Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1196/2015

In the matter between:

MATTHYS PIETER RUBEN DE VILLIERS **APPELLANT**

and

ELSPIEK BOERDERY (PTY) LTD **FIRST RESPONDENT**

REGISTRAR OF DEEDS, CAPE TOWN **SECOND RESPONDENT**

Neutral citation: *De Villiers v Elspiek Boerdery (Pty) Ltd* [2017] ZASCA 4 (1196/2015) (9 March 2017)

Coram: Shongwe, Majiedt and Mocumie JJA and Fourie and Schippers AJJA

Heard: 24 February 2017

Delivered: 9 March 2017

Summary: Validity of a notarially executed 99 year lease : whether agent had the necessary authority to bind her principal : held that power of attorney with draft lease attached thereto duly authorised the agent to execute the lease on behalf of her principal : whether the provisions of s 3*(d)* or 3*(e)*(ii) of the Subdivision of Agricultural Land Act 70 of 1970 prohibited the conclusion of the lease : held that these provisions of Act did not find application : lease held to be valid.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Binns-Ward J sitting as court of first instance):

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

JUDGMENT

Fourie AJA (Shongwe, Majiedt and Mocumie JJA and Schippers AJA concurring):

[1] This appeal concerns the validity of a lease that was notarially executed on 25 January 2010 (the lease) and registered against the title deed of the farm Elspiek (the property) situated in the Hex River Valley of the Western Cape Province. The appellant, Mr M P R de Villiers (De Villiers), was at all relevant times the registered owner of the property and in terms of the lease he let the property to the first respondent, Elspiek Boerdery (Pty) Ltd (Elspiek), represented by Mr G H de Kock (De Kock), for a period of 99 years commencing on 15 April 2009.

[2] However, on 20 August 2012, De Villiers instituted action in the Western Cape Division of the High Court, Cape Town, claiming that the lease was void; that the registrar of deeds should deregister the lease as well as a subsequent notarial cession thereof; and that Elspiek be evicted from the property. Elspiek opposed the action and raised a contingent claim in reconvention. In the event, the trial proceeded before Binns-Ward J, who ordered, by agreement between the parties, that the claim in convention be heard first, with the counterclaim to stand over for later determination, if necessary.

[3] De Villiers presented no oral evidence at the trial, while De Kock gave evidence on behalf of Elspiek. Two main contentions were advanced at the trial on behalf of De Villiers in support of his claim, first that the agent who purportedly acted on his behalf to conclude the lease lacked authority and, second, that the lease was void by virtue of the prohibitions contained in s 3*(d)* and s 3*(e)*(ii) of the Subdivision of Agricultural Land Act 70 of 1970 (the Act). The court a quo dismissed the claim with costs, but granted De Villiers leave to appeal only in respect of the second contention above. This court on petition subsequently extended the ambit of the appeal to include the rest of the findings of the court a quo in regard to the issue of the validity of the lease, namely the agent's alleged lack of authority.

[4] In its judgment the trial court dealt at length with the relevant background facts and circumstances giving rise to the litigation between the parties. These facts and circumstances are largely common cause and the correctness of the summary of the trial judge is accepted by both parties. There is accordingly no need to repeat this laborious exercise. Where necessary, in dealing with specific issues, I will succinctly refer to the relevant facts or circumstances.

[5] Before dealing with the grounds relied upon by De Villiers to have the lease and its subsequent cession voided, it is necessary to record the following crucial finding made by the trial court in analysing the evidence that led to the conclusion of the lease:

'There is no doubting on the evidence that was adduced that the registered contract [the lease], with the plaintiff [De Villiers] as lessor, reflects the common intention of the parties.'

Differently put, the court a quo held that, on the evidence, the common intention of the parties was that De Villiers, as owner, would let the property to Elspiek, as lessee, for 99 years on the terms and conditions set out in the lease. De Kock's evidence unequivocally demonstrated this. He testified that De Villiers was willing to sign any document to achieve this goal. There is simply no evidence to gainsay the evidence of De Kock, with the result that there is no basis for attacking the above conclusion of the trial judge. As submitted on behalf of Elspiek, De Villiers' failure to testify is a clear indication that he could not dispute De Kock's evidence.

[6] In his original particulars of claim, De Villiers firstly attacked the validity of the lease on the basis that the power of attorney of Ms Ronelle Miller (the agent), who appeared before the notary public for purposes of the notarial execution of the lease, mandated her to conclude a lease with a trust as lessor, and not with him personally as lessor. This cause of action was abandoned after Elspiek had closed its case. The particulars of claim were then amended to record that the first attack of De Villiers on the validity of the lease was that the agent was not authorised by him to conclude the lease on his behalf, as:

(a) The special power of attorney granted by him authorising her to notarially execute a deed, did not have the lease as an annexure thereto.

(b) The power of attorney related to a notarial deed referred to therein, which was not the lease and could not have been the lease.

[7] In order to appreciate the case of De Villiers regarding this first ground of attack upon the validity of the lease, it is necessary to record the events preceding and following the creation of the relevant documents: For a period of at least ten years immediately prior to the notarial execution and registration of the lease, De Kock had leased the property from De Villiers and farmed same, either personally or through a legal entity controlled by him. At all relevant times during this period and thereafter, De Villiers and his family were and still are in occupation of the dwelling on the property. During 2006, De Villiers and De Kock decided that De Villiers would sell the property to a company in order to serve as de facto security for the repayment of loans which De Kock and various entities controlled by him had granted to De Villiers. As part of this transaction, De Villiers and De Kock established the M P R de Villiers Trust (the trust), which it was envisaged would hold the majority share in the company, representing De Villiers' interest in the property, while the remainder of the shares would be held by a company representing De Kock's interests. Elspiek was acquired for the purpose of purchasing and holding the property.

[8] To facilitate this transaction, a special power of attorney was executed by De Villiers on 13 October 2008 (the power of attorney), for the purpose of registering rights of pre-emption in favour of his two brothers, who had testamentary rights of pre-emption over the property. The rights of pre-emption that would be registered in

favour of the two brothers, would replace the testamentary rights of pre-emption that they enjoyed in the property against De Villiers. The power of attorney read as follows:

'**SPESIALE VOLMAG OM NOTARIëLE AKTE TE VERLY**

Ek, die ondergetekende,

Matthys Pieter Ruben de Villiers

Identiteitsnommer [5...]

Getroud buite gemeenskap van goed

nomineer, konstitueer en stel hiermee aan Ronelle Miller met mag van substitusie om my/ons wettige Agent te wees om voor 'n Notaris Publiek in die Provinsie van die Kaap die Goeie Hoop te verskyn en dan en daar as my/ons gemagtigde 'n Notariële Akte te teken volgens die konsep hierby aangeheg welke konsep deur my/ons geparafeer is vir die doeleindes van identifikasie, en om sodanige formele wysigings op die gemelde Notariële Akte aan te bring as wat nodig mag wees vir die doeleindes van die registrasie daarvan,
en in die algemeen, ten einde voorgenoemde doeleindes uit te voer, te doen of te laat doen al wat nodig is, net so volmaak en doeltreffend asof ek/ons self teenwoordig was en hierin gehandel het, en ek/ons bekragtig hiermee alles wat my/ons genoemde Prokureur en Agent uit krag hiervan wettiglik doen of laat doen.
Geteken te **De Doorns** op **13 Oktober 2008**.'[1]

[9] However, the sale of the property to Elspiek could not be concluded as one brother of De Villiers refused to waive his testamentary pre-emptive right. In view of the failure of the contemplated sale, De Villiers and De Kock then decided to conclude a 99-year lease of the property by Elspiek, which would afford De Kock and his entities the security required for the repayment of the amounts that they had advanced to De Villiers. The parties further intended that De Villiers and his family should not lack for a roof over their heads and that, notwithstanding the conclusion of

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[1] The trial judge provided an accurate translation of the document as follows:
'SPECIAL POWER OF ATTORNEY TO EXECUTE NOTARIAL DEED
I the undersigned
Matthys Pieter Ruben de Villiers
etc. . . .
nominate, constitute and appoint Ronelle Miller, with power of substitution, to be my/our lawful Agent to appear before a Notary Public . . . and then and there as my authorised representative to sign a Notarial Deed in accordance with the draft attached hereto which has been initialled by me/us for purposes of identification, and to make such formal amendments thereto as might be necessary for the purposes of the registration thereof, and in general, for the achievement of the aforementioned purposes, to do or permit to be done everything as completely and effectively as if I/we were personally present and dealing with the matter, and I/we hereby ratify everything that our nominated Attorney and Agent lawfully does or permits to be done in terms hereof.
Signed at De Doorns on 13 October 2008.'

the 99-year lease agreement, they should have the right to continue living in the house on the property for as long as they might wish.

[10] To facilitate the registration of the 99-year lease, a draft notarial contract of lease (the draft) was executed in May 2009 and annexed to the power of attorney which had by then not yet been utilised due to the failure of the contemplated sale of the property. The draft identified the trust, represented by its trustees, as the lessor and Elspiek as the lessee. It was plainly a mistake to identify the trust as the lessor as it had never been the registered owner of the property and the parties never contemplated that it would become the owner. Nor did the trust have any right to encumber the property by means of a lease. The uncontroverted evidence of De Kock was that the description of the trust as lessor in the draft was a common mistake. The evidence further showed that the trust had only featured in the plans of the parties in 2006, when the sale of the property had been contemplated. Once that plan fell through, the trust had no purpose; did not feature in any further plans; became dormant and continued in existence only in name.

[11] In the event, the lease was notarially executed and registered after the draft annexed to the power of attorney had been amended, to reflect De Villiers and not the trust as lessor. As recorded earlier, the common intention of the parties was that De Villiers, as owner, would let the property to Elspiek as lessee – therefore the draft had to be amended to give effect to the common intention of the parties. In this regard it should be borne in mind that the lease was susceptible to rectification as it was a common mistake that led to the trust and not De Villiers being described as the lessor.

[12] As recorded above, the first line of attack of De Villiers was that, in terms of the power of attorney, he did not authorise the agent to conclude the lease on his behalf. The power of attorney was the source of the agent's authority to perform juristic acts on behalf of De Villiers and it is accordingly necessary to turn to the document itself to determine the ambit and extent of the authority granted to the agent. As stated in 1 *Lawsa* 3 ed para 141, the power of attorney constitutes written authority to the agent to perform the acts set out in that document on behalf of the

principal. Where the words of the power of attorney are clear they are to be followed and no question of interpretation arises (see A J Kerr *Law of Agency* 4 ed at 66).

[13] The words of the power of attorney are clear and unambiguous. In terms thereof the agent was mandated to appear before a notary public as the authorised representative of De Villiers and there to sign a notarial deed in accordance with the draft attached to the power of attorney, which had been initialed by De Villiers for purposes of identification, and to make such formal amendments thereto as might be necessary for the purpose of the registration thereof.

[14] What the evidence shows, is that the draft attached to the power of attorney was the lease as initialed by De Villiers, expressly confirming that the agent was authorised by him in terms of the power of attorney granted by him at De Doorns on 13 October 2008. There was no evidence of any other power of attorney executed on 13 October 2008, with the result that, when De Villiers initialed the draft attached to the power of attorney, he was aware that he was granting the agent the authority to execute the lease before the notary public in terms of the power of attorney. This is borne out by the uncontroverted evidence of De Kock as to the circumstances surrounding the execution of the lease in accordance with their common intention. As alluded to earlier, De Villiers, who bore the onus, failed to place evidence before the trial court to gainsay the objective evidence and the evidence of De Kock. This failure constituted a clear indication that he could not dispute this evidence or, at least, that he and his legal advisers were satisfied that, although he was able to give material evidence in this regard, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination. (See *Galante v Dickinson* 1950 (2) SA 460 (A) at 465.)

[15] It was submitted on behalf of De Villiers, that as the power of attorney had initially been executed for another purpose, which had not materialised, namely the registration of rights of pre-emption pursuant to the contemplated sale of the property to Elspiek, it had lapsed and could not thereafter serve as authority for the agent to execute the lease. I agree with the finding of the trial court, that there was no bar to using the power of attorney for a different purpose after it had become clear that the sale of the property would not be concluded. As held by Binns-Ward J, from a

practical point of view there was nothing exceptional about such 'economy of documentation'. In any event, it is clear from the wording of the power of attorney that its use was not limited to the initial purpose contemplated by the parties, or indeed to a sole purpose.

[16] Finally, in regard to this line of attack, the proof of the pudding is in the eating. The conduct of De Villiers subsequent to the execution and registration of the lease, unequivocally shows that the registration of the lease was authorised by him personally and that it reflected the parties' common intention. On 28 April 2010, De Villiers executed a special power of attorney authorising his agent to act on his behalf to execute a notarial deed of cession of the lease and to obtain the registration thereof. The draft deed attached to that power of attorney unambiguously described De Villiers as the lessor of the property and, as in the case of the draft lease which he executed in May 2009, set forth a declaration that he was the owner of the property that had been let. As held by the court a quo, this conduct in respect of the cession was wholly irreconcilable with the case that De Villiers subsequently sought to advance, ie that the lease had been notarially executed and registered without his authority.

[17] Furthermore, two years later, in April 2011, De Villiers acknowledged that the property had lawfully been let to Elspiek, when approaching an attorney to assist him to sell the farm to his brothers, stating that he 'stel geensins belang dat die grond enigsins verder verhuur word nie'.[2] What is striking, is that De Villiers at this late stage made no mention of the fact that the lease had been executed and registered without his authority. Had that been the case, one would have expected him to have advised the attorney that, for this reason, the lease was invalid. In view of the above, I conclude that there is no merit in this first cause of action relied upon by De Villiers and that the trial court correctly rejected same.

[18] The second ground upon which De Villiers sought to have the lease declared void, was that it fell foul of the provisions of s 3*(d)* of the Act,[3] which prohibit the

[2] 'was not interested in the continued letting of the property.'
[3] It is to be noted that the commencement of the Subdivision of Agricultural Land Act Repeal Act 64 of 1998, that repeals the whole of the Subdivision of Agricultural Land Act 70 of 1970, has not yet been promulgated.

letting of only a portion of agricultural land for an effective period of 10 years or longer, without the prior consent of the Minister of Agriculture (the Minister). It is common cause that the property constituted agricultural land as defined in s 1 of the Act and that the consent of the Minister was not sought or obtained for the conclusion of the lease. De Villiers contended that, upon a proper construction of the lease, and in particular clauses 2.1 and 16 thereof, Elspiek leased only part of the property and absent the prior consent of the Minister, the lease is void.

[19] It is clear from clause 2.1 of the lease, read with the definition of 'eiendomme' in clause 1 thereof, that the four registered land units that make up the entire property, constitute the subject of the lease. However, De Villiers contended that clause 16, which provides that he has the right to reside in the house on the property for as long as he wishes and to use the outbuildings in the yard to the extent that they are not required for Elspiek's farming operations, resulted in Elspiek leasing only part of the property – therefore the prohibition in s 3*(d)* of the Act finds application.

[20] I agree with the trial court that this argument of De Villiers finds no support upon a proper construction of the lease. The court a quo duly rejected this line of attack, with reference to the relevant jurisprudence, in particular the decision of this court in *Adlem & another v Arlow* 2013 (3) SA 1 (SCA); [2012] ZASCA 164.

[21] It is clear from *Adlem* at para 13 that, to succeed with this cause of action based on s 3*(d)* of the Act, De Villiers had to establish that the right reserved to him to live in the house on the property, resulted in the lease being in respect of only part of the property with reference to its registration in the deeds registry, rather than the whole of the property. This was simply not the case. The lease expressly provides that the property, consisting of the four registered land units which make up the entire property, constitutes the subject of the lease. The whole of the property was leased by Elspiek as a single economic unit for farming purposes. This included that part of the property upon which the dwelling house and its yard is situated.

[22] Clause 16 of the lease merely constituted a temporary and limited restriction of Elspiek's right of use of the property as a whole in terms of the lease. As

emphasised by the court a quo, the limited nature of the right conferred upon De Villiers in terms of clause 16, is demonstrated by the fact that he has no right to use or deal with the house if he vacates it. This limitation on his ability to deal with the house during the currency of the lease, stems from the fact that De Villiers had let the whole property to Elspiek in terms of the lease.

[23] Furthermore, the limited right granted to De Villiers to reside in the dwelling, does not detract from the kind of 'use and enjoyment' conferred upon Elspiek by the lease, ie to utilise the property as a whole for its farming enterprise. This 'use and enjoyment' of the property as a farming enterprise constituted the subject and substance of the lease, and is not in any way curtailed by the limited right conferred upon De Villiers to reside in the house. See *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785G-H.

[24] The above construction accords with the object of the Act, as appears from its long title, namely:

'To control the subdivision and, in connection therewith, the use of agricultural land.'

In *Adlem* at para 12 Cloete JA emphasised that '. . . what is sought to be controlled is not both the subdivision and also the use of agricultural land, but the subdivision and, *in connection therewith*, the use of such land'. Therefore, what s 3*(d)* of the Act seeks to prevent, is the 'subdivision' of agricultural land by means of a lease in respect of a portion of agricultural land for a period of 10 years or longer and the use thereof as an uneconomic portion of agricultural land. As recorded above, in terms of the lease the whole property was let to Elspiek and its enjoyment of the property as a whole for purposes of its farming enterprise was not in any way curtailed by the limited right of residence afforded to De Villiers. Neither does the right of residence in any way result in uneconomical fragmentation of agricultural land. There is accordingly no basis upon which s 3*(d)* of the Act finds application.

[25] During argument in the court a quo, De Villiers added a second string to his bow, namely that the lease was in any event void by virtue of the provisions of s 3*(e)*(ii) of the Act. This cause of action had not been pleaded, but the trial court allowed De Villiers to raise it as it would not have caused prejudice to Elspiek in the conduct of its case.

[26] Section 3*(e)*(ii) of the Act, inter alia, provides that no right to a portion of agricultural land shall be granted for a period of more than 10 years, except for the purposes of a mine as defined in s 1 of the Mines and Works Act 27 of 1956, unless the Minister consents in writing. De Villiers contended that, if it is found that Elspiek had leased the whole of the property (which it did, as recorded above), then the granting of the right to De Villiers to live on a portion thereof, constituted a contravention of s 3*(e)*(ii) of the Act, as it was effected without the prior written consent of the Minister.

[27] The court a quo rightly gave this alternative submission short shrift. The granting of the right to use the farm house for dwelling purposes did not derogate from the character of the farm as a unit of agricultural enterprise. Bearing in mind the object of the Act, the granting of the right had no subdivisional effect on the property and no effect on the use of the property as a notional single unit for farming purposes.

[28] The absurd consequences which would result from De Villiers' construction of the subsection were highlighted thus by the trial court:

'Taken to its extreme the plaintiff's contention would mean that if a right were to be granted to a farm worker to occupy a single room in a cottage on a farm for his lifetime or for periods which taken together . . . might amount to more than 10 years, that could competently be done only with the prior written consent of the Minister of Agriculture. That postulate would seem to give rise to a function for the Minister which bears no relationship whatever with the recognised objectives of the Act.'

It follows that the reliance on s 3*(e)(*ii) of the Act is clearly misplaced.

[29] For all the above reasons the appeal falls to be dismissed. The matter justified the employment of two counsel and the following order is made:

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

P B Fourie

Acting Judge of Appeal

APPEARANCES:

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