2017 that the defendants' attorney addressed to the plaintiff's former attorney, she stated that her instructions were that the trust relocated 3 bulls, 60 cows and 900 sheep from Bethulie to Middelburg. In that same letter she stated that the trust purchased 1 bull, 4 cows, 9 heifers and 1 089 sheep when it purchased Culmstock during April 2014.

[10] In the affidavit that the first defendant deposed to on 16 February 2016 in support of the application which culminated in the order granted by Lowe J on 8 September 2016 he stated the same number of livestock purchased from Mr Southey as that stated in the attorney's letter 8 March 2017. However, the number of livestock relocated from Bethulie differed markedly from the numbers stated in the attorney's letter. Firstly, the cattle increased from 63 to 144. In his affidavit he stated that there were 2 bulls, 64 cows, 63 heifers and 42 weaned heifer calves. Secondly, the number of sheep increased from 900 to 2 213. When he was invited to explain the discrepancy, he was unable to do so.

[11] After the defendants had given notice of their intention to defend the plaintiff's claim in case number 234/2017, the plaintiff made an application for summary judgment. The defendants' opposing affidavit was deposed to by the first defendant on 11 April 2017. Therein he stated that at the commencement of the interim lease during November 2014, the trust

was in possession of 258 cattle, approximately 60 more than what he stated in his affidavit dated 16 February 2016, and 3 548 sheep, about 48 more than in the February 2016 affidavit.

[12] Furthermore, it is common cause that on 9 May 2017 the first defendant telephoned the offices of his accountant, Neels Grobbelaar, who deposed to an affidavit on 30 November 2017 wherein he stated inter alia that on 9 May 2017 the first defendant spoke to his clerk, Francisca, and advised her that the trust had 900 sheep and 60 cattle. During the hearing the first defendant was unable to give any explanation as to why he gave those figures to Francisca. The following answers typify his evidence regarding the number of livestock on Harveya and Culmstock:

"Okay. Is it also so that you are simply not in a position to contest the animal numbers given by Mr Ackerman because you were not involved? Not fully involved should I say? --- I'm not able to contest?"

Yes, contest numbers ... [interrupted] --- Excuse me, just the word "contest".

You are not able to gainsay, you are not able to refute or say it is different if Mr Ackerman says "I had 10 of those." You really do not know. 100 or 500. --- No, I wouldn't.

Do you agree with me if he says the numbers, you can't contest them? ---I can't say. That is what it is.

Now, I am asking you another question. You can't say that is not correct if Mr Ackerman says "I had so many sheep."

You cannot deny that? --- "M'Lord, if I can't say there are so many then I can also not deny that there are so many."

[13] In the result, a determination of the number of livestock shall be made in the light of documentary evidence and the plaintiff's evidence insofar as it is corroborated by documentary evidence.

- [14] The plaintiff testified that when he sold Klein Rooiwal to the government towards the end of 2011, he also sold all his livestock to the government. He testified that during 2012 he purchased ewes from a Hennie Coetzee, a Mark Froon and someone in Burgersdorp. Although the persons from whom he allegedly purchased the above ewes were not called to corroborate his evidence in that regard, the plaintiff's financial statements for the year ending February 2012 lent some credibility to his evidence in that regard. They showed that he had 684 sheep and lambs as at the end of February 2012. The probabilities are that he purchased the sheep after he had sold his livestock at Klein Rooiwal but before the end of February 2012, hence their reflection in the aforesaid financial statements.
- [15] When Harveya was purchased at the beginning of 2012 the trust also purchased 504 ewes and 29 lambs from Mr Trollip who also delivered 2 rams to the trust at no charge. At that stage the plaintiff was farming on Harveya with the livestock which reflected on his financial statements.
- [16] The plaintiff's financial statements for the period ending February 2014 show that, as at that date, he had 827 sheep. However on that same day he sold 700 ewes to the Staples Trust, leaving a balance of 127 ewes, rams and lambs. In April/May 2014 the first and second defendants relocated from Bethulie to the farms. It is common cause that they took 1 599 sheep with them. It emerged during the first defendant's cross-examination that while he was farming in Bethulie, he was unable to distinguish his livestock from that belonging to the Craig and Carmen Trusts, save for his stud sheep, as he ran them as one unit. He estimated that each owned approximately one third of the total livestock on the farms at Bethulie. The first defendant testified that, when he relocated from Bethulie, the livestock belonging to the Craig Trust "moved over to the Carmen Trust". At no stage did he testify that the Craig Trust sold its land and/or livestock to the Carmen Trust. He simply referred to the financial statements of the Carmen Trust for the period ending February 2015 which showed that the Carmen Trust owed the Craig Trust the sum of R7 218 516.00. His evidence in that regard is recorded as follows:

"So what happened to the Craig Trust's livestock? --- The Craig Trust livestock when we moved to Culmstock, it was moved over to the Carmen Trust.

And if you go back to page 113 of the financial statement of the Carmen Trust. Page 113 of Exhibit B. --- I have that M'Lord.

Is that in that figure R7 218 516.00? --- That would be correct, yes.

Because the Craig Trust had sold its land, it was not farming anymore? --- It was not farming anymore, it sold the property in the Free State."

- [17] The first defendant's evidence was that, before the relocation to Middelburg, he sold most of his livestock. The fourth defendant's evidence regarding the number of livestock was not of assistance. She testified under cross-examination that she was unable to state how many livestock the first and sixth defendants respectively retained when there was a relocation

from Bethulie to Middelburg. However, she knew that the first defendant relocated with his livestock to Middelburg, although she was unable to say how many. As pointed out above, the first defendant testified about the sale of his livestock before

he relocated to Middelburg.

- [18] I will, for purposes of this judgment, accept that before the relocation, the first defendant sold all his livestock. Since I am not satisfied that the defendants, upon whom the onus rested, proved that the Craig Trust sold its livestock to the Carmen Trust, it means that the two trusts had an equal share in the remaining livestock. In the circumstances, of the approximately 1 600 sheep that were relocated to Middelburg, 800 belonged to the Carmen Trust and the other 800 to the Craig Trust. Of the 98 cattle that were relocated to Middelburg, 49 belonged to the Carmen Trust and the other 49 to the Craig Trust.
- [19] The plaintiff counted the livestock on 28 April 2014 and established that there were 2 795 sheep (inclusive of 267 lambs) and 313 cattle on Harveya and Culmstock. Those figures are reconcilable with the figures in the financial statements of the plaintiff and the Carmen Trust for the year ending February 2014. They showed that the plaintiff had 827 sheep and no cattle. According to its financial statements the Carmen Trust had 1 052 sheep and 39 cattle as at the end of February 2014. On the acceptance of the correctness of those financial statements, the plaintiff's count on 28 April 2014 and his evidence that he sold 700 sheep on 28 February 2014, there must have been at least 2 795 sheep on Harveya and Culmstock at the end of April 2014, of which 800 belonged to the Craig Trust, 1 868[7] to the Carmen Trust and 127 to the plaintiff. The above findings mean a rejection of the plaintiff's evidence that the Carmen Trust did not own livestock. The documentary evidence demonstrates that, when the farms were purchased in 2012 and 2014 respectively, the Carmen Trust purchased livestock with each farm. Furthermore, it is the plaintiff's own pleaded case in case number 234/2017 that he leased 900 ewes and 60 cows from the trust. That plea acknowledged that the trust owned livestock.
- [20] On the basis of the plaintiff's count on 28 April 2014, there were at least 313 cattle on the farms, 53 thereof having been bought from Mr Southey while 98 relocated from Bethulie. The calves must account for the remaining 162 cattle. Once again, half of the 98 cattle belonged to the Craig Trust. Accordingly, as at 28 April 2014, the Craig Trust owned 49 cattle while the Carmen Trust owned at least the 53 cattle bought from Mr Southey and 49 that relocated from Bethulie. There was

no evidence that the plaintiff owned cattle as at the end of February 2014 or that he purchased cattle before 28 April 2014. In the circumstances, of all the livestock counted by the plaintiff on 28 April 2014, the Craig Trust owned 800 sheep and 49 cattle, the Carmen Trust owned 1 868 sheep and 264 cattle while the plaintiff owned 127 sheep.

- [21] The plaintiff was in control of the livestock even before the livestock was purchased from Mr Southey. It is common cause on the pleadings and the plaintiff confirmed during his evidence that, since May 2014, he assumed responsibility also for the conduct of the trust's farming business on the farms. That business included all the trust's livestock.
- [22] During September 2014 while the plaintiff was managing the farming activities on Harveya and Culmstock, he requested the first defendant to furnish him with the number of ewes and cows that he brought from Bethulie. In response the first defendant sent a proposal regarding the lease of Culmstock. That proposal entailed the lease of 800 ewes and 60 cows to the plaintiff at a monthly rental of R25 267.00. Nothing came of that proposal during 2014. The plaintiff's financial statements showed that he sold livestock to the value of R1 335 416.84 during 2014 (R993 462.41 between March and December 2014). He also sold livestock to the value of R2 730 047.00 in 2015 and livestock to the value R965 510.00 during
2016. Regard being had to the fact that the plaintiff only had 127 sheep as at 28 April 2014, most, if not all, that he sold belonged to the trust.
- [23] On 8 May 2015 a meeting was held in the offices of attorneys in Bloemfontein. All the defendants were in attendance, save for the fourth defendant. There was a dispute whether the third defendant attended that meeting. That dispute is irrelevant to the issues to be determined. Deon Rossouw also attended the meeting in his capacity as attorney and trustee of the Harveya
- Trust[8] while Neels Grobbelaar attended as the trust's bookkeeper. In that meeting Mr Grobbelaar advised that the Harveya Trust should lease the farms from the Carmen Trust. The plaintiff's evidence was that Mr Rossouw was instructed to prepare three agreements. In the first one the Carmen Trust would lease Culmstock, improvements, 60 cows and 900 ewes to the Harveya Trust at a rental of R25 000.00 per month for a period of 5 years. In the second one the Carmen Trust would lease Harveya to the plaintiff at a rental of R14 300.00 per month for 5 years. In the third one the Harveya Trust would purchase Harveya from the Carmen Trust for R7.2m. Mr Rossouw drafted the agreements. The first and third agreements were signed on 12 June 2015 by the plaintiff on behalf of the Carmen Trust and Mr Rossouw on behalf of the Harveya Trust. On that same day the plaintiff signed the second agreement as lessor and lessee. The first and fourth defendants testified that the trustees did not resolve to enter into the above agreements.
- [24] The plaintiff testified that his marriage to the third defendant, which had been under strain for some time, had in the meantime broken down resulting in the issue of a summons during August 2015 for a decree of divorce. He received notice of a trustees' meeting scheduled for 25 November 2015 but did not attend it. Pursuant to that meeting the defendants' attorney addressed a letter to his attorney on that same day. The minutes of the trustees' meeting were attached to that letter. The plaintiff's attorney was informed that the trustees had resolved to withdraw the plaintiff's powers as trustee of the trust, that he should provide a detailed account of the trust's assets and livestock which were sold or encumbered

since January 2015, provide the number of the current livestock, give an undertaking that he would not sell any of the trust's assets and livestock and that he would vacate the farms and return possession of the trust's assets by 25 December 2015. The plaintiff testified that his attorney discussed the contents of the letter with him. He was unsure whether his attorney had responded to that letter.

[25] The plaintiff did not vacate the farms. The defendants approached this court and on 8 September 2016 Lowe J declared that the plaintiff had no right or entitlement to be in possession or control of Harveya and Culmstock and all livestock and implements belonging to the trust, and ordered him to restore possession and control of Harveya and Culmstock to the defendants. The plaintiff's application for leave to appeal against the judgment of Lowe J was also refused by the Supreme Court of Appeal. There was further litigation which culminated in an order granted by Pickering J on 7 March 2017 in terms whereof the plaintiff was declared to be in contempt of the order granted by Lowe J on 8 September 2016 because of his failure to restore the farms, livestock and implements to the trust. The plaintiff vacated the farms after Pickering J had ordered him on 7 March 2017 to do so within 24 hours. His evidence was that, when he vacated the farms, he took with him all the livestock, except for 3 dairy cows and a few sheep. Thembekile Nqongwa, a farm worker called by the defendants, testified that there was no livestock on Harveya and, when the plaintiff vacated the farms he left only a few rams and a few cattle on Culmstock. That evidence was unchallenged and is accordingly accepted. It transpired that the plaintiff also left 491 ewes which he did not claim, 16 young rams and 16 cows on Culmstock. The plaintiff's explanation for taking almost all the livestock off the farms was because it belonged to him and the first defendant and not to the trust.

[26] The defendants claimed that the plaintiff was in possession of 2 526 of the trust's sheep and 154 of its cattle at the commencement of the interim lease. The allegation in respect of the sheep loses sight of the fact that, of all the sheep on the farms, at least 800 thereof belonged to the Craig Trust. I have already found that, as at 28 April 2014, the trust was the owner of 1 868 sheep and the plaintiff was the owner of at least 127 sheep. Those are the most reliable numbers. I also accept that the trust owned 1 868 sheep at the commencement of the interim lease. That number is made up as follows:

26.1. 1 338 ewes consisting of:

26.1.1. 633 purchased from Mr Southey;

26.1.2. 256 Alfrino and Merino flock;

26.1.3. 316 young Alfrino and Merinos;

26.1.4. 44 old Alfrino and Merinos; and

26.1.5. 89 pregnant Alfrino and Merinos

26.2. 428 ewes consisting of:

26.2.1. 267 purchased from Mr Southey; and

26.2.2. 161 stud Alfrino and Merinos

26.3. 102 rams consisting of:

26.3.1. 26 purchased from Mr Southey;

26.3.2. 55 Alfrino and Merinos; and

26.3.3. 21 stud Alfrino and Merinos.

[27] Although I have already found that the trust owned 264 cattle as at 28 April 2014, the defendants alleged that the plaintiff was in possession of only 154 of the trust's cattle at the commencement of the interim lease. That number is made up as follows:

27.1. 124 cows;

27.2. 27 calves; and

27.3. 3 bulls.

[28] The defendants claimed that they recovered 1 666 sheep (consisting of 1 602 ewes, 16 lambs and 48 rams) as well as 20 cattle from Mr Jordaan's farm. The plaintiff admitted that the first defendant and members of the South African Police Service removed the above livestock from Mr Jordaan's farm. The trust later recovered 14 cattle and an additional 8 were later returned. The plaintiff's cattle were sold in execution at the instance of various creditors. That being the case and the plaintiff having been under an obligation to return the same number of livestock to the trust at the termination of the interim agreement, he should have returned an additional 202 sheep and 134 cattle to the trust. Those numbers are made up as follows:

28.1. 66 Alfrino and Merino ewes @ R1 800.00 each [9] R118 800.00

28.2. 39 young Alfrino and Merino ewes @ R2 500.00 each R97 500.00

28.3. 17 pregnant ewes @ R2 500.00 each

R42 500.00

28.4. 80 rams @ R2 500.00 each

R200 000.00

28.5. 124 cows @ R12 500.00 each

R1 300 000.00

28.6. 27 calves @ R7 000.00 each

R189 000.00

28.7. 3 bulls @ R15 000.00 each

R45 000.00

R1 992 800.00

[29] The plaintiff relied on the agreement that he and Mr Rossouw signed on 12 May 2015 on behalf of the Carmen and Harveya Trusts respectively for the contention that the lease agreement was in respect of 900 ewes and 60 cows and for a period of five years. Any reliance in these proceedings on that agreement was misplaced because it was held by Lowe J to be invalid.

That judgment still stands with the result that the plaintiff cannot rely on it. It means that there was no such an agreement.

The interim agreement was the only one that existed between the parties. The plaintiff was accordingly obliged to return to the trust the same number of livestock that was placed in his possession at the commencement of the interim lease at the termination of that lease.

[30] The plaintiff also testified that during April 2014 he had an agreement with the first defendant in terms whereof he would sell his sheep with which he had been farming on Harveya until then and take over the sheep purchased from Mr Southey when Culmstock was purchased. The justification for that gift or donation by the first defendant to the plaintiff was, according to the plaintiff, because the first defendant was of the view that Mr Southey's sheep were of a better quality than the plaintiff's sheep and that they were used to the local conditions. He referred to that agreement as the exchange of

the sheep (omruilooreenkoms). He testified that he gave effect to that agreement after the first defendant's arrival on the farms. On the plaintiff's version, he leased only 900 ewes of the 1 599 sheep which relocated from Bethulie.

[31] It is common cause that from March 2012 the plaintiff farmed for his own account on Harveya and from May 2014 he was in control of all the livestock on Harveya and Culmstock. He accepted during the hearing that after the first defendant's relocation to Middelburg, there were at least 2 688 sheep on the farms, 1 599 from Bethulie and 1 089 purchased from Mr Southey. That number is not too far off the 2 795 counted by the plaintiff on 28 April 2014.

[32] I have earlier found that, at the commencement of the interim lease there were 2 795 sheep and 313 cattle on Harveya and Culmstock. After the order granted by Pickering J the plaintiff removed all the livestock, save for a few, from the farms. It was, for the purposes of the defendants' case, immaterial how many livestock the plaintiff removed from the farms. What was important for their case was that he was required to return 1 868 sheep and 154 cattle to the trust at the termination of the lease. For purposes of the plaintiff's case, he was required to establish that he was the owner of the livestock and how he arrived at the number of livestock that he claimed. It is unchallenged that only 1 650 sheep and 20 cattle were retrieved from Mr Jordaan's farm, with the result that the plaintiff should have in terms

of the interim agreement, have returned 218 sheep and 134 cattle to the trust. On the other hand, and against the above findings, the plaintiff failed to prove firstly, ownership in the livestock which was accounted for after the judgment of Pickering J; and secondly, how he arrived at the number of livestock that he claimed.

- [33] The plaintiff did not produce any reliable evidence in support of the allegation that he concluded a lease agreement with the first defendant in respect of 900 sheep and 60 cows. The fact that the trust issued a VAT invoice dated 1 January 2015 for 3 months' rental for Culmstock corroborated the defendants' version of the conclusion of a lease agreement during December 2014 for the period from 1 January 2015, as pleaded by them.
- [34] There is another reason why the plaintiff cannot rely on the lease agreement which he alleged was concluded between him and the first defendant. That agreement involved the lease of the trust's property. The assets of a trust vest in the trustees. They must act jointly in respect of the trust's assets, unless the trust deed provides otherwise. Trustees may, unless the trust deed provides to the contrary, expressly or impliedly authorise someone to act on their behalf. That person may be one of the trustees or a third party.[10] Clause 14 of the trust deed specifically authorised the trustees to delegate their obligations.
- [35] The defendants denied the lease agreement upon which the plaintiff relied. The first defendant denied that he concluded that agreement with the plaintiff. Although the plaintiff testified that he concluded that agreement with the first defendant, he was unable to testify as to when the first defendant would have been authorised by the trustees to conclude that agreement on their behalf. The first defendant conceded under cross-examination that at some time in the distant past the other trustees authorised him to enter into agreements on their behalf relevant to the day- to-day ordinary farming operations so that it was unnecessary to call trust meetings to authorise him every time something needed to be done on the farms. He emphasised that such authority did not include major transactions affecting the future of the trust, certainly not giving away the trust's

livestock of about R1.8m or leasing 900 ewes and 60 cows or the farms. The absence of evidence of such an agreement or proof of payment of rental by the plaintiff to the trust or the first defendant is in my view conclusive of the absence of a lease agreement between the plaintiff and the trust for any period before 1 January 2015.

- [36] I also have difficulty with the exchange agreement. It transpired during the plaintiff's evidence that he leased Culmstock from the trust and livestock from the first defendant personally because, on his version, the trust owned no livestock. He sought to bolster that contention because the undisputed evidence was that the livestock from Bethulie bore the first defendant's mark. The first defendant's explanation therefor was that, before the relocation to Middelburg, his brand mark was used on his livestock as well as the livestock of the Carmen and Craig Trusts because he farmed with them as a unit. Furthermore, the first defendant sold his livestock before he relocated from Bethulie.

- [37] The onus having been on the plaintiff to prove the lease agreement upon which he relied, on the evidence, he failed to prove that during April 2014 he and the first defendant concluded a lease agreement involving 900 ewes and 60 cows. The first defendant's explanation for why the trust's livestock bore his brand mark was reasonable and therefore accepted
- [38] The plaintiff's evidence that there was an exchange agreement must be rejected. Firstly, the plaintiff did not rely on such an agreement in his pleadings. Secondly, it is improbable that the trust would have given livestock to the plaintiff to the value of R1.8m. Thirdly, and most importantly, the plaintiff conceded that there was no resolution by the trustees that the livestock be given to him. He would have known if the trustees had taken such a resolution because he himself was a trustee of the Carmen Trust at that time. That concession means that the first defendant had no authority to bind the trust in the alleged agreement. The record in this regard reads:

"... en waar sal ek 'n resolusie van die trustees van die Trust kry dat hulle nou oor die amper R2m se vee aan u gee? --- Mnr wys my asseblief 'n resolusie wat ek die R12m se plaas gekoop het. Wys my asseblief 'n resolusie wat Rooiwal vir R700 000.00 gekoop is. Daar is nie een nie Edelagbare. Daar is nie een nie, want daar het nooit een bestaan nie.

Ja, dankie. --- Daar is vir niks 'n resolusie gewees nie." (Own underlining)[11]

- [39] At one stage the plaintiff testified that the trustees were bound to the agreement upon which he relied because they did not authorise the first defendant to enter into other agreements in the past. The simple response to that evidence is that, the fact that the first defendant did not have authority from the other trustees to conclude other agreements, did not make those agreements valid. They were invalid if the other trustees did not authorise them. Absent any authority by the other trustees to the first defendant to give the livestock to the plaintiff, such agreement cannot be binding on the trust.[12]
- [40] A further indication of the absence of the agreement upon which the plaintiff relied is that his financial statements for the financial years ending February 2014, 2015 and 2016 did not reflect that he received a donation of livestock from the first defendant or the Carmen Trust or that they swapped livestock. In all the circumstances, the plaintiff failed to prove the lease agreement upon which he relied. Even if that finding is wrong and were it to be found that the plaintiff concluded such an agreement with the first defendant, he failed to show that the first defendant was authorised by the other trustees to act on their behalf in that regard. The interim agreement was the only agreement that there was between the plaintiff and the first defendant in respect of the trust's livestock, farming machinery and equipment.
- [41] During the hearing a ruling was made allowing the plaintiff to cross-examine the defendants' witnesses on the minutes (or lack thereof) of the resolutions taken over the years by the trustees of the Carmen Trust. I undertook to give reasons for that ruling in this judgment. At the time there was a likelihood of it being shown that the first defendant had ostensible authority from the other trustees to bind them in his dealing with the plaintiff. It

was for that reason that cross-examination in that regard was allowed. On a consideration of all the evidence the plaintiff failed to show that the first defendant had actual or ostensible authority from the other trustees to bind them in that regard.

- [42] The defendants pleaded that on 25 November 2015 the trustees cancelled the interim agreement. The plaintiff admitted that allegation in case number 234/2017. During the cross-examination of the first defendant it was put to him that the fact that the plaintiff sought leave to appeal against the judgment of Lowe J demonstrated that he did not accept the cancellation of the interim agreement. That approach is untenable. A guilty party who admits in his pleadings that the innocent party has cancelled an agreement releases the innocent party of the burden of proving the cancellation. It means that the innocent party, on whom the onus rests to prove cancellation,[13] does not have to prove that there was a breach of the agreement, that the breach was so serious that it justified the cancellation of the agreement[14] and that the decision to cancel the agreement had been conveyed to the guilty party who admitted the cancellation.[15]
- [43] Once the plaintiff admitted the cancellation of the agreement, he admitted that there was a breach of the interim agreement, that the breach was so serious that the defendants were justified to cancel the interim agreement and that the decision to cancel the interim agreement had been conveyed to him. It was accordingly not open to the plaintiff to adopt the attitude during the hearing that the right to cancel the interim agreement had not accrued to the defendants because, for instance, there was no breach or that the breach was not so serious that the defendants were justified to cancel the interim agreement. It is found that the agreement was indeed cancelled by the defendants on 25 November 2015.
- [44] It is common cause that the plaintiff paid monthly rental of R25 000.00 plus VAT (escalating annually) to the trust until March
2017. The defendants' case is that, because the agreement was cancelled on 25 November 2015 and because the plaintiff should have vacated the farms by 25 December 2015, the plaintiff should have paid a fair market rental of R75 000.00 per month from 1 January 2016 until the end of March 2017. The plaintiff continued to pay only R25 000.00 per month, with 6% escalation per annum, until he vacated the farms during March 2017. At that stage he paid R30 210.00, being the escalated monthly
- rental of R26 500.00 plus VAT of R3 710.00.
- [45] The overwhelming evidence is that the relationship between the plaintiff and members of the Collett family was very strained during 2016 because of amongst others the involvement of a third party in the marriage between the plaintiff and the third defendant and the litigation between him and the trustees. It is to be noted that in paragraph 7 of her letter dated 10 October 2015 the defendants' attorney informed the plaintiff that he had already been given notice of cancellation of the lease agreement but that he had not vacated the farms at the end of September 2015. No demand was made for market related rental in that letter. It was only in the first defendant's affidavit in opposition of the plaintiff's application

for summary judgment that it was indicated that “the trust has suffered damage in the amount of at least R146 337.00 as loss of market related rental from 9 September 2016 to 22 March 2017 when the fixed property was restored to the Trust, albeit without all the livestock and equipment.” In the counterclaim in case number 234/2017 the defendants claimed that the trust “suffered damages in the sum of R50 000.00 per month, being the difference between the fair market rental of the farms and the rental paid by the plaintiff, for the period 1 January 2016 until 1 April 2017 and amounting in all to the sum of R750 000.00.”

[46] In my view the claim for market related rental is an afterthought. The trust sent VAT invoices in the sum of R90 630.00 to the plaintiff and the Harveya Trust for the lease of Culmstock for periods of 3 months in 2016 and 2017. If the defendants’ claim in this regard was genuine, one would have expected the defendants to have given notice to the plaintiff of that claim soon after the cancellation of the agreement and not to send out VAT invoices during 2016 and 2017 for monthly rental of R26 500.00 plus VAT. In the circumstances, the defendants’ claim for market related rental must be dismissed.

[47] In the circumstances and insofar as case number 234/2017 is concerned, it should be ordered that the defendants pay to the plaintiff the sum of R988 759.00, being the difference between the sum of R2 981 559.00 that the trust owes the plaintiff and the sum of R1 992 800.00 that the plaintiff owes the trust.

[48] In case number 1650/2017 the plaintiff claimed delivery of 10 farming implements or payment of their value on the basis that he was the owner thereof. In their plea the defendants admitted that they were in possession of those implements but placed in dispute the plaintiff’s ownership thereof and the values ascribed to them by him. There was accordingly a duty on

the plaintiff not only to establish that he was the owner of those implements but also the value of those implements.

[49] During the hearing the defendants tendered a road scraper, a one tooth ripper, a poison sprayer, a land roller and a three tiered plough. The ownership of a tiller, a John Deere maize planter, a Stoney Croft scraper, a five tooth ripper and an offset disc was in dispute and should accordingly have been established by the plaintiff. In support of his claim for 4 of the above 5 implements the plaintiff relied on his financial statements for the period ending February 2007. They showed that certain implements which might fit the description of those claimed by him were purchased during 2006.

[50] The tiller, which the plaintiff described as a machine with many teeth, was noted in the financial statements as a “duisendpoot” (a millipede). The first defendant testified that there were 2 tillers on the farm, both came from Bethulie.

[51] The plaintiff testified that the planter, which was referred to in the financial statements, was the John Deere maize planter that he claimed. The first defendant testified that he could not find such a planter on the farms.

- [52] The plaintiff testified that he purchased the Stoney Croft scraper from his grandfather when he started his farming career. The first defendant once again testified that he could not find such a scraper on the farms.
- [53] The plaintiff referred to the two rippers in the financial statement as the ones that he claimed to be his. The one tooth ripper was tendered by the defendants, leaving the five tooth ripper in dispute. The first defendant testified that the five tooth ripper came from Bethulie.
- [54] The plaintiff referred to the financial statement in support of his claim for the offset disc. The first defendant testified that it came from Bethulie.
- [55] In the light of the defendants' plea that they had possession of the above implements, the first defendant's evidence that he could not find some of those items on the farms cannot be accepted. I am satisfied that the plaintiff has placed sufficient evidence before the court for a finding that he probably purchased the implements reflected in the financial statements and that he is the owner thereof. His evidence that he purchased the Stoney Croft scraper from his grandfather is also accepted. The plaintiff is accordingly entitled to the delivery of a tiller, a John Deere maize planter, a Stoney Croft scraper, a five tooth ripper and an offset disc.
- [56] The court cannot place any monetary value on those implements because the plaintiff placed no evidence before the court to establish their value. The value of the items referred to in the financial statements would in all probability have been insignificant. The most expensive of the above implements was the offset disc which, according to the aforesaid financial statements, was purchased for R15 500.00 on 18 December 2006. Within one year its value dropped by 50% to R7 750.00. The least expensive implement was the tiller which was bought for R4 000.00 on 5 September 2006 and valued at R2 000.00 in
2007. That was approximately thirteen years ago. The value of those implements would be so insignificant today as not to be worthy of judicial attention. In my view this is an appropriate case for the application of the maxim *de minimus non curat lex* insofar as the plaintiff's claim for the payment of the value of those implements was concerned.
- [57] In case number 1650/2017 the plaintiff claimed a list of 30 movable items as his. In their plea the defendants admitted that the items were in their possession but denied that the plaintiff was the owner thereof. They also denied the values ascribed to those items. During the hearing the defendants tendered most of those items which tender was accepted by the plaintiff. An order shall accordingly be made for the delivery of the items tendered by the defendants.
- [58] The fact that the defendants tendered those items did not relieve the plaintiff of the duty to prove the value of those items. He failed to do so. A monetary value can accordingly not be placed on any of the movable items.

[59] In addition, the plaintiff claimed railway sleepers, numerous wooden poles, numerous oregon and yellowwood boards, 28 draglines (irrigation pipes with sprayers attached thereto) and 3 dismantled windmills. The defendants did not admit that the plaintiff was the owner of those items or the value ascribed to them. The plaintiff's evidence was that the first defendant gave them to him. The first defendant denied that he gave those items to the plaintiff. This aspect will be dealt with later in this judgment.

[60] During the hearing the plaintiff amended his particulars of claim in case number 1650/2017 to include a claim for wool bins, wool presses and wool shearing machines. I do not agree with the submission made on behalf of the defendants that whether or not the first defendant gave those items to the plaintiff depends on whether or not there was an agreement between them. The plaintiff's evidence was that the first defendant gave various farming equipment and items to him and told him that he could

sell those that he did not need at an auction which was held on Mr Southey's farm. The first defendant testified

that, because there was a surplus of some items on the farm after his relocation, he gave permission that the surplus be sold. In my view the probabilities support the plaintiff's version. In the first place, it was common cause that the first defendant was retiring at that stage and did not need farming equipment. Secondly, the plaintiff, married to the first defendant's

daughter, was himself farming with cattle and sheep and had a need for the equipment for his farming operations. It made sense to make the equipment and items available to his son-in-law. Thirdly, the proceeds of the sale of the farming equipment at the auction were sent to the plaintiff, there being no evidence that the first defendant laid claim thereto. One would have expected the first defendant to have made enquiries about the proceeds of the sale if the equipment still belonged to him.

[61] Although there is no evidence that the plaintiff sold some of the sleepers, poles, wooden boards, draglines or dismantled windmills at the auction, I find, for the remaining reasons in the preceding paragraph, that the first defendant probably also gave those items to the plaintiff. He is accordingly entitled to an order for their delivery.

[62] To revert to the wool bins, wool presses and wool shears, the plaintiff testified that he purchased three wool bins from Mr Southey at the auction on his farm. For that claim he relied on an invoice dated 20 May 2014 which the auctioneer issued to him. That invoice showed that he purchased three wool bins for R1 500.00, R3 700.00 and R3 800.00 respectively.

He furthermore testified that after the first defendant's relocation from Bethulie there were three wool presses on the farms. The first defendant took two of them from Bethulie and gave them to him. He built a hydraulic one himself which he used at Klein Rooiwal. One of the two that the first defendant took from Bethulie was sold at the above auction for which the plaintiff was paid R16 500.00. Two wool presses accordingly remained. He testified that he sold the one that built to

a Mr de Villiers of Noupoot. The plaintiff had no right to claim that wool press from the defendants as, on his own version, ownership therein vested in Mr de Villiers. The first defendant, in the company of the police, removed the last wool press from the farm of a Mr Cumming, where the plaintiff was a lessee after he vacated the farms and used that wool press on that farm. The defendants initially claimed 12 wool bins, 2 electric hydraulic wool presses from the plaintiff, but withdrew those claims during the hearing because those items had in the meantime been found. The defendants did not lead evidence to gainsay the plaintiff's claims in respect of the above items other than to put to him that he was not entitled to them

because they were in the possession of the police. He also claimed three electric wool shears with hand pieces. He

testified that the first defendant gave them to him. It is presently in the possession of the police.

- [63] The submission that the plaintiff cannot claim the wool press and the electric shearing equipment from the defendant because they are in the possession of the South African Police Service cannot be sustained for the simple reason that the defendants caused the police to remove those items from the plaintiff's possession. Nothing prevents them from retrieving those items from the police and delivering them to the plaintiff. An order that they should deliver those items to the plaintiff would be appropriate.
- [64] In all the circumstances the plaintiff is entitled to an order for the delivery of three wool bins, one wool press and two wool shearing machines. Once again, he failed to prove the value of those items with the result that a monetary value cannot be placed on them.
- [65] The defendants contended that an electric gate and zink dams became part of the land when they were constructed. The law recognises the acquisition of ownership in property through accession. It usually happens when things are joined in such a manner that they become one entity. The most obvious form of accession is the building of a structure, like a house, on a piece of land. Once built the building forms part of the land with the result that the owner of the land becomes the owner of the building. For determination of the circumstances under which an attachment could be regarded as having become part of land by way of accession, the primary investigation is to establish whether the purpose of the attachment indicated that the attached object had been added to the land permanently or for an indefinite period in such a manner that it formed a new, separate entity with it and had therefore itself become immovable. The purpose could be determined from facts such as the nature and function of the attached object; the manner of attachment; the subjective intention of the owner of the attachment at the time of the attachment; the act of the owner of the attachment; and any other relevant facts or circumstances.[16]
- [66] The first defendant accepted the plaintiff's evidence that he was the owner of the dams. His evidence was that "those are not things that you put up to move around" and that it "is not something that you put down in a camp or a farm with the intention of moving it". The plaintiff testified that, although the zink dams are connected to the water reticulation system on the farm which takes water to and from the dams, they could easily be dismantled and

assembled elsewhere. He used a bath which is built into a bathroom wall as an example of an attachment which he believed would accede to the house. I find it difficult to see the analogy of or distinction between a bath built into a bathroom wall and a zink dam which is bolted onto the land and connected to a water reticulation system. The fact that the dams could be unbolted is only one of the factors to be considered to establish the purpose of its attachment to the land. The fact that the dams were attached to the land, that they were connected to a water reticulation system and that they were used for farming operations which would have been a long term project

are, in my view, indications that when they were constructed, the plaintiff must have intended them to be permanent fixtures, despite

his evidence that he did not intend them to become permanent fixtures.

[67] The plaintiff testified that the gate was mounted on rollers. The rollers are permanently fixed to the land, but the gate can easily be removed off the rollers. The gate is meant to be operated through an electric generator which, although available, had not been attached to the gate before the plaintiff vacated the farms. The gate was manually operated until then. The plaintiff testified that, once the motor was attached to the gate, the gate would become a permanent fixture. I cannot accept that logic. In my view the rollers, gate and motor form one unit. When the rollers were fixed to the land the plaintiff must have intended the entire sliding gate, consisting of the rollers, gate and motor, to permanently become part of the

land. The fact that the motor was not attached to the unit does not render the sliding gate a movable item. The plaintiff's

claim for the zink dams and electric gate must accordingly be dismissed.

[68] The first defendant was unable to gainsay the plaintiff's evidence that Mr Southey gave the loading ramp to him. The loading ramp was required to load livestock onto double-decker livestock transporting vehicles. The photographs that were referred to in evidence in that regard showed that the loading ramp is mounted on vehicles. The evidence suggested that during the loading process the loading ramp would be positioned under a permanent wooden structure from which the loading ramp would be lifted and lowered by way of a block and tackle suspended from the wooden structure. I am satisfied that, based on the evidence

and the photographs, it was the wooden structure that was permanently attached to the land. The fact that the loading ramp had wheels means that it could be used under any similar structure and that it was not in any way attached to the land. I accept the plaintiff's evidence in that regard. The plaintiff is accordingly entitled to the delivery of the loading ramp. Once again, he failed to prove the value of the loading ramp with the result that a monetary value cannot be placed on it.

- [69] The plaintiff's claim for loss of income is based on the fact that the defendants were in possession of his livestock. I have already found that the plaintiff has failed to prove that, after the removal of the livestock from Harveya and Culmstock following the delivery of the judgment by Pickering J, the defendants were in possession of his livestock. Absent proof of his ownership of the livestock, his claim for loss of income can accordingly not succeed.
- [70] The plaintiff's claim for the delivery of wool or the payment of the monetary value thereof was also dependant on proof of his ownership of the sheep. His claim in that regard suffers the same fate. The plaintiff's claim for the delivery of wool or the payment of any sum for the value of that wool must accordingly be dismissed.
- [71] Regarding costs, although the plaintiff's claim for the repayment of a loan of almost R2m has been upheld to the extent of almost R1m, it cannot be said that the defendants' counterclaim was unreasonable. They have been able to prove that the plaintiff must pay to them livestock to the value of almost R2m. Both parties have had limited success.
- [72] The defendants must, despite their success, still make payment to the plaintiff in the sum of almost R1m. That being the case, if case number 234/2017 had been heard alone, I would probably have ordered the defendants to pay a bigger portion of the costs. Because the defendants raised the same counterclaim in both cases, they cannot be awarded the same award and costs in both. However, the counterclaim would have been successful to the extent of almost R2m had the court dealt with case number 1650/2017 alone. In all the circumstances and regard being had to both cases which were heard at the same time, the plaintiff was more successful. In my view it would be appropriate that the defendants be ordered to pay 60% of the plaintiff's party and

party costs.

- [73] It was submitted on behalf of the plaintiff that the defendants should pay the plaintiff's costs on a punitive scale in respect of the claims which the defendants abandoned after the plaintiff had given tedious evidence in respect thereof. In my view the order that I make takes into account the fact that a substantial period of time was spent on the abandoned claims. In my view there is no reason to make a punitive costs order against the defendants.

- [74] In the circumstances, it is ordered that:

74.1. insofar as case number 234/2017 is concerned:

74.1.1. the defendants shall pay to the plaintiff the sum of R988 759.00, with interest thereon at the legal rate calculated from 25 January 2017, being the date of issue of summons to date of payment thereof;

74.1.2. the defendants' counterclaim for market related rental be and is hereby dismissed;

74.1.3. the defendants' counterclaim for the payment of money be and is hereby upheld only to the extent that it reduces the plaintiff's claim in convention to R988 759.00; with interest on R1 992 800.00 at the legal rate calculated from 25 May 2017, being the date of issue of the counterclaim to date of payment thereof.

74.2. insofar as case number 1650/2017 is concerned:

74.2.1. the plaintiff's claim for the delivery of livestock or payment of the monetary value thereof be and is hereby dismissed;

74.2.2. the plaintiff's claim for the delivery of implements and movables is upheld to the extent set out in schedules A, B, and C attached to this judgment;

74.2.3. the plaintiff's claim for a loading ramp as depicted on photograph 9 on page 187 of Exhibit B be and is hereby upheld;

74.2.4. the plaintiff's claim for the delivery of one wool press and two wool shears with hand pieces be and is hereby upheld;

74.2.5. the plaintiff's claim for an electric sliding gate and three zink dams be and is hereby dismissed;

74.2.6. the plaintiff's claim for the delivery of wool be and is hereby dismissed;

74.2.7. the plaintiff's claim for future loss of income be and is hereby dismissed;

74.2.8. the defendants' counterclaim for the payment of monetary value of livestock has already been upheld in case number 234/2017 and can accordingly not also be upheld under case number 1650/2017.

74.3. insofar as case numbers 234/2017 and 1650/2017 are concerned, the defendants shall pay 60% of the plaintiff's costs in both cases, such costs to include:

74.3.1. the costs attendant upon the employment of two counsel;

74.3.2. the transcription of the record;

74.3.3. the drafting of heads of argument.

G H BLOEM

Judge of the High Court

For the plaintiff: Advs S H Cole and T Miller, instructed by Wheeldon Rushmere & Cole, Grahamstown.

For the defendants: Adv D H de la Harpe SC, instructed by Minnaar and de Kock, Middelburg and Dold and Stone, Grahamstown.

Date of hearing: 1, 4, 5 June 2018, 17, 18, 19, 20, 21 September 2018, 26 November 2018, 13 and 14 January 2020.

Date of delivery of judgment: 26 May 2020.

ANNEXURE

SCHEDULE A:

1. 1 x duisendpoot tiller
2. 1 x John Deere maize planter
3. 1 x Stoney Croft scraper
4. 1 x five tooth ripper
5. 1 x offset disc

SCHEDULE B: (list of goods tendered):

1. 1 x road scraper
2. 1 x one tooth ripper
3. 1 x 400l poison sprayer
4. 1 x land roller
5. 1 x three tiered plough
6. 6 x old gates
7. 22 x sheep gates
8. 2 x cattle shifting gates
9. 1 x dog kennel
10. 20 x steel droppers
11. 10 x iron standards
12. 12 x barbed wire
13. 3 x 20l cans of roof paint
14. 7 x 40mm piping
15. 13 x round stock feeders
16. 15 x Rocla cement cribs
17. 4 x submersible pumps

18. 2 x rolls of steel wire
19. 1 x steel workbench
20. 8 x caracal cages
21. 9 x 900mm rolls of jackal proof netting
22. 6 x steel pipes
23. 2 x tilting tables
24. 22 x tyre casing feeders
25. 15 x cattle lick feeders
26. 2 x cattle sliding gates
27. 1 x box of paint & building tools
28. 1 x platform of cattle scale

SCHEDULE C:

1. railway sleepers
2. wooden poles
3. oregon and yellowwood boards
4. 28 x draglines
5. 3 x dismantled windmills

[1] The defendants pleaded that the plaintiff was removed as a trustee by the remaining trustees of the Carmen Trust on 25 November 2015 while the plaintiff pleaded that he resigned on 28 March 2019. This dispute is immaterial for purposes of this judgment.

[2] The sum claimed by the defendants when the counterclaim was initially issued was R7 985 900.00. However, during the trial that sum was reduced to R3 440 500.00.

[3] The original sum claimed by the defendants was R5 004 341.00, being the difference between R7 985 900.00 and

R2 981 559.00.

[4] The Harveya Trust was established to protect the plaintiff's and his children's interests.

[5] The plaintiff attached a copy of that lease agreement to his plea. Contrary to his plea, that document showed that he purportedly

represented the trustees of the Carmen Trust while attorney Deon Rossouw represented the trustees of the Harveya Trust when that

lease agreement was signed.

- [6] I have taken heed of the warning of Caney J in *Standard Bank of SA Ltd v Minister of Bantu Education* 1966 (1) SA 229 (N) at 242H-243A that the remarks in counsel's opening statement should not, depending on the context, be accorded decisive effect in regard to proof of facts necessary to a party's case or defence.
- [7] The number of 1 868 comprises the 1 052 sheep referred to in the financial statements of the Carmen Trust for the period ending February 2014 (which includes the 926 sheep purchased from Mr Southey) and the 800 relocated from Bethulie.
- [8] The Harveya Trust was established to protect the plaintiff's and his children's interests.
- [9] The parties' respective experts reached agreement on the value of the livestock dealt with in this paragraph.
- [10] *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) at paras 16 and 23.
- [11] The underlined sentence, in the context, means that there was no resolution from the trustees that the plaintiff could be given
- livestock to the value of approximately R2m. There was not one, because no one ever existed, the plaintiff testified.
- [12] *Thorpe and others v Trittenwein and another* 2007 (2) SA 172 (SCA) at para 14.
- [13] *Amler's Precedents of Pleadings Ninth Edition* by LTC Harms at pages 101 – 102.
- [14] *Singh v McCarthy Retail Ltd t/a McIntosh Motors*
- [2000] ZASCA 129; 2000 (4) SA 795 (SCA) at 803G-H.
- [15] *Datacolor International (Pty) Ltd v Intamarket Pty Ltd*
- [2000] ZASCA 82; 2001 (2) SA 284 (SCA) at 300A-C.
- [16] *Sumatie (Edms) Bpk v Venter en 'n ander NNO* 1990 (1) SA 173 (T) at 189E-G.

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Prepared on 12 October 2026 · Esheria