

SOUTH AFRICA / JUDGMENT

Kometsi N.O and Others v Kopano Uitkyk Farming Enterprise (Pty) Ltd and Others (223/2023) [2023] ZAFSHC 290 (20 July 2023)

[2023] ZAFSHC 290

COURT

Free State High Court, Bloemfontein

BEFORE

Cronjé

CASE / FILE NUMBER

223/2023

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: 223/2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between: MACHABEDI DINAH KOMETSI N.O. First Applicant [In her capacity as Trustee of the KOPANO UITKYK NO. 2 TRUST] PHATEDI JOHANNES MOKONE N.O. Second Applicant [In his capacity as Trustee of the KOPANO UITKYK NO. 2 TRUST] PHAKELA BEN MAPHAKISA N.O. Third Applicant [In his capacity as Trustee of the KOPANO UITKYK NO. 2 TRUST] NAMEDI FRANS MELATO N.O. Fourth Applicant [In his capacity as Trustee of the KOPANO UITKYK NO. 2 TRUST] TEBELLO JOHANNES MOTSOANI N.O. Fifth Applicant [In his capacity as Trustee of the KOPANO UITKYK NO. 2 TRUST] THE MINISTER OF AGRICULTURE, LAND SIXTH APPLICANT AND RURAL DEVELOPMENT THE CHIEF DIRECTOR / ACTING CHIEF SEVENTH APPLICANT DIRECTOR IN THE DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT THE NATIONAL GOVERNMENT OF THE EIGHTH APPLICANT REPUBLIC OF SOUTH AFRICA [Through its Department of Agriculture, Land Reform and Rural Development, previously known as the Department of Rural Development and Land Reform] MEMBER OF THE EXECUTIVE COUNCIL ("MEC") NINTH APPLICANT [For the Free State Department of Agriculture and Rural Development] and KOPANO UITKYK FARMING ENTERPRISE (PTY) LTD First

Respondent [Registration number: 201[...] LOUIS HENDRIK CLAASSEN (SNR) N.O. Second Respondent [In his capacity as Trustee of the LOUIS CLAASSEN FAMILY TRUST] STEFAN HENDRIK OLIVIER N.O. Third Respondent [In his capacity as Trustee of the LOUIS CLAASSEN FAMILY TRUST] LOUIS HENDRIK CLAASSEN (JNR) N.O. Fourth Respondent [In his capacity as Trustee of the LOUIS CLAASSEN FAMILY TRUST] DANIEL KOCK CLAASSEN N.O. Fifth Respondent [In his capacity as Trustee of the LOUIS CLAASSEN FAMILY TRUST]

CORAM: CRONJÉ, AJ

HEARD ON: 15 JUNE 2023

DELIVERED ON: 20 JULY 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h50 on 20 July 2023.

I

INTRODUCTION

- [1] The Applicants brought a common law[1] application for the eviction of the Respondents from eighteen (18) farms (the “properties”) of which the National Government of the Republic of South Africa (“the Government”), through the Department of Land, Agriculture and Rural Development (the Department) is the owner.
- [2] The Kopano Uitkyk Farming Enterprise (Pty) Ltd (“Kopano Enterprise”) and the Second to Fifth Respondents (the “LCF Trust”) oppose the application.
- [3] At commencement of the proceedings, I enquired from the legal representatives of the parties whether, given the fact that there are presently four other cases pending in respect of the properties and the operations thereon, this application should be heard and the orders granted. This is especially so as the Respondents raised four points in limine.
- [4] I specifically asked the Applicants' counsels whether the matter does not also raise factual disputes and whether the matter should not be referred for oral evidence and that the opportune time to make the election is at commencement of the proceedings.
- [5] The counsels for the Applicants were of the view that there is no impediment and that I can safely dispose of the matter on the papers. The Respondents' counsel argued the contrary.
- [6] It was only after all arguments were advanced that the First to Fifth Applicants' counsel argued that I have a discretion to order referral. I will deal with the basis on which I may exercise my discretion at the end of the judgement.

II

BACKGROUND

- [7] It is common cause that the Government bought the properties from the LH Claassens Family Trust, the Louis Claassen Family Trust and Expectra 322 (Pty) Ltd for a purchase price of R89 000 000.00.[2]
- [8] The Department, on behalf of the Government, entered into a long-term lease with the Kopano Uitkyk No. 2 Trust ("Kopano 2") during November 2020.[3]
- [9] The initial period was for a period of thirty (30) years from commencement, 27 November 2020.
- [10] The rent payable to the Department is R323 638.23 per year, escalating at 6% per annum. Clause 10.1 of the lease agreement provides that Kopano 2 must retain control of the properties and the farming activities conducted on the property, as well as the controlling interest of any legal entity established for purpose of any Joint Venture arrangement between Kopano 2 and any other party.[4] The agreement also provides that Kopano 2 shall not be entitled, except with the prior written consent of the Government, to cede or assign any of the rights and obligations of Kopano 2 under the lease, sublet the farm in whole or in part, or give up possession of the property, or any part thereof, to any third party.[5] Kopano 2 was represented by the First Applicant at the conclusion of the agreement.
- [11] Subsequent to the conclusion of the sale agreement, the Department's National Land Allocation Control and Recapitalization Committee ("NLACR") made recommendations that the properties should be allocated to two (2) persons. One of the persons was, however, already a beneficiary under the Land Reform Program and the Department instructed Louis Claassen, who actively conducted the operations on the farms, to continue to maintain it in terms of Clause 14 of the purchase agreement.
- [12] During 2014, the Department held discussions with the LCF Trust about a proposed Joint Venture agreement between the LCF Trust and beneficiaries. It appears that Kopano Enterprise was already registered and it was intended that it will conduct trading activities on the properties provided it was converted into a Joint Venture wherein the LCF Trust will hold 40% of the shares and the beneficiaries 60% through Kopano 2.
- [13] On 5 March 2014, the Department informed Louis Claassen that the Ministerial Committee granted approval to the proposed Joint Venture subject to a 60/40 share arrangement and that the Department was still awaiting response from the legal unit in Pretoria.[6] On the next day, the LCF Trust sent a letter to the Department stating that the Trust is satisfied with the 60/40 share allocation

and will proceed to amend the company documentation, Trust Deeds, related agreements and documents wherein Kopano 2 and the LCF Trust will hold 60% and 40% respectively in Kopano Enterprise.[7]

- [14] In a letter dated 21 May 2014, Mr Alan Groves (who is a Trustee of the LCF Trust) sent a letter as Managing Director of Starplex 404 (Pty) Ltd wherein he informed the Department that Kopano 2 was registered on behalf of the workers and that the Department will issue a lease to Kopano 2. Kopano Enterprises will conduct the trading activities on the farms and Kopano 2 will hold 60% and LCF Trust 40% of the shares. Two (2) directors would be appointed by Kopano 2, one by the Department and one by the LCF Trust. Profits would be shared according to the shareholding.[8]
- [15] Eight (8) years later, on 1 February 2022, the Department dispatched a letter to Kopano Enterprise wherein it stated that it considered the relationship between Kopano 2 and Kopano Enterprise and came to the conclusion that the relationship is irreparable and that Kopano 2 wish to continue with farming operations independent of Kopano Enterprise.
- [16] On 25 March 2022, JC Uys Attorneys sent a letter to the Department on behalf of Kopano Enterprise, the LCF Trust and one Mr Lethoba. It is noted that summons was issued by Kopano 2 against their clients under case number 55/2022 and that Kopano Enterprise denies the Department's rights to cancel the agreement between the Department and the LCF Trust, which agreement was concluded for the benefit of Kopano Enterprise. Reliance is then placed on a partly written partly oral agreement, which the Respondents refer to as a stipulatio alteri (the "stipulatio"). The written part of the alleged stipulatio consists of an e-mail dated 5 March 2014, a letter dated 5 March 2014, and two e-mails on 21 May 2014.[9]
- [17] It states that the terms of the stipulatio were that the JV would have the right of use and enjoyment of the property; the JV would have shareholding of 49% by the LCF Trust and 51% by the beneficiaries chosen by the Department and the percentage shareholding was thereafter amended to be 60/40 in favour of the appointed beneficiaries. The duration of the right granted to the JV over the immovable properties would subsist for a duration of the lease granted to the beneficiaries chosen from time to time, but not less than five years.[10]
- [18] It continues to state that the benefit under the stipulatio is an interest in land in the form of a usufruct in favour of the JV and that the JV accepted the benefit of the stipulatio by conducting the farming enterprise. It gives an exposition of the business conducted on the properties and states that the

Department registered Kopano 2 during January 2015. It states that on 30 August 2017, Kopano 2 passed a unanimous resolution to enter as chosen beneficiary into the JV on the terms set out by the Department and the LCF Trust. According to it the JV paid the salaries of various beneficiaries pending the conclusion of the Lease Agreement between the Department and Kopano 2.

- [19] It alleges that the stipulatio was orally amended on or about 12 November 2020 where the Department was represented by Mr Modise, and the LCF Trust. I pause to state that the Government and the Department denies that Mr Modise has authority to bind them and this raises a factual dispute. It is alleged that: the duration of stipulatio was agreed on; it would allegedly subsist for the duration of the lease, but not less than thirty (30) years; the rights and responsibilities of the shareholders in the JV would be set out in a Shareholders

Agreement; the financial exposure of the LCF Trust towards the affairs of the JV be safeguarded by means of managerial rights; and the JV to be able to guarantee dividend payments to Kopano

2. This was an “amended stipulatio alteri”. The JV accepted the benefit of the amended stipulatio and has continued to conduct the farming operations. All the Trustees of Kopano 2 as well as the beneficiaries attended the meeting on 12 November 2020 and that they have knowledge of the amended stipulatio. Effect was given in the lease agreement to the amended stipulatio in terms of Clause 10.1.1 read with Clause 2.1.1, Clause 2.1.3 and Clause 2.1.13(a) – (h), (j) – (i), and (q) of the Lease Agreement. After entering into the lease agreement, Kopano 2 failed to enter into the Shareholder Agreement. It is furthermore stated that the benefit to the JV, being a usufruct, is a personal right that becomes a real right upon registration in terms of Section 102 of the Deeds Registries Act, 47 of 1937 (“Registries Act”) and that the JV is entitled, in terms of Section 65 of the Registries Act to have such right registered.

[20] During early 2021, an internal disagreement arose between Kopano 2 and that the First Applicant instituted an application for a declaratory order under case number 818/2021, which she later withdrew by agreement between the parties. It appears that: on 23 March 2021, the Department and Kopano 2 was requested not to interfere with the JV’s rights on the farm; on 20 April 2021 a meeting was held where further negotiations took place and the JV would continue with all farming activities; on 31 May 2021, a meeting was held where it was accepted, discussed and confirmed by all parties that the commercial farming enterprise, comprising of the Department’s farms and LCF Trust farm and cattle, is in peaceful and undisturbed possession of the JV; that on 24 August 2021, the Department confirmed its acceptance of the commercial farming enterprise, but that on 1 and 2 September 2021, Kometsi and Mokone proceeded to dispossess the JV of possession of the farm.

[21] Thereafter an application was brought under case number 4076/2021 by the LCF Trust, the JV and Lethoba to restore possession and to cease interference in the rights exercised by the JV and Lethoba. The order was granted.

[22] On 11 January 2022, Kometsi and Mokone issued summons under case number 55/2022.

[23] On 30 March 2022, the Department dispatched a notice to vacate the farms to JC Uys Attorneys wherein it is inter alia stated that the Department has policies and procedures in place that require certain authorizations before contracts can be concluded and rights in land be granted, and that no authorizations to conclude contracts and/or grant rights in land were obtained by Kopano Enterprise, the LCF Trust or Mr Lethoba.[11]

[24] The author of the letter was Mr Modise (Acting Chief Director: Free State Provincial Shared Services Centre). On 24 May 2022, the LCF Trust was instructed to leave the farm at the end of the current harvesting season. It should be noted that this letter was marked “without prejudice”, but attached by the Applicants. A similar letter was sent to Kopano Enterprise on 22 August 2022, also “without prejudice” but attached to the Applicants’ papers and signed by Mr Modise.

III THE RESPONDENTS’ VERSION:

[25] The Respondents were out of time with their answering affidavit and ask for condonation. They state that Kopano Enterprise brought an urgent application under case number 3805/2022 to interdict the Sixth to Ninth Applicants from interfering with Kopano Enterprises’ possession over the properties. Kopano 2 then applied to be joined. Whilst the parties were awaiting judgment, this application was launched and as judgment in that case would have had an influence on the present application, if in favour of Kopano Enterprise, it would render this application redundant. On 9 March 2023, the First to Fifth Applicants in this application were joined to case number 3805/2022, the application was removed from the roll, and Kopano Enterprise was ordered to pay the costs.

[26] The answering affidavit was deposed to on 16 March 2023 whereas it had to be served no later than 21 February

2023. It appears to have been served on all the Applicants on 17 March 2023. The application is therefore, on the Respondents’ calculation, twenty two (22) Court days late. They state that the application is voluminous. In respect of prospects for success, they refer to the various points in limine they raise in this application and that the Supreme Court of Appeal recognize an oral stipulatio alteri, as raised under case number 1993/2022 as a valid cause of action.[12]

[27] Case number 3805/2022 would be heard in the ordinary course and would be set down simultaneously with filing of the answering affidavit. They submit that the Applicants suffer no prejudice which cannot be remedied by a costs order.

[28] I am satisfied that a proper case has been made for condonation.[13] The explanation was reasonable and little time was spent on the issue in argument. Not much space and time was spent in the pleadings on the issue. For that reason, each party is to pay its own costs.

[29] The Respondents raise four (4) points in limine. The first is that of *lis pendens*. There are presently matters before the Free State High Court dealing with the property and use thereof. The first is a spoliation application under case number 4076/2021. The second an action by the First to Fifth Applicants against the Respondents and the Sixth to Ninth Applicants under case number 55/2022. The third is an action issued under case 1993/2022 where the Respondents are the Applicants. The Fourth is an urgent application brought by Kopano Enterprise against the Sixth to Ninth Applicants under case number 3805/2022. The fifth is the present application.[14]

- [30] There are therefore, on their version, at least four active matters being proceeded with by the parties to this present application. The same facts as are required to be considered in this application are under consideration in case numbers 55/2022 and 1993/2022 as both relate to the central issue of determination of rights of possession over the property. It is submitted that the present application should be stayed pending the determination of the actions where oral evidence will be led and the issues properly ventilated. Furthermore is an application for an interim interdict to prevent interference with possession and to prevent any eviction pending finalization of the actions, is still pending.
- [31] The Respondents submit that the disputes between the parties are currently being litigated in the same Court, on substantially the same issues, and between substantially the same parties. It is submitted that given the disputes of fact raised together with the advanced stage of litigation in the other applications/actions, where the pleadings are already closed, it would not be expedient, just and equitable that I determine the eviction.
- [32] The second point in limine relates to disputes of fact. They submit that the disputes between the parties are numerous and that the essential dispute of fact is whether there is a stipulatio alteri or amended stipulatio alteri, whether Kopano 2 had knowledge thereof and what the rights of Kopano Enterprise are. It is submitted that the disputes of fact are not contrived and would form the basis of the facts that would be needed to be decided considering the judgments in both the action proceedings under case numbers 55/2022 and 1993/2022. They submit that this Court would not be able to come to the correct conclusion when only the papers filed are considered. They submit that considering the multiple actions, this application should not have been brought and it should be dismissed with costs on a punitive scale.
- [33] The third point in limine relates to the locus standi and authority. They argue that the First to Fifth Applicants lack locus standi as this is a vindicatory application. There is no lessor/lessee relationship between the Kopano 2 and Kopano Enterprise.
- [34] Kometsi and Mokone, as referred to above, issued summons against the other parties, excluding the Third Applicant in the present proceedings under case number 55/2022.[15]
- [35] I pause to state that Kopano 2 averred in paragraph 70 of the particulars of claim that despite repeated demands – telephonically, verbally – and in written communications of the Claassens to vacate the farms, the Claassens have failed and/or neglected and/or refused to hand over the farms and the equipment.
- [36] In the fourth point in limine the Respondents aver that the Second to Fifth Respondents have been mis-joined to the proceedings. They referred to an order

granted by Acting Justice O'Brien on 3 March 2021 in terms of which the First Applicant under case number 818/2021 and by agreement between the parties, withdrew the application and the parties agreed that the meeting between all stakeholders (i.e. Trustees, beneficiaries and representatives of the relevant State Departments) will be scheduled to take place on 16 March 2021 at 10h00, be held at the premises of the attorneys for the Respondents.[16]

[37] On 9 September 2021, Acting Justice Wright under case number 4076/2021, granted an order in terms of which the First and Second Applicants in the present application and Miengana Agriculture (Pty) Ltd were ordered to immediately restore to Kopano Enterprise and Mr Lethoba possession of fifteen (15) immovable properties, which properties also form the basis of the present application. The First and Second Applicants, then acting for Kopano 2 and Miengana Agriculture were ordered to pay the costs of the application jointly and severally.[17]

[38] The Respondents furthermore refer to a letter dated 30 August 2017, directed to one Mr Sekawana, presumably the Chief Director of the Department, wherein the Trustees of Kopano 2 asks for permission to enter into a Joint Venture with the LCF Trust in terms of which the Kopano 2 will have 60% and LCF Trust 40% of the shares after the financial year.

[39] The Joint Venture would be for five (5) consecutive years commencing on 1 October 2017 until 1 October 2022. It appears to be signed by Mr Lethoba, and the First and Second Applicants in this present application.

[40] They submit that the terms of the lease agreement are subject to the stipulatio and the joint venture agreement.[18]

[41] They further state that the appointment of the Third, Fourth and Fifth Applicants as Trustees of the Kopano 2 is presently disputed by Mr Lethoba, the founding Trustee of the Trust under case number 1993/2022.[19]

IV THE FIRST TO FIFTH APPLICANTS' REPLY

[42] The agreement between Mr Groves, Ms Ntono and Mr Modise is denied. This, to me, raise a factual dispute. According to them the 5 years period granted to the JV has expired. The Respondents are challenged to provide audited financial statements. It is denied that the Department accepted the stipulatio and denied that the request to enter into a JV was a unanimous resolution. There is a denial of a meeting held with the Department

and the question is raised why the terms of the agreement was amended from five years to thirty years.[20] They question the oral agreement and the terms of it. The role and authority of Mr Lethoba is questioned. They deny the meeting held on 12 November 2020[21] whereas the Government admits the meeting.[22] Save to aver prejudice, these Respondents do not, materially, take issue with the merits of the condonation application.[23] They submit that this application will dispose of all the other litigious matters.[24]

V THE GOVERNMENT'S REPLY

[43] It tenuously opposes condonation. Although, in attacking the point of *lis pendens*, they are correct in stating that they did not institute any actions, the subject matter is still the properties, the use and enjoyment and whether a stipulatio came into existence and was amended. I cannot find that this application is totally divorced from the balance of the pending litigation. They state that the LCF Trust has a substantial interest in the litigation as they are parties to the conclusion of the JV agreement and is a party to one of the litigious matters.[25]

VI AUTHORITIES AND ARGUMENTS

[44] The Applicants, having knowledge of existing litigation about the subject matter, moved this application on motion. Bringing evictions proceedings on motion is perfectly in order unless factual disputes arise or can be anticipated. Should a party elect to proceed on motion, there are attendant risk to be considered.

[45] In *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*[26] it was held:

"A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril, for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application."

[46] In *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)*[27] it was held:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. 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 (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), 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. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

[47] This principle was affirmed in *Law Society, Northern Provinces v Mogami*[28]:

"An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail (De Reszke v Maras and Others 2006 (1) SA 401 (C) ([2005] 4 All SA 440) at paras 32- 33). [14] No special circumstances that justified a deviation from the general rule of practice were shown to exist. The factual disputes are wide-ranging and not within a narrow compass. A referral to oral evidence on specified issues, therefore, would not

have been a suitable method of employing viva voce evidence for the determination of the disputed issues of fact. The exchange of pleadings and a trial are required to define and resolve the disputes between the parties.”

[48] Adv Ramaili SC (Adv Vilakazi appearing with him), appeared for Kopano

2. They argued that the LCF Trust and the other sellers of the properties had to vacate the properties on 31 August 2013.[29] They refer to Port Elizabeth Municipality v Various Occupiers[30] for a submission that this is a quasi-PIE application and that the factors in that Act cannot be used to justify occupation. I agree with them. The challenge that I have with their arguments in the heads is, however that they refer to the Claassens’

(effectively the Second to Fifth Respondents) who are on my reading of the papers not claiming possession[31], as was also evident in the order of Wright AJ.[32]

[49] In respect of the stipulatio alteri, they refer to Adhu Investments CC and Others v Padayachee.[33] In that case, however, the transaction was regulated by a loan agreement and reliance was placed on a tacit stipulatio. The agreement contained a non-variation clause. It was only after the issue of summons, that Padayachee amended his particulars of claim to allege that the loan agreement contained

a stipulatio alteri. The facts therein differ from those before me. Clause 10.1 of the lease agreement provides that Kopano 2 must retain control of the properties and the farming activities, as well as the controlling interest in any legal entity established for purposes of any joint venture.[34] The JV was, according to the Respondents, established to give effect to the clause and on the papers Kopano 2 would have the controlling (60%) interest. On the Respondents’ version the stipulatio was in favour of the JV.[35] Without oral evidence and purely considering the papers, I am unable to make a conclusive finding that there was no stipulatio or amendment thereof. To the extent that it is necessary to make a finding in respect of a usufruct, the same applies. The reference to AJP Properties CC v Sello[36] is not on point. Loggenberg and Others v Maree[37] is also authority that such a contract has been recognised as enforceable in relation to a company not yet formed.[38] The balance of the cases referred to are not on point.

[50] Adv Seneke (Adv Boonzaaier appearing with him) for the Government, argues that clause 14 of the sale agreement allowed Louis Claassen to continue to farm as to keep the appropriate levels of production. The intention was to create the JV but the relationship between Kopano 2 and the LCF Trust broke down which led to Kopano 2 to refuse to enter into a joint venture. The Department subsequently gave notice to the LCF Trust to vacate the property and the LCF Trust thereafter, on 16 May 2022, served a summons moving for an order that it be declared that a stipulatio came into existence.

[51] In support of their argument, reference is made to MV Andre Builder Joiner CC v Nordien.[39] The principles applicable to eviction where the Applicant had established all the grounds cannot be faulted. In that case the occupier claimed an enrichment lien. The court found that a clause in that agreement provides any improvements, alterations or additions

which the tenant may have affected to the leased premises shall become the property of the landlord, and the landlord shall not be obliged to compensate the tenant in respect thereof. The question, however, remains whether the occupier has established a defence. The case is not on point. The same applies to the case of *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre*.^[40]

[52] Reference is made to *Wrightman t/a JW Construction v Headfour (Pty) Ltd and another*^[41] for the submission that the Respondents' defence does not disclose a genuine and bone fide dispute of fact as there were only discussion about the joint venture which never materialised.

[53] In respect of *lis pendens* they refer to *Loader v Dursot Bros (Pty) Ltd*.^[42] In *Ferreira v Minister of Safety and Security and Another*^[43] the Court referred to the case and stated that the discretion to stay the proceedings or to hear the matter is determined with reference to what is just and equitable as well as the balance of convenience. In view of the fact that the later proceedings are presumed to be vexatious, the party who instituted those proceedings bears the onus of establishing that they are not vexatious. He or she does so by satisfying the court that despite all of the elements of *lis alibi pendens* being present, justice and equity and the balance of convenience are in favour of the subsequent proceedings being adjudicated upon.

[54] Reliance on *Phillip Dintsi and others v Dewald van Breda and others*^[44] is not on point. *Eksteen v Road Accident Fund*^[45] is authority for the exercise of a discretion to stay proceedings. Bearing in mind that the Respondents' stance that pending

litigation was known before launching this application, I am of the view that the bona fides of the Applicants are not so clear.

[55] They submit that the point of misjoinder should fail as the LCF Trust has a direct and substantial interest in the proceedings.

[56] Adv Meijers (with Adv Lebona) appeared for the Respondents. They submit that the central issue is substantially the same right of possession between substantially the same parties, which is subject to a pending action under case number 1993/2022. The same argument is made in respect of case number 55/2022. The Respondents' application to interdict eviction is also pending under case number 3805/2022. They submit that the matter before me should be stayed pending final determination of case numbers 1993/20022, 55/2022 and 3805/2022. They refer to *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*.^[46]

[57] They too rely on *Loggenberg and Others v Maree*^[47] on which Kopano 2 relies, albeit for different reasons.

[58] They submit that Mr Lethoba was not joined in the present application although he is a party to case number 1993/2022 and that his rights have to be considered with those of Kopano Enterprise. Reliance is placed on *Beadica 231 CC and Others v Trustees for the time*

being of the Oregon Trust and Others[48] for the supposition that pacta sunt servanda gives effect to the central constitutional values of freedom and dignity. It has further recognised that general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. Pacta sunt servanda is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts

through the instrument of public policy as it gives expression to central constitutional values.[49]

[59] They submit that the facts were known and raise real and bona fide disputes of fact.[50]

[60] In respect of the misjoinder of the Second to Fifth Respondents, they submit that the LCF Trust is not in possession but merely a shareholder of Kopano Enterprises. It is not a matter of piercing the corporate veil. I am of the view that the merits of all the pending cases have implications for the determination of the various agreements between the parties. The Second to Fifth Respondents may eventually have good argument in respect of costs but in view of the conclusion that I arrive at, it is not the time to determine that.

[61] They submit that the approach in Metallurgical & Commercial Consultants (Pty) Limited v Metal Sales Co (Pty) Limited[51] should not be followed as it would set the parties back a number of steps.

VII

CONCLUSION

[62] In my view, the Applicants were well aware of the challenges they will face in launching the application. I do not find it necessary to list all of them and only refer to the more salient ones. There are numerous correspondence by way of emails and letters which, prima facie, support the version of the Respondents. The arguments of the Respondents were well-known to the Applicants.

[63] The denial of the authority of Mr Modise, specifically, is not clearcut. He acted in many roles for the Government. There are disputes between the Applicants about the meeting of November 2020. I, however, make no finding in respect hereof. The status and locus standi of the trustees, and who may be trustees and who not, is also not clear.

[64] Motion proceedings can generally not answer questions pertaining to credibility. Probabilities are not determined on motion.[52] In Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd[53] it was stated that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities

disclosed in contradictory affidavits as opposed to viva voce evidence.[54]

- [65] There are litigious matters still pending and this does raise the issue of *lis pendens*, if not in respect of all the parties, then at least about the subject matter. This point in *limine* therefore succeeds.
- [66] I referred to the various factual issues that I am unable to determine on affidavit. The point in *limine* in respect of factual disputes therefore carries merit.
- [67] I am of the view that Kopano 2 has *locus standi* as it has a lease agreement which grants it rights over the land. The existence of the JV raises questions about Kopano 2's sole authority to use the properties. The Government has *locus standi* to initiate or support applications for eviction where it is the owner. The matter is not purely vindicatory.
- [68] In respect of misjoinder of the Second to Fifth Respondents, I find that as they are shareholders in the JV, which the Applicants now question, they are necessary parties. This does not imply that the relief affect them personally as I, only for purposes of this judgment, accept that the JV appears to be the vehicle utilised for conducting the farming operations.
- [69] Should I, in view of the case law quoted above, and the belated request to exercise my discretion to refer the matter to oral evidence or trial, do so? The law is clear that I can only do so if there are exceptional circumstances.
- [70] I find no exceptional circumstances. As stated, there are presently other litigious matter pending. They have a material bearing on whether there was a JV, whether a *stipulatio* and *usufruct* came into being, and whether the JV is in unlawful occupation. The JV brought an application to stop eviction and this is, as part of the other cases, still pending.
- [71] I exercise my discretion in postponing the application pending the final determination of the other litigious matters between the parties. It would be fair, just and equitable that the application be entertained only when the rights have crystallised after the merits were properly evaluated. The same argument holds true for costs.
- [72] Therefore, I grant the following order.

ORDER

1. Condonation is granted for the late filing of the answering affidavit of the Respondents.
2. Each party shall pay its own costs in respect of the condonation application.
3. The application is postponed pending the finalisation of case numbers 55/2022, 1993/2022, 3805/2022, and any such actions and/or applications that may have been instituted in respect of the properties and rights therein.
4. The costs of the main application stand over for later adjudication.

P R CRONJÉ, AJ

For the First to Fifth Applicants: Adv M. Ramaili SC Adv J. Vilakazi Jam Jam Attorneys Inc.
Rampai Attorneys For the First to Sixth to Nineth Applicants: Adv T. Seneke Adv A.S. Boonzaaier
State Attorney For the Respondents: Adv G.V. Meijers Adv N. Lebona JC Uys Attorneys McIntyre
van der Post Attorneys

[1] The other two species of evictions takes place under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE) and the Extension of Security of Tenure Act, 62 of 1997 (Esta)

[2] Pleadings,

p. 23, para 24; page 153 - 165

[3] Ibid,

p. 90 - 106

[4] Ibid,

p. 96, Clause 10.1

[5] Ibid,

p. 97, page 11

[6] Ibid,

p. 187

[7] Ibid,

p. 188

[8] Ibid,

p. 189

[9] Ibid,

p. 194, para 5.4 – 5.5

[10] Ibid,

p. 195, Clause 5.6

[11] Ibid,

p. 208 - 210

[12] Ibid,

p. 280, para 88

[13] See: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *Grootboom v National Prosecuting Authority and Another* (CCT 08/13)

[2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013)

[14] Pleadings,

p. 283, para 123.1 – 123.5

[15] *Ibid*,

p. 395

[16] *Ibid*,

p. 385

[17] *Ibid*,

p. 396 - 397

[18] *Ibid*,

p. 304, para 163

[19] *Ibid*,

p. 323, para 238

[20] *Ibid*,

p. 588, para 32 - 33

[21] *Ibid*,

p. 588, para 32

[22] *Ibid*,

p. 619, para 26 - 27

[23] *Ibid*,

p. 594, para 73 - 77

[24] *Ibid*,

p. 595, para 80

[25] *Ibid*,

p. 628, para 60

[26] 1982 (1) SA 398 (A); See also Gounder v Top Spec Investments (Pty) Ltd [2008] ZASCA 52; [2008] 3 All SA 376 (SCA) para [10]

[27] [2009] 2 All SA 243 (SCA)

[28] 2010

(1) SA 186 (SCA) at 195C-D

[29] Pleadings,

p. 163, clause 14.1

[30] (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004) – which application was in terms of the PIE Act

[31] Esta is therefore not applicable even though it is farm land

[32] Referred to above

[33] (1410/2016)

[2019] ZASCA 63 (24 May 2019)

[34] Pleadings,

p. 141, clause 10.1

[35] Ibid,

p. 252, para 14 - 16

[36] (39302/10)

[2017] ZAGPJHC 255; 2018 (1) SA 535 (GJ) (8 September 2017)

[37] (286/17)

[2018] ZASCA 24 (23 March 2018)

[38] At para [22]

[39] (19002/20)

[2021] ZAWCHC 255 (6 December 2021)

[40] 1997

(1) 646 SA

[41] (66/2007)

[2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008)

[42] 1948

(3) SA 136 (T)

[43] (1696/2011)

[2015] ZANCHC 14 (4 September 2015) at para 8 - 9

[44] (LCC 15/2019)

[45] (873/2019)

[2021] ZASCA 48; [2021] 3 All SA 46 (SCA); 2021 (8) BCLR 844 (SCA) (21 April 2021)

[46] (741/12)

[2013] ZASCA 129; 2013 (6) SA 499 (SCA); [2013] 4 All SA 509 (SCA) (26 September 2013); See also: Socratous v Grindstone Investments 134 (Pty) Ltd (149/10)

[2011] ZASCA 8; 2011 (6) SA 325 (SCA) (10 March 2011) at para [16]

[47] (286/17)

[2018] ZASCA 24 (23 March 2018)

[48] (CCT109/19)

[2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020)

[49] At para [83]

[50] Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd (53/84)

[1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)

[51] 1971

(2) SA 388 (W)

[52] There may be exceptions but they are not evident in this application

[53] 1949

(3) SA 1155 (T)

[54] See also: T.C.M v L.R.M.M (HCAA09/2021)

[2022] ZALMPPHC 3 (19 January 2022); See also Kalil v Decotex (Pty) Ltd. and Another (158/87)

[1987] ZASCA 156; [1988] 2 All SA 159 (A) (3 December 1987)

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Prepared on 11 October 2026 · Esheria