Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 16138/2012

Before: The Hon. Mr Justice Binns-Ward

Hearing dates: 17-19 March; 5 October 2015
Judgment delivered: 9 October 2015

In the matter between:

MPR DE VILLIERS Plaintiff

and

ELSPIEK BOERDERY (PTY) LTD First Defendant

REGISTRAR OF DEEDS, CAPE TOWN Second Defendant

JUDGMENT

BINNS-WARD J:

[1] In this matter, the plaintiff, Matthys Pieter Ruben De Villiers of the farm Elspiek at De Doorns, instituted action for the following substantive relief:

1. An order declaring the notarial contract annexed to the particulars of claim as annexure 1 ('the contract of lease'), as well as the notarial cession of the lease ('the cession agreement'), annexed to the particulars of claim as annexure 3, to be void;

2. An order authorising and directing the Registrar of Deeds (the second defendant) to deregister the contract of lease and the cession agreement;
3. An order declaring the plaintiff to be entitled as against the first defendant (Elspiek Boerdery (Pty) Ltd, hereafter referred to simply as 'the defendant') to its eviction from the property described in paragraph 5 of the particulars of claim and for its eviction should it fail to vacate the property within such period as the court might deem meet.

The defendant raised a contingent claim in reconvention in terms of which, in the event of the plaintiff's claim being upheld, it would seek to enforce its rights in terms of an alleged improvement lien over the property. By agreement between the parties, the trials of the claim in convention and the counterclaim were separated in terms of rule 33(4). Counsel were agreed that the practical effect of the separation was that the relief sought by the plaintiff, as described in item 3, above, could not be granted until after the later determination of the claim in reconvention, if the case proceeded that far.

[2] The plaintiff is, and has at all material times been, the registered owner or co-owner of four registered land units at De Doorns; namely, Erf 1466 De Doorns, the remainder of Erf 1468 De Doorns (in which he owns a one third undivided share), the remainder of Erf 1471 De Doorns, and the remainder of the Farm Groot Hoek No. 70 (in which he also owns a one third undivided share). By reason of a condition previously imposed by the Minister of Agriculture in terms of the Subdivision of Agricultural Land Act 70 of 1970 ('the Subdivision Act'), the aforementioned properties may only be dealt with together as if they were a single land unit notwithstanding that they are not mutually contiguous.[1] It is common ground that the land units (to be referred to hereafter collectively as 'the property') are agricultural land within the meaning of the Subdivision Act.

[3] A 99-year lease has been registered in favour of the defendant against the title deeds of the property. The lease was registered in terms of a power of attorney executed by the plaintiff on 13 October 2008. The power of attorney provided as follows:

[1] The relevant part of the condition provided that the land units '*nie afsonderlik met 'n verband beswaar, afsonderlik oorgedra of op enige ander wyse afsonderlik mee gehandel mag word sonder die skriftelike toestemming van die Minister van Landbou nie*'. (That is that the land units *could not be individually mortgaged, transferred or otherwise dealt with in any manner without the written consent of the Minister of Agriculture*. (My translation.))

SPESIALE VOLMAG OM NOTARIëLE AKTE TE VERLY

Ek, die ondergetekende,

Matthys Pieter Ruben de Villiers

Identiteitsnommer 591023 5044 08 3

Getroud buite gemeenskap van goed

nomineer, konstitueer en stel hiermee aan Ronelle Miller met mag van substitusie om my/ons wettige Agent te wees om voor ’n Notaris Publiek in die Provinsie van die Kaap die Goeie Hoop te verskyn en dan en daar as my/ons gemagtigde ’n Notariële Akte te teken volgens die konsep hierby aangeheg, welke konsep deur my/ons geparafeer is vir die doeleindes van identifikasie, en om sodanige formele wysigings op die gemelde Notariële Akte aan te bring as wat nodig mag wees vir die doeleindes van die registrasie daarvan,
en in die algemeen, ten einde voorgenoemde doeleindes uit te voer, te doen of te laat doen al wat nodig is, net so volmaak en doeltreffend asof ek/ons self teenwoordig was en hierin gehandel het, en ek/ons bekragtig hiermee alles wat my/ons genoemde Prokureur en Agent uit krag hiervan wettiglik doen of laat doen.

Geteken te **De Doorns** op **13 Oktober** 2008.[2]

As getuies:

1. [signed]……..
2. [signed]……. [signed]……

M P R de Villiers

[4] The document upon the terms of which the lease in question was notarially executed and registered was signed by the plaintiff and De Kock in May 2009. I shall refer to it as ‘the draft’. According to the tenor of the draft (which is annexure 2b to the particulars of claim), the lessor is the MPR de Villiers Family Trust (‘the Trust’), with the defendant being reflected as the lessee.

[5] The draft contains certain recordals in the preamble that are material in the context of the dispute that has emerged, namely –

1. that the party named therein as the lessor (i.e. the Trust) is the owner of the property;

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[2] ***SPECIAL POWER OF ATTORNEY TO EXECUTE NOTARIAL DEED***
I the undersigned
Matthys Pieter Ruben de Villiers
etc….
nominate, constitute and appoint Ronelle Miller, with power of substitution, to be my/our lawful Agent to appear before a Notary Public…and then and there as my authorised representative to sign a Notarial Deed in accordance with the draft attached hereto which has been initialled by me/us for purposes of identification, and to make such formal amendments thereto as might be necessary for the purposes of the registration thereof,
and in general, for the achievement of the aforementioned purposes, to do or permit to be done everything as completely and effectively as if I/we were personally present and dealing with the matter, and I/we hereby ratify everything that our nominated Attorney and Agent lawfully does or permits to be done in terms hereof.
Signed at De Doorns on 13 October 2008.
(My translation.)

2. that the lessee (i.e. the defendant) had in terms of an agreement between itself and the lessor been running the farming business on the property, was currently investing in the property, and intended further investing in the property in the future;
3. that the lessee desired security for the investment it had made in the land and would make in the future, together with security of tenure to continue with the conduct of the farming business thereon
4. that the parties had agreed to 'formalise' the lessee's interests in the property and the farming business conducted on the property.

The draft was signed by the plaintiff as lessor, his signature appearing above the words 'MPR de Villiers Familietrust', and by Mr Gerhard De Kock ('De Kock'), whose signature appeared above the defendant company's name, 'Elspiek Boerdery (Edms) Bpk'.

[6] The notarially executed and registered lease faithfully replicated the terms of the draft signed by the plaintiff and De Kock in May 2009, save that the lessor was reflected not as the Trust, but as the plaintiff, personally. The notarised execution of the contract, which happened only in January 2010, appears to have been done by Ms Ronelle Miller, purportedly acting in terms of the special power of attorney described in paragraph [3], above. The amendment of the description of the parties to record the plaintiff, rather than the Trust, as the lessor appears to have been done purportedly in terms the provision in the power of attorney that authorises the agent to make such formal amendments ('*formele wysigings*') as might be necessary to obtain the registration of the contract.

[7] The declaratory relief described in paragraph [1].1, above, was sought in the first instance on the basis that the notarised execution and registration of the lease had not been authorised by the plaintiff. The relevant allegations are set forth in paragraph 8 of the amended particulars of claim as follows:

> 8. Die huurkontrak (gemeld in paragraaf 6 hierbo) is deur die agent, steunende op die volmag (aanhangsel 2(a)(i) en (ii)) en die notariële huurkontrak (aanhangsel 2(b)), namens Eiser, as verhuurder, en Eerste Verweerder, as huurder voor die notaris verly en geteken, waarvoor daar geen magtiging of bevoegdheid deur Eiser aan die agent verleen is of bestaan het nie, aangesien:
>
> 8.1 Die volmag nie die notariële huurkontrak as aanhangsel gehad het nie;

> 8.2 Die volmag, wat Eiser verleen het, betrekking gehad het op die notariële akte in die volmag vermeld, wat nie die notariële huurkontrak was, of kan wees nie.[3]

[8] The allegations in paragraph 8 of the particulars of claim fall to be considered in the context of the facts as they were established by the oral evidence of De Kock, who - at the instance of the first defendant - was the only witness to testify at the trial, and the documentary record in the trial bundle (exhibit A) put in by the parties, to which it was ultimately agreed I might have regard for the purpose of deciding the case, and, of course, the admitted or common cause facts. The background history may be summarised as follows (I have simplified the facts in certain respects for brevity and clarity; the omitted detail is not relevant for the adjudication of the case):

1. The plaintiff had approached De Kock for financial advice many years ago at a time when he had been under pressure from one of his brothers to repay a loan. In terms of the arrangements made at that stage, the plaintiff and De Kock agreed that De Kock would control and manage the property. For that purpose an agreement of lease between the plaintiff and a company controlled by De Kock, Cape Orchard Company (Pty) Ltd ('Cape Orchard') was concluded on or about 1 July 2001 for a period of five years, renewable for a further period of four and a half years. The lease was in respect of only the two smaller registered land units making up the property, which were planted with vineyards or developed with housing for the farm workers. The lease contained special terms that obliged the lessee to work and improve the property and to afford the plaintiff a share in the proceeds of the farming enterprise to be conducted on the farm by the lessee. The arrangement enabled the plaintiff to remain living on the property and to maintain his family.

2. On 20 November 2003, the plaintiff and Cape Orchard also executed a written agreement of loan, which recorded that the plaintiff was already indebted to Cape Orchard at that stage in an amount of approximately R531 000.00. The rental payable to the plaintiff by Cape Orchard in terms of the lease was offset against the capital owed and the interest accruing to Cape Orchard in terms of the loan.

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[3] *The contract of lease…was signed by the agent and the notarial lease was executed by her on behalf of the Plaintiff as lessor and the First Defendant as lessee before the notary relying on the power of attorney (annexure 2(a)(i) en (ii)) and the notarial contract of lease (annexure 2(b)), for which there was no authority had been granted by the Plaintiff to the agent or existed, as:*

1 The power of attorney did not have the notarial contract of lease annexed as an attachment

2 *The power of attorney which the Plaintiff had granted related to the notarial deed mentioned in the power of attorney, which was not, and could not have been, the notarial contract of lease.*

(My translation.)

3. De Kock subsequently realised that the interest accruing to Cape Orchard was exceeding the rental due by the company to the plaintiff and that the plaintiff's financial woes were generally increasing. In or about 2006, De Kock concluded that the plaintiff did not have the means to repay the loan, and would only be able to do so if the property were sold.

4. De Kock and the plaintiff then agreed upon an arrangement in terms whereof the property would be sold to a company. The arrangement contemplated that the majority of the shares in the company would be held by a trust to be established to represent the plaintiff's family's interests and that the remainder of the shares would be held by Cape Orchard, representing De Kock's interests. The Trust was duly established, with the plaintiff and De Kock as the co-trustees; and the defendant company was acquired for the purpose of purchasing and holding the property. A 74/26 division of the allocated shares in the defendant company between the Trust and Cape Orchard, respectively, was determined upon. The extent of the respective holdings in the defendant was settled with regard to (i) the ratio of the amount of the plaintiff's debt to the value of the property and (ii) the need for Cape Orchard to hold sufficient shares to be able to block any disposition of the property by the defendant company against Cape Orchard's wishes.[4]

5. An agreement to implement the aforementioned arrangement was concluded on 31 Augustus 2006 between the Trust, Cape Orchard and the defendant company. It provided that the defendant, having acquired the property, would lease it to Cape Orchard, the rental being set off against the amount owed to Cape Orchard by the Trust and/or the plaintiff.

6. The implementation of the agreement required the co-operation of the plaintiff's two brothers, who enjoyed rights of pre-emption over part of the property. One of the brothers declined to waive his right of pre-emption. It would appear from correspondence in the trial bundle that this must have happened sometime between 13 and 23 October 2008. The agreement consequently could not be carried through and it was cancelled. De Kock or Cape Orchard thereafter acquired the entire shareholding in the defendant company and the Trust continued in existence only in name. Indeed, De Kock testified that the trustees never held a meeting at any stage.

[4] Cf. s 228 of the Companies Act 61 of 1973, which was then in force.

Notwithstanding the failure of the sale agreement, De Kock continued to provide for the plaintiff and his family.

7. The aforementioned power of attorney document was executed by the plaintiff in October 2008 for the purpose of enabling the registration of a right of pre-emption in favour of the plaintiff's brothers over the property to be acquired by the defendant company in terms of contemplated sale described earlier. The idea had been that the contemplated rights of pre-emption would replace those that the brothers had previously enjoyed in the property against the plaintiff. The annexed draft ('*konsep*') referred to in the power of attorney was the relevant contract pertaining to the cancellation of the pre-existing rights of pre-emption and the creation and registration of the replacement rights of pre-emption; it was obviously *not* the notarial lease described in paragraph [4], above, which at that stage had not even been conceived of.

8. After the arrangement to sell the property to the defendant was frustrated, it was decided instead to enter into a 99-year lease. A registered 99-year lease would afford the defendant the security De Kock required and, if it were in respect of the whole property (i.e. all four registered land units), would not require the consent of the Minister of Agriculture in terms of the Subdivision Act.

9. It was the common intention of the plaintiff and De Kock that the plaintiff and his wife should not lack for a roof over their heads and that, notwithstanding the conclusion of a 99-year lease agreement, they should have the right to continue living in the dwelling house on the property for as long as they might wish.

10. In or about May 2009, the plaintiff signed a document entitled 'Notarial Contract of Lease' ('Notariële Huurkontrak'). This was the draft referred to earlier (at paragraph [4], above). It is plain that the draft was signed for the purposes of obtaining the notarial execution of a lease in accordance with the provisions of the document. The introductory section of the draft went as follows:

> Protokol Nr:
>
> **NOTARIËLE HUURKONTRAK**
>
> Hiermee word bekend gemaak dat op 2009
>
> Voor my, Christiaan Ludolph Nelson Fick, Notaris van Kaapstad, behoorlik beëdig en toegelaat, in die teenwoordigheid van die ondergetekende getuies, persoonlik verskyn het Ronelle Miller, agerende as die agent van

1. **Die Trustees van die MPR de Villiers Familietrust (IT 3300/2006)** herein verteenwoordig deur Matthys **Pieter Ruben de Villiers**
   Heirna die "Verhuurder" genome)
   kragtens 'n volmag aan haar verleen te De Doorns op 13 Oktober 2008
   En as agent van
2. **Elspiek Boerdery (Edms) Bpk**
   ….
   hierin verteenwoordig deur **Gerhardus Hager de Kock**
   ….(hierna die Huurder genoem)
   kragtens 'n volmag aan haar verleen te 13 Oktober 2008
   welke Volmagte in my protokol geliaseer is;
   En die partye verklaar dat:
   NADEMAAL die Verhuurder die geregistreerde eienaar is van[5]
   1….. (a deeds office description of the four registered land units comprising the property was then set out).

(Underlining supplied for highlighting purposes.)

[9] It is apparent then that the 99-year lease agreement had not been in contemplation by the parties when the special power of attorney was executed in October 2008 and a different draft contract (described in paragraph [8], above) had been annexed to the power of attorney document when it was executed. The same power of attorney document was, however, used when the 'Notarial Contract of Lease' document was signed by the plaintiff in May 2009. It was the '*volmag aan haar verleen te De Doorns op 13 Oktober 2008*' referred to in the introduction to the 'Notarial Contract of Lease' document quoted above. If regard is had to the wording of the power of attorney, it is evident that it was equally amenable for use with

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[5] '***NOTARIAL CONTRACT OF LEASE***
It is hereby declared that on 2009
Ronelle Miller appeared before me Christiaan Ludolph Nelson Fick, Notary Public of Cape Town, duly sworn and admitted, in the presence of the undersigned witnesses, acting as the agent of

1. ***The Trustees of the MPR de Villiers Family Trust…****herein represented by Matthys* ***Pieter Ruben de Villiers***
   Hereafter referred to as the "Lessor"
   And as agent of
2. ***Elspiek Boerdery (Pty) Ltd***
   ….
   herein represented by ***Gerhardus Hager de Kock***
   *…(****hereafter referred to as the Lessee****)*

in terms of a power of attorney granted to her on 13 October 2008
which powers of attorney are filed in my protocol
And the parties declared that:
Whereas the Lessor is the registered owner of:
1. ….'
(My translation.)

the document signed in May 2009 as an annexure as it had been for the originally annexed registration of pre-emptive right agreement. The character of the attached draft ('*konsep*') is not specified in the wording of the power of attorney and therefore the nature of the authority granted thereby falls to be determined by reading it with the attachment. The two documents have to be read together as a composite instrument.

[10] The plaintiff's case appears to rest on the contention that because the special power of attorney was originally executed for a different purpose (i.e. the registration of rights of pre-emption pursuant to the contemplated sale of the property to the defendant), it could not serve as authority for the purpose of notarially executing and registering the 99 year lease.[6] In my judgment there is no merit in that contention. It follows clearly from the words '*kragtens 'n volmag aan haar verleen te De Doorns op 13 Oktober 2008*' in the 'Notarial Contract of Lease' document signed by him in May 2009 that the plaintiff had decided to employ the special power of attorney document for a different purpose after it had become clear that the sale contract contemplated earlier had become frustrated. From a practical point of view there was nothing exceptionable about such economy of documentation.

[11] The power of attorney did not, in itself, constitute the authority given by the plaintiff, qua principal; it merely served as evidence of the grant of the authority. Whether authority for the particular transaction was indeed granted in accordance with the tenor of the power of attorney document is a question of fact. There was no suggestion in the evidence that the plaintiff had executed any other power of attorney on 13 October 2008. It is thus evident from the aforementioned reference in the 'Notarial Contract of Lease' signed by him in May 2009 to the power of attorney document executed by him in October 2008 that it had subsequently been adopted by him to represent to the notary that Ms Ronelle Miller was authorised to represent him in the execution of the notarial deed of lease for the purpose of enabling the registration of the 99-year lease. It did not matter that the power of attorney document had originally been drafted and brought into being for a quite different purpose.

[12] The plaintiff's counsel submitted, however, that a special power of attorney lapses when the act to which it is directed has been carried out or has fallen away. The implication was that the power of attorney document executed by the plaintiff in October 2008 ceased to have effect when the idea of registering the cancellation and substitution of pre-emptive

[6] In his original particulars of claim the plaintiff had pleaded that the draft had been attached to the power of attorney and that the consequent execution and registration of the notarial lease was invalid by virtue of the contract having been purportedly concluded between the plaintiff and the defendant, rather than between the Trust and the defendant as expressed in the draft.

rights in favour of his brothers fell away. The argument is correct only insofar as it pertains to the power of attorney read as it was with the original annexure. It ignores the effect of the plaintiff having subsequently used the power of attorney document with a different attachment. The latter act evidenced a separate juristic act in respect of the grant of authority for a quite different purpose. As noted, the power of attorney document is indeed ineffectual unless construed with an attachment initialled by the principal for identification. The plaintiff's act of annexing first one such attachment to the power of attorney and then subsequently using the same document with a different attachment for a different purpose resulted in the bringing into being of two entirely distinguishable composite instruments.

[13] The plaintiff did not volunteer any evidence to detract from or contradict the effect of the reference to the October 2008 power of attorney in the draft signed by him in May 2009; nor could he. The evidence thus established that the plaintiff did in fact authorise Ms Miller to act as his agent in the execution of the notarial lease. It is evident from the content of the documents in the notary's protocol, which were included in the trial bundle,[7] that the 'Notarial Contract of Lease' must indeed have been annexed to the power of attorney executed by the plaintiff that was presented to the notary.

[14] In my judgment the plaintiff has therefore failed to establish the allegations pleaded in sub-paragraphs 8.1 and 8.2 of his amended particulars of claim.

[15] Furthermore, if regard is had to the factual background described above, the identification of the lessor in the Notarial Contract of Lease as the Trust, rather than the plaintiff personally, was plainly a mistake. The draft contained a declaration that the lessor is the registered owner of the property and the power of attorney document to which it was attached purports to record a grant of authority by the plaintiff personally, and not in his capacity as a trustee. The Trust had never been the registered owner of the property, and it had never been provided in the various arrangements contemplated by the parties that it should become such. There is therefore no reason to doubt De Kock's uncontroverted evidence that the description of the Trust as the lessor in the draft executed by him and the plaintiff in May 2009 was a common mistake.

[16] The plaintiff's counsel sought to resist that conclusion by relying on the fact that the Trust had been referred to as the lessor in a number of other documents. In my view there is nothing to be made of that in the peculiar factual context. The perpetuation or repetition of a

[7] At p. 316 ff of exhibit A.

mistake does not alter the fact that it remains a mistake. No plausible reason existed for the Trust to be the lessor, and if it had nevertheless indeed actually been intended that it should be, the plaintiff failed to give evidence to that effect. Had he ventured into the witness box, he would probably have been hard pressed to explain why he had signed a declaration that the Trust was the registered owner of the property when he must have been well aware that the land units comprising it were registered in *his* name.[8] He would have encountered similar difficulty in explaining the recordal of the previous agreement concerning the running of the farming operation on the farm, to which he, and not the Trust, had been party.[9]

[17] The plaintiff's counsel submitted that it had in any event been beyond the agent's powers to amend the signed deed to reflect the identity of the lessor as the plaintiff, instead of the Trust as indicated in the draft. The defendant's counsel countered that this had been done within the agent's authority to effect 'formal amendments'. It is not necessary, in my view, to decide whether the amendment was indeed of a formal nature. It is evident, however, that registration of the contract could not have been effected without the amendment, as the Trust was not the registered owner of the property. It is also clear from the factual history outlined above that the draft was in any event susceptible to rectification and in the circumstances the agent's dealing with it consistently with that susceptibility is not a matter that the plaintiff can rely on to have the contract or its registration declared void. There is no doubting on the evidence that was adduced that the registered contract, with the plaintiff as lessor, reflects the common intention of the parties.

[18] It is not necessary in the light of that conclusion to consider the defendant's alternative defences based on estoppel and ratification. It does bear mention, however, that my conclusion that the registration of the agreement was duly authorised by the plaintiff and reflects the parties' common intention is supported by the plaintiff's subsequent conduct. On 28 April 2010, he executed a special power of attorney authorising Janetha Willemina Gertruida Botha to act on his behalf to execute a notarised deed of cession of the notarial lease and to do everything necessary to obtain the registration of the cession. The draft 'Notariële Sessie van Notariële Huurkontrak' attached to the power of attorney referred to the

[8] The plaintiff's counsel emphasised that it is not necessary that the lessor be the owner of the property let. That much is trite. But the principle hangs in the air on the facts of the current case; there being nothing to show that it was ever intended that the Trust, rather than the owner of the property, should be the lessor. The only object of the Trust that was demonstrated in the evidence was to hold most of the shares in the defendant company in the context of the contemplation by the plaintiff and De Kock, at the relevant stage, that the company would replace the plaintiff as the registered owner of the property.

[9] See para [5].2, above.

plaintiff as the lessor and, just as the draft executed by him in May 2009 had done, set forth a declaration that he was the owner of the property that had been let. A cession of the lease to a third party was duly registered pursuant to the authority so provided by the plaintiff. The plaintiff offered no explanation for his conduct in respect of the cession. It was wholly irreconcilable with the case he has now sought to advance that the lease had been notarially executed and registered without his authority.

[19] As a second string to his bow, the plaintiff pleaded that the registered lease was in any event void by reason of the effect of the provisions of 3(d) of the Subdivision Act. The relevant allegations were set out in paragraphs 12-14 of the particulars of claim as follows:

> 12. Op 'n behoorlike uitleg verleen die huurkontrak die reg van gebruik aan Eerste Verweerder van daardie gedeelte van die eiendom, met uitsluiting van die woonhuis en van sekere buitegeboue daarop, terwyl daardie gedeelte waarop die woonhuis en die relevante buitegeboue geleë is, nie deur deur Eerste Verweerder gehuur word nie, maar ingevolge die huurkontrak deur die verhuurder uitgehou word vir gebruik.
> 13. Die Minister, soos bedoel in die Wet, het nie skriftelike toestemming verleen vir die huurkontrak, waarvan die termyn langer as 10 jaar is en ten opsigte van 'n deel van die eiendom aangegaan is nie.
> 14. In die vooropstelling is die huurkontrak nietig en is Eiser geregtig op die deregistrasie daarvan.[10]

[20] It is well-established that the Subdivision Act prohibits the letting of only a portion, as distinct from the whole of any registered land unit that is 'agricultural land', as defined in s 1 of the Act, without the prior consent of the Minister of Agriculture. Section 3(d) of the Act provides:

> **Prohibition of certain actions regarding agricultural land**
>
> Subject to the provisions of section 2[11]-
>
> (d) no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original

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[10] '*12. On a proper construction the lease confers the right of use on the First Defendant in respect of that part of the property, with the exclusion of the dwelling house and of certain outbuildings thereon, while that portion on which the dwelling house and the relevant outbuildings are situated, was not leased by the First Defendant, but in terms of the contract of lease was reserved for use by the lessor.*

13. The Minister, as defined in the Act, had not granted written consent for the contract of lease, of which the term was longer than 10 years and which was concluded in respect of a portion of the property.

14. In the premises the contract of lease is void and the Plaintiff is entitled to the deregistration thereof.' (My translation.)

[11] None of which pertain on the facts of the current case.

lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into

unless the Minister has consented in writing.

It is common cause that the property is agricultural land. It is also not in dispute that the consent of the Minister of Agriculture to the conclusion of the lease was not sought or obtained.

[21] The allegations pleaded in paragraphs 12-14 of the particulars of claim fall to be assessed against the provisions of the lease. The plaintiff's counsel relied for the argument that the defendant had leased only part of the property on the provisions of clause 2 read with clause 16. Those clauses provide as follows:

2 **VERHURING VAN DIE EIENDOMME**

2.1 Die eiendomme wat bekend staan as die plaas Elspiek, word verhuur saam met die pakstore, gifkamer, kunsmisstoor, trekkerstoor en arbeidershuise asook die roerende goed en aanhegtings, wat kragpunte, pompe, pype en ander toerusting implemente insluit, soos wat dit tans op die plaas Elspiek is en gebruik word vir boerdery op die plaas of wat nuttig daarvoor gebruik kan word, asook die toegang tot alle water vir menslike en boerdery gebruik, waarop die plaas Elspiek geregtig is, en die gebruik van alle wingerde en ander gewasse wat bestem is of aangewend kan word om inkomste mee te verdien.

2.2 Die eiendomme word aan Huurder verhuur vir die doel om boerderybedrywighede daarop te beoefen vir sy eie rekening, spesifiek vir die doel van die verbouing van tafeldruiwe en gebruik die huurgoed vir geen ander doel as wat met die boerdery en verwante bedrywighede verband hou nie.

2.3 Die Huurder gebruik die water waarop die plaas Elspiek geregtig is en wat beskikbaar is of kan kom, vir huishoudelike en besproeiingsdoeleindes en vir geen ander doel nie. Water word gebruik binne die raamwerk van die regte en verpligtinge wat kontraktueel of van owerheidsweë daarvoor geld.

2.4 Die Huurder mag dooie hout wat daarvoor bestem is vir huishoudelike gebruik deur bewoners van die plaas Elspiek sny of oes, maar mag dit nie verkoop of daarin handel dryf nie.

2.5 Die Huurder sal die wingerde op die plaas soos 'n sorgsame eienaar in die omgewing van De Doorns bewerk, boer, bestuur en bedryf.

2.6 Die Huurder mag wingerde of ander meerjarige aanplantings net vervang met die toestemming van die Verhuurder, welke toestemming nie onredelik weerhou sal word nie.

2.7 Die Huurder sal toerusting, implemente en ander aanhegtings net gebruik of laat gebruik vir waarvoor dit bestem is, sal dit soos 'n sorgsame eienaar laat diens en in stand hou en besorg dit by die afloop van die huurtermyn aan die Verhuurder teruggee in dieselfde goeie toestand as waarin hy dit met die aanvang van die huurtermyn gekry het, redelike verweer deur gebruik en tyd uitgesluit.

2.8 Die Huurder sal wonings, pakkamers, store ens. op die plaas soos 'n sorgsame eienaar gebruik en laat gebruik en sal dit op eie koste na behore in 'n netjiese toestand in stand hou en by die afloop van die huurtermyn aan die Verhuurder teruggee in dieselfde goeie toestand as waarin hy dit met die aanvang van die huurtermyn ontvang het, redelike verweer deur tyd uitgesluit.

2.9 Die partye bevestig dat die Verhuurder nie verplig sal wees om toerusting, implemente of ander roerende goed, wat deel uitmaak van wat verhuur word, te vervang wanneer dit deur gebruik, tydsverloop of deur oornag onbruikbaar of ongeskik geraak het vir die doel waarvoor dit aangeskaf en verhuur word nie. Die Huurder is nie geregtig op enige vermindering in die huurgeld as gevolg hiervan nie.

2.10 Die Huurder sal die plaas Elspiek binne die raamwerk van die titelvoorwaardes, kontraktuele regte en verpligtinge en voorskrifte van owerheidsweë boer en gebruik.[12]

16. **WOONHUIS EN WERF**

Die Verhuurder behou die reg voor om in die woonhuis op die eiendom te bly en die buitegeboue op die werf (behalwe daardie buitegeboue wat deur die Huurder gebruik word vir die normale boerderydoeleindes) te gebruik vir solank as wat hy en/of sy vrou lewe of totdat hulle besluit om te verhuis.

Die Verhuurder is verantwoordelik vir die onderhoud en instandhouding van die woonhuis en geboue wat hy gebruik en vir betaling van alle dienste wat aan die woonhuis en geboue gelewer word.[13]

[22] The properties ('*eiendomme*') that are the subject of the lease are defined in clause 1 of the contract as '*die eiendomme soos in die aanhef beskryf, welke eiendomme tans deur die*

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[12] '*2. **LEASE OF THE PROPERTIES***

2.1 The properties, which are known as the farm Elspiek, are let together with the store houses, poison room, fertilizer store, tractor shed and labourers' houses, as also the movable property and attachments including power points, pumps, pipes and other equipment, such as is currently to be found on Elspiek and is used for farming on the farm or which could be useful for that purpose, as also access to all water for human or agricultural use to which the farm Elspiek is entitled, and the use of all vineyards and other cultivated material that is intended or suitable for use to produce income.

2.2 The properties are let to the lessee for purpose of conducting an agricultural enterprise thereon for its own account, specifically for the cultivation of table grapes and the lessee may use the leased property for no other purpose than that which is related to such farming and associated activities.

2.3 ...

...

2.8 The Lessee shall use and ensure that the dwellings, store houses, stores etc. on the farm are used in the manner in which a diligent owner would use them and maintain them in good condition and at the expiry of the lease return them to the lessor in the same good condition as it received them at the commencement of the lease fair wear and tear excepted.' (My translation.)

I have not translated all the provisions of clause 2 because of the length of the provision. Suffice it to say that the content of the other provisions of the clause confirm that the object of the lease was to afford the lessee the use and enjoyment of the whole property for the purpose of farming on it.

[13] '*16. **DWELLING AND YARD***

The Lessor retains the right to reside in the dwelling on the property and to use the outbuildings in the yard (except those outbuildings used by the lessee for ordinary farming purposes) for so long as he and/or his wife might live or until they decide to relocate.

The Lessor is responsible for the maintenance and upkeep of the farmhouse and buildings used by him and for payment for all services provided to the dwelling and buildings.'

(My translation.)

Verhuurder besit word'.[14] The definition is subject to the following qualification in sub-clause 1.1:

> In hierdie ooreenkoms, behalwe indien 'n verskillende mening duidelik bedoel word, sal die vogende woorde en/of frases die volgende ooreenstemmende betekenis hê:[15]

The properties described in the preamble to the agreement are the four registered land units that make up Elspiek Farm.

[23] In my view the argument that the defendant leased only part of the farm is contrived and finds no support upon a proper construction of the contract. The farmhouse and '*werf*' are not excluded from the lease. The lessor has the right to reside in the house for as long as he wishes, and to use the outbuildings on the '*werf*' to the extent that they are not required for the lessee's farming operations. The fact that the lessor's right to reside on the farm does not derogate from the lease being in respect of the entire property - as indeed expressly worded - is borne out by a number of features of the lease, namely –

1. The extent of the property subject to the lease will not be altered when the lessor vacates the farm house or dies before the expiry of the 99 year term of the contract; this is because the house and outbuildings are subject of the lease from inception. Clause 16 merely reflects a temporary and very limited restriction of the lessee's right of use of the whole property *in terms of the lease*. (Whether the nature of the limitation is one that attracts the effect of the Subdivision Act will be considered presently, in relation to the effect of s 3(e) of the Act.) That the lessor's right to live in the farm house was subordinate in terms of the lease to the lessee's overarching rights in terms of the contract is confirmed by the fact that the lessor has no right to use or deal with the house if he vacates it. He cannot let it or give any right to the use and enjoyment of it to any third party. Those limitations on his ability to use the house during the currency of the lease arise because he has let the whole property to the defendant subject to the provisions of the lease. They confirm that no part of the property was excluded from the lease.

2. The provisions of clause 2 construed in the context of the contract as a whole make it plain that the lease comprehends and is directed at providing for the use and enjoyment by the lessee of the entire property for its farming enterprise; and nothing

[14] '*…the properties described in the preamble, which properties are currently possessed by the Lessor'*. (My translation.)
[15] '*In this agreement, except if a different meaning is clearly intended, the following words and expressions shall have the following corresponding meaning:*'. (My translation.)

about the right reserved to the lessor in terms of clause 16 to remain living in the farm house detracts from the efficacy of those provisions. It is clear that the defendant has leased the whole of the four registered land portions comprising the farm as a single economic unit and intended to use it as such.

3. The lessee's obligation in terms of clause 8.1 to keep all improvements on the properties insured at replacement value against all risks does not exclude the house occupied by the lessor or such outbuildings on the 'werf' as the latter might use.

4. Clause 4.5 of the lease provides that the rental payable by the lessee will be adjusted annually to the extent of any increase in the property tax payable on the property. It is plain that this provision relates to the whole of the property, including any increases in tax calculated with reference to its value including the farm house and any outbuildings that might be used by the lessor.

[24] The plaintiff's counsel emphasised in their argument that a lease is a contract for the use and enjoyment of a thing for a period and for consideration (rent). They cited the statement in Joubert et al (ed), *LAWSA Second Edition* vol.14 part 2, at para 2(a), that '(t)*he subject matter of a contract of lease is not the leased property itself but the use and enjoyment thereof*' in support of the proposition.[16] The characterisation contended for by the plaintiff's counsel is borne out by the authorities cited there: *Genac Properties JHB (Pty) Ltd v NBC Admin CC (previously NBC Admin (Pty) Ltd)* 1992 (1) SA 566 (A) at 576D-G and *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785. But it is important to properly understand the concept of 'use and enjoyment' in the peculiar context. The relevant passage in LAWSA and that in the judgment in *Oatorian Properties* were premised on Pothier's *Treatise on the Contract of Lease* at para 22. In *Oatorian Properties*, Potgieter JA quoted Mulligan's translation of Pothier as follows:

> 22. It is of the essence of the contract of lease that there be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon, and it is actually that which constitutes the subject and substance of the contract.
>
> The kind of enjoyment which is conferred by the lease either is or is not stated therein. When it is stated, the lessee may not put the thing to a use other than to that stated in the lease.

[25] The kind of enjoyment expressly conferred by the lease in the current matter is in respect of the use of the entire property for the lessee's farming enterprise. The reservation of a right to the lessor to live in a house on the property and use outbuildings not required for

[16] Underlining supplied to express the emphasis in the plaintiff's counsel's argument.

the purpose of the defendant's farming activity does not detract from the 'kind of enjoyment' contracted for by the lessee.

[26] The plaintiff's argument in this respect in any event fundamentally missed the point in my view. When it comes to considering whether the provisions of s 3(d) of the Subdivision Act are implicated, the vital consideration *is*, in fact, the extent of the agricultural land that is subject to the lease. The provision is directed at regulating the lease of '*a portion of agricultural land*'. The Supreme Court of Appeal's judgment in *Adlem and Another v Arlow* 2013 (3) SA 1 (SCA) serves to confirm that what is meant by the term '*a portion of agricultural land*' in s 3(d) s 3(e)(i) and (ii) of the Subdivision Act is '*a piece of land that forms part of a property registered in the Deeds Registry;… In other words, the word "portion" in, inter alia, s 3(d) must be interpreted as meaning a part of a property (as opposed to the whole property) registered in the Deeds Registry…*'. See *Adlem*, at para 13.

[27] As appears from the long title to the Act, its object is 'To control the subdivision *and, in connection therewith,* the use of agricultural land'. (I have inserted the italicisation to emphasise the material significance of the italicised phrase acknowledged in *Adlem* supra, at para 12, where Cloete JA noted that *'...what is sought to be controlled is not both the subdivision and also the use of agricultural land, but the subdivision and, **in connection therewith**, the use of such land. The Act does not confer on the minister the power to control the use of agricultural land absent a contemplated subdivision, whether in the literal sense as envisaged in s 3(a) and (e)(i), or the extended sense as envisaged in s 3(d) (a lease for 10 years or longer) and 3(e)(ii) (a right for 10 years or longer).*' (Emphasis in the original.)

[28] The learned judge of appeal made the observation quoted in the preceding paragraph after having reviewed (in para 9 of the judgment) the objects of the statute with reference to a number of well-known earlier judgments concerning its interpretation. It would be a supererogation to try to reproduce in my own words the comprehensive but succinct summary of the relevant jurisprudence given there:

> [9] The purpose behind the Act has been dealt with in a number of decisions. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) (2008 (11) BCLR 1123; [2008] ZACC 12) the Constitutional Court said in para 13:
>
> > 'The essential purpose of the Agricultural Land Act has been identified as a measure by which the legislature sought in the national interest to prevent the fragmentation of agricultural land into small uneconomic units. In order to achieve this purpose the legislature curtailed the common-law right of landowners to subdivide their agricultural property. It imposed the requirement of the Minister's written consent as a prerequisite for subdivision, quite evidently

> to permit the Minister to decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation.'

In *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA) ([2003] 4 All SA 553) this court said, in paras 5 and 15:

> '(T)he learned Judge commenced his motivation by identifying the essential purpose of the Act as an attempt by the Legislature, in the national interest, to prevent the fragmentation of agricultural land into small uneconomic units. This proposition, incidentally, is well supported by authority (see, for example, *Van der Bijl and Others v Louw and Another* 1974 (2) SA 493 (C) at 499C – E; *Sentraalwes Personeel Ondernemings (Edms) Bpk v Wallis* 1978 (3) SA 80 (T) at 84E – F; and *Tuckers Land and Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) at 153H-154A). In order to achieve this purpose, the Legislature curtailed the common-law right of landowners to divide their agricultural property by imposing the requirement of the Minister's consent as a prerequisite for subdivision, quite evidently with the view that the Minister should decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation.
>
> . . .
>
> 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.'

The broadening of the 'target zone' of the Act by the amendment of its terms was dealt with in *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) at 162B – D where the court held:

> 'In this connection it seems to me to be of some importance to bear in mind that s 3 in its original form included only paras (a), (b) and (c), which were repeated in the same form in the 1974 substitution quoted earlier. It seems to me to be a clear inference that the Legislature in 1974 considered that the existing three paragraphs were not sufficient by themselves to prevent the mischief of the division of agricultural land into uneconomic units, and therefore that it found it necessary in addition to prohibit (inter alia) long leases of portions of agricultural land and the sale of erven (whether surveyed or not) on such land. In other words, in my view, the primary purpose of the extension of the prohibitions in the section was to improve the means of achieving the original purposes of the Act . . . .'

In *Tuckers Land and Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) the court held at 153G – H and 154B – C:

> 'The basic object and purpose of the Act was obviously to prevent the subdivision of agricultural land into uneconomic portions. The long title of the Act, prior to its amendment by s 9 of Act 55 of 1972, was ‘To control the subdivision of agricultural land’, and this was changed by the amending section referred to, the long title after the amendment reading ‘To control the subdivision and, in connection therewith, the use of agricultural land’.
>
> . . .
>
> Apart from prohibiting the subdivision of agricultural land without the written consent of the Minister, the Act inter alia also provides that no undivided share in agricultural land shall vest

> in any person without the Minister's consent (s 3(b)) and that no lease in respect of a portion of agricultural land for a period of 10 years or longer, or for other long terms, shall be entered into without the Minister's written consent (s 3(d)).
>
> The clear impression one gets from reading the Act as a whole is that the object and purpose thereof is to prevent subdivision of agricultural land into uneconomic units, and furthermore to prevent the use of uneconomic portions of agricultural land for any length of time.'
>
> [To which I would add — 'and furthermore to prevent encroachment on the use of agricultural land so as to threaten its viability as such'.]

[29] Thus, in order for the plaintiff's case - to the extent that it is founded on the alleged application of s 3(d) of the Act - to succeed, it would have to be established that the right reserved to the lessor to live in the dwelling house resulted in the concluded lease being in respect of only part of the property as defined with reference to its registration in the deeds registry, rather than the whole of the property. For the reasons given earlier, I have already decided that issue adversely to the plaintiff. The lease gives the defendant the use and enjoyment of the whole property for farming purposes.

[30] Notwithstanding that no reliance on the provision had been pleaded in the amended particulars of claim, the plaintiff's counsel submitted in their heads of argument and in their oral argument at the hearing that if the lease did not fall into the category contemplated in terms of s 3(d) of the Subdivision Act, the provisions of clause 16 thereof[17] brought it within the reach of s 3(e)(ii). Section 3(e) of the Act provides that:

> Subject to the provisions of section 2-
>
> (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, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act 27 of 1956); and
>
> (ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956
>
> unless the Minister has consented in writing.

(Underlining provided to highlight the most relevant part of the provision.)

[31] The defendant's counsel questioned whether it was open to the plaintiff's counsel to place any reliance on s 3(e)(ii) in the absence of any reference thereto in the particulars of claim. In my view, although it is desirable for a plaintiff who relies on a provision of a

[17] Quoted in para [21], above.

statute for the relief it seeks to identify the provision in its particulars of claim, a failure to do so does not prevent it from invoking the provision in argument if it is implicated as a matter of law on the duly admitted factual evidence. The position would be different only if the other party would be prejudiced in the conduct of its case by the reliance on a non-pleaded statutory provision. That could be the case if the other party had not adduced evidence or directed cross-examination that it would have done if reliance on the provision had been pleaded. There was no suggestion in the current matter that the defendant would have tendered additional evidence to meet the point had a reliance on s 3(e)(ii) been pleaded by the plaintiff. It would be senseless in the circumstances to avoid dealing with the issue when the effect would only be to invite a re-running of the case on the same evidence in fresh proceedings.

[32] The alternative argument advanced on the plaintiff's behalf begs the question whether the grant of a right to use a facility on the property constitutes a right to a portion of the land of which the property consists. Taken to its extreme the plaintiff's contention would mean that if a right were to be granted to a farm worker to occupy a single room in a cottage on a farm for his lifetime or for periods which taken together (say, in terms of a renewable annual contract of employment) might amount to more than ten years, that could competently be done only with the prior written consent of the Minister of Agriculture. That postulate would seem to give rise to a function for the Minister which bears no relationship whatever with the recognised objects of the Act. The result would be to give the Minister a regulatory function in respect of the use of the land irrespective of the fact that the act in question did not relate to a subdivision of the land in either the ordinary or extended sense of the concept identified in *Adlem*, supra, at para 12. The postulate also serves to highlight that a proper answer to the question has to be framed mindful of the objects of the statute, in general, and the import of the term '*portion of agricultural land*', in particular. The use of the farmhouse for dwelling purposes does not derogate from the character of the farm as a unitary agricultural enterprise. It has no subdivisional effect on the land and no effect on the use of the land as a notional single unit for farming. Moreover, as I shall seek to illustrate below, it is not something self-evidently to be equated to the use of 'a portion' of land in the relevant sense.

[33] If regard is had to the wording of sub-paragraph (i) of paragraph (e), it is significant that it makes a distinction between buildings and portions of land; it speaks of portions of land '*whether there is any building thereon or not*'. This would suggest that the grant of the right to use a building that stands on agricultural land is not the same thing as granting a right

to the land on which it stands. The notion does not present a conceptual difficulty. While buildings accrue to the land on which they are erected, they are not the same thing as the land. Thus the grant of the use of a building erected on agricultural land would not, without more, constitute the grant to the user of a right in a portion of the land.

[34] In any event, the grant of a right in a portion of land implies a voluntary disposition by the grantor of a part of the bundle of rights that it holds in the land. The lessor could not grant to himself a right that as owner he already possessed. For that reason, s 3(e)(ii) of the Subdivision Act could find no basis for operation if clause 16 were construed, according to its tenor, as a limited reservation of right of use and enjoyment by the lessor.

[35] It follows that the implication of the plaintiff's argument must necessarily be that clause 16 of the lease expresses the conferral by the lessee of a right on the lessor in portion of his own land. It is trite that no-one is able to effectively grant what he does not possess (*Nemo dat quod non habet*). The lessee did not enjoy the right of occupation of the farmhouse for so long as the lessor continued to live there and therefore it was not a right that was within its ability to grant.

[36] Furthermore, the rights that are invested in the lessee in terms of the lease - as the plaintiff's counsel were at pains to stress in their argument in support of their reliance on s 3(d) of the Act - are not to the property as such, but rather to the use and enjoyment thereof *on the basis provided in terms of the lease*. The effect of clause 16 of the lease is not to sequester the land on which the farmhouse stands from the rest of the property, or in any way to inhibit the lessee from using and enjoying the whole property for the purpose for which it was let. The effect of clause 16 therefore in no way constitutes a subtraction from the lessee's rights in terms of the lease. Thus, it cannot properly be construed as constituting the grant of a right by the lessee to the lessor.

[37] All of the aforementioned considerations make it clear, in my view, that s 3(e)(ii) of the Act is not implicated.

[38] It should be mentioned that the plaintiff (erroneously described as representing the Trust) and the defendant subsequently subscribed to an addendum to the lease on 26 August 2010. The addendum appears to have been directed at confirming the plaintiff's reserved right of occupation in the farmhouse. It is not necessary to consider the addendum in the light of the concession by Mr *JW Olivier* SC for the plaintiff that it did not amend the original contract, nor was it intended to do so. Suffice it to say that if the addendum did have the

effect of purporting to amend the original contract in a manner that gave rise to a contravention of the Act, it would be the addendum, and not the original contract, that would be legally ineffectual.

[39] The relief (described in paragraph [1].1, above) in respect of the notarial cession of lease was predicated on the alleged voidness of the lease itself. It is not necessary to consider it in the context of the conclusions reached on the latter question.

[40] In the result, the plaintiff's claim will be dismissed with costs. Both sides employed two counsel. That was reasonable in view of the commercial importance of the matter and the complexity of some of the legal issues involved in the dispute.

[41] The following order is made:

> The plaintiff's claim is dismissed with costs, including the fees of two counsel.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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