

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)**

CASE NO: **1202/2017**
DATE HEARD: **23 NOVEMBER 2017**
DATE DELIVERED: **20 APRIL 2018**

In the matter between:

ELSA WILHELMINA WIEHAHN

Applicant

and

**GERT JOHANNES SCHEEPERS GOOSEN
JOHANNA MAGRIETHA GOOSEN
ABRAHAM GERHARDUS GELDENHUYS
PHILLIPENTIA JACOMINA JORDAAN
ELRETHA HUISAMEN N.O.
MASTER OF THE HIGH COURT, KIMBERLEY
REGISTRAR OF DEEDS, KIMBERLEY**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent

Coram: Lever AJ

JUDGMENT

LEVER AJ

1. I had written a draft judgment in this matter. At that stage I still had concerns on one aspect of this case. On the 18 February 2018 I wrote to the respective attorneys representing the parties actively involved in this application. The substance of this letter reads as follows:

"I have written a provisional judgment in this matter, but I have decided to hold the delivery of such judgment back because there is one aspect of the matter that still causes me a great deal of concern. Both Mr Olivier SC and Mr Van Niekerk SC premised their oral arguments on the position that the note in terms of which the first respondent purported to exercise his option, dated the 24 January 2017, did not comply with the formalities required by section 2(1) of the Alienation of Land Act 68 of 1981.

What was not pertinently addressed by either Mr Olivier or Mr Van Niekerk was the question of whether the note dated 24 January 2017 read together with the relevant provisions of the last will and testament of the late Abraham Gerhardus Geldenhuys formed a composite contract which actually complied with the formalities required by the said Act or in substance complied with the formalities required by such Act.

The respective parties are invited to make written submissions on this point on or before the close of business on the 29 January 2018."

2. Both Mr Olivier and Mr Van Niekerk provided written submissions by the date requested. Both Mr Olivier and Mr Van Niekerk answered the question posed in my letter of the 18 February 2018 in the negative. They were both of the view that in the circumstances of the present case that the note referred to and the last will and testament of the late Abraham Gerhardus Geldenhuys did not and could not be read as a composite contract that complied with, or in substance complied with, the formalities required by s2(1) of **THE ALIENATION OF LAND ACT**¹ ("**The Alienation Act**").
3. I have considered the written submissions made by both Mr Olivier and Mr Van Niekerk and I have also concluded that in the circumstances of the present case the note referred to and the last will of the late Abraham Gerhardus Geldenhuys cannot be read together as a composite document that complies or in substance complies with the formalities required by s2(1) of the ***Alienation Act***.
4. Accordingly, I now turn to dealing with the application itself.
5. The application in its present form seeks to set aside a purported contract to purchase a farm entered into by the first respondent, under the provisions of the last will and testament of the late Abraham Gerhardus Geldenhuys (applicant's late father). Then to

¹ Act 68 of 1981.

deal with the property concerned under another provision of the last will and testament of the applicant's late father.

6. The issue to be determined, as defined by the parties in their respective oral arguments, relates to whether the provisions of the said last will and testament dealing with the disposal of the relevant farms after the death of the father's spouse, was either a pre-emptive right or an option in favour of the first respondent. It was argued that if the right given to first respondent in terms of the said last will and testament was a pre-emptive right, then no formalities were required. In those circumstances, the application must fail.
7. However, if the said right amounted to an option, then this court would have to determine if the formalities required by **THE ALIENATION OF LAND ACT**² ("***Alienation Act***") had been complied with, within the period specified in the said will for the exercise of such option.
8. To place the matter in its proper context, a fairly detailed summary of the background facts is required.
9. The applicant's late father executed a will in which he left his two farms to his then wife, being the applicant's stepmother ("*stepmother*"). This bequest was subject to certain conditions, *inter alia*, that: if the stepmother were to dispose of one or both farms during her lifetime then the spouse of second respondent (the first respondent) would be given an opportunity to buy one or both such farms; the price to be paid by the first respondent in respect of such farms was determined in the relevant testamentary

² Act 68 of 1981.

instrument; in the case of the farm Hunitees at the rate of R20.00 (twenty Rand) per morgen and in respect of the farm Holte at the rate of R30.00 per morgen; if the stepmother did not dispose of the said farms during her lifetime the first respondent could choose to acquire one or both such farms on the same conditions, within three months of the stepmother's death; that payment would be deferred for some time after transfer of such property(ies) on terms very favourable to first respondent; and if the first respondent chose not to acquire the farms as set out above they would be sold by public auction, subject to certain conditions.

10. After the father passed away, on the 26 May 1997, the stepmother inherited both farms and they were registered in her name. It was common cause by the time that this matter was argued that, because she had accepted the transfer into her name of the said farms, under the provisions of the said will, that she was also bound by the conditions relating to such properties contained in the father's will.
11. There are conflicting versions of how it came about, but at some stage after the father's death, the farm Holte was sold to the first respondent by the stepmother for R30.00 per morgen. For present purposes, nothing turns on the different versions that led to this sale and accordingly I shall simply ignore such differences, such as they are.
12. It appears that either: the stepmother came to believe that the first and second respondents had been unduly benefited by being able to purchase the farm Holte at a price which is alleged to be below the then market value; or, as alleged by first and second

respondents, the relationship between the stepmother and them simply soured.

13. Whatever the case, the stepmother approached a psychiatrist to certify that she was of sound mind to execute a will. Thereafter, she executed a will that essentially excluded the first and second respondents as well as the applicant from any benefit flowing from the remaining farm (Hunitees or Hunites). In her will, the stepmother instructed that the said farm be sold at a market related price. She further instructed that the proceeds of such sale be divided equally between the third and fourth respondents.
14. The stepmother died on the 5 December 2016.
15. In terms of the father's last will and testament, first respondent had to exercise his right to buy the relevant property within three months of the stepmother's death. First respondent purported to exercise his option on the 24 January 2017. There are two copies of this document attached to the papers in this matter. The second one merely also indicated that the *executrix*, being the fifth respondent herein acknowledged receipt of the said document on the 27 January 2017.
16. This note purporting to exercise this right to acquire the farm Hunitees reads as follows:

"UITOEFINING VAN OPSIE – PLAAS HUNITEES

*Hiermee wens ek u in kennis te stel dat ek die
opsie gaan uitoefen aangaande die plaas Hunitees,*

*volgens die bepalings van my oorlede skoonpa, AG
Geldenhuys, se testament.*

Die uwe"

17. It is important to note at this juncture that both Mr LM Olivier, who appeared for the applicant in this matter and Mr JG Van Niekerk, who appeared for the first and second respondents herein, premised their arguments and submissions on the position that this document purporting to exercise an option did not comply with the formalities required in the ***Alienation Act***. In these circumstances, it is safe to conclude that it was common cause that this purported exercise of his right, by the first respondent did not comply with the formalities required in the ***Alienation Act***.
18. The executrix and first respondent entered into a written contract of sale in respect of the relevant property on the 30 March 2017. Such date being outside the three-month period contemplated in the father's last will and testament for first respondent to exercise his right to acquire the relevant property. The stepmother having passed away on the 5 December 2016, the relevant three-month period would have expired on the 5 March 2017.
19. Lastly, before turning to the actual terms of the respective wills, it needs to be mentioned that the applicant originally sought very different relief. Originally, applicant sought relief under the common law, to depart from the provisions of clause 2 of the last will and testament of her father insofar as it related to the purchase price of the said property. Also, applicant sought alternative relief, to remove the restrictions imposed on the relevant immovable property under the provisions of the

REMOVAL OR MODIFICATION OF RESTRICTIONS ACT, 94 of 1965.

20. The underlying premise for such original application was that the father could not have foreseen nor could he have intended that the first respondent would, many years after his death acquire the relevant property at one thirtieth of its present market value. It was contended that this would have been grossly unfair and prejudicial to his other children. A point *in limine* was taken, the exact nature of which is not material for present purposes, the Notice of Motion was subsequently amended to reflect the current relief sought.
21. The relevant terms of the father's last will and testament, reads as follows:

"2 Ek bemaak my vaste eiendom synde my plase bekend as Hunitees en Holte aan my eggenote ALBERTA JOHANNA GELDENHUYS gebore Maass, onderhewig aan die volgende voorwaardes:

2.1 Die eggenoot van my dogter JOHANNA MAGRIETHA GOOSEN, gebore Geldenhuys, sal die eerste opsie he om indien my eggenote die eiendomme wil verkoop die plaas Hunitees en/of die plaas Holte te koop op die volgende terme:

2.1.1 Die koopprys van die plaas Hunitees sal bereken word teen R20,00 (Twintig Rand) per morg en die

koopprys van Holte sal bereken word teen R30,00 per morg;

2.1.2 Die koopsom(me) hierbo genoem sal binne vyf (5) jaar vanaf registrasie van transport betaalbaar wees tesame met rente bereken vanaf datum van transport op enige bedrag uitgestel teen sewe persent (7%) per jaar welke rente tesame met die kapitaal betaalbaar sal wees;

2.2 Indien die eiendom(me) wel verkoop word sal die opbrengs met rente soos volg verdeel word:

2.2.1 Een-helfte daarvan aan my eggenote ALBERTA JOHANNA GELDENHUYS;

2.2.2 Een-helfte vir verdeling in gelyke dele aan my vier (4) kinders ELSA WILHELMINA WIEHAHN, gebore Geldenhuys, JOHANNA MAGRIETHA GOOSEN, gebore Geldenhuys, ABRAHAM GERHARDUS GELDENHUYS en PHILLIPENTIA JACOMINA JORDAAN, gebore Geldenhuys.

2.3 Indien my eggenote een of albei plase nie gedeurende haar leeftyd verkoop nie sal die

eggenoot van my dogter JOHANNA MAGRIETHA GOOSEN, gebore Geldenhuys, by die dood van my eggenote en vir 'n tydperk van drie (3) maande daarna 'n opsie he soos hierbo in klosule 2.1 beskryf om die eiendom (een of albei) te koop op en onderheuwig aan dieslefde voorwaardes as wat hierbo in klousule 2.1 met subklousules beskryf is en onderheuwig aan klousule 7 hieronder.

2.4 Indien die Opsies in 2.1 en 2.3 gemeld nie uitgeoefen word nie sal die eiendom per publieke veiling verkoop word onderheuwig aan die voorwarde egter dat indien alle erfgename nie die aanbod wat op so 'n veiling behaal word aanvaar nie hulle nie verplig sal wees om die eiendom dan te verkoop nie maar sal hul 'n verdere tydperk van nog 12 maande daarna he om die eiendom na goeddunke te verkoop maar voor verstryking van die termyn van 12 maande sal die partye verplig wees om die eiendom te verkoop vir die beste aanbod wat ontvang word. Ingeval van 'n verkoping soos in hierdie klousule voorsien sal die opbrengs verdeel word tussen my vier kinders hierbo in klousule 2.2.2 genoem in gelyke dele."

22. Clause 7 of the father's will, mentioned in clause 2.3 quoted above, deals with the circumstance of him and his wife (stepmother) dying simultaneously, and is not relevant to the present application.
23. The relevant terms of the stepmothers will, reads as follows:

"4 Ten opsigte van my plaaseiendom bepaal ek:

4.1 Dat my plaas HUNITES deur my Eksekuteur verkoop sal word na my afsterwe teen 'n billike markverwante prys, welke prys deur 'n bevoegde wardeerder bepaal sal word, en die koopprys sal betaalbaar wees aan my boedel by registrasie van die transport van die eiendom op die koper se naam;

4.2 Die verkoopprys van die plaaseiendom moet gelykop verdeel word tussen my twee kinders, ABRAHAM GERHARDUS GELDENHUYS en PHILLIPENTIA JACOMINA JORDAAN (gebore Geldenhuys)."

24. Options or pre-emptive rights are usually created by contract. However, such rights can also be created by testamentary instrument³.

³ Glass and Others v Ker N.O. and Others 1953 (1) SA 550 (AD).

25. When oral argument on this matter was presented, Mr Olivier, for the applicant, essentially ignored the Heads of Argument he had filed on behalf of his client and struck out in a different direction. Although Mr Van Niekerk, for the first and second respondents, must have been taken by surprise by this development, he nonetheless proceeded to present the case for his clients.
26. The present argument presented by Mr Olivier on behalf of the applicant was developed as follows: he referred the court to the recent Constitutional Court decision of **Mokone v Tassos Properties**⁴ and submitted that such case was authority for the proposition that in the case of pre-emptive rights there need not be compliance with the formalities prescribed in the ***Alienation Act***; that clause 2.1 of the father's last will and testament was in substance a pre-emptive right where no formalities are required; that clause 2.3 of the said will, being the clause upon which the present application turns, is in substance an option; accordingly, in exercising the option contained in clause 2.3 formalities are required; that the purported exercise by the first respondent of such option did not comply with the formalities set out in the ***Alienation Act***; and that consequently applicant was entitled to have the Deed of Sale in respect of the farm Hunites, entered into on the 30 March 2017, set aside.
27. The response of Mr Van Niekerk to this argument on behalf of the first and second respondents' was as follows: clause 2.3 of the late father's last will and testament did not operate in conjunction with clause 2.2; that clause 2.3 in the said will had to be read in the context of clause 2.4; that reading clause 2.3 in the context of

⁴ Ntswaki Joyce Mokone v Tassos Properties and Another [2017] ZACC 25 (24 July 2017). Also reported at 2017 (5) SA 456 (CC).

clause 2.4 of the said will showed that clause 2.3 evidenced a right to pre-empt the sale contemplated in clause 2.4; that accordingly, the right contemplated in clause 2.3 of the said will was a pre-emptive right; also relying on the judgment of the Constitutional Court in the Mokone case⁵ he submitted that the exercise of the pre-emption contemplated in clause 2.3 did not require any formalities; and that consequently, the option was exercised timeously and the Deed of Sale in respect of the farm Hunitees was valid and enforceable.

28. In reply to this, Mr Olivier argued that clause 2.4 was intended for an entirely different purpose. That clause 2.3 should not be read in the context of clause 2.4, as submitted by Mr Van Niekerk.
29. As set out above, it is common cause that the document, dated 24 January 2017, purporting to exercise the first respondent's option to purchase Hunitees does not comply with the formalities required in the ***Alienation Act***. It is also common cause that the Deed of Sale for the relevant property was entered into on the 30 March 2017, outside the three-month period prescribed in the father's last will and testament.
30. In my view the decision in Mokone's case⁶ deals with the question of whether formalities are required when the agreement granting the pre-emptive right comes into being. Mokone's case⁷ does not deal with the question whether the exercise of the pre-emptive right requires adherence to the formalities prescribed by the ***Alienation Act***. The upshot of this is that formalities would be required to enforce and give effect to the right contained in clause

⁵ Above.

⁶ Above.

⁷ Above.

2.3 of the late father's last will and testament regardless of whether such right is a right of pre-emption or an option.

31. Section 2(1) of the ***Alienation Act*** reads as follows:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

32. Clearly, the note dated the 24 January 2017 does not comply with the required formalities. Having regard to the common cause facts set out above as well as my understanding of the Constitutional Court's judgment in the **Mokone**⁸ matter, that should be the end of the matter. Accordingly, the applicant should be entitled to the principal relief set out in the Notice of Motion.

33. If I am wrong in my understanding of the judgment of the Constitutional Court in Mokone's case⁹, then I need to consider the arguments raised by Mr Olivier and Van Niekerk on behalf of their respective clients. The appropriate starting points to deal with these arguments is to define the terms "pre-emptive right" and "option".

⁸ Above.

⁹ Above.

34. A pre-emptive right, in the context of a lease, is defined by Kerr in his work *The Law of Sale and Lease*, as follows:

*"A preferent conditional right to purchase is referred to as a right of pre-emption. It gives the grantee – in the context under discussion, the lessee – a right to purchase if the condition in question is satisfied. Normally the condition is that if the lessor decides or desires or proposes to sell, he shall offer the property to the lessee first."*¹⁰

Even though this definition is given in the context of a lease, it is still helpful with appropriate adjustment for the present context.

35. Pre-emption is defined in Claassen's work, *DICTIONARY OF LEGAL WORDS AND PHRASES*, as follows:

*"The grant of a right of pre-emption does not compel the grantor to sell it; it only compels him to give the grantee the preference in case he sells it at all."*¹¹

36. Kerr, again in his work *THE LAW OF SALE AND LEASE*, defines an option in relation to the sale of land as follows:

"An option is a contract in which a person undertakes to keep open an offer which he has made or is making or will make. If the offer which

¹⁰ AJ KERR., *THE LAW OF SALE AND LEASE*., 3RD Ed., Lexis Nexis p. 462.

¹¹ RD CLAASSEN, SC., *DICTIONARY OF LEGAL WORDS AND PHRASES*., 2ND Ed., Vol 3., P-80.

*is kept open is to sell land, it must be in writing. The offer to keep it open, however, being distinct and not falling within the province of the Act, may be oral. An offer contains the terms upon which the offeror is prepared to sell, so in the case of an offer to sell land it will be ineffective if it does not cover the points required by law to be in the contract."*¹²

37. Claassen in his work DICTIONARY OF LEGAL WORD AND PHRASES, defines option as:

*"...An option to purchase is 'in effect an offer to sell, which may be accepted at any time within the period fixed by the contract, and on such acceptance being notified a contract is formed."*¹³
(authorities omitted)

38. Clearly, then the right granted to the first respondent under the provisions of clause 2.1 of the father's last will and testament is a pre-emptive right. This is so because the provisions of clause 2.1 of the said will contemplates the circumstance where the stepmother intended selling both or either of the said farms during her lifetime. In which case, the first respondent would have the right to buy the relevant farm(s) on the terms specified in the last will and testament of the father. There is no real dispute on this issue between Mr Olivier and Mr Van Niekerk.

¹² Kerr., Above at p 103.

¹³ Claassen., Above at O-45.

39. The dispute emerged when the nature of the right acquired by the first respondent under the provisions of clause 2.3 of the said will was debated. It is convenient to consider the argument submitted by Mr Van Niekerk on behalf of the first and second respondents first.
40. To recap, Mr Van Niekerk's argument was in substance that clause 2.3 must be read in conjunction with and in the context of clause 2.4 of the last will and testament of the father. That reading clause 2.3 in the context of the provisions of clause 2.4 would show that the right granted under the provisions of clause 2.3 was a pre-emptive right and thus on the authority of the judgment in Mokone's case, not subject to the formalities contained in the ***Alienation Act***. Accordingly, Mr Van Niekerk argued that there was a valid sale between the executrix (fifth respondent) and the first respondent and that it followed from this that the application should be dismissed with costs.
41. In my view, Mr Van Niekerk's argument does not stand up to scrutiny. Firstly, it seems to me that the provisions of clause 2.3 of the said will are independent and self-contained. The provisions of clause 2.4 are created to deal with an entirely different set of circumstances, even though clause 2.4 will become operative on first respondent electing not to exercise his rights under clause 2.3. Secondly, the provisions of clause 2.3 provide for: an offer to sell on the death of the stepmother; such offer to be held open for a period of three months from the death of the stepmother; and the conditions of sale are incorporated by reference therein.
42. In substance, what the provisions of clause 2.3 of the said will contemplate is an option in favour of the first respondent. In the

circumstances, reading the provisions of clause 2.3 within the context of clause 2.4 cannot change what the father intended in executing his said last will and testament.

43. In my view, what is contemplated by the provisions of clause 2.3 is clearly an option. This would be subject to formalities prescribed under the ***Alienation Act***. It is common cause that such formalities were not complied with. In such circumstances the applicant is entitled to have the sale of the farm Hunites, entered into between the first and the fifth respondent on 30 March 2017, declared null and void as contemplated in prayer 2 of the amended Notice of Motion.
44. The applicant is also entitled to an order contemplated in prayer 3 of the said Notice of Motion that the executrix deal with the farm concerned in accordance with the provisions of clause 2.4 of the last will and testament of the father executed on the 27 November 1990.
45. Applicant would in such circumstances be entitled to the ancillary relief contemplated in prayer 4 of the said Notice of Motion.
46. The last remaining question is the question of costs. The primary rule in considering the question of costs is that the question of costs rests within the discretion of the court. The ordinary or secondary rule in respect of costs is that, normally unless there is sufficient reason to depart from such rule, costs follows the event.
47. In the present case, applicant substantially changed the nature of her case upon the filing of a point *in limine*. This court was not provided with the application to amend the Notice of Motion.

Accordingly, there is no information before this court indicating whether the costs occasioned by the amendment have been appropriately dealt with. In the circumstances, I have to assume that the matter was not settled.

48. Further, there is the question of applicant's counsel Mr Olivier taking as applicant's main line of argument, an argument that was not foreshadowed in applicant's Heads of Argument. Also, I must bear in mind that first and second respondent at the hearing hereof tendered that in the event of this court ruling in their favour, that they would not insist on a costs order against the applicant but tendered that each party should bear their own costs.
49. In all of these circumstances, I think that the equitable order to be made is that each party should bear their own costs.

Accordingly, the following order is made:

- 1) THE WRITTEN AGREEMENT OF SALE ENTERED INTO BETWEEN THE FIRST RESPONDENT AND FIFTH RESPONDENT ON THE 30 MARCH 2017 IN RESPECT OF THE PROPERTY KNOWN AS FARM HUNITES, FARM NUMBER 84 SITUATED IN NAMAQUALAND, NORTHERN CAPE AND HELD BY TITLE DEED NUMBER T20365/98 AS REGISTERED WITH THE REGISTRAR OF DEEDS, KIMBERLEY ("THE PROPERTY"), WHICH CONTRACT IS ANNEXED TO THE FOUNDING AFFIDAVIT MARKED ANNEXURE "F", IS HEREBY DECLARED TO BE NULL AND VOID.**

- 2) THE FIFTH RESPONDENT BE AND IS HEREBY ORDERED TO DEAL WITH THE SAID PROPERTY IN ACCORDANCE WITH THE PROVISIONS OF CLAUSE 2.4 OF THE LAST WILL AND TESTAMENT OF THE LATE ABRAHAM GERHARDUS GELDENHUYS EXECUTED ON 27 NOVEMBER 1990.
- 3) THE FIFTH, SIXTH AND SEVENTH RESPONDENTS ARE HEREBY ORDERED TO DO ALL THINGS NECESSARY TO GIVE EFFECT TO THE ORDERS SET OUT IN 1) AND 2) ABOVE.
- 4) EACH PARTY SHALL PAY THEIR OWN COSTS.

For the Applicant:

For the 1st & 2nd Respondents: