IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – PORT ELIZABETH

Case No.: 821/2017

In the matter between:

GERALD JACK FRIEDMAN N.O.	First Applicant
BEVERLY GAY FRIEDMAN N.O.	Second Applicant

In their capacity as Trustee for the time being of

THE RIETVALLEI TRUST, IT 484/2007

And

JOYCE D MOOLMAN	Respondent

JUDGMENT

<u>REVELAS J</u>:

[1] On 2 December 2016 the first applicant, in his capacity as trustee of the trust and the respondent, in her personal capacity, signed a document headed "OOREENKOMS". This document was the product of a proposal, an oral agreement, discussions and pursuant e-mail correspondence and telephone conversations between the applicant and Mr Heinrich Nel of the attorneys firm Nel Mentz Incorporated of Humansdorp. In terms of the agreement, the respondent sold a portion of her farm to the trust (280 hectares) to the trust. In this application the applicant seeks the following relief:

"1. Declaring that the Agreement between the Applicants and Respondent, annexure GJF4 to the founding affidavit of the First Applicant ("the Agreement") is of no force and effect;

2. <u>alternatively</u>, confirming the cancellation of the Agreement.

3. that the respondent be directed to pay the applicants, in their aforesaid capacities, the sum of R1 325 000.00 (the purchase price), together with interest thereon at the legal rate a *tempore morae*;

4. that the respondent be directed to pay the costs of this application."

[2] The applicant contends that the agreement is null and void for failure to comply with the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981; alternatively, for want of compliance with the provisions of section 3 of the Subdivision of Agricultural land Act, 70 of 1970; alternatively, that the agreement was consensually cancelled by the parties; alternatively, that the agreement is, in any event, at an end, by virtue of the respondent's repudiation thereof, which repudiation the trust has accepted, alternatively, accepts as a result of which the trust cancels the agreement.

[3] The applicant contends that in all the premises contemplated in law, the respondent is liable to repay the trust the initial purchase price of R1 175 000.00 which amount was later amended to R1 325 000.00. The applicant filed a supplementary affidavit wherein he explained that upon reconciliation of his bank statement, he realized that he had made a mistake in regards to the amount that he had paid the respondent. He alleges that he paid an additional amount of R150 000.00 in part redemption of the purchase price payment. In this regard the applicant relied on an e-mail dated 7 December 2016 sent to him by Hugo Muller, respondents grandson.

[4] The said payment of R1 325 000.00 made to the respondent is made up as follows:

(1) R300 000.00 – 28 November 2016

(2) R200 000.00 – 1 December 2016

(3) R300 000.00 – 6 December 2016

(4) R265 279.63 – 7 December 2016

(5) R109 720.37 – 9 December 2016

(6) R150 000.00 – R20 December 2016.

<u>Background</u>:

[5] The two applicants in this matter are trustees of Rietvallei Trust ("the trust"). Since the first applicant was the predominant role player in the events set out herein, I shall refer to him as "the applicant".

[6] The trust owns a farm adjacent to tracts of land respectively owned by the respondent (Mrs Joyce Moolman) and her daughter (Hannelie Muller). The portion west of a gravel road belongs to respondent. The portion east of the gravel road is owned by Hannelie Muller (the correct identification of their respective properties occurred later). The applicant and the Muller family had a long term relationship pertaining to farming matters. Mr Adriaan Muller, the husband of Hannelie Muller, had an arrangement with the applicant in terms whereof Adriaan Muller would manage 200 sheep owned by the applicant for their mutual benefit. When the marriage relationship

between Hannelie Muller and her husband broke down during 2016 and Adriaan Muller left the farm in October 2016, their son, Hugo Muller, thereafter managed the applicant's sheep on their joint behalf. Mr Nel also represented Hannelie Muller in her divorce proceedings and was familiar with the financial affairs of the respondent and her family.

[7] According to the applicant, Adriaan did not farm profitably and by the time he left and, the Mullers were experiencing financial difficulties. The Mullers and the respondent needed to generate capital and the possible sale of a portion of Uitvlucht (adjacent to the applicant's eastern boundary) was discussed with the applicant Hugo Muller approached the applicant. This portion of Uitvlucht was believed by all concerned to be owned by the respondent. Her grandson Hugo Muller was in charge of the farming operations thereon. According to the applicant, Hugo confirmed to him, that he was authorized by the respondent to conclude an agreement of sale with the applicant, with the objective of the trust purchasing a portion of the respondent's farm (approximately 280 hectares) at the asking price of R5 000.00. The respondent disputes that she gave such authority to her grandson or any other member of her family.

[8] For purposes of identification of the land to be sold, Hugo Muller and the applicant agreed that the area intended for sale should be

measured. To this end Hugo Muller and the applicant's farm manager, Ricardo Byers walked around the boundaries and used Hugo Muller's measuring device to take measurements. The applicant and Hugo Muller agreed that the measurements would later be verified by Mr S.T. Maarschalk, a land surveyor. Hugo Muller later reported it was 235 hectares. The applicant wanted to be sure.

[9] For the sale to have any legal consequences, the agreement had to be reduced to writing. The applicant was also desirous to commence payment. The Mullers conveyed to the applicant that the respondent was willing to conclude the agreement.

[10] According to the applicant, the terms of their oral agreement were:

(1) The trust would buy the land (later identified by Hugo Muller and Ricardo Beyers) from the respondent at a purchase price of R5 000.00 per hectare.

(2) If the agreement of sale should fail for same reason (related to the relevant legislation) the land in question will be rented by the trust for nine years and eleven months at a renal equal to five percent of the purchase price, per annum.

(3) Should the agreement fail through no fault of the trust, any monies paid by the trust in respect of the proposed sale, would be treated as a loan to the respondent.

[11] The agreement was translated into Afrikaans to accommodate the respondent who is Afrikaans speaking. The salient terms of the agreement were the following:

[12] Clause 3 of the agreement stipulates that the trust agreed to purchase a portion of land, approximately 280 hectares in size, owned by the Muller family.

[13] Clause 4 records that the applicant and Hugo Muller, the grandson of the respondent, walked around the boundaries of the land in question for purposes of identification of the land and noted that a land surveyor (Mr T.S. Maarschalk) would measure the land. Later Hugo Muller advised that the land was 235 hectares in size.

[14] Clause 5 sets the purchase price at R5 000.00 per hectare

[15] Clause 7 notes that pending compliance with the provisions of the subdivision of Agricultural Land Act, 70 of 1970, the trust would lend and advance certain sums of money to the respondent (referred to as “Mev Moolman”) who, in turn would on-lend those sums of

money to her grandson Hugo Muller, or the payments would be regarded as payment towards the purchase price ("afbetaling op die koopprys").

[16] Clause 9 makes provision for the eventuality that the transfer of the property is not effected due to no fault on the part of the trust or the applicant. It provides that the sums of money already paid by the applicant, be repaid to her, together with 10% interest, which is then set off monthly against the rental, and on no other basis ("en op geen ander basis nie"). This clause previously provided differently and was amended by Mr Nel who did not alert the applicant to the amendment.

[17] Clause 13 records that the applicant had already paid R500 000.00 towards the purchase price.

[18] Clause 14, which must be read in conjunction with clause 7 of the agreement, provides that the balance of the purchase price, to be advanced as a loan to the respondent, would be paid on her confirmation of acceptance of the terms of the agreement by virtue of her signature being appended thereto. The applicant avers that this clause does not reflect the agreement between them.

[19] The property had yet to be subdivided at that stage, in accordance with the measurements of the land surveyor, and the

Minister of Agriculture and Land Affairs had to give the necessary consent to subdivision. Hence the provisions and the conditions contained in clause 7.

[20] The respondent signed the agreement thereby confirming as provided for in clause 13 of the agreement, that by the time she appended her signature to the agreement, that the applicant had already paid R500 000.00 over to Hugo Muller. The balance of the purchase price (R650 000.00 would be paid on acceptance of terms of the agreement, by signing it. The payment of the R500 000.00 was acknowledged and confirmed by Hugo Muller in and e-mail addressed to the applicant on 5 December 2016. He requested the balance of R650 000.00 to be paid. The applicant first wanted a copy of the signed agreement which he received on 8 December 2016, and thereafter he paid the outstanding balance of R650 000.00.

[21] A dispute about the 200 sheep (referred to above) ensued between the applicant and Hugo Muller in January 2017. According to the applicant he demanded the return of the sheep and discovered that some sheep were not form his herd. Hugo Muller denied this but nonetheless refunded the applicant for the sheep to preserve their good relationship.

[22] In the interim, the services of the land surveyor Mr S.T. Maarschalk were engaged. Mr Maarschalk delivered a sketchplan of the portion of land to be sold in terms of the agreement and its measured area was 112,9026 hectares in extent. It was not 280 hectares as Hugo Muller had reported after his excursion. The land intended for sale was portions 3/293 of the farm Rietvallei and portions 5/194 and 7/194 of the farm Uitvlucht. As it turned out the latter two portions were owned by Hannelie Muller, and not the respondent. It was unclear what portion of land was sold, who the owner was, nor how big or small was it.

[23] As matters then stood, the property referred to in the agreement was not identified properly in respect of its situation, it extent or its ownership. Mr Nel subsequently advised the applicant that as a result of the incident in the sheep “only the rental alternative” provided for in the agreement “remains” an option. The signed agreement of sale of land was thus repudiated by the respondent and that was accepted by the applicant. All parties agreed that the agreement was null and void, with this difference: The respondent’s stance was that the sale of land was void but not the lease agreement in respect of that land. The lease agreement which eventuated from a failed sale of the land in question, was alive, according to the respondent.

[24] The applicant alleges that he was unaware that Mr Nel had effected amendments to the agreement, and in particular amendments to clauses 7, 9 and 12. Clause 9 according to him incorporated a new provision that there would be no monies repayable and whatever monies were due, would be offset by rental. The applicant reiterated that the agreement between himself and the respondent was that if the respondent transaction failed, the respondent would refund the applicant. Mr Nel advised the applicant that the respondent did not have the money to refund him.

[25] As the applicant pointed out, the set off arrangement in clause 9 would, on a mathematical basis, not be feasible since, on the one hand, the respondent had an interest obligation of ten percent annually on the purchase price, whilst on the other hand she would be receiving interest of only five percent per annum on the purchase price, i.e. the capital sum as and for rental.

[26] Between the applicant and Mr Nel no solution could be found. The agreement had failed. No further agreements could be reached and the respondent refused to repay the applicant. Accordingly the applicant launched the present application.

[27] The respondent opposed the relief sought by the applicant on several grounds. Firstly she denies being aware of any negotiations

between the applicant and Hugo Muller and stressed that she had no personal involvement in any negotiations regarding "an agreement which was allegedly entered between him [the applicant] and my attorney Mr Hein Nel."

[28] The respondent alleged that a loan was not made to her, but to her grandson Hugo Muller. She reiterated that she was never in a position to repay such a large loan. She said that Mr Hein Nel was given a mandate to protect her interests and in this regard, both Mr Nel and the respondent rely on the contents of clause 9. As stated before, the respondent denies that she ever authorized any of her family members to negotiate or act on her behalf.

[29] Secondly, the respondent accused the applicant of being a credit provider, who provided "reckless credit", in that he never required her to provide him with the necessary information as required by the National Credit Act, 34 of 2005. None of the parties regarded the applicant or the trust as a credit provider and the agreement is in any event not enforceable. Therefore this second point has no merit.

[30] The respondent also averred that a 20 year lease would have eventuated if the sale did not go through. Such a lease is prohibited by section 3(d) of the Subdivision of Agricultural Land Act, Act 71 of 1970.

[31] The respondent also accuses the applicant of misrepresenting to Mr Nel and herself that the portion of the farm he intended to purchase was owned by her. She states that it was only much later when the she prepared her answering affidavit that her attorney, Mr Nel, noticed that only one portion of the three portions intended for sale, was actually owned by her. In my view, the applicant cannot be blamed for this clear oversight on the part of the respondent and her family. They wanted to sell land to the applicant and should have ascertained before approaching him, what portion they wanted to sell.

[32] The respondent accused the applicant of *mala fides*, stating that he knew, when he signed the agreement that it did not comply with section 2(1) of the Alienation of Land Act in that the land being sold was not identified. The applicant may have conducted his business in this instance in a rather unorthodox way. In fact, this case is a text book example of how not to go about buying land. However, the applicant never intended to mislead anyone. The whole body of evidence in this matter suggests that the applicant had the interests of the respondent and her family at heart. Hugo Muller called him "Oom". The idea to sell the farm emanated from the Muller family's financial predicaments and the applicant immediately responded to

Hugo Muller's approach to him by starting putting a proposal in writing. He was also clearly sympathetic to their plight.

[33] Lastly the respondent submitted that the applicant's assertion that Hugo Muller and her daughter acted as her agents, is so fraught with factual disputes that the trust ought to have issued summons instead of seeking relief in motion court proceedings. The approach I choose to adopt in this matter renders oral evidence unnecessary.

Conclusion:

[34] The respondent's opposition is essentially two-fold. Even though contends the agreement of sale was null and void, she added that, a loan agreement was entered into between the applicant and her grandson, and a lease between herself and applicant.

[35] The respondent cannot rely on clause 9 of the agreement or any ancillary agreements contained therein. The entire agreement is void. The respondent cannot escape the consequences thereof by pleading a loan to her grandson. The respondent signed the agreement. Even if clause 9 was not null and void, that would not assist the respondent. The land referred to in the deed of sale was area of 280 hectares. Subsequent land surveying measurements demonstrated that it was in effect half the size. The respondent could not tender performance of

the so-called lease agreement as an alternative to the agreement of sale by offering the property to the applicant to lease. The land tendered (approximately 112 hectares) was not the 280 hectares described in the agreement. Neither party could therefore perform their obligations under such a lease.

[36] The agreement, in its signed form, whether or not the applicant agreed to the amendment of certain paragraphs therein, is of no force and effect, because it does not comply with the mandatory provisions of section 2(1) of the Alienation of Land Act. This section requires land being sold in terms of an agreement of sale, to be identified or described. If an agreement is of no force and effect, it is void *ab initio*[1]. This case is a clear illustration of why the formal requirements for a valid deed of sale in section 2(1) are important. In *Philmatt (Pty) Ltd v Mosselbank Development CC* 1996(2) SA 15(A) at 25 C-D, Grosskopf JA held as follows:

"The general object of s 2(i) of the Act [the Alienation of Land Act, 68 of 1981], and similar enactments which preceded it, has been considered in a number of cases and it is generally accepted that the policy underlying this legislation is, to prevent disputes, uncertainties and possible malpractices in

[1] Wilken v Kohler 1913 AD 135 at 143.

respect of transactions, which as a rule, are of considerable value and importance."

[37] Even at this stage it is not certain what precise portion of land the parties had in mind. That in itself demonstrates a lack of consensus in respect of the sale and the lease of the land. The trust performed its obligations by making payment of the purchase price in terms of the void agreement. The respondent has not affected any performance in terms of that agreement.

[38] The respondent argued that she was not enriched and therefore the applicant is not able to rely on the provisions of the *condictio indebiti*, or enrichment, as a ground for repayment of the purchase price. The basis for this proposition is that her son, and not she, had received the applicant's money.

[39] This submission has no merit. Clearly the applicant has been impoverished by paying the purchase price when the agreement turned out to be of no force and effect. The agreement in terms whereof he had paid, was signed by the respondent. She loaned the money to her grandson, a fact incorporated in terms of the same agreement. She therefore has a *jus in personam* against her grandson

who was an *adiectus solutionis causa*[2] in the transaction, and the respondent was thus enriched at the applicant's expense. The respondent concluded an agreement of sale with the applicant in terms whereof the applicant paid her, through her grandson, the full purchase price for property she could not deliver. Her stance that she can simply wash her hands off the whole transaction is misconceived.

[40] Section 28(1) of the Alienation of Land Act provides as follows in respect of the consequences of deeds of alienation of land which are void:

"(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24 (1) (c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and-

(a) the alienee may in addition recover from the alienator-

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for-

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[2] De Wet en van Wyk: Kontraktereg en Handelsreg 5th ed at 261

(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(b) the alienator may in addition recover from the alienee-

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable."

[41] Section 28 is a type of statutory *condictio indebiti* and its terms clearly favour the applicant in the present situation.

[42] In terms of section 28 of the Alienation of Land Act and the common law, the respondent has to repay the applicant the purchase price of the agreement which amounted to R1 350 000.00.

[43] In the circumstances the applicant is entitled to the relief sought in his amended notice of motion.

[44] The following order is made:

1. That the respondent is directed to pay the applicants, in their aforesaid capacities, the sum of R1 325 000.00, together with interest thereon at the legal rate a *tempore morae*.

2. That the respondent is directed to pay the costs of this application.

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E REVELAS

Judge of the High Court

<u>Appearances</u>:

For the Applicant: Adv. Beyleveld SC and Adv Ronaasen SC instructed by Kaplan Blumberg, Port Elizabeth

For the respondent: Adv Pretorius SC instructed by Greyvensteins, Port Elizabeth

Date heard: 21 September 2017

Date delivered: 22 February 2018