IN THE HIGH COURT OF SOUTH AFRICA Reportable

EASTERN CAPE, PORT ELIZABETH Case No: 3885/2010

In the matter between Date Heard: 26/04/2012

Date Delivered: 02/05/2012

EBEN VERSTER Applicant

And

MICHELE TRIXIE FLETCHER First Respondent

REGISTRAR OF DEEDS Second Respondent

JUDGMENT

DAMBUZA J:

[1] This is the return day of a *Rule Nisi* granted on 26 May 2011, in terms of which the applicant obtained an interlocutory interdict restraining the first respondent from selling an immovable property known as "the farm *Wingle Dew No 2006*", situated in Stutterheim (the farm), pending institution, by the applicant, of an action for relief based on the farm being an asset of a partnership between the parties, alternatively, their co-ownership of the farm, alternatively, the applicant's right of pre-emption in respect thereof. Only the first respondent opposes the application, the second respondent has

filed a “report” in which he states that he has no objection to the granting of the order prayed. For that reason I shall refer to the first respondent, simply, as “*the respondent*”.

[2] According to the Deed of Transfer which forms part of the record, the farm is registered in the name of the respondent. It is common cause that the respondent is in the process of selling the farm; a Deed of Sale was concluded between her and Johan Steenkamp in November 2010, in terms of which the farm was sold to Steenkamp.

[3] The application stands on three legs. In the first leg, the applicant claims that the farm is an asset of a partnership between the parties (ie the applicant and the respondent). In the second leg the applicant claims that the parties are co-owners of the farm. Thirdly, the applicant contends that he has a right of pre-emption in respect of the farm.

[4] The respondent disputes the existence of a partnership between herself and the respondent; she also disputes that the farm is an asset in the alleged partnership. The applicant’s claim that the parties are co-owners of the farm is also disputed. The respondent contends that the agreement to sell a portion of the farm, on which the applicant’s claim to a right of pre-emption is founded, is illegal.

The facts

[5] The background facts to acquisition of the farm by the respondent are in dispute. The applicant’s version, as set out in the founding of papers, is that in July 1999 the parties concluded an oral partnership agreement. This partnership was aimed at buying the farm. In terms of the agreement the applicant would contribute R70 000,00 towards the purchase price of the farm, which was R90 000,00; the respondent would contribute

R20 000,00. The applicant states that because of inexperience he never paid attention to the details of the purchaser as they appeared in the Deed of Sale. He never contested the absence of a recordal that the farm is, in fact, held by the respondent on behalf of a partnership.

[6] On the other hand to the respondent states that the farm was sold to her by a Mrs Magdalena Petzer in May 1999. At that time, the respondent was married to Craig Fletcher. They have since divorced. Fletcher has filed an affidavit in which he supports the applicant's claims in respect of the farm. The respondent states that when she bought the farm, her husband (Fletcher) undertook to pay the purchase price for the farm on her behalf. But when the purchase price had to be paid Fletcher did not have the money; he then offered to sell to the applicant a certain portion of the farm for R70 000,00. It is in these circumstances, according to the respondent, that the R70 000,00 was paid to Fletcher. Fletcher then paid the R70 000,00 over to the attorneys who were attending to the transfer of the farm..

[7] A document "*V4*" annexed to the founding papers purports to be a recordal of, *inter alia,* the sale of a portion of the farm. It reads as follows:

> *"1999-08-08*
>
> *I Michele Trixie Fletcher, I.D. 6804080102083, hereby declare that I have sold the camps above the road of the farm Winkeldew, measuring, 121.hec to Eben Vester, I.D 66010315022086.*

If I Michele wanted to sell my portion, Eben has first option on it and if Eben had to sell his portion, I would have the first option."

It is not in dispute that both parties signed this document. I might add that according to the Deed of Transfer the farm was transferred to the respondent on the 28July 1999. I can only conclude therefore that annexure V4 was drawn and signed subsequent to transfer of the farm to the respondent.

The law

[8] It is trite that for the applicant to be afforded the relief of an interlocutory interdict he must prove, on a balance of probabilities, that he has a *prima facie* right in respect of the object of the relief; that he has a reasonable apprehension of irreparable harm to that right; that the balance of convenience favours the granting of the order sought and that there is no satisfactory alternative remedy available to the applicant.[1] These requisites must all be satisfied for an interim interdict application to succeed.[2] It is also trite that the approach to an application for an interim interdict is to consider the facts set out by the applicant in the founding affidavit, together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to inherent probabilities, the applicant should obtain final relief at the trial.[3] The facts set out by the respondent in contradiction should then be considered, and if serious doubt is shown on the applicant's case, the relief should not be granted.[4] Against these

[1] Coalor (Cape) (Pty) Ltd and others v Boiler Efficiency Services.
[2]Webster v Mitchell 1948 (1) SA(W) at 1189 and Ndanti v Kgami 1948 (3) SA 27 (W)
[3]Setlogelo v Setlogelo 1914 AD 221
[4]Setlogelo.

principles I now turn to consider whether the applicant could obtain final relief at the trial on the evidence before me.

The claim based on partnership.

[9] The applicant's case is that in the contemplated action he intends to seek an order dissolving the partnership between himself and the respondent, together with an order for equitable division of the partnership asset (the farm). However, his allegations regarding the partnership are disputed as set out above. I therefore consider the evidence of both parties in the context of objective documentary evidence which forms part of the record. The Deed of Transfer reveals that the farm was sold to the respondent by Mrs Petzer on 19 May 1999 as alleged by the respondent. This is prior to the time (July 1999) when, on the applicant's version, the partnership was concluded. I can only conclude that the farm was indeed bought by the respondent on 19 May 1999. Further, I am persuaded that the respondent never dealt with the applicant prior to her purchasing the farm. I am also persuaded that any purported agreement between the parties regarding the farm was concluded after the respondent bought the farm. My view is that if the parties had formed a partnership with the intention of acquiring the farm and had bought the farm jointly as the applicant contends, there would have been no need for the parties to enter into another agreement in terms of which a portion of the same farm was sold to the applicant. Consequently I am not persuaded that the applicant could succeed at trial in the claim based on the farm being a partnership asset.

Co-ownership

[10] In this regard the plaintiff contemplates claiming (in the action) rectification of the agreement or sale concluded between Mrs Petzer and the applicant, presumably to record that the farm was sold to both the applicant and the respondent. This claim is therefore also based on the disputed version that the parties jointly resolved to buy the farm. For the same reasons set out above, it is improbable that the applicant will succeed in a claim based on a joint decision by the parties to buy the farm together. Although the applicant does not state when the resolution to buy the farm was taken, on the papers, this could only have been on 19 May 1999 or prior thereto. This is disputed by the applicant. Further, again there is no explanation as to why the parties would then reach the agreement recorded in annexure V4 if they had agreed to acquire the farm as co-owners in undivided shares thereof.

[11] I agree with the submission on behalf of the respondent that the most probable version is the one tendered by the respondent; in particular, that in August 1999 the respondent purported to sell to the applicant a portion of the farm, as recorded in annexure V4. However, the purported sale does not take the applicant's case in this application any further.

[12] Firstly I have serious doubt that annexure V4 is a valid Deed of Sale of immovable property. Further, as submitted on behalf of the respondent, the purported sale is prohibited by the provisions of the Subdivision of Agricultural Land Act, No 70 of 1979 (the Act). In annexure V4 the respondent purports to sell to the applicant a specific portion of the farm, measuring 121, hectares. This would entail subdivision of

the farm. A summary of Section 3 of the Act is given by Silberberg and Schoeman[5] as follows:

> *"(a) agricultural land may not be subdivided;*
>
> *(b) no undivided share in agricultural land "not already held by any person, shall vest in any person";*
>
> *(c) "no part of an undivided share in agricultural land shall vest in any person, if such part is not already held by a person";*
>
> *(d) no long term lease in respect of a portion of agricultural land may be entered into; and*
>
> *(e) no portion of agricultural land may be sold or advertised for sale and no right to such portion may be sold or granted by virtue of a long term lease or advertised for sale or for lease;*
>
> *Unless the Minister of Agriculture has consented in writing".*

It was common cause before me that there had been no attempt to seek the approval of the Minister of Agriculture in respect of the transaction envisaged in annexure V4. It

[5]The Law of Property 5th ed; at 107

appears that when annexure V4 was drawn the parties were oblivious to restrictions applicable to the transaction they sought to conclude.

[13] The following commentary on section 3 of the Act, by Silberberg and Schoeman bears mention:[6]

> *"Restriction (a) is clear enough and requires no clarification. However, the remaining four require some brief explanation. Section 3(b) is intended to prevent the sole owner of agricultural land, not holding the land in undivided shares, from transferring any undivided share in the ownership of the that land to another person without the Minister's consent first having been obtained. Section 3(b) however, does not prohibit the registration of a farm as a partnership asset in the name of the partner. Upon registration the other partner or partners do not acquire a real right in the property, but only a personal right against the partner in terms of which he or she is bound to treat the property as a partnership asset. Section 3 (c) is intended to prevent the holder of an undivided share in the ownership of agricultural land from transferring a 'portion' of his or her*

[6] At 107

> *undivided share to another without such consent. There is nothing, however, which prevents the holder of two or more undivided shares in the ownership of a single piece of land from transferring one (or more) of these shares to another, whether or not the latter holds any share in the ownership of such land. The intention of the legislature was therefore to prevent uncontrolled subdivision of agricultural land into smaller (uneconomic) units, as well as further division of existing undivided shares in the ownership of such land into smaller 'shares'."*[7]

[14] I am satisfied that any claim of co-ownership founded on the purported sale (in terms of annexure V4) would not succeed.

The claim based on a right of pre-emption

[15] The contemplated claim would also be founded on annexure V4. In this regard the applicant's case is that he has a right of first refusal in respect of a portion of the farm owned by the respondent. But the right of first refusal contained in annexure V4 is, itself, founded on the validity of the purported (preceding) sale of a portion of the farm to the applicant and parties therefore being owners portions of the farm and then giving each other a right of pre-emption in respect of the portion owned by each. As I have

[7] See also the authorities cited at 108 of Silberberg.

stated because the parties never sought and/or obtained the required consent, the agreement as contained in annexure V4 is void.

[16] The applicant therefore has failed to prove a *prima facie* right. In my view, the applicant's case is not merely open to doubt, as it was submitted on his behalf by Mr Smith; it is improbable that any action in respect thereof will succeed. That being the case, I deem it unnecessary to inquire into whether the remaining pre-requisites for an interlocutory interdict have been satisfied.

Consequently the following order shall issue, that:

1 The Rule Nisi is discharged and the applicant is ordered to pay the first respondent's costs of the application; such costs shall include the costs of 26 May 2011.

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N. DAMBUZA

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv. Smith Instructed by Roelofse Meyer INC. Central, Port Elizabeth

For the Respondent: Adv. Nepgen Instructed by Rushmere Noach INC. Conyngham Road, Greenacres, Port Elizabeth.