

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 18781/2018

In the matter between:

BOTHONGO AGRICULTURE GP (PTY) LTD

Applicant

and

KERBYLAND (PTY) LTD

First Respondent

CRAB FARM KROOMDRAAI (PTY) LTD

Second Respondent

REGISTRAR OF DEEDS, PRETORIA

Third Respondent

JUDGMENT SUMMARY

Dispute – sale of immovable property – property subject to lease – lease agreement contained right of first refusal in favour of lessee – applicant and owner of property signed offer to purchase the property – sale conditional on lessee waiving right of first refusal – lessee exercised right of first refusal and offered to purchase the property – applicant alleged misrepresentation in that owner indicated to applicant that tenant unlikely to exercise right of first refusal – applicant seeks specific performance – requests court to authorise transfer of property into its name – such relief incompetent – offer to purchase between applicant and owner lapsed due to non-fulfilment of condition precedent – applicant did not seek to have contract declared valid and binding – a court cannot resurrect a contract which has lapsed or a write new contract for parties – applicant amended relief to have exercise of right of first refusal and sale agreement concluded between owner and lessee set aside for being unconstitutional – applicant alleged that right of first refusal exercised in an unfairly discriminatory manner, contravening s 9(4) of the Constitution (applicant's

right to equality) – lack of objective facts on which to base allegation of unfair discrimination – applicant in further amended relief requested a referral to oral evidence in order to determine whether the exercise of the right of first refusal was motivated by racism – test for referral to oral evidence – there must be a valid dispute of fact before a matter can be referred to oral evidence – allegations of racism speculative and without factual basis – application dismissed with costs.

Background

The applicant, Bothongo Agriculture GP (Pty) Ltd owns the Rhino and Lion Nature Reserve. The director and sole shareholder of the applicant is a black male. The applicant sought to acquire a property adjacent to the Reserve, owned by the first respondent, Kerbyland (Pty) Ltd (Kerbyland). This property was leased to Crab Farm Kroomdraai (Pty) Ltd, the second respondent. In terms of the lease agreement, the lessee had a right of first refusal in the event that Kerbyland decided to sell the property.

The applicant and Kerbyland concluded a sale agreement in respect of the property. The sale agreement was subject to a suspensive condition, inter alia, that the tenant waived its right of first refusal and chose not to purchase the property. During the course of the negotiations, the owner had indicated to the applicant that the tenant would probably elect not to purchase the property, but that this decision was still under consideration.

After the sale agreement was signed, the tenant chose to exercise its right of first refusal and elected to purchase the property. It entered into a sale agreement with Kerbyland. The applicant approached the Court for an order that Kerbyland transfer the immovable property to the applicant. It thereafter amended the relief claimed to one declaring the sale between the respondents unconstitutional. It later sought a referral to oral evidence.

Legal arguments and findings

The applicant alleged that it had been induced to enter into the contract on the basis of a misrepresentation made by Kerbyland, which had led it to believe that the lessee would not purchase the property. This argument was dismissed by the Court. Kerbyland had made it clear that the shareholders of the lessee would have to be consulted for a final decision in respect of the right of first refusal, and it also informed the applicant that a condition precedent would be inserted into the contract. Furthermore, Kerbyland did not purport to be a representative of the lessee at any time.

The initial relief sought by the applicant was problematic. The applicant sought transfer of the property into its name – essentially a claim for specific performance based on a contract. However, the sale agreement concluded between the applicant and Kerbyland had lapsed due to

the non-fulfilment of a condition precedent, and the applicant did not seek an order declaring the contract to be valid and binding. In order to transfer the property to the applicant, a court would have to resurrect that contract, or even write a new contract, which is not sustainable in law.

The applicant presented an alternative argument based on the equality clause of the Constitution. The applicant alleged that it had been unfairly discriminated against, as the lessee's motivation in choosing to purchase the property was to prevent a black-owned company from acquiring further immovable property in an area historically dominated by white Afrikaners. Therefore, the exercise of the right of first refusal was unconstitutional, and the resultant sale agreement concluded between Kerbyland and the tenant had to be set aside.

Shortly before the hearing of the matter, the applicant amended its relief, requesting that the question of whether the tenant's conduct was motivated by racism be referred to oral evidence. The Court found that there was a lack of objective facts on which to sustain an allegation of unfair discrimination. The allegation of racism was based on speculation and conjecture and a referral to oral evidence could not be justified. There must be a valid dispute of facts before a matter can be referred to oral evidence – a party cannot seek such a referral to make out a case which was not made out on the papers.

ORDER: The application was dismissed with costs.

Coram: Weiner J

Heard: 14 February 2019

Delivered: 22 February 2019