IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A 75/13

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) DATE DELIVERED: 13/6/2014

13/6/14

In the matter between

COMMISSION ON RESTITUTION OF LAND RIGHTS Appellant

and

GERHARDUS THEODORUS KNOETZE Respondent

JUDGMENT

BAM J

1. In February 2007 the appellant issued summons against the respondent. In summary the action turned upon the question whether certain property, was included in the written sale agreement between the parties in terms of which the appellant purchased a farm from the respondent. The appellant's case was that the property in question, a dehusking plant, used in the final production of nuts, was included in the agreement. The respondent disagreed and instituted several counterclaims, which, during the trial were separated in terms of Rule 33(4).

2. The trial pertaining to the appellant's claims started in October 2011. On 30 April 2012 the court *a quo*, Ebersohn A J presiding, dismissed the appellant's claims with costs.

3. Leave to appeal was refused by the trial court but subsequently granted by the Supreme Court of Appeal.

4. The respondent was the owner of a farm, measuring 158 hectares, in the Levubu area of Limpopo, where he produced Macadamia nuts on a commercial scale. The respondent sold the farm to the appellant for R15M.

5. It was common cause that an evaluator, Mr Kapp, evaluated the property on two separate occasions.
   The first evaluation, (Exh C, Vol 5 p463), was done on 20 August 2002 on request by the appellant to determine the open market value. (This evaluation was however later updated and signed by Mr Kapp on 24 November 2003.)
   The second evaluation, (Exhibit D, Vol 5 p478), was done on 24 February 2003 upon request by the respondent for the purposes of Capital Gain Tax.

6. On both occasions the property was valued at R15M and on both occasions Mr Kapp regarded the dehusking plant immovable property. The value of the plant, R4,5M, was included in the valuation of the farm.

7. On 3 March 2003 the appellant made a written offer to the respondent to purchase the farm for R15M and on 19 March 2003 the offer was accepted by the respondent. The written agreement of sale was entered into in September 2005.

8. In 2006 a dispute arose between the parties regarding the question whether the dehusking plant was part of the immovable property on the farm, and whether it had been included in the sale agreement.

9. It was not in dispute that the dehusking plant was installed by the respondent in a shed on the farm and that it consisted of several parts. The parts obviously varied in size and structure, and included, amongst others, electric motors, containers, conveyer belts and the mechanism devised for removing the shells. It was also not disputed that the plant was assembled by the respondent and that it was in use and functioning at the time of the purchase of the property.

10. It was the appellant's case that the dehusking plant, was included in the selling price of R15M. On the other hand it was the respondent's case that all along he had in mind that the plant was movable property and that it was not included in the selling price.

11. The latter issue was the main point of dispute between the parties

12. On this basis the matter was argued before us by Adv Notshe SC, assisted by Adv Seneke, on behalf of the appellant, and Adv Coetzee, representing the respondent.

13. The trial court, in considering whether the plant was immovable property or not, referred to the law as stated in *Pettersen and Others v Sorvaag* 1955 (3) SA 624 (A). In this case the considerations, (referred to as elements by the trial court), to be taken into account were formulated and discussed.
They are the following:

(i) The nature of the thing annexed;
(ii) The degree and nature of its annexation; and
(iii) The intention of the party annexing it.

14. This was confirmed in *Konstanz Properties (Pty) Ltd v WM Spilhaus en Kie (WP) Bpk* 1996(3) SA 273 AD, in which case it was stated that the issue, when movable property becomes a fixture, depends on the circumstances of the case.

15. In the latter case, at 281 B-C, it was added that pertaining to the first consideration, emphasis should be put on the assimilation of the movable property to the immovable property, and in regards to the second consideration, with emphasis on the integration of the movable property with the immovable property as well as the removability of the movable property, without causing damage to any of the two. And in regards to the third consideration, with emphasis on whether the attachment was intended to be permanent.

16. In regards to the first consideration it was clear that the plant was used in the process of the final stages of preparing macadamia nuts for the market. In my view there cannot be any doubt that it formed part and parcel of the business venture on the farm.

17. With reference to the terms of the agreement, the trial court pointed out that the agreement did not describe the property as a running concern, but instead, referred only to the farm and not the farming activities. This remark was, with respect, clearly sound and correct. However, in my opinion, there is much to say for the appellant's contention that the farm was purchased for the specific purpose to continue with the production of macadamia nuts. In that regard the farm was clearly a running concern. What is therefore important is that at all relevant times, including the time the property was evaluated before the respondents made the tender to purchase the farm, it was surely within the contemplation of the parties that the farming on the

property as a business venture, would proceed as before. It was even agreed upon that the respondent would remain on the farm for a certain period with the intention to see to it that the nut production continue.

18. Accordingly, in my view, it was clear that in so far as the nature of the plant is concerned, although it was constructed and assembled from different and separate parts, it was installed with the sole purpose to be part of the process to produce nuts to the market. In this regard, I find it impossible, in principle, to distinguish between the water pumps on the farm used for irrigation of the macadamia trees, which were included in the sale, and the dehusking plant.

19. In respect of the second consideration, although it was disputed by the appellant that the plant was movable and that it could be disassembled and removed from the shed without damaging the structure of the shed, it appears from the oral evidence, including the evidential material contained in the notes of the inspection *in loco* held during the trial, that it stands to reason that the plant could indeed be disassembled and that the parts could be removed separately. It was in any event initially assembled by the respondent in this way. The trial court's finding that the nature of the plant was such that it could be removed, in my view, cannot be faulted.

20. In respect of the third issue, which seems to be the main issue in dispute, namely whether it was the intention of the respondent to affix the plant permanently, and whether it should have been regarded as immovable or movable, it was argued by Mr Coetzee that the appellant's version that he subjectively had it in mind to remove and relocate the dehusking plant, was not contested.

21. It was further pointed out by Mr Coetzee that it was common cause that it was already published in 2001 in the Government Gazette that the farm was subject to a land claim, and that the respondent, realising that he was not entitled to develop the property any further without notice, and that he would not be compensated for further developments, still proceeded to install the plant. That proved, submitted Mr Coetzee, that the respondent never intended the plant to be regarded as immovable property and that it should not be included in the sale agreement.

22. The trial judge considered the evidence and the submissions made by counsel and made certain credibility findings in favour of the respondent. In this regard it is trite that a court of appeal will not lightly interfere with a trial court's finding. This court will however be entitled to interfere in the event of the trial court having erred materially or misdirected itself.

    See *Kunz v Swart and Others* 1924 A.D. 618 at 655;

    "And if we are satisfied that the judge in the Court Below came to a wrong decision on the facts we should not shrink away from overruling him. But before doing that we must be quite satisfied that he was wrong;"

23. The trial court, amongst others, found that the respondent was a credible and honest witness.

    In this respect the trial court's findings included the acceptance of the respondent's evidence that he, at all relevant times, intended to eventually remove the dehusking plant, and that it should accordingly not have been regarded as immovable property.

    The trial court also concluded that the fact that the plant was assembled after the publishing in the Government Gazette of a land claim on the property, substantiated the respondent's contention that he intended the plant not to be regarded as immovable property.

24. Unfortunately I am unable to agree with the finding of the trial court. In arriving at my conclusion the following aspects were regarded as relevant:

(i) It was common cause that the Mr Kapp, the evaluator who evaluated the farm in the beginning of 2002 and in 2003, regarded the plant as immovable property.

(ii) It was further not disputed that the respondent installed the plant subsequent to the notice in the Government Gazette, in order to continue with the production of nuts, which apparently was in full swing at the time of Mr Kapp's evaluation.

(iii) The farm was evaluated for R15M, the amount eventually agreed upon as the selling price. According to Mr Kapp's evaluation the R15M included the amount of R4,5M, the value of the dehusking plant.

(iv) The respondent was aware that Mr Kapp was mandated to evaluate the property on instructions by the appellant for purposes to enable the appellant to make an offer to the respondent to purchase the property.

(v) The respondent, on his own version, refrained from informing Mr Kapp that the plant should not be regarded, or evaluated, as immovable property, and that it should not be included in the evaluation of the property. In this regard the evidence of the respondent at the trial, when questioned by his counsel, is very instructive and, for the purpose of this judgment, need to be referred to:

(Record Vol 4, Page 410) (Questions put by Mr Coetzee, respondent's counsel.)

"Did you discuss the question whether the dehusking plant was to be included or excluded from the evaluation? No, M'Lord we did not, he wants to make up his own mind, what was fixed items and what is not."

(vi) In view of the respondent's contention that, at all relevant times, he thought that the dehusking plant was movable property, it is peculiar, and not explained by the respondent, why he decided not to inform Mr Kapp immediately that the plant is

movable property and that it had to be excluded from the agreement. During the trial it appeared that the respondent blamed Mr Kapp for not having informed him after the evaluation that the plant was regarded as immovable property. This is untenable.

(v) If the respondent's version was true, it stands to reason, in my view, that he would have been very concerned that his valuable movable property of R4,5M, should not be regarded as immovable property, and that he surely would have alerted Mr Kapp accordingly.

(vi)I cannot for one moment imagine that any person concerned about such valuable movable property would have hesitated to tell anybody concerned, what he had in mind pertaining to it.

(vii)What, in my opinion, further counts against the respondent's version is that he did not communicate with Mr Kapp after the evaluation at all, in order, as one would have expected him to do, to find out what Mr Kapp considered to be immovable property.

(viii)It is further also remarkable that at no stage, before, or even at the time, of signing of the agreement, did the respondent raise any concerns about the valuation of the plant with the appellant's officers, neither did he inform them that the dehusking plant should not be included in the agreement.

(ix) Although Mr Coetzee, during cross examination of Mr Nkatingi made a lot about the appellant's failure to state in the tender of 3 March 2004 (page 273) that the dehusking plant was included, it is remarkable that the respondent, in accepting the offer in his letter of acceptance dated 19 March 2004 (page 274), did not state in that letter that the plant was not included, well knowing at the time that Mr Kapp, on the respondent's own version, had indicated that he wanted to make up his own mind in that regard.

(x)The argument of Mr Coetzee that the respondent's conduct, in proceeding to install the plant and thereby developing the farm further, well knowing that he was not entitled to do so, without notice to the appellant, further substantiated the respondent's contention that he did not intend to sell the plant as an immovable and part of the farm, loses sight of the circumstances and that the respondent did absolutely nothing to exclude the plant from the agreement.

(xi)What is further a remarkable coincidence, according to the respondent's version, is that the respondent's evaluation of the plant corresponds, to the Rand, with Mr Kapp's evaluation of R4,5M.

(xii)Although the respondent in his evidence in chief denied that Mr Kapp had asked him about the value of the plant, the following was recorded when Mr Kapp was cross-examined Mr Coetzee: (Vol.3 page 263-4)

". . . I want to make the following two statements to you, the first is, and your valuation does not seem to be the one that you relied on very heavily, for two reasons. Firstly, you did not value the plant; you simply asked Mr Knoetze how much it cost him. Secondly, when you were asked to adjust the value, you simply did so."

To this proposition Mr Kapp answered that he, independently did some research and that he was satisfied with the figure supplied by the respondent. Any *"coincidence"* that Mr Kapp could have evaluated the plant without the contribution by the respondent, seems to be unfounded. There cannot be any other reasonable finding in this regard but that the said figure was indeed furnished by the respondent and that Mr Kapp's version was the truth.

(xiii)During argument before this Court, Mr Coetsee was unable to make any submissions pertaining to the question how and in what way the respondent *"protected"* the, on his version, movable dehusking plant from the time of installation until the dispute arose.

25. At the trial the respondent was unable to furnish any proof of the expenses he incurred with the installation of the plant. This, in my view, is a matter of concern, especially in view of the fact that the respondent, as alluded to above, installed the plant well knowing that he was not entitled to do so, and, as submitted by Mr Coetsee, well knowing that he would not be compensated by the appellant.

26. It follows that the whole situation leaves one with the uncomfortable feeling that the respondent, in installing the dehusking plant, endeavoured to enhance the price of his farm, and that he belatedly and in an opportunistic way pretended that he always *"thought"* to exclude the plant from the sale agreement.

27. Accordingly, in my view the trial court erred in dismissing the appellant's claims. I therefore suggest that the appeal should succeed with costs, and that the order of the trial court should be set aside. The order I propose, entailing that the dehusking plant was included in the sale, corresponds with the appellant's first prayer. In my view the order would be a resolution of the whole problem.

Order

A. The appeal succeeds to the extent as indicated in Part B. The respondent is ordered to pay the costs of the appeal, including the costs of two counsel.

B. The order of the trial court is substituted by the following:

1. It is declared that the dehusking plant is included in the contract between the parties, entered into in September 2005.
2. The respondent is ordered to pay the costs.

A J BAM JUDGE OF THE HIGH COURT

I agree.

S STRAUSS ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

T M MASIPA JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Adv Notshe SC and Adv Seneke.

For the Respondent: Adv Coetsee.

Date of Hearing: 11 June 2014

Date of Judgment: 13 June 2014