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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: **223/2023**

In the matter between:

MACHABEDI DINAH KOMETSI N.O.

First Applicant

[In her capacity as Trustee of the
KOPANO UITKYK NO. 2 TRUST]

PHATEDI JOHANNES MOKONE N.O.

Second Applicant

[In his capacity as Trustee of the
KOPANO UITKYK NO. 2 TRUST]

PHAKELA BEN MAPHAKISA N.O.

Third Applicant

[In his capacity as Trustee of the
KOPANO UITKYK NO. 2 TRUST]

NAMEDI FRANS MELATO N.O.

Fourth Applicant

[In his capacity as Trustee of the
KOPANO UITKYK NO. 2 TRUST]

TEBELLO JOHANNES MOTSOANI N.O.

Fifth Applicant

[In his capacity as Trustee of the
KOPANO UITKYK NO. 2 TRUST]

THE MINISTER OF AGRICULTURE,

Sixth Applicant

LAND AND RURAL DEVELOPMENT

THE CHIEF DIRECTOR: ACTING
CHIEF DIRECTOR IN THE DEPARTMENT
OF AGRICULTURE AND RURAL DEVELOPMENT

Seventh Applicant

THE NATIONAL GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA

Eighth Applicant

[Through its Department of Agriculture,
Land Reform and Rural Development,
previously known as the Department of
Rural Development and Land Reform]

MEMBER OF THE EXECUTIVE COUNCIL ("MEC")
[For the Free State Department of Agriculture
and Rural Development]

Ninth Applicant

and

KOPANO UITKYK FARMING ENTERPRISE (PTY) LTD
[Registration number: 2013[...]]

First Respondent

LOUIS HENDRIK CLAASSEN (SNR) N.O.
[In his capacity as Trustee of the LOUIS
CLAASSEN FAMILY TRUST]

Second Respondent

STEFAN HENDRIK OLIVIER N.O.
[In his capacity as Trustee of the LOUIS
CLAASSEN FAMILY TRUST]

Third Respondent

LOUIS HENDRIK CLAASSEN (JNR) N.O.

Fourth Respondent

[In his capacity as Trustee of the LOUIS
CLAASSEN FAMILY TRUST].

DANIËL KOCK CLAASSEN N.O.

Fifth Respondent

[In his capacity as Trustee of the LOUIS
CLAASSEN FAMILY TRUST]

CORAM: P R CRONJÉ, AJ

HEARD ON: 08 SEPTEMBER 2023

DELIVERED ON: 19 OCTOBER 2023

JUDGMENT BY: P R CRONJÉ, AJ

[1] On 20 July 2023, I granted the following orders:

- “1. Condonation is granted for the late filing of the answering affidavit of the Respondents.
2. Each party shall pay its own costs in respect of the condonation application.
3. The application is postponed pending the finalization of case numbers 55/2022, 1993/2022, 3805/2022 and any such actions and/or application that may have been instituted in respect of the properties and rights therein.
4. The costs of the main application stand over for later adjudication.”¹

¹ *Kometsi N.O and Others v Kopano Uitkyk Farming Enterprise (Pty) Ltd and Others* (223/2023) [2023] ZAFSHC 290 (20 July 2023)

[2] Dissatisfied with my order, the Applicants filed applications for leave to appeal to the Supreme Court of Appeal in respect of the whole of my judgment. I do not deal with each and every aspect of the main application that was comprehensively argued before me, nor each aspect contained in the applications for leave. I did however consider all.

GROUND OF APPEAL: FIRST TO FIFTH APPLICANTS:

[3] Under the first ground they submit that I erred in “presumably” finding, that a Joint Venture (JV) is for all intents and purposes a *stipulatio alteri* and that I was mistaken in relying on such as an indication of a dispute of fact. No mention of a *stipulatio* was ever stated in any correspondence and the Respondents relied on “meetings” between the LCF Trust and Seventh Applicant. The Sale Agreement specifically prohibited a *stipulatio* whether in writing or verbally unless it was reduced to writing and signed by all parties. I erred in equating discussions with an agreement. No JV came into existence and the beneficiaries never accepted the *stipulatio*. The Lease Agreement did not allow for any variation of the Agreement unless reduced to writing and signed by both parties. A 40% shareholder cannot conclude an Agreement on behalf of a Company. The Lease Agreement allowed the First to Fifth Applicants to form a Joint Venture of their choice and a Court cannot keep a person or entity to an agreement if they no longer wish to be governed by it.

[4] The second ground is that the issue of a *stipulatio* is not a dispute of fact but a dispute of law and thus capable of resolution on papers. Denials of a *stipulatio* does not make it a dispute of fact. Where one party denies and the other party alleges a *stipulatio*, the Court is none the wiser and would need to resolve the issue as a question of law.

[5] The third ground is that I erred in upholding the defence of *lis pendens* in not looking at the substance of the other litigation compared with the present matter. Case number 55/2022 dealt with specific performance by the Department, a claim for damages and just and equitable relief in terms of Section 172 of the Constitution.

[6] Case number 1993/2022 dealt with a declaration of usufruct rights, conditional upon that declaration, Kopano 2 to pay for the implementation of a resolution and Mr Lethoba praying for a declaration of a legal duty resting on the Department. Lethoba also prays for the removal, reinstatement and addition of trustees for Kopano 2. Only case numbers 55/2022 and 1993/2022 are in existence and will be consolidated and heard as one when they are ready for hearing.

[7] Case number 818/2021 is not pending, case number 4076/2021 was already granted and not pending and case number 3805/2022 was removed from the roll due to lack of urgency and is therefore not pending.

[8] The fourth ground is that a commercial eviction cannot be resisted and a Court has no equitable discretion to refuse or grant an ejectment order when the grounds are established. This Court therefore erred in not granting the eviction.

[9] Mr Vilakazi (on behalf of the First to Fifth Applicants) submits that there was never an oral or written *stipulatio alteri* mentioned until March 2022. I disagree. I dealt with the history of the *stipulatio* in paragraph [19] of my Judgment. To some extent, the meeting held on 12 November 2020 is indicative of discussions post 21 May 2014, upon which the First to Fifth Applicants rely. In paragraph [42] of my Judgment, I refer to the fact that the Department admits the meeting that was held whereas the First to Fifth Applicants, notwithstanding that at least some of the names of the Trustees appear on the attendance register, deny that a meeting was held.

[10] In paragraph [19] of my Judgment I referred to the meeting of 12 November 2020 and that the lease would either subsist for the duration of the lease but not less than thirty (30) years. The issue of the five (5) years therefore, in my view, became inoperative. The Applicants submit that if it can be found that the *stipulatio* was amended, it could only be entered into by the First Respondent and not by the minority shareholder. The challenge for the Applicants in this respect is however that they also dispute the First Respondent as being the JV. If it was not for case numbers 55/2022 and 1993/2022 wherein the central issue for determination is the rights and possession in and of the property.

[11] Having considered all the disputes between the parties as well as the pending litigation, it was impossible for me to arrive at a conclusion in favour of the Applicants on either disputes of fact or disputes of law. It is important to note that the *stipulatio alteri* and/or *usufruct* is not purely a question of law. It has to find its origin in the facts and as the papers stood before me I could not make final determinations of whether a *stipulatio/usufructs* came or did not come into existence, the authority of the respective actors in the matter, the dispute on who were present at the meeting of 15 November 2020 and the binding effect of what was discussed, or what the chances of success in the other case numbers are.

[12] Adv Vilakazi further submits that I erred in respect of *lis alibi pendens* having regard to *Association of Mineworkers and Construction Union and others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and others*², where the Constitutional Court affirmed that the defence can only exist where the same dispute, between the same parties, is sought to be placed before the same Tribunal and that in absence of any of those, there is no potential for a duplication of actions. My reading of the judgment does not show the strictness of the test that the Applicants advance. In that matter only the requirement that the litigation had to be between the same parties in the two sequential proceedings was met. The others dealt with the objection to the council's jurisdiction and had nothing to do with the unfairness of the second dismissal.³

[13] Case number 55/2022 was issued by the First and Second Applicants and relates to specific performance by the Department, damages against the Department and the LCF Trust, and declaring the conduct of the LCF Trust to be invalid. In my view, the parties to that litigation are essentially bound up by the fact that it relates to the Lease Agreement, which in Clause 10 makes provision for the involvement of third parties. It relates to the same property that is presently the income-generating business and involves the LCF Trust.

[14] Adv Vilakazi submits that case 1993/2022 was issued by the Respondents, served on all the Applicants, including one Mr Lethoba, who seek a declaration of *usufruct* rights with

² 2020 (7) BCLR 779 (CC)

³ At para [28]

reference to the amended *stipulatio alteri* and a conditional claim for implementation of a resolution signed by Kopano 2.

[15] There are also claims by Mr Lethoba against the Department and for the removal/reinstatement of additional trustees in Kopano 2. He submits that but for the “*generalized same parties*” in both cases, they are not the actual same parties, the relief is also far from being an eviction.

[16] In my view, however, it loses sight of the Judgment of Wright AJ. In my view the fact that those matters are distinguished from the present one where eviction is sought, does not assist the Applicants. It is the root of the disputes between the parties that determines the substantive rights claimed. In my view, the central issue remains whether it is a dispute between the parties, even more so when the matters in 55/2022 and 1993/2022 are consolidated, and the basis for claiming the right of use of the property. I cannot agree that the defence of *lis alibi pendens* is not satisfied. Adv Vilakazi argues that case number 818/2021, 4076/2021 are not pending. It did not make such a finding in my Judgment.

[17] In respect of case number 3805/2022, he submits that the matter is no longer pending as LCF Trust has not set it down for hearing. This is not critical in determining of whether there is litigation pending. The fact that the matter was struck from the roll due to a lack of urgency does not make it moot. The result is only that the matter is then dealt with in the ordinary course of process as provided for in the Uniform Rules.

[18] He submits that the Applicants are enforcing their rights in terms of both the purchase agreement and the sale agreement. It is important to note the provisions of Clause 10.1 of the Lease Agreement. It reads:

“The Lessee must retain control of the farm and the farming activities conducted on the property, as well as the controlling interest of any legal entity established for purposes of any joint venture and arrangement between the lessee and any other party.” [my emphasis]

[19] In terms of the correspondence before me, it was stated that Kopano 2 has a 60% shareholding and this would satisfy the requirement.

[20] Clause 11 provides:

“11. Assignment and subletting –

The lessee shall not be entitled, except with the prior written consent of the lessor, to –

11.1 cede or assign any or any of the rights and obligations of the lessee under this lease;

11.2 sublet the farm in whole or in part;

11.3 give up possession of the farm, or any part thereof, to any third party.”⁴

[21] The two clauses have to be read together. It was apparent to me that there was no prohibition against the conclusion of an agreement wherein Kopano 2 would have the majority vote and the First Respondent being the vehicle for conducting the business. It is also apparent that the Department continues to play an active role subsequent to the conclusion of the Lease Agreement. Mr Vilakazi submits that there is no real dispute of fact and even an oral hearing would not resolve the dispute. I was therefore called upon to dispose of the question of law. In eviction applications, so the argument went, a Court has to accept those facts averred by the Applicants that were not disputed by the Respondents and the Respondents' version as far as it was plausible, tenable and credible.

[22] It is correct that Kopano 2 has a Lease Agreement and that it gives it full control over the property, subject to the balance of the provisions in the agreement, but it is incorrect to state that there is no compelling reason for the Company to continue to be in occupation of the farms, involving the LCF Trust.

⁴ Pleadings, p. 96 - 97

[23] There has already been an order by Wright AJ in respect of spoliation. Furthermore the LCF Trust were not the sellers of all of the properties. The Applicants err in their reliance on the purchase agreement that provides for a non-variation clause and loses sight of the Lease Agreement that was concluded subsequently.

GROUND OF APPEAL: SIXTH TO NINTH APPLICANTS:

[24] Adv Seneke (Adv Boonzaaier appearing with him) for the Government, submits that the points *in limine* have no merit and submits that this Court ought to have assessed the evidence before it, and if it did so, it would have noted the allegations of the Respondents that do not raise a genuine and *bona fide* dispute of fact. The documentary evidence demonstrate discussions of a proposed JV and no amount of oral evidence could change the nature of the discussions to a *stipulatio alteri*.⁵ At best, the Department and the LCF Trust discussed a possible JV agreement, which the beneficiaries later declined to sign. In similar vein to the argument by Adv Vilakazi, they submit that this Court erred in relying on *Loggenberg and Others v Maree*⁶ as authority for the proposition that a *stipulatio alteri* has been recognized as enforceable in relation to a company not yet formed. I disagree and refer to para [22] of that judgment.

[25] It is argued that the JV never materialized, and the agreement remains unsigned. Reference is made to *Buffalo Freight Systems (Pty) Ltd v Castleigh Trading (Pty) Ltd and Another*⁷, where it was held that a Court has to undertake an objective analysis of disputes and that the version propounded by the Respondents was fanciful and untenable. This Court, so the argument went, failed to objectively assess the facts and that a Court of Appeal would find that it misdirected itself in failing to assess the facts. They are therefore reasonable prospects that a Court of Appeal would find that the finding that the First Respondent is a JV

⁵ I did not refer the matter for oral evidence and pended the finalisation of the matter until the other cases have determined the respective rights. It may well be that if that litigation goes against the Respondents in this matter, eviction may inevitably follow.

⁶ (286/17) [2018] ZASCA 24 (23 March 2018)

⁷ (311/09) [2010] ZASCA 66; 2011 (1) SA 8 (SCA) ; [2011] 1 All SA 1 (SCA) (24 May 2010)

is a material misdirection, that the *stipulatio* is too farfetched and untenable, and that the order of eviction should have been granted.

[26] I could not make factual findings as there are so many and unable to be resolved on the papers. I did not find the Respondents' version to be fanciful and untenable.

[27] Reference is made to *Dintsi and Another v Van Breda and Another*⁸ where the Court held:

"... The original action is for ejectment as they were unlawful occupiers in terms of ESTA whereas the matter before that Court was whether interim relief should be granted, which has its own requirements. The original action is for the ejectment of the Defendants on the premise that they are unlawful occupiers. The Defendants filed a counter action to be declared occupiers in terms of ESTA. The application before this Court is somewhat different from the issue which the Magistrate must determine. The present application is for an interim interdict which is not what the Magistrate will be called upon to decide. The interim interdict has its own requirements which are different from the requirements." [my emphasis]

[28] I am criticized for not appreciating that the case is on point. It is submitted that the interdict application, which the Respondents instituted, has been overtaken by events and became moot, as the application did not succeed. I already dealt with the status of that matter and do not agree. Until that matter is finally disposed of, or withdrawn, it remains alive for adjudication. As a fall-back position, they submit that I should have concluded that the institution by the Respondents of case number 1993/2022 could not be utilized to frustrate the termination of the dispute because it was instituted maliciously with ill intent and ulterior motive to frustrate and circumvent the eviction proceedings. It was only instituted after the Respondents received the notice to vacate. As with many of the other disputes between the parties, I cannot determine, as a Court who hears the matters would be able, to conclude that it was malicious and with ill intent and ulterior motive. I still maintain that the case is distinguishable.

⁸ (LCC15/2019) [2019] ZALCC 29 (10 May 2019) para 10.1

[29] It is argued that the matter is also to be determined in the interest of justice. In *Eksteen v Road Accident Fund*⁹ the Court held:

“Although the claim for non-pecuniary loss has not prescribed it is a composite part of the claim emanating from one collision. It is pending in the Magistrate’s Court. It would be in the interest of justice, fair and convenient that the entire claim be adjudicated in the same forum.”

[30] The Supreme Court of Appeal¹⁰ upheld the appeal and the defence of *lis alibi pendens*.

RESPONDENTS’ ARGUMENTS:

[31] Adv Meijers (with Adv Lebona) for the Respondents, submit that the crux of the application for leave turns on the exercise of a judicial discretion that was exercised and whether an appeal would have reasonable prospects for success. They submit that the discretion exercised is a discretion in the true sense and all options were considered.¹¹ The Court has inherent power to regularize its own process in terms of Section 173 of the Constitution and the options by this Court pertaining to *lis pendens* was wide enough to grant or refuse to grant a postponement/stay.

[32] This also applies to whether the matter should be referred to oral evidence or not. They submit that the First Respondent, being a JV has its own rights and obligations and fulfils a dual purpose of Government namely to create a class of black commercial farmers and ensure sustainable commercial production of land and food security.

⁹ (4972/2016) [2019] ZAFSHC 46 (2 May 2019)

¹⁰ *Eksteen v Road Accident Fund* (873/2019) [2021] ZASCA 48; [2021] 3 All SA 46 (SCA); 2021 (8) BCLR 844 (SCA) (21 April 2021)

¹¹ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at para [82] – [97]

[33] With reference to *lis pendens* they refer to *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*¹² where the Supreme Court of Appeal held that the requirements to meet *lis pendens* have been relaxed and a Court may grant a stay even where such relaxed requirements are not met. If the requirements of *lis pendens* are shown, a Court will only refuse to stay if facts are shown based on fairness and convenience why it should not be granted.

[34] The central issue in this application (the right to possession) is subject to pending action under case number 1993/2022, between substantially the same parties. To a lesser extent, the same argument applies to case number 55/2022. The history of the engagements, the correspondence and actual conduct can be accepted to indicate that rights were acquired. Mr Lethoba has interests and rights of possession and would be left in the cold if the eviction were granted. Such rights of possession and such constitutional rights are to be considered together by the trial Court where all the public policy factors are taken into account. The pending matter should not be dealt with piecemeal. There are real disputes of fact pertaining to the partly written, partly oral *stipulatio alteri*/amended *stipulatio alteri* accepted by the First Respondent and as to knowledge of Kopano 2 of the rights of the Company. All parties were aware of the dispute of fact. The Court did not misdirect itself as to the identity of the JV.

CONCLUSION

[35] Notwithstanding prolonged and thorough argument when the matter was initially heard as well as helpful and able argument in the applications for leave to appeal, I cannot find any basis for concluding that the Supreme Court of Appeal would come to a different conclusion.

[36] I ordered a stay of the proceedings and that the costs in the main application stand over for later adjudication. The Court hearing the evidence under the consolidated case numbers would determine the rights between the respective parties. This is especially so when the cases would be consolidated as argued by the First to Fifth Applicants.

¹² (741/12) [2013] ZASCA 129; 2013 (6) SA 499 (SCA); [2013] 4 All SA 509 (SCA) (26 September 2013)

[37] The Second to Fifth Respondents interest in the JV will eventually be determined. It appears that the First to Fifth Respondents came to this Court not appreciating the test to be applied in respect of *locus standi*, *lis pendens*, factual disputes and the exercise of a discretion. In dismissing their application, it would be in my view be unfair to order them to pay costs of their application for leave.

[38] The Sixth to Nineth Respondents, however, have the ability and resources to appreciate the risks and tests applied. I am not convinced by any of the grounds of appeal of any of the Sixth to Nineth Respondents and costs should follow the result.

[39] The Sixth to Nineth Respondents were represented by two counsel. The Respondents were similarly represented. The Respondents prayed for the costs of two counsel. The applications were grounds for leave were comprehensive, the arguments intricate and in my view justifies the costs of two counsel.

[40] I therefore make the following order.

ORDER

1. The First to Fifth Applicants' application for leave to appeal is dismissed.
2. The Sixth to Nineth Applicants' application for leave to appeal is dismissed.
3. The First to Fifth Applicants and the Respondents each pay their own costs of the First to Fifth Applicants' application.
4. The Sixth to Nineth Applicants pay the Respondents' costs, which includes the costs of two counsel.

PR CRONJÉ, AJ

For the First to Fifth Applicants: Adv J. Vilakazi

Jam Jam Attorneys Inc.
Rampai Attorneys

For the Sixth to Nineth Applicants: Adv T. Seneke SC
Adv A.S. Boonzaaier
State Attorney

For the Respondents: Adv G.V. Meijers
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