

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 4293/2013

In the matter between:-

NTAU LUCAS MOKOENA

Applicant

and

**MINISTER OF AGRICULTURE, FORESTRY AND
FISHERIES, GOVERNMENT OF SOUTH AFRICA**

First Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

Second Respondent

JUDGMENT BY: VAN DER MERWE, J

HEARD ON: 19 JUNE 2014

DELIVERED ON: 31 JULY 2014

- [1] On 27 October 1993 the remainder of the farm Kareelaagte 394, district Bloemfontein, Province Free State, extent 647,6755 hectares (the farm) was transferred to the national Department of Agriculture (the department) in terms of Deed of Transfer T19072/1993. The first respondent is the Minister responsible for the department. The question in this application is whether the applicant has obtained a right to transfer of the farm.

BACKGROUND

- [2] During 2002 the department published a request for applications by emerging farmers to lease certain specified farms owned by the State,

including the farm, with a view to eventual purchase thereof. This formed part of the government's Land Redistribution for Agricultural Development Programme. The applicant submitted an application, was interviewed by officials of the department and an agreement was entered into between the applicant and the department in terms of which the farm was let to the applicant. The lease was subsequently renewed on two occasions. The applicant was then advised by officials of the department that the Minister of Public Works has approved the sale of the farm to the applicant for the amount of R365 000,00. The applicant says that he was informed at the time that the farm had been valued for the amount of R365 000,00 and this is not denied by the first respondent.

- [3] Following hereon, a lease agreement in respect of the farm was entered into between the "The Government of the Republic of South Africa through its department of Agriculture, Forestry and Fisheries" and the applicant (the lease). Although the lease was signed on behalf of the lessor on 19 December 2011, its duration was from 1 April 2011 to 31 March 2014. The initial rental in terms of the lease was the amount of R34 787,01 per annum, with annual escalation of 10%. Clause 5 of the lease provides:

"The purchaser is hereby granted an option to purchase the property for the sum of R365 000,00 (THREE HUNDRED AND SIXTY FIVE THOUSAND RANDS) at any stage during the existence of this lease agreement. Should the Lessee wish to exercise the option it must give the lessor three months of notice in writing of its intention. This option to Purchase is subject to the provisions contained in clause 46 hereto."

Clause 46 deals with crops not yet harvested at the time of termination of the lease. Clause 7 of the lease contains the rather peculiar provision that should the lessee exercise the option in terms with clause 5, all rentals paid in terms of the lease are to be deducted from the purchase price.

[4] Clauses 42, 44 and 45 of the lease provide as follows:

“42. Should the Lessee fail to pay rent on due date and fail to make payment within 7 (seven) days or after a written request, then the Lessor shall be entitled to cancel the agreement, without prejudice to any rights it may have in terms of this agreement or the law in general, to have the Lessee removed from the Property and to claim compensation for any loss it may have suffered or shall in future suffer as well as rent in arrears or any amount due and payable.

43. ...

44. Should any party fail to comply with any other term of the Agreement and fail to rectify such breach within 14 days of a written request to do so, then the aggrieved party shall be entitled without prejudice to any other right it may have to terminate this agreement forthwith and exercise any right it may have in law.

45. Should the Lessee be in breach in terms of clauses 43, 44 or 45 the option to purchase the Property contemplated in clause 5 above shall immediately fall away and be of no force or effect.”

[5] The applicant exercised this option by a letter dated 4 July 2012. The applicant's case is that a binding agreement of sale of the farm accordingly came into being. It is not disputed that the option was

properly exercised, if it was still extant at the time. Repeated requests by the applicant that the agreement of sale be given effect to, were to no avail. The applicant therefore in essence now asks for an order that obliges the first respondent to transfer the farm to him against payment of the purchase price.

- [6] Only two grounds of opposition to the application were persisted in before me on behalf of the first respondent. The first is alleged non-joinder of the Minister of Public Works and the Minister of Rural Development and Land Reform. The second is that the option was terminated in terms of clause 45 of the lease.

NON-JOINDER

- [7] A court should not decide a matter without joinder of or due notice to a party with a direct and substantial interest in the outcome of the litigation. In **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953 (2) SA 151 (O), this court said that a direct and substantial interest means a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment. A commercial, financial, political or other indirect interest is not a legal interest. This judgment has been followed and applied on numerous occasions, including by the Constitutional Court in **President of the RSA v South African Football Union** 2000 (1) SA 1 (CC) para [233] at 102.

- [8] I accept that the farm comprises State land. Section 2 of the State Land Disposal Act 48 of 1961 (the Act) provides that the State President may, subject to provisions not relevant here, *inter alia* lease or sell State land on such terms and conditions as he may deem fit. Section 6 of the Act provides that the State President may either

generally or in regard to specified State land or in a specified case assign to “the Minister” any power or duty conferred or imposed by him by *inter alia* section 2 of the Act. “Minister” is defined in the Act as the Minister of Public Works, but in relation to a provision of the Act which applies to or is connected to any land transferred to the Minister of Rural Development and Land Reform in terms of paragraph 1(e) of Proclamation No R.28 of 31 March 1992 or after 1 April 1992, means the latter Minister. The farm was not transferred to the Minister of Rural Development and Land Reform as envisaged in this definition. It follows that the power to sell the farm to the applicant may only have been assigned to the Minister of Public Works and not the Minister of Rural Development and Land Reform.

- [9] It is an admitted fact that during 2004 the Minister of Public Works granted approval in terms of the Act for the letting with an option to purchase and the eventual sale of specified State-owned farms, including the farm, to emerging farmers approved by the department. It must therefore be accepted that the power to lease and sell the farm to the applicant was assigned to the Minister of Public Works in terms of the Act. The approval was based on the recommendation of the then Minister of Agriculture and Land Affairs. The Department of Rural Development and Land Reform was established only in 2009. Before this, the Minister of Agriculture and Land Affairs was responsible for rural development and land reform. The approval was also subject to certain conditions, but they are not relevant here and are not relied upon by the first respondent. It is clear that the department approved the sale of the farm to the applicant. The Minister of Public Works therefore has approved what the applicant seeks in this application.

Any interest of the Minister of Public Works cannot be prejudicially affected by the judgment in this matter.

- [10] In respect of the interest of the Minister of Rural Development and Land Reform, counsel for the first respondent only relied thereon that internal government policy and procedure require “ministerial concurrence” of the Minister of Rural Development and Land Reform for the sale of the farm. But clearly that is not a legal interest.

TERMINATION OF OPTION

- [11] The first respondent says that as at 31 December 2013 the rent payable in terms of the lease was in arrears in the amount of R131 692,81. The first respondent made a written request for payment thereof. The applicant denies that the rent was in arrears and says that he subsequently in any event paid the said amount to the first respondent, without prejudice to his rights and simply to avoid an ancillary dispute. For purposes of these motion proceedings the version of the first respondent must however be accepted.
- [12] The first difficulty with the first respondent’s contention that the option was terminated in terms of clause 45 of the lease, is that clause 42 thereof, which deals with failure to pay rent, is not referred to in clause 45. On this basis clause 45 cannot be involved in respect of failure to pay rent. This may or may not have been a mistake in the drafting of the lease, but the first respondent does not rely on rectification of the lease. The second difficulty is one of timing. Assuming that clause 44 is applicable, the option would become of no force or effect should the applicant be in breach of clause 44, that is on failure to rectify the breach within 14 days of a written request to do so. The written request

relied upon by the first respondent was made in December 2013, long after the option was exercised and even after the application was launched during October 2013.

[13] It follows that the first respondent is bound by the agreement of sale of the farm that was entered into when the applicant exercised the option contained in the lease and that the applicant is entitled to an appropriate order to enforce compliance therewith against payment of the purchase price. In this regard the applicant specifically elected not to rely on clause 7 of the lease and tenders to pay the full agreed purchase price or R365 000,00. I am therefore prepared to grant the order prayed for in the amended notice of motion.

[14] In the result the following order is made:

1. It is declared that the applicant validly exercised the written option to purchase the farm known as remainder of the farm Kareelaagte 394, district Bloemfontein, Province Free State, held by the first respondent under Title Deed No T19072/1993, contained in the lease agreement concluded between the applicant and the Department of Agriculture, Forestry and Fisheries (the department) dated 19 December 2011 and that a valid and binding deed of sale came into existence between the applicant and the department for sale of the farm for the amount of R365 000,00.
2. The first respondent is ordered to, within 30 days of the date of this order, take all necessary steps and sign all necessary documents in order to ensure that the property is transferred into the name of the applicant as soon as reasonably possible after the applicant has paid

the purchase price of R365 000,00 or has provided an appropriate guarantee for payment thereof.

3. In the event of the first respondent failing to comply with the order contained in paragraph 2 of above, the registrar of this court is authorised to do all things necessary and sign all documents in order to ensure that the property is transferred into the name of the applicant upon payment of the purchase price of R365 000,00 or provision of an appropriate guarantee for payment thereof.
4. The second respondent is authorised to register the property in the name of the applicant pursuant to the steps contemplated in paragraphs 2 or 3 above.
5. The first respondent is ordered to pay costs of this application.

C. H. G. VAN DER MERWE, J

On behalf of applicant:

Adv. M. C. Louw
Instructed by:
Kramer, Weihmann & Joubert
BLOEMFONTEIN

On behalf of first respondent:

Adv. B. S. Mene
Instructed by:
State Attorney
BLOEMFONTEIN

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