

SOUTH AFRICA / JUDGMENT

Kelsey NO and Another v de Hart (3921/2016) [2020] ZAFSHC 2; [2020] 1 All SA 808 (FB) (23 January 2020) [2020] ZAFSHC 2

COURT

Free State High Court, Bloemfontein

BEFORE

Meintjes

CASE / FILE NUMBER

3921/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 3921/2016

In

the matter between:

BRIGITTE
KELSEY N.O.
First Plaintiff
ELSIE
JACOBA JACOMINA CAROLINA
DE
HART
N.O
Second Plaintiff
and
CHARL
DE
HART
Defendant

HEARD

ON: 18; 19 and 21 June and 16 and 17 July 2019. (Defendant's Counsel's final heads of arguments received on 14 October 2019).

JUDGMENT

BY: MEINTJES, AJ

DELIVERED ON: 23 JANUARY 2020

- [1] In this action concerned, the first and second plaintiff, both acting in their capacities as the duly appointed trustees of the Koos de Hart Testamentary Trust, MT13885/2008 ("the trust"), instituted action against the defendant. The first plaintiff/trustee being an institutional trustee (representing Standard Trust), and the second plaintiff/trustee the widow of the late Mr. Petrus Jacobus de Hart ("the deceased") and who was nominated as trustee pursuant to the will ("the will") of the deceased.
- [2] The deceased owned the farm Middelwater, in the district of Prieska. He stipulated in his will that the farm be held by the trustees, and on termination of the trust (by the death of the longest living of the second plaintiff/trustee or Mrs. Ann de Hart, the deceased's ex-wife). Mrs. Ann de Hart has since also passed on. She was the mother of the defendant. The trust capital would be distributed as follows:
- 2.1 The farm to the defendant;
- 2.2 Any mineral right to the beneficiaries as mentioned in the will.
- [3] The will also stipulates that the trustees would be required to distribute the nett trust income as follows:
- 3.1 R600.00 per month to Mrs. Ann de Hart until her death;
- 3.2 The balance of the nett trust income to the second plaintiff/trustee until her death.
- [4] On 6 August 2008, prior to his death on 1 September 2008, the deceased (father of the defendant) and defendant, both acting in person, entered into a written agreement of lease ("the agreement"), in respect of which deceased, as lessor, leased Middelwater to the defendant, for the defendant to conduct farming activities thereon.
- [5] The lease in terms of the agreement commenced on 1 September 2008 and would subsist for a period of 5 years until 31 August
2013. The agreement also provided, amongst other provisions, as follows:

5.1 Payment of annual rent, in the amount of R120 000.00 plus VAT thereon per annum, payable in advance bi-annually. The first payment being due and payable on 1 September 2008 and then thereafter bi-annually. The rental was also to be adjusted by a percentage equal to the Consumer Price Index from 1 September 2009;

5.2 The defendant would be entitled, at his own costs, to erect any structure to improve the efficient use of the available water on the farm through building dams and storage tanks and the like and then to maintain all such improvements;

5.3 The defendant would be permitted to utilize the farm only for the purpose of livestock farming;

5.4 No variation of the agreement would be of any force or effect, unless such variation was reduced in writing and signed by both the parties. In fact, clause 19 of the agreement provided:

“Mondelinge veranderinge nie geldig nie. Nog die verhuurder nog die huurder word gebind deur enige ooreenkoms wat strydig met ‘n bepaling van hierdie huurkontrak is tensy dit vervat is in ‘n skriftelike dokument wat deur elk van hulle onderteken is”;

5.5 The defendant undertook to return possession of the farm upon expiration of the lease.

- [6] The trustees administered the affairs of the trust, including the lease of the farm in accordance with the lease agreement. The defendant made payments of the annual rental until the expiration of the lease on 31 August 2013. At the expiration of the lease, no further written agreement was concluded between the plaintiffs and the defendant according to clause 20 of the agreement, in order to vary or amend the agreement that has expired on 31 August 2013 and defendant had accordingly to restore possession of the farm then. He, instead, remain in occupation of the farm and continued, and still is, conducting farming operations on the farm.
- [7] The plaintiffs in this action, pleaded that defendant's failure to vacate the farm in accordance, constitutes a breach of the defendant's express contractual obligation to vacate the farm at the termination of the lease period, alternatively that the failure to vacate, was wrongful. As a result of defendant's continued occupation, which constitutes a holding over, plaintiffs suffered damages.

The plaintiffs sought the following relief:

Claim 1:

Payment for the damages suffered as a result of the hold over as follows:

- a) R166,722.42, being R146,247.74 plus VAT of R20 474.68, in respect of the defendant's holding over for the period 1

September 2013 to 31 August 2014;

- b) R166,722.42, being R146,247.74 plus VAT of R20,474.68, in respect of the defendant's holding over for the period 1 September 2014 to 31 August 2015;
- c) R166,722.42, being R146,247.74 plus VAT of R20,474.68, in respect of the defendant's holding over for the period 1 September 2015 to 31 August 2016.

The total amount for damages payable amounts to R500,167.26, being R166,722.42 per year for a period of 3 years.

Claim 2,

in the alternative to Claim 1: Payment of damages representing the market related rental value of the farm as follows:

- a) R340,550.00 for the period 1 September 2013 to 1 August 2014;
- b) R340,550.00 for the period 1 September 2014 to 31 August 2015;
- c) R340,550.00 for the period 1 September 2015 to 31 August 2016.

The total amount for damages payable amounts to R1,021,650.00, being R340,550.00 per year for a period of 3 years.

Claim 3:

Ejectment of the defendant in respect of only his commercial farming activities on the farm.

- [8] The defendant has opposed the action, and filed a counterclaim, raising the following issues:

8.1 That the will had created a fidei commissum, with the trustees in the position of a fiduciary and the defendant as capital beneficiary and fidei commissary, and as a result, the plaintiffs/trustees owed as a fiduciary duty to the defendant to maintain the farm, and to do all that are necessary in this regard at the cost of the trust;

8.2 That the defendant in his capacity as capital beneficiary and fidei commissary, was entitled to be provided by the plaintiffs/trustees of a management plan and financial budget, to inter alia, resolve the water shortages and the provision of water on the farm, at the cost of the trust;

8.3 That the defendant is entitled to occupy the farm until the water provision on it was resolved by the plaintiffs/trustees; until the farm was again economically viable and rentable and a new lease agreement had been offered to defendant and negotiated with him;

8.4 It is also alleged that a meeting was held during August 2013, which later actually seemed to be 4 September 2013, attended by Beverley Jackson and Belinda van Dyk, but not by second plaintiff, during which an oral agreement was concluded between the trustees of the trust, represented by Beverley Jackson and Belinda van Dyk and the defendant, pursuant to which the defendant was entitled to remain in occupation of the farm, until the water problem was resolved at the cost of the trustees, without the payment of any remuneration to the trust.

[9] The plaintiffs, in their plea to the counterclaim, pleaded inter alia that:

9.1 It is denied that any agreement was concluded between the plaintiffs and the defendant on 4 September 2013, either in the terms as alleged by defendant or at all;

9.2 That the trustees had to act together in the conclusion of the alleged agreement and that the second plaintiff who was not present at the said meeting, had not and did not, authorise the other trustee (Jackson), to conclude any such agreement with the defendant;

9.3 That the agreement, as alleged by defendant, was, in any event, beyond the powers of the trustees, and therefor invalid and void, depriving the income beneficiaries of any benefit from the capital assets of the trust (the farm);

9.4 It is denied that the will of the deceased established a fideicommissum; made the plaintiffs fiduciaries or created fideicommissary assets; and/or a fiduciary relationship between the plaintiffs/trustees and the defendant, the defendant as capital beneficiary.

[10] In replication to this, the defendant replies that:

10.1 Beverly Jackson had been authorized by the second plaintiff to conclude such agreement with the defendant, in the terms as alleged by the defendant;

10.2 That the trustees accordingly acted jointly and together in the conclusion of the agreement and that the agreement was valid;

[11] That Jackson/trustees and accordingly the first plaintiff as her successor in title, are estopped from relying on the alleged fact that the said Jackson/trustees are not authorized to act for and on behalf of the second plaintiff when so entering into the agreement with the defendant. This on the following basis:

11.1 That the said Jackson at all relevant times held out to defendant that she had the necessary authority from the first plaintiff to enter into the agreement on behalf of the trust; alternatively,

11.2 That Jackson, by her conduct, lead and induced the defendant into the reasonable and bona fide belief that she was indeed duly authorised by the second plaintiff to act for and on her behalf and to represent her in entering into the agreement on behalf of the trust;

11.3 That the defendant, acting upon his belief in the correctness of such representations, was induced, to his detriment, to act upon such representations and to enter into the agreement;

11.4 That the defendant was prejudiced by the representations, made fraudulently, alternatively negligently, and that the trustees are accordingly bound to the agreement on the basis of estoppel.

[12] The plaintiffs called 3 witnesses:

12.1 ELSIE JACOBA JACOMINA CAROLINA DE HART (the second plaintiff herself) testified she was born on [...] 1936. At the time when she testified, she was 82 years of age. She was married to the deceased, who had 5 children with his former wife (the late Ann De Hart), defendant being one of them. The deceased owned the said farm Middelwater, where he farmed with goats and generated an income from his farming activities.

He was also the owner of a house at Witsand, from where he at a stage, periodically visited the farm to keep an eye on the farming activities. In 2005, he has bought a house in Paarl, where the witness was supposed to settle, should the deceased pass away. He indeed passed away on 1 September 2008.

The witness confirmed the will of the deceased as well as the lease agreement. She also confirmed the trust and the fact that she was a trustee of the trust, duly appointed thereto. After the death of the deceased, she kept on staying in the house in the Paarl. The defendant promptly paid the rent to the trust, and the only income the witness had, was the income from the trust.

When the lease agreement concluded in August 2013, it became necessary to conclude a new agreement, which was however never done in writing/signed, according to her. Since then, she did not receive any income whatsoever from the trust. She had many expenses. She sold her house in Paarl. She is since staying with her daughter in Port Owen, renting a room.

She was informed of the meeting held on 4 September 2013. She herself did not attend. Her relationship with the defendant was not on good terms. She left all, according to her, in the capable hands of Jackson (representing the first trustee) and Van Dyk.

Shortly after the meeting, Jackson and Van Dyk visited her and informed her that the defendant was not willing to sign a new lease agreement and that he also alleged that there was a water problem on the farm. The alleged water problem, then not to be understood by her, because the defendant farmed for 5 years, without any complaint about water, the issue only raised when a new agreement had to be signed.

She confirmed the handwritten document by Andre Marais, a family member of the deceased and the defendant, but could not comment on his expertise, if any. She testified she heard about the so-called verbal agreement, stating that defendant could remain on the farm, without paying rent, until the water problem is resolved, but she had not authorized Jackson to conclude such agreement with the defendant. Jackson had no authority also to agree to a reduced rental.

She testified that Jackson had not informed her of an agreement that she had concluded with the defendant to the effect that he could remain on the farm without paying rental.

After the meeting held on 4 September 2013, the trustees decided to look into the alleged water problem. A report was obtained from Dr. Van der Merwe, confirming a serious water problem on the farm. She could not answer and explain what was decided after this report was received and the water shortage was confirmed.

She had opposed the expenditure of any of the capital of the trust on dealing with the water problem. According to her, this had been the obligation of the defendant during the course of the lease agreement. She testified that the capital of the trust, excluding the farm, should not be utilized for effecting improvements (dry boreholes), because that would leave nothing for the other capital beneficiaries. According to her, that would be “immoral”.

2.2 BEVERLEY LYNNE JACKSON testified she is a trust manager at Absa Trust. She was however prior to this, a trust manager at Standard Trust from November 2011 to May 2015. She was on 16 February 2012, duly appointed as trustee of the undermentioned trust. In August 2015, she was replaced by Brigitte Kelsey.

Belinda van Dyk was the senior trust administrator also at the relevant bank, responsible for the administration of the trust, reporting directly to the witness. It was the witness and Mrs. De Hart, who were the trustees of the trust. Mr. Marius de Hart, also a son of the deceased, was once also a trustee, but he resigned in 2010.

She confirmed the lease agreement which had expired on 31 August 2013. On request of the defendant, a draft lease agreement was prepared and sent to the defendant for consideration. The proposed rental had been discussed with Mrs. De Hart and agreed by her.

A meeting on 4 September 2013 was then arranged, if her memory serves her well, also on request of the defendant. He indicated that he wanted to meet with them to discuss the farm itself and the problems that he was experiencing on the farm.

The meeting, and the only, was indeed held on the said date at Standard Bank in Cape Town. She herself, Van Dyk and the defendant attended. Mrs. De Hart was also invited to the meeting, but for personal reasons she indicated that she would not be present.

The witness was required to have the draft rental agreement signed, and if it was not concluded, she needed to report back to Mrs. De Hart. She was very anxious that the new contract be concluded, because the rental income, to her knowledge, was her only source of income.

At the meeting on 4 September 2013, the defendant shared concerns that he had with regard to the farm and the levels of the boreholes. He was also not prepared to sign the draft lease agreement, stating that because of the water problems, the proposed rental amount, was not feasible. He did not indicate what amount he was prepared to pay, but indicated that he would get an expert to provide the trustees with a report with regard to the water problem.

She denied, as pleaded by defendant, that they on this meeting, agreed and accepted that the farm was not suitable for rental, because it was no longer financially viable to farm there without sufficient water. The issue with regard to the water, was yet to be investigated and confirmed.

She also denied that they had agreed and accepted that a market related rental then therefor could not be determined by the trustees.

She denied that the trustees had accepted on this meeting that it was the responsibility of the trust to solve the water problems at the cost of the trust, because they were to confirm firstly whether there was a water crisis and secondly, whether it was a maintenance or a capital issue.

She also denied that the parties had agreed and accepted that the defendant could remain on the farm, without paying any remuneration, until such time that the trust had resolved the water crisis. No such agreement had been concluded.

They had a responsibility to the income beneficiary. She denied that it was agreed by her, that the trustees would, for the purpose of addressing the water problem, appoint a geologist with water knowledge, to provide an expert report with regard to the water problem and possible solutions for it. It was the defendant who volunteered to get an expert to provide a report to the trustees. Once this report from Marais was obtained and received from the defendant, the trustees concluded that it was unsatisfactory. After this meeting, during September or October 2013, the University of the Free State was identified and Professor Van Tonder and Dr. Van der Merwe indicated that they would be able to assist in investigating what the nature of the water problem was.

After the meeting on 4 September, she reported back to Mrs. De Hart, that the defendant indicated that there was problems with water on the farm and also that he refused to sign the rental agreement as it stood. She was distraught, because her only income then was that of the trust and worried as to how she was going to make ends meet without the income.

On 9 September 2013, after the meeting and after she had reported back to Mrs. De Hart, she despatched an e-mail to Mr. Ferdinand Myburgh in their legal department. She sought advice on how to proceed with contentious lease agreement. She also explained the water problems on the farm and stated that the co-trustee (Mrs. De Hart) is adamant that the trust should not be responsible for funding boreholes and that the defendant vacate the premises immediately.

On 13 September 2013 an e-mail was written by Van Dyk to the defendant and copied to the witness, in which it was proposed that he pay rental to the trust as a sign of good faith that he indeed wishes to continue with the rental of the farm. It was suggested that these funds be held in a separate sub-account which will earn interest, and should it be that the trust will indeed pay for the boring of new boreholes, they will refund the defendant. Mrs. De Hart had on the interim, also sought legal advice with regard to her not being paid an income from the trust, and after receiving correspondence from her attorney, this proposal was then made.

The proposal was that the defendant would do the drilling of the boreholes. The refunding would have come from the rental income that was paid, and not from the capital of the trust. This, only in the event of the trust being satisfied that it was in fact a capital expenditure, rather than a maintenance item, and subject to what the trustees might have decided in this regard.

No response was received from the defendant to this e-mail. On 23 October 2013, Van Dyk wrote another e-mail to the defendant and copied it also to the witness, stating that the trustees have met and in order to make a decision with regard to the boreholes, they will require the services of

a professional who requires some information, pertaining to, inter alia, information about the boreholes and a maintenance record, because the defendant was, according to the lease agreement, responsible for the maintenance of the boreholes, requesting the assistance of the defendant in this regard. The defendant did initially not reply to this request. Then on 5 November 2013, he did provide information, but it was insufficient for the expert to use. She then on 17 March 2014, wrote a letter to the defendant, in which she conveyed the decision of the trustees (herself and Mrs. De Hart) that they are going to charge occupational rent, as he was not prepared to sign the lease agreement.

Further correspondence took place. The defendant was invited to make proposals as to what rental he would be prepared to pay. He was also invited to contact the specialist (Van der Merwe) to assist with the said information. His response was that he urgently wanted to know when the trustees are going to obtain “people to investigate the boreholes”.

The defendant continued to occupy the farm, without paying any money or making any proposal as to what he would be prepared to pay. Despite the said numerous correspondence, including the e-mail exchange in March 2014, the defendant never therein raised the agreement he now alleges in his case and as pleaded, or alleged that he would not pay any rental.

She confirmed that there were before the meeting on 4 September 2013, much, being more than once, correspondence between her, Van Dyk and the defendant regarding the borehole issue and the water problem on the farm.

She also, during cross - examination by counsel for the defendant, agreed that her authority from Mrs. De Hart, was limited only to getting the new lease agreement signed by defendant on the meeting on 4 September 2013.

12.3 MATTHYS ROSSOUW BEUKES testified that he is a registered professional valuer with the South African Council for the Property Valuers’ Profession since

2001. He also serves on their national executive. He stated his qualification and extensive experience in the valuation of farms and agricultural properties.

He was instructed by Standard Bank Trust to perform a market value and market valuation report in respect of Middelwater.

He inspected the said farm on 10 October 2017, in the presence of the defendant. The defendant showed him around. He inspected the buildings and then proceeded to inspect the veld and the various water points. He found and stated in his report that the farm has a considerable frontage on the Orange River. The extent of the farm, and he used the title deed of it, was 5842.5259 hectares.

The standard carrying capacity of the farm per hectare where water is available, is 35 hectares per large stock unit (l.s.u), which is a cow. It is about 6 hectares per small stock unit (s.s.u), like a sheep or a goat. The defendant informed him that there were at the time of the investigation, only 65 ewes and 18 cows on the farm, due to the water scarcity. Converted to sheep, 173 sheep.

The area normally receives 200 to 400 millimetres of rain per annum. Most rainfall during summer. The last 2 years had lower averages. The farm has 10 boreholes. All equipped with windmills. Of the 10 boreholes, 2 (Tierkloof and Springbokkamp) gave strong water, 1 gave average water, 5 gave poor quantity water, insufficient for livestock purposes and 2 were dry. In addition, there is also a borehole at the house, only used for human consumption. There had been much speculation about why boreholes in the area dried up and the debate continues. Some neighbouring farms also experienced similar water problems. Nobody knows why? Defendant's opinion in this regard is it is because of irrigation from boreholes.

The farm is situated on the western bank of the Orange River but has no registered water entitlement from the river. Livestock are allowed to drink from the river but this is problematic due to drowning and livestock getting stuck in the clayish mud on the banks. The defendant has to transport water with a tank on a trailer from the 2 strong boreholes to distribute water over the farm. This is a very daunting and time consuming exercise that makes farming on this farm very time consuming and difficult. The 2 strong boreholes, quite far from the homestead and access routes to them are difficult over rocky and uneven areas. The property is virtually impossible to sell and a sale is only likely at a heavily discounted price. The motivation for this being that it is very difficult to sell a farm that does not have water to sustain efficient farming on it. One cannot have livestock on a farm if there is no water. The amount of livestock is directly related to the amount of water available.

There is a portion of the farm that has water and is usable and there is a portion where it is very far away and that is not usable. If only part of the farm has got water, the price of it will be reduced.

Wells and ponds are dried up. Water infrastructure deteriorates very quickly when dry or not in use. The defendant is trying to maintain it as far as possible. The farm has no electricity. There is also an issue with vermin, especially jackal which relates to large losses of sheep. The kudu population on the farm has dwindled due to the lack of water (as informed by the defendant). The farm has invasive species, like Prosopis trees, especially around the boreholes, as well as Swarthaak, which is a problem to sheep. There are large numbers of wild cats. In general, the area has low carrying capacity.

The farm is to be completely redeveloped and new water sources will have to be found to turn it into an efficient and fully functioning sheep farm, which will have a large capital outlay for the potential owner.

He was also requested to determine the reasonable fair market rental value of the farm in its present condition for the periods:

1 September 2013 to 31 August 2014;

1 September 2014 to 31 August 2015;

1 September 2015 to 31 August 2016.

Carrying capacity and the type of vegetation will have an influence on it and it is normally determined on a price per head per small stock unit. That is the general use in the industry, alternatively, a price per hectare is used, which is going to come to the same. Then from that, a determination must be made of the amount animals one could keep according to the carrying capacity and usable portion. In this case it was 35 hectares per l.s.u. and 6 hectares per s.s.u. That is the carrying capacity per usable hectare. There were 6 usable camps, out of a total of 23 camps. Only 28,04% of the farm is usable, which is an area of 1638 hectares of the total hectarage of 5843. To determine how many small stock one would have on 1638 hectares, that should be divided by 6, representing 273 sheep.

The rental value per hectare in the relevant area ranged between R280.00 to R400.00 per head per annum. He applied an average of R350.00 per head per annum, taking into account the water difficulties, which indicates that the reasonable rental for the farm, would be R95 600.00 per annum.

He also pointed out that the rental charged in terms of the original lease agreement during 2008, was a discounted rental, and if it was applied, it would mean that the rental for the period as at 1 September 2017 (he inspected the property in October 2017) amounted to R200.00 per head per annum, which then was the market related rate and which would equate then to a total of R54 600.00 per annum. The average between the 2 parameters, was then calculated at plus minus R75 000.00 per annum, which he suggested would be a reasonable rental amount. This was also the amount that he used in his table in his report. He calculated it backwards for the periods requested. He applied the Consumer Price Index (CPI) to determine the rentals for the relevant periods, excluding VAT.

He accordingly calculated the reasonable market rental for the 3 periods as follows:

1. 1 September 2013 to 31 August 2014: R59 864.00
2. 1 September 2014 to 31 August 2015: R63 719.00
3. 1 September 2015 to 31 August 2016: R66 780.00

If he had used the rate, based on R350.00 per head, then the amount would have been much higher, because he would have used the amount of R95 600.00 and worked backwards from there.

He also indicated that if the market related rental is calculated on the basis of rand per hectare, then the rental per hectare per annum for the 3 periods would be as follows:

1. 1 September 2013 to 31 August 2014: R36.54 per hectare
2. 1 September 2014 to 31 August 2015: R38.94 per hectare
3. 1 September 2015 to 31 August 2016: R40.76 per hectare

The witness also considered the report by Mr. Johan van der Walt, as filed by the defendant and who testified on behalf of him also. Other than the witness, who determined the usable hectares as 1630 hectares, he had calculated the usable hectares as being 1560 hectares. According to the

witness, Van der Walt was wrong in stating that Springbokkamp is dry. If the 360 hectares then of Springbokkamp are added to the 1560 hectares, then the total would have been 1920 hectares, with a carrying capacity of 320 sheep and the rental would increase to the amounts as stated by the witness.

Van der Walt had also considered that the reasonable rental for the 3 periods, calculated on the basis of rand per hectare, would be for 2014, R36.00 per hectare; R38.00 per hectare for 2015 and R40.00 per hectare for 2016, which was not very different from the witness's determination in this regard.

This concluded the case of the plaintiffs.

[13] The defendant presented the evidence of 2 witnesses in support of his defence and counterclaim:

13.1 The defendant himself, CHARL DE HART, confirmed the lease agreement. The water problem had already commenced prior to the death of defendant's father (deceased)

and the conclusion of the agreement, while the defendant had kept an eye over the farm because of his father's ill health at the time. On the date of the signing of the lease agreement (6 August 2008), he did mention that 2 boreholes (Waterkloof and Harderant) have serious water availability. He asked his father to bore 2 new boreholes, whereby his father had told him that he will repair this, once he has sold his house in Witsand.

He also confirmed the contents of the deceased's will and his awareness thereof. The terms, inter alia being that the second plaintiff was to be a trustee of the trust and that in the event of a difference of opinion between her and the first trustee, her opinion would prevail.

The deceased had died on 1 September 2008. In a letter dated 16 February 2009, addressed to the executor's representative, Anika Ungerer, the witness again referred to the undertaking by the deceased to attend to the said 2 problematic boreholes. He also in this letter demanded that new boreholes be drilled to replace the dry ones, alternatively that the rent should be adjusted downwards. He met her in Cape Town to discuss this with her. She then on 24 March 2009 replied in a letter addressed to defendant that:

"Die trust sal met hierdie versoek moet handel wanneer die eiendom aan haar oorgedra is".

On 28 April 2009, he again wrote a letter to the said Ungerer and the trustees, stating again the problem of the 2 dry boreholes and that he had suffered damages, due to the fact that 6 camps cannot be utilized. He requested that steps should be taken to correct the situation.

On 24 August 2010, the executor's representative again wrote a letter to the defendant, confirming that any discussion about the said boreholes, had to be done with the trustees.

In 2011, he cannot remember the month, he flew down to Cape Town to meet the trustees. Only Belinda van Dyk then had met him and he conveyed to her that a further 2 boreholes have dried up. She informed him that they will look into it and return to him with an answer.

He requested the presence of the second plaintiff at this meeting, because he wanted the complete trust to be present, but she however never attended. The farm was at this stage transferred to the trust and the executors out of the picture.

In February/March 2013, he again flew down to Cape Town to meet with Beverley Jackson and Belinda van Dyk, as the lease agreement stipulates that 6 months' notice should be given for renewal. It was at this meeting that he conveyed to them that a further 2 boreholes also had given in and that there are 6 dry boreholes. He also informed them that he had to reduce his livestock with 50% due to the water problem on the farm. He again addressed these aspects in a letter, dated 18 July 2013, to Belinda van Dyk, but made no reference to this meeting in it.

He also explained in this letter what it would cost to bore new boreholes (R200 000.00) and that he has to transport water at high costs to prevent dams from drying out. If that happens, a dam will crack and deteriorate and it will cost an enormous amount of money to replace it.

The transport of water, a slow and exhausting process.

Then on initiation of Jackson, the defendant, Jackson and Van Dyk met on 4 September 2013 in Cape Town. The second plaintiff was not present and the defendant aware of the fact that only 1 of the 2 trustees are present at this meeting. At the meeting, Jackson had handed the draft lease to the defendant for perusal and the signing thereof. He had read it, but indicated that he is not going to sign it because the water problem was not yet addressed and taken into account in the agreement. He also indicated that they can take back the farm. Jackson then had immediately responded by telling him:

"...ons as trust sal onderneem om die waterkrisis vir u uit te sorteer op die trust se koste. Ons vra u sal u vir ons aanbly op die plaas en vir ons kyk na die goed asseblief".

He had agreed to this. She also said:

"...daar is geen verdere huur ter sprake nie.... Gee ons kans en tyd ons wil 'n deskundige person inkry om ons te help met die water probleem en – krisis op die plaas. As ons die goed uitgesorteer het dan het u weer die eerste reg om te besluit of u die plaas wil huur of nie".

He also accepted this.

He testified that he did receive the letter dated 13 September 2013, which proposed to him that he pay the rent as a "show of good faith", the funds to be held in a separate sub-account which will earn interest. This in contradiction with what had been agreed at the meeting on 4 September. He had not responded to this letter. He did not see the need to do so, because he and

Jackson could possibly have had a telephonic conversation about this. It also transpired that in subsequent letters, this agreement was not mentioned. It was actually first mentioned, 3 years later, in defendant's opposing affidavit to summary judgement.

He later during cross-examination, conceded that the reference in paragraph 10.6 of the counterclaim was incorrect, because there had been no mention of the Free State University at the meeting. He also conceded that there was no reference in the meeting to the issue of “lewensvatbaarheid” as referred to in paragraph 10.1 of the counterclaim. The content of paragraph 10.4 thereof, was also not agreed.

On 23 October 2013 Van Dyk requested information for their specialist regarding the boreholes. The defendant on 5 November 2013 provided the trustees with all the information he had, after which the trustees did not show any kind of reaction.

During 2014, the defendant was unsure of the date, Jackson had informed him that they instructed a professor from the Free State University to inspect the water situation on the farm. They arranged a date for this at end November 2014 and a week beforehand, the defendant went to the farm to extract the pipes from the boreholes.

During early 2015, the defendant requested either Van Dyk or Jackson, to see the report of the professor. He was however informed that the trustees had paid for it and that he is not entitled to see it.

The defendant also gave detailed explanations of the problems and the effects thereof, caused by vermin. Swarthaak and Prosopis are also a big problem. Because of this, only 60% of the camps with water can be used. Animals cannot drink at the river, they got stuck in the mud. There is no electricity on the farm. Water therefor cannot be pumped out of the river. He explained in detail which boreholes had run dry and which ones are giving strong water. An area of 1560 hectares on the farm can be utilized.

He also testified that the boreholes were improvements on the farm and that they became problematic because there was insufficient underground water. It is not a matter of repair or maintenance of the existing boreholes, but rather the drilling of new boreholes at other positions.

He had cleaned 2 boreholes, Waterkloof and Harderant, in an attempt to improve the water flow, but it did not yield positive results. He did not drill new boreholes himself, because he is of the opinion that it is not his responsibility. He did not have the money to drill new boreholes. He did not ask the trustees’ permission to drill boreholes himself. He accepted that the trustees had duties to himself as capital beneficiary, as well as to the other capital beneficiaries.

When asked during cross-examination that if trust capital is spent on boreholes and improvements, nothing will be left of the trust capital for the other capital beneficiaries, he answered that it is speculation as one cannot say what amount will be spent and whether all the money will be spent. If repairs are not done, the farm will not generate an income.

13.2 WILLEM ADRIAAN VAN DER WALT testified he is a professional valuer for more than 20 years. He is also an agricultural economist. He stated his qualifications, which includes a MBA Degree, obtained in 1990. He also compiled a report on the rent of the said farm (page 106 of the trial bundle). He did since 1985, financial planning, analysis of farming businesses with the

purpose to assess the feasibility of a farm enterprise, the profit of a business's role and return on investment. He was employed at Senwes Co-op in 1995, but started his own business in 2000. He is a consultant as well for several farms and institutions in the agricultural economics field.

He specializes in the valuations of farms in the Free State and Northern Cape. He is quite familiar with the area around Prieska. He himself farms on a part time basis in the neighbouring district.

He described the carrying capacity of the farm as being 30 to 35 l.s.u. per hectare. The area has a "dry extreme climate".

The camps on the farm were fenced with jackal proof. Predators and vermin indeed a huge problem in the area. Although the farm borders the Orange River, animals cannot drink at the river because of the risk of losing them.

He stated that it is only possible to farm on 1560 hectares on the farm. Which is not an economical unit. An economical unit will be 5000 to 10 000 hectares. This unit has too high fixed costs. The defendant has supplied the financial figures which are realistic.

He confirmed that his report regarding the water status of Springbok camp is not correct. He had noted that Springbok is "Dry, no water", while it actually has water. He confused this camp with another, but he could not state with which camp.

At the time of his investigation, he visited each camp on the farm. He did not have any source documents in order to confirm how many animals were on the farm for the relevant periods. He only accepted the defendant's figures in this regard. Regarding the income and expenditures, he also did not verify the financial figures with statements. Only relying on the defendant for information.

Market-related rent for 2014 was R36.00 per hectare. In 2015 it was R38.00 per hectare and in 2016, R40.00 per hectare. The market-related rent then for 2016 for 1560 hectares, being R62 400.00. According to the financial figures, there is a profit of R16 788.00. If rent of R62 400.00 is to be paid, there will be a loss of plus minus R50 000.00.

This concluded the case for the defendant.

[14] The totality indicates that the issue in dispute is whether such agreement was concluded between the parties on 4 September 2013, as alleged by the defendant. The defendant bears therefor the onus of proving such agreement on a balance of probabilities.

[15] The second plaintiff, Mrs. De Hart, and keeping in mind her advanced age at the time of her testimony and conspicuous hearing problem, as well as the long time lapse between the events and her testimony, testified in a satisfactory and forthright manner. There were no material contradictions in her evidence. Except to be noted, her evidence regarding the aspect whether she was informed about the conclusion of the said so-called verbal agreement concluded on 4 September 2013, not to be seen as a discrepancy in the real sense, which would cast possible doubt on her credibility as a witness.

[16] She clearly stated during cross examination by counsel for defendant:

“...Geensins. Geensins gepraat van enige tussenoreenkoms nie. Nooit nie. Daar was nooit sprake van dit nie”.

And also:

“Hulle het net gesê dat hy weier om die kontrak te teken omdat daar vier waters is...”

(page 33 line 20 and page 34 line 1 of the typed proceedings). She later testified when counsel for defendant asked her:

“...Die een ding wat gerapporteer is is dat die - daar was ‘n mondelingse ooreenkoms dat die verweerder op die plaas kan aanbly tot die water uitgesorteer is”

as follows:

“Dit is wat sy aan my gerapporteer het ja, maar dit is nie te sê dat ek daarmee saamgestem het op daardie oomblik nie”

(page 40 line 20 and page 41 line 1).

[17] She then clearly stated in no uncertain terms on page 42 line 25 and on page 43 line 1:

“Maar hulle het sover dat ek dit weet het hulle nie so ooreenkoms aangegaan nie. Dit is nie aan my gerapporteer dat hulle toestemming gegee het nie, want hulle...”.

And line 18 also on page 43:

“Sy het nooit vir my Edelaagbare gesê dat sy gesê het dat hy kan op die plaas aanbly”.

And page 45 line 1:

“...maar ek weet net vir ‘n feit sy het nie ‘n mondelingse ooreenkoms met Mnr. De Hart aangegaan nie, want dan sou sy dit aan my gerapporteer het”.

And line 7:

“Die gesprek het baie – het gegaan oor die watertekort. Die rede waarom hy nie wil die kontrak teken nie”.

[18] Mrs. De Hart convinced the court as an honest witness upon whose testimony the court can rely.

[19] Jackson, likewise, impressed the court as an honest witness. Despite lengthy cross examination by counsel for defendant, she throughout testified in a clear and forthright manner, with no contradictions or any improbabilities in her evidence. She had no reason to be dishonest with regard to the meeting of 4 September

2013. At the time that she gave her testimony, she was not even employed any more at Standard Trust, but at Absa Bank. This court has no hesitation whatsoever in accepting her evidence.

[20] Remarkable, there were some resemblances and consistency in the versions of these 2 witnesses regarding the reporting back, after the meeting on 4 September 2013 and corroboration as to what Jackson's authority was at this meeting.

[21] Mr. Beukes, with regard to his qualification and extensive experience, is indeed an expert in his field. It is trite that an expert witness is required to assist the court and not to usurp the function of the court. They are required to lay a factual basis for their conclusions and to explain their reasoning to the court. In *R v Jacobs* 1940 TPD 142 at 14-7 Ramsbottom J said:

"Expert witnesses are witnesses who are allowed to speak as to their opinion, but they are not the judges of fact in relation to which they express an opinion, the court...is the judge of fact...In cases of this sort it is of the greatest importance that the value of the opinion should be capable of being tested, and unless the expert witness states the grounds upon which he bases his opinion it is not possible to test its correctness, so as to form a proper judgment upon it".

Mr. Beukes clearly satisfied this requirement. He spoke in detail to the facts upon which his opinion and conclusion are based with regard to the fair market rental value of the farm.

[22] The defendant, on the other hand, did not convince the court as a trustworthy and reliable witness. He contradicted himself and when confronted during cross-examination, he was evasive. The record speaks for itself. He changed his version and could not support all the terms of the agreement as pleaded. He could not explain why he did not react to or deal with correspondence received by him where it would have been reasonably expected of him to do so.

[23] His version with regard to the agreement concluded on 4 September 2013, is highly improbable. It is unthinkable that Jackson would have attended the meeting, authorised by Mrs. De Hart to get the new lease agreement signed, submitted it to the defendant to be signed by him, and immediately after he had indicated that he would not sign because of the water problem and would give possession of the farm back to the trustees, just then immediately volunteered the so-called agreement on the terms alleged by the defendant. That where she had no authority to do so from her co-trustee, Mrs. De Hart and without the defendant even having suggested such an agreement. It is improbable that Jackson, as trustee, would bind herself to such an agreement without the trust having conducted any investigation to at least verify and confirm the existence of the water problem, what causes it, possible manners of resolving it, and very important, the costs thereof. Very improbable that Jackson would have volunteered such an agreement with the effect that defendant would be allowed to stay on the farm for no payment at all, whereas this situation could

continue indefinitely, leaving the other trustee, Mrs. De Hart, whose only income was the rent, and the trust, without any further income.

[24] Improbable, after the conclusion of the agreement on 4 September 2013 as alleged by the defendant, he never, and particularly in response to the letter from the trustees dated 13 September 2013, made any reference as reasonably expected, to the agreement and state but he was therefore not obliged to pay any rental as agreed. In *Benefit Cycle Works v Atmore* 1927 WLD 524 (as quoted by counsel for the plaintiffs) it was stated as follows at page 530:

“...but where as in this case, negotiations had taken place immediately preceding the writing of the letter, and the writer then places on record his version of what had taken place during the negotiations, and there is no reply by the other side, then the court is bound to attach the greatest importance to that fact”.

“Now there are cases, business and mercantile cases, in which the courts have taken notice that in the ordinary course of business if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did not so agree”.

[25] Defendant's failure to have raised the agreement in response to the letter from the trustees, dated 13 September 2013, therefore justifies the inference that no such agreement was concluded.

[26] Mr. Van der Walt has clearly impressive qualifications and extensive experience as a valuer and an agricultural economist, but his report, as admitted by himself, contains certain mistakes and shortcomings. However, his calculations of what the reasonable rental would be, calculated on the basis of rand per hectare, were not very different than that of Mr. Beukes in this regard.

[27] Having regard to the totality of the evidence and taking into account the probabilities of this matter, the court finds that the version of the plaintiffs is far more probable than that placed before the court by the defendant. His evidence is therefore rejected as far as it differs from that of the plaintiffs. He has not acquitted himself of the onus to prove that the agreement as alleged by him, was in fact concluded.

[28] The defendant, on the pleadings, has pleaded that Jackson had been authorized by the second plaintiff to conclude the said agreement, in the terms alleged by the defendant, and that the trustees had accordingly acted jointly and together in the conclusion of the agreement and that it is therefore valid.

[29] In *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 on page 493 para [16] it was stated as follows:

“...Trustees have to act jointly unless the trust deed provides otherwise and trust deeds seldom do. The principle works well in the traditional trust setting where trustees hold property on behalf of beneficiaries...”

and on page 494 para [23]:

“...the fact that trustees have to act jointly does not mean that the ordinary principles of the law of agency do not apply. The trustees may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but whether a particular trustee has the ostensible authority to act on behalf of the other trustees is a matter of fact and not of law”.

[30] The undisputed facts clearly indicated that Mrs. De Hart was not part of the meeting held on 4 September 2013. If accepted for one moment that Jackson, did purport to defendant to conclude the said agreement it would have been invalid. The accepted evidence clearly indicated that Mrs. De Hart was not a party to this agreement and did not authorize Jackson to conclude such an agreement or to act on her behalf in this regard. The trust deed in this case, as contained in the will, does not provide that the trustees do not have to act jointly. The defendant had actual knowledge of the trust deed as contained in the will. They therefor had to act jointly, which was not the case. The agreement, if found that Jackson did purport to conclude such, invalid and not binding on the trust.

[31] The defendant has also pleaded estoppel on the pleadings, based on a representation by Jackson. He has not pleaded any representation

having been made by Mrs. De Hart.

[32] The essential elements of estoppel in the field of agency are:

32.1 A representation made in words or by conduct, including silence or inaction;

32.2 The representation must be made by the principal to the person who raises estoppel (the representee);

32.3 The principal must reasonably have expected that his/her conduct may mislead the representee; and

32.4 The representee must reasonably have acted on the representation to his/her own prejudice.

[33] The totality indicated that Mrs. De Hart made no representation to the defendant that Jackson was authorised to conclude such agreement on her behalf. No evidence was presented by the defendant that either Jackson or Mrs. De Hart had made any representation to the defendant that Jackson was authorised to conclude such agreement without Mrs. De Hart or that Jackson was authorised by Mrs. De Hart to bind her as trustee in such agreement. There is also no evidence that the defendant, as a consequence of the alleged representation, acted thereon to his prejudice.

[34] The requirements for estoppel clearly lacking. It is to be noted that estoppel and ostensible or apparent authority are not to be conflated. Ostensible or apparent authority is the authority of an agent as it appears to others, which underscores the distinction

between it and estoppel. Ostensible authority may not have been conferred by the principal, but it is still authority of the agent as it appears to others. Estoppel is no authority at all. Estoppel and apparent authority have different elements, but one common to both, i.e. a representation which may take the form of words or conduct.

[35] Defendant however had also not established that Jackson had ostensible authority when they had according to him, concluded the agreement in question. There is no evidence that either Mrs. De Hart or Jackson has created the impression that Jackson had the power to act on behalf of Mrs. De Hart and the trust.

[36] The defendant has also pleaded that the will had created a fideicommissum, with the trustees in the position of a fiduciary and the defendant as fideicommissary and that the trustees owed as a fiduciary duty to the defendant to maintain the farm at the cost of the trust.

[37] It is incorrect to identify fideicommissum with trust or equate fiduciary with trust. A trust, as agreed by counsel for defendant, is not a fideicommissum. There is a clear distinction to be drawn between a trust and a fideicommissum, fully explained in the decision of *Braun v Blann & Botha N.N.O. & Another* [1984] ZASCA 19; 1984

(2) SA 850 (A).

[38] It was also contended as part of the defendant's case, that the trustees had a duty to maintain the trust assets, which duty included the obligation to drill new boreholes.

[39] It was an express term of the lease that the defendant had the obligation to maintain the improvements on the farm, including

windmills, pumps and the like. It was contended that boreholes have run dry over time. The specific reason, unknown. Not that the water problem was caused by any possible wear and tear, defect or failure to maintain the boreholes. The drilling of new boreholes in different positions, stated as a possible solution.

[40] Windmills, pumps, boreholes and the like are certainly improvements to the farm which have to be maintained. Their replacements

amount to new and further improvements and not maintenance of the existing ones. In *Flemming v Kommissaris van Binnelandse Inkomste* [1994] ZASCA 142; 1995 (1) SA 574 (A) at 584 para D-E it was said as follows:

"Volgens die aangevoerde getuienis moet dit aanvaar word, omdat, die teendeel nie bewys is nie, dat die beskikbaarheid van water uit die eerste boorgat verminder het bloot as gevolg van die feit dat daar ondergronds op daardie plek minder water beskikbaar was. Op daardie grondslag kan die nuwe boorgat nie beskou word as 'n herstel deur vervanging van die eerste een nie, maar was dit 'n aanvulling van die plaas se watervoorraad".

- [41] Mr. Beukes on behalf of the plaintiffs, testified that should new boreholes be drilled and water be found, it would increase the market value of the farm as well as its income capacity.
- [42] However, some of the boreholes have already dried up prior to the conclusion of the lease agreement in 2008 and the establishment of the trust, the mentioned obligations part of it, which agreement has expired, with no new lease in place. It therefore cannot be found that the trustees had an obligation to effect new improvements, such as the drilling of new boreholes, which will amount to new improvements and not repairs or maintenance. There was accordingly no duty on the trustees to effect these improvements to the farm.
- [43] The defendant did not give vacant possession of the farm on termination of the lease agreement. Instead he continued his farming activities thereon without any remuneration to the trust. He clearly breached a contractual obligation and as a result thereof, the plaintiffs had suffered damages.
- [44] The relief sought by him are damages for holding over, in the amount equivalent to the amount payable for the last period of the lease which expired on 1 September 2013. The amounts as stated; alternatively, damages based upon the market rental value of the farm from 1 September 2013 onwards.
- [45] Plaintiffs did prove the market rental value of the farm for the relevant period. Their expert witness established that the fair and reasonable market rental for the 3 years in question, amounts to R59 864.19; R63719.20 and R66 779.95, excluding VAT, per annum respectively. The total amount being R190 363.34. The calculation based on 1630 usable hectares and head of stock per hectare. It was also established, through the evidence of Mr. Beukes, that although it is difficult to farm on this farm, it is leasable and it has a carrying capacity of stock. It is also not in dispute that the defendant grazed stock on the farm during the periods as alleged.
- [46] In the light that there was no agreement concluded on 4 September 2013 as alleged by defendant, his occupation and farming activities of/on the farm is unlawful and without any approval by the plaintiffs. The plaintiffs are therefore entitled to ejectment of the defendant in respect of only his commercial farming activities (excluding the worker/s who live and work on the farm) on the farm.

Order

[46] In the result the following order is made:

1. Payment of damages representing the market related value of the farm as follows:
 - 1.1 For the period 1 September 2013 to 31 August 2014: R59 864.00;
 - 1.2 For the period 1 September 2014 to 31 August 2015: R63 719.00;
 - 1.3 1 September 2015 to 31 August 2016: R66 779.95.

The total amount: R190 362,95 (excluding VAT).

2. Ejectment of the defendant in respect of only his farming activities (not including the workers) on the farm Middelwater.
3. The defendant's claim in reconvention is dismissed.
4. The defendant to pay the costs.

S.G. MEINTJES, AJ

On behalf of plaintiffs: Adv.D.W Gess

Instructed by:

SYMINGTON & DE KOK

On behalf of defendant: Adv.M.D.J.Steenkamp

Instructed by:

SPANGENBERG ZIETSMAN & BLOEM

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