IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A33/2023

Before:
The Hon Ms Justice Ndita
The Hon Mr Justice Henney
The Hon Ms Justice Nziweni

In the appeal of:

ALWYN NICOLAAS HANEKOM First appellant

MARTHA FREDERIKA HANEKOM Second appellant

vs

BARTHOLOMEUS LOMBARD Respondent

Hearing: 17 July 2023
Judgment: 7 September 2023 (delivered electronically to Counsel)

JUDGMENT

Henney J:

Introduction and Background:

[1] This is an appeal with leave of the Supreme Court of Appeal to a full court against a decision of Dolamo J, which declared the lease agreement concluded between the parties as invalid because it was in contravention of section 3(d) of the Subdivision of Agricultural Land Act 70 of 1970 ("the Act"). This appeal relates to a lease agreement concluded between the appellants and the respondent in respect of portions of the farm Rhenosterbosrug ("the farm") in the Malmesbury district which, together with various rights of extension at the will of the lessees, cumulatively exceeded a period of 10 years. Mr Walters together with Mr A J van Aswegen appeared for the appellants. Mr Newdigate SC appeared for the respondent and Mr J Whitaker assisted in drafting the heads of argument for the respondent, but was not present at the time of the appeal hearing.

[2] Dolamo J, in the court a quo granted an order that:

> 1) The agreement entered by the [respondent] with the appellants on 1 September 2000, its purported extension in terms of clause 5.16 of the mortgage bond registered under bond number B 47 […], in terms of which the latter leased from the former certain portions of the farm comprising the remainder of Portion 2 of the farm Tweekuilen No. 80[…], Malmesbury Division, Province of the Western Cape; and portion 6 of the farm Orangerie Annex No. 84[…] Malmesbury Division, Province of the Western Cape ("Farm Rhenosterbosrug") is hereby declared *void ab initio*;
>
> 2) The [appellants] are to forthwith vacate farm Rhenosterbosrug, failing which the sheriff of this court is hereby authorized and directed to evict the [appellants] on 2nd May of 2002; and
>
> 3) The [appellants] are ordered to pay the cost of the application, such cost to include the cost of two counsel.

Before dealing with the appeal, I shall first deal with the application for condonation of the late filing of the heads of argument by the appellants.

<u>Condonation</u>

[3] The appellants seeks this court's condonation for the late filing of its heads of argument which was delivered 2 days after it was due. The reasons for the delay is set out in an affidavit filed by the appellants' attorneys and is accepted. The respondent also does not oppose this application. The application for the late filing of the heads of argument by the appellants is hereby granted.

The facts underpinning this matter

[4] The respondent is the registered owner of two adjacent agricultural properties held under a single title deed (T 45[…]) comprising the remainder of portion 2 of the farm Tweekuilen No.80[…], Malmesbury Division, and portion 6 (portion of portion 2) of the Orangerie Annex No. 84[…], Malmesbury Division. The properties are jointly known as Rhenosterbosrug.

[5] The properties are agricultural land as defined in Section 1 of the Act. A written lease agreement was concluded between the parties on 1 September 2000 in terms of which specified portions of the farm were leased by the appellants for an initial period of 9 years and 11 months. It was a commercial lease in terms of which the appellants leased the portions of the farm which comprised the following:

a) the vineyard as from 1 September 2000 to 31 July 2010;

b) the sowing ground from the November / December 2000 - harvest to the end of March 2010;

c) The Farm, excluding the yard, buildings (house and cottage), kraal, and two workers' houses in the vlei camp, but including the two separate workers' houses in the fenced camp next to camp 2, which houses the respondents may use camp 12, bordering the vineyard, the vlei comes with the camp in front of the house and the dam camp which are used by the owner/ lessor.

[6] It is common cause that the appellants did not lease the whole of the farm but only certain portions thereof. The appellants took occupation of the leased portions

of the farm after the conclusion of the lease in 2000 (and subsequently also camp 12 in 2002) and remain in occupation thereof till present. It is common cause that in 2004 a bond was registered over the farm in favour of the second appellant under bond number B 47[…], a security for the monies lent to the respondent by her.

[7] In terms of clause 5.16 of the bond, it is recorded that the second appellant would be entitled to lease the same portions of the farm as set out in the lease agreement for a further period of 10 years after the expiry of the initial agreement, with the option to renew that agreement and otherwise, on the same terms and conditions. At that stage, the existing lease agreement in turn, contained an option in clause 1.1 for the appellants to renew the lease after the expiry of the initial period for a further period of 9 years and 11 months.

[8] In the proceedings before the court a quo, it was common cause that the lease agreement and the option contained therein are void as it provided for an initial lease period of 9 years and 11 months, together with an option to renew the agreement at the will of the appellants (as lessees) for a further period of 9 years and 11 months in contravention of Section 3(d) of the Act; the required written consent of the Minister of Agriculture was not obtained in respect of either the lease agreement or any of its renewals. In this regard, the appellants in their answering affidavit[1] as stated by the first appellant, said: '*I admit that the lease agreement technically is void for non-compliance with the Act. I am advised that that does not entitle the applicant to our eviction without more*'.

> It would be appropriate at this stage to deal with the provisions of section 3(d) of the provisions of the Subdivision of Agricultural Land Act 70 of 1970, which is crucial for the determination of the issues in this appeal. It states: '*3 (d) no lease in respect of a portion of agricultural land of which the period is 10 years or longer or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease,*

[1] Para 57 at page 162 of the record

indefinitely or for periods which together with the first period of the lease amount in all to no less than 10 years, shall be entered into.'

[10] During the proceedings in the court a quo, the appellants also admitted that the provisions of the bond as contained in clause 5.16 which provides for a further extension of the lease, was also similarly void for contravention of Section 3(d) of the Act. In this regard, the appellants stated the following in their answering affidavit[2]: '*I accept that the option to extend the lease agreement as contained in the bond is void by reason of the technical non-compliance, and consequential contravention of the Act'*.

[11] In correspondence between the parties through their attorneys of record, prior to the institution of the proceedings concerning the validity of the lease agreement, the appellants claimed on more than one occasion[3] that they had a valid lease and an improvement lien over the property. In this regard, the appellant stated that they have a valid lease agreement which will run until 28 February 2030, and that they have an improvement lien to the value of R4 616 827, 00.

[12] These claims were however retracted by the appellants who stated in their answering affidavit[4] that … "*I do not allege that we are entitled to retain possession of the property by virtue of a lien. Our case is that our eviction, if granted, would be manifestly unjust. In such a circumstance, the relaxation of the par delictum rule would be inappropriate in the present circumstances"*.

The appellants' case before the court a quo was the following:

[13] They accepted that the lease agreement, which included the original lease agreement together with the subsequent renewals, technically contravenes the Act and is therefore void. According to them, however, the respondent has failed to make out, or even attempt to make out a case for the relief he seeks. The appellants

[2] Paragraph 64 at page 163
[3] In letters dated 6 October 2020 and 8 February 2021
[4] paragraph 81at Page 166

stated in this regard that they rely on the principle expressed as in *par delicto potior est conditio defendentis*, commonly known as the *par delictum* rule.

[14] They alleged that in terms of the *par delictum* rule, the respondent is barred from claiming the return of possession of the property, which is the farm, in terms of a turpid agreement. In this regard the appellants submitted that in the event of the respondent seeking to escape the operation of the *par delictum* rule, the respondent was obliged to set out the policy considerations which dictate and mandate the relaxation of the rule; and why the non-relaxation of the rule would amount to an injustice being done to him.

The findings of the court a quo:

[15] The court[5] a quo was not persuaded that the respondent acted with turpitude or dishonourably as alleged by the appellants. The court a quo firstly held that the appellants' concession that at the time of the conclusion of the agreement, neither they nor the respondent was aware of the need to obtain the Minister's consent and that the failure to do so rendered the agreement null and void; which made it difficult to show that the respondent rendered his performance with turpitude or dishonesty. In this regard, the court also found that '. . . *Turpitude, in my view, entails knowledge of what the legal position is and yet going out to commit an illegal act. It requires a willful and intentional disregard of the legal prescripts in favor of unlawful conduct. Ignorance is insufficient'*.

[16] Furthermore, the court a quo found that an agreement concluded in violation of the law is void ab initio. The court held that it is when a party seeks to claim back his performance in terms of a contract which is void from inception, that the determination has to be made whether his or her performance was tainted by dishonesty or turpitude. In this regard, the court held that the lease agreement which was void ab initio cannot be saved by a subsequent application to the Minister in terms of the Act. The consent of the Minister must first be obtained before entering into an agreement that will potentially violate Section 3 (d) of the Act.

[5] Paragraphs 37 - 40 of the judgment at page 265-266

[17] The court a quo further held[6] that when two parties reached a consensus at the conclusion of an agreement, turpitude, if any, had to exist. And if there is no turpitude at the conclusion of the agreement, the contract will still be void ab initio, if it is affected by illegality. Irrespective of the subsequent conduct of the respondent in this matter. The court held that the conduct which the appellants complain about, which according to them manifested when the respondent sought to extricate himself from the agreement, is nothing but conduct amounting to a breach of the agreement, but not affecting its illegality. It held that such conduct does not form the basis for the application of the *par delictum* rule.

[18] Lastly, the court a quo held that since there is no other basis upon which the appellants claim the right to possession of the farm, the finding that the *par delictum* rule is not applicable opens the way for the appellants' eviction. And whatever claims appellants may have against the respondent will not be a bar to the eviction.

[19] The issues in this appeal are the following:

1) Whether the rule in *pari delicto potior est conditio defendentis* ("the *par delictum* rule") finds application on the facts of the present application, where the lease agreement by virtue of which the appellants occupied portions of the respondents' farm is admittedly void for contravention of the Act;

2) If the *par delictum* rule does not apply, the question to consider is whether the appellants have any defence to the application for the ejectment, as found by the court a quo;

3) Should the *par delictum* rule, however, find application, the question to consider is whether its application should be relaxed in the circumstances of the present case;

These were the defined issues which the court a quo dealt with.

[6] Paragraph 40

The application to adduce further evidence:

[20] In these proceedings, the appellants have made an application to adduce further evidence in terms of the provisions of section 19(b) of the Superior Courts Act 10 of 2013 and which they want the court to adjudicate upon during these proceedings. The provisions of section 19 states the following: '*The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-*

(b) receive further evidence;'

Based on the application to adduce further evidence, the following new issues are also raised by the appellants:

1) That they seek to withdraw their admission made in the court a quo that the lease agreement is void and in contravention of the Act;

2) That the lease is not in contravention of the Act as all arable and commercially viable land on the farm is leased by them;

3) They contend that if the lease agreement is void, a part of the leased property can be salvaged by severing it from the unlawful part of the lease.

[21] The Respondent opposes the appeal on the following grounds:

1) That the *par delictum* does not apply as there was no turpitude by the respondent in concluding or performing under the lease because the parties were not aware of the illegalities thereof;

2) Should the rule however apply it should be relaxed on the facts of this case;

3) The lease is indivisible, and the unlawful part cannot be severed from this case.

[22] In this appeal, the appellants contend that the court need only consider the validity of the second lease agreement, which agreement is contained in paragraph 5.16 of the bond concluded between the parties, which granted the appellants the option to conclude such an agreement at the expiry of the first agreement. Furthermore, although the appellants before the court a quo conceded that the agreement was void for technical non - compliance with the Act, it now submits that the second lease agreement is unaffected by the Act, based on the common cause facts because the appellants rented the farm to the extent that it related to farming operations in its entirety. The appellants admit that in light of two unreported judgments, one in this division and the other in the Supreme Court of Appeal confirming that judgment, the concession was incorrectly made.

[23] The appellants further submitted that the second lease agreement in any event is severable insofar as the farm consists of two separate erven or cadastral units. According to the appellants one of those cadastral units, Orangerie, is leased to the second appellant without any exclusion, and so the second lease agreement is valid to the extent that it relates to that cadastral unit as there is no non-compliance with the Act, whether technical or otherwise insofar as it relates to Orangerie. They submit that where a contract is illegal, but the illegal portion thereof can be severed, then it should be severed.

[24] They further submit that the portions of the farm which are excluded from the second lease agreement are all situated on the portion of the farm defined as '*Tweekuilen 2*'. According to them the validity of the second lease agreement may be retained, in part at least, but excising therefrom the portion of the second lease agreement which relates to Tweekuilen 2.

[25] They further contend that if the second lease agreement is impacted by the Act, and consequently void to that extent, the operation of the *par delictum* rule would preclude the grant of the relief sought by the respondent.

[26] Lastly, they contend that if the second lease agreement is deemed void, and the *par delictum* rule does not find application, or the respondent has made out the case for its relaxation, the appellants' eviction might lead to material unfairness, which the court would be called on to mitigate, through the exercise of its discretion on ordering their eviction from the commercial premises. The appellants submitted before the court a quo, they plainly, as a matter of law, conceded that the lease agreements were void by reason of a technical non-compliance with the Act. According to them the concessions of law and related assumed consequences are incorrect for the following reasons:

a) when determining whether the lease agreement falls foul of the Act, the purpose and object of the Act must be considered;

b) the purpose and object of the Act is to prevent the fracturing of agricultural land into uneconomic units;

c) where the lease in question had no effect on the economic viability of farmland in question, the Act is not triggered; and

d) on the common cause facts, the portion of the farm which had been excluded from the second lease agreement is:

(i) not relevant to the commercial viability of the farm;

(ii) not farmed by the respondent at all;

(iii) has no bearing whatsoever on the commercial viability of the farm, whether in whole or in part; and

(iv) serves no more than, and is no more capable, as otherwise being used for residential purposes.

For all of these reasons that the appellants submit, that second lease agreement is not affected by the Act and is consequently valid.

[27] According to the appellants, based on the decision of *Paddock Motors v Igesund*[7] which they quote at length, the concession of invalidity is wrong and falls to be withdrawn. They further submit that it is common cause that all the farmable or arable land of the farm is leased by the second appellant and is farmed by the appellants; that the portions that had been retained by the respondent to provide him and his family with housing and remain subject to an option to purchase or lease afforded to the second appellant.

[28] In this regard they refer to what they state in the answering affidavit, which is that in truth, in fact and in their mind, they leased the entire operational farm and by allowing the respondent to remain in the homestead and its surrounds effectively, and 'let' a portion thereof back to the respondent for his residential and domestic purposes. The appellants however concede that erroneously, the lease agreement does not state this clearly.

[29] They submit that while the respondent asserts that the Act makes no differentiation between farmable and other land, the courts however have had the opportunity to consider the issue. And in this regard, they refer to two unreported judgments where the applicability of Section 3(d) of the Act is considered which were unfortunately not placed before or referred to by either party before the court a quo. They referred to the cases of *De Villiers v Elspiek Boerdery (Pty) Ltd*[8] *and De Villiers v Elspiek Boerdery (Pty) Ltd*[9]).

[30] The appellants submit that in respect of the second lease agreement, the parties reached common ground that the second appellant leases, and the appellants farm the entirety of the farm for agricultural purposes and that the respondent retains only the right to reside at the farm homestead. The appellants also rely on paragraph 24 of Elspiek SCA judgment in confirming the Elspiek WCC judgment, which in summary states that *'... [I]n terms of the lease the whole property was let to Elspiek and its enjoyment of the property as a whole for the purposes of its farming enterprise was not in any way curtailed by the limited right of residence*

[7] 1976(3) SA 16 (A) at page 23C -24G
[8] *2015 JDR 2195 (WCC)("Elspiek WCC")*
[9] 2017 *JDR0465 SCA* ("*Elspiek SCA*")

afforded to De Villiers. Neither does the right of residence in any way result in the uneconomical fragmentation of the agricultural land. There is accordingly no basis upon which s 3 (d) of the Act finds application.'

[31] The appellants therefore submit that it is common cause on the papers that the entire farming operation, and the entire commercial capacity of the farm was taken over by them. No fragmentation of the agricultural activities of the farm in terms of the second lease agreement has been alleged or proven. And as a fact, there is no allegation founded in fact, that the actual purpose of the Act has been undermined at all. According to the appellants the respondent simply seeks to opportunistically grab at the perceived technical breach of a statute and to appropriate material benefits which he is not entitled, and which is against all precepts of fairness and justice.

[32] Therefore, based on the Elspiek cases as decided by Binns-Ward J in this division, and confirmed by Fourie AJA in the Supreme Court of Appeal, the second lease agreement as with the first lease agreement once amended, relates to the entirety of all arable land on the farm which only afforded the respondent the right to use and reside on the non-farming portions of the farm.

[33] The appellants submit that there is no fragmentation of the agricultural capacity of the farm on the factual level at all. Therefore, they submit that the Act finds no application and no Ministerial consent is required. The second lease agreement is therefore valid. They further submit that by virtue of the description of the two cadastral units, Tweekuilen 2 and Orangerie, and aside from the fact that the farming operations on each unit is effectively being farmed independently, they are inherently severable. In this regard, they submit that where an agreement is affected by its illegality, its validity may be saved by severing that which makes the agreement invalid. For this proposition, they rely on the cases of *Eastwood v Shepstone*[10] and *Bal v Van Staden*[11].

[10] 1902 TS 294
[11] 1903 TS 70

[34] In dealing with the case at hand they submit that as a fact, the portion of the farm which has been excluded from the lease agreement all fell within Tweekuilen 2. The effect thereof is that the appellants leased at all material times the entirety of Orangerie, without any exclusion whatsoever. This fact was not explained by the respondent and the appellants only became aware of the possibility that one of the cadastral units of the farm was leased in its entirety, in the lead-up to the preparation of argument of this appeal. And after having been alerted to this as a possibility, they commissioned an investigation.

[35] It is their belief that on the evidence, the exclusions in the lease agreements have no impact on Orangerie at all because it is being let to the second appellant in its entirety in terms of the second lease agreement. It is for this reason that they submit that the lease of Orangerie is severable from that of Tweekuilen 2. They further submit that on the evidence and in furtherance of the conclusion, the two composite parts of the farm can each operate as self-sustaining, independent, commercially viable farmable units.

[36] Regarding the applicability of the *par delictum* rule, they repeat the submissions they made in the court a quo and once again submit that there was no justification for the rule to be relaxed in this particular case. Regarding the question of whether the respondent was in delicto, he relied on the case of *Afrisure CC v Watson NO*[12], where he submitted that he was unaware that the various agreements were in breach of the Act and therefore his conduct was not in delicto and subsequently the *par delictum* rule did not find application. The appellants submit that the respondent's reliance on the *Afrisure CC v Watson NO* is misplaced.

[37] According to them, firstly, the respondent's conduct is dishonourable in that he admitted that his own conduct is a crime and open to criminal sanction. And he seeks to avoid the label of turpitude and dishonourable conduct on the basis that, while his conduct constitutes an offence, he as well as the appellants were unaware of the terms of the Act. Whilst he was not aware of the fact that at the time that the agreement was in breach of section 3(d) of the Act, the appellant, for more than a

[12] (2009) 1 All SA 1 (SCA)

year, proceeded to render performance under the void agreement by making the land available for lease and by continuing to collect the rental and requiring the appellants' to pay the rates and taxes. He furthermore attempts to avoid all and any remaining obligations attached to promises he has made.

[38] According to the appellants, from the respondent's further attempts to misappropriate a technical contravention of the Act for which he is responsible, for his own benefit. In all the circumstances he could readily in good faith have honoured these promises made in a lawful manner, simply by concluding a new lease on the same terms for the remaining period of the second lease agreement. This amounts to dishonourable conduct.

[39] Secondly, he tries to escape the consequences of his own turpitude by reason of his lack of knowledge which is manifestly inappropriate because the maximum *ignorantia iuris non excusat* is trite law and of application in this particular case. In this regard, the appellants further submit that it is noteworthy that the Act, in defining the offence, does not require fault of any kind at all. And the respondent's ignorance thereof compounds turpitude, his moral blameworthiness, and makes his conduct then and now still dishonourable.

[40] Thirdly, the Act does not forbid the conclusion of a long lease for a portion of agricultural land, it however forbids the conclusion of a long lease for a portion of the agricultural land in the absence of a prior written Ministerial consent. The respondent says that no such consent from the Minister had been obtained.

[41] The appellants submit that the respondent by denying culpability have neglected to deal with Section 4(1)(a)(i) of the Act which provides as follows:

> *'(4)(1)(a) Any application for the consent of the Minister for the purposes of Section 3 shall-*
>
> *(i) In the case where any act referred to in paragraphs (a) to (e) of that section is contemplated, be made by the owner of the land concerned.'*

[42] In the circumstances, the appellants submit that the obligation and the power to obtain the requisite Ministerial permission rests solely on and with the respondent; and that the appellants were without the power to do so. What the respondent now seeks is to be excused from his own consequences and to benefit materially from his own failure to comply with a statutory obligation, to the prejudice and at the expense of the appellants.

[43] They further submit that the underlying policy and purpose of the Act is to prevent the breaking up or subdivision of agricultural land in the uneconomic portions. The evidence will show that the respondent retained for his use and benefit only, the homestead, the kraal, and the blue gum trees and that it does not form part of the agreement at all; nor have they done so since contracting with the respondent. These portions so retained by the respondent have no commercial farming value and that all the arable land is formed as a single unit by the appellants. The further fact is that no other variable farming is or can be carried out by any other person, including the respondent himself.

[44] The appellants, based on these facts, submit that there is no evidence at all that the de facto subdivision by the respondent of the residual component has had any impact on the farm's viability at all.

[45] In their final submission, the appellants contend that should the court find that the second lease agreement is void and the *par delictum* rule not operative, and the respondent has made out a case for its relaxation. The court however, does not retain the discretion to refuse to direct the appellants' eviction.

[46] It does, however, at common law retain the discretion to delay the ejectment of an occupier. The court's decision must be rational when exercising such a discretion. In this regard they submit that the court should consider the following in exercising its discretion:

> a) whether the appellants had breached the terms of the lease agreement, was paying rent and could be expected to remain so;

b) whether the respondent neglected to timeously inform the appellants what was to happen with the leased premises;

c) the duration of the appellants' occupation;

d) any hardship which the appellants (and its staff) would suffer if evicted without delay, or sufficient delay; and

e) what benefit the respondent would gain from the renovations of the leased property.

[47] The appellants submit that on the evidence they have not breached the agreement; that the respondent steadfastly refused to indicate what he proposed to do with the farm besides coyly hinting that he may lease it out after the appellants vacate the property. The fact that the appellants have occupied the farm for more than 20 years, t and that their current crops of wheat and silage would be ready for harvest in December 2023 only. The appellants submit that in the circumstances, any eviction before that would materially and unjustly prejudice them.

Evaluation:

[48] I shall first deal with the appellants' attempt to adduce new evidence on appeal. It is well established that the court exercising appeal jurisdiction will allow the leading of further evidence on appeal but only in special circumstances as it is in the public interest that there should be finality to the trial. In Van Loggerenberg: Erasmus Superior Court Practice[13] the learned authors refer to a statement of Lord Chelmsford in *Shedden v Patrick and Attorney General* where it was stated:[14] '*It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence, which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to*

[13] Van Loggerenberg: Erasmus Superior Court Practice Volume 1 - 2 (Ed) at RS18,2022 A2 -70
[14] (1869)22 LT 631 at 634; (1861-1873) All ER 724(HL) at 730g-I

which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial.'

[49] Despite this principle, the courts held that it is undesirable to lay down definite rules as to when the court ought to accede to an application by a litigant desirous of leading further evidence upon appeal. Our courts have, however, in a series of decisions laid down certain basic requirements a litigant like the appellants has to show why such evidence may be accepted at the appeal stage. These are set out in a more recent decision of this court in *Mayekiso and Another v NO and others Patel*:[15]

a) the application has been made timeously;

b) why the evidence was not placed before the court a quo;

c) the failure to introduce the evidence earlier was not attributable to any remissness or negligence on their part;

d) that there is a primary facie likelihood in the truth thereof;

e) that the evidence is materially relevant to the outcome of the matter; and

f) The application is bona fide (*S v De Jager 1965 (2) SA 612 (A) 613 (1)*; *De Aguair v Real People Housing (Pty) Ltd 2011 (1) SA 16 (SCA) para 11*).

Any non-compliance with any of these requirements would ordinarily be fatal to the application depending on the circumstances of each case, but in rare cases and for special reasons a court may be more disposed to grant relief.

[15] [2019] 1 All SA 221(WCC) para 30, citing Erasmus: Superior Court Practice, (2Ed) Volume 2 at A2-70; Rail Commuters Action Group and other v Transnet Ltd t/a Metrorail and other 2005(2) SA 359(CC) at 41-43; Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency & others 2014 (1) SA 604 (CC) at 94

[50] As to the first requirement, there is no dispute that the application was not lodged timeously. Mr. Walters submitted that he only discovered and became aware of this evidence about six weeks before the hearing of this appeal. No reason was given to this court as to why a proper and diligent search was not undertaken in order to procure the purported new evidence. The appellants were at all times aware that the farm comprised of two separate cadastral units namely, Orangerie and Tweekuilen; that it was on Orangerie where most, if not all of the farming activities takes place in terms of the second lease agreement. They only state that counsel for the appellants, in preparing for this appeal, discovered this fact a few weeks prior to the hearing of the appeal. No reason is provided why this fact did not come to the attention of the applicants given the significance they attached to it during these proceedings at an earlier stage.

[51] In any event, I am furthermore in agreement with the respondent that it was always known that the farm comprised of two cadastral units, as was clearly stated by the respondent in the founding affidavit[16]. It is furthermore difficult to understand given the fact that the respondent at all times alleged that the lease of the portion of the land which they farmed on commercially, was unlawful if compared with the portion the respondent retained, that they did not investigate the possibility that it might not be the case as they now belatedly claim; instead of investigating this possibility, they admitted in the court a quo that the lease agreement concluded between them and the respondent was unlawful and failed to comply with the provisions of the Act. One would have expected them or their legal representatives to have thoroughly investigated the correctness of the respondent's claim before agreeing with him, which clearly points to remissness or negligence on the part of the appellants.

[52] This new evidence belatedly presented is rather unconvincing given that on the conspectus of the evidence, which the appellants also believed to be correct, it was accepted that these two units comprising the farm is a single piece of agricultural land, and it seems on the reading of the papers the parties have always treated the farm effectively as a single property. And as pointed out by the

[16] As set out in paragraph 6 of the founding affidavit

respondent, the farm was even regarded and seen by the appellants as a single commercial unit or entity.

[53] Lastly, I am not persuaded that the application to adduce new evidence is bona fide given the manner in which they have conducted their case. This is evident from the fact that prior to instituting proceedings and in correspondence through their attorneys, the appellants claimed on more than one occasion that they had a valid lease and an improvement lien over the property. Furthermore, their attorneys asserted that there are deep-seated factual disputes between the parties and that the respondent had to proceed by way of action proceedings, without mentioning what such disputes of fact entail.

[54] It was only after having filed the answering affidavit that it emerged that they do not allege that they are entitled to retain possession of the property by virtue of any lien. However, their case is that if the eviction is granted, it would be manifestly unjust and the relaxation of the *par delictum* rule would be inappropriate in the present circumstances. In their answering affidavit, no reason was given as to why they did not proceed with the case their attorneys so enthusiastically proclaimed they would be asserting in their correspondence with the respondent's attorneys.

[55] The introduction of the new evidence would result in the appellants having proffered three different versions as the basis upon which they opposed the application. Firstly, it vacillated from a version that the contract was valid and subject to an improvement lien that was asserted by their attorneys prior to the filing of their answering affidavit. Secondly, to an admission that the contract was void and technically contravenes the Act and that respondent failed to make out a case for the relief he seeks, which was for the ejectment of the appellants from the farm. This is based on their assertion that the *par delictum* rule is applicable and should not be relaxed. And lastly, a further version in terms of which they withdrew the admission that the contract was void in these proceedings, to a version that the contract was indeed lawful because the portion of the property that is leased to them does not fall within the provisions of section 3(d) of the Act as a result of new evidence that was discovered just prior to the hearing of this appeal.

[56] What is further disconcerting is the appellants' assertion that the respondent failed to identify to the court that the farm comprises of two adjacent properties, whereas this was pertinently stated by the respondent in his founding affidavit. I agree that this allegation on the part of the appellants is unfounded and demonstrates their lack of bona fides. The manner in which the so-called new facts were brought to bear is rather skeptical and seems to have been moulded and forged around the facts in the Elspiek case, which, in my view, even if it was the facts of this case, are not comparable to the facts in Elspiek which I will demonstrate later. This is a further fact that has a bearing on the bona fides of the appellants.

> For all these reasons the appellants have failed to make out a case to adduce further evidence on appeal and their application fall to be dismissed. Even if it is incorrectly held that the evidence should not be accepted in this appeal, the evidence would in any event not be convincing enough to conclude that the lease agreement is not unlawful.

The merits of the appeal

[57] In dealing with the merits of the so-called new facts, it seems that the appellants' attempt to withdraw their earlier admission that the lease is void and in contravention of the Act is premised on the fact that the second lease agreement ("lease agreement") is unaffected by the Act. This they contend is so because they rent the farm to the extent that it is related to the farming operations in its entirety. In this regard they submit that Orangerie, is leased to them without any exclusion, therefore this lease agreement is valid to the extent that it relates to Orangerie because there is no non-compliance with the Act, technical or otherwise.

[58] I do not agree with the submissions by the appellants that only the Orangerie section of the property is unaffected by the Act. This is factually not correct because it is common cause that the property comprises of two adjacent agricultural properties that are held under a single title deed (T 45[…]).

[59] On the papers filed of record, it was always accepted that the property which is farm Rhenosterbosrug comprised of two adjacent properties being Portion 2 of the

farm Tweekuilen and Portion 6 of the farm Orangerie Annex 84[…], that are held under a single title deed. This means that although the farm consists of two cadastral units, both are indivisible units of the farm. Legally, one portion cannot be divided from the other unless the title deed is amended.

[60] The Orangerie portion is part of the farm. It is irrelevant how it is utilized. It is and remains a piece of the land that forms part of the property registered in the Deeds registry. And it forms part of the property named Rhenosterbosrug, it is not separated from Rhenosterbosrug. Both units form part of the farm and are '*agricultural land''* as defined in section 1 of the Act. In this regard, the following was stated in *Adlem v Arlow*[17] that '…*The correct interpretation in my view is that advanced on behalf of the appellants, namely that the word 'portion' in s 3(d) and in s 3(e)(i) and (ii) means a piece of land that forms part of a property registered in the Deeds Registry; and, on the authorities I have quoted, the prohibition is aimed at preventing physical fragmentation of the property, and the use of part of the property under a long lease — as well as, I would add, the granting of a right for an extended period in respect of the property. In other words, the word 'portion' in, inter alia, s 3(d) must be interpreted as meaning a part of a property (as opposed to the whole property) registered in the Deeds Registry, and not as having the meaning used in the deeds registry to describe the whole property…'* (own underlining)

[61] Even if this new evidence should be accepted, it does not advance the appellants' case that the lease agreement does not fall foul of the provisions of the Act. On the contrary, it clearly does because the portion (Orangerie) of the farm is leased to them. Their further argument is that due to the fact that the portion of the farm that they are leasing encompasses all arable land and that the portion which comprises Tweekuilen, on which the respondent resides is not arable farming land, there is no fragmentation of 'agricultural capacity' of the land, is a contrived and illogical interpretation of the Act.

[62] Nowhere in the Act is it stated that where a portion of agricultural land with 'agricultural capacity' is leased, that the lease of such a portion of the property does

[17] 2013(3) SA 1 SCA at para 13

not fall foul of the provisions of section 3(1)(d) of the Act. The Act clearly seeks to prevent the fragmentation of agricultural land, which in my view even includes arable or non-arable land. In *Tucker's Land and Development Corporation (Pty) Ltd v Truter*[18] the following is said:

> '*The basic object and purpose of the Act was obviously to prevent the subdivision of agricultural land into uneconomic portions. The long title of the Act, prior to its amendment by s 9 of Act 55 of 1972, was "To control the subdivision of agricultural land", and this was changed by the amending section referred to, the long title after the amendment reading "To control the subdivision and, in connection therewith, the use of agricultural land'*
>
> And
>
> *'Apart from prohibiting the subdivision of agricultural land without the written consent of the Minister, the Act inter alia also provides that no undivided share in agricultural land shall vest in any person without the Minister's consent (s 3 (b)) and that no lease in respect of a portion of agricultural land for a period of 10 years or longer, or for other long terms, shall be entered into without the Minister's written consent (s 3 (d)).*
>
> *The clear impression one gets from reading the Act as a whole is that the object and purpose thereof is to prevent subdivision of agricultural land into uneconomic units, and furthermore to prevent the use of uneconomic portions of agricultural land for any length of time.'* (own underlining)

[63] What the Act seeks to prevent is the fragmentation or proliferation of agricultural land into uneconomic portions and based even on the so-called new facts, as presented by the appellants and on their own version given the fact that the portion of land, Orangerie, is where all the farming activities are taking place, it will render the portion of the agricultural land on the farm, Tweekuilen, into an uneconomic unit. This is exactly what the Act seeks to prevent. In this regard the

[18] 1984(2) SA 150 (SWA) at 153 G-H and 154 B-C

appellants[19] state that the portion Tweekuilen, which has been excluded from their lease agreement, is not relevant to the commercial viability of the farm; that it is not farmed by the respondent at all and has no bearing on the commercial viability of the farm, whether in whole or in part and serves no more than, and is no more capable than otherwise being used for residential purposes. For all of these reasons, the appellants have failed to convince this court that the farm is effectively not a single piece of agricultural land or economic entity, and that the lease agreement of a portion of the farm is in contravention of the Act and thus void.

[64] I agree with the respondent that the appellants should therefore be held to the admission that the farm is agricultural land and effectively one single commercial entity which has always been deemed as such; from which the legal consequence of voidness of the lease agreement for the portion thereof flows.

[65] The *Elspiek* case does not assist the appellants and it is clearly distinguishable on the facts from the present application. The facts in *Elspiek* were that the entire property was subject to the lease agreement and: *'the reservation of a right of the lessor to live in a house on the property and the use of the outbuildings not required for the lessee's farming activity does not detract from the kind of enjoyment contracted for by the lessee'*. In this regard the court a quo, as well as the Supreme Court of Appeal emphasized that on a proper construction of the lease agreement, there was no lease of a part of the property. That, unlike in this case, there was clearly an intention to lease a portion of the property to the appellants as opposed to the whole or entire property.

[66] The appellants averred that because of them leasing the entire farming or arable land which is situated on Orangerie and because the respondent lives on non-arable or farming land, they purported that the facts in their case were similar to the facts in the Elspiek case. If the entire farm however, which included both Orangerie and Tweekuilen, had been leased to the appellants, the Elspiek case would have been applicable and not subject to the provision of section 3(d) of the Act. The

[19] Appellants Heads of Argument page 18

leased portion of the agricultural land, Orangerie, forms part of the property Rhenosterbosrug as registered in the Deeds Registry.

The appellants have not succeeded in convincing this court that the lease agreement does not fall foul of the provisions of section 3 (d) of the Act and is thus unlawful.

Severability:

[67] Given the fact that the entire lease agreement is deemed unlawful and void ab initio, the question of the severability of the legal portions of the agreement from the illegal portions thereof does not arise. Christie (8th Ed) at 10.5.1 says the following in this regard:

> '*Before considering the effects of illegality, it is well to differentiate these instances in which the effect is on the contract as a whole or only part of it. The general propositions is that a contract that contains an illegal term is rendered void in its entirety unless that term is severable from the rest of the contract*.'

In any event, no case for severability had been made out. The principle of severability only finds application in cases where a party seeks to sever an illegal contractual term from an agreement. In this case, the appellants want the portion of the land which they argue is not subject to the provision of the Act to be severed from the portion which they say is subject to the provision of the Act.

The Application of the *par delictum* rule:

[68] The principles and the application of the *par delictum* rule have been dealt with in a number of decisions by previous Appellate Divisions as well as the Supreme Court of Appeal courts and more especially in the decision of *Afrisure v Watson* that had been referred to earlier in this judgment. The court a quo also took guidance from this judgment in upholding the claim of the respondent.

[69] It is well established that the *condictio ob turpem vel iniustam causam* can in principle only be instituted by a plaintiff whose own conduct was free from turpitude i.e. who did not act dishonourably. This rule is expressed in the maxim taken from Roman and Dutch Law: *in pari delicto potior est conditio defendentis* and thus became known as the *par delictum rule.* The principle underlying the *par delictum* rule is that, because the law should discourage illegality, it would be contrary to public policy to render assistance to those who defy the law. This strict application of this rule was however relaxed since the judgment in *Jajbay v Cassim 1939 AD 537*, where it was found that it should be relaxed '*in those instances where "public policy should properly take into account the doing of simple justice between man and man'.*

[70] In *Afrisure v Watson*, Brand JA held that: '…*No definite criteria have, however, been laid down to decide whether the rule should be relaxed or not. The reason, I think, is plain. The issue of relaxation may arise in such an infinite variety of circumstances that it would be unwise for the courts to shackle their own discretion by predetermined rules or even guidelines as to when a relaxation of the par delictum rule will be allowed.*'[20]

> The court proceeds by stating the following:'*But the keystone to the par delictum defence is that the plaintiff has rendered performance dishonourably or with turpitude. Absent turpitude on the part of the plaintiff, the par delictum rule is simply not available."*[21]

[71] The appellants submitted that the court a quo was wrong in finding that the *par delictum* rule does not find application or that it should be relaxed. Mr. Walters took issue with the court a quo's finding that there was no turpitude or dishonesty on the part of the respondent only at the time of the conclusion of the contract, and not thereafter. According to him, one must also consider whether there was turpitude or dishonourable conduct in or during the performance of the contract. According to him, the respondent's conduct of making the leased premises available and receiving rental from the appellants in the course of the performance of the contract constitutes dishonourable conduct.

---

[20] Afrisure v Watson (supra) at para 39
[21] Supra at para 40

[72] In this regard, he refers to a letter written by the respondent's attorneys dated 29 July 2020[22] wherein the respondent informed the appellants that he has been informed that the lease agreement is unlawful and in contravention of the provisions of section 3(d) of the Act; a letter that was sent more than a year before the respondent instituted proceedings on 22 July 2021 in this court. The respondent, according to him, acted with turpitude when he continued with the lease knowing that they were in contravention of the provisions of the Act. And during this time the respondent enforced his obligation to collect rates and taxes from the appellants and he did not seek the Minister's permission. What the respondent actually did was try to get a better deal by claiming an increased rental amount which is market-related instead of terminating the lease agreement.

[73] I do not agree that what is stated in this letter can be characterized as dishonourable conduct in the course of the performance of the contract, after the respondent became aware of the fact that the contract was in contravention of the provisions of the Act. Firstly, it was an attempt on the part of the respondent to terminate the unlawful agreement, by giving notice to the appellants. Secondly, it was also an attempt by the respondent to enter into a lease period of 5 years, after he realised that the existing agreement was unlawful. This in my view, cannot be construed as dishonourable conduct on the part of the respondent in rendering performance in terms of the unlawful agreement, where the respondent expressed a desire to terminate that very same agreement. Where the respondent stated the following: *'If you are interested in leasing further, we would like to receive your offer for the term of 5 years, possible with the right of first refusal in respect of further leasing in favour of the lessee.'*[23] Thirdly, given the stance taken by the appellants after having received this letter from the respondent's attorneys, which they held up until the filing of their answering affidavit, which was that the agreement was not unlawful and not in contravention of the provisions of Section 3(d) of the Act; it is not open to them to argue that during the period after the respondent had given notice that the contract is unlawful until the institution of these proceedings, that the respondent was dishonorable in the performance of the contract. Because it was

[22] FA8 page 66

[23] Page 68 of FA 8, translated by the parties at page 19 in Bundle of translated documents.

always their case up to the finding of their answering affidavit for more than a year that the contract was lawful and not in contravention of the Act. Fourthly, this was not the basis upon which the appellants asserted before the court a quo why the *par delictum* rule should find application.

[74] In the court a quo the appellants asserted that the *par delictum* rule is applicable because the respondent concluded the agreement in ignorance of the provisions of Section 3(d) of the Act and that such ignorance of the law is no excuse because he rendered his performance dishonourably and therefore with turpitude. This is inconsistent with what the appellants had argued during this appeal as referred to earlier. The second ground they asserted which the court a quo refers to in paragraph 18 of its judgment was the respondent's turpitude was to be found in his failure to comply with the provisions of section 4(1)(a)(i) of the Act in that he failed to apply for the Minister's consent.

[75] The court a quo summarised the argument as follows: that whilst the respondent like the appellants, initially did not know of the requirement in terms of section 3(d) of the Act to obtain the written consent of the Minister and was therefore unaware of the illegality of the agreement, the respondent upon being made aware of the illegality of the agreement in 2020 when he obtained legal advice, was obliged to apply in terms of Section 4(1)(a)(i) of the Act, an obligation which is placed solely upon him as they just said the owner of the land, for the Minister's consent.

[76] These grounds raised by the appellants were found by the court a quo not to be sustainable to justify a conclusion that the respondent rendered his performance dishonourably or with turpitude, it was a proper and correct finding. The court quo correctly in my view found that *'turpitude entails knowledge of what the legal position is and yet going out to commit an illegal act. It requires a bold, full and intentional disregard of the legal prescripts in favour of unlawful conduct. Ignorance is insufficient'.*[24]

[24] Paragraph 37 of the judgment of Dolamo, J

[77] The second ground was also correctly rejected by the court a quo; it held that the lease agreement which was void *ab initio* cannot be saved by subsequent application to the Minister in terms of section 4 (1)(a)(i) of the Act. Furthermore, the Minister's consent must first be obtained before entering into an agreement that will potentially violate section 3(d) of the Act. It correctly relied on a decision of this court, in *Coetzee v Coetzee*[25] where Binns-Ward J writing for a full bench stated: *'It is common ground that any subdivision of the property would be subject to the Subdivision of Agricultural Land Act 70 of 1970…and therefore could only occur with the previously obtained consent of the national Minister of Agriculture'.*

[78] The court a quo correctly held that section 4(1)(a)(i) of the Act does not envisage an *ex post facto* application to the Minister. In my view, the court a quo correctly held that at the conclusion of the agreement no turpitude existed. I am furthermore not persuaded as the appellants contend in this appeal that the respondent, during the period 29 July 2020 to 20 July 2021 as pointed out above, rendered performance dishonourably or with turpitude. There was no turpitude during the conclusion of the agreement nor in the rendering of the performance of the agreement after the respondent became aware of the fact that the agreement was unlawful.

[79] The appellants have failed to show therefore, that the *par delictum* rule finds application. Thus, there is no other basis upon which the appellants can assert a claim or a right to be in possession of the farm. I therefore conclude for all of these reasons that the appeal falls to be dismissed. The only aspect that needs further consideration is the date when the court should order the ejectment of the appellants, which I will now consider.

Date of the ejectment

[80] At the conclusion of the proceedings on 17 July 2023, the parties were requested to provide a note setting out the submissions in respect of the date on which the appellant should vacate the farm in the event that the court finds in favour

[25] (2016) 4 All SA 404 at para 6

of the respondent in the appeal. The respondent in its further submission stated that this court does not have the power to delay such further date as the issue had been appropriately dealt with by the court a quo. I cannot agree with the submission of the respondent, the court a quo in its judgment did not properly deal with this issue in this regard, it just stated the following at paragraph 41'*Since there is no other basis upon which the respondents [appellants] claim the right to possession of the farm the finding that the par delictum rule is not applicable opens the way for the respondents [appellants] eviction. Whatever claims the respondents may have against the applicant will not be a bar to their eviction'.*

[81] In my view, adequate consideration was not given to the question when it would be appropriate for the appellants to either vacate on a voluntary basis or to be evicted from the property. The respondent further submits the appellants have been aware since July 2020 of the respondent's contention that the purported lease agreement is invalid. They were furthermore aware during January 2021 that an application would be brought removing them from the respondent's farm and that they should not invest money in the farm, in preparation for the following year's crop as the cost would be lost should the respondent succeed with this application.

[82] The respondent further contends that on 11 April 2022 the respondent, through his attorneys addressed a further letter to the appellants' attorneys in which the appellants were warned that if they conducted farming operations on the farm pending the appeal, they would do so at their own risk. The appellants do not themselves reside on the farm, nor do any of the workers employed by them reside there. Therefore, there is no practical difficulty with them vacating the farm.

[83] The respondent further submits that to the extent that the appellants seek to rely on their investment on the farm during the past years, such investments are simply ordinary inputs that any farmer would make in order to farm with wheat. The appellants have also not disclosed what profits they have derived from the use of the farm during the years, which according to the respondent must be substantial. The appellants have therefore benefited from the unlawful use of the farm for an extended period and there is no justification for them being permitted to do so any

longer. This the respondent submit, that he as the owner of the farm is entitled to the use and enjoyment thereof, being restored to him as soon as reasonably possible.

[84] According to the respondent, the appellants should be required to vacate the farm forthwith, alternatively within a period of five days of the date of the order of the court. The appellants on the other hand submit that this court sitting as a court of appeal has the power to delay the appellants' eviction on grounds of equity and fairness. In this regard they rely on the decision of *AJP Properties CC v Sello*[26], as well as rule 45A of the Uniform rules of court.

[85] The appellants submit that the court in exercising its powers to delay the eviction should exercise its discretion by having regard to the circumstances of the appellant, which includes the commercial realities attached to the nature of the farm and the appellants' farming enterprise which requires them to harvest their crops. Firstly, the harvesting of their wheat and grain crops takes place in December 2023 and the harvesting of their grapes from the vineyards in March 2024. The appellants need to remain on the farm to be allowed to reap the harvest they have prepared and which they paid for on an annual cyclical basis. Provision is made for such eventualities in rural lease agreements in general, with regard being had to the particular specified farming crops attached to agricultural land.

[86] The power of a court to stay or suspend an order of ejectment is derived from the common law. In this regard the court in *AJP Properties v Sello* (supra) the court said the following: '*There is accordingly a history of case law spanning close on a century which has, irrespective of its pedigree, become solidified and which has accepted that courts can exercise a discretion which, it appears, is not derived from its inherent jurisdiction but from a common-law power to stay or suspend the execution of an ejectment order…'*[27] (footnotes omitted)

[87] At paragraph 22 the court further states: '*Insofar as the [H]igh [C]ourts are concerned, as pointed out by Selikowitz J in City of Cape Town at 72H, rule 45A (which was introduced in 1991) allows it to stay the execution of an order. In terms of*

[26] 2018(1) SA 535 (GJ)
[27] Supra at para 21

the rule which is headed "Suspension of orders by the court": "(t)he court may suspend the execution of any order for such period as it may deem fit". If it is accepted that our common law in respect of delaying eviction orders in appropriate cases has solidified through decisions on appeal then magistrates' courts are similarly bound and issues of their not having inherent jurisdiction become moot.' (footnotes omitted)

[88] At paragraph 25 the court discussed the common law principles applicable to suspension or stay of ejectment with reference to the lease of rural property by referring to the following quotation from WE Cooper Landlord and Tenant 2 ed (Juta & Co 1994) at 179 fn 172: '*In Cooper at 66 the author describes the following:*

> *"Grotius and Van Leeuwen take the view that a year's notice is required to terminate a yearly lease of rural property; while Pothier says that it is for such time as is necessary for the collection of fruits. Except in an early case, our courts have refused to accept as an inflexible rule that a rural lease is entitled to a year's notice. The period our courts have considered reasonable to terminate a yearly rural lease has either been three months or six months, being the time that the lessee reasonably required to reap his crops, settle his affairs and find other farm land".'* [Emphasis added]

[89] Given the facts and circumstances of this case, I agree with the appellants that given the considerable expense they have incurred to prepare the harvest in respect of the wheat and grapes, that fairness and justice demand that the court exercises its discretion to suspend the eviction order until the wheatlands has been harvested in December 2023, requiring them to hand it over on 1 January 2024. And secondly that they harvest the grapes in March 2024 and hand it over on 1 April 2024.

Conclusion:

[90] In the result, I would make the following order:

90.1 The application for leave to adduce further evidence is dismissed with costs;

90.2 That the appeal is dismissed with costs including the costs of two counsel, where so employed;

90.3 That the appellants are evicted from the portion of property occupied in terms of the unlawful lease agreement, but the order of eviction in respect of the wheatlands is suspended until 1 January 2024 and the order in respect of the eviction on land on which the grapes are to be harvested is suspended to 1 April 2024.

90.4 Should the appellants fail to vacate the Wheat lands, as ordered above, the Sheriff of this court is hereby authorised to evict the appellants from the Wheat lands by 3 January 2024.

90.5 Should the appellants fail to vacate the grape vineyards on the date as ordered above, the Sheriff of this court is hereby authorised to evict the appellants on 3 April 2024.

_____

R.C.A. Henney
Judge of the High Court

I agree, it is so ordered.

_____

T. Ndita
Judge of the High Court

I agree.

_____

N. Nziweni
Judge of the High Court