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LL Case No 231/1984

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PRO NOBIS LANDGOED (EDMS) BEPERK Appellant

and

AMAVUBA (PTY) LIMITED Respondent

CORAM: RABIE, CJ, JANSEN, VAN HEERDEN, GROSSKOPF, JJA, et CILLIé, AJA

HEARD: 4 NOVEMBER 1985

DELIVERED: 19 NOVEMBER 1985

JUDGMENT

/VAN HEERDEN, JA ...

VAN HEERDEN, JA:

The respondent is the owner of 17 immovable properties situated in the County of Zululand. During 1983 it instituted motion proceedings in the Natal Provincial Division against the appellant (as first respondent) and three other respondents (hereinafter referred to as the Meintjes brothers). The main relief sought by the present respondent was an order directing the appellant and the Meintjes brothers to vacate the said properties.

In the founding affidavit, deposed to by one Griffith, a director of the respondent, it was alleged that the appellant, through its directors and employees (the Meintjes brothers), was in unlawful occupation of portions of the respondent's properties, collectively known as the game farm. It was further alleged that the appellant had been the lessee of the game farm by virtue of an oral or implied lease which had terminated

/on ...

on 31 December 1982.

Only the appellant opposed the application (the Meintjes brothers abiding the decision of the court). The appellant's main defence was that in terms of an oral agreement concluded in 1980 it remained entitled to occupy the game farm. Further, and presumably in the alternative, the appellant relied on a right of retention in regard to improvements effected by it on the property. The appellant also made a counter-application which is not relevant for the purposes of this appeal.

It appears that in February 1980 the respondent, then registered as Meintjes Broers (Edms) Bpk, was provisionally wound up. On 26 July 1980 Jeremy Timbers (Pty) Ltd ("Jeremy Timbers") in terms of s 311 of the Companies Act (61 of 1973) made an offer of compromise to the creditors and members of the respondent. That offer was later duly accepted and sanctioned by the

/court ...

court. In the result the provisional winding-up order was discharged and Jeremy Timbers became the beneficial owner of all the shares in the respondent.

Prior to the acceptance of the offer of compromise certain negotiations took place between two attorneys, James and Thunstrom. According to affidavits filed on behalf of the appellant the object of the negotiations was to secure the support of the appellant and the Meintjes brothers for the offer. (It is not clear what the interest of the appellant was, but the Meintjes brothers were then the holders of all or most of the shares in the respondent.) Thunstrom deposed that on 20 August 1980 he and James, acting on behalf of their respective principals, in the course of a telephone conversation concluded an agreement to the effect that:

> "7.1 the first respondent [i e, the present appellant] was to have the right to lease the game farm for a two year period at a nominal rental;
>
> 7.2 on the expiration of the two year period, [if]

the owner decided to sell the game farm, the first respondent would have a right of first refusal in respect thereof;

7.3 in the event of the owner deciding not to sell the game farm, and being satisfied with the manner in which the first respondent had managed the game farm, it would have a right to continue to lease the game farm at a reasonable rental."

Thunstrom said that he knew that James represented Jeremy Timbers but that he strongly suspected that it was an intermediary for Anglo American Corporation of South Africa Ltd ("Anglo American") as undisclosed principal. Hence, Thunstrom concluded, James bound his principal which was either the respondent, Jeremy Timbers or Anglo American,"whichever is the 'lessor'."

In the appellant's main opposing affidavit, deposed to by one of the Meintjes brothers, reference was made to an application instituted by the appellant against Anglo American. The relief sought in that application was an order declaring that an agreement of lease at a rental of R22 140,00 per annum (allegedly a reasonable

/rental ...

rental), in terms of which the appellant was entitled to occupy the game farm, existed between "the applicant" and Anglo American, alternatively Jeremy Timbers, and an order directing Anglo American, alternatively Jeremy Timbers, "to do all things necessary to require ... (the respondent) ... to withdraw its application" against the appellant and the Meintjes brothers. (It is tolerably clear that when formulating the first prayer the deponent inadvertently used the words "the applicant" instead of "the first respondent", i e, the present appellant. I say so because the opposing affidavit is devoid of an allegation, or even a suggestion, that any agreement existed between Anglo American, or Jeremy Timbers, and the present respondent, which was the applicant in the court a quo.)

The opposing affidavit in the present proceedings concluded with a prayer for an order directing that the respondent's application and the appellant's counter-application be stayed pending the determination of the

appellant's application against Anglo American.

In affidavits filed in reply it was denied that an agreement had been reached by James and Thunstrom in regard to the use and occupation of the game farm after the end of 1982. James's instructions emanated from Griffith and both he and James also denied that the former had been authorised to conclude an agreement in terms of which the appellant would be entitled to continue leasing the property after the expiration of a period of two years. It was furthermore made clear that although Jeremy Timbers was controlled by a company which was in turn controlled by Anglo American, all negotiations relating to the offer of compromise had been conducted by James on behalf of Jeremy Timbers (represented by Griffith) and that Anglo American had not been a party thereto.

Whilst denying that the appellant enjoyed a lien over the game farm, the respondent tendered to furnish

/security ...

security for payment of such sum as might be due to the appellant in respect of improvements effected by it. And during the course of argument in the court a quo it was agreed that security for payment of an amount of R6 300 would suffice.

On the authority of the decision of the Full Bench of the Natal Provincial Division in Trook t/a Trook's Tea Room v Shaik and Another 1983 (3) SA 935 (N), the court a quo held that a stipulation in a "lease" to pay a reasonable rental is void for vagueness. Hence, in the court's view, no valid agreement of lease in regard to a period subsequent to the end of 1982 would have been concluded between James and Thunstrom even if the latter's version of their agreement were to be accepted. Despite the conflict of fact raised by the affidavits the court accordingly granted an order directing the appellant and the Meintjes brothers to vacate the game farm. That order was, however, not to be of any effect until such

/time ...

time as the appellant lodged security to the satisfaction of the Registrar in the aforesaid amount of R6 300. The issues raised by the counter-application were referred for oral evidence and the appellant was ordered to pay the costs of the application, excluding the costs of the counter-application which were reserved for decision by the court adjudicating upon it.

On appeal, with the leave of the court a quo, the only question debated in counsel's heads of argument was whether a valid lease or innominate contract is concluded if the "lessee" undertakes to pay a reasonable rental. For the reasons set out hereunder I find it unnecessary, however, to consider that question.

At the hearing of the appeal we were informed that the appellant's application against Anglo American was dismissed on the same day as the ejectment order against the appellant and the Meintjes brothers was granted. (All that can be gleaned from a copy of the

judgment made available to this Court, is that the application was brought against both Anglo American and Jeremy Timbers and that no argument in support of the application was addressed to the court.) Counsel for the appellant accordingly disavowed the prayer in the opposing affidavit and submitted that the appellant's defence to the application for ejectment should be approached on the basis that James represented and bound the respondent (and not Anglo American or Jeremy Timbers).

The only relevant paragraphs in Thunstrom's affidavit read as follows:

> "5.1 In representing the respondents [i e, the appellant and the Meintjes brothers] in their negotiations and in concluding the agreement referred to in paragraph 7 hereof, I dealt with the said JAMES, and at no stage did I have any discussions with the deponent to the applicant's [i e, the appellant's] affidavit, the said GRIFFITH.
>
> 5.2 I knew that JAMES represented JEREMY TIMBERS (PROPRIETARY) LIMITED, but I

/strongly ...

> strongly suspected that JEREMY TIMBERS was an intermediary and that the ANGLO AMERICAN CORPORATION was in fact his undisclosed principal in the negotiations and to the eventual agreement.
>
> 5.3 In the premises, in concluding, as I did, a Lease Agreement with JAMES, I bound the first respondent [i e, the appellant] and JAMES bound his principal which is either the applicant, [i e, the respondent] JEREMY TIMBERS (PROPRIETARY) LIMITED or THE ANGLO AMERICAN CORPORATION, whichever is the 'lessor'."

It is clear that para 5.3 contains a conclusion and not an independent statement of fact. There is, however, not a single factual averment in Thunstrom's affidavit, or in the main opposing affidavit, from which it can be inferred that James represented the respondent. On the contrary, Thunstrom's allegation that James represented Jeremy Timbers can hardly be reconciled with the conclusion that the respondent may have been his principal.

There is in any event a consideration which militates strongly against the notional possibility that

James may have represented the respondent. It was common cause on the affidavits that the telephone conversation in issue took place on 20 August 1980. At that stage the respondent was in provisional liquidation and it is indeed difficult to see on what basis James could have bound the respondent. Assuming that it would have been competent for the provisional liquidator to enter into an agreement which would become binding upon the respondent in the event of the liquidation order being discharged, there certainly is no suggestion in the appellant's papers that he authorised James to conclude any agreement on his behalf.

It follows that the appellant failed to show that the respondent was a party to the agreement reached by James and Thunstrom. Nor did the appellant make out a case that subsequent to the respondent's discharge from liquidation it became a party to that agreement. And since the lacuna in the appellant's affidavits was not cured by anything said in reply, the agreement deposed

/to ...

to by Thunstrom did not present a bar to the claim for ejectment.

Counsel for the appellant relied, however, upon a so-called concession made by counsel for the respondent in the court a quo, and submitted that it was in effect conceded that the respondent was a party to the agreement concluded by James and Thunstrom.

The nature of the concession appears from the following extracts from the judgment of the court a quo:

> "Mr Shaw, who appeared for the applicant [i e, the respondent], submitted that despite the conflict of fact raised in the affidavits, the applicant's claim for ejectment could be resolved on the papers. He submitted that even if first respondent's [i e, the appellant's] version of the alleged agreement were proved no valid and binding agreement of lease would have been concluded by the parties."

And:

> "The applicant has elected that the matter be decided on the basis of the acceptance of first respondent's version of the facts."

It seems clear that in the court below counsel

/for ...

for the respondent conceded no more than that, in so far as the affidavits raised a conflict of fact, the appellant's version had to prevail. Hence I fail to see how it can be said that an implied admission was made in regard to a hiatus in the appellant's affidavits. It is true that the only submission made by counsel for the respondent was that a stipulation in a "lease" to pay a reasonable rental is void for vagueness, but his concession did not preclude him from contending that for another reason the appellant's papers did not disclose a valid defence to the claim for ejectment.

There is, however, an additional reason why the appeal cannot succeed. On the assumption that an undertaking to pay a reasonable rent may give rise to a valid contract of lease, the agreement on which the appellant relied is in my view in any event void for vagueness. It will be recalled that according to Thunstrom it was agreed that on the expiration of the

initial two year period the appellant would have a conditional right "to continue to lease the game farm at a reasonable rental". On his version not a word was said about the duration of the lease. Nor was provision made for a periodic payment of rent, e g a reasonable monthly, quarterly or yearly rental. It is accordingly impossible to determine whether it was intended that the lease should run for a definite period, or until the occurrence of an event, or from period to period or, conceivably, at the will of either the lessor or the lessee.

The appeal is dismissed with costs, including the costs of two counsel.

H.J.O. VAN HEERDEN, JA

RABIE, CJ
JANSEN, JA
GROSSKOPF, JA
CILLIÉ, AJA

CONCUR