

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG  
REPUBLIC OF SOUTH AFRICA

CASE NO : 6518/11

In the matter between:

<b>DIANNE MARGARETA HOLDERNESS N.O.</b>	<b>First Applicant</b>
<b>CLIVE SCOTT HENDERSON N.O.</b>	<b>Second Applicant</b>
<b>TIMOTHY JOHN HOLDERNESS N.O.</b>	<b>Third Applicant</b>

and

<b>WILLIAM GRAEME MAXWELL</b>	<b>First Respondent</b>
<b>EUGENE NEL N.O.</b>	<b>Second Respondent</b>
<b>MUKHTAR AHMED ISMAIL DAWOOD N.O.</b>	<b>Third Respondent</b>
<b>PREETHA DABIDEEN N.O.</b>	<b>Fourth Respondent</b>

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**J U D G M E N T**

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**K PILLAY J**

[1] This application concerns a herd of cattle referred to as the Razzle Dazzle Herd (“the Herd”), the ownership whereof is in dispute.

[2] The Applicants’ seek an order *inter alia* directing the sale of the herd, the retention of the proceeds of the sale in trust and an account from the First Respondent in respect of the sale of cattle belonging to the Razzle Dazzle Herd by him and the sale of milk produced by the Razzle Dazzle Herd whilst the herd was in his possession.

[3] The order is to issue pending the final determination of the ownership of the Razzle Dazzle Herd, in an action to be instituted by the Applicants in due course.

[4] The application was initially brought on an urgent basis. However the

parties eventually argued the matter on a full set of papers on the opposed roll.

## BACKGROUND

[5] The First Applicant, together with her husband to whom she is married out of community of property (hereinafter referred to as the “insolvent”) operate a dairy farm in the Karkloof area of the Natal Midlands through what appears to be a variety of entities, including the trust.

[6] The First Applicant asserts that during 1984, she commenced purchasing Jersey and Holstein cows for her own account. By 1997, she had built the herd up to 130 cattle. These cattle formed the basis of the Razzle Dazzle Herd. She sold the said herd to the Trust during 1998/1999.

[7] The First Respondent is the owner, through a company of which he is the sole shareholder and director, of several pieces of land collectively referred to in the papers as the Yarrow Farm and the Gala Farm.

[8] On 31 August 2000, he and the insolvent concluded a written agreement of lease for the Yarrow Farm for a period of three years ending 31 August 2003. This agreement provided the insolvent with a right of extension for a further period of two years which the insolvent exercised by way of fax dated 22 April 2003. This was accepted by the First Respondent who faxed back his acknowledgement thereof on 8 May 2003. The extended lease was due to expire on the 31 August 2005.

[9] On 20 July 2004, the insolvent requested, by way of fax, the First Respondent’s permission to sublet Yarrow Farm to an entity known as Trade Avail CC, which was another of the entities through which the First Applicant and the insolvent operated. This fax expressly stated that the dairy operation was run under the name of Trade Avail CC. The First Respondent faxed back his consent on the same day.

[10] However, on 11 August 2004, the insolvent and the First Respondent

concluded a new lease agreement for the Yarrow Farm, which lease was to operate from 1 August 2004 until the 31 July 2009. For almost two years thereafter, everything ran smoothly, until June 2006, when the insolvent failed to pay the rent.

[11] On 25 February 2008, the First Respondent was informed by the son of the First Applicant and the insolvent that the herd situated on the Yarrow Farm belonged to the Trust. The son also appears to have been involved in the running of the dairy farm. The First Respondent alleges that up to this point, he did not know of the Trust's existence. On 12 June 2008, the First Respondent cancelled the lease agreement by way of registered letter.

[12] The First respondent then secured a provisional sequestration order against the insolvent on 8 June 2009. This was made final on 24 August 2009. On 16 October 2009 the Master of the High Court appointed the Second, Third and Fourth Respondents as Trustees in the insolvent estate. Throughout all of this, the herd appears to have remained on the Yarrow farm.

[13] In his affidavit deposed to in support of the sequestration application the First Respondent referred to the Razzle Dazzle Herd as "the Holderness Herd" and alleged that the insolvent was the owner thereof. In fact, as appears from extracts of the aforesaid affidavit put up by the Applicants, the First Respondent averred that he did not recognise the Trust as the owner of the Razzle Dazzle Herd. The First Respondent claims to have a lien over the Razzle Dazzle Herd as security for the insolvent's indebtedness to him.

[14] It is common cause that the Razzle Dazzle Herd is currently in possession of the First Respondent. The Applicants assert that the First Respondent refused to deliver the said herd when demand was made therefor by the Second, Third and Fourth Respondents, subsequent to their appointment as Trustees.

[15] In addition, it is submitted that the First Respondent is milking the cows of the herd and has failed to account to the Trust or the aforesaid Trustees for

the proceeds of the sale of such milk, despite agreeing to do so.

[16] Further, that during or about December 2009, the First Respondent sold approximately 34 head of cattle belonging to the herd without the sanction of any Court Order and it is believed that a further 26 cows were sold during September 2010.

[17] It is not in dispute that the First Respondent's claim against the insolvent estate amounted to R323 980.26. On the First Respondent's version the Razzle Dazzle Herd comprised 368 head of cattle when the First Respondent first took possession thereof. It appears to be not in dispute that the herd now stands at 192.

[18] In a counter-application, the First Respondent seeks an order directing the attachment of the Razzle Dazzle Herd and certain movable property to secure certain claims which the First Respondent alleges he has against the insolvent estate on the basis that he has a landlord's hypothec over the said goods. The counter-application is opposed.

[19] The First Respondent, in opposing the application and claiming a lien over the aforesaid herd does not categorically state who owns the herd. He vacillates from it being the insolvent (in the liquidation proceedings) to he does not know who the herd belongs to in these proceedings. For the purposes of this application it is not necessary for me to determine, the ownership of the herd. What is clear on the papers is that the herd belongs either to the insolvent or the Trust. Both parties consent to the sale of the herd.

#### IF THE HERD BELONGS TO THE INSOLVENT

[20] In the event that the insolvent is the owner of the Razzle Dazzle Herd then Section 85(2) of the Insolvency Act 24 of 1936, recognises the First Respondent's tacit hypothec in respect of arrear rental for Yarrow Farm. The legal hypothec vests statutorily and no attachment is necessary to render it

effective as against the insolvent estate.

[21] In addition Section 47 of the Insolvency Act 24 of 1936 affords further protection to the First Respondent's legal hypothec.

*“If a creditor of an insolvent estate who is in possession of any property belonging to that estate, to which he has a right of retention, or over which he has the landlord's legal hypothec, delivers that property to the trustee of that estate, at the latter's request, he shall not thereby lose the security afforded by his right of retention or lose his legal hypothec, if when delivering the property, he notifies the trustee in writing of his rights and in due course proves his claim against the estate.”*

[22] He is in terms of this provision obliged to deliver the cattle upon demand. He is also obliged to inform the Trustees, that the herd was his security as he possessed a lien and in due course to prove his claim. He did none of the above.

#### IF THE HERD IS THE PROPERTY OF THE TRUST

[23] The Applicants contend that if the herd is the property of the Trust, in order to establish a hypothec over the herd, the First Respondent was obliged to obtain attachment of the herd prior to gaining knowledge of the Trust's claim to ownership of the said herd.

[24] The landlord's tacit hypothec<sup>1</sup> refers to the security a landlord retains under common law over his tenant's movables situated on the leased premises for unpaid rent. However, this hypothec can also extend over the movables owned by third parties brought onto the premises.

[25] The requirements that must be present before the hypothec can be extended to property of third parties were succinctly summarised by Combrink J in *Paradise lost Properties (Pty) Ltd v Standard Bank of South Africa and*

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<sup>1</sup> Also referred to as the lessor's residual hypothec

Another <sup>2</sup> as follows: <sup>3</sup>

*'In order to succeed in proving that the hypothec operated over property of a third party the lessor must establish the following:*

- a) the goods must be on the leased premises with the knowledge and consent of the third party;*
- b) the lessor must be unaware of the fact that the goods are owned by the third party;*
- c) the goods were brought onto the premises for the use of the lessee;*
- d) the goods were intended to remain on the premises indefinitely.'*

[26] It is evident from the above passage that the onus rests on the landlord to establish the existence of his hypothec.

[27] The basis for extending the hypothec in these circumstances to the property of a third party was explained by Curlewis JA in *Bloemfontein Municipality v Jackson* <sup>4</sup> thus: <sup>5</sup>

*'When goods belonging to a third person are brought on to a leased premises with the knowledge and consent, express or implied, the owner of the goods, and with the intention that they shall remain there indefinitely for the use of the tenant, and the owner, being in a position to give notice of his ownership to the landlord, fails to do so, and the landlord is unaware that the goods do not belong to the tenant, the owner will thereby be taken to have consented to the goods being subject to the landlord's tacit hypothec, and liable to attachment.'*

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<sup>2</sup> 1997 (2) SA 815 (D)

<sup>3</sup> At 818

<sup>4</sup> 1929 AD 266

<sup>5</sup> At 271

[28] As the basis of extending the hypothec in this way is either that of implied consent or a form of estoppel the evidentiary burden in this particular aspect rests on the third party to show that the landlord knew that the tenant was not the owner or that the landlord was not induced by an erroneous belief and he therefore knew the true state of affairs.<sup>6</sup> However, the landlord is to a certain extent also expected to exercise reasonable care<sup>7</sup> in that he cannot heedlessly turn a blind eye to the facts before him.<sup>8</sup>

[29] Although the hypothec arises automatically as soon as the rent is in arrears<sup>9</sup> the benefits of the hypothec are not automatically obtained,<sup>10</sup> and the mere existence of the hypothec does not give the landlord an automatic real right of security.<sup>11</sup> In order to be effectual the movables must be attached.<sup>12</sup> This right of attachment is a crucial aspect of the hypothec which has been said to be of 'small value' without it.<sup>13</sup> Attachment is therefore crucial to the existence of the lien, and consequently, a landlord cannot prevent removal of the goods from the premises without first seeking an attachment order.<sup>14</sup>

[30] The issue of whether or not the hypothec continues if, prior to attachment, the landlord subsequently becomes aware that the property belongs to a third party, was considered in *Eight Kaya Sands v Valley Irrigation Equipment*.<sup>15</sup> This decision confirmed that a third party who creates the "appearance" that his/her goods, which were available to the tenant are in fact the goods of the tenant exposes those goods to the landlord's hypothec this changes once ownership of the goods are made known to the landlord. Consequently once this "appearance" is removed the basis for the extension of the hypothec is also removed.<sup>16</sup> There exists no legal obligation between the third party and the landlord, and there is no justification for a third party's

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6 *Paradise Lost (Pty) Ltd v Standard Bank* note 2 above at 819

7 *Paradise Lost v Standard Bank* note 2 above at 822 G-H

8 *Paradise Lost Properties (Pty) Ltd v Standard Bank of South Africa* 1998 (4) SA 1030 (N) at 1036

9 *Reddy v Johnson* 1923 NPD 190 at 194

10 A Kerr *The Law of Sale and Lease* 3ed at 402

11 17(2) LAWSA 441

12 *Webster v Ellison* 1911 AD 73 at 79

13 Per Innes J in *Webster v Ellison* supra at 87

14 *Reddy v Johnson* 1923 NPD 190

15 2003 (2) SA 495 (T)

16 *The law of Property* – Silverberg and Schoeman 5<sup>th</sup> Edition Page 406

property serving as security for a tenant's debt. Consequently, if the appearance disappears before the movables have been attached, the landlord must return the goods to the third party.<sup>17</sup>

## APPLICATION

[31] It is common cause between the parties that the First Respondent, as landlord, was made aware on 25 February 2008 that the Trust was the owner of the herd and at this time had not sought to attach the herd and thereby perfect any hypothec he may have had. Therefore, any evidentiary onus resting on the Applicants referred to by Combrink J in the *Paradise Lost* need not be discussed.

[32] The crucial issue in this matter consequently, is whether or not this court should follow the majority decision of *Eight Kaya Sands*. Counsel for the First Respondent submitted that *Eight Kaya Sands* is in conflict with *Reddy v Johnson*,<sup>18</sup> a decision which is binding on this court. He made further submissions similar to that of the minority judgment in *Eight Kaya Sands*, namely that *Webster v Ellison*,<sup>19</sup> read correctly, is not authority for the proposition that 'perfection' is a requirement for the creation of the hypothec.

[33] Firstly, it is unclear how *Reddy v Johnson* can be in conflict with *Eight Kaya Sands*. The issues in *Reddy* were different, and in that case there was no ownership claim by a third party, a fact that is central to the issue *in casu*.

[34] Secondly, the stumbling block to Counsel's further argument is that it appears to somewhat misconstrue the issue being not whether perfection creates the real right afforded to a landlord, but rather whether the landlord's subsequent knowledge of the true owner prior to perfection destroys it. The majority decision in *Eight Kaya Sands* is far more convincing.

[35] Secondly, as discussed in *Eight Kaya Sands*, there is no legal

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<sup>17</sup> At 501 F – 502 B

<sup>18</sup> Note 9 above

<sup>19</sup> Note 12 above



relationship between the landlord and the third party and there can be no justification to attach such property as security for the debt of the tenant. To hold that even where the landlord becomes aware of the true owner prior to perfection, the hypothec continues, would create a situation where the property of a third party becomes security for the debts of another.

[36] For these reasons, the majority judgment in *Eight Kaya Sands* appears to be correct, and therefore the First Respondent cannot be said to have a hypothec over the herd.

[37] The First Respondent's counter-claim therefore fails and is dismissed with costs.

[38] It is instructive that the First Respondent has admitted to selling 34 head of cattle belonging to the Razzle Dazzle Herd, without advancing any legal ground rendering such sale lawful.

[39] It is not in dispute that he also failed to disclose the proceeds of the sale of cattle and of the sale of milk produced by the cattle belonging to the Razzle Dazzle Herd, either to the insolvent or to the Trust, who are the only parties in whom ownership can possibly vest. In fact the First Respondent undertook in writing to hold the proceeds of the sale of milk in trust pending a determination of what was to happen to the proceeds, but failed to do so.

[40] There can be no dispute that the herd is diminishing. I am satisfied that the Applicants have established a *prima facie* right to an order to preserve the asset, albeit in a different format.

[41] The only parties, in whom ownership can possibly vest, agree that the herd should be sold and the proceeds retained in trust pending the determination of the ownership of the herd.

[42] The First Respondent also takes the point that there has been some mixing of the herds, which might make the execution of the order sought by

the Applicants difficult.

[43] In this regard the proposal made by the Applicants' Counsel appears sound namely that prior to removal from the possession of the First Respondent and the sale, the cattle belonging to the Razzle Dazzle Herd be properly identified by a joint exercise being conducted between the Applicants, the First Respondent, the Second, Third and Fourth Respondents to identify the aforesaid cattle with the assistance of the herd management records.

[44] In the circumstances I grant the following order:

- i) That pending the final determination of an action to be instituted by the Applicants as set out in paragraph (ix) below, the First Respondent is directed to forthwith deliver to the Second, Third and Fourth Respondents possession and control of all cattle inclusive of the progeny belonging to the Razzle Dazzle herd and of which he still has possession and control, such will exclude the 27 calves referred to in paragraph 34 of Applicants Replying Affidavit.
- ii) That in the event of the First Respondent failing to comply with the abovementioned order within five calendar days of the date of the issue of this order, the sheriff of this court and/or his deputy are hereby directed to take all such steps as may be necessary to deliver possession and control of the abovementioned cattle to the Second, Third and Fourth Respondents.
- iii) That the Second, Third and Fourth Respondents are directed to within a period of thirty days of obtaining possession and control of the Razzle Dazzle herd, cause the sale of the said herd by public livestock auction held

by a livestock auctioneer.

- iv) That the Second, Third and Fourth Respondents are directed to retain the net proceeds of the abovementioned auction in trust pending the final determination of the ownership of the Razzle Dazzle herd and/or the identity of the party or parties entitled to the proceeds of the said auction.
- v) That the First Respondent is directed to account to the Second, Third and Fourth Respondents in respect of all sales by him of cattle inclusive of the progeny belonging to the Razzle Dazzle herd, such accounting to include:
  - (aa) The date of each sale of cattle;
  - (bb) The identity and address of the purchaser(s) of the cattle on each occasion;
  - (cc) The price at which each animal or parcel of animals were sold;
  - (dd) The identity mark and/or stud registration number and/or tag name and/or tattoo of each and every animal sold;
  - (ee) Copies of all vouchers relating to such sales;
  - (ff) Payment of an amount equal to the gross proceeds of such sales to the Second, Third and Fourth Respondents.
- vi) That the First Respondent is directed to account to the Second, Third and Fourth Respondents in respect of all

sales by him of milk produced by the Razzle Dazzle herd, such account to include:

- (aa) the date of each such sale;
  - (bb) the identity and address of the purchaser(s) of all such milk sold;
  - (cc) the price(s) at which such milk was sold from time to time;
  - (dd) details of the gross proceeds of all such milk sales received by the First Respondent or by any entity under his control;
  - (ee) copies of all vouchers relating to such milk;
  - (ff) payment of an amount equal to the gross proceeds of all such milk sales to the Second, Third and Fourth Respondents.
- vii) That the Second, Third and Fourth Respondents are directed to retain the proceeds of the above accounting received from the First respondent in trust pending the final determination of the identity of the party or parties entitled to such proceeds.
- viii) That the Second, Third and Fourth Respondents are directed to disclose the accounting received from the First Respondent to the Applicants.
- ix) That the Applicants are directed to within thirty days of the holding of the public auction and of receipt of the abovementioned accounting results from the Second,

Third and Fourth Respondents, whichever is the later, institute action for the determination of the ownership of the Razzle Dazzle herd, the determination of the identity of the party or parties entitled to the proceeds of the sale of cattle belonging to the said herd, the determination of the identity of the party or parties entitled to the proceeds of the sale of milk produced by the Razzle Dazzle herd and such ancillary relief as the Applicants may deem fit.

- x) That the costs of this Application be reserved for decision in the action to be instituted as set out in paragraph (ix) above.

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**K PILLAY J**

Date of Judgment	:	31 July 2012
Applicants' Counsel	:	Advocate G M E Lotz SC
Instructed by	:	Hay & Scott Attorneys Applicants' Attorneys 3 Highgate Drive Redlands Estate 1 George Macfarlane Lane PIETERMARITZBURG Ref: LWeakley/evdw/12/N074001
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