

SOUTH AFRICA / JUDGMENT

Agribee Beef Fund v Makinana; Agribee Beef Fund v Ngudle; Agribee Beef Fund v Ngqoshana; Agribee Beef Fund v Joyi (867/2020; 868/2020; 869/2020; 870/2020) [2020] ZAECGHC 76 (14 July 2020) [2020] ZAECGHC 76

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

867/2020; 868/2020; 869/2020; 870/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
GRAHAMSTOWN

Date

heard: 09

July 2020

Date

delivered: 14

July 2020

CASE

NO: 867/2020

In the matters between:

AGRIBEE
BEEF FUND
Applicant
and
SIPIWO
KENNETH MAKINANA
AND
Respondent
CASE
NO: 868/2020
AGRIBEE
BEEF FUND
Applicant
and

SIVE
NGUDLE
AND
Respondent
CASE NO: 869/2020
AGRIBEE
BEEF FUND
Applicant
and
MONWABISI
NGQOSHANA
Respondent
AND
CASE NO: 870/2020
AGRIBEE
BEEF FUND
Applicant
and
SIPHE
JOYI
Respondent

JUDGMENT

LOWE, J

INTRODUCTION

[1] For the purposes of the above four matters, the facts are essentially the same and much is common cause. It is convenient to deal with them all jointly as the issues in dispute are also substantially identical.

[2] Early in May 2020 Applicant launched four applications as set out above, seeking urgent interdiction relief in two parts, as follows:

“1. Dispensing with the forms and service provided for in the Uniform Rules of Court and directing that this application be heard on an urgent basis in terms of Uniform Rule 6 (12).

2. That a rule nisi be issued returnable on a date to be determined by the above Honourable Court, ordering the Respondent to show cause why an order

in terms of Part A below (the interim interdict) should not be made final:

PART A

2.1 That the Respondent is ordered to return 50 weaners, belonging to the Applicant given to him and as fully described in the induction Form dated 21/01/2019 (annexed as Annexure “VEB2” to the Founding Affidavit), pursuant to a Beef Weaner Production Agreement entered into between the parties on 11 December 2018,

within 24 hours of this Order, alternatively;

2.2 That the Respondent is ordered to allow Applicant into its premises to fetch 50 weaners, belonging to the Applicant given to Respondent as fully described in the Induction Form dated 11/12/2018 (annexed as Annexure “VEB2” to the Founding Affidavit), pursuant to a Beef Weaner Production Agreement entered into between the parties on 11 December 2018,

within 24 hours of this Order;

2.3 That Respondent is interdicted and ordered not to sell, alienate or dispose in any manner any of the 50 weaners belonging to the Applicant given to him as fully described in the Induction Form dated 21/01/2019 (annexed as Annexure VEB_____ to the Founding Affidavit), pursuant to a Beef Weaner Production Agreement entered into between the parties on 11 December 2018, pending the final determination of the application.

2.4 That an Interim Order be granted in terms of paragraphs 1 and 2 above (inclusive of 2.1 – 2.3).

PART B

3. That Paragraphs 2.1 to 2.3 above be confirmed as final.
4. That the Beef Weaner Production Agreement entered into between the parties on 11 December 2018 be declared cancelled and of no force and effect.
5. That the Respondent be ordered to return all unutilised feed reserves, cleaning materials, veterinary medication and vaccines, if any, belonging to the Respondent, which were given to him pursuant to the Beef Weaner Production Agreement entered into between the parties on 11 December 2018.
6. That Respondent be ordered to pay the costs of this Application on an attorney and client scale.
7. Granting the Applicant such further and / or alternative relief as the above Honourable Court may direct.”

[3] On 13 May 2020 Roberson J gave the following interim relief:

“1. A Rule Nisi, returnable on 26th May 2020, be and is hereby issued calling upon the Respondent to show cause why this order should not be made final.

2. The Respondent is to return 50 weaners belonging to the Applicant given to the Respondent, and as fully described in the Induction Form dated 21st January 2019, pursuant to a Beef Weaner Production Agreement entered into between the parties on 11th December 2018, within 24 hours of this Order, alternatively.
3. The Respondent is to allow Applicant into its premises to fetch 50 weaners, belonging to the Applicant given to the Respondent, and as described in the Induction Form dated 21st January 2019, pursuant to a Beef Weaner Production Agreement entered into between the parties on 11th December 2018, within 24 hours of this Order.
4. The Respondent be and is hereby interdicted and restrained from selling alienating or disposing of in any manner any of the 50 weaners belonging to the Applicant given to the Respondent, and described in the Induction Form dated 21st January 2019, pursuant to a Beef Weaner Production Agreement entered into between the parties on 11th December 2018, pending the final determination of the application.
5. Paragraphs 2, 4 and 4 above operate as an interim order.”

[4] This order was extended on 26 May 2020 as follows:

“1. The matter be and is hereby postponed to 9th of July 2020.

2. The Rule Nisi be and is hereby extended accordingly.
3. The Respondent is to file an answering affidavit, if any, by 10th June 2020.
4. The Applicant is to file a replying affidavit, if any, by 17th June 2020.”

[5] The matters then came before me, Applicant seeking a final order.

[6] By this time 183 pages of papers were before me in each Application and the matter was fully ventilated.

THE

BACKGROUND

- [7] The background to this matter can be shortly stated.
- [8] Applicant carries on business as an “agent for transformation” accelerating the active participation of black smallholding famers in the commercial production and growth of A grade beef.
- [9] Each Respondent owns/possesses a farm in the Joe Gcabi District, Eastern Cape, utilising same as a smallholding beef farm.
- [10] The order sought is vindicatory in nature, Applicant seeking the return of 50 beef weaners sourced from Applicant, from each Respondent.

- [11] Put shortly Applicant and each Respondent entered into a written agreement at the end of 2018 in terms of which Applicant delivered to each Respondent 50 weaners for grazing and upkeep, during a specified growth cycle period, whereafter each Respondent would return same to Applicant.
- [12] Respondents were not required to provide any capital but only grazing land, water and secured pastures, these monitored by sector co-ordinators, being agricultural graduates.
- [13] The weight gain of the weaners was to be assessed monthly over the six to eight months of the agreement, to increase from about 200kg to 350kg before return and sale to feedlots.
- [14] Respondents were to be paid for the profits generated in this manner – the best performing farmer (not Respondents) receiving R2800 per weaner.
- [15] The growth cycle was to expire on or before July 2019 for the weaners to be delivered to Respondents on 21 January 2019.
- [16] Due to a severe drought the end of the growth cycle was postponed and extended to the end of November 2019.
- [17] What happened thereafter is not common cause save to say that the 50 weaners due for return by each Respondent have not been returned. In the Answering Affidavits, for the first time, Respondents depose to the allegation that all the weaners (and their own stock) died in “2019”.
- [18] This is contested by Applicant which persists in the relief sought.
- [19] It is not disputed that had the weaners existed, their return was due some time ago.
- [20] It is also not disputed that Applicant is the owner of the weaners retaining ownership at all times.
- [21] In November/December 2019, due to the drought, Applicant postponed the date of return of the weaners keeping the growers in operation. In February 2020 Applicant commenced collection of the weaners from other farmers in the scheme area, but started to experience problems in this regard from Respondents. Whilst this is denied by Respondents, it is clear and undeniable that the weaners were never returned despite demand.
- [22] The sector and area coordinators became frustrated and escalated the issue to senior management. Whilst other participated farmers in the same area also in the scheme handed back their weaners, Respondents failed to do so.
- [23] Finally a meeting was held in Mthatha on 11 February 2020 and Applicant alleges that Respondents wanted the weaners to remain with them for breeding purposes. This request was considered but declined.

- [24] In this regard Respondents seem to deny a meeting attended by them, save one in January 2020, attended by Respondent Ngudle, though his confirmatory affidavit referred to is not attached and in his affidavit in the application against him he denies attending same.
- [25] In essence Respondents in their answer obfuscate in this regard, denying that they did not co-operate the majority of their answers in the Affidavits being bald, unsubstantiated denials or simply the noting of the allegations made.
- [26] The only thing of substance that is said relevant to the weaners is that the weaners were no longer in Respondents' possession but had died due to the "severe drought in the district", inter alia as follows:

"3.1.11. Instead, the unfortunate death of the weaners and some of my own livestock has resulted due to severe drought in the Eastern Cape during 2019.

3.1.12. No beef weaners survived."

- [27] No details are given whatsoever as to when, or over what period, they had died or what happened to the carcasses. No allegation is made that Applicant was informed hereof at any stage, up until the filing of the answering affidavits towards end May 2020.
- [28] The bare denials of attempts made by Applicant to recover the animals, and to contact Respondents, simply cannot stand.
- [29] There is no suggestion even in the answer that any mention was ever made to Applicant or its representatives that the weaners were at risk in the drought or that any had in fact died.
- [30] Allegations that numerous attempts were made to contact Respondents meets with bare denial. Allegations that when sector co-ordinators were given dates by Respondents to meet at the farms and when the visits occurred Respondents would be absent, and access would be denied by others, were met with bare denials.
- [31] The series of demands made, and meetings in January and February 2020, is met with unconvincing obfuscation.
- [32] This response that the weaners had all died took Applicant by surprise as it had no reason to believe that this was even as issue in the application. In reply it alleges, supported by affidavit of two of Applicant's project co-ordinators, that during a visit to the area weaners were observed in good condition on the farms of Mr Ngudla and Mr Makinana and there were no reports from other surrounding farms of calamity and disease. It is further pointed out that in November 2019 Respondents were negotiating the weaners return and no mention was ever made of any deaths.

THE APPROACH TO APPLICATIONS

[33] Generally applications are not designed to resolve factual disputes between the parties and are decided on common cause facts. Probabilities and onus issues are not amenable to being determined in motion proceedings[1].

[34] As is set out in Civil Procedure in the Supreme Court[2]:

“It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.” [3]

[35] The Court has to accept those facts averred by Applicant that were not disputed by Respondents, and Respondents’ version insofar as it was plausible, tenable and credible[4].

[36] This however is not the end of the matter as is pointed out in Harms Civil Procedure in the Supreme Court [5] as follows:

“It is accordingly generally undesirable to endeavour to decide an application upon affidavit where the material facts are in dispute.

In such a case it is preferable that oral evidence be led to enable the court to see and hear the witnesses before coming to a

conclusion.[6] On the other hand, it is equally undesirable for a court to take all disputes of fact at their face value. If this were done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.[7] In every case the court should examine the alleged disputes of fact and determine whether in truth there is a real[8] issue of fact that cannot be satisfactorily resolved without the aid of oral evidence.[9] Whether a factual dispute exists is not a discretionary decision; it is a question of fact and a jurisdictional pre-requisite for the exercise of the discretion given by the rule.[10] It is not a question of any difference of character between the various kinds of claims being enforced, but a question of the proper method of determining in each case the facts upon which any claim depends.[11]”

[37] In respect of a vindicatory claim it is presumed, until the contrary is shown, that the Applicant will suffer irreparable harm, absent an interdict[12].

[38] In an answering affidavit Respondent is required to set out which allegations he admits or denies and his version of the relevant

facts.

[39] A hollow denial or fanciful untenable version does not create a dispute of fact[13].

FINAL INTERDICT

- [40] A final interdict may be granted on application if no bona fide dispute of fact exists[14].
- [41] The requirements are: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy. Irreparable injury, though relevant in the context of interim interdicts, is not a requirement for the grant of a final interdict.
- [42] A clear right is a matter of substantive law.
- [43] As set out above “injury” as envisaged in a vindication claim is rebuttably presumed.
- [44] No other adequate remedy must be present. To qualify such remedy must be adequate in the circumstances, be ordinary and reasonable being a legal remedy giving similar protection[15].
- [45] In this matter the only possible argument is that there is an alternative remedy in damages. The choice between interdict and an action for damages involves the exercise of a Court’s discretion. This must provide ample compensation, be capable of being estimated in money and the claim for damages must not compel Applicant to part with his rights[16].
- [46] In this matter not only would it be difficult to estimate the damages in money, as the growth weight of each weaner would be unknown, but in any event the vindicatory right to return is Applicant’s primary right which it cannot be forced to abandon.
- [47] The fact that Applicant, subsequent to the finalization of the application papers, issued summons against each Respondent for cancellation and return of the weaners, alternatively, damages is of no consequence hereto whatsoever.

THE RESULT

- [48] It flows from the above that in these matters Respondents have dismally failed to meet the standard required for putting up a sustainable defence, in Application proceedings.
- [49] The answer is replete with hollow denials and the version of death, previously entirely unmentioned, puts up a patently untenable, unarticulated version which entirely fails to create a bona fide dispute of fact. This is a clear, text book, example of a case in which I am able, indeed obliged, to adopt a robust approach and to reject a patently mala fide attempt to create an unsustainable dispute of fact to avoid the granting of a final vindicatory interdict.
- [50] In the result the interdict is such as to warrant being made final, the defence such as to be dismissed on the papers.

COSTS

- [51] The costs must follow the result. I am however not satisfied that the egregious nature of the failure in the reply to put up a sustainable bona fide defence justifies the punitive costs order sought.

ORDER

[52] As against each Respondent in each separate application above:

1. Each Respondent is to return 50 weaners belonging to Applicant given to each Respondent, and as fully described in the Induction Form relevant to each Respondent (Annexure VEB 2 in each Application) pursuant to a Beef Weaner Production Agreement entered into between Applicant and each Respondent, within 24 hours of this Order, alternatively failing which paragraph 2 below follows.
2. Failing the return referred to in paragraph 1 above, the Sheriff of the High Court is authorised to enter each Respondent's premises to fetch the 50 weaners, belonging to Applicant, given to each Respondent, and as described in the Induction Form relevant to each Respondent, (VEB 2), pursuant to a Beef Weaner Production Agreement entered into between Applicant and each Respondent, subsequent to the expiration of the period referred to in paragraph 1 above.
3. Each Respondent is hereby interdicted and restrained from selling, alienating or disposing of in any manner any of the 50 weaners belonging to Applicant, given to Respondent, and described in the Induction Form given to each Respondent (VEB 2) pursuant to a Beef Weaner Production Agreement entered into between Applicant and each Respondent.
4. The Beef Weaner Production Agreement entered into between Applicant and each Respondent, is declared cancelled and of no force and effect.
5. Each Respondent is ordered to return to Applicant, all unutilised feed reserves, cleaning materials, veterinary medication and vaccines, if any, within possession of each Respondent, which were given to them pursuant to the Beef Weaner Production Agreement entered into between the parties.
6. Each Respondent is to pay Applicant's costs in the Application relevant to that Respondent.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearances:

Obo Applicant: Adv Z Mapoma

Instructed by:

Garlicke & Bousfield Inc., Umhlanga Rocks

c/o Neville Borman & Botha, Grahamstown

Obo Respondents:

Adv L Ntlokwana

Instructed by:

Mgangatho Attorneys, Grahamstown

[1] Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984

(3) SA 623 A.

[2] Harmse (Butterworths) B6.45

[3] Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017

(2) SA 1 (SCA); National Director of Public Prosecutions v Zuma [2009] 2 All SA 243; 2009 (2) SA 279 (SCA) [26]; South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd 2012

(3) SA 431 (KZP) [5]

[4] Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books [2016] 4 All SA 665 (SCA).

[5] Butterworths B6.45

[6] Frank v Ohlsson's Cape Breweries Ltd 1924 AD 289 294; Plascon-Evans 634-635

[7] Petersen v Cuthbert & Co Ltd 1945 AD 420 428. A hollow denial or a detailed but fanciful and untenable version does not create a dispute of fact: Truth Verification Testing Centre CC v PSE Truth Detection Centre CC 1998 (2) SA 689 (W) 698; Rosen v Ekon

[2000] 3 All SA 23 (W) 39; Ripoll-Dausa v Middleton NO [2005] 2 All SA 83 (C), 2005 (3) SA 141 (C).

[8] Rothman v Curr Vivier Inc 1997

(4) SA 540 (C) 551; Peterson v Cuthbert & Co Ltd supra 429; President of the Republic of South Africa v South African Rugby Football Union 2000

(1) SA 1 (CC) pars 234-239. It has variously been called a “genuine” or “bona fide” dispute (“n werklike of direkte feitegeskil”: Van der Merwe v Meyer 1971 (3) SA 22 (A) 26G) but the meanings are the same. Whether the converse of a “real” dispute is a “mala fide” dispute of fact as suggested in Von Steen v Von Steen 1984

(2) SA 203 (T) is open to doubt. Speculation does not create a real dispute of fact: Standard Credit Corporation Ltd v Smyth 1991 (3) SA 179 (W); Governing Body of Hoërskool Fochville and Another v Centre for Child Law; In re: Governing Body of Hoërskool Fochville and Others (Greenside High School Governing Body as amicus curiae) [2014] 4 All SA 204 (GJ).

[9] Petersen v Cuthbert & Co Ltd supra 428; Administrator, Transvaal v Theletsane [1990] ZASCA 156; 1991

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- (2) SA 192 (A) 197; G v Superintendent, Groote Schuur Hospital 1993
- (2) SA 255 (C).
- [10] Ismail v Durban City Council 1973
- (2) SA 362 (N) 374A-B; Du Preez v NWK Ltd [2005] 3 All SA 551 (B).
- [11] Plascon-Evans supra 634-5; Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949
- (3) SA 1155 (T) 1162; Ter Beek v United Resources CC 1997
- (3) SA 315 (C) 329D-E.
- [12] Stern & Ruskin NO v Appleson 1951
- (3) SA 800 (W).
- [13] Ripoll-Dausa v Middleton NO and Others 2005
- (3) SA 141 (C).
- [14] Plascon-Evans supra
- [15] Civil Procedure in the Supreme Court, Harms, A5.5
- [16] Civil Procedure, Harms supra A5.5 and footnotes.
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