**(REPUBLIC OF SOUTH AFRICA)**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 30031/21**

(1) REPORTABLE: NO / YES
(2) OF INTEREST TO OTHER JUDGES: NO / YES
(3) REVISED.

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**MOOSA T AJ** **29/11/2021**

In the matter between:

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| **MAR-DEON BOERDERY CC** | Applicant |
| and | |
| **GERHARD JACOBUS MARAIS N. O** | First Respondent |
| **ELIZE HALLATT BOERDERY (PTY) LTD** | Second Respondent |
| **STEPAHANUS BERNADUS VAN VUUREN** | Third Respondent |
| **THE REGISTRAR OF DEEDS, PRETORIA** | Fourth Respondent |
| **MASTER OF THE HIGH COURT NORTH GAUTENG** | Fifth Respondent |
| **JACOBUS PETRU HENDRICUS MARX** | Sixth Respondent |
| **JANO BEUMER (NEE MARX)** | Seventh Respondent |
| **KERRY JOAN GORDON – GREEN** | Eighth Respondent |

## JUDGEMENT

**MOOSA AJ:**

**INTRODUCTION**

1. This is an application for an interim interdict. The pivotal consideration being the interpretation of Section 47 of the Administration of Estates Act, Act No 66 of 1965. ("the Act")

2. The validity of the sale agreement entered into between the Applicant and First Respondent on 9 March 2021;

3. Whether the requirements for an interim interdict have been met.

4. The common cause facts being;

   4.1 The sixth, seventh and eighth Respondents are the only three heirs of the deceased **("the heirs").**

   4.2 The sale of the farm is not contrary to the will of the deceased.

   4.3 In terms of the Sub division of Agricultural Land Act 70 of 1979 the farm cannot be transferred to all the heirs simultaneously without the consent of the Minister.

   4.4 The lease concluded between Jansen van Vuuren and the estate, which included a right of first refusal to Jansen van Vuuren.[1]

**FACTUAL BACKGROUND:**

5. Elizabeth Hallett **("the deceased")** passed away on 6 July 2020.[2]

6. First Respondent was appointed as the executor of the deceased estate on 5 August 2020.[3]

7. First Respondent took the decision to sell the farm Klipspruit – forming part of the deceased estate during September 2020, **("the farm").**[4]

[1] Annexure "DJV5" – Founding Affidavit
[2] Answering Affidavit, 1st Respondent, par 11, p 013-3
[3] Answering Affidavit, 1st Respondent par12, p 013-4
[4] FR Answering Affidavit, par 15, p 013-4

8. On 24 September 2020, First Respondent informed the heirs via email that the Respondent was interested in purchasing the farm for R7 million (R4 920 000.00 through a bank loan and the balance to be paid over 10 years plus interest).

9. On 27 September 2020, the heirs, via email from the sixth Respondent informed First Respondent that they wished to offer the Third respondent a right of first refusal to purchase the farm for R8 078 000.00, (but as an all-inclusive payment **"enkel transaksie").**

10. On 30 September 2020 First Respondent informed the heirs via email that Third Respondent was not interested in buying the farm for R8 078 000.00.[5]

11. In response via email the Sixth Respondent informed First Respondent (on behalf of all the heirs) that First Respondent could then proceed to market the property to interested parties.

12. On 19 November 2020, First Respondent informed the heirs via email that the farm is yet to be sold and that the "third party" did not put his hand on paper to purchase the farm for R7 500 000.00 and discussed different methods of selling the farm.

13. On 30 November 2020 First Respondent informed the heirs that the member of Applicant **("Jansen van Vuuren")** was interested in hiring the farm and again informed the heirs that Third Respondent was not interested in buying the farm of R7 500 000.00.

14. On 2 December 2020, First Respondent and Janse van Vuuren concluded a written lease agreement in respect of the farm, which includes the right of first refusal.[6]

15. On 19 January 2021, First Respondent furnished the heirs with a draft agreement providing for the sale of the farm from the deceased estate to a company formed by the heirs ("the second sale"). He also informed them that he would sign as executor once the tenant at the farm (Jansen van Vuuren) informed them that he cannot buy the property and that the draft sale would only be valid when all parties have signed.[7]

16. On 9 March 2021, Applicant and First Respondent on behalf of the deceased estate concluded a Deed of Sale, ("the first sale").[8]

17. On 9 March 2021, First Respondent's attorney (Mr Els) transmitted the signed Deed of Sale to the 3 heirs with draft consent forms. The latter forms were not signed by any of the heirs.

18. On 28 March 2021, Sixth Respondent informed First Respondent, via email that the heirs wished to sell the farm to the Third Respondent also for R7. 5 million. Such sale was concluded on 14 April 2021 ("the third sale").[9]

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[5] Annex "G", p 020-1
[6] Annexure "DJV5" – Founding Affidavit
[7] Annexure "K", p 002-116
[8] Annexure "DJV6" - Founding Affidavit
[9] Annexure "P", p 029-1

19. First Respondent's attorney signed the second sale concluded the between Second Respondent and the deceased estate on 15 April 2021.[10]

20. On 3 May 2021, Applicant furnished a guarantee of R7.5 million in compliance with the first sale.[11]

21. Shortly thereafter, First Respondent informed Van Vuuren that the heirs no longer wanted to sell the farm to Applicant.

22. The application was issued on 17 June 2021 after First Respondent had refused to provide an undertaking for specific performance of the first sale.[12]

**ISSUES:**

23. In determining whether the Applicant established prima facie that the contract is valid and enforceable, when measured against the provisions of section 47 of the Act, the following questions are considered:

23.1 Firstly, whether the provisions of section 47 are peremptory, rather than directory; and

23.2 Second, if Section 47 is indeed peremptory, whether non-compliance with the peremptory provisions of section 47 renders the contract a nullity.

24. Section 47 provides as follows:

*"**Sales by executor***

*Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stockbroker or a bill of exchange or property sold in the ordinary cause of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: provided that-*

*(a) In the case where an absentee, a minor or a person under curatorship is heir to the property: or*

*(b) If the said heirs are unable to agree on the manner and conditions of the sale.*

*The executor shall sell the property in such manner and subject to such conditions as the Master may approve".*

[10] Annexure" DJV8", p002-64
[11] Annexure "DJV7", p 002-54
[12] P. 002-1

25. In the matter of ***Sutter***, Wessels JA provided some guidelines for consideration whether a statutory provision is peremptory, rather than a directory mandate. [13]

*"(1) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than as a directory mandate...*

*(2) If a provision is couched in positive language and there is no sanction added in the case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory...*

*(3) If when we consider the scope and object of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the Act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the proposition being directory.*

*(4) The history of the legislation will also afford a clue in some cases."*

26. Therefore, the plain wording of section 47 is that an executor shall sell property in the manner and subject to the conditions which the heirs who have an interest therein approve in writing.

27. The word "shall" when used in a statute to be construed as peremptory rather than directory unless there are circumstances which negative this construction.[14]

28. The peremptory choice of language in section 47 is given effect to by the legislator in that non compliance with the provisions of section 47 attracts criminal sanction. In terms of section 102(1)(g) any person who contravenes or fails to comply with the provisions of section 47 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding twelve months.

29. Levinson J, in ***Davis***,[15] considered the position prior to 1910, the position that obtained under the Administration of Estates Act 24 of 1913 (in section 52 thereof), the provisions of section 47 of the Act prior to its amendment in 1983, and the present wording of section 47. Levinson J concluded that section 47, in its current form should be interpreted thus:

"Before *an executor can sell estate property he requires in the case of a single heir, that heir's consent. In the case where there is more than one heir, the consent of all such heirs."*

30. Van Oosten J (writing for the full bench) in ***Schofield,***[16] expressly held that section 47 is peremptory, and it casts the duty on the executor to fulfil the requirements of obtaining the consent of the heirs. Non compliance cannot even be cured by a court order.[17]

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[13] Sutter v Scheepers 1932 AD 165 at 173 -174
[14] Sutter v Scheepers 1932 AD 165 at 173 -174
[15] Davis and another v Furman NO and others 2000 JDR 0619 (N)
[16] Schofield v Bontekoning 2011 JDR 1273 (GSJ)
[17] At para [5]

31. The applicant contends that "" the decisions of Schofield and Davis are not necessarily at odds. In so far as they may be, that the Davis decision is to be preferred for the following reasons: The bald statement that the provisions of Section 47 are peremptory means, *inter alia* that the heirs have to approve the manner and conditions of a sale in writing. **But** once there are heirs under disability of if the heirs cannot agree on the manner and conditions, the Master should lend his or her approval before the sale may proceed."[18]

32. Given the contextual historical setting of section 47, the peremptory language of the provision, the criminal sanction provided for in the case of non-compliance with section 47 and the scope and object of the provision (namely to protect the heirs in the public interest) to my mind confirms that the provisions of section 47 are peremptory.

33. The general rule is that non-compliance with the prescripts of statute results in nullity.[19]

34. The Applicant in the replying affidavit and heads of argument interpret the letter of one of the heirs (Mr Jaco Marx) on 30 September 2020 as written approval on the manner of the sale and the conditions of the sale.

35. That the probabilities are "overwhelming" that the heirs were fully and timeously appraised of the contract and that the contract would not have been concluded without their blessing.

36. However, the facts of the matter are that the heirs simply did not approve in writing the manner of sale and the conditions of sale in the contract with the Applicant.

37. Relying on the contentions in ***Davis,*** the applicant further advanced that the Master has the right to approve the manner of sale and the conditions of sale, even if all the heirs do not approve.

38. When the contract was concluded neither the heirs, nor the Master approved of the manner of sale and the conditions of sale.

39. Limiting the import and effect of section 47 only to the manner of sale and the price is not consonant with the express terms of section 47. The section speaks to the manner of sale and the conditions of sale. The conditions of sale included all the terms of the contract, it is not restricted to price. The contract is therefore void.

40. The Masters jurisdiction being to approve the manner and conditions of sale is to be exercised prior to the conclusion of a contract, not *ex post facto.*

41. In the result, the Applicant failed to establish prima facie right that would entitle him to the granting of an interim interdict.

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[18] Para 13 Applicants HA

[19] De Faria v Sheriff, High Court, Witbank 2005 (3) SA 372 (T)

42. There being no substantive argument for the granting of a punitive costs order, costs to follow the result.

43. The application is accordingly dismissed with costs, including the cost of senior counsel in respect of both the First and Third Respondents.

**T. MOOSA AJ**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 November 2021

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|---|---|
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