IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No:

4022/2020P

In the matter between:

JAMES NAYSMITH **APPLICANT**

and

ROSALIND SANDERS **RESPONDENT**

ORDER

The following order is granted:

1. The loan agreement concluded between the applicant and the respondent is declared null and void for being in contravention of the Subdivision of Agricultural Land Act 70 of 1970.

2. The respondent is ordered to pay the applicant's costs.

JUDGMENT

Mathenjwa AJ

Introduction

[1] In this matter the applicant seeks a declaratory order, firstly, that the loan agreement concluded between the applicant and the respondent be wholly declared null and for being in contravention of the Subdivision of Agricultural Land Act 70 of 1970. Secondly, that if the agreement is declared to be null and void, the provisions thereof as relied upon by the respondent are not severable from the rest of the loan agreement.

Historical background

[2] The respondent instituted arbitration proceedings against the applicant, in terms of the Arbitration Foundation of Southern Africa Rules for Commercial Arbitrations, which arbitration proceedings are being heard by the duly appointed arbitrator, Mr Dickson SC.

[3] During the course of such arbitration proceedings, the applicant's defence was formally amended and it was contended that the loan agreement was wholly null and void, as being the sale of a portion of agricultural land, contrary to the provisions of the Act.

[4] The respondent opposed the relief sought by the applicant, and objected to the jurisdiction of the arbitrator to deal with the matter arising out of the validity of the agreement. The arbitrator issued an award in terms of which the arbitration was adjourned *sine die* for the validity of the agreement to be dealt with by this court. The applicant was directed to bring proceedings in this court within 60 (sixty) days of the date of the granting of the award to have the issue of the validity of the agreement on which the claim is based determined.

Issues before this court

[5] The issues for determination in this court are:

(a) Whether the loan agreement is null and void for being in contravention of the Act, as the primary purpose of the parties was a sale of an undivided portion of agricultural land, without the consent of the Minister.
(b) Whether the provisions of clause 5.2.2 of the agreement are severable from the loan agreement.

[6] The respondent disputed the authenticity of the loan agreement annexed by the applicant to the notice of motion, and she attached what she alleged was a true copy of the contract, as annexure 'RSI' to her answering affidavit. The applicant accepted that the agreement annexed as 'RSI' was a subsequent agreement signed by the parties which incorporated an express amendment to the loan agreement attached by the applicant to the notice of motion. Therefore, annexure 'RSI' is the correct agreement relied upon by the parties.

Applicant's contention

[7] The applicant contends that he concluded the loan agreement, which was drafted by the respondent's attorney, at the time when he and the respondent had agreed that the applicant would sell a designated portion of the farm he exclusively owned to the respondent and her late husband. He allegedly informed the respondent that the designated portion would be subdivided, and once the requisite consent of the Minister was obtained, the subdivided portion, which would be five hectares in extent, would become her exclusively legally owned immovable property.

[8] The applicant contends that when he signed the loan agreement, drafted by the attorney, he believed that he was signing the sale agreement which the parties had agreed and intended to conclude. The applicant

allegedly did not recall having debated the terms of the agreement with the attorney, prior to his signature thereof, including it not being titled as a 'sale agreement', but rather being titled as a loan agreement, which is not a matter he had applied his mind to at the time.

[9] It is contended that the applicant did not at that time have personal knowledge of the statutory provisions expressly applicable to the subdivision of agricultural land as detailed in the Act. Accordingly, he was not advised by the respondent's attorney that the loan agreement needed to be drafted to 'circumvent' the existing legal provisions of peremptory statutory legislation. The respondent allegedly duly complied with the loan agreement, by making payments including payment of what the applicant understood was the purchase price, and the respondent took occupation of the designated portion of the farm to be subdivided in due course. Based on these reasons, the applicant contends that the loan agreement constitutes the sale of a portion of undivided agricultural land, which sale is prohibited in terms of the Act, unless the Minister has consented thereto.

Respondent's contention

[10] The respondent contends that the loan agreement does not constitute a sale of land and alternatively, if it is found that it does, that such portion of the agreement is severable from the remainder of the agreement.

[11] The respondent avers that the surrounding circumstances leading to the signing of the loan agreement were that in 2006, her late husband and the applicant agreed orally that the property would be purchased and registered in the applicant's and respondent's name. On the assumption that the property was registered in both the applicant's and respondent's

name in 2006, she built a residential home on the property, and also invested monies in the development of the property.

[12] It is contended that on establishing that the applicant had, contrary to their agreement, purchased the property and registered it in his name, she entered into a written partnership agreement with the applicant. She allegedly received advice that as the property was registered in the applicant's name, her investment in the property was not sufficiently protected by the partnership agreement. It is further contended that this led to further negotiations between the parties, culminating in the substitution of the partnership agreement with the loan agreement.

[13] It is further contended that once the loan agreement was signed, her investment in the property was sufficiently protected by the registration of a mortgage bond, a reserved right of pre-emption, the right to share in the proceeds of the sale, her share in the proceeds of the sale, and her share to be commensurate with her investment, or if a subdivision took place, then in that event, transfer of a portion of the property. Based on these reasons, the respondent concluded that the intention of the parties to the agreement was not one pursuant to which the applicant was selling to her, and she was purchasing from the applicant an undivided portion of agricultural land, but one pursuant to which her investments in the property was being protected.

[14] It is apparent from the papers that a dispute of fact exists regarding the surrounding circumstances relevant to the conclusion of the loan agreement.

[15] I now turn to the relevant terms of the contract and thereafter consider whether the dispute between the parties can be resolved on the affidavits.

The relevant terms of the agreement

[16] The agreement is titled 'loan agreement', between the lender who is the respondent and the borrower who is the applicant. Clause 1 of the preamble record that 'the lender has contributed or will lend monies to the borrower'. Clause 2 provides that the borrower has or will utilise these funds for the acquisition of the property. Clause 3 provides that the capital lent by the lender to the borrower has been done so other than as a purely commercial transaction at arm's length, in order to allow the lender to acquire a share in an agricultural property. Clause 4 provides that the basis of the agreement, as set out in annexure 'A', was that the borrower would acquire all the land on the Durban side of the Thornville Road and that the portion of the property on the Pietermaritzburg side would be acquired through the partnership referred to above, and all expenses, risks and benefits in that portion only, would be shared equally. Lastly, clause 5 provides that the parties wish to record the terms and conditions of their arrangement in this written memorandum.

[17] At page 2 of the agreement, it is recorded that the capital amount is R308 918.38, comprising of an advance of R98 715.55, and a residual payment of R210 022.83. The property involved is described as Rem of Portion 62 of the Farm Vaalkop and Dadelfontein, registration division FT, in extent 14.4143 ha.

[18] Clause 2 of the agreement deals with the interpretation of the agreement. Clause 2.2 provides that the preamble shall form part of this agreement.

[19] Clause 3 deals with the loan. Clause 3.1 provides that the burrower acquired the property, which is an agricultural property, and is not capable of being owned in subdivided shares. It was the intention of the lender and the borrower that the property be jointly owned, notwithstanding the legal impediment to this. The basis of the joint ownership is as set out in the preamble and annexure ‘A. Clause 3.2 provides that the lender contributed an amount as set out in the definitions as an advance towards the cost of acquisition and improvement of the property. Clause 3.3 provides that the lender shall contribute the residual to the borrower within seven days of the date of signature of the agreement. Clause 3.4 provides that in return for the full capital (being the advance and the residual) loan, the lender has acquired an interest in and to the property.

[20] Clause 5 deals with repayment of the loan. Clause 5.2 provides that the loan shall be repaid in one of the following three ways:

‘5.2.1 In the event of the property being sold to a third party the borrower and lender shall be entitled to payment equivalent to their respective percentage interests in and to the property from the proceeds of the sale. Such allocation to be made prior to the deduction of personal costs from the sale provided, however, that joint costs incurred in the sale shall be deducted from the proceeds prior to their division.

5.2.2 The borrower has applied for consent to divide the property into stands of approximately five hectors each. In the event of consent to the sub-division being obtained then the lender shall take possession and ownership of such stand on which her personal residence is situated as no purchase cost in full settlement of the loan. The lender shall be liable for the costs of transfer of the stand.

5.2.3 In the event of either party exercising their pre-emptive right in terms of this agreement then he or she shall be liable to pay an amount equivalent to the other parties' percentage interest in and to the property.'

[21] Clause 6 deals with security. Clause 6.1 provides that in order to secure her interest in and to the property, the borrower consents to the registration of a mortgage bond over the property in favour of the lender recording the terms and conditions of the loan agreement.

[22] Clause 13 provides that this agreement constitutes the entire record of the contract between the parties, and clause 14 provides that 'no agreement varying, adding to, deleting from or cancelling this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties'.

Interpretation of the agreement

[23] Mr Alberts, for the applicant, submitted that on the material and relevant issues, there are *bona fide*, and genuine real dispute of facts which cannot be resolved with reference to the affidavits. He pointed out that it is evident from the answering and replying affidavits that the dispute of facts exist with reference to the factual 'matrix' in respect of the facts prior to the conclusion of the loan agreement.

[24] Mr Smit, for the respondent, agrees that there is a dispute of facts in respect of the facts prior to the conclusion of the lease agreement, but that it is not material, since the resolution of the application is to be found in an interpretation of the lease agreement.

[25] Uniform rule 6(5)*(g)* empowers the court to direct that oral evidence be heard on specified issues with a view of resolving any dispute of fact where an application cannot properly be decided on affidavit. The court must examine the disputed facts and determine whether there is a real dispute of fact which cannot be determined without oral evidence (see *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162).

[26] In determining whether a real and material dispute of facts exists, it is relevant to consider the law relating to the interpretation of a contract. The state of the law relating to interpretation of contracts was stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[27] The present state of the law relating to the interpretation of contracts was further expressed in *Dexgroup (Pty) Ltd v Trustco Group*

International (Pty) Ltd and others 2013 (6) 520 (SCA) para 16, where it was held that:

'These cases make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset.'

[28] *Dexgroup* reinforces the principle set out in *Natal Joint Municipal Pension Fund* regarding the interpretation of contracts, and further reaffirms that the background to the preparation and production of the contract is not secondary to the language used when interpreting the contract.

[29] However, it is settled law that if a written contract provides that any variation of its terms should be in writing, the court may not admit evidence which tends to contradict, alter or vary the written contract. This was reaffirmed by Scott JA in *HNR Properties CC and another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) at 479C, where the learned judge of appeal, in referring with approval to *SA Sentrale Ko-op Graanmaatskappy BPK v Shifren en andere* 1964 (4) SA 760 (A), held that:

'. . . a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding'.

[30] It follows that in accordance with the non-variation clause contained in clause 14 in the parties' agreement, the dispute of facts, with reference

to ‘factual matrix’ in respect of the facts prior to the conclusion of the loan agreement, is not material to interpretation of the agreement.

[31] I now consider whether the agreement is a loan or sale agreement as contended by the parties in their affidavits. It should be pointed out that although in his affidavit, the applicant contended that the agreement is not a loan agreement but an agreement of sale of the property, Mr Alberts conceded during argument that the agreement was a loan agreement. The concession was correctly made considering that the agreement is titled as being a loan agreement, it records the respondent as a lender, the applicant as a borrower, the capital amount lent to the borrower, and the repayment of the loan.

[32] Having found that the agreement signed by the parties is a loan agreement, I now determine the purpose of the agreement. In doing so, the agreement is read and considered as a whole. I observe that the purpose of the agreement is specified in clause 2 of the preamble of the agreement, where it is stated that the borrower has or will use these funds in the acquisition of the property. Clause 4 of the preamble goes further and records that the borrower would acquire all the land on the Durban side of the Thornville road. In clause 2.2 of the agreement the parties incorporated the preamble as part of their entire agreement. Therefore, the purpose of the loan as expressed by the parties in the preamble is part of the agreement.

[33] The agreement provides for three ways in which the loan would be repaid. What is relevant is clause 5.2.2 of the agreement which provides that in the event of the consent to the subdivision being obtained, then the lender would take possession of ownership of the stand on which her

personal residence is situated at no purchase cost, in full settlement of the loan.

[34] On reading the agreement as a whole, it appears that the main purpose of the loan agreement was to enable the respondent to purchase a portion of the property. The respondent also protected her interest in the property. Clause 6.1 of the agreement records that in order to secure the respondent's interest in the property, a mortgage bond would be registered over the property in favour of the respondent. In this manner, the respondent protects her interests in the property.

[35] I accept that the respondent protected her investment or interest in the property by registering a mortgage bond over the property. In my view the protection of the respondent's interest was subsidiary to the main purpose of the loan agreement to purchase the property.

[36] Section 3 of the Act provides that:

'Subject to the provisions of section 2—

(a) agricultural land shall not be subdivided;

(b) no undivided share in agricultural land not already held by any person, shall vest in any person;

(c) no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;

. . .

unless the Minister has consented in writing.'

[37] This section prohibits any sale of an undivided portion of farmland unless the subdivision has been approved by the Minister. Section 3(e)*(i)* of the Act provides that:

'(e) (i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale . . . .
unless the Minister has consented in writing.'

[38] The purpose of the provision of the Act was explained in *Geue and another v Van Der Lith and another* 2004 (3) SA 333 (SCA) para 15 where Brand JA held that:

'. . . The purpose of the Act is not only to prevent alienation of undivided portions of land. The target zone of the Act is much wider. This is clear, for example, from s 3(e)(i), which also prohibits advertisements for sale. Since advertisements obviously precede the actual sale or alienation of an undivided portion, it is by no means absurd to infer that the Legislature intended to prohibit any sale of an undivided portion of farmland, whether conditional or not, unless and until the subdivision has actually been approved by the Minister. . .'

[39] It follows that in the light of *Geue*, although the agreement is not an agreement of sale, since the purpose of the loan is to purchase a specific portion of the farmland, and the Minister has not consented to the subdivision of the farmland, the agreement is prohibited by the Act.

[40] Counsel for the respondent submitted that in the event that it is found that clause 5.2.2 amounts to the sale of an undivided portion of agricultural land, contrary to the Act, then it is contended that clause 5.2.2 is severable from the remainder of the contract. I have found that the contract constitutes a loan agreement for purposes of purchasing an undivided farm land. The test for determining whether clauses are severable from the contract was stated in *Afrisure CC and another v Watson NO and another* 2009 (2) SA 127 (SCA) para 35, where Brand JA held that:

'The answer, I think, depends on whether the illegal part of the agreement can be severed so as to leave the remainder, which may in itself be unobjectionable, enforceable. . .'

[41] In my view, even if clause 5.2.2 was severed, the remainder of the clauses of the agreement will still reflect that the main purpose of the agreement was to enable the lender to purchase a portion of undivided farm land.

[42] I observe that the decisions of the high courts have held that the legislature's intention was that agreements prohibited by section 3*(e)* of the Act should be visited with invalidity (see the various high court cases set out in *Geue supra* para 19).

Order

[43] Having made the finding that the loan agreement concluded by the applicant and respondent contravenes section 3*(e)*(i) of the Act, I make the following order:

1. The loan agreement concluded between the applicant and the respondent is declared null and void for being in contravention of the Subdivision of Agricultural Land Act 70 of 1970.
2. The respondent is ordered to pay the applicant's costs.

MATHENJWA AJ

DATE OF HEARING :	15 April 2021
DATE OF JUDGMENT :	21 May 2021
FOR THE APPLICANT :	Adv S M Alberts
	Instructed by Cox Yeats Attorneys
	c/o Austen Smith
FOR THE RESPONDENT:	Adv M Smit
	Instructed by Martin Pike Incorporated
	c/o Dirk Stofberg & Associates