Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number 10947/2010

In the matter between:

ESKOM HOLDINGS LIMITED Applicant

versus

GERT JACOBUS HEYNS Respondent

JUDGMENT DATED THIS 19th DAY OF AUGUST 2011

ZONDI, J:

Introduction

[1] In this application the applicant seeks an order compelling the respondent to sign all the documents and to do all such things as are necessary to effect the registration of transfer of Portion 19 (a portion of Portion 10) of the Farm Witte Water No. 93 held under a Deed of Title No. T42442/1997, Piketberg ("the property") in the applicant's name.

[2] The basis for the application is that the applicant purchased the property from the respondent on or about 21 February 2001 following the exercise of the option and that it complied with all of its contractual obligations entitling it to demand transfer of the property.

[3] The relief sought by the applicant is opposed by the respondent on two main

grounds, namely that the condition relating to the subdivision of the access road, which forms part of the property, has not been met and that the applicant's right to order the respondent to transfer the property to him has become prescribed.

Factual background

[4] On or about 19 February 2001 the respondent granted the applicant an option to purchase the property as set out in the sketch plan annexed to the option marked KPT-01 for the sum of R5000. The property is depicted on the sketch plan by the letters A, B, C, D, E and F and includes a 6m wide access road represented in the sketch plan by the letters F and G.

[5] The option was irrevocable for a period of one year of the date of its signature and was exercisable by the applicant by giving a written notice.

[6] The sale agreement which would follow upon the exercise of the option by the applicant was subject inter alia to the following conditions:

'7.1 'Dat ESKOM verantwoordelik sal wees vir die onderverdeling van die eiendom en alle verwante koste.

7.2 Indien ESKOM nie kan slag om goedkeuring vir die onderverdeling te bekom nie, sal hierdie kontrak verval en van nul en gener waarde word.

7.3 Tot die nakoming al dan nie van hierbo vermelde voorwaardes 7.1 en 7.2 is die OPSIE vir verkoop transaksie van die Eiendom van volle krag en die partye is nie geregtig terug te tree nie.

7.4 Indien hierdie verkoop transaksie van nul en gener waarde word moet elke party aan die ander party watter betaling voordeel of voorreg ook al wat sodanige ander party bekom het as gevolg van die uitoefening van hierdie OPSIE, terug betaal of herstel, dit wil sê albei partye moet in dieselfde posisie geplaas word asof die verkoop transaksie nie aangegaan was nie.'

[7] By a letter dated 22 February 2001 the applicant advised the respondent that it was exercising the option to purchase the property and that as soon as the servitude was available, instructions would be furnished to the respondent's attorney to register the property in the applicant's name.

[8] In a letter dated 25 June 2002 the applicant instructed the erstwhile attorneys of the respondent to proceed with the transfer and registration of the property in the applicant's name in terms of the agreement of sale.

[9] The applicant alleges that the respondent refused to sign the transfer documents. The respondent admits refusal to sign the transfer documents but seeks to justify his refusal on the ground that the transfer documents which were forwarded to him for signature had not been correctly prepared so as to give a proper description of the property. He points out, however, that he was prepared to give effect to the provisions of the option.

[10] On 4 August 2006 the applicant's attorney of record addressed a letter to the respondent inter alia recording that the respondent was in possession of the transfer documents, which he refused to sign, and that the applicant had addressed whatever concerns the respondent had raised in regard to the transfer documents and reminded the respondent that his refusal to sign the transfer documents was prejudicial to the applicant.

[11] In a subsequent telephone conversation which Mr Petersen of the applicant's attorneys of record had with the respondent on 15 August 2006, regarding the signing of the transfer documents, the respondent informed Mr Petersen that he was

scheduled to undergo surgery on 21 September 2006 and had been advised by his doctors to refrain from any business matters until after surgery and further that he intended to consult with his attorneys before signing transfer documents.

[12] On 28 August 2006 the respondent's attorneys wrote to the applicant's attorneys informing them that the respondent wanted to have the following issues addressed first before signing the transfer documents:

i) he wanted to have a servitude of right of way registered in his favour over the access road;

ii) the applicant had to plant trees on the respondent's property to block the applicant's substation from the respondent's view as he felt it was unsightly, and

iii) that the applicant had to either shift or lay underground 11kv power lines connecting the substation and the existing distribution line.

[13] In an attempt to resolve the issues raised by the respondent in his letter of 28 August 2006, the parties met on 28 September 2006. At the meeting the applicant agreed that it would register a servitude of right of way over the property in favour of the respondent. The respondent indicated that he was no longer insisting that the trees be planted on his property to obscure the applicant's substation from his view. The applicant undertook to investigate what it could do to obscure the power lines from the respondent's view.

[14] After the meeting of 28 September 2006 the applicant's attorney of record visited the respondent's farm, in which the property is located, with one of the applicant's employees to investigate the visual impact of the power lines. On inspection, it appeared that the power lines in question could be obscured from the

respondent's house by planting some trees in the gap of the existing row of trees along the fence between the house and the orchard. The applicant undertook to purchase and plant the trees provided that the respondent would water them afterwards.

[15] Thereafter the respondent's attorneys forwarded to the applicant's attorneys a letter dated 17 October2066 stating the following:

'Ons kliënt het ons aandag nou daarop gevestig dat daar inderdaad nog 'n verdere opsie beskikbaar is met betrekking tot die probleem rakende die sigbaarheid van die verbindingslyn aan die oostekant van die pad soos in genommerde paragraaf 3 van ons skrywe van 3 Oktober 2006 aangespreek. Die verdere opsie is dat hierdie verbindingslyn glad nie die pad kruis en na die oostekant daarvan beweeg nie en dat dit geheel en al aan die westekant van die pad aangebring moet word. Dit was inderdaad 'n moontlikheid wat ons kliënt heel aan die begin aan u kliënt gemeld het, maar wat eensydig deur u kliënt verwerp is. Ons kliënt beskou dit steeds as die mees effektiewe oplossing van die problem.
Ons sal dit waardeer indien u hierdie voormelde opsie ook aan u kliënt sal deurgee vir oorweging."

[16] The applicant rejected the respondent's suggestions on the grounds that the existing route and the one proposed by the respondent were discussed with the respondent on site prior to the erection of the power lines. The applicant points out that the respondent had agreed to the existing route which traversed through the veld, after it was explained to him that the routes west of the road would traverse through the property.

[17] The parties deadlocked and hence the applicant brought the present application in which it seeks the relief on the basis that it has complied with all of its contractual obligations in terms of the sale agreement contending that the respondent's refusal to sign the transfer documents is wilful and without good

reason. It avers that the property houses its Kapteinskloof 132 kv substation. It has installed and/or constructed infrastructure on the property amounting to approximately R12 million. The applicant contends that it seeks the transfer of the property not only to secure its rights, but also the supply of electricity to many inhabitants in the surrounding area.

[18] The respondent's defence to the applicant's application before the applicant filed its supplementary affidavit rested on three main grounds. It had sought to justify its refusal to sign the transfer documents on the grounds, first, that the description of the property in the transfer documents differs to the one in the option. It points out that in the transfer documents the extent of the property is indicated as 3955m^2 instead of 3819m^2 as described in the option. Secondly, the respondent contends that the agreement has lapsed due to non-fulfilment of a suspensive condition by the applicant and thirdly that the applicant's right to enforce the option agreement prescribed.

[19] The respondent's approach to the applicant's case changed following the filing of a supplementary affidavit by the applicant. In its supplementary affidavit, the applicant denies that the agreement lapsed due to non-fulfilment of a suspensive condition relating to the obtainment of a consent to subdivision of the property. The applicant avers that it is a statutory body and as such it is not required to obtain a requisite consent under the provisions of the subdivision of Agricultural Land Act, No 70 of 1970 (the Act) for the subdivision of land as it is exempted from complying with the provisions of the Act. The respondent has admitted this averment in its further answering affidavit.

[20] It is also apparent from the respondent's further answering affidavit and from C J Nortje's affidavit, the author of the relevant surveyor's diagram, L.G. No 6302/2001, that an error in the description of the property in terms of its extent is no longer a matter of concern to the respondent and hence it no longer relies upon it as a basis for its opposition.

[21] Notwithstanding this concession, it still remains the respondent's case that the applicant failed to comply with its contractual obligation as the access road as depicted on the sketch plan (Annexure KPT/01) to the option document was not surveyed and subdivided as the option agreement requires. It accordingly avers the following at paragraph 5.5 of its answering affidavit:

'Soos blyk uit Mnr Nortje se verklaring, is dit derhalwe nie moontlik dat hierdie pad, as deel van die koopsaak, aan die applikant oorgedra kan word nie.'

[22] Mr Nortje, the surveyor, explains how he became involved in this matter. He has this to say at paragraph 3 of his affidavit:

'Rumboll & Vennote het gedurende Mei 2001 'n versoek ontvang van Eskom om aan laasgenoemde 'n kwotasie te voorsien vir die opmeting van 'n stuk grond op die Respondent se plaas Kapteinskloof, in die distrik van Piketberg. Die betrokke stuk grond is vir die oprigting van 'n Eskom substasie benodig.'

[23] Mr Nortje alleges that he thereafter visited the property for the purposes of surveying it. He goes on to say at paragraphs 11 and 12 of his affidavit:

'11. Ek heg hierby aan gemerk "CJ3", 'n afskrif van die landmeter diagram wat ek opgestel het na aanleiding van my gemelde opmetings, wat die volgende uitbeeld:

11.1 Die stuk grond vir die beoogde substasie, wat uitgebeeld word deur die letters A, B, C D, E en F; en

11.2 Die serwituut pad wat uitgebeeld word deur die krom lyn vanaf punt x tot punt y.

12. *Hierdie landmeter diagram is op 5 Desember 2001 deur die Landmeter-Generaal goedgekeur, met verwysingsnommer LG No. 6302/2001.'*

[24] Mr Nortje points out that *'die grond pad soos uitgebeeld deur die letters F tot G op aanhangsel "CJ2" hiertoe, vorm nie deel van Gedeelte 19 (gedeelte van Gedeelte 10) van die plaas Witte Water No 93, synde die stuk grond wat ek opgemeet het en daarna van Kapteinskloof onderverdeel is nie.'*

Issues

[25] There are now only two issues which remain for determination in the light of the facts which have now become common cause. The first one is whether the fact that the applicant is not taking transfer of the road but intends to have a servitude of right of way registered over the access road entitles the respondent to refuse to sign the transfer documents and the second is whether the applicant's right to enforce its claim to demand transfer of the property has become prescribed.

[26] The determination of the first issue requires a consideration of the agreement upon which the applicant relies for the relief it seeks. The sale of the property was subject to certain conditions as set out in clause 7 of the option. In particular in terms of clause 7.1, the applicant was responsible for the subdivision of the property. In my view, on a proper construction clause 7.1 is a suspensive condition because it renders the operation of the whole contract dependent upon an uncertain future event namely subdivision of the property.[1] What this means is the operation of the obligations flowing from the contract is suspended pending the subdivision of the property.[2] The contract becomes enforceable when the suspensive condition is fulfilled, but if the condition fails and the parties not having agreed otherwise, the

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[1] *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C.
[2] *Southern Era Resources v Farndell* 2010 (4) SA 200 (SCA) para 11.

contract would be rendered void.

[27] In the circumstances, it is premature for the applicant to demand transfer of the property to it before a suspensive condition relating to the subdivision of the property is met. The relief sought by the applicant in paragraph 1 of its notice of motion is not competent before the suspensive condition is met. The access road forming part of the property sold to the applicant was not surveyed and subdivided from Kapteinskloof. Mr Nortje explains in this regard *'...indien die betrokke pad ook aan Eskom oorgedra moet word, sal dit opgemeet en deur middle van 'n landmeter diagram onderverdeel moet word vanaf Kapteinskloof'*. This evidence was not challenged by the applicant.

[28] In an attempt to circumvent the need to have the access road subdivided the applicant pleads in its supplementary affidavit a case which differs slightly to the one made out in the founding affidavit which forms the basis of the relief it seeks in the notice of motion. The applicant now seeks transfer of property less the access road. In other words, ownership of the access road will vest in the respondent and the applicant will have a servitude right of way registered in its favour over the access road.

[29] The difficulty with the relief which the applicant now seeks is that it requires of the respondent to perform an act not in pursuance of a contractual obligation. The agreement which the parties concluded was for the sale of the property including the access road. They did not stipulate in the contract that the access road was to be excluded from the subject matter of the sale. In my view the true legal effect of the subdivision was to vest full ownership of the property including the access road in the

applicant and the respondent's rights thereto would have come to an end. In terms of the sale agreement the respondent did not intend to retain ownership of the access road and on this ground alone the applicant's application should fail as to grant an order for performance other than that actually stipulated for in the contract will result in a new contract being made for the parties.

[30] This brings me to the defence of the prescription raised by the respondent. It contends that the applicant's right to demand transfer of the property has become prescribed.

[31] In this regard the respondent avers that the applicant's right to claim transfer of the property arose on 25 June 2002 when the applicant instructed its attorneys to demand that the respondent sign the transfer documents. The respondent contends that the applicant's right to demand transfer prescribed on or about 24 June 2005. Mr **Vivier**, who appeared for the respondent, submitted that a contractual obligation by the seller to transfer property is a "debt" within the meaning of section 10(1) of the Prescription Act No 68 of 1968 ("the Prescription Act") which is extinguished after the lapse of relevant prescriptive period. In developing his argument Mr **Vivier** pointed out by reference to section 11 of the Prescription Act, which deals with the periods of prescription of debts, that the applicant's claim prescribed after three years from the date on which it arose.

[32] In response to Mr **Vivier's** argument, Mr **de Vries** submitted on behalf of the respondent that the suggestion that the applicant's claim had prescribed was incorrect. He argued by reference to section 14 of the Prescription Act that it has never been the respondent's case that it denied liabilities. He argued that at all times

the respondent admitted to have concluded the sale agreement with the applicant and acknowledged that he was liable to transfer the property to the applicant pursuant thereto. He accordingly submitted that the respondent's conduct constitutes an express or tacit acknowledgement of liability which is sufficient for the purposes of section 14 of the Prescription Act to interrupt the running of prescription.

[33] Section 14 provides that the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. In order to bring its case within the reach of section 14 it is, however, necessary for the applicant to prove that the respondent by its conduct intended to admit that the debt (obligation to transfer the property) was in existence and that he was liable therefor. (*Hawken v Olympic Pools (Pty) Ltd*[3]).

[34] It is correct that Courts have held that the term "debt" in the context of the Prescription Act has a wide and general meaning and includes an obligation to do something or refrain from doing something and would include a contractual obligation by the seller to transfer property. (cf *Desai NO v Desai and Others*[4], *Banderker NO and Others v Gangrakar NO and Others*[5].) Therefore the respondent's obligation to effect registration of transfer of the property into the applicant's name pursuant to the sale agreement is a debt as contemplated in the Prescription Act which is liable to extinction by prescription.

[35] As I have stated in paragraph [26] above, the agreement, on which the applicant's claim is founded, is subject to a suspensive condition, the effect of which

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[3] 1979(3) SA 224 (T) at 228H – 229A
[4] 1996 (1) SA 1141 (A) at 1461.
[5] 2008 (4) SA 269 (C) at para 26.

is to render the whole contract dependent upon an uncertain future event. This means that the operation of the rights and obligations flowing from the contract may not be enforced pending the fulfilment of the suspensive condition. In other words, pending the fulfilment of the suspensive condition, namely subdivision of the property by the applicant, the applicant's right to claim transfer of the property from the respondent and the respondent's obligation to effect transfer are suspended, which therefore means that pending the fulfilment of the suspensive condition there can be no basis for the contention that the applicant's right to compel the respondent to transfer the property has become prescribed. This is so because prescription begins to run in favour of the debtor the moment the creditor's right of action arises (*Hawken v Olympic Pools supra*[6]) and in a contract subject to a suspensive condition the creditor's right of action does not arise before the suspensive condition is met. For the respondent's defence of prescription to succeed, it has to show that the applicant was entitled to bring its claim in June 2002.

[36] In my view the applicant would not have been able to demand transfer of the property in June 2002 because at that stage it had not complied with a suspensive condition. In the circumstances the respondent's defence of prescription must fail. In order to succeed in its application to enforce performance, the applicant must show that it has complied with all of its contractual obligations and as the agreement in the present matter is subject to a suspensive condition, it must also show that the condition was met or compliance therewith was waived. In the present case the applicant has failed to discharge the onus of proof and its claim must therefore fail.

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[6] At 227 (B).

The order

[37] In the result the following order is made:

The applicant's application is dismissed with costs including costs reserved on 29 July 2010.

D H ZONDI
HIGH COURT JUDGE