

SOUTH AFRICA / JUDGMENT

Van Wyk and Others v Topaz Sky Trading 146 (Pty) Ltd and Others (50235/15) [2017] ZAGPPHC 1 (3 January 2017) [2017] ZAGPPHC 1

COURT

North Gauteng High Court, Pretoria

BEFORE

Maier-Frawley

CASE / FILE NUMBER

50235/15

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
Case
No. 50235/15

Reportable: YES
Of
interest to other judges: YES
Revised.
3/1/2017
MARIE-LOUISE
VAN
WYK First
Applicant
JOHANN
VAN
WYK Second
Applicant
JOHRHEMAR
ARABIAN
STUD Third
Applicant
and
TOPAZ
SKY TRADING 146 (PTY)
LTD First
Respondent

REVELINE
PROPERTIES 8
CC Second
Respondent
THE
MINISTER OF
AGRICULTURE Third
Respondent

JUDGMENT

MAIER-FRAWLEY AJ

Introduction

1. This matter concerns an agreement of sale, subject to a suspensive condition, of a portion of agricultural land, which was concluded

without the Minister of Agriculture's (the Minister) consent. The owner of a farm sold an undivided portion of farmland subject to the suspensive condition of the Minister's consent being obtained for the proposed subdivision of the land. At the time of the agreement, the farm was not divided into portions nor had the consent of the Minister for the sale as required by section 3(e) {i} of the Subdivision of Agricultural Land Act No. 70 of 1970 (the Act), been obtained.

Background

2. The first and second applicants have been farming and breeding Arabian horses for over 30 years on their family farm located in the district of Klerksdorp, being Portion 19 of the farm Reebokfontein Wes 393 Registration Division I.P., North West Province (the farm). During the course of their farming activities they established an Arabian Horse Show and Breeding Stud known as the 'Johrhemar Arabian Stud', which they conducted in partnership on the farm. In 2008 they resolved to reduce the size of the Stud, subdivide the farm, move the Stud to a lower portion of the farm and to sell the larger subdivided portion to provide for their retirement and future income.
3. On 30 April 2008, the first respondent purchased the larger undivided portion of the farm from the first applicant as registered owner for a purchase price of R20 million (the sale). At the time of the sale, no application for the subdivision of the farm had been made to the Minister, as envisaged in section 4 of the Act. In the deed of sale, the property sold was described as a certain Portion A of the proposed subdivision of Portion 19 of the farm. The sale was subject to the suspensive condition that the subdivision be approved. The sale included a sale by the Johrhemar Arabian Stud (third applicant) of its movable property on the farm including all game thereon. The sale was a joint and indivisible one in respect of immovable and movable property.

4. The subdivision of Portion 19 of the farm into 'Portion 43 (a portion of Portion 19)', being the larger portion of the farm that was purchased by the first respondent, and the remainder of Portion 19, being the smaller portion of the farm that was retained in ownership by the first applicant,

,

was allegedly approved by the local Municipality[1] according to the applicants' initial version, during November 2009, whereafter the subdivided portion purchased became known as Portion 43 (a portion of Portion 19) of the farm Reebokfontein Wes 393 Registration Division I.P., North West Province (Portion

- 43) and the subdivided portion retained became known as the Remainder of Portion 19 of the farm Reebokfontein Wes 393 Registration Division I.P., North West Province.
5. The first respondent paid a non-refundable deposit of R1 million and a further amount of R2.5 million against registration of transfer of the property into its name in accordance with the provisions of the sale agreement. The first respondent, however, failed to pay the balance of the purchase price in terms of the agreement and repudiated its remaining obligations under the sale agreement as a result of which the first applicant purported to cancel the sale agreement on 21 April 2005.

Parties

6. The first applicant is the registered owner of the Remainder of Portion 19 of the farm. The first applicant is cited both in her capacity as seller of the immovable property and as member of the third applicant.
7. The second applicant is cited in his capacity as member of the third applicant.
8. The first respondent is the purchaser under the sale agreement and the entity in whose name Portion 43 is currently registered. It is also the applicant in the counter-application.
9. The second respondent is the entity to which the first respondent granted a bond over the property purchased in order to raise funds. The second respondent is cited as an interested party and no relief is sought against it by the applicants. The second respondent has not opposed the application or the counter-application.
10. The third respondent was joined to the proceedings at the instance of the first respondent by virtue of his interest in the proceedings as the official designated in terms of the Act to consider whether a subdivision of agricultural land[2] falls to be authorised or not..

Initial relief sought in Application and Counter-Application

11. The applicants seek an order for the re-transfer of Portion 43 into the name of the first applicant consequent upon the cancellation of the sale agreement, including an order for:
 - 11.1. cancellation of mortgage bonds registered over the property;

- 11.2. signing of transfer documents by representatives of the first respondent;
- 11.3. declaring 'insofar as may be necessary' that all game and movables on the property revert back to the third applicant in ownership;
- 11.4. costs against such party(s) opposing the application jointly and severally.
12. The first respondent opposes the application and counter-applies for an order to declare the deed of sale null and void ab initio for contravening the provisions of the Subdivision of Agricultural Land Act 70 of 1970 ("the Act"), including an order for:
- 12.1. a refund by the applicants to the first respondent of the amount of R3.5 million paid by the first respondent pursuant to the deed of sale;
- 12.2. that the refund ordered be made *pari passu* with the re-transfer of Portion 43 from the first respondent to the first applicant;
- 12.3. costs against such party(s) opposing the application jointly and severally.
13. The third respondent indicated in his answering affidavit (delivered belatedly on 16 November 2016) that he does not oppose the relief claimed in the Notice of Motion or in the Counter-Application. The third respondent however contended in his written heads of argument that the relief sought in the counter-application should be granted and that the main application should be dismissed with costs.

Events preceding the hearing of the Application and Counter-Application

14. It was initially common cause[3] between the parties that the farm comprised agricultural land, which the third respondent had not excluded from the provisions of the Act by notice published in the Government Gazette of the Republic.[4] In their replying affidavits however, the applicants contended that the farm did not comprise agricultural land[5] on grounds that it had been excluded from the provisions of the Act by prior agreement between the National Department of Agriculture,

the Department of Development, Local Government and Housing, North West Province, and the local Municipality prior to the sale agreement on 30 April 2008.

The legal challenge by First and Third Respondents

15. The first and third respondents (the respondents) contended that the sale of an undivided portion of the farm as well as the subdivision of Portion 19 to form Portion 43 of the farm were invalid and void ab initio for lack of compliance with the provisions of section 3 of the Act, in that written approval for the subdivision of Portion 19 of the farm and for the sale of an undivided portion of the farm had not been obtained from the third respondent or his delegate in the department before the sale agreement was concluded and before the subdivision was registered[6]. The respondents further contended that the registration of the two subdivided portions of the farm in the Deeds office as well as the registration of the transfer of ownership in respect of Portion 43 of the farm to the first respondent by the

Registrar of Deeds was also invalid.

16. The first respondent challenged the validity of the sale on similar grounds in its answering affidavit.

17. The critical provisions of the Act are contained in sections 1,3 and 4 of the Act.

18. The definition of 'agricultural land' is contained in section 1 of the Act. Section 1 reads:

" 'agricultural land' means any land, except-

(a) land situated in the area of jurisdiction of a municipal council, city council, town council...,but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the Gazette to be agricultural land for the purposes of this Act;

(f) land which the Minister after consultation with the executive committee concerned and by notice in the Gazette excludes from the provisions of this Act;

Provided that the land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act 1993 (Act no. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such; "

19. The requirements for any subdivision of agricultural land are contained in section 3 of the Act. Section 3 reads:

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

(a) agricultural land shall not be subdivided;

...

(3) (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...;and

unless the Minister has consented in writing.

20. Section 4 of the Act determines that any application for the Minister's consent in terms of section 3 thereof shall be made by the owner of the land concerned. Section 4 reads:

"4. Application for consent of Minister, and imposition, enforcement or withdrawal of conditions by him -

(1)(a) Any application for the consent of the Minister for the purposes of section 3 shall-

(i) in the case where any act referred to in paragraphs (a) to (e) of that section is contemplated be made by the owner of the land concerned;

(2) The Minister may in his discretion refuse or-

- (a) on such conditions, including conditions as to the purpose or manner in which the land in question may be used, as he deems fit, grant such application;

..."

21. The legal challenge made by the first and third respondents holds merit. It is trite that the requirements of the Act are peremptory

and that the sale of a portion of agricultural land[7] and the subdivision of agricultural land, without Ministerial consent, contrary to the provisions of the Act, result in the sale

agreement being null and void.[8] The third respondent may not and cannot waive compliance with imperative statutory requirements and the consequences which follow

upon non-compliance, as such

requirements were laid down in the national interest.[9]

22. The purpose of the Act has been discussed in a number of decisions.[10] In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009

- (1) SA 337 (CC) at para 13, the essential purpose of the Act was 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 which would have the unwanted result of uneconomic fragmentation'.

23. In *Adlem and Another v Arlow* 2013 (3) SA 1SCA para 12, the following was stated:

'...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 s3(a) and (3)(i) or in 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)'

24. The Minister's power to control the sale of agricultural land is therefore limited to a contemplated subdivision thereof. If there is no proposed subdivision of agricultural land, the minister does not have any control of the sale of such land.

Applicants concede sale agreement void ab initio

25. After receipt of the third respondent's answering affidavit and written heads of argument and shortly before the hearing of the application, the applicants filed a supplementary practise note in which they indicated, inter alia, that 'It is now common cause that, pursuant to the Third Respondent's answering affidavit and having regard to the state of the current applicable statutory regimes and as applied by the courts, that the deed of sale was null and void ab initio. The remaining dispute is whether re-transfer of the immovable property into

the name of the First applicant should now take place *pari passu* with the return of the initial part of the purchase price of R3,5 million paid by the First Respondent or whether such repayment should stand over until finalisation of a damages action separately launched by the Applicants and in respect of which a partial judgment had already been obtained. The Third Respondent is not a party to this dispute. '

Events following applicants 'concession

Applicant 's proposed draft order

26. The applicants indicated that they would seek an order in the following terms at the hearing of the matter:

"1. The deed of sale entered into between the First Respondent and the First Applicant dated 30 April 2008 is declared null and void *ab initio*.

2. The First Respondent is ordered to take all relevant steps to see to the transfer of the property known as a portion of Portion 43 (a portion of Portion 19) of the farm Reebokfontein West 393 Registration Division IP North West Province back into the name of the First Applicant.

3. The obligation to re-transfer shall include the obligation to see to the cancellation of the existing bonds over the property and the payment of the necessary rates and taxes and transfer duties in respect of the aforesaid transfer by the First Respondent.

4. Should the directors of the First Respondent fail to sign any required or prescribed documents or affidavits or fail to take the necessary resolutions to effect the aforesaid transfer, the Sheriff of the Court of the District of Matlosana is authorised and ordered to sign all such documents.

5. The Applicants are ordered jointly and severally to refund the First Respondent the amount of R3,5 million paid pursuant to the deed of sale.

6. The payment of the amount of R3,5 million referred to above or such portion thereof which has not been extinguished by the Applicants' claim in case no. 28307/2016 is postponed *sine die* and to be paid after finalisation of that action.

7. The First Respondent is ordered to pay the Applicants' costs of the application. "

27. Pursuant to the delivery of the applicant's proposed draft order, the first and third respondents availed themselves of the opportunity to file supplementary practise notes and heads of argument.

28. In his supplementary practise note, the third respondent indicated that he had reconsidered his position in respect of the relief

claimed by applicants and by the first respondent, has decided to oppose the relief claimed by the applicants and that he intends to move for an order: condoning the late filing of his answering affidavit, practise note and heads of Argument; declaring the deed of sale invalid and void ab initio; declaring the subdivision of Portion 19 of the farm and the Remainder of Portion 19 of the farm to be invalid and that the applicants be ordered to pay the Third Respondent's costs.

29. The third respondent specified the following issues as remaining in dispute between the third respondent and the applicants:

29.1. Whether the subdivision of Portion 19 of the farm Reebokfontein Wes 393 IP to form Portion 43 of the farm Reebokfontein Wes 393 IP was invalid;

29.2. Whether the registration of the transfer of ownership of Portion 43 of the farm Reebokfontein Wes 393 IP was invalid; and

29.3. Whether the Court should order that first respondent take steps to have Portion 43 of the farm Reebokfontein Wes 393 IP transferred back to first applicant.

30. The first respondent indicated in its supplementary practise note that the following issues remain to be decided:

30.1. "Despite the concession, the Court has to be convinced that the farm constitutes 'agricultural land' for purposes of the Subdivision of Agricultural Land Act 70 of 1970 ("SALA") and that the deed of sale offends its provisions;

30.2. The issue whether the subdivision was approved by the Third Respondent in terms of the provisions of SALA;

30.3. The appropriate remedy following a finding that the deed of sale and subdivision offend against the provisions of SALA;

30.4. The appropriate process to be followed in undoing the unlawful subdivision and transfer;

30.5. The possible postponement of the First Respondent's claims for repayment and retransfer."

First and third respondents proposed draft orders

31. The first and third respondents each submitted a draft order in respect of the relief to be sought at the hearing.

32. In terms of the third respondent's proposed draft, an order is sought in the following terms:

"1. The late filing of the First Respondent's set of heads of argument is condoned;

2. The late filing of the Third Respondent's answering affidavit and heads of argument be condoned;

3. The deed of sale entered into between the First Applicant and the First Respondent, dated 20 April 2008, in respect of a Portion of Portion 19 of the Farm Reebokfontein Wes 393, Registration Division 1.P., North-West Province is hereby declared null and void ab initio and the subdivision pursuant thereto is also hereby declared invalid;
4. Prayers 2 and 3 of the First Respondent's counter-application are postponed sine die;
5. The Third Respondent is ordered to, within 60 (sixty) days hereof, make application for an order:
 - 5.1. That the invalid subdivision of Portion 19 of the Farm Reebokfontein Wes No. 393, Registration Division 1.P., North-West Province into portion 43 (a Portion of Portion 19) and the Remaining Extent of the said Farm, be set aside;
 - 5.2. That the subdivision diagram depicting Portion 43 (a Portion of Portion 19) of the Farm Reebokfontein Wes No. 393, Registration Division 1.P., North-West Province as approved by the Surveyor-General, be cancelled;
 - 5.3. That the title deed purporting to transfer ownership of Portion 43 (a Portion of Portion 19) of the Farm Reebokfontein Wes No. 393, Registration Division 1.P., North-West Province to the First respondent and all bonds registered there against, be cancelled;
 - 5.4. That the Registrar of Deeds be ordered to cancel the endorsements on the title deed of Portion 19 of the Farm Reebokfontein Wes No. 393, Registration Division 1.P., North-West Province depicting the subdivision thereof and the transfer of Portion 43 (a Portion of Portion 19) of the said Farm therefrom; and
 - 5.5. Costs.
6. The Applicants' application is dismissed with costs, such costs to include the costs of the First and Third Respondents;
7. The Applicants are ordered to pay the First Respondent's costs in the counter- application. "
33. The first respondent's proposed draft order is in similar terms, save that it seeks that the third respondent be ordered to, within 60 (sixty) days of the order, make application for an order (in slightly different phraseology):
 - "5.1. That the subdivision diagram SG 1212/2009 depicting Portion 43 (a Portion of Portion 19) of the Farm Reebokfontein Wes No. 393, Registration Division 1.P., North-West Province("the property") be cancelled;
 - 5.2. That certificate of registered title T01209310/2009 be cancelled;
 - 5.3. The deed of transfer T12094/2014 in respect of the property and all bonds registered there against be cancelled; and

5.4. That upon cancellation of deed of transfer T12094/2010, deed of transfer T13146/1979 shall be revived to the extent of such cancellation and the Registrar of Deeds shall cancel the relevant endorsement thereon evidencing the registration of the cancelled title deed."

Condonation

34. The first respondent seeks condonation for the late filing of its heads of argument. These were received by me only on Wednesday the 23'd November 2016, some 3 court days before the commencement of my opposed motion court roll on 28 November 2016.
35. The third respondent seeks condonation for the late filing of his answering affidavit as well as for the late filing of his practise note and heads of argument. The third respondent's answering affidavit was delivered to the parties on 17 November 2016. However, the answering affidavit, practise note and heads of argument were only received by me on 23 November 2016.
36. The applicants did not oppose the applications for condonation. I do not intend to set out the grounds for condonation relied on by the first and third respondents respectively, save to state that I am satisfied that each made out a proper case for condonation, both in fact and in law, for the grant of condonation.

Evaluation of the remaining triable issues

Whether the subdivision was invalid

37. The first applicant's pleaded case was premised upon the conclusion of a valid sale agreement. The applicants contended that Portion 19 of the farm had been excluded from the provisions of the Act by agreement with the department of Agriculture, therefore obviating the need for Ministerial consent to the proposed subdivision of Portion 19 of the farm[11] and the sale[12] of an undivided portion thereof to the first respondent.
38. It was apparent from the papers that:
 - 38.1. Absent the Minister authorising the exclusion of the farm from the provisions of the Act, Portion 19 of the farm comprised agricultural land[13] and as such would remain subject to the requirements of section 3 of the Act;
 - 38.2. The Minister had not by notice published in the Government Gazette, excluded the said property from the provisions of the Act[14] and
 - 38.3. Albeit that the local authority had consented to the proposed subdivision of the farm, no application as envisaged in section 4 of the Act was ever made to the Minister or his nominated delegate(s) in the Department of Agriculture for written approval of the proposed subdivision of portion 19 of the farm, nor was such consent ever furnished by the Minister or his nominated delegate prior to the sale of an undivided portion of the farm to the first respondent.

39. The applicants relied on factual allegations in support of the conclusion that the Portion 19 of the farm was excluded from the provisions of the Act as contained in:

39.1. correspondence exchanged between the local municipality[15] and various national, provincial and local government structures confirming a 'gentleman's agreement' allegedly concluded between the first applicant's land surveyor, the local municipality and the National Department of Agriculture to the effect that the property

would be excluded from the provisions of the Act; and

39.2. a letter from a representative in the department of agriculture in which he expressed the view that because the farm was included into the Town Planning Scheme of Klerksdorp, it was therefore no longer subject to the provisions of the Act.

40. The third respondent dealt comprehensively in his answering affidavit with all the facts why the sale of a portion of Portion 19 of the farm was void ab initio as well as why the subdivision of Portion 19 to form Portion 43 (a portion of Portion 19 of the farm) was invalid. In my view, the factual allegations relied on by the applicants in support of their pleaded case were comprehensively refuted by way of uncontestible evidence tendered by the third respondent in his answering affidavit.

41. The first respondent likewise dealt comprehensively with the legal position pertaining to the functions, powers and autonomy of the national, provincial and local spheres of Government, as delineated in section 40 of the Constitution[16] and in particular, the powers of municipalities as provided in section 156(1) of the Constitution.[17] The executive authority of municipalities is limited to functional areas listed in Part B of Schedules 4 and 5 of the Constitution and it is not exclusive executive authority See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* 2008(4)SA 572 (W) at paras 48 and 49.

42. At the time of the conclusion of the deed of sale on 30 April 2008 the farm was located within the municipal area of the Matlosana Local Municipality (the municipality). The applicants also sought to contend that the farm fell within the municipality's urban edge and by virtue of that fact, was excluded from the definition of 'agricultural land' in the Act, and therefore not subject to the requirement of the Minister's consent to its subdivision in terms of section 3 of the Act.

43. The first respondent submitted that the fact that a municipality delineates an urban edge as indicated on the Spatial Development

Framework of the municipality that includes 'agricultural land' (as defined in section 1 of the Act) within such delineation, does not result in agricultural land being removed from the ambit of the Act and hence the Minister's control over its subdivision.[18]

44. The submission has merit. Whilst the authority to determine an urban edge is a constitutional prerogative of a municipality (and not the Minister),[19] when regard is had to the provisions of Municipal Planning Regulations[20], particularly, Regulations 2(4) (a)-(c) and 2(4)(i) as well as the purpose of a municipality's Integrated Development Plan,[21] it is apparent that a municipality's spatial development framework and the urban edge forming part of it is intended as a statutory

planning instrument that binds a municipality when it considers planning applications, such as inter alia, applications for township development. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* [2008] ZACC 12; 2009

- (1) SA 337 (CC) the court held that the enhanced status of municipalities and the fact that municipal ordinances accorded them various powers, including inter alia, those of planning, zoning and rezoning of land, was not a ground for ascribing to the Legislature the intention that national control over 'agricultural land' through the Act was a thing of the past.
45. As indicated earlier, the applicants conceded that the deed of sale was invalid and void ab initio. This concession could only have been made on the basis that there was a failure to comply with section 3 of the Act, bearing in mind that the land was 'agricultural land' (as defined in section 1 of the Act) which had not been excluded from the provisions of the Act by notice published in the Gazette.
46. The concession was correctly made as earlier revealed. That being so, there can certainly no longer be any dispute or /is between the parties on whether or not the land constituted agricultural land (as defined in the Act) or whether or not the subdivision was invalid.
47. The underlying question of law at issue, namely, the mandatory requirements of publication in the Gazette of notice[22] of any exclusion of agricultural land from the provisions of the Act in section 1(f) of the Act and Ministerial consent in terms of section 3 of the Act to any subdivision of 'agricultural land' (as defined in section 1 of the Act), has long been established by judicial precedent[23] and requires no restatement.

Whether the registration of transfer of ownership of Portion 43 of the farm was invalid

48. The third respondent submits that the invalidity of the sale agreement carries the consequence that the registration of the two subdivided portions of Portion 19 in the Deeds Office as well as the registration of the transfer of ownership in respect of Portion 43 of the farm to the first respondent by the Registrar of Deeds are likewise invalid.
49. When regard is had to the main purpose of the Act, namely, to prevent the fragmentation of agricultural land by the subdivision thereof into uneconomic units[24] and that it was the intention of the legislature to accord the minister wide-ranging and flexible powers of regulation and control under the provisions of section 4 of the Act in order to achieve the purpose of the Act[25] it follows that the substantive validity of the sale and subdivision of the farm is a necessary precondition for the validity of consequent acts such as registration

by the Registrar of Deeds. Since the sale agreement is void ab initio, therefore all acts performed on the basis that the deed of sale was valid and all acts that followed to give effect to it, will be of no force and effect. Stated differently, if the first act is declared invalid then a second act which depends for its validity on the first act must be invalid as the legal foundation for its performance no longer exists.[26] The effect of such an order is retrospective.[27] The acts which were performed to give effect to the invalid sale agreement include the subdivision of Portion 19 to form Portion 43 (a portion of Portion 19) of the farm and the Remainder of Portion 19 of the farm, and the registration of transfer of ownership of Portion 43 of the farm from the first applicant to the first respondent.

Should Portion 43 of the farm be transferred back to the First Applicant in these proceedings?

50. As pointed out in his supplementary heads of argument, the third respondent has no objection to restitution taking place between the first applicant and the first respondent so as to put the parties back to the position which existed before the illegal and invalid subdivision of Portion 19 of the farm, and before the illegal sale of the proposed subdivision of portion 19 took place. The first and third respondents contend however that the relief cannot be ordered until a review court sets aside all illegal and invalid acts consequent upon the illegal and invalid sale.
51. The first and third respondents submit that the effect of granting the applicants' claim to transfer Portion 43 of the farm back to the first applicant in these proceedings will result in the anomaly that the court would be recognising the subdivision of Portion 19 of the farm (to become Portion 43) as valid and enforceable, well knowing that it is illegal and invalid. The court will thereby be giving legal sanction to the very situation which section 3(a) of the Act prohibits and seeks to prevent, namely, the subdivision of portion 19 of the farm as agricultural land without the written consent of the Minister. I agree for reasons that follow.
52. The subdivision of Portion 19 of the farm is invalid and unenforceable not only because the preceding sale was invalid[28] but also because the subdivision was not approved by the third respondent in writing.[29]
53. The relationship between consent by the Minister for the sale of an undivided portion of agricultural land[30] and the approval by the Minister of the subdivision of agricultural land[31] is of significance in the light of what was said in Gueue's case at par 15, namely, that '...it is by no means absurd to infer that the Legislature intended to prohibit any sale of an undivided portion of farmland, whether conditional or not, unless and until the subdivision has actually been approved by the Minister.'
54. It follows therefore that the approval of the subdivision of such land by the Minister must precede the Minister's approval of the proposed subdivision, and that approval of the proposed subdivision by the Minister is a prerequisite before the Minister approves of such sale.

55. At the risk of repetition, the sale agreement is void ab initio for two reasons, the first being because the Minister did not approve of the proposed subdivision before the sale and the second

being because the Minister did not approve of the sale of the proposed subdivision.

56. Both first and third respondents challenged the enforceability and validity of the sale agreement on the basis that the sale was for an undivided portion of agricultural land which was concluded without the written consent of the Minister as prescribed by section 3(e)(i) of the Act. Both respondents also challenged the validity of the subdivision of portion 19 of the farm to form portion 43 of the farm on the basis that it was not approved in writing by the Minister as prescribed by section 3(a) of the Act.
57. It was therefore incumbent upon the first applicant to prove that the sale agreement, the subdivision of Portion 19 of the farm to form Portion 43 of the farm and the registration of transfer of ownership of Portion 43 of the farm to the first respondent were all valid, legal and enforceable in order to succeed with her claim for the transfer back to her of ownership of Portion 43 of the farm. So far from establishing the aforesaid prerequisites for the relief sought by the applicants, they not only conceded that the sale was void ab initio, but they also failed to provide proof of the validity and enforceability of the subdivision of portion 19 and the registration of transfer of Portion 43 to the first respondent thereafter[32].
58. The applicants had to show that they complied with the provisions of section 3(a) of the Act in respect of the subdivision, that the subdivision was valid and that the registration of transfer of ownership of Portion 43 was valid and enforceable.[33] The applicants failed to do so. The application was therefore doomed to failure. Since the agreement of sale was void ab initio, it was not capable of being breached and cancelled, being the whole cause of action relied on by the applicants. The application falls to be dismissed for this reason alone.

Further reasons why the Applicants' Application ought to be dismissed

59. Counsel for the first respondent correctly submitted that illegal agreements are void in the sense that they are not contracts and do not create obligations.[34] That submission is correct. See *Kudu Granite Operations (Pty.) Ltd v. Caterna Ltd* 2003(5) SA 193 (SCA) at 202 E-F (paragraph [16]). In that case *Navsa, J.A. and Heher, A.J.A.*, as he then was, said at 201 D-J (paragraph [15]):

"There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in *Baker v. Probert* 1985(3) SA 429 {A}, a judgment relied on by the Court a quo) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a

distinct contractual remedy: Baker at 439A, and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As van den Heever J. said in *Pucilowski v. Johnston's Executors* 1946 WLD 1at 6:

'The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab i initio unenforceable or has subsequently become inoperative (causa non secuta: causa finita).'

"

60. The first applicant persists in seeking retransfer of Portion 43 of the property into her name. The first applicant claimed retransfer on the basis of her alleged cancellation of the agreement as a result of first respondent's repudiation thereof. Since breach and repudiation of a null and void contract is not possible, the first applicant failed to establish any cause of action entitling her to retransfer of the property. To paraphrase what was stated by Coetzee J in *Marais v Standard Credit Corporation Limited* 2002 (4) SA 892 (W), without a cause of action, there is nothing to sustain a judgment.
61. In the applicants' heads of argument, they submit that prayers 2 and 3 of the first respondent's counter-application ought to be postponed pending the finalisation of the applicants' damages claim already instituted, or to be heard simultaneously therewith. In their proposed draft order they seek an order compelling the first applicant to make repayment of the portion of the purchase price paid by the first respondent, but seek that such repayment be postponed sine die pending the finalisation of the damages claim under case no. 28307/2016. However, that claim is premised upon damages resulting from the first respondent's alleged repudiation of a valid deed of sale and not restitution that follows upon a deed of sale which was null and void ab initio.
62. For all the reasons given, the applicants are therefore not entitled to the relief sought in prayers 2 to 6 of their draft order.

Submissions

in regard to the appropriate remedy and process to be followed in undoing the unlawful subdivision and transfer

63. The first and third respondents submit in their supplementary heads of argument that this court is empowered and obliged to declare the subdivision of Portion 19 of the farm invalid since the subdivision was done without the Minister's written consent in terms of section 3(a) of the Act.

64. As I have found that the subdivision is invalid, I have no discretion to withhold the declaration of invalidity sought. This is so because section 172(1)(a) of the Constitution compels every court to declare invalid any conduct that is inconsistent with the Constitution and the principle of legality.[35]
65. Both respondents submit that after the court makes a declaration of invalidity as to the sale and subdivision of Portion 19 of the farm, a review application in terms of either PAJA[36] or a rule of law review[37] will have to be brought to regulate the consequences of the invalid subdivision in a just and equitable manner.
66. A transfer of a portion of land and part payment therefore, have taken place without a lawful causa. I am not entirely convinced of the suitability of review proceedings. That which would have to be undone is simply the registration of transfer and the part-payment of the R3.5 million pursuant to a void causa.
67. It is clear that all necessary or interested parties are not before the court in these proceedings[38]. The Registrar of Deeds ought to have been joined as a party as he will have to implement any court order regulating the consequences of the invalidity.

Postponement of prayers 2 and 3 of the First Respondent's Counter-Application

68. In my view, any claim based on enrichment[39] under one or other *condictio* and which the applicants may enjoy against the first respondent in consequence of the invalidity of the sale agreement or any claim for damages caused by the decimation of pristine bushveld and removal of game during the period that the first respondent had possession of Portion 43 of the farm, ought appropriately to be determined in separate proceedings. Because of the abrupt and last minute

turn-around by the applicants, all the pertinent issues have not been canvassed in these proceedings. It is therefore apposite to postpone the hearing of prayers 2 and 3 of the first respondent's counter-application.

For all the reasons given, I conclude that the application must fail and the first respondents' counter-application must succeed, in part.

Costs

69. In *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300 D- E, Van Rhyn J stated the following:

"Where a litigant withdraws an action or in effect withdraws it, very sound reasons {baie gegronde redes) must exist why o defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiffs or applicant's institution of proceedings. "

70. The court retains an overall discretion as to the award of costs. As stated by Holmes JA in *Ward v Sulzer* 1973 (3) SA 701 A at 706G: 'In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides.' In *Mcpherson v Teuwen and Another*, [40] Kgomo J held:

" [53] It is so that when awarding costs, a court has a discretion which it must exercise judiciously and after a due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.

[54] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court. No hard and fast rules have been set for compliance and conformity by the court unless there are special circumstances. See: *Fripp v Gibbon and Co* 1913 AD 354 at 364."

71. Counsel for the applicants urged me to make no order as to costs, thereby effectively compelling the parties to each pay their own costs. He contended that it would be inimical to order the applicants to pay the first and third respondents costs in that the 'poor applicants' have lost a substantial asset, have expended a lot of money in seeking to exact payment by the first respondent or to get a portion of their farm back and for a long time, the first respondent performed in terms of the sale agreement and also opposed prior proceedings between the parties on the basis of a valid sale.

72. Counsel for the first respondent submitted that the conduct of the applicants has been inexcusable. This is because the correspondence

attached to the third respondent's answering affidavit indicates that the second applicant has been aware (which knowledge is to be attributed to the first and third applicants) since 19 October 2012 of the fact that the Minister's consent was required, as the farm constituted 'agricultural land' for purposes of the Act. Yet, despite such knowledge, the applicants mounted various applications to court for specific performance of a deed of sale which had been void ab initio.

73. Counsel for the third respondent submitted that the applicants have at all relevant times been fully aware that Portion 19 of the farm was subject to the provisions of the Act, that the Minister had not excluded Portion 19 of the farm by notice in the Gazette, nor had he approved of the sale or subdivision in writing. The third respondent was obliged to challenge the validity of the sale due to non-compliance with section 3 of the Act in the national and public interest, having regard to the essential purpose of the Act. What compounded matters, is that the applicants persisted with their relief even after having conceded that the sale was void ab initio.

74. The applicants contended that vast sections of pristine bushveld on Portion 43 of the farm (the property) have become decimated by the conduct of the first respondent, who also caused the unlawful removal of game from the farm and inter alia, failed to maintain the property, the boreholes, electrical reticulation and the fences and gates. Even after the first respondent raised the issue of voidness of the sale agreement in prior proceedings[41] (in which the applicants sought to enforce payment of the balance of the purchase price in terms of the sale agreement), the directors of the first respondent continued acting and dealing with Portion 43, relying on the validity of the agreement, by inter alia, making applications for the establishment of a township thereon and marketing of the Nyala Eco Estate (which the proposed township would be called).
75. I am not persuaded that good grounds or sound reasons have been shown to exist such as would constrain me to exercise my discretion against any award of costs. Inter alia, because the applicants persisted in seeking relief on a causa which was not established, I intend to make an appropriate award of costs, having regard to all the peculiar circumstances, however taking the conduct of the first and third respondents into account.
76. The court would ordinarily order costs to follow the result. In the circumstances of the present matter, the first respondent has obtained some limited success. From a costs perspective, the court can nevertheless deprive it of the benefit of costs for substantial reasons such as unconscionable conduct. As regards the third respondent, the same can be done by virtue of the manner in which that particular party conducted itself in the proceedings.
77. As regards the conduct of the first respondent: The applicants' allegations of the first respondent having breached and repudiated

the agreement are but faintly denied, but what is indisputable, is that the first respondent retained the benefit of its ostensible

title in respect of the property, despite its own concession as to the invalidity of the causa for the transfer. The first respondent furthermore brought about substantial damage to the property during the course of its tenure which, at the risk of sounding cyclic, was a tenure that the first respondent itself concedes is unsupported by any legal causa.

78. The first respondent seeks a postponement of prayers 2 and 3 of its counter-application. All facts relevant to a determination of those prayers have not been properly canvassed in these proceedings and in any event, all necessary and interested parties were not joined to the present proceedings so as to entitle the first respondent to the eventual adjudication of prayers 2 and 3 of its counter-application. The applicants should not have to bear the wasted costs associated by any such postponement. Furthermore, the first respondent relied on one composite affidavit, both in opposition to the application and in support of the counter-application.

79. As regards the third respondent: The third respondent must bear responsibility for the conduct of one of its officials in the

Department of Agriculture Forestry and Fisheries, a delegate of the Minister: Land use and Soil Management, whose conduct had a material bearing, on the misconception of the applicants, in imbuing the erroneous belief that the land did not need to be subdivided on the authority of the Minister. What is more, the third respondent initially took the view not to oppose the relief sought in the application or counter-application but at the twelfth hour, resolved to change its mind by supporting the amended relief sought by the third respondent and seeking its own relief. In these circumstances, it would be apposite for each party to pay his/her/its own costs

80. The parties in the application and counter-application accumulated a record of some 446 pages in these proceedings, excluding heads of argument and supplementary heads of argument. The third respondent's answering affidavit and the first and third respondent's respective heads of argument (including supplementary heads of argument) arrived at my doorstep shortly before the hearing and in piecemeal fashion, contrary to the provisions of the Practise Manual of the North Gauteng Division, placing additional pressure upon an otherwise very loaded and very busy opposed motion court roll for the allocated week. Yet the third respondent was joined as a party to the proceedings already on 15 July 2016 at the instance of the first respondent. The court order joining him as a party was served on third respondent on 3 August 2016.

81. In *Licinio and Others v Imvula Quality Protection (Pty) Ltd* (2009/15228) [2015] ZAGPJHC 82 (20 March 2015) at para 21 Makume J pointed out that

'...The rules and directives contained in the Practice Manual are there to assist judges to prepare for and hear matters expeditiously. The rules and directives were introduced to assist the judge who is to hear matters to be able to properly prepare for the hearing...' In *Rossiter & others v Nedbank Ltd* {96/2014} ZASCA 196 (1 December 2015) at para 15, the Supreme Court of Appeal agreed that '...a practice manual or directive duly promulgated by the Judge President of a division of the High Court, has the same force and effect as the Uniform rules - *National Pride Trading 452 v Media 24 Ltd* 2010 (6) SA 587 (ECP) para 31..'

82. In these circumstances, the costs of the third respondent's answering affidavit and the costs of the heads of argument of the first and third applicants ought not to be recoverable from the applicants.

83. In the result, I grant the following order:

ORDER

1. The applicants' application is dismissed with costs, such costs to include the costs of the first and third respondents but excluding the costs of the third respondent's answering affidavit and the heads of argument, including the supplementary heads of argument of the first and third respondents;

2. On the first respondent's counter-application, an order is granted that:

2.1. The late filing of the First Respondent's set of heads of argument is condoned;

2.2. The late filing of the Third Respondent's answering affidavit and heads of argument is condoned;

2.3. The deed of sale entered into between the First Applicant and the First Respondent, dated 20 April 2008, in respect of a Portion of Portion 19 of the Farm Reebokfontein Wes 393, Registration Division 1.P., North-West Province is hereby declared null and void ab initio and the subdivision pursuant thereto is also hereby declared invalid;

2.4. Prayers 2 and 3 of the First Respondent's counter-application are postponed sine dies;

2.5. The Third Respondent is ordered, within 60 (sixty) days hereof, to make application for an order:

(i) That the invalid subdivision of Portion 19 of the Farm Reebokfontein Wes No. 393, Registration Division 1.P., North- west Province into portion 43 (a Portion of Portion 19} and the Remaining Extent of the said Farm, be set aside;

(ii) That the subdivision diagram depicting Portion 43 (a Portion of Portion 19} of the Farm Reebokfontein Wes No. 393, Registration

Division 1.P., North-West Province as approved by the Surveyor-General, be cancelled;

(iii) That the title deed purporting to transfer ownership of Portion 43 (a Portion of Portion 19) of the Farm Reebokfontein Wes No. 393, Registration Division 1.P., North-West Province to the First respondent and all bonds registered there against, be cancelled;

(iv) That the Registrar of Deeds be ordered to cancel the endorsements on the title deed of Portion 19 of the Farm Reebokfontein Wes No. 393, Registration Division 1.P., North- west Province depicting the subdivision thereof and the transfer of Portion 43 (a Portion of Portion 19) of the said Farm therefrom; and

2.6. Costs.

ACTING JUDGE OF THE HIGH COURT

Date of hearing:

1 December 2016

Date of judgment:

30 December 2016

Judgment

delivered

3 January 2017

Counsel for the Applicants:

Adv N. Davis SC 082 653 2010

Attorneys for the Applicants:

Jassat Mitchell Inc

c/o Serfontein Viljoen & Swart (012) 362 2556

Counsel for the First Respondent : Adv. A. Liversage 082 490 1549

Attorneys for the First Respondent: Prinsloo Bekker Attorneys (Mr A. Bekker)

(012) 348 3906

Counsel for Third Respondent Adv. LB Van Wyk SC 082 774 7017

Attorneys for Third Respondent: State Attorney (Mr SL Botes) (012) 309 1578

[1] At the time of the conclusion of the deed of sale on 30 April 2008 the farm was located within the municipal area of the Matlosana

Local Municipality

[2] being 'agricultural land' as defined in section 1 of the Act

[3] This is clear from inter alia, the contents of para 12 of the founding affidavit read with para 40.3 of the third respondent's

answering affidavit and acknowledged in paragraph 14 of the third respondent's written heads of argument dated 21 November 2016.

[4] Section 1(f) of the Act read together with section 2 of the Interpretation Act 33 of 1957.

[5] As defined in section 1 of the Act

[6] In terms of paragraph (f) of the definition of 'agricultural land' in section 1 of the Act, such land remains agricultural land until the Minister has excluded the land from the provisions of the Act by notice in the Gazette. In terms of section 3(a) and (e)(i) of the Act, agricultural land may not be subdivided and no portion of agricultural land, whether surveyed or not, may be sold unless the Minister has consented thereto in writing. In terms of section 4(2) of the Act, the Minister may in his discretion refuse or grant any such consent on any conditions as he deems fit

- [7] That is, land which has not been exempted from the provisions of the Act by notice of the Minister as published in the Gazette
- [8] See: *Geue and Another v Van Der Lith and Another* [2003] ZASCA 118; 2004 (3) SA 333 (SCA) at para 19; *Four Arrows Investments 68 v Abigail Construction (2047012014)* [2015] ZASCA 121 (17 September 2015); *Wary Holdings (Pty) Ltd v Stalwo (Ply) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC) at paras [6] read with para [94]
- [9] See: *Portwig v Deputation Street Inv (Pty) Ltd* 1985 (1) SA 83 (D) at 90 A-F; *SA Co-op Citrus Exchange Ltd v D-G: Trade & Industry*
- [1997] ZASCA 6; 1997 (3) SA 236 (SCA) at p244F and 2450
- [10] See: *Adlem and Another v Arfow* 2013 (3) SA 1 SCA para 9 and the authorities there cited; *Blue Crane Country Estate (Ply) Ltd v National Minister of Agricultural, Forestry and Fisheries and Others*
- [2015] ZAGPPHC 149 (23 March 2015)
- [11] As prescribed by section 3 (a) of the Act
- [12] As prescribed by section 3 (e)(i) of the Act
- [13] In terms of the definition of 'agricultural land' in section 1 of the Act, all land is agricultural land unless such land falls under one of the exclusions which are listed in sub-paragraphs (a) to (f) thereof. The first applicant expressly acknowledged in paragraph 12 of her founding affidavit that the farm 'is still agricultural land'. Lest there be any misconception about this concession, the fact that the first applicant, as owner, on 1 November 2005 lodged a formal application for the exclusion Of the property from the provisions of the Act, indicates unequivocally that she knew that portion 19 of the farm comprised agricultural land and that in the absence of notice by the Minister in the Gazette, the provisions of section 3(a) and (e)(i) of the Act would be applicable to the sale of a portion of the farm or any subdivision thereof. Surprisingly, the said application for exclusion has to date hereof, not been determined.
- [14] As prescribed in section 1(f) of the Act
- [15] At the time of the conclusion of the deed of sale on 30 April 2008 the farm was located within the municipal area of the Matlosana
- Local Municipality (Municipality)
- [16] The Constitution of the Republic of south Africa 1996, (Act No. 108 of 1996)
- [17] Section 156(1) of the Constitution affords municipalities' original constitutional powers. It reads: "(1) A municipality has executive authority in respect of, and has the right to administer-

- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
- (b) any other matter assigned to it by national or provincial legislation" Part B of schedule 4 includes 'municipal planning' as a functional area preserved for municipalities, which includes township establishment, rezoning, land use and like functions. Part A of Schedule 4 preserves the functional area of 'agriculture' as a concurrent national and provincial legislative competence, not as a municipal competence. More significantly, the administration of the Sub-Division of Agricultural Land Act 70 of 1970 has never been assigned to municipalities. Its administration remains with the Minister who may delegate certain functions to officials within the National Department of Agriculture, Forestry and Fisheries. The sub-division of 'agricultural lane' is specifically excluded from a municipality's powers by virtue of the provisions of section 2(1)(d) of the Division of Land Ordinance 20 of 1986

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[18] In terms of section 25 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), every municipality is required to adopt an Integrated Development Plan (IDP). In terms of section 35(1)(a) of the Systems Act, the IDP 'binds a municipality in the exercise of its executive authority, except to the extent of any inconsistency between the municipality's integrated development plan and national or provincial legislation, in which case such legislation prevails.' (own emphasis) In terms of section 26(d) of the Systems Act, 'a spatial development framework' must include the provision of basic guidelines for a land use, management system for the municipality.' The spatial development framework (SDF) forms part of the municipality's IDP. The SDF and the urban edge forming part of it, is a statutory planning instrument that binds a municipality when it considers planning applications such as applications for township development.

- [19] Dee: Blue Crane Country Estate (Pty) Ltd v National Minister of Agricultural, Forestry and Fisheries and Others 12015] ZAGPPHC 149 (23 March 2015)
- [20] 'The Local Government: Municipal Planning and Performance Administration and Management Regulations' published in GNR 796 of 24 August 2001
- [21] in sections 25, 35(1)(a) and (b) and section 26(d) of the Systems Act
- [22] In Section 1(f) of the Act
- [23] In which regard, see authorities quoted in fn 4 above
- [24] Ibid Geue at paras (5) and [15]
- [25] Ibid Wary Holdings at para [13]
- [26] See: Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others 2008 (4) SA 43 (SCA) at para [13]
- [27] See: Escom Holdings Ltd v New reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA) at para [9]
- [28] As a result of non-compliance with section 3(e)(i) of the Act
- [29] As a result of non-compliance with section 3(a) of the Act
- [30] which is subject to the provisions of the Act in terms of section 3(e)(i)
- [31] In terms of section 3(a) of the Act
- [32] The applicants had to show that they complied with the provisions of section 3(a) of the Act in respect of the subdivision
- [33] See too: South African Local Authorities Pension Fund v Msunduzi Municipality 2016 (4) SA 403 (SCA) at paras 33-35, 37, 39 and 40.
- [34] See: Contract General Principles, Van Huyssteen et al, Juta, 51 Edition, p187 para7.1; LAWSA vol 9 'Contract', para 334 et seq
- [35] See: MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye & Lazer Institution 2014 (3) SA 481 (CC) at para [46]
- [36] Promotion of Administrative Justice Act 3 of 2000
- [37] Constitutional review in terms of section 172(1)(b) of the Constitution
- [38] Other affected or interested parties may include the Registrar of Deeds, the local Municipality and all bondholders over the property.
- [39] It is settled law that where there is no contract, the appropriate remedy is to be found in unjust enrichment. See: Kudu Granite operations (Pty) Ltd v Catema Ltd 2003 (5) SA 193 (SCA at 201 E-F

[40] (2009/27002) [2012] ZAGPJHC 18 (22 February 2012).

[41] instituted under case no. 34758/2012

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