

SOUTH AFRICA / JUDGMENT

Bothongo Agriculture (Pty) Ltd v Kerbyland (Pty) Ltd and Others (18781/2018) [2019] ZAGPJHC 42 (22 February 2019)

[2019] ZAGPJHC 42

COURT

South Gauteng High Court, Johannesburg

BEFORE

Weiner

CASE / FILE NUMBER

18781/2018

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO: 18781/2018

In the matter between:

BOTHONGO AGRICULTURE GP (PTY)

LTD

Applicant

and

KERBYLAND (PTY) LTD

First Respondent

CRAB FARM KROOMDRAAI (PTY) LTD

Second Respondent

REGISTRAR OF DEEDS, PRETORIA

Third Respondent

JUDGMENT

WEINER, J

Introduction

- [1] The applicant, Bothongo Agriculture GP (Pty) Ltd, initially applied for an order that the first respondent, Kerbyland (Pty) Ltd (Kerbyland), be ordered and directed within 30 days of the granting of the order, to do all things necessary and sign all documents necessary, to effect registration of transfer of ownership of the immovable property described as Portion 22 (a Portion of Portion
- 4) of the Farm Kromdraai No. 520, Registration Division JQ, held under Deed of Transfer No.T42878/71 (the property) into the name of the applicant. Ancillary relief was also sought.

Background

- [2] The applicant conducts business as a property owner and developer, on which properties it conducts agricultural game farming and animal husbandry. It acquired ownership of the Rhino and Lion Nature Reserve (the Reserve) for the sum of R120 million in August 2017.
- [3] Kerbyland is the registered owner of the property in respect of which this application is launched. This property is situated adjacent to the Reserve. According to the applicant, acquiring the property formed part of its overall business strategy associated with the Reserve.
- [4] The deponent, Keith Mogola Khupe Bothongo (Bothongo), who is the director and sole shareholder of the applicant, contends that, based upon this business strategy, Khumbulani Sibanda (Sibanda), the Senior Group Finance and Operations Manager of the applicant, acting on its behalf, negotiated with Edward Kerby (Kerby) who acted on behalf of Kerbyland, in regard to the sale and purchase of the property.

The representations

- [5] Sibanda states that he was informed by Kerby that the property was subject to a lease agreement concluded with the second respondent, Crab Farm Kroomdraai (Pty) Ltd (Crab Farm). Clause 15 of the lease agreement provided that, in the event of Kerbyland deciding to sell the property, Crab Farm had a right of first refusal. In the event that Kerbyland received a written offer for the purchase of the property, from a bona fide third party, Crab Farm had a pre-emptive right to purchase the property on the same terms and conditions as the third party offer.
- [6] The applicant alleges that Kerby represented to Sibanda that Crab Farm did not intend to exercise its right of first refusal, and that the waiver thereof was a mere formality. The applicant refers to a letter dated 27 February 2018 addressed to Sibanda by Kerbyland's attorney, Neil McKinon (McKinon), in which, the applicant alleges, Crab Farm's right of first refusal and the waiver thereof is referred to as a mere formality.
- [7] It is pertinent to have regard to the relevant portions of the letter, which read as follows:

'1

2. We confirm that in principle, our client is amenable to entering into an offer to purchase with you for the immovable property more fully described as Ptn 22 of Farm 520 Kromdraai.
3. We are in possession of the draft offer to purchase and we are in the process of finalising the agreement to make provision for a number of our clients concerns as discussed in the meeting held with you.
4. In addition to the above, you are aware that the property is subject to an existing lease which contains a right of first refusal in favour of the current tenant.
5. The lease also contains a renewal clause in favour of the tenant which has not yet been exercised by the tenant.
6. Notwithstanding the above, and as discussed with you on Friday the 23rd of February 2018, our client has engaged the main shareholder of the tenant with regards to their intentions pertaining to the renewal of the lease as well as their right of first refusal.
7. The tenant has, in principle, indicated that they will have no objection to the sale of the land to yourselves and will agree to an early termination of the lease.
8. However, the representative of the tenant has indicated that he is obliged to discuss the above with the other shareholders before making a final decision.
9. We do not foresee that the other shareholders will object but we are obliged to engage with them.

...

12. Having regard to the above we will prepare the amended offer to purchase which will contain a condition precedent that the tenant:

13.1 agrees not to renew the lease;

13.2 agrees to early termination of the lease;

13.3 waives their client's right of first refusal and declines to purchase the property from our client.

- [8] The applicant's contention that this letter amounts to a representation and a waiver of Crab Farm's rights is ill-founded for the reasons set out below.

The agreement to purchase between the applicant, Bothongo Agriculture GP (Pty) Ltd and the first respondent, Kerbyland (Pty) Ltd (the Bothongo / Kerbyland agreement)

- [9] A draft agreement was thereafter prepared in which the above suspensive conditions were contained. Clause 5, titled 'Condition Precedent' reads as follows:

‘5.1 The parties acknowledge that the Property is currently subject to an existing lease agreement in terms of which the Tenant:

5.1.1 Has a right of renewal for a further period of lease; and

5.1.2 Has a right of first refusal in respect of the prospective sale of the PROPERTY; and

5.1.3 ...

5.2 In the circumstances, the successful sale of the PROPERTY is conditional upon the following:

5.2.1 That the Tenant, within 30 days of the last party signing the agreement, enter into an addendum to the existing Lease Agreement with the SELLER in terms of which it is recorded that:

5.2.1.1 The Tenant has considered its right of First Refusal in terms of the lease and has elected NOT to exercise such right of First Refusal thereby waiving its rights thereto and agreeing to the sale of the PROPERTY to the SELLER;

5.2.1.2 The Tenant does not intend to renew the existing lease agreement in terms of the renewal clauses mentioned therein; and

5.2.1.3 The Tenant agrees to early termination and vacation of the PROPERTY on or before.

5.2.2 ...

5.3 Should the condition precedent not be timeously fulfilled by the due date, or such other date as may be agreed by the parties in writing, then this agreement shall lapse and be of no further force or effect, save that the parties shall be restored to the position that they were in prior to the signing of this agreement.’

[10] Clause 26 of the sale agreement also provided that it constituted the whole agreement between the parties as to the sale of the property, and no agreement, representation or warranty between the parties, other than those set out in the agreement, would be binding on the parties. The agreement was signed on 8 March 2018 by both the applicant and Kerbyland. Clause 26.1 of the agreement provides that ‘the AGREEMENT constitutes the whole agreement between the Parties as to the sale of the PROPERTY and no agreement, representation or warranty between the Parties other than those set out in the AGREEMENT are binding on the Parties.’

[11] The applicant contends that, based on the strength of the representations by Kerby, the applicant offered to purchase the property and paid the deposit. The applicant relies on Kerby’s representations as amounting to a negligent misrepresentation in that it was false, made on behalf of Kerbyland, was material, and influenced the applicant to enter into the offer. It is also submitted that it was foreseeable that such representation would induce the applicant to enter into the offer and that the representation did in fact induce the applicant to enter into the offer. The applicant contends that it is entitled to stand by its offer to purchase and sought specific performance in respect thereof.

Crab Farm's exercise of the right of first refusal

- [12] On 29 March 2018, Crab Farm addressed a letter to Kerbyland, confirming that, in terms of the lease agreement, it exercised the right of first refusal to purchase the property. A signed offer was attached to the letter. This led to a letter from the applicant's attorneys, indicating that they intended to launch an application interdicting the transfer of the property to Crab Farm, pending an action to be instituted regarding the circumstances of the exercise of the right of first refusal.
- [13] The applicant goes on to state in the founding affidavit that—
- ‘...there is something altogether more sinister and immoral about the purported exercise by the second respondent of its right of first refusal. I have good reason to believe that the second respondent purported to exercise its right simply in order to prevent a black-owned company from further acquiring immovable property in an area which historically is a white Afrikaans dominated area.’
- [14] The reasons the applicant gives for this belief is that since acquiring the Reserve, Bothongo, as the director of the applicant, has not been made to feel welcome in the area by the neighbours, who he describes as white Afrikaans farmers, and therefore the only inference to be drawn is that the acquisition of the property by the applicant is being frustrated due to Bothongo's race.
- [15] Kerby states that, at all material times, he advised Sibanda that there was a right of first refusal granted to Crab Farm in the event of Kerbyland electing to sell the property. He states further that he is not connected to Crab Farm, nor is he authorised to make decisions or representations on its behalf. There is no allegation by the applicant that Kerby was authorised to bind Crab Farm, or that he was entitled to waive Crab Farm's entitlement to exercise its right of first refusal.
- [16] The letter dated 27 February 2018 makes it clear that other shareholders of Crab Farm would be consulted and a condition precedent would be inserted into the offer to purchase in the event that Crab Farm wished to exercise its right of first refusal.
- [17] The respondents contend that the allegations made by the applicant are scandalous, vexatious and defamatory in that they suggest that Crab Farm exercised its right simply in order to prevent a black-owned company from acquiring further immovable property in the area.
- [18] Prior to the applicant becoming the owner of the Reserve, in and during 2017, Kerby was asked to provide written consent to the applicant continuing with the business conducted on the Reserve and confirm that he, on behalf of Kerbyland, did not object to the running of a zoo on the Reserve. Such written consent was given. The respondents contend that this flies in the face of the allegations made by the applicant that the decision in regard to the property was racially based. The respondents also state that since the applicant acquired ownership of the Reserve, a number of overtures have been made by owners of nearby

properties to introduce themselves to Bothongo, but their efforts have been rebuked.

Legal submissions

- [19] The respondents contend that Crab Farm had a right of first refusal and was fully entitled in terms of its rights, as well as the condition precedent, to exercise its right of first refusal, which it did.
- [20] The respondents submit that the transfer of the property, as claimed by the applicant, is reliant upon the enforcement of a valid agreement of sale between the applicant and Kerbyland. In the absence of a valid and binding sale agreement, the applicant is not entitled to the transfer of the property. There is no relief sought declaring the offer to purchase to be valid and binding. The offer has lapsed by virtue of the non-fulfilment of the condition precedent and is of no force and effect.
- [21] The respondents also submit that specific performance is not relief which is available to the applicant on the grounds of an alleged misrepresentation. The innocent party is entitled to seek the cancellation of the agreement and/or damages but not specific performance. The relief sought is paradoxical in that it seeks to hold Kerbyland to an agreement which the applicant itself contends came into effect as a result of a misrepresentation, made to it, on behalf of Kerbyland.
- [22] In the replying affidavit, the applicant notes that the opposition is based on legal argument. It contends that the respondents have failed to deal adequately with the allegation that the exercise by Crab Farm of its right to first refusal is motivated 'by what I [Bothongo] believe to be unjustified constitutional infringement of my right to be treated equally'.^[1] The applicant contends that, irrespective of whether Crab Farm's election to exercise its right to first refusal ought to be respected in law, this Court is duty-bound to consider whether such an exercise of a contractual provision conforms with the objects and spirit of the Constitution. The applicant contends that it has made out a case for the setting aside of the sale agreement between the respondents and striking out Crab Farm's contractual right of first refusal. The applicant states that, as the respondents rely on legal argument, they demonstrate a fear 'to challenge the true grievance which the applicant faces namely a strategy to exclude black ownership of land in the area.'
- [23] The applicant contends that this Court has an obligation to combat racism and discrimination and that the manner in which Crab Farm exercised its contractual right is unfairly discriminatory and infringes the applicant's right to equality. Various authorities are quoted by the applicant on the obligation of this Court to combat racism and discrimination. In the case of *Daniels v Scribante* the Constitutional Court discussed the manner in which black South Africans were dispossessed of land to the benefit of white farmers.^[2] In the *Crown Chickens*^[3] case, Zondo JP (as he then was) held as follows:

‘It seems to me that in being required to uphold the Constitution and the human rights entrenched in it, the courts are enjoined to play a particularly critical role in, among others, the fight against racism, racial discrimination and the racial abuse of one race by another. They must play that role fairly but firmly so as to ensure the elimination of racism in our country and the promotion of human rights....’[4]

[24] There is no doubt that this policy is obligatory and, correctly so. However, the Court’s role must be based upon objective facts or proper inferences, not speculation.

[25] The applicant sought, by way of an amendment to the relief sought, dated 7 February 2019, to declare the conduct of Crab Farm unconstitutional and invalid and for it to be set aside. The applicant contends, in its supplementary submissions, that the material averments for the relief sought are that Crab Farm exercised its right of first refusal ‘for the sole basis of preventing a black-owned company from acquiring additional immovable property in the area.’ This, it is contended, amounts to unfair discrimination under section 9(4) of the Constitution.

[26] The applicant, in effect, asks the Court to disregard Crab Farm’s exercise of its contractual right, on the basis that it was illegal, unconstitutional and contrary to section 9(4) of the Constitution. It thus asked the Court to declare the conduct of Crab Farm invalid and to set the sale agreement aside.

[27] However, at the hearing the applicant sought a further amendment that the matter be referred to oral evidence on the issue as to whether the exercise by Crab Farm of its right of first refusal was motivated by racism. The applicant contends that there is now a genuine and bona fide dispute of fact in this regard. The respondents however, refer to the case of *Dodo v Dodo* where the court held that a party may not seek to lead oral evidence to make out a case that was not already made out by him on the papers.[5]

[28] As set out above, the only allegation made by the applicant is that Bothongo believes that the exercise of the right of first refusal by Crab Farm was racially motivated. The only basis for this contention, is that Bothongo believes he is unwelcome in the area as his neighbours have not made contact with him. It is not based on any objective facts before this Court. The applicant’s counsel has argued that because this matter involves land, which is a very sensitive and racially fraught issue, the Court should refer the matter to oral evidence to determine whether or not racism was involved.

[29] The respondents contend that the relief which the applicant seeks cannot be granted. What the applicant is seeking is an entitlement to be placed in the position as the purchaser of the property if allegations of racism are proven following a referral of the matter to oral evidence. However, this would involve the court resurrecting the contract which has lapsed and this is unsustainable in law.

[30] In *Absa Bank Limited v Moore*[6] the Constitutional Court, in dealing with an application for leave to appeal, considered the High Court order which had found that the agreements of sale relating to the Moores' property were invalid by reason of simulation, and which granted an application for an interdict prohibiting the proposed sale in execution of the Moores' property. The High Court ordered the restitution of the property to the Moores, subject to the reinstatement of the original mortgage bonds. Absa, the mortgagee, brought the matter on appeal to the SCA, which held the agreements to be invalid for fraud, not simulation. The SCA undid the condition imposed by the High Court that the mortgage bonds be reinstated, finding it to be unjustified and incompetent. Absa's contention was that the cancellation of the Moores' debt was part of a grand fraudulent scheme which should be undone so as to restore Absa to its pre-fraud position. The SCA and the Constitutional Court held that this would require the court to write a new contract for it and the Moores, which it could not do.[7]

[31] The applicant wishes this Court to take the allegations of racism which are set out above and to draw an inference from same that Crab Farm's exercise of its right of first refusal was racially motivated. In *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting 2002 (3) SA 765 (T)* at 780H, Southwood J referred to the judgment of Smalberger AJA in *S v Mtsweni*, where it was 'emphasised that inference must be distinguished from speculation and must be based on properly proved objective

facts.'[8] Smalberger AJA quoted with approval the following passage from *Caswell v Powell Duffryn Associated Collieries Limited* 1939

(3) All ER 722 (HL) at 733E-F where it was held:

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."[9]

[32] The applicant seeks that this Court ignore the legal and contractual elements of this case and decide the matter by referring it to oral evidence on the issue of whether the respondents acted in a discriminatory manner. There are no objective facts upon which this can be based. The use of the issue of land in the context of this case appears to be misplaced. The applicant has without any problem, acquired a very large tract of land, and was given consent by Kerbyland to continue operating on such land. This appears to fly in the face of his allegations that the respondents herein acted in a racially discriminatory manner. The property that the applicant purchased is valued at R120 million. I do not believe that this is a case where the Court, based upon the speculative allegations of the applicant, should refer the matter for oral evidence in relation to the motivation behind the second respondent exercising its contractually valid right. As was stated in *Dodo v Dodo*, there must

be a valid dispute of fact before a matter can be referred for oral evidence.[10] A party may not seek to lead oral evidence to make out a case that was not already made out by him on the papers. In the present case, the applicant's allegations are not borne out by any objective facts whereas the objective facts are that the applicant acquired land in this area, with consent from the neighbour, to operate. Whilst issues of discriminatory conduct must be dealt with harshly, such conduct must be based upon facts and sustainable inferences. The applicant's submission that this Court should take judicial notice of the fact that racially discriminatory conduct is rife, in general, is an insufficient basis to find that the applicant was racially discriminated against. The applicant has other remedies; it may seek relief from the Equality Court or the South African Human Rights Commission, or damages in an action, but the relief sought in this Court is ill-founded.

In the premises the following order is made:

1. The application is dismissed with costs.

S E WEINER

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 14 February 2019

Date of judgment: 22 February 2019

Appearances:

Counsel for the Applicant: Adv. C Georgiades SC

Adv. M de Oliveira

Instructing Attorneys: KWA Attorneys

Counsel for the Respondents: Adv. D van Niekerk

Instructing Attorneys: De Jager McKinnon Incorporated

- [1] The right to equality is contained in section 9 of the Constitution. It provides as follows: (1) 'Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National

legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

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- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National

legislation must be enacted to prevent or prohibit unfair discrimination.

- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

[2] Daniels v Scribante 2017 (4) SA 341 (CC).

[3] Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others [2002] 6 BLLR 493 (LAC).

[4] Ibid para 35.

[5] Dodo v Dodo 1990 (2) SA 77 (W) para 91.

[6] Absa Bank Limited v Moore & Another 2017 (1) SA 255 (CC).

[7] Ibid paras 43-44.

[8] S v Mtsweni 1985 (1) SA 590 (A) at 593E-F.

[9] Ibid 593E-H.

[10] Dodo v Dodo (note 5 above).

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