

SOUTH AFRICA / JUDGMENT

Morkel v Thornhill (A105/2009) [2010] ZAFSHC 29 (4 March 2010)

[2010] ZAFSHC 29

COURT

Free State High Court, Bloemfontein

BEFORE

Hancke, Ebrahim, Moolla

CASE / FILE NUMBER

A105/2009

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FREE STATE HIGH
COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH
AFRICA

Appeal No. : A105/2009

In

the appeal between:

DRICKY
MORKEL Appellant
and
IRIS
THORNHILL First
Respondent

CORAM: HANCKE,
J et
EBRAHIM, J et
MOOLLA,
AJ
HEARD
ON: 1
MARCH 2010

JUDGMENT

BY: HANCKE, J

DELIVERED ON: 4 MARCH 2010

- [1] This is an appeal against a finding of the court a quo (Rampai, J) that the lease agreement between the parties was null and void in view of the applicability of section 3(d) of the Subdivision of Agricultural Land Act, No. 70 of 1970 (“the Act”). The appellant was ordered to vacate the land, described as “a certain portion of the remaining extent of the farm Platbergdrift No. 924 (approximately 4 hectares) situated in Ladybrand district” and to pay 70% of the respondent’s costs. The appellant successfully petitioned to the SCA after an application for leave to appeal was refused by the court a quo.
- [2] The respondent is presently the owner of the said property and the successor in title of Mr. Gert Hendrik Pienaar who entered into a lease agreement with the appellant on 6 September 2001. The lease was agreed upon for an initial period of nine years and eleven months with an option to extend the lease for three further periods of five years each.
- [3] The main issues in this appeal are:
1. Whether the lease agreement was null and void ab initio, seeing that it was concluded without the consent of the Minister;
 2. Whether the respondent had properly and legally cancelled the agreement between the parties due to the alleged breach of contract by the appellant.
- [4] As far as the first issue is concerned, section 3 of the Act provides as follows regarding a lease relating to agricultural land:

“3 Prohibition of certain actions regarding agricultural land Subject to the provisions of section 2-

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 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.”

- [5] It is appellant’s case that the said property does not constitute agricultural land as envisaged by the Act, in view of the fact that nobody ever considered the leased portion of the farm land to be agricultural land; that such portion of land was in any event so small that no economic farming could be sustained thereon; that there were vested business rights in respect of the particular portion of land; that the authorities are exercising control over such portion of land; the division of the farm land by a national road has so fragmented the farm land that the leased portion cannot be economically utilised for agricultural purposes. The

court a quo dealt in extenso with this aspect. I agree with the conclusion reached in this regard. Section 1 defines “agricultural land” as “any

land except land as described in sub-sections (a) to (f) thereof”. The ground raised by the appellant is of no consequence in the circumstances of this case because it does not bring it within the exceptions as envisaged in sub-sections (a) to (f) of the Act. The lease is subject to the Act.

[6] The further question is whether the court a quo was correct in finding that although the initial agreement was for a period of nine years and eleven months and therefore less than 10 years, the three optional periods of five years each, add up to 24 years and 11 months; therefore, in the absence of the written consent of the Minister, the lease agreement was ab initio null and void, because the lease agreement falls squarely within the provisions of section 3(d) of the said Act.

[7] There is ample authority for the view that in general a lease in such circumstances will be void.

PALM FIFTEEN (PTY) LTD v COTTO TAIL HOMES (PTY) LTD 1978 (2) SA 872 (A) at 887 H – 890 G;

TUCKERS LAND AND DEVELOPMENT CORPORATION (PTY) LTD v WASSERMAN 1984 (2) SA 157 (T) at 162 B – 164 H;

LETABA SAWMILLS (EDMS) BPK v MAJOVIL (EDMS) BPK

[1992] ZASCA 195; 1993 (1) SA 768 (A) at 772 F – I.

[8] It seems to me that this aspect should be approached from the view whether the contract dealing with the initial period of nine years and eleven months is severable or divisible from the subsequent options. In EASTWOOD v SHEPSTONE 1902 TS 294 the parties entered into a contract for the sale of two farms together with the right to supply quarterly 250 labourers. The court found that the contract in respect of the labour clause was void. On p. 303 Innes CJ stated the following:

“Where a contract is divisible, that is to say, where the parties have so expressed themselves, either in the original agreement or in any subsequent valid variation of it, that a subject matter of the contract and the consideration can be divided into two or more parts, then if one part be void and bad, and one part be good, the Court will, at the request of one of the parties, reject the bad portion and enforce the good.”

And continued on p. 305:

“The contract was split up and divided by the agreement of the parties; and that being so, the valid portion must be enforced, while the invalid portions fall to the ground.”

[9] In CAMERON v BRAY GIBB & CO (PVT) LTD 1966 (3) SA 675 (R) Goldin J stated the following at p. 676 B:

“The general rule is that where the illegal part of a contract cannot be severed from the legal part, the contract is altogether void, but where these parts can be severed the bad may be rejected and the good retained; and this whether the illegality be created by statute or by common law.”

On p. 676 H – 677 A he continued as follows:

“The test appears to be whether the illegal promise is substantially the whole or the main consideration for the promise sought to be enforced. If the contract is divisible into a number of separate promises and the elimination of one or more of the invalid promises would still leave the substantial character of the contract unchanged, then the legal portion will generally be enforced.”

[10] It is clear that the options in this matter are stipulations in the contract for the exclusive benefit of the appellant. In *DU PLOOY v SASOL BEDRYF* (EDMS) BPK 1988 (1) SA 438 (A) Van Heerden JA stated the following at 456 H:

“Indien 'n kontrak dus slegs uit die oogpunt van een party ondeelbaar is en dit 'n nietige bepaling bevat, het die party in wie se guns die bepaling beding is die keuse om die kontrak te vernietig of dit in stand te hou. Die kontrak is met ander woorde nie nietig nie, maar vernietigbaar ter keuse van die betrokke party.”

In the said case the contract between the parties contained provisions in respect of the purchase of coal rights not complying with the formalities in respect of Contracts of Sale of Land Act 71 of 1969. The said provisions were not mutually dependant on the rest of the contract and severable from the remainder of the contract. The court accordingly found that the rest of the contract could indeed have an independent and legally valid existence.

See also *The Law of Contract in South Africa* (5th Edition) by R H Christie, p. 388 – 391.

[11] It is also important to have regard to the probable intention of the parties as it appears from the terms of the contract or the facts of the case.

DU PLOOY v SASOL BEDRYF (EDMS) BPK, *supra*, at 451 A – B;

SASFIN (PTY) LTD v BEUKES 1989 (1) SA 1 (A) at 16 B.

It is clear that in the present case the respondent never manifested an intention to cancel the contract on the ground that it was unenforceable or that she was not bound by the contract.

BANTJIES v KUNTZE 1998 (4) SA 201 (C) at 205 G – 206 D.

[12] The allegation that the contract was unenforceable was never raised in any correspondence between the parties. To the contrary, in a letter dated 19 June 2006 addressed by the respondent’s attorney to the appellant’s attorney, the following was *inter alia* stated:

“We also note that this long term lease has not been notarialy registered and it is therefore our submission that the lessee is only protected by the ‘huur gaat voor koop’ – doctrine for the first nine years and eleven months of the lease contract. It is therefore our instructions to inform the lessee that this lease expires on 31 May 2011, when he has to vacate the property and deliver it to the lessee in free and undisturbed possession.”

- [13] The first time it was raised since the agreement was concluded on 6 September 2001 (i.e. eight years ago), was after the filing of papers by both parties when the respondent applied for a postponement to enable her to amend her notice of motion.
- [14] It appears from the papers that the main lease was for a period of nine years and eleven months which period was not ensnared by the statutory provision. The only reason why clause 1 of the lease was possibly hit by the statutory provisions of the legislation, was because of the contemplated options which lengthened the initial period of the lease beyond ten years. It is important to note that the first of such options had not yet been exercised and that the three options would only come in operation after the expiry of the main or initial lease period.
- [15] The options were clearly stipulations in the contract for the exclusive benefit of the appellant who could, of his own accord, irrevocably renounce them. In view of the fact that the appellant had already irrevocably renounced the three options in his answering affidavit, such renunciation had effectively removed the illegality which contaminated the lease agreement. The wording of section 3(d) of the said Act does not assist the respondent in this regard. The purpose of the said Act is clearly to prevent circumvention of the maximum period of ten years in the manner stated in section 3(d). It follows therefore that the court a quo erred in its finding that the said agreement was not severable and therefore illegal and ab initio void.
- [16] As far as the issue of cancellation is concerned, it is the respondent's case on the papers that the appellant was in material breach of several essential terms of the contract, including the erection of structures which did not comply with the stipulations of the contract; certain people were in unlawful occupation of the premises; the premises were dirty and unhygienic, and that she was therefore entitled to cancel the contract. There exists a serious dispute of fact with regard to the respondent's allegations in this regard. I deem it necessary first to deal with the question whether the respondent had properly and legally cancelled the contract.
- [17] According to the lease agreement the lessor is entitled to cancel the agreement in the following circumstances:

“10. In die geval van wanbetaling van enige huurgeld, of by nie-nakoming van enige wesenlike voorwaarde in hierdie huurkontrak sal die verhuurder die reg hê om hierdie huurkontrak nadat hy 14 (veertien) dae skriftelike kennis aan die huurder gegee het om die gebrek te herstel, te kanselleer en besit te neem van die perseel sonder afbreek van die verweerder se reg om ‘n eis in te stel teen die huurder vir agterstallige huurgelde of vir vergoeding vir enige skade deur hom gelei weens beëindiging van die huurkontrak.”

- [18] On 19 June 2006 the respondent’s attorney wrote a letter to the appellant alleging that he had breached clause 4 (regarding a sub-letting without informing the respondent in writing of his intention to sub-lease and informing her about particulars of the sub-lessee) as well as clause 5 (not supplying approved building plans for the erection of certain structures on the property). It also states that

“If this breach is not rectified within 14 (fourteen) days from date hereof, the lessor hereby cancels the lease with immediate effect.”

It also informs the appellant that the lease expires on the 31st May 2011 due to the fact that the appellant,

“is only protected by the ‘huur gaat voor koop’ – doctrine for the first nine years and eleven months of the lease contract.”

- [19] In reply to the said allegations the appellant’s attorney stated in a letter dated 28 June 2006 that there was no sub-lease entered into by the lessee in respect of the leased property. As far as the alleged contravention of clause 5 is concerned, the appellant’s attorney stated that the necessary plans were made available to Mr. Pienaar, the respondent’s predecessor in title.

- [20] On 8 August 2006 the respondent’s attorney wrote another letter to the appellant, referring to a discussion between the parties on 20 July 2006:

“To address problems regarding the lease and reiterate that you are still in breach of contract due to the following...”

The letter concludes as follows:

“We want to be fair to you by giving you a final opportunity to rectify the problem within 7 (seven) days from the date of service hereof, failing with an interdict will be sought to prevent all construction and for the cancellation of the contract. You will further be held liable for legal costs, should it be necessary to approach a court. We hope and trust that you will respond to our letter in order to prevent legal action that could not be beneficial to anyone.”

- [21] A final letter addressed by the respondent’s attorney to the appellant is dated 28 August 2006 in which previous complaints are repeated and then concluding as follows:

“Please comply with my requests to give these matters your urgent attention immediately.”

Nothing is said about cancelling the agreement.

[22] The object of cancellation is to terminate the primary obligations of an agreement i.e. the obligations of both parties to perform. A notice of cancellation must therefore be clear and unequivocal which takes effect from the time it is communicated to the appellant.

SWART v VOSLOO 1965 (1) SA 100 (A);

KRAGGA KAMMA ESTATES CC AND ANOTHER v FLANAGAN

[1994] ZASCA 137; 1995 (2) SA 367 (A) at 375 E – F.

[23] In her founding affidavit the respondent alleges that she was more than reasonable in affording the appellant an opportunity to rectify the breach. She alleges that she acted in terms of clause 10 of the contract

“and therefore consider the contract as cancelled by the second letter of cancellation marked annexure IT5”

i.e. the letter dated 8 August 2006, although the Notice of Motion alleges that the “lease agreement ... is cancelled on 19 June 2006”.

[24] It is important to have regard to what Watermeyer AJ stated in SEGAL v MAZZUR 1920 CPD 634 at 644:

“Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind.”

See also Christie op cit at 538 – 541.

[25] Having regard to the wording of the letter dated 19 June 2006, (being the only notice affording the appellant 14 days in terms of clause 10 of the agreement to rectify an alleged breach), it is not clear whether the respondent has already made up her mind to cancel the contract. If any doubt exists it is removed by a later letter dated 28 August 2006 where the appellant is again requested to give certain matters his urgent attention, which is inconsistent with an election to cancel.

[26] It follows from the foregoing that the respondent has not communicated a clear and unequivocal notice of cancellation to the appellant. On the contrary it appears that the respondent elected not to cancel the contract and that she is bound by that election. The respondent (as applicant in the court a quo) has therefore not made out a case for the main relief claimed. As far as the alternative relief is concerned, no argument was advanced, and no relief was asked. In view of the decision reached in this regard, it is not necessary to deal with the dispute of fact regarding the respondent’s allegations of breach of contract.

[27] Accordingly the appeal succeeds with costs. The order of the court a quo is set aside and substituted with the following order:

“The application is dismissed with costs.”

S.P.B. HANCKE, J

I agree.

S. EBRAHIM, J

I agree.

E.A. MOOLLA, AJ

On behalf of the appellant: Adv. S.J. Reinders

Instructed by:

Rosendorff Reitz Barry

BLOEMFONTEIN

On behalf of the respondent: Adv. D.M. Grewar

McIntyre & Van der Post

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Prepared on 10 October 2026 · Esheria