FREE STATE HIGH COURT. BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4121/2007

In the case between:

S J S	1st Plaintiff
E M S	2nd Plaintiff

and

L J S	1st Defendant
STEPHANUS JACOBUS VAN WYNGAARD	2nd Defendant
CHANTELL VAN WYNGAARD	3rd Defendant
REGISTRAR OF DEEDS	4th Defendant

JUDGEMENT: MOCUMIE, J

HEARD ON: 12 May 2009 & 14 September 2009

DELIVERED ON: 3 December 2009

MOCUMIE J

[1] The plaintiffs instituted a claim in this Court for the following relief (translated):

1.1 An order declaring the transfer of the property, Venterbloem, Brandfort, from the name of the first defendant into the names of the second and third defendants to be null and void and directing the reversal of the transfer into the name of the first defendant.

1.2 The transfer of the aforementioned property into the name of the plaintiffs against payment by the plaintiffs to the defendants the sum of R120 000-00.

1.3. Costs of suit, alternatively to the aforegoing, payment of the sum of

R453 696-12 by first defendant to the plaintiffs.

1.4. Interest on the abovementioned amount [no rate stipulated] a *tempore morae.*

1.5. Costs of suit.

[2] The fourth defendant, the Registrar of Deeds, abides the decision of the Court. In their joint plea the first three defendants ("the defendants") deny that first defendant sold the property, a farm, to the plaintiffs. They also counterclaim for the ejectment of the plaintiffs from the property with its improvements and payment of the amount of R5000,00 per month or an amount that the Court deems reasonable for the occupation and utilization of the property, calculated from 16 May 2007 until the date of ejectment; costs of suit; further and/or alternative relief.

[3] At the beginning of the trial the parties agreed to the separation of issues. An agreement was formulated in terms of which the Court was required to determine the validity of the contract first as set out in paragraphs 1 to 7 of the particulars of claim. All other issues contained in paragraphs 8 to 13 of the particulars of claim were to be determined subsequently. This agreement was made order of this Court.

[4] The plaintiffs are husband and wife and are married in community of property. The second and third defendants are also husband and wife.

The first defendant is first plaintiff's mother and second defendant is first plaintiff's nephew. This is therefore a family dispute. First plaintiff's father died in 1996.

[5] First plaintiff testified that he worked for Westonia Gold Mines in Carletonville for a considerable period when he resigned in 2004. He then moved with his immediate family to the farm in dispute. Prior to moving there he used to visit his home during vacations. Because of his interest in farming the first defendant orally offered to sell him the farm for R120 000,00 because she said she was old and had no one to help her with its running. He also accepted the offer orally. Some time in December 2002 the oral agreement was reduced to writing in the presence of his wife, his sister Karolina, and a third person whose name he could not remember. According to him the two of them agreed that the property was to be transferred into the plaintiffs' name on 1 September 2004 or any date agreed upon thereafter. The written contract was handed in as exhibit "A" and reflects the date "op 1 September 2004" next to the handwritten description of the property.

[6] In 2005 tension developed in the family. The first defendant left her home to stay with her daughter, the first plaintiffs younger sister, in Bloemfontein. As a result of the fall out and due to the existence of a lease contract with a certain Mr Botha the transfer of the property was

kept in abeyance. The first defendant thereafter, through her lawyers, made a fresh offer to the plaintiffs for the same property for R 360 000, 00 which first plaintiff, acting for both spouses, turned down. She also unilaterally increased the lease from R 1 200, 00 to R5000, 00 per month. First plaintiff also refused to pay the increased rental. In a letter dated 2 May 2006 first plaintiff learned that his mother, the first defendant, denied the existence of the written agreement, Exhibit "A". When he supplied the attorneys with a copy of the agreement the attorneys alleged that the agreement was vague and unenforceable. In a letter dated 9 February 2007 the first defendant's attorneys insisted on the increased purchase price of R360 000, 00. On 4 May 2007 first plaintiff was informed that the farm was in the process of being sold to a third party or willing buyers. On 1 June 2007 he learned that second and third defendants were the new registered owners of the farm and that he should vacate the property by 1 July 2007. When the matter could not be resolved amicably the plaintiffs approached this Court for the relief set out in paragraph 1 above.

[7] During the course of the hearing it emerged that the first defendant disputed the authenticity of the signatures or initials attached to exhibit "A". As the dispute could not be resolved through the oral testimony by the parties the trial was adjourned and the disputed contract document was sent for forensic analysis by a hand writing, disputed documents and finger print expert. Subsequently per agreement between the parties

the report by Lt Colonel Gerhardus Cloete, a hand writing expert in the Free State, was admitted as exhibit C. The result of his analysis was positive and was accepted by all parties. It reads:

> "Op grond van bovermelde ondersoekresultate het ek geen twyfel nie dat die betwiste handtekeninge en parawe op Q1.1, Q1.2 en die egte voorbeelde van handtekeninge en parawe op S1 tot S21 deur een en dieselfde persoon geskryf was."

I consequently find that exhibit "A" was duly signed by the first plaintiff and the first defendant and that first defendant's denial that she did so was false.

[8] The matter does not end there. As I see it there are still three issues that fall for determination:

8.1 Whether the deed of sale complies with the requirements contemplated in section 2(1) of the Alienation of Land Act, 68 of 1981;

8.2 Whether the agreement was executed in compliance with the Matrimonial Property Act, 88 of 1984; and

8.3 Whether the second and third defendants were aware of the deed of sale, exhibit "A", between the first plaintiff and the first defendant when they bought the farm.

[9] Section 2(1) of the Alienation of Land Act provides that:

> "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."

> The object of this provision, as in the case of its predecessor, is undoubtedly to eliminate any uncertainty in matters involving the alienation of land, which always ranks as one of the most valuable assets in an estate. This requirement is in the public interest and meant to reduce litigation to a minimum. See **Thorpe v Trittenwein** 2007 (2) SA 172 (SCA); **Wilken v Kohler** 1913 AD 135; **Clement v Simpson** 1971 (3) SA 1 (A) at 7 and **Johnston v Leal** 1980 (3) SA 927 (AD).

[10] Mr Benade, on behalf of the defendants, argued that exhibit "A"is not enforceable as it is not in compliance with s2(1) of the Alienation of Land Act because clause 1 thereof provides that the purchase price shall be paid as agreed ("soos ooreengekom") and that the date of purchase is indicated as "op 1 September 2004 en/of soos verder ooreengekom." He submitted that this clause was vague as it does not stipulate with any precision when the purchase price falls due for payment and in what form it will be paid.

[11] In order to examine the validity or otherwise of Mr Benade's contention the work of **Christie RH: The Law of Contract in South**

Africa, 5th ed is a good point of reference where the following is stated:

> "The price is an essential term of any contract of sale, so a written contract for sale of land that does not fix the price or leaves it for subsequent negotiation is void.[1] But a properly signed written contract of sale of land together with movable assets for a lump sum price is valid even though no specific portion of the price is allocated to the land.[2] The method of payment of the purchase price is also an essential or atleast a material term, so a written contract that leaves the method of payment vague[3] or leaves it over for future negotiation[4] is void and therefore cannot be rectified,[5] but can probably be saved by a tender of cash when the contract does not provide for payment in cash but by some other method to be negotiated.[6] The method of payment may be made sufficiently certain by implied terms, provided they can be implied from the document itself.[7] Evidence to prove a contemporaneous oral agreement[8] or a subsequent oral variation relating to the method of payment is not admissible.[9]"

[12] The Deed of Sale is incorporated in a standard pro forma document which leaves very little room for error. The parties to the agreement are clearly identified. Stefan us Jacobus Slabbert, ID no 540502 5089 083, is described as the purchaser and Louisa Johanna Slabbert, ID no 281212 0046 087 is the seller. The property is properly described (that is

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1 Coronel v Kaufman 1920TPD 207.

2 Brink v Wiid 1968 1 SA 536 (A).

3 Patel v Adam 1977 2 SA 653 (A).

4 Margate Estates Ltd v Moore 1943 TPD 54; Jammine v Lowrie 1958 2 SA 430 (T); Ruststein v Elandsheuwel Farming (Pty) Ltd 1971 SA 268 (T); Raven Estates v Miller 1984 1 SA 251 (W).

5 Thathiah v Khan 1982 3 SA 370 (D); Engelbrecht v Nel 1991 2 SA 549 (W) 552A-D.

6 Dold v Bester 1984 1 SA 365 (D).

7 Gandhi v SMP Properties (Pty) Ltd 1983 1 SA 1154 (D).

8 Du Plessis v Van Deventer 1960 2 SA 544 (A); Kroukamp v Buitendag 1981 1 SA 606 (W).

9 Kuper v Bolleurs 1913 TPD 334; Van der Berg v Van Leggelo 1935 TPD 304; Neethling v Klopper 1967 4 SA 459 (a) 465B; Sidali v Mpolongwana 1990 4 SA 212 (C).

not in dispute). In clause 2 the purchase price is given as the sum of R120 000,00 "payable to the Seller as follows: soos ooreengekom." The method of payment of the purchase price is an essential term of an agreement of the sale of immovable property. It is correct that the payment of the stipulated purchase price "as agreed" ("soos oooreengekom") is vague. However the method of payment may be sufficiently ascertained from the implied terms: provided such terms can be implied from the document itself. See **Gandhi v SMP Properties (Pty) Ltd** 1983(1) SA 1154(D).

[13] Clause 3, 4 and 5 provide that:

> *"3. COST OF TRANSFER.*
>
> *The Purchaser shall pay transfer costs in connection with the registration of transfer of the property, including Transfer Duty, or Value Added Tax whichever is applicable and the cost of this Deed of Sale which amounts shall be paid immediately upon request by the Purchaser's Conveyancer.*
>
> *4. TRANSFER*
>
> *Transfer of the property shall be passed by the SellersVPurchaser's* Conveyancer and shall be given and taken upon the Purchaser having complied with his obligations in terms of clause 2 and 3 hereof. (*Delete that which is not applicable).*
>
> *5. POSSESSION*
>
> *Possession of the property shall be given to the Purchaser on registration of transfer or <u>soos ooreengekom</u> from which date the property shall be at the sole risk, loss or profit of the*

Purcahser and from which date the Purchaser shall be liable for payment of all Rates and Taxes, Insurance Premuims and other charges in respect of the property. The Purchaser shall refund to the Seller any such monies which may have been paid in advance beyond such date."

[14] In my view it can be inferred from clause 4 that transfer to Stefanus Jacobus Slabbert "should be given and taken" by him upon payment, inter alia, of the R120 000,00. It is evident therefore that it was understood by the parties to the agreement that the purchase price will be paid in cash and not in instalments. Clause 1 states that the "offer shall become a final and binding sale upon acceptance hereof by the Seller on or before 16 December 2002." This was complied with. The property was to be transferred to the purchaser "op 1 September 2004 en/of soos verder ooreengekom."

I am in the result satisfied that the parties' agreement is not void *ab initio.*

[15] A further hurdle that the plaintiffs have to overcome is the following. They are married in community of property. It is common cause that the second plaintiff did not sign the deed of sale as prescribed by s2(1) of the Alienation of Land Act which requires that it be "...signed by the parties thereto or by their agents acting on their written authority." This section must be read in conjunction with s15 of the Matrimonial Property Act, 88 of 1984,

which provides that:

"15 Powers of spouses

1. Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse-

(a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;

(b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;

(3) and (4) (Not relevant)

(5) The consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses."

[16] Both plaintiffs testified that the second plaintiff did not sign the deed of sale despite being present when it was signed by the first plaintiff and first defendant in December 2002. They knew that they were enjoined to sign the deed of sale jointly. They contended that the second plaintiff had, as in other transactions not related to the case under discussion, given the first plaintiff a general power of attorney to conclude contracts which bound her even though she did not sign the contract or expressly declared her consent. They were further mindful that this power of attorney was signed in 2000, two years before the conclusion of the deed of sale in dispute.

[17] Assuming for the moment that the plaintiffs honestly believed that the general power of attorney covered their case and was valid the obstacle remains that they omitted to plead that fact. S15(2) prescribes that in the event that one spouse gives consent that the other acts as his or her agent such consent must be given separately in writing in respect of each act and must be attested to by two competent witnesses. This was admittedly not done. The submission made by plaintiffs' counsel to the effect that because the second plaintiff was present when the deed of sale was concluded amounted to substantial compliance with the prescripts of s15 is fallacious because the legal formalities were not adhered to. See **Thorpe v Trittenwein** 2007(2) SA 172 (SCA) at 176E-178F.

[18] The intention of the Legislature with section 15 of the said Matrimonial Property Act is, inter alia, to protect a spouse who is married in community of property not to be divested of property without his or her consent or knowledge. In **Amalgamated Banks of South Africa Bpk v De Goede en n Ander** 1997(4) SA 66 (SCA) at 74B-E the Court stated:

> *"(D)ie Wet op Huweliksgoedere handel met huwelike in gemeenskap van goed. Soos blyk uit art 14 was die oogmerk van die Wetgewer om gelyke bevoegdhede met betrekking tot die gemeenskaplike boedel aan gades getroud binne gemeenskap van goed te verleen. In aansluiting by hierdie beginsel van gelyke bevoegdhede van die gades is daar die bepalings van art 15(1) waarvolgens elke*

gade in 'n huwelik in gemeenskap van goed in beginsel enige regshandeling met betrekking tot die gemeenskaplike boedel kan verrig. Hierdie bevoegdheid — is weliswaar onderhewig aan die bepa lings van subarts (2) en (3). Volgens daardie subartikels word die toestemming van die ander gade vir sekere regshandelinge vereis. Dit is regshandelinge wat moontlik die ander gade se belang in die gemeenskaplike boedel kan benadeeL So bepaal art 15(2) (a) bv dat 'n gade nie sonder die skriftelike toestemming van die ander gade onroerende goed wat deel van die gemeenskaplike boedel uitmaak, mag vervreem of beswaar nie. Soos gesien, vereis art 15(2) (h) ook die ander gade se skriftelike toestemming alvorens 'n gade horn as borg verbind. Die vereiste van toestemming geld egter in gelyke mate vir beide gades, dws sonder om afbreuk te doen aan die beginsel van gelyke bevoegdhede."

[19] In the light thereof the provisions of section 15 of the Matrimonial Property Act are enacted for the benefit of the spouse married in community of property such spouse is entitled to waive the benefits conferred by it and safe the contract from invalidity. This is moreso that section 15 is clearly severable from the other formalities of section 2(1) of the Alienation of Land Act. See: **Voqal NO v Volkersz** 1977(1) SA 537(t) at 548G-551B.

I therefore come to the conclusion that exhibit A is valid and that the first respondent was not entitled to sell the property to second and third defendants.

[20] The conclusion that I have reached has material consequences for the three first defendants. The property is already registered in the

names of second and third defendants and they may have paid first defendant the R360 000,00 or portion thereof. It also has to be determined whether the transfer of the property into the names of the second and third defendants was valid. If valid they will retain ownership and first defendant will be liable to the plaintiff for damages suffered. The final order must take account of all these permutations. See: **Menqa and Another v Markram and Others** 2008(2) SA 120 (SCA) at 130B-D.

[21] The hearing will now have to proceed on the outstanding issues set out in paragraphs 8 - 13 of the Particulars of Claim.

[22] The general rule applicable to costs should apply. The plaintiffs were successful and are entitled to their costs. However, I wish to hear further argument on whether second and third defendants must bear the costs jointly and severally with first defendant.

ORDER

[23] In the circumstances I make the following order.

1. The sale agreement between the first plaintiff and the first defendant is declared to be valid.

2. The costs issue will stand over for later determination.

B.C. MOCUMIE, J

On behalf of the 1st and 2nd plaintiffs: Adv. Reinders
Instructed by:

BLOEMFONTEIN

On behalf of the 1st, 2nd and 3rd respondent: Adv. Benade
Instructed by:

BLOEMFONTEIN