

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 8421/09

DATE: 05/11/2010

IN THE MATTER BETWEEN:

THE STANDARD BANK OF SOUTH AFRICA

APPLICANT

AND

ESTELLE KATHLEEN VAN DER MERWE NO

FIRST RESPONDENT

(in her capacity as Trustee of the PJS FAMILIE TRUST)

CORNELIUS JANSEN VAN DER MERWE NO

SECOND RESPONDENT

(in her capacity as Trustee of the PJS FAMILIE TRUST)

GERHARDUS FRANCOIS ROSSOUW NO

THIRD RESPONDENT

(in her capacity as Trustee of the PJS FAMILIE TRUST)

CORNELIS JANSEN VAN DER MERWE

FOURTH RESPONDENT

LIMPOPO WEST FARMING AND BUSINESS

ENTERPRISES (PTY) LTD

FIFTH RESPONDENT

GALESHEWE MOSES GASETINGWE NO

SIXTH RESPONDENT

(capacity as Trustee of LIMPOPO WEST WORKERS TRUST)

RAMOKANY JOHANNA MOABELO NO

SEVENTH RESPONDENT

(capacity as Trustee of LIMPOPO WEST WORKERS TRUST)

JOSEPH SEEMA MOKOENA NO

EIGHTH RESPONDENT

(capacity as Trustee of LIMPOPO WEST WORKERS TRUST)

GERHARDUS FRANCOIS ROSSOUW NO

NINTH RESPONDENT

(capacity as Trustee of LIMPOPO WEST WORKERS TRUST)

ABRAHAM JACOBUS JOHANNES GERHARDUS

LAMPRECHT NO

TENTH RESPONDENT

(capacity as Trustee of LIMPOPO WEST WORKERS TRUST)

JUDGMENT

SERITI, J

A INTRODUCTION

[1] This matter came to Court by way of motion. In the notice of motion, the Applicant is seeking an order directing the First, Third and/or the Fifth Respondent forthwith to deliver to the Applicant certain movable property therein described, together with an order for costs on the scale as between attorney and client.

[2] The application was opposed by the First, Second, Third and Fourth Respondents and the other respondents did not oppose the application.

B BACKGROUND FACTS

[3] During the period June 2004 to July 2005, the Applicant concluded fourteen instalment sale agreements with the PJS Famillie Trust, hereinafter referred to as ("the Trust"); the latter duly represented by its Trustees.

[4] In terms of each of the instalments sale agreement referred to above, the Trust purchased certain goods from the Applicant, on certain terms and conditions, which included that the Trust will make certain payments at certain intervals to the Applicant. The goods in question were duly delivered to the Trust, but ownership thereof vested in the Applicant until such time as the Trust complied with all its obligations in terms of the instalment sale agreements.

[5] The instalment sale agreements also provided that in the event of a failure by the Trust to pay any sum due to the Applicant on due date thereof, the Applicant would be entitled, after due demand, to cancel the agreement, repossess the goods, and claim all amounts due at that stage and in the future, less the value of the goods on the date that the Applicant regains possession thereof, together with value added tax. The sale agreements also made provision for the payment of the Applicant's legal costs on the scale as between attorney and client in case of any litigation.

[6] At some stage and in particular from November 2005 the Trust fell in arrears in respect of each of the instalment sale agreements. The Applicant demanded that the Trust should remedy its breach but the Trust failed to do so. On 15 March 2007, the Applicant's attorneys addressed a letter to the attorney of the Trust. In the said letter, *inter alia* the following is stated:

“Despite numerous demands, your client has still not paid the arrear instalments in respect of each of the above agreements, and in terms of paragraph 11.2(b) of each of these Agreements we hereby cancel same with immediate effect, without prejudice to our client's rights flowing from such cancellations.”

[7] The Trust was in financial difficulties and, in order to raise funds to enable it to pay its debts, it attempted to structure a certain deal with the fifth respondent, in terms of which the Development Bank of Southern Africa will make funding available.

[8] In the answering affidavit, the Respondents alleged that in terms of the transactions mentioned in the previous paragraph, the Applicant agreed that the movable assets which formed the subject of the instalment sale agreements, should be taken over by the Fifth Respondent and the later will pay balance owing to the Applicant utilising funds that will be made available by the Development Bank of Southern Africa. The Trust further alleged that the Fifth respondent, and not the Trust is in possession of the movables in question. The Trust further stated “In die vooropstelling is die goedere nie in besit van die Trust nie maar wel in besit van LWFBEW, alternatiewelik Kerneels en Paul van der Merwe namens LWFBE, ...”. LWFBEW is the Fifth Respondent.

FINDINGS

[9] In the written heads of arguments, the Respondent's counsel raised various defences, but they were later abandoned except one of them. During oral argument the Respondent's counsel submitted that they rely on storage lien. He further submitted that the Respondents stored the goods of the Applicant, kept them in a good condition and consequently the Respondents are entitled to storage costs which amounts to just over R4 million.

[10] A lien or right of retention is a right which allows a possessor of movables of another to retain said movables until he is compensated for expenses incurred in

respect of that property. See Delport – SA Property Practice and the Law – 2nd Edition at p76 and authorities therein stated.

A lien comes into being only if the person who alleges that he/she/it has a right of retention is in possession of the movable to which his/her/its claim relates. The lien exists only for as long as possession thereof is retained. See Silberberg & Schoeman – The Law of Property – 4th Edition at p392 and LAWSA First Reissue – Volume 15 para 51 and the authorities therein quoted.

[11] In one paragraph of the answering affidavit the First, Second, Third and Fourth respondents stated that they are not in possession of the movables under consideration and that the Fifth respondent is in possession thereof. In another paragraph, they simply stated that it is denied that the Trust is in possession of the movable in question. The Trust is not in possession of the movables in question and consequently it cannot rely on any lien or right of retention to resist the order the Applicant is seeking.

[12] My view is that the Applicant is entitled to an order is seeking together with costs associated with this matter. The matter is such that the Applicant is entitled to the costs of two counsel. Respondents counsel did not argue that the Applicant if it succeeds, should not be awarded costs consequent upon employment of two counsel.

[13] On 19 October 2009 the Applicant was granted an order in terms of which Third, Fourth, Sixth, Seventh, Ninth and Tenth Respondents were joined and the costs thereof were reserved.

[14] The Applicant's founding affidavit was attested to on 6 February 2009 and only two Respondents, in their capacities as Trustees were cited as they were the only two Trustees mentioned in the "Letters of Authority" of the PJS Familie Trust. In the answering affidavit attested to by the First Respondent, a point *in limine* was raised to the effect that there is a misjoinder in the sense that Mr. Cornelis Jansen van der Merwe should not have been joined as he resigned as a Trustee from 20 January 2009 and was replaced, on the same date by Mr Gerhardus Francois Rossouw. It was also stated by the deponent of the answering affidavit that other parties, namely Limpopo West Farming and Business Enterprises (Pty) Ltd who is in possession of the movables in question should have been joined.

[15] My view is that at the time the founding affidavit was attested to the Applicant could not have known that there has been a change of Trustees of the Trust as at the time Applicant started dealings with the Trust, and over the years when they attempted to resolve the dispute, the Trust had only two Trustees who the Applicant cited in the founding affidavit and initial notice of motion. The Fifth Respondent who the Applicant was compelled to join, is not opposing this application.

My view is that the Applicant is entitled to the reserved costs.

[16] The court therefore makes the following order:

16.1 The first and third respondents (in their capacities as Trustees of the PJS Familie Trust) alternatively the fifth respondent to deliver, forthwith to the Applicant the following movable property.

16.2

16.1.1 John Deere 8520 MFWD tractor, serial number 020272;

16.1.2 John Deere 5715 tractor, engine number PE4045T294735, chassis number 8341;

16.1.3 John Deere 6820 MFWD tractor, engine number CD6068H832135, chassis number L06820K396044;

16.1.4 10 Ton "Mass" trailer, serial number AC9B213HB4JCZ1112;

16.1.5 JME 1,5 Ton "Mass" trailer, chassis number AC9B324HP4JCZ1029;

16.1.6 15 Ton "Mass" trailer, chassis number AC9B324HB4JCZ1028;

16.1.7 9,2 m "Platsnyer", serial number P473;

- 16.1.8 Tatu planter COP CL SUPREMA 19/1, serial number T404S-0403;
- 16.1.9 Tatu COPCL SUPREMA 19/19 planter, serial number C/PN-50403;
- 16.1.10 JD 1750 V/D Vacuum Dry planter, chassis number CJ1750X0031020;
- 16.1.11 9660 “stroper” (harvester), chassis number H09660S710512;
- 16.1.12 John Deere 6420 tractor, engine number CK4045H869198, chassis number L06420G422815;
- 16.1.13 Tata SFC 407-2 ton Truc dropsied body and towbar, serial number 35713348R25865, engine number 497SPTC31LVZ942610; and
- 16.1.14 John Deere 8320 MFWD Greenstar Auto Track and duel tyres, engine number RG6Q81H248466, chassis number RW8320P025347

(“the goods”) failing which the sheriff of this court is authorised and directed to attach the goods wherever he may find them and to deliver them to the Applicant.

16.2 The First and Third respondents are to pay the costs of the Application on the scale as between attorney and Client, which cost will include costs consequent upon the employment of two counsel.

16.3 The First and Third respondents are to pay the cost reserved on 19 October 2009 on the scale as between attorney and client

SERITI

JUDGE OF THE HIGH COURT

FOR THE APPLICANTS: ADV. A GAUTSCHI SC, ADV. CB GARVEY

INSTRUCTED BY: YOUNG-DAVIS INC

FOR THE RESPONDENTS: DA PREIS SC

INSTRUCTED BY: JOOP LEWIES INC