rtable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 2004/2019
Heard: 21/02/2021
Date delivered: 07/10/2022

In the matter between:

GERT JOHANNES HERMIAS WILHELMUS NIEUWOUDT
(I.D. No: [...]) Applicant

and

MARTIN VOS (I.D. No: [...]) First Respondent
YOLANDIE VOS (I.D. No: [...]) Second Respondent
SOL PLAATJE MUNICIPALITY Third Respondent

In re:

MARTIN VOS
First Applicant
YOLANDIE VOS Second Applicant

And

GERT JOHANNES HERMIAS WILHELMUS NIEUWOUDT First Respondent
THE REGISTRAR OF DEEDS, KIMBERLEY Second Respondent

JUDGMENT

EILLERT, AJ

[1] This is a judgment which I had previously reserved in two applications brought simultaneously, to wit: an eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, as well as a counter-application thereto. The Applicant in the application for eviction is Mr Gert Johannes Hermias Wilhelmus Nieuwoudt and the Respondents are Mr Martin Vos and Mrs Yolande Vos. The Applicants in the counter-application are respectively Mr Martin Vos and Mrs Yolande Vos, with Mr Nieuwoudt being the First Respondent therein and the Registrar of Deeds, Kimberley, being the Second Respondent. In this judgment I will for ease of reference refer to the parties herein as they are cited in the application for eviction.

[2] On 5 August 2019 the immovable property of Erf […], Kimberley, also known as […] Street, Kimberley ("*the property*"), was transferred into the name of the Applicant. Before the transfer, the property was registered in the names of the Respondents. The property is the home of the Respondents. They purchased the property in 2005 with the assistance of a loan by First National Bank, in respect of which a mortgage bond was registered in favour of the bank to secure the Respondents' indebtedness.

[3] The First Respondent conducts business as a livestock broker. According to him he does so by way of a close corporation, Lanmar Verskaffers CC ("*Lanmar*"). A CIPC company report regarding Lanmar has been provided to Court and on the face of it, the closed corporation exists.

[4] The Applicant is a farmer and also a director of a company, BN Handel

(Pty) Ltd ("*BN Handel*"). The other director of BN Handel is a Mr Andries Johannes Burger.

[5] In April 2019, and possibly May 2019, certain business transactions took place in which the Applicant and the First Respondent was involved. These business transactions consisted of the provision of cattle, the sale of cattle, the deduction of commission from the proceeds of the sale and the payment to the Applicant of the nett proceeds derived in this manner. I have described the business transactions in broad terms, as it is the Applicant's version that the transaction in April 2019 took place between the Applicant personally as the seller, and the First Respondent personally as the livestock broker, and that the alleged transaction in May 2019 took place between BN Handel, represented by the Applicant, as the seller, and the First Respondent personally as the livestock broker. However, in his papers the Applicant also refers to the First Respondent interchangeably as "Lanmar". It is the First Respondent's version that all business transactions were conducted between Lanmar, represented by the First Respondent, and BN Handel, represented by Mr Nieuwoudt. Invoices that were purportedly issued in respect of the business transactions have been provided to this Court and I will address these invoices in due course. The reason why I have referred to the alleged transaction possibly taking place in May 2019 will presently become clear.

[6] It is common cause that an indebtedness in the amount of R837,456.55 arose as a result of the sale of cattle. Because of the conflicting versions set out in paragraph 5 above, a dispute of fact exists whether this amount was owed by the First Respondent or Lanmar, and whether this amount was initially due to both the Applicant and BN Handel, or only to BN Handel. Part of the Applicant's version is that BN Handel's claim resulting from the (alleged) transaction in May 2019 was later ceded to him.

[7] According to the First Respondent, Lanmar conducted its business with

the assistance of a GWK credit facility. Lanmar started experiencing financial difficulties during 2019 as a result of the drought and the high interest rate charged by GWK. During May 2019 GWK suspended Lanmar's credit facilities causing it to experience a cash flow problem.

[8] It has not been disputed by the First Respondent that Lanmar, or perhaps the First Respondent in his personal capacity, did not pay as per the terms of the agreement that he had had with BN Handel and/or Mr Nieuwoudt.

[9] Further events that are common cause are that Mr Nieuwoudt attended a farmers' day between Ulco and Barkly West on what must have been 23 May 2019. Rumours regarding the First Respondent and/or Lanmar were going round that either or both were indebted to creditors to the tune of R14 million and that the First Respondent had not made payments as he should have. Mr Nieuwoudt concluded that the First Respondent's ability to pay was in serious doubt and that he needed to act. He telephoned his Bloemfontein attorney, who also advised him that it would be prudent for the Applicant to act as soon as possible. Together they decided that the Applicant, Mr Noordman, the attorney, a Mr Liebenberg, a friend of Mr Nieuwoudt, and the attorney's clerk, Mr Bothma, attend at the First Respondent's residence at approximately 1 o'clock on the same day. Mr Liebenberg was also a creditor of the First Respondent in the amount of R192,922.00. Their purpose was to discuss "the matter" with the First Respondent, presumably on the question of whether the First Respondent and/or Lanmar was in financial difficulty, and the payment of the debt owed to the Applicant and/or BN Handel.

[10] During the meeting on 23 May 2019, the Applicant requested the First Respondent to issue an invoice to BN Handel, which the Applicant says he had requested from the First Respondent for weeks on end. The First Respondent complied with this request. The other director of BN Handel, Mr Burger, was still at the farmers' day, but it is alleged that the Applicant and Mr Burger had resolved that BN Handel would cede its claim to the Applicant.

[11] The Applicant then asked the First Respondent to sign an acknowledgment of debt for the amount of R837,456.55. In terms of the acknowledgment of debt, payment of this full amount had to be made on or before 30 May 2019. Mr Noordman drafted documents on his laptop, and Mr Bothma was sent to have the documents printed. Upon Mr Bothma's return, the First Respondent signed the documents. Later in the afternoon, the Second Respondent came home and also signed the documents.

[12] It is not disputed that the payment arrangement in the acknowledgment of debt was not honoured.

[13] Subsequent to the events of 23 May 2019, there was an occasion on which a Mr Francois Van Pletzen, an associate of Noordmans Attorneys, met with the Respondents at a restaurant venue outside of Kimberley to sign further documents. The Respondents complied with the request to sign such further documents.

[14] The Respondents advanced the contentions in their papers that they were induced by fraud and duress to sign the documents on 23 May 2019 and to meet with Mr Van Pletzen. The First Respondent's case is that he agreed to sign an acknowledgment of debt, but to do so on behalf of Lanmar, as he was not able to utilise his GWK credit facilities. He alleges that he was not given the opportunity to read the documents before being forced to sign them by Mr Noordman. He says he was also forced to phone the Second Respondent to come home and that she was likewise forced to sign the documents on her arrival. According to the First Respondent, he was not informed that he was also signing a Deed of Sale in respect of his residential property. Much the same goes for the subsequent meeting between Mr Van Pletzen and the Respondents, where they were allegedly again not afforded the opportunity to peruse the documents before signing them. According to the Respondents, they verily believed the documents to be additional only to the

acknowledgment of debt.

[15] On the other hand, it is the Applicant's case that the Respondents agreed on 23 May 2019 to, in addition to signing the acknowledgment of debt, sell their residential property to him on the premise that, if payment was not made in terms of the acknowledgment of debt, the Applicant would proceed to enforce the agreement of sale. In addition to the acknowledgment of debt binding the First Respondent to pay, Mr Noordman also prepared a Deed of Sale which was provided to the Respondents. According to the Applicant the Respondents were never under duress, were not induced by fraud, that they had the opportunity to peruse the documents and that they knew exactly what they were signing.

[16] On 5 July 2019 it was discovered that the amount owing on the mortgage bond over the property held by First National Bank was R799,333.20. Later in July 2019 the rates and taxes owing to the Sol Plaatje Municipality was ascertained to be in the amount of R6,381.27. The Applicant proceeded to settle the mortgage bond and the rates and taxes to obtain a clearance certificate from the Municipality.

[17] The Applicant's attorneys proceeded with the transfer and registration of the property into his name. On the First Respondent's version he only became aware on 6 August 2019 that the mortgage bond over the property had been settled and that the property had been transferred to the Applicant.

[18] Needless to say, the Respondents did not vacate the property. The Applicant never averred that he at any stage informed the Respondents in writing, or on any formal basis, that they were required to vacate the property.

[19] On 9 September 2019 the Applicant initiated the eviction application against the Respondents in terms of the Prevention of Illegal Eviction

from and Unlawful Occupation of Land Act, 19 of 1998 ("*the Act*"). What is peculiar about the application for eviction is that the Founding Affidavit in support of such application is very cursory, its contents merely meeting the requirements stipulated in Section 4 of the Act by way of allegations mostly devoid of any substance. The Applicant preferred not to provide much of the background recounted above. Although this is a peculiar feature to this matter, I prefer not to speculate about the reasons why this course of action was taken.

[20] The Respondents opposed the application for eviction, and it was only when they filed their papers in the matter that the background thereto was revealed. The Respondents additionally instituted a counter-application, in which they seek the relief that the Deed of Sale dated 23 May 2019 whereby the property was sold to the Applicant, be declared null and void, and that the Registrar of Deeds be directed and authorised to cancel the relevant Deed of Transfer.

[21] The Respondents' papers further revealed that on 4 October 2019 the Applicant issued summons against the Respondents under case number 2206/19 of this Court ("*the action*") for recovery of the amount which the Applicant had paid for the settlement of the mortgage bond in respect of the property. I was provided with the court file of the action at the hearing of this matter. What must be noted from the Particulars of Claim in the action, as amended on 28 September 2020, are the following: the Particulars of Claim refer to an oral agreement concluded between the Applicant and the First Respondent on 23 April 2019 in respect of the sale of calves; it also refers to an oral agreement concluded between BN Handel and the First Respondent on 23 May 2019 at Daniëlskuil for the sale of calves. According to the Particulars of Claim, it was a term of both oral agreements that the First Respondent would pay the amount due in terms of the respective agreements within 14 days of taking delivery of the calves.

[22] In the adjudication of an application for eviction of an alleged unlawful

occupier, a Court must undertake two separate enquiries. *In casu*, and in terms of Sections 4(6) and 4(8) of the Act, the first enquiry is whether it is just and equitable to grant an eviction order having regard to all relevant factors. Once the Court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. The second enquiry relates to what both justice and equity demands in relation to the date of implementation of the order. [1]

[23] In assessing whether the Applicant has satisfied the requirements of Sections 4(6) and (8) of the Act, or whether the Respondents have managed to raise a defence against their proposed eviction from the property, I must remark that there are aspects on the side of both parties which raise the proverbial eyebrow. In light of the order I intend to make in these proceedings, I do not consider it prudent to list each and every concerning aspect the papers reveal, and will therefore confine myself to some observations and findings which I deem relevant.

[24] The Respondents aver that as at 2 September 2019 the realistic market value attainable if the property was to be sold, was the amount of R1,380,000.00. In support of this averment, they attached a copy of a valuation performed by Keystone Property Consultants to their papers. The Respondents further contend that they would never have sold their property willingly for an amount far below its market value.

[25] The problem with the evaluation report of the property is that it was not confirmed by the professional valuer. The Applicant took the point in his papers that the valuation report therefore constitutes inadmissible hearsay evidence. If my recollection serves, Mr Jacobs on behalf of the Applicant did not persist with this point during the hearing. This Court nonetheless has the discretion in terms of Section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988 ("*the Law of Evidence Act*"), to

[1] See: **CITY OF JOHANNESBURG vs CHANGING TIDE 74 (PTY) LTD AND 97 OTHERS (THE SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA INTERVENING AS AMICUS CURIAE** [2012] ZASCA 116 (14 September 2012)

admit this evidence if I should be of the opinion that it would be in the interest of justice to do so. [2]

In applying the considerations set out in Section 3(1)(c) of the Law of Evidence Act, it is so that this Court has not been given a reason why the evidence is not given by the professional valuer himself, and that the admission of the evidence may cause prejudice to the Applicant. In my view however, these two considerations are outweighed by the other considerations enumerated in Section 3(1)(c), being: the nature of the proceedings, in that hearsay evidence may more readily be admitted in application proceedings; the nature of the evidence, in that it is nevertheless a report signed by a professional valuator which has not been gainsaid by way of evidence from the Applicant, and the inherent sufficient probative value of the evidence. Another factor which I take

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[2] Section 3 of the Act provides:

"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
  (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
  (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
  (c) the court, having regard to-
    (i) the nature of the proceedings;
    (ii) the nature of the evidence;
    (iii) the purpose for which the evidence is tendered;
    (iv) the probative value of the evidence;
    (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
    (vi) any prejudice to a party which the admission of such evidence might entail; and
    (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section –
- 'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
- 'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

into consideration is that the Applicant also responded to the Respondents' averment regarding the market value of the property that he denies that the property sold for below its market value, as when calculating the acknowledged debt together with the outstanding bond balance, the price for the property was much higher than market related prices. This lastmentioned argument of course conveniently omits the fact that the Applicant instituted action to recoup the money paid by him in settlement of the mortgage bond and that he still intends to recover such amount from the Respondents. In my considered view therefore, the valuation report should be admitted into evidence.

[26] The consequence of the evidence that have been provided regarding the market value of the property is that it supports the contention that the Respondents would not likely willingly part with the property if Lanmar, or the First Respondent, was indebted to the Applicant and/or BN Handel in an amount of R442,543.45 less than the reasonable market value of the property.

[27] The next aspect is the questionability of the invoices and the resultant impact thereof upon the question of the First Respondent's liability to the Applicant and/or BN Handel. Mr Jacobs on behalf of the Applicant insisted that this court is not called upon to adjudicate on the veracity of the invoices or the issues in the action. As a general proposition this would be correct, and it would be wrong of this Court to, at this stage, make findings regarding issues that might still be addressed in the action. However, this Court is called upon to decide whether it is just and equitable that the Respondents be evicted from their home, and if the invoices, or rather the questionability of the invoices, is raised as part of a respondent's defence in an eviction application, it would be equally wrong for the Court to merely turn a blind eye thereto.

[28] The Applicant failed to provide a copy of the invoice in respect of the transaction of 23 April 2019 in its papers *in casu*. This invoice had to be found in the annexures to the summons in the action. It appears to be

an invoice issued by the Applicant to Lanmar Verskaffers on 23 April 2019, and has an entry written in manuscript at the bottom thereof stating "*To Pay, Martin Vos*", along with a signature underneath such entry. Then, the purported invoice, which the First Respondent averred he was forced to issue, is a handwritten tax invoice produced from a proforma source document or book, made out by Lanmar Verskaffers on 23 May 2019 to "BN Algemeen", again with a manuscript entry at the bottom thereof, stating "*Vos To Pay*", and with a signature above such entry. This lastmentioned invoice seems highly questionable, as it clearly runs counter to the way both parties allege the transactions were conducted. Whoever the party on either side was, Lanmar or the First Respondent was never alleged to be the supplier of cattle, and BN Handel was never alleged to be the livestock broker. It must also not be forgotten that in the action, the Applicant alleges that an oral agreement was concluded at Daniëlskuil on 23 May 2019 between BN Handel and the First Respondent. Contrary thereto, *in casu*, the Applicant has stated that he first was at a farmers' day on 23 May 2019 (where the First Respondent was not present) and thereafter at the First Respondent's home for a large part of the rest of the same day. These two versions of the Applicant are contradictory and mutually exclusive, and raises suspicions whether the purported invoice constitutes a document properly evidencing liability by the First Respondent toward BN Handel. Furthermore, even if a transaction took place on 23 May 2019, on the Applicant's version in the action, payment in respect of such transaction would only have become due before or on 14 days following such transaction. Therefore, the debt which is purportedly evidenced by the alleged invoice of 23 May 2019 would not have been due by 30 May 2019.

[29] On the side of the Respondents, the Respondents elected not to seek leave to file a Supplementary Affidavit in the application for eviction, or to file a Replying Affidavit in the counter-application. This left some pertinent averments regarding the Respondents' conduct post the signing of the documents on 23 May 2019 unexplained. This has made this Court's task all the more difficult and was a major cause for concern

regarding the veracity of the Respondents' version.

[30] I am left with the dispute of fact about the question whether the documents signed by the Respondents were entered into under the influence of fraud and duress, or whether they were freely and voluntarily entered into. Mrs Erasmus on behalf of the Respondents submitted that the application for eviction should be dismissed, and the counter-application referred to oral evidence, as the factual disputes cannot be resolved on the papers.

[31] It is trite that, although it is generally undesirable, and often impossible, to decide factual disputes on the papers alone, there may be instances in which a Court should adopt a robust approach and where disputes of fact must be decided on the papers in order for justice to be done.[3] Furthermore, although it is also trite that it would usually be undesirable for a Court to attempt, in motion proceedings and based on evidence on affidavit, to make findings based on probabilities, I still had to consider whether *in casu* perhaps either of the parties' versions were not improbable to such an extent that it could only be considered as palpably implausible, far-fetched or clearly untenable. [4]

[32] This being said, I find that in this matter I cannot simply adopt a robust approach in order to adjudicate the factual disputes between the parties. The Respondents' affidavit did at least disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being decided only after *viva voce* evidence has been heard. [5] I believe that it would be just and equitable in the circumstances to allow the Respondents the opportunity to adduce *viva voce* evidence on the issues of the alleged fraud and/or duress which, if established, would constitute

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[3] See: **SOFFIANTINI vs MOULD** 1956(4) SA 150 (E) at 154 G – H;
BUFFALO FREIGHT SYSTEMS (PTY) LTD vs CRESTLEIGH TRADING (PTY) LTD AND ANOTHER 2011(1) SA 8 (SCA) at paragraph [19]

[4] Compare: **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS vs ZUMA** 2009(2) SA 277 (SCA) at paragraph [26]

[5] **ROOM-HIRE CO. (PTY) LTD vs JEPPE MANSIONS (PTY) LTD** 1949(3) SA 1155 (T) at p. 1165

a valid defence against the application for their eviction. The Applicant should equally be given an opportunity of answering the case advanced by the Respondents.

[33] In terms of Uniform Rule 6(5)(g) this Court is afforded the power to make such order as it deems fit with a view to ensuring a just and expeditious decision. The orders that I make are informed by such power and considerations. [6]

In the premise the following orders are made:

[1] The application for the eviction of the Respondents from Erf […], Kimberley, also known as […] Street, Kimberley, is stayed pending the final adjudication of the oral evidence on the Respondents' counter-application as provided for below.

[2] The Respondents' counter-application is referred for the hearing of oral evidence, at a time to be arranged with the Registrar, on the question whether the agreement of sale in respect of Erf […], Kimberley, dated 23 May 2019 should be declared null and void as a result of fraud and/or duress.

[3] The evidence shall be that of the First and Second Respondents and the Applicant, as well as any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 4 hereof.

[4] Save in the case of the First and Second Respondents and the Applicant, neither party shall be entitled to call any witness unless:

(a) he or she has served on the other party at least 14 days before the date appointed for the hearing (in the case of a witness to be called

[6] It was my intention to deliver this judgment without delay. However, due to circumstances beyond my control, the judgment has taken much more time than was anticipated. I sincerely regret the delay.

by the Respondents) and at least 10 days before such date (in the case of a witness to be called by the Applicant), a statement wherein the evidence to be given in chief by such person is set out; or

(b) a court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his/her evidence.

[5] Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

[6] The fact that a party has served a statement in terms of paragraph 4 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

[7] Within 21 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issues referred to in paragraph 2 hereof, which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Uniform Rule 35 and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.

[8] The costs of the application for eviction are to stand over for later determination.

[9] The costs of the counter-application are to be determined in the hearing of oral evidence envisaged above.

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EILLERT, A

ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION
KIMBERLEY

For the Applicant:	Adv. F.F. Jacobs
Instructed by:	Van de Wall Inc. BH/lg/M05634
For the Respondents:	Adv. S.L. Erasmus
Instructed by:	Engelsman, Magabane Inc. FEngelbrecht/VOS21/0001