

SOUTH AFRICA / JUDGMENT

Kotze N.O and Others v UD Boerdery CC (18631/2021) [2024] ZAWCHC 302 (8 October 2024) [2024] ZAWCHC 302

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

18631/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 18631/2021

In the matter between:

THEUNIS NICOLAAS KOTZÉ N.O.

First applicant

ROUXNELLE KOTZÉ N.O.

Second applicant

SYBRAND ALBERTUS NEL LOUW N.O.

Third applicant

and

UD BOERDERY CC

Respondent

JUDGMENT DELIVERED ON 8 OCTOBER 2024

Delivered electronically via e-mail

VAN ZYL AJ:

Introduction

1. The applicants are the trustees of the Willemsrivier Trust ("the Trust"). The Trust applies for the eviction of the respondent from a wheat farm in the district of Malmesbury. It does so on the basis that the Trust is the registered owner of the two immovable properties[1] constituting the farm, and that the respondent is in occupation of the farm through its conduct of commercial farming activities there.
2. The Trust took transfer of the farm from the previous owner almost three years ago on 3 September 2021, but the respondent has refused to vacate it, for reasons that will be discussed below.
3. The central issue to be determined is the lawfulness of the respondent's continued occupation of the farm.

Background

4. The background to the dispute is largely common cause.
5. The farms respectively known as "Klein Swartfontein" and "Hanekomshoop" had previously been owned by the Hanekomshoop Trust ("the HT"). Mr Nicolaas Hanekom was, at all relevant times, one of the trustees of the HT. He represented the HT in its dealings with the respondent.
6. On 1 January 2005 the HT and Mr Hanekom, in his personal capacity, concluded a lease agreement (referred to in the papers as "the headlease") in terms of which the HTT leased both of the farms to Mr Hanekom for an indefinite period. Mr Hanekom paid rental to the HT, which payment was aimed at providing an income for his parents from the HT.
7. During 2006 Mr Hanekom, again in his personal capacity, concluded a written agreement with the respondent in terms of which the latter would manage the farming operations on the farms for a period of 10 years, terminating in 2016. Although the sublease was cast in the format of a management agreement, the effect thereof was that Mr Hanekom placed the farms at the respondent's disposal for its exclusive exploitation, thereby granting it rights of occupation and use, whilst Mr Hanekom would be compensated by means of a proportion of its produce. As such, the agreement was a typical partiarian agricultural agreement which remains, in essence, an agreement of lease, irrespective of its further provisions.[2] As Mr Hanekom was himself a lessee of the farms, deriving his rights of occupation and use from the headlease with the HT, the management agreement was essentially a sublease.
8. The headlease between Mr Hanekom and the HT remained extant for the ensuing years. In March 2016, with the termination of the sublease through the effluxion of time, Mr Hanekom and the respondent, represented by one of its members, Mr Johannes Bester, negotiated the terms of a new sublease. Mr Hanekom and the respondent subsequently concluded a new written sublease on 15

April 2016, providing for the respondent's continued management of the farming activities on the farms until 28 February 2026.

9. On 1 September 2020 the HT concluded a written agreement with the Trust in terms of which the latter purchased Klein Swartfontein for R22,5 million ("the first sale").
10. On 23 September 2020 Mr Hanekom's attorneys notified the respondent in writing of the sale of Klein Swartfontein,[3] and of the fact that the headlease between Mr Hanekom and the HT would be cancelled with effect from 31 December 2020. On the instructions of Mr Hanekom the attorneys cancelled the sublease in terms of clause 2.1 thereof which, so the Trust avers, provided for cancellation by notice. The basis for the cancellation was that the cancellation of the headlease rendered the continuation of the sublease impossible.
11. Clause 2.1 of the sublease provides as follows:

“Hierdie ooreenkoms neem ‘n aanvang op 1 April 2016 and sal duur tot 28 Februarie 2026. Nieteenstaande hierdie bepaling het die partye egter die reg om voor 31 Desember van enige jaar die tydskuur van hierdie ooreenkoms te hersien indien enigeen of albei van hulle sou meen dat daar grondige redes is, byvoorbeeld ‘n verbokkeling van die verhouding tussen die partye en/of die wysiging/aanbring van enige wetgewing wat die voortsetting van die ooreenkoms onwenslik sou maak”.

[“This agreement commences on 1 April 2016 and shall endure until 28 February 2028. Notwithstanding this provision the parties have the right to, before 31 December of any year, revise the duration of this agreement should any one or both of them be of the view that there are good reasons, for example a breakdown in the relationship between the parties and/or the amendment/implementation of any legislation that would make the continuation of the agreement undesirable.”][4]

12. I shall return to the parties' submissions in relation to this clause.
13. The respondent's attorneys replied on 8 October 2020, disputing the validity of the termination of the sublease under clause 2.1 on the basis that such clause did not allow for the unilateral cancellation of the sublease. They contended further that the provisions of clause 2.3 of the sublease rendered the Trust, as purchaser of farm, bound to the sublease. In the circumstances, they conveyed the respondent's refusal to vacate the farm prior to 28 February 2026.
14. The relevant portion of clause 2.3 of the sublease, upon which the respondent relies, provides as follows:

“Hierdie ooreenkoms is bindend op NH,[5] sy erfgename or regsopvolgers.”

[“This agreement is binding on NH, his heirs or successors-in-title.”]

15. On 21 December 2020 the trustees of the HT (including Mr Hanekom) adopted and signed a resolution terminating the headlease with effect from 31 December 2020. This was done in terms of clause 2 of the headlease, providing for unilateral termination by notice prior to 31 December of each year:

“Die partye het die reg om die ooreenkoms te kanselleer met skriftelike kennisgewing voor 31 Desember elke jaar.”

[“The parties have the right to cancel the agreement on written notice prior to 31 December every year.”]

16. The first sale of the farm was subsequently cancelled, but on 4 June 2021 the Trust and the HT concluded a second agreement of sale in respect of Klein Swartfontein, which replaced the first sale. Pursuant to the second sale, registration of transfer of the farm into the Trust’s name was effected on 3 September 2021.
17. On the same day the Trust’s attorneys wrote a letter to the respondent’s attorneys, demanding that the respondent cease any further activities on the farm and vacate the farm by 30 September 2021.
18. The respondent’s attorneys replied on 14 September 2021, contending that the respondent occupied the farm lawfully in terms of an oral agreement concluded with both the HT and with Mr Hanekom at the time of conclusion of the written sublease, which permitted the respondent’s occupation until 28 February 2026.
19. This application was launched in November 2021, and was heard on 1 March 2022. On that day the Court referred the matter for the hearing of oral evidence. The Trust brought an interlocutory application for the reconsideration of the referral ruling, and for consent to deliver a supplementary affidavit. Such an order was granted on 9 November 2023 and the main application

was postponed sine die. It was eventually set down for hearing, and heard, on 26 July 2024.

20. The Trust’s case, in short, is that prior to it taking transfer of the farm on 3 September 2021 the HT cancelled the headlease between it and Mr Hanekom, and the latter cancelled his sublease with the respondent, both by notice with effect from 31 December
2020. Consequently, the sublease terminated as a result of Mr Hanekom’s cancellation thereof. Alternatively, and in any event, the Trust submits that the sublease was terminated by operation of law because of the termination of the headlease. The Trust denies that the respondent’s reliance on the alleged oral agreement has merit, because:

20.1 The conclusion of the oral agreement in the terms pleaded by the respondent is implausible to such an extent that the Court would be entitled to reject the respondent’s version on the affidavits;^[6] and

20.2 The respondent's evidence of the prior oral agreement is in any event inadmissible by virtue of the parol evidence rule.

21. The respondent denies that its continued occupation of the farm is unlawful. It does so on four bases.
22. First, the respondent argues that the sublease was binding on the HT, and thereafter on the Trust when the latter became the owner of the farm. This is because, during the negotiation of the written sublease, the HT[7] orally agreed that in the event of Mr Hanekom no longer leasing the farm from the HT, the HT (or the Trust, as the HT's successor-in-title as owner of the farm) would continue to lease the farm to the respondent.[8]
23. Second, the HT had bound itself to the sublease when it granted to Mr Hanekom its consent, in terms of clause 3 of the headlease, to conclude the sublease with the respondent.
24. Clause 3 of the headlease provides that:

“Die huurder sal die reg hê on die eiendom te verhuur onder te verhuur op terme en voorwaardes waarop die partye mag besluit.”

[“The lessee will have the right to sublet the property on terms and conditions that the parties may agree upon.”]

25. The respondent contends that, because the HT could decide on the terms and conditions upon which the farm could be sublet, it by implication became a party to the sublease. As stated in the respondent's heads of argument: “If the [HT] had any concerns with the terms and conditions contained in the sublease, then the [HT] was able to demand that Hanekom amend such terms and conditions prior to the conclusion of any [sublease] agreement. However, the [HT] cannot accept the terms and conditions in the sublease and then later, when it suits it, ignore them. Accordingly, the sublease as supplemented by the [oral agreement] can be enforced against the [HT].”
26. Third, Mr Hanekom's cancellation of the sublease was invalid because the termination of the headlease does not constitute a good reason for the termination of the sublease under clause 2.1 of the sublease.
27. Fourth, the respondent argues that the HT's cancellation of the headlease was in any event invalid, as Mr Hanekom did not receive written notice of the cancellation as required by clause 2 of the headlease.
28. The merits of these defences are dealt with below.

The alleged oral agreement

29. From the answering papers it is clear that the oral agreement relied upon by the respondent was concluded at the time of the lapsing of the first sublease between Mr Hanekom and the respondent, and during the sublease negotiations which culminated in the conclusion of the written sublease. It was thus concluded orally and prior to the sublease.
30. It was concluded by the respondent and the HT, represented by Mr Hanekom, and was an agreement distinct from, and collateral to, the subsequent written sublease.[9] The oral agreement provided, in essence, that should the farm no longer be leased by Mr Hanekom, he would be replaced by the HT as party to the sublease.
31. The Trust argues that the respondent's evidence in relation to the alleged oral agreement is inadmissible, because it falls foul of the integration aspect of the parol evidence rule.
32. The respondent argues, on the other hand, that its evidence as regards the oral agreement is relevant and admissible because the written sublease falls to be interpreted at the hand of, and with the assistance of, the oral agreement. Thus, the respondent says, the oral agreement goes to the interpretation aspect of the parol evidence rule, and evidence of its existence and terms is therefore admissible.
33. Our courts have adopted the following English law formulation of the integration subrule of the parol evidence rule:[10]

"By the general rules of the common law if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument is made or during its preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract."

34. In *University of Johannesburg v Auckland Park Theological Seminary and another*[11] the Constitutional Court held as follows:

"[89] The rule consists of two sub-rules. This duality was outlined by Corbett JA in Johnston:

"As has been indicated, the parol evidence rule is not a single rule. It in fact branches into two independent rules or sets of rules: (1) the integration rule . . . which defines the limits of the contract, and (2) the [interpretation] rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract."

- [90] The parol evidence rule therefore has both an integration facet and an interpretation facet. It is the latter facet that was relied on by the Supreme Court of Appeal. That facet of the rule was explained by Corbett JA as follows:

"In many instances recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by . . . that branch of the 'rule' which prescribes that, subject to certain qualifications, when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract. The extrinsic evidence is excluded because it relates to matters which, by reason of

the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant.”

[91] He continued to say:

“[I]t is clear to me that the aim and effect of [the integration] rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence.”

[92] The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced. The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement. If UJ had sought to adduce evidence to show the Court that the parties had intended to include a pactum de non cedendo, but had failed to do so, this part of the parol evidence rule would have precluded UJ from seeking to add this term to the contract by means of extrinsic evidence...”

35. The integration facet of the parol evidence rule therefore remains part of our law and applies to evidence of a prior oral contract which has the effect of adding to or subtracting from or in any manner varying or qualifying the subsequent written contract.[12] One must look at the objective effect of the prior oral agreement as opposed to the subjective intention of the parties. There mere fact that the oral agreement and the written agreement can live side by side does not mean that the law permits evidence of the oral agreement’s existence. [13]

36. What the oral agreement seeks to do in the present case is exactly this: adding to or subtracting from the written sublease. First, its effect would be to extend the written sublease to include the HT as a third party[14] having agreed to be the substitute lessor under the sublease. In *De Villiers v McKay NO and another*[15] the Supreme Court of Appeal held as follows:

“[14] The court below, mindful of the appellant's concession that the contract would not have come into being had the undertaking not been given, sought to come to the rescue of the respondents by resorting to the mechanism of a 'prior inducing contract'. The undertaking addressed by the appellant to the attorney refers to an oral agreement reached earlier.

[15] The problem with the approach is that this court in *Du Plessis v Nel* 1952

- (1) SA 513 (A) emphatically stated that, if the terms of the prior inducing contract contradict, alter, add to or vary the written contract evidence to prove them will not be admitted. In the present case the undertaking, if admitted on the basis advanced by the respondents, has the effect of adding to the purchase consideration - increasing it by the number of plots to be made available. The court below was therefore, in the circumstances of this case, precluded from having regard to the provisions of the undertaking.

...

- [17] The respondents, in persisting before us with the contention that the contract and the undertaking could be married, compounded the error by the court below. Of course it is open to parties to an agreement to stipulate that one of them undertakes an obligation in respect of a third party. The contract itself does not provide for this and, as pointed out above, the terms of the undertaking cannot be used in relation to the obligations of the parties spelt out in the contract.”
37. Second, the oral agreement has the effect of limiting Mr Hanekom's express right in terms of clause 2.1 of the sublease to cancel the sublease by notice, as he would not be entitled to do so by reason of termination of the headlease – the oral agreement provides that Mr Hanekom would then merely be substituted with the HT as sublessor under the continuing sublease. Third, it would have the effect of excluding the term of the sublease, implied by common law, that the sublessee's rights would terminate on termination of the sublessor's rights in the property.
38. The respondent's argument that the interpretation (as opposed to the integration) subrule of the parol evidence rule is involved, because the oral agreement assists in the interpretation of the sublease, cannot be upheld. As indicated, the respondent's interpretation of the sublease by way of the oral agreement in fact varies the sublease in material respects. I therefore find that the respondent's evidence in relation to the alleged oral agreement is inadmissible, because it falls foul of the integration aspect of the parol evidence rule.
39. Given the Court's conclusion on the parol evidence aspect, it is not strictly necessary to discuss the other contentions upon which the Trust's relies for its argument that the alleged oral agreement does not assist the respondent. I am inclined to agree with the Trust, however, that the conclusion of the oral agreement in the terms pleaded by the respondent is so implausible that the Court would have been entitled to reject the respondent's version on the affidavits.
40. The qualification to the Plascon-Evans principle and the courts' robust approach thereto was summarised as follows in *Cape Town City v South African National Roads Agency Ltd* and others:[16]

"[165] ... In the absence of oral evidence, any genuine dispute of fact on the papers is resolved, for purposes of determining the case, on the basis of an acceptance of the respondent's version, unless the respondent's evidence is so far-fetched and untenable as to defy belief. The test for

finding such untenability has been described as 'a stringent one'. The probabilities are plainly a relevant consideration in this regard. While a mere balance of probabilities on the papers is not enough, the untenability or far-fetchedness of a version may be established if the improbability of the evidence is towards the extremity of the negative end of the continuum of the measure of probability.

[166] Having acknowledged that it is only when the evidence for the respondent is blatantly implausible that it may be rejected on the papers, the court should not shrink from rejecting evidence on that basis when the situation arises."

41. In considering the facts of this matter holistically, it is inherently improbable that Mr Bester, for the respondent, and Mr Hanekom would pursuant to their negotiations for the conclusion of the sublease in 2016 essentially record in writing only one of two agreements. This is especially so given – as appears from the respondent's papers – the alleged oral agreement was a far-reaching agreement which would effectively convert the sublease into a main lease, with the owner as lessor, in the event of the headlease with Mr Hanekom being terminated. The oral agreement thus provided a significant protection of the sublease for the benefit of the respondent, and entailed the undertaking of significant obligations by the owner. Why would the parties be content with reducing only the first of the agreements – the sublease – in writing?

42. The improbability of the respondent's version is exacerbated by the fact that the sublease was drafted by the respondent's attorneys on Mr Bester's instructions, following the sublease negotiations which he conducted with Mr Hanekom. The draft sublease addressed the concerns expressed by Mr Hanekom during the sublease negotiations but contains no word about the oral agreement which would have been particularly beneficial to the respondent. Had the oral agreement been concluded, Mr Bester would have required

the attorneys to refer to the terms thereof in the sublease. The attorneys would probably have advised that the HT should be added as a party to the sublease to render the obligations undertaken by the HT towards the respondent under the oral agreement enforceable. None of this was done.

43. There was, moreover, no obvious or alleged motivation for Mr Hanekom to have concluded the oral agreement on behalf of the HT. The respondent does not allege that Mr Hanekom had any reason or motivation to bind the HT to the sublease in the event of the termination of the headlease. On the contrary, at the time of the conclusion of the sublease, Mr Hanekom was intent on himself and the HT being able to terminate the sublease and the headlease, respectively, in order for the farms to be sold without those burdens.

44. Lastly, neither of the two letters from the respondent's attorneys, expressly dealing with the alleged entitlement to enforce the sublease against the Trust, refers to the oral agreement or its effect of converting the sublease into a headlease. This is despite the fact that the letter from Mr Hanekom's attorneys to the respondent on 23 September 2020 stated that the farm had been sold and that the headlease was about to be cancelled, and contained notice of Mr

Hanekom's intention to cancel the sublease as a result thereof. It would have been a simple matter for the respondent's attorneys to refer to the HT as becoming a party to the sublease in Mr Hanekom's stead once the headlease is terminated, and to the purchaser (the Trust) becoming the HT's successor as new owner of the land. Yet, the respondent's correspondence is silent on this score.

45. I have already found that the respondent's evidence in relation to the prior oral agreement is inadmissible. Had it been admissible, the Court would have been entitled to reject it on the papers. This leaves the fate of the written sublease

to be discussed.

Did the HT bind itself to the sublease by acting in terms of clause 3 of the headlease?

46. As indicated earlier, the respondent contends that the HT had bound itself to the sublease when it granted to Mr Hanekom its consent, in terms of clause 3[17] of the headlease, to conclude the sublease with the respondent.
47. This argument has no merit. On no reasonable interpretation of the headlease did the HT bind itself to the terms of the sublease when it granted to Mr Hanekom its consent to conclude the sublease with the respondent. The fact that the HT allowed Mr Hanekom to sublet the farm on such terms conditions as might be agreed upon between the parties does not lead to a conclusion that the HT through such consent undertook any obligations to the respondent under the sublease. There is nothing in either the headlease or the sublease to substantiate such a notion.
48. The respondent argues that the HT is simply the alter ego of Mr Hanekom, and therefore that the Court should regard the HT as an extension of Mr Hanekom. This is because Mr Hanekom represented the HT in all of its dealings with the respondent, and because he attempted to "channel the income of the HT to himself". The fact on record do not, however, support the complete disregard of the difference in personality[18] between Mr Hanekom and the HT in the face of the provisions of the written headlease and sublease.
49. The respondent's interpretation would, moreover, negate one of the fundamental principles of subletting, namely that the conclusion of a sublease does not create a contractual relationship between the lessor and the sublessee.[19]

The cancellation of the sublease

50. The respondent argues that Mr Hanekom's cancellation of the sublease was in any event[20] invalid because the cancellation of the headlease did not constitute sufficient reason for the cancellation of the sublease under clause 2.1[21] of the latter.
51. I do not agree. The termination of the headlease – and with that the termination of Mr Hanekom's entitlement to conclude the sublease – was a very good reason for the cancellation of the sublease.

52. At the core of the second sentence of clause 2.1 is that the parties have the right to “hersien” the “tydsduur” (“review the duration”) of the sublease. Read in context, “review” means to shorten, given the further reference to continuation of the sublease being undesirable. The clause creates a right of termination by notice, unrelated to breach.
53. The right can be exercised unilaterally. This is because, in terms of the common law, the parties always have the right to terminate their contract by agreement. [22] The core provision of clause 2.1 would therefore be superfluous if it referred only to consensual termination. In addition, the requirement of cogent reasons would be superfluous. If the parties terminate their contract by agreement, their respective reasons for agreeing so are legally irrelevant. The words “enigeen of albei van hulle” (“any one or both of them”) support the interpretation in favour of a right of unilateral termination.
54. The respondent argues that the provision that the termination may be effected “voor 31 Desember van enige jaar” (“before 31 December of any year”) indicates that a long-term sublease was envisaged, and therefore that it supports the respondent’s reliance on the oral agreement to the effect that the sublease would endure despite the termination of the headlease. In my view, the provision should be interpreted in the context of a wheat harvest cycle (including preparation, planting and harvesting), running from March to November of each year. The provision must thus be construed to mean that any termination would only take effect on 31 December of the particular year. In that way a harvest cycle cannot be interrupted as a result of termination by notice, but can only take effect after its completion. This is a sensible and businesslike interpretation in the circumstances.[23]
55. The party wishing to terminate is entitled to do so should he “meen” (“be of the view”) that there are cogent reasons to do so. This is indicative that a subjective opinion of such party is sufficient.[24] Even if, however, the view to be held by the terminating party is interpreted as having to be reasonable, and not frivolous or unreasonable or unmeritorious,[25] then I am of the view that the cancellation of the headlease as reason for termination of the sublease fulfils this requirement.
56. The respondent contends that the cogent reasons required are limited to the two examples contained in clause 2.1, namely a disintegration of the relationship between the parties, and the amendment or introduction of any legislation. There is no interpretational basis for reading such a limitation into clause 2.1. The two reasons foreshadowed in the clause are expressly introduced by the word “byvoorbeeld” (“for example”), meaning “such as”, which have been held merely to introduce examples. The preceding general words (“cogent reasons” in the present matter) must bear their unlimited meaning.[26]

57. In the present case, the sale of the property forming the subject matter of the sublease, and the consequential termination of the headlease, is a cogent reason rendering the continuation of the sublease undesirable, at least from Mr Hanekom's point of view. In that sense the continuation of the sublease would effectively become impossible for Mr Hanekom, and thus undesirable.
58. There is nothing untoward or opportunistic about Mr Hanekom's involvement in termination of both the headlease and the sublease. He did not breach any term of the sublease in giving notice of cancellation. In order for the HT to give the Trust vacant occupation of the farm, Mr Hanekom exercised his termination right in circumstances contemplated in clause 2.1 of the sublease,

and the HT exercised a similar right in terms of clause 2 of the headlease.

59. In any event, when a sublease is concluded, there are two distinct leases in existence: the main lease between the lessor (in this case, the HT as owner of the farm) and the lessee (Mr Hanekom) and, second, the sublease between the lessee (Mr Hanekom) and the sublessee (the respondent). As indicated, there is no contractual relationship between the lessor and the sublessee.[27]
60. The sublessee cannot acquire from the lessee greater rights than the lessee has. The sublessee's right in the property is dependent on the sublessor's title. Accordingly, a sublessee's rights terminate when the lessee's rights come to an end (a sublease contains a term, implied by common law, to that effect), and the sublessee can be ejected by the lessor or owner upon termination of the main lease.[28]
61. If, at the time of the conclusion of the sublease, the sublessee had knowledge of the limited nature of the sublessor's right in the property (that is, that the sublessor is a lessee and not the owner of the property in question), the sublease itself terminates upon termination of the main lease.[29] In the present case, it is clear from the answering papers that the respondent had known all along that Mr Hanekom was not the owner of the farm, but that he was a lessee thereof under the headlease. The sublease therefore terminated automatically and by operation of law when the headlease terminated on 31 December 2020. This is so even if Mr Hanekom's cancellation of the sublease had somehow been invalid.
62. The Trust has in the meantime, after having taken transfer of the farm, separately given notice to the respondent of cancellation of the sublease as a belt and braces exercise. In the light of the conclusion to which I have come on the termination of the sublease it is not necessary to say anything more about this additional notice of cancellation.

The cancellation of the headlease

63. As indicated, the respondent argues that the cancellation by the HT of the headlease was invalid, as Mr Hanekom did not receive written notice of the cancellation as required by clause 2 of the headlease.[30] In other words, the HT did not write to Mr Hanekom formally to notify him of the cancellation of the headlease after the trustees of the HT had resolved to terminate the headlease.
64. I agree with the Trust's submission that, given the prevailing circumstances, further written notification to Mr Hanekom of the cancellation of the headlease was not necessary. Mr Hanekom, as trustee of the HT, participated in the written resolution to cancel the headlease, and has since clearly accepted its termination.
65. The facts indicate that, on 23 September 2020, Mr Hanekom personally delivered to Mr Bester the letter from the former's attorneys addressed to the respondent. The third paragraph of the letter expressly states that the headlease between the HT and Mr Hanekom was going to be cancelled on 31 December 2020, and that the respondent thus had to cease its farming activities on the properties under the sublease on that date.
66. On 21 December 2020 the trustees of the HT, including Mr Hanekom, held a meeting where it was formally decided to cancel the headlease. The written resolution is signed by all three trustees, and reflects the decision to cancel the headlease in terms of clause 2 thereof. Mr Hanekom has conducted himself in accordance with such resolution ever since. That both the parties to the headlease were fully aware of the cancellation is also reflected in clause 19.1 of the second agreement of sale in respect of Klein Swartfontein, which was signed on 27 May 2021 by Mr Hanekom on behalf of the HT as seller: "The Seller confirms that the lease agreement, dated 1 January 2005, between them and Nicholaas Hanekom, has been terminated with effect from 31 December 2020 in accordance with a valid resolution by the Seller's trustees."
67. In these circumstances, the headlease was validly cancelled either because the HT's written resolution simultaneously served as the written notice of termination to Mr Hanekom, as required by clause 2 of the headlease, or Mr Hanekom waived his right to receive separate formal notice. Such waiver may be inferred from his conduct both prior to and after the date of the resolution.[31] There is no suggestion that he did not have knowledge of the rights that he was waiving. It is in any event patently evident that the trustees and Mr Hanekom had reached consensus on the cancellation of the headlease. Given the facts, a third possibility in the circumstances is that the headlease was terminated by consensual cancellation, which was not required by the headlease to be in writing.
68. On any construction, however, the respondent's contentions to the contrary have no merit on the facts of this case. I do not agree with the respondent that the Trust made out its case in reply because it dealt with the defence in its replying affidavit. The acceptance by Mr Hanekom of the cancellation of the headlease was so obvious that the Trust did not squarely address the issue in the founding affidavit. It did, however, lay a factual foundation in the founding affidavit for what was subsequently set out in the replying affidavit after the

respondent had raised its defence on that basis. It is clear from the allegations in the founding affidavit that Mr Hanekom was informed of the impending termination of the headlease, and he was part of the HT's decision to terminate the headlease.

69. The respondent was not prejudiced by the applicant's allegations in the replying affidavit, because the respondent, as an outside party, never had knowledge of the facts regarding the process of cancellation of the headlease which it could have put up as countervailing facts in the answering affidavit. Had the respondent been in any position to counter the applicant's allegations in this respect, it could have sought leave to deliver a supplementary affidavit in response to the replying affidavit under Rule 6(5)(e).

Conclusion

70. It follows that the respondent's right to occupation of the farm has terminated, and its current occupation is unlawful.
71. The costs of the interlocutory application brought by the Trust for the reconsideration of the referral ruling, and for consent to deliver a supplementary affidavit, stood over for later determination. Given the Trust's success in the main application, there is no reason why the costs of the interlocutory application (where it also was the successful party) should not follow the result, as in the main application.

Order

72. I therefore grant an order in the following terms:
1. The respondent, and all those holding through or under it, is evicted from the farm known as Klein Swartfontein, comprising the following properties in the division of Malmesbury ("the Farm"):
 - a. Remainder of Portion 11 (a Portion of Portion
 - 1) of the Farm Zwartfontein No. 414;
 - b. Remainder of Portion 12 (Klein Zwartfontein) (a Portion of Portion 1) of the Farm Zwartfontein No. 414;
 - c. Remainder of Portion 13 (Annex Klein Zwartfontein) (a Portion of Portion 1) of the Farm Zwartfontein No. 414; and
 - d. Remainder of Portion 18 (a Portion of Portion
 - 1) of the Farm Zwartfontein No. 414.
 2. The respondent and all those holding through or under it are ordered to vacate the Farm by no later than Friday, 25 October 2024.

3. In the event of the respondent or any of those holding through or under it failing to comply with the order in paragraph 2, the Sheriff of this Court is authorized and directed to enter the Farm forthwith and evict the non-complying persons.
4. The respondent shall pay the costs of this application, including the costs of the interlocutory application for the reconsideration of the referral ruling made on 1 March 2022, and for consent to deliver a supplementary affidavit.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant: H. du Toit, instructed by De Klerk & Van Gend Attorneys

For the respondent: H. N. de Wet, instructed by Werksmans Attorneys

- [1] Being two farms respectively known as Klein Swartfontein and Hanekomshoop. The Trust seeks relief only in relation to the

Klein Swartfontein farm.

- [2] Stevens v Van Rensburg 1948

- (4) SA 779 (T) at 782-783.

- [3] At the time, the sale of the second farm, Hanekomshoop, was being negotiated between the Trust and the HT. That sale has since been concluded, and transfer of Hanekomshoop was passed to the Trust on 12 September 2023.

- [4] Loosely translated.

- [5] Nicolaas Hanekom.

- [6] With reference to the manner in which disputes of fact are to be resolved where final relief is sought on motion: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

- (3) SA 623 (A) at 634E-635C.

- [7] Represented by Mr Hanekom.

- [8] This alleged oral agreement is referred to in the papers as the "Hanekom agreement". I refer to it as the "oral agreement".

- [9] The answering affidavit repeatedly refers to "the sublease and the Hanekom Agreement" (the latter being the oral agreement) as two distinct agreements.

- [10] See Tshwane City v Blair Athol! Homeowners Association 2019

- (3) SA 398 (SCA) at para [66].

[11] 2021

(6) SA 1 (CC) at paras [89]-[92]. Emphasis supplied. See also *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022

(1) SA 100 (SCA) at paras [39]-[40].

[12] See also *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail*

[2008] ZASCA 127; 2009

(1) SA 196 (SCA) at para [13].

[13] See the discussion in *Capitec supra* at para [42]ff.

[14] The identity of the parties is one of the essential terms of an agreement: *Osborne and another v West Dunes Properties 176 (Pty) Ltd and others* 2013

(6) SA 105 (WCC) at para [28].

[15]

[2008] ZASCA 16; 2008

(4) SA 161 (SCA) at paras [14]-[17]. Emphasis added.

[16] 2015

(6) SA 535 (WCC) at paras [165]-[166].

[17] Quoted in para [24] above.

[18] Keeping n mind the sui generis nature of a trust.

[19] *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd* 1999

(1) SA 796 (W) at para [6].

[20] Leaving aside the respondent's reliance on the oral agreement.

[21] Quoted in para [11] above.

[22] See the discussion in *Bradfield Christie's Law of Contract in South Africa* (7ed) at pp 504-506.

[23] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA) at para [18].

[24] See, for example, *Lichtenburg Town Council v Johannesburg Board of Executors and Trust Co Ltd* 1939 AD 618.

[25] *Blake v Cassim* [2008] ZASCA 67; 2008

(5) SA 393 (SCA) at para [22].

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- [26] SA Eagle Insurance Co Ltd v Van der Merwe NO 1998
- (2) SA 1091 (SCA) at 1097F–J.
- [27] Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd supra.
- [28] Ntai and others v Vereeniging Town Council and another 1953
- (4) SA 579 (A) at 589A–H.
- [29] Cooper Landlord and Tenant at p 322. See also Joubert (ed) The Law of South Africa (2ed) Vol. 14 Pt 2 at para 48.
- [30] Quoted in para [15] above.
- [31] See Road Accident Fund v Mothupi 2004
- (4) SA 38 (SCA) at paras [16]–[18].
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