

SOUTH AFRICA / JUDGMENT

Arlow v Adlem and Another (523/2010) [2011] ZANWHC 65 (20 October 2011)

[2011] ZANWHC 65

COURT

North West High Court, Mafikeng

BEFORE

M M Leeuw

CASE / FILE NUMBER

523/2010

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Case No: 523/2010

In the matter between:

NESTOR ALGEMUS ARLOW PLAINTIFF

And

EUGENE ADLEM 1st DEFENDANT

JOSEPH ADLEM 2nd RESPONDENT

JUDGMENT

Leeuw JP:

Introduction:

[1] This is an application for leave to appeal against the following judgment handed down on 4 August 2011

"1. The lease agreement entered into between the plaintiff and the defendants on the 14th August 2008 in respect of Portions 3 and 6 of the Farm Koppieskraal number 73, Schuinsdrift is declared null and void.

2. The defendants' counterclaims 1, 3, 4, 5, 6, 7 and 8 are dismissed with costs.

3. The defendants must restore possession of the Portion 3 and Portion 6 of Farm Koppieskraal No 73, Schuinsdrift to the plaintiff within 30 days of this Order.

4. The defendants are ordered to pay costs of the action and of the defendants' counterclaims referred to in paragraph 2 of this order as well as the withdrawn counterclaims 2 and 9 jointly and severally, the one paying the other to be absolved."

[2] The grounds of appeal as they appear on the Amended application for leave to appeal filed with the Registrar on 25 August 2011 are that the Court erred in one or all of the following aspects:

"1. In failing to find the land in question, which is being leased by the Defendants from the Plaintiff, falls under the definition of the word "land" in terms of the Act 70 of 1970 (The Subdivision of Agricultural Land Act) and in consequence can no longer, after the said Act has come into force, be referred to as a portion or portions of land, notwithstanding the description thereof in terms of the title deeds of the said land;

2. In failing to find that Section 3 (d) of the said Act, in line with the other sub sections of the mentioned Section 3 have been

incorporated in the said Act with the aim of preventing further subdivision of land in the same manner that such subdivision had

taken place before the promulgation of the said Act, namely prior to 1970;

3. In failing to find that the intention with Section 3 (d) of the said Act is to prevent the long term leasing of a portion of land, which would have the effect of further subdivision of land;

4. In failing to find that the land being leased by the Defendants from the Plaintiff is not a portion of land, but in fact that such land being leased by the Defendants from the Plaintiff in fact consists of two areas of land, of which each have a separate title deed, registered in the Deeds Office of the Registrar of Deeds;

5. In failing to find that the land being leased by the Defendants from the Plaintiff may equally on a legal basis be leased for a period of longer than 10 years without the permission of the relevant Minister as it may legally be sold as separate units without such permission;

6. In failing to find that the word "portion" contained in subsection 3 (d) of the said Act is not equivalent or has the same meaning as the word "portion" contained in the description of the properties being leased by the Defendants from the Plaintiff;

7. In failing to find that the lease agreement pertaining to the land being leased by the Defendants from the Plaintiff is a valid and legal document in circumstances;

8. In failing to find that the land being leased by the Defendants from the Plaintiff can be equated with the long term lease of undivided portions of farmland, for which the relevant Minister's consent would not be necessary;

9. In finding that the lease agreement between the Plaintiff and Defendants on 14 August 2008 is invalid and unenforceable as result

of non compliance with the provisions of the mentioned Section 3 (d) of the mentioned Act;

10. In finding that the said agreement between the parties Is null and void;
 11. In dismissing the Defendants' Counter Claims numbers 1, 3, 4, 5, 6, 7 and 8;
 12. In finding that the Plaintiff is in the circumstances found by the Court a quo entitled to repossession of the land in question in terms of prayer 3 of the Particulars of Claim;
 13. In failing to make an order in favour of the Defendants against the Plaintiff for costs in consequence of the fact that the Plaintiff delivered a notice in terms of the PIE legislation to the Defendants in terms of which the latter were called upon to appear in Court on 1B August 2011, but then abandoned his reliance on the said legislation in the Honourable Judge's chambers and in Court;
 14. In finding that the Defendants are jointly and severally liable for the costs of action and counterclaims."
- [3] The application for leave to appeal was argued in this Court on the 13 September 2011 simultaneously with the application filed in terms of Rule 49 (11) of the Uniform Rules of this Court. For ease of reference, I will refer to the parties as plaintiff and defendants. The plaintiff opposed the application for leave to appeal and the Rule 49 (11) application is also opposed by the defendants. I will first deal with the application for leave to appeal.
- [4] The main question to be decided is whether:
- (i) the agricultural land at issue, namely Portions 3 and 6 of the Farm Koppieskraal number 73, Schuindriff (the farm), should be regarded as agricultural land that has already been subdivided in terms of section 1 (b) of the Subdivision of Agricultural Land Act No 70 of 1970 (the Act);
 - (ii) whether the provisions of section 3 (d) of the Act should be applied and limited to a lease of a portion of agricultural land already divided as such in respect of the farm, or only apply to a lease of a further subdivision of a portion of the farm,
- [5] I made a finding that this Act applied to any agricultural land with the exception of land defined in section 1 of the Act. I further held that since "portion" is not defined in the Act, on reading section 3, which prohibits "certain actions regarding agricultural land," and that section 3 (d) read with section 2 (e), which latter section excludes a lease of agricultural land which is longer than 10 years without the consent of the Minister, save under the provisions of section 2 (e) of the Act (which allows registration of a lease in respect of agricultural land longer than 10 years, if concluded in writing prior to the commencement of this Act), a reasonable interpretation would be that the lease agreement entered into between the plaintiff and the defendants was in contravention of section 3 (d) of the Act, and thus rendered the lease agreement null and void in the circumstances.

- [6] However, I am of the view that my analysis of the above provisions especially with regard to the interpretation of "portion of agricultural land" in section 3 (d) of the Act, may be interpreted differently by another Court.

Rule 49 (11) of the Uniform Rules of Court application.

- [7] The plaintiff has filed an application in terms of Rule 49 (11) on the basis that:

- (a) there are no reasonable prospects of success on appeal and that the application for leave to appeal is merely vexatious and frivolous and intended to prolong the finalisation of this matter;
- (b) he desperately needs to take occupation of the farm which he would either sell at a profit or start farming activities for his own and family's benefit;
- (c) the defendants have another farm where they keep their cattle and are only using the farm (Plaintiffs farm) for hunting purposes over weekends, which is for luxury purposes;
- (d) the defendants have allowed overgrazing on the farm thereby causing damage to the veld in the farm. In support thereof, the plaintiff attached:
 - (i) a study of the farm Specialist report compiled by Wayne Birch and Dr W J Myburgh , who are ecologists and veld conditions experts. Having evaluated the conditions on the farm, they concluded amongst others, that "the difference in species compositionwere

mainly caused by irresponsible stocking rates and severe utilization by live stock/grazers," They recommend, amongst others, that "animal numbers should not exceed the suggested number*1 and "consider resting the vegetation of camp two for at least one season and then stock conservative within the potential of the land."

- (ii) the second report compiled by Wayne Birch regarding the game on the farm, which states that the farm is not conducted according to a management plan aimed at amongst others, conservation of the specific piece of land;

- (iii) a letter of complaint received from the office of the Chief Directorate of the Department of Agriculture and Rural Development, Rustenburg (the Department) complaining about the appalling state in the management practice on the farm as well as the number of cattle on the farm which exceeded the accepted normal carrying capacity for the area. The main complaint was the potential damage to the soil which will be caused by the various forms of degradation which may become extremely costly to correct. In this letter, the plaintiff is requested to correct the situation with immediate effect or face action which will be taken against him;

- (iv) At the hearing of this matter on 13 September 2011, the plaintiff handed up another letter from the Department, wherein the plaintiff received a final warning regarding the overstocked cattle on the farm. Of great concern, stated in the letter, is that "the damage caused by the mismanagement of natural resources may in some cases be irreversible unless urgent action" is taken. The immediate action proposed by the department is (which is a final warning) is that the present management system be corrected with immediate effect by removing all the cattle until

the natural vegetation has recovered.

- [8] It is submitted by counsel for the plaintiff that the factors referred to in paragraph [7], and that the defendants are shooting the plaintiff's game for their own financial gain and further that the defendants are damaging and illegally using the water from the canal which forms part of the irrigation scheme and are not supplying water to the animals on the farm, constitute exceptional circumstances.
- [9] The further grounds are those stated in the opposition papers of the application for leave to appeal, namely that the defendants are deliberately delaying in having this matter finalised and also that the defendants are paying rental of R300-00 per month for a farm worth approximately R3million and is approximately 350 hectares in size, and is in most instances in areas with the payment of the rental.
- [10] It is also submitted on behalf of the plaintiff that the balance of convenience favours the plaintiff because of the factors already mentioned above.
- [11] The defendants oppose the Rule 49 (11) application on basis that:
- (a) the plaintiff does not indicate any change in the circumstances in which he presently finds himself from those that prevailed when he leased the property to the defendants;
 - (b) it is not correct that the defendants do not pay the rental amount regularly;
 - (c) the plaintiff is simply guessing or speculating on the financial status of the defendants;
 - (d) the allegations oh how the farming on the farm is being conducted as well as th© alleged mismanagement of the farm are issues which are put in dispute and can only be resolved through oral evidence; and
 - (e) that it would prejudice the defendants to vacate the farm in view of the fact that they are conducting a substantial farming operation.

The Law

- [12] In *South Cape Corporation (Ptv) Ltd v Engineering Management Services (Ptv) Ltd* 1977 (3) SA 534 (A) at 545, the Court laid down the following principles to be applied in considering the Rule 49 (11) application. The Court has a wide discretion on whether or not to grant the application. In exercising its discretion, the Court will consider the following

factors:

- (a) Potentially irreparable harm or prejudice being sustained by either the applicant or the respondent;
- (b) Prospects of success on appeal including the question whether or not the appeal is frivolous or vexatious or whether it is a delaying tactic;

(c)The balance of hardship or convenience on either of the parties, and that there are good grounds for the Court to exercise its discretion in favour of either of the parties.

[13] The plaintiffs action was for a declaratory order based on the purported invalid lease agreement and in the alternative, he sought an eviction order based on the breach of the lease agreement. Per agreement, this Court was called upon to adjudicate on the validity of the lease contract only and as such, the merits of the action were not traversed during the hearing of the main action.

[14] The facts relied upon by the plaintiff in this application have a bearing on the facts or allegations as stated in the particulars of claim, which allegations are disputed by the defendants in their plea and counterclaims.

[15] It is therefore difficult and in actual fact inappropriate to decide this application on the basis of facts which are still to be decided by the Court in the event that the defendants succeed in their appeal against my judgment on the interpretation of section 3 (d) of The Subdivision of Agricultural Land Act No 70 of 1970. For the above reasons, the application in terms of Rule 49 (11) of the Supreme Court Act No 59 of 1959 cannot succeed.

[16] I accordingly make the following order:

- (1) The application for leave to appeal to the Supreme Court of Appeal is granted.
- (2) Costs will be costs in the appeal.
- (3) The application in terms of Rule 49 (11) of the Supreme Court Act No 59 of 1959 is dismissed with costs.

M M LEEUW

JUDGE PRESIDENT

APPEARANCES;

FOR THE PLAINTIFF ADV STEF GULDENPLEFENNING

FOR THE DEFENDANTS : ADV P J VAN DER WALT

PLAINTIFF'S ATTORNEYS: MOTLHE JOOMA SABDIA INC

C/O A V ROOYEN TLHAPI WESSELS REF: MW/ENS 1

DEFENDANTS' ATTORNEYS: F & F V D ATTORNEYS

C/O NIENABER WISSING REF: HSVDWALT/PIKKIE/B208

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