IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION Case no 72893

In the matter between

RALPH VELCICH First Appellant
EZRA MARTINS Second Appellant
JAN DE BRUYN BREEDT Third Appellant

and

LAND EN LANDBOUBANK VAN SUID-AFRIKA First Respondent
JAMES VAN RENSBURG NO Second Respondent
CHALMAR BEEF (PTY) LTD Third Respondent

Coram: JOUBERT, NESTADT, STEYN, VAN DEN HEEVER et SCHUTZ JJA

Heard: 23 May 1995

Delivered: 31 August 1995

JUDGMENT

JOUBERT JA:

This is an appeal against the dismissal on 15 June 1993 by the

Transvaal Provincial Division of an application by the appellants for judgment against the respondents. It is brought with the leave of the Judge a quo (ROUX J).

The relevant background facts may conveniently be tabulated as follows:

1 On 18 August 1975 L.C. Moolman, and his brother D.J. Moolman, as lessors, entered into a written lease ("the original lease") with the first and second appellants, as lessees, in respect of the arable lands on the farm Tweefontein ("the farm") as from 1 September 1975 for a period of 3 years. The lessees could not sub-let the hired lands, or any portion thereof, without the prior consent of the lessors. At that stage the lessors were not the registered owners of the farm.

2 On 10 November 1977 L.C. Moolman became the registered owner of the farm.

3 L.C. Moolman as mortgagor registered four mortgage bonds over the farm in favour of the first respondent ("the Land Bank"). They were expressly made subject to the provisions of the Land Bank Act No 13 of 1944 ("the Act").

4 The original lease was extended from lime to time until it was finally terminated on 31 August 1983.

4 On 19 September 1983 L.C. Moolman concluded a new written lease with the first and second appellants, as lessees, in respect of the arable lands on the (arm as from 1 September 1983 to 31 August 1988. The lessees were expressly precluded from sub-letting any of the hired lands, or any portion thereof, without the prior written consent of L.C. Moolman as lessor. The period of this lease was extended by the parlies to 31 August 1991. On 9 September 1991 they extended it to 31 August 1993.

5 The estate of L.C. Moolman was sequestrated on 26 February 1992 and the second respondent was appointed trustee thereof.

6 On 3 August 1992 the insolvent L.C. Moolman purported to consent in writing to the sub-letting of the lands on the farm by the first and second appellants. The latter then purported during August 1992 to sub-let the lands for a year to the third appellant who commenced with the preparation of the lands Tor the planting of crops early in September 1992 . The crops were planted during October/November 1992.

8 Upon the insolvency of L.C. Moolman the Land Bank acting in terms of sec 55 (2) (b) of the Act decided to sell the farm by public auction. The auction was advertised to be held on 1 October 1992 "vry van enige huurooreenkomste, bewoningsreglc, huurkoopooreenkomste en/of vruggebruik." It was auctioned as advertised. Since the bids received were inadequate to satisfy the secured claim of the Land Bank, the farm was bought in by the latter. On 17 December 1992 the Land Bank in terms of sec 72 (2) of the Act sold the farm to the third respondent.

The original notice of motion was dated 26 February 1993. During the hearing of the application by the Court a quo it was amended by the applicants/appellants to claim a declaratory order viz.

7 that the new agreement of lease of 19 September 1983, as extended from time to time to 31 August 1993, was still valid, binding and enforceable as against the respondents;

8 that the agreement of sub-lease of August 1992 was valid, binding and enforceable, also against the respondents;

9 that the sale of the farm on 1 October 1992 to the Land Bank and

thereafter by it on 17 December 1992 to the third respondent was subject to the aforementioned lease and sub-lease; and

4 that the third applicant/appellant was entitled to reap the crops sown by him on the farm as at 22 April 1993.

On 22 April 1993 the third applicant/appellant and the third respondent agreed that the crop which was valued at R150 000-00 would be reaped by the third respondent which would pay the said amount to the third applicant/appellant in the event of a judgment being granted in his favour.

The first question to be decided is whether or not the new lease survived the sale in execution of the farm on 1 October 1992. I have already indicated supra that the farm was auctioned as advertised without mention of the lease. It is common cause that the mortgage bonds were registered over the farm prior to the conclusion of the lease. Mr Pauw, on behalf of the appellants, contended that the lease survived the auction sale since the Land Bank failed to adopt the accepted procedure to protect the interests of the first and second appellants as lessees viz. first to put up the farm subject to the lease but to sell it free of the lease if the highest bid did not cover the Land Bank's claim. See Lubbe v

Volkskas Bpk 1992 (3) SA 868 (A) at p 875 C-H. Failure to adopt the accepted procedure at a sale in execution of mortgaged property will, however, not necessarily result in invalidity of the sale. Thus in Wiber v Mahodini (1904) 21 SC 645 a lease was executed alter a mortgage bond had been passed over a property. When the sale in execution of the property took place no mention was made of the lease. The property was sold at the highest bid obtained which was far less than the mortgage debt. DE VILLIERS CJ held at p 647:

"It is obvious that if the property had been put up subject to the lease, the highest bid would have been still lower. I consider, therefore, the mortgagee is now entitled to claim that the sale of the property free From the lease shall be sanctioned by the Court." ROUX J acted on a similar assumption: "Even if the farm was sold according to the accepted procedure the result would have been the same. The effect is that the lease ended on 1 October 1992." In the particular circumstances of the present case I agree with the approach and conclusion by the Court a quo that the lease did not survive the sale in execution of the farm. It follows that the sale of the farm by the Land Bank

to the third respondent on 17 December 1992 was accordingly free of the lease.

The next question raised related to the validity of the sub-lease. The new lease of 19 September 1983 expressly prohibited the first and second appellants as lessees from sub-letting the hired lands, or any portion thereof, without the prior written consent of the lessor (L.C. Moolman). After the sequestration of his estate the latter without the consent of the trustee (second respondent) purported to consent in writing to the sub-letting of the lands by the lessees (first and second appellants). During August 1992 the latter sub-let the lands to the third appellant. It is common cause that L.C. Moolman never obtained the consent in writing of his trustee to authorise him to consent to the sub-lease of the lands between the appellants.

Is the sub-lease valid as against the Land Bank and the third

respondent? Insolvency does not deprive the insolvent of his contractual

capacity but limits it in several respects as provided for in the Insolvency Act.

See 23 (2) reads as follows:

"The fact that a person entering into any contract is an insolvent, shall not affect the validity of that contract: Provided that the insolvent does not thereby purport to dispose of any property of his insolvent estate; and provided further

that an insolvent shall not, without the consent in writing of the trustee of his estate, enter into any contract whereby his estate or any contribution towards his estate which he is obliged to make, is or is likely to be adversely affected, but in either case subject to the provisions of sub-section (1) of section twenty-four."

Since sec 24 (1) deals with assets acquired by the insolvent after sequestration of his estate, it is irrelevant for purposes of this appeal. If an unrehahilitated insolvent were without the consent of his trustee to enter into a contract which falls within the ambit of the provisos to sec 23(2) such contract would according to our case law be voidable only and not void. See LAWSA vol 11 (1981) s.v. Insolvency, para 210 at p 157 for a full exposition with reference to the case law. Unfortunately this matter has not been dealt with by counsel in their written heads of argument. In my judgment there is, however, a very simple basis on which the matter may be resolved. At the sale in execution no mention was made at all of the existence of the sub-lease. It was not a registered sub-lease and the Land Bank at all relevant times had no knowledge of its existence. The Land Bank in fact bought in the farm with a clean title free of the sub-lease and subsequently sold it with a clean title to the third respondent. It therefore follows that the sub-lease is not binding upon nor

enforceable against the Land Bank and/or the third respondent. For purposes of this appeal it is irrelevant whether or not the sub-lease is valid as regards the first and second appellants.

That would really dispose of the appeal hut for an argument advanced hy Mr Pauw for the first time on behalf of the third appellant in this court. He asserted that the third appellant as a bona fide occupier of the lands had a lien on the crops which was based on unjust enrichment. In my judgment this contention is misconceived on the facts of this appeal. The causa of the application is based on contract, viz. the existence of the new lease and the sublease as contracts. No facts were pleaded as a basis for unjust enrichment giving rise to a lien on the crops. In the light of the aforegoing the appeal is dismissed with costs.

C.P. JOUBERT JA

CONCUR

NESTADT JA
STEYN JA
VAN DEN HEEVER JA
SCHUTZ JA