

SOUTH AFRICA / JUDGMENT

Erasmus and Others v de Villiers Berrange NO and Others (3369/2013) [2013] ZAFSHC 149 (10 September 2013) [2013] ZAFSHC 149

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue

CASE / FILE NUMBER

3369/2013

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 3369/2013

In the matter between:-

JOHAN WILLEM ERASMUS1st Applicant

HENDRINA MAGDALENA ERASMUS2nd Applicant

SCHALK WILLEM JONKER3rd Applicant

JOHANNES PETRUS VAN NIEKERK4th Applicant

and

PIERRE DE VILLIERS BERRANGE N.O.1st Respondent

TSUI VINCENT MATSEPE N.O.2nd Respondent

FIFEHEAD FARMING PARTNERSHIP3rd Respondent

DOWNIBROOKE PROPERTIES (PTY) LTD4th Respondent

THE TRUSTEES OF THE EVERFAIR TRUST5th Respondent

BADEN MUNGO SMYTHE6th Respondent

THE TRUSTEES OF THE VAUQUILIN

FAMILY TRUST7th Respondent

HEARD ON: 29 AUGUST 2013

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 10 SEPTEMBER 2013

I INTRODUCTION

- [1] This is an opposed urgent application concerning 86 Holstein cows (“the cows”). The major role players are the four applicants and in particular the first applicant, Johan Willem Erasmus, a farmer of the farm Weltevrede (also known as Rasdal) district Koppies on the one hand and the two provisional trustees of the insolvent estate of the Kirkdale Trust (“the trust”), cited as the first and second respondents in this application on the other. For sake of convenience I shall refer to these two respondents as the trustees.
- [2] Third to seventh respondents were cited as such as applicants believed that they might have a possible interest in the relief sought in the circumstances set out more fully herein. They have not given notice of their intention to oppose the application and no relief is sought against them. The third respondent, the Fifehead Farming Partnership (“Fifehead”) is mentioned in particular insofar as it played a role in the sequestration proceedings preceding the present application and I shall refer to its involvement later herein.

THE RELIEF CLAIMED

- [3] On Wednesday, 21 August 2013, applicants issued their application claiming the following relief:

3.1. That the non-compliance with the rules regarding service, as well as time-limits and any other non-compliance with the Court Rules, be condoned and that the matter be heard as urgent in terms of Uniform Rule 6(12)(a);

3.2. That the first and second respondents are ordered to immediately return the 56 Holstein cows (identified with a specific brand) and the 30 Holstein cows (identified with a certain different brand) in their possession or under their control to the first to fourth applicants by delivering the said cows to me (sic) at my (sic) farm “Weltevrede” (more commonly known as “Rasdal”) in the district of Koppies, Free State Province;

3.3. That the first and second respondents are ordered to pay the costs of this application on a scale as between attorney and client;

3.4. In the event of any of the Third to Seventh Respondents opposing this application, that such a respondent is also ordered to pay the costs of this application on the scale as between attorney and client;

3.5 Further and/or alternative relief as the Honourable Court may decide to be appropriate.

I should add that the applicants begged leave to hand from the Bar at the hearing of the application an amended notice of motion claiming that applicants sought delivery of the said cows to the first applicant at his farm Weltevrede, more commonly known as Rasdal. No substantial amendment was sought and it was not opposed. It is apparent from the papers and the initial notice of motion that first applicant is in fact the driving force behind the application.

[4] The application papers were served on the respondents by email and on Tuesday, 27 August 2013, answering affidavits were filed. The following day replying affidavits were filed and the next day, i.e. 29 August 2013, the application was heard. Advocate P. Zietsman SC appeared for the applicants and Advocate G.M.E. Lotz SC for first and second respondents. Not surprisingly, and due to the time constraints, both parties were forced to approach me in respect of certain housekeeping matters, seeking my leave to accept certain confirmatory affidavits which came to hand late as well as the amended notice of motion referred to above. There was no objection and I accepted these documents. I must also point out that although counsel presented cogent arguments, I was not provided with written heads of argument and both counsel referred to the minimum of authority in support of their arguments. This necessitated extra research and consequently this judgment will be delivered a few days later than anticipated.

THE ISSUES

- [5] Before I deal with the material background, it is apposite to indicate what the issues are. At the onset I requested Mr Zietsman to indicate the legal basis or bases of applicants' claim. He indicated that the answer was quite simple and that applicants rely on spoliation. Alternatively and only insofar as I might find against applicants in this regard, they rely on *rei vindicatio*. I indicated to Mr Zietsman that the notice of motion did not contain a prayer for the setting aside of the warrant issued by the Magistrate of Koppies in accordance with the provisions of s 69(3) of the Insolvency Act, 24 of 1936, which was obtained by the trustees and in terms whereof first applicant was dispossessed of the cows. He made it clear that he was not going to ask for such relief as he deemed it unnecessary.
- [6] Mr Lotz was quite surprised to learn that applicants relied on spoliation which he regarded as a completely new *causa*. He was of the view that the application was clearly couched to deal with the merits of ownership in respect of the cows and that procedurally speaking, I should not even have allowed Mr Zietsman to argue spoliation. In a nutshell applicants' version is that they have been in undisturbed possession of the cows, that the trustees have dispossessed them unlawfully and the trustees are presently in possession of the cows.
- [7] Evidence was also tendered by applicants to indicate that the cows were purchased by each of them respectively on different occasions and at different purchase prices from the trust prior to its insolvency, that the purchase prices were paid and that the cows were delivered to them. Although the cows were leased from different lessors by the trust from time to time, the agreements of lease provided in each case a right to the trust as lessee to sell cows from time to time. Consequently, so they aver, ownership of the cows vests in them.

THE FACTUAL MATRIX

[8] The factual background is contained in the application papers and to a certain extent few issues are really in dispute. I refer to the following:

8.1. First applicant is a farmer of the farm Weltevrede (Rasdal) district Koppies. Second applicant is his wife with whom he is married out of community of property. Third applicant is an adult male residing in the town of Koppies. Fourth applicant is referred to as a farmer, but is residing in the town of Koppies.

8.2. The trustees are the provisional trustees of the insolvent estate of the trust which was provisionally sequestered on 25 July 2013 on application of Fifehead, the third respondent in this application. A final sequestration order was issued on 22 August 2013.

8.3. At all relevant times hereto the trustees of the trust were Cornelius Andries Petrus Loggenberg (Loggenberg), his wife Mary-Jane Loggenberg and a so-called independent trustee, Mr Ebenhaézer Kriek (Kriek), an attorney of Parys. On 22 July 2013, three days prior to the granting of the provisional sequestration order, Kriek resigned as trustee of the trust. Loggenberg is a role-player in other legal entities referred to later herein and he is in particular the sole director of a private company, Kirkdale (Pty) Ltd, which also features in this application.

8.4. Third to seventh respondents have entered into written lease agreement with the trust in terms whereof Holstein cows were leased to it. Apparently, and according to the investigations by the trustees so far, there are many more cattle owners who leased cows to the trust. It is not necessary to deal with this aspect further, save to refer to my remarks *infra*. Third respondent is a farming partnership, fourth respondent is a private company, fifth and seventh respondents are trustees of family trusts and sixth respondent is a private person. Applicants rely on these lease agreements, some of which have not been signed by all the parties thereto, or at all, for the trust's entitlement to sell the cows to them. The trustees deny that the trust was entitled to sell cows, particularly not wholesale and in the circumstances evident from Loggenberg's *modus operandi*. They aver that the evidence overwhelmingly shows that Loggenberg was the mastermind behind the trust's fraudulent conduct. The ostensible purpose of the trust was to conduct a dairy milking operation for which purpose these agreements were concluded in terms whereof owners of cows (investors) were induced to part with possession of their cows, but instead of utilising the cows for the purpose for which they were leased, these cows were sold, many of them immediately after lease agreements were entered into. I shall deal with this aspect again *infra*.

8.5. Although applicants aver that they received possession of the cows against payment of the purchase prices to the trust, it is apparent, even on their own version that no payments were made to the trust, alternatively that they failed to prove such payments to the trust. Instead payments were made into the bank account of Kirkdale (Pty) Ltd and an account that has not been identified. For instance, and to mention just one example, first applicant's version that he paid R300 000,00 to the trust in June 2012 in respect of the thirty cows purchased by him is not supported by the documentation relied upon. Payments were in fact made to the bank account of Loggenberg's company, Kirkdale (Pty) Ltd. It is unnecessary to deal further with the version

pertaining to the purchase of the cows by the various applicants, save insofar as I shall consider these transactions again infra. Fact of the matter is that, as Mr Lotz has indicated, applicants have endeavoured to make out a case on the merits that they are entitled to delivery of the cows based on their alleged ownership.

8.6 It is applicants' case that the cows purchased by second, third and fourth applicants were thereafter leased to first applicant and that these cows were all in possession of first applicant ever since such transactions until he was dispossessed.

8.7. On 14 August 2013, i.e. after the provisional sequestration order was issued and the appointment of the trustees as provisional trustees, they inter alia obtained a search warrant from the magistrate in Koppies in accordance with the provisions of s 69(3) of the Insolvency Act. The same day the warrant was served on first applicant and the 86 cows, the subjects of this application, were removed from his farm

Weltevrede (also known as Rasdal). Applicants elected not to attach the founding affidavit filed with the Koppies magistrate in support of the application in terms of s 69(2), but the founding affidavit used in a similar application before the Vereeniging magistrate pertaining to different cows and different farms where cows were also held. Mr Zietsman made certain submissions in this regard and I shall deal with that infra. It is apposite to state at this stage that although detailed averments were made in this affidavit pertaining to the fraudulent scheme embarked upon by the trust and Loggenberg, applicants elected not to deal with these damning averments at all. This is strange insofar as Mr E.A.L. Muller, an attorney of Potchefstroom, who was the legal representative of the trust during July 2013, as will be shown later herein, is now also the applicants' attorney of first instance in this application.

8.8. Applicants aver that they have a clear right to the cows, emphasising that they rely on their alleged ownership and the trustees' infringement of this right.

8.9. The trustees rely on the fact that Kriek, as independent trustee, was never consulted about the sale of cows and that the trustees did not agree to or authorise their sale. In reply applicants rely on the fact that Kriek himself drafted agreements of lease, which was presented in evidence, but not signed by anyone, indicating that Loggenberg in his personal capacity as lessee would be entitled to sell cows under certain conditions.

8.10. The founding affidavit of Willem Andries Pretorius, ("Pretorius") Fivehead's deponent in the sequestration application, was attached to the answering affidavit and confirmed upon oath by Pretorius. He made serious and damning allegations pertaining to the fraudulent scheme embarked upon by Loggenberg and the trust. Pretorius' investigations indicated that up to 5 000 herd of cattle were involved and have gone "missing" resulting in a potential loss to investors/lessors of approximately R30 million. In July 2013, a few days prior to the provisional sequestration order, Pretorius met with attorney E.A.L. Muller of Potchefstroom acting on behalf of the trust. Muller advised Pretorius as follows: The cows in the possession of the trust had contracted contagious abortion and had to be slaughtered, but the money was "gone". Also, a "payment plan" agreement had been entered into with another investor/lessor, one Vauquelin (a

trustee of the seventh respondent in this application), who met with Muller earlier that same day. Furthermore, neither Loggenberg, nor his trust had any assets, but Loggenberg's family intended to set up a sheep farming operation and offered to pay the Fifehead Farming Partnership of Pretorius from the profits of this farming venture and a written proposal would be presented to Pretorius. Nothing came from this. This version has not been contested, either in the sequestration application, or in reply in this application. In particular, applicants failed to file any affidavit from Loggenberg or his wife in an effort to deny these serious allegations.

8.11. Jesaja Alexander Erasmus (Erasmus), the farm manager of the trust, largely confirms the version of Pretorius and the trustees. According to him approximately 1000 cows subject to lease agreements were sold during the period May 2012 to July 2013.

8.12. It is indicated by the trustees that on first applicant's own version he purchased 30 Holstein cows from the trust, which were the subject of lease agreements entered into during May 2012. This purchase took place in June 2012, barely one month after the trust took possession of the cows.

8.13. Just after the provisional sequestration order the sheriff made his inventory. He found a paltry 31 cows in possession of the trust.

8.14. Approximately 90% of the cows in possession of the applicant have been over-branded.

8.15. It is apparent that representatives of the third and fourth respondents, namely Pretorius referred to above and Shane Pinchen respectively, visited or attempted to visit the farm Kirkdale on a regular basis to inspect their dairy cows. The manner in which Loggenberg instructed his farm manager, Erasmus, to tag random cows with identification tags of the lessor who came to inspect the cows, is hair-raising. Once the one lessor would leave the farm, his tags would be removed and the cows retagged in preparation for the inspection by the other lessor. Care was taken that lessors did not arrive at the farm simultaneously.

8.16. It is evident that Loggenberg instructed the purchaser of milk, Tip Top Full Cream Milk, to make payments for milk delivered by the trust to entities such as Kirkdale (Pty) Ltd., Millika (Pty) Ltd and the Andre Loggenberg Trust. During February 2013 to July 2013 the sum of R1,1 million was so deposited into the bank account of this lastmentioned trust.

8.17. In reply applicants rely on the fact that the trustees brought their application in terms of s 69 of the Insolvency Act for the purpose of obtaining possession of cows leased by the trust from various lessors. However, the trustees were only entitled to obtain possession of cows belonging to the insolvent estate of the trust, but on the trustees' own version the cows never belonged to the trust. However and although applicants accept that the magistrate of Koppies granted the warrant, they aver that "this does not mean that they (the trustees) are entitled to remain in possession of the relevant cows".

8.18. Finally, applicants reiterate in reply that the trust was entitled to sell cows in accordance with the provisions of the various agreements of lease.

SPOILIATION AND SECTION 69(3) OF THE INSOLVENCY ACT 24 OF 1936

[9] As indicated supra, Mr Zietsman, when confronted at the onset to explain the legal basis of applicants' claim, submitted that he relied on two bases, to wit

- (a) that the trustees obtained possession of the cows unlawfully and therefore the mandament van spolie is applicable as spoliation had taken place. In order to substantiate this submission, he argued that the trustees obtained the warrant in terms of s 69(3) of the Insolvency Act unlawfully.
- (b) Secondly, and only if it is found that no spoliation has taken place, applicants rely on the rei vindicatio as it is submitted that a proper case has been made out that they purchased the cows from the trust, paid the purchase price and

obtained possession thereof. I deal firstly with spoliation.

[10] It is common cause that a total of 86 cows were in possession of first applicant until their removal on 14 August 2013 in terms of a warrant obtained by the trustees in terms of s 69(3) which authorised the removal of the cows belonging to the insolvent estate of the trust. These cows are presently in possession of the trustees. Innes CJ stated the rule pertaining to spoliation in the followings terms in *Nino Bonino v De Lange* 1906 TS 120:

"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable."

See also *Yeko v Qana* 1973 (4) SA 735 (AD) at 739B – G; *Makhubedu and Another v Ebrahim* 1947 (3) SA 155 (TPD) at 160 and 169 – ejection following upon a judgment valid at the time was found not to be spoliation - and *Ntai and Others v Vereeniging Town Council and Another* 1953 (4) SA 579 (AD) at 590 – no action can be brought against messenger or the party instructing the messenger for carrying out a writ as long as the writ stands.

[11] The mandament van spolie (spoliation order) is a possessory remedy which offers temporary relief. The applicant must allege and prove the following only, i.e.

that he or she was in possession of the property; and

that he or she was illicitly ousted from such possession.

See: *Badenhorst et al, Silberberg and Schoeman's The Law of Property*, 5th ed, p 288 - 294; *C G van der Merwe, Sakereg*, 2nd ed, p 129.

[12] In Afrikaans the type of possession is referred to as "vreedsame en ongestoorde besit" and in English it is described as "peaceful and undisturbed possession". The defences that may be raised are limited, one being that the dispossession was not unlawful or illicit.

- [13] The purpose of the mandament van spolie is to restore the status quo ante, i.e. the unlawfully deprived possession and to prevent a person who asserts that he or she has a real right to particular property in possession of another to resort to self-help, instead of taking recourse to a court of law. In deciding a spoliation application proper, the merits of the case, i.e. the rights of the parties pertaining to the property, are never considered.
- [14] In *Sillo v Naude* 1929 AD 21 at 26 the Appellate Division found that by setting the machinery of the Pound Ordinance into motion in terms whereof cattle of the appellant were impounded, the respondent merely invoked the aid of the law and could not be said to have taken the law into his own hands. Consequently appellant's appeal was dismissed as the Court found that no spoliation occurred.
- [15] In order to develop his argument Mr Zietsman relied on s 18(3) of the Insolvency Act and submitted that the trustees were not entitled to launch the proceedings in terms of s 69 as they did not have any authority from the High Court to do so. In fact, he pointed out that the trustees opposed the present application and were represented by counsel without authority from the Court contrary to the provisions of s 18(3), although he did not want to make an issue of such lack of authority pertaining to the present proceedings. I may add that this caused me to consider the specific issue during argument and after hearing Mr Lotz as well, and without objection from Mr Zietsman, I authorised the trustees belatedly to oppose applicants' application. I shall deal *infra* with the argument pertaining to court authorisation in relation to s 69.
- [16] Mr Zietsman also argued that in terms of s 69 the trustees had to present evidence upon oath that the relevant cows belonged to the insolvent estate of the trust and that they were in the district of Koppies. He argued that these cows never belonged to the trust and that the trustees did not have the power to apply s 69. Finally, he argued that the magistrate should have applied the *audi alteram partem* rule and should not have granted the warrant without allowing the applicants the opportunity to answer the allegations of the trustees.

On his version the cows were not hidden and the magistrate would never have granted the warrant if applicants were given the opportunity to respond.

- [17] On his appointment the insolvent estate becomes vested in the provisional trustee and remains so vested until the appointment of a trustee. This is trite. Subject to certain exceptions a provisional trustee has all the powers and is subject to all the duties of a trustee. Although a provisional trustee is not in the business of winding-up of the insolvent estate, or the sale of assets or the institution of legal action as his primary tasks, he is duty bound to take physical control of the estate assets and to preserve same for creditors until a trustee is appointed.

See: *Goodwin Stable Trust v Duohex (Pty) Ltd and Another* 1998 (4) SA 606 (C) at 620 F and Mars, *The Law of Insolvency in South Africa*, 9th ed, p 316, Meskin, *Insolvency Law*, par 5.6.7, p 5.24 and s 69(1) of the Insolvency Act.

See: Cooper NO v First National Bank of SA Ltd 2001 (3) SA 705 (SCA) at paras

[22] and [23] p 713D – 713E and s 69 of the Insolvency Act.

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