FRANCOIS DOMINICUS THERON AND ANOTHER V
JUTTA MARIA THERESIA TEGETTHOFF AND TWO OTHERS

CASE NO. (P)A 283/2000

2001/04/06

Maritz, J.

CONTRACT
SUBDIVISION OF AGRICULTURAL LAND ACT, 1970
FORMALITIES IN RESPECT OF CONTRACTS OF SALE OF LANDS ACT, 1969

Subdivision of Agricultural Land Act, 1970 – definition of “agricultural land” discussed in view of constitutional developments – every registered unit of agricultural land constitutes “agricultural land” for purposes of Act - meaning of “a portion of agricultural land” – what constitutes - purpose of the Act discussed – dealing with such land contrary to s.3(a)-(e) of the Act without ministerial consent – void *ab initio* .

Subdivision of Agricultural Land Act, 1970 – whether oral relocated lease agreement terminable on 12 months notice by either party in respect of a portion of agricultural land conflicts with s.3(d) of Act – not a lease agreement indefinitely renewable from time to time at the will of the lessee – lease agreement not void for that reason.

Contract – option - whether written option in original lease agreement has been incorporated in oral relocation of that agreement for further period – differences between the terms of the “relocated option” and the original option - oral relocation of lease agreement not intended by parties to

incorporate an oral relocation of the option clause, in any event not on same terms

Formalities in respect of Contracts of Sale Of Lands Act, 1969 –– incorporation of option to purchase land in lease agreement relocated orally – some of the terms of the relocated option orally agreed on – contrary to s.1 of Formalities in respect of Contracts of Sale Of Lands Act, 1969 – option void *ab initio*.

CASE NO. (P) A 283/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FRANCOIS DOMINICUS THERON FIRST APPLICANT

CATHARINA JOHANNA THERON

SECOND APPLICANT

versus

JUTTA MARIA THERESIA TEGETHOFF FIRST RESPONDENT

GOTTFRIEDT TSUSEB SECOND RESPONDENT

THE REGISTRAR OF DEEDS N.O. THIRD RESPONDENT

CORAM: MARITZ, J.

Heard on: 23/02/2001

Delivered on: 06/04/2001

<u>JUDGMENT</u>

<u>MARITZ, J.</u>:

The first respondent is the registered owner of two farms: the "Remaining extent of Farm Okauakondu-Noord No.10" and the "Remaining extent of Farm Okanapehuiri No. 19" (the "land"). She let the land (excluding the farmstead and a residential unit at an outpost) to the first applicant for farming purposes. During the currency of the lease, she sold the land to the second respondent in terms of a written suspensive sale agreement. Shortly thereafter, but prior to the fulfillment of the suspensive condition under the deed of sale, the first applicant purported to exercise an option to purchase the land - which he claimed had been granted to him as one of the terms of the lease agreement. For reasons that will become apparent later in the judgment, the first and second respondents maintained that the applicant was not in law entitled to do so and, after the suspensive condition had been fulfilled, they took steps to register transfer of the land in the name of the second respondent. As a consequence, the first applicant and the second applicant (his wife to whom he is married in community of property) sought and obtained *interim* interdictory relief on an urgent *ex parte* basis against the respondents.

Today is the extended return day of the rule *nisi* issued at the time which, in effect, calls on the first and second respondents to show cause why, (a) they should not be interdicted from registering transfer of the land and (b) the third respondent (the Registrar of Deeds) should not be authorized to register a *caveat* against the title deeds thereof, pending the outcome of an action to be instituted by the applicants for a declarator that the first applicant has validly executed the option to purchase the land. The first and second applicants are opposing confirmation of the rule.

Whilst labouring under the evidentiary and procedural disadvantages occasioned by the fact that the applicants are only seeking *interim* interdictory relief (i.e. pending the outcome of the action to be instituted), the first and second respondents nevertheless contend that the applicants have failed both in law and on the facts to make out a *prima facie* case justifying such relief. Their opposition at this stage of the proceedings is based on three grounds: Firstly, that the agreement of lease, which (according to the applicants) includes the option to purchase the land, falls squarely within the proscriptive provisions of section 3(d) of the Subdivision of Agricultural Land Act, 1970 (Act 70 of 1970 - to which I shall hereinafter refer to as the “Subdivision Act”) and

it is, for that reason void *ab initio*. Secondly, that the lease agreement does not contain an option to purchase the land or, if it does, that it was an oral agreement and that, given the provisions of section 1 of the Formalities in respect of Contracts of Sale of Land Act, 1969 (Act 71 of 1969 – to which I shall hereinafter refer to as the "Formalities Act") acceptance of the oral option to purchase does not give rise to an enforceable contract for the sale of the land. Thirdly, that the second respondent's agent had no written authority as required by section 1 of Act 71 of 1969 to grant the first applicant an option to purchase the land. I shall, as far as need be, deal hereunder with these points *seriatim*.

Subject to the provisions of section 2 (which is not relevant for purposes of this case), Section 3(d) of the Subdivision Act precludes any person from the entering into of a lease agreement without the written consent of the Minister -

> "in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years"

Section 3 only applies to "agricultural land" and paragraphs (a) to (g) thereof imposes significant restrictions on the subdivision of such land, the holding of undivided shares therein and the lease or sale of portions thereof. What constitutes "agricultural land" is defined in section 1 of the Subdivision Act. Mr. Heathcote initially submitted on behalf of the respondents that the land was not "agricultural land". He now concedes that the submission was based on an incorrect reading of the definition. If regard is being had to Article 124 of the Constitution and the provisions of the Local Authorities Act, 1992, the otherwise lengthy definition of "agricultural land" as it now applies in Namibia simply means any land, except land situated in the area of jurisdiction of a local authority (unless the Minister has declared otherwise by notice in the *Gazette* after consultation with the local authority council concerned), land which is a township as defined in section 102(1) of the Deeds Registries Act, 1937 (Act 47 of 1937) or land owned by the Government. The definition thus read and applied, clearly includes the land in question.

Mr. Miller advances on behalf of the respondents that, what has been let under the lease agreement is "a portion of agricultural land" as contemplated by section 3(d) of the Subdivision Act. Precisely what

constitutes a “portion of agricultural land” is not defined in the Act. A literary interpretation of that phrase will include all registered units of agricultural land – each being a “portion” of the whole. Such an interpretation will effectively put a stop to the sale or lease of existing registered farming units without the Minister’s consent. I need not analise the objects and provisions of the Act to conclude that such an interpretation will not only lead to an obvious commercial absurdity but also to a result which is “unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute” (to use the words of Malan, J. in Volschenk v Volschenk 1946 TPD 486 at 488). On a proper interpretation, every registered unit of agricultural land is therefore to be regarded as “agricultural land” for purposes of the application of the Act. The prohibition against the subdivision of such land, the holding of undivided shares therein and the lease or sale of portions thereof should therefore be understood accordingly. It is, for example, not the sale of an existing registered unit of agricultural land that is prohibited, but the subdivision and sale of a portion thereof.

Mr. Miller agrees that “a portion of agricultural land” should be so understood but nevertheless argues that the lease in question is one relating to such a portion. He points out that the lease excluded the

homestead and the residential unit at an outpost from the land leased. Mr. Heathcote concedes the factual correctness of the submission but submits that, given the overall object of the Subdivision Act, it is not the intention of the Legislature to concern itself with such comparatively small portions of land. He invites the Court to disregard the exclusion of those portions from the lease agreement and to hold that, in effect, the land as a whole was let and not only "a portion of agricultural land". On that basis, he submits, the lease agreement falls outside the sweep of section 3(d) of the Subdivision Act.

In *Van Der Bijl And Others v Louw And Another*, *1974* (2) SA 493 (C) at 499C-E Baker, J. summarized the purpose of the Subdivision Act and the intention of the Legislature to be inferred therefrom in the following terms:

> "The purpose of the Act is manifest: its object is to prevent the sub-division of economic units of farming land into non-viable (uneconomic) subunits or smaller units. 'Injudicious sub-division by testators and property speculators leads to uneconomic farming units and ultimately to a peasant rural community' (Annual Survey, 1970, p. 203); and for this reason Parliament has very wisely put a stop to unrestricted fragmentation of arable land. The Act, in the interests of national welfare, effects a drastic curtailment of previous common-law rights of land-owners in a certain category to carve their properties into units as

> small as they choose, and is undisputably one of the wisest pieces of legislation on the statute book."

I find nothing in that judgment supportive of the applicants' contentions. It seems to me that all necessary and useful improvements made on arable land ultimately contribute to the economic viability thereof. The construction of a homestead and other residential units on agricultural land constitutes a substantial portion of the capital investment required to develop and utilize the economic potential of the land. It is not so much the comparative insignificance of the size of the land on which the improvements have been constructed that determines the economic viability of the remainder, but, more often than not, the value of the improvements thereon that makes it commercially viable. Whilst a fully developed unit of agricultural land may be regarded as viable for agricultural purposes, the same land without such developments may not be.

Moreover, as Baker, J. has pointed out, the Subdivision Act "in the interests of national welfare, effects a drastic curtailment of previous common-law rights of land-owners in a certain category" in relation to agricultural land. Land-owners who intend to deal with their land in any one of the ways defined in paragraphs (a) to (e) of section 3 of the Subdivision Act, first have to obtain ministerial consent before doing

so. Without the requisite consent, the performance of any act in contravention of the section 3-prohibitions is void *ab initio.* That was the reasoned conclusion of a full bench of this Court's constitutional predecessor in *Tuckers Land and Development Corporation (Pty) Ltd v Truter*, 1984 (2) SA 150 (SWA) with which I respectfully agree. Other than the regulatory powers entrusted to the Minister, the peremptory formulation of section 3 does not allow for any exceptions. Whereas the seize of the "portion of agricultural land" may well be an important factor for the Minister to consider when granting or refusing consent to sell or let, without such consent it matters not if the proscribed act relates to 1% or 99% of the agricultural land – it remains invalid. For the same reasons that a person may not legally enter into an agreement providing for the subdivision, sale and transfer to him/her of only that portion of agricultural land on which no residential unit has been constructed without ministerial consent, he/she may also not enter into a lease agreement contemplated in section 3(e) in respect of the same portion land without such consent. There is nothing in the objectives underlying the Act or in the wording thereof to support the applicants' contention that the lease in question did not relate to a "portion of agricultural land" as contemplated in section 3(d) of the Subdivision Act.

The real issue, which I have raised with the parties during argument, is whether the provisions contained in the lease agreement bring it within the four corners of section 3(d) of the Act. It is not all lease agreements relating to "portions of agricultural land" that require ministerial consent. On my reading of the section, it applies only to four types: a lease "in respect of a portion of agricultural land (a) of which the period of lease (i) is 10 years or longer, or (ii) is the natural life of the lessee or any other person mentioned in the lease, or (b) which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, (i) indefinitely or (ii) for periods which together with the first period of the lease amount in all not to less than 10 years". (The letters and numbers in brackets are mine).

It is common cause between the parties that the initial lease agreement between the first plaintiff and the first defendant was concluded in writing on 19 August 1996. Clause 2 thereof provided as follows:

> "The period of lease shall commence on 1 September 1996 and shall continue indefinitely, unless either the lessor or the lessee give written

> notice to the other party at least twelve months before the time that he/she no longer wants to continue with the agreement."

The initial lease was terminated by notice at the instance of the lessor on 31 July 1999. As a consequence of certain negotiations between the parties and their representatives, the first defendant's legal representatives wrote a letter relocating the lease on 18 November 1999. Due to the importance of that letter it is necessary to quote its contents in full.

> "This letter serves to confirm that the previous lease agreement between the parties, which has in the mean time lapsed, will be used as the basis for an oral lease agreement until such time a written agreement has been drafted and signed by both parties, alternatively such time the farms have been duly transferred into the new owner's name.
>
> The monthly rent will remain N$2 000.00, payable in advance into the same account of Mrs. Tegethoff at Standard Bank Walvis Bay as per debit order.
>
> Mr. Theron will furthermore have all rights and obligations in terms of the previous contract, including the right to do whatever is necessary to prevent any third parties who are about and/or who have already infringed any of the lessor's and/or Lessee's rights.
>
> It is furthermore recorded that both parties intend to enter into an agreement of sale, in terms of which the farms are sold to Mr. F.D.

> Theron and both parties will do whatever is required and necessary to effect the transfer of the aforementioned property as soon as possible.
>
> We trust this explains the present situation."

The agreement relocating the lease is therefore an oral one. Subject to the other conditions recorded in the letter, the terms of the relocated lease are based on those of the previous written lease agreement. If those terms are read together with the qualifying conditions in the letter, the relocated lease under the oral agreement is terminable by either party on twelve months written notice to the other and will terminate when a written lease agreement has been concluded or when the land has been transferred to the first applicant, whichever incident will happen first.

The lease, not being one for 10 years or longer or for the natural life of the lessee or any other person mentioned in the lease, clearly falls outside the first two types contemplated in section 3(d). It is also not suggested by any of the parties that it is of the last type, i.e. one which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, for periods which together with the first period of the lease amount in all not to less than 10 years.

Does it belong to the third type? Mr. Miller strongly contends on behalf of the respondents that the word “indefinitely” in section 3(d) should be read disjunctively and that, in the context of the section, it sweeps within its ambit all “indefinite” leases of agricultural land – not only those which are “renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely”.

I do not agree with the interpretation Mr. Miller is seeking impress upon the Court. The word “indefinitely” clearly cannot refer to the first two types because the durations of those types of agreements are finite. The word identifies one of the two further types of lease agreements “renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease”. The one being a lease that is so renewable “for periods which together with the first period of the lease amount in all not to less than 10 years” and the other that is so renewable “indefinitely”.

The lease in question is not one that is “renewable from time to time at the will of the lessee”. It is a lease terminable upon notice at will of either the lessor or the lessee or it will terminate upon the happening

of one of two defined but uncertain events. Its terms do not afford a right to any party to "renew" the lease. The distinction drawn in law between the two types is so apparent that it requires no further comment.

That distinction notwithstanding, Mr. Miller, argues that the object of the Legislature will be frustrated if "indefinite" leases (even if they are terminable at the option of the lessor) were to fall outside the scope of the section. I do not agree. Had it been the intention of the Legislature to include indefinite leases in the prohibition, it could have easily done so. Moreover, given the overall object of the Act as previously stated, the underlying reason why the Legislature is treating the sale of a portion of agricultural land on the same footing as the long term lease of such a portion is evident: the likely result of both will be that the owner of the land will either permanently or for such a long period be constrained to farm on is likely to be, the uneconomical remainder of he land. So too, will the purchaser or lessee only have the agricultural use and enjoyment of the other uneconomical portion. For all the long term result is likely to be their gradual impoverishment. On a national level, that in turn will affect the agro-economic industry, food self-sufficiency and the viable use and management of the country's natural resources. Moreover, because 'huur gaat voor koop", the

agricultural utilization of land sold in circumstances where a portion thereof is subject to a long term lease agreement will, as far as the new owner thereof is concerned, in effect be the same for the duration of the lease as if he/she had only purchased a portion of the land. A short term lease of a portion of agricultural land, on the other hand, will not expose the landowner to a lengthy erosion of his/her agricultural resources and may serve a useful commercial purpose – especially in a country like Namibia where droughts in certain areas often force farmers to rent portions of grazing in areas where the rainfall had been better or where there is grazing in abundance. Such a short-term commercial arrangement benefits both farmers – it provides an additional income for the one with seasonal grazing in abundance and the preservation of the livestock and genetic material for future breeding purposes by the one in need.

On an application of the "expressio unius est exclusio alterius" maxim to section 3(d) of the Subdivision Act, the prohibition's limitation to leases renewable "at the will of the lessee" clearly implies that leases renewable at the will of the lessor are excluded. That exclusion fits in with the reasoning in the previous paragraph. The landowner retains the option not to renew the lease as soon as he/she realises that the letting of a portion of the farmland impacts negatively on the medium

or long-term viability of farming operations on the remainder of the land. The retention of that option will also allow him/her to sell the land as an economic unit either without a lease or without the rights new owner to use the land being limited by a long-term lease.

For the same reasons that the Legislature deemed it appropriate to exclude (by implication) leases renewable at the option of the lessor, so too did it exclude lease agreements without a fixed term but terminable at the will of either the lessor or the lessee. Provided that the owner gives the prescribed notice, the lease can be determined at any time.

In the result I find that the oral lease agreement between the first plaintiff and the first defendant in relation to a portion of the land does not fall within the prohibition contained in section 3(d) of the Subdivision Act by reason of the fact that it is terminable at any time upon notice by either of those parties. It follows from this finding that the lease agreement is valid and binding between them.

The next inquiry is whether the lease agreement contained an option to purchase the land and, if so, that option was valid in law and could be exercised by the first plaintiff.

There is no doubt that the written lease agreement previously in existence between those parties contained an option to purchase the land. Mr. Heathcote submits that it was again included in the terms of the lease relocated by oral agreement according to the letter of 18 November 1999. The plaintiffs rely in particular on paragraph stating that the first plaintiff will have “all rights and obligations in terms of the previous contract..” under the relocated lease. Whilst he concedes that the lease agreement has been relocated orally, he argues that the offer to sell is one contained in written terms (as required by section 1 of the Formalities Act) in the previous agreement and that the oral relocation of the lease only affected *pactum* (the period within which the option could be exercised). Thus, he contends, the option complies with the requirements of the Formalities Act. Mr. Miller, on the other hand, submits that the option did not form part of the relocated lease and, in any event, was at best an oral one falling short of the provisions of the Formalities Act and as such, was unenforceable.

The option was formulated as follows in the expired written lease:

> “in terms of an option which exists since 1 October 1998 and which was renewed on 7 April 1993 and again on 19 October

> 1995, the lessor once again grants an option to the lessee to purchase the property. The property is however only leased and the agreement of sale shall only become operative upon the death of the lessor. The purchase price shall be the sum of the land bank valuation +10% and be payable to her estate upon the expiry of the lease agreement which is terminable with 12 months' notice."

Upon a reading of the option, two important inconsistencies with the oral relocated lease agreement become apparent. Firstly, whereas the first plaintiff had the right to exercise the option to purchase the land at any time during the subsistence of the lease as a consequence whereof a binding agreement between the lessor (as seller) and the lessee (as purchaser) parties would have resulted, the letter expressly records that "both parties intent to enter into an agreement of sale". The letter contemplates the preparation of a separate agreement of sale between the parties – not one that would come into existence merely by the exercise of an "option. Secondly, in terms of the contemplated agreement of sale, "both parties will do whatever is required and necessary to effect the transfer of the aforementioned property as soon as possible" whereas in terms of the option, the

agreement of sale which will result from the exercise of the option, "shall only become operative upon the death of the lessor".

Those inconsistencies lead me to conclude that the parties did not intent that the option to purchase the land which existed under the previous written lease agreement should form part of the relocated lease agreement at all, alternatively and in any event, not in the terms it previously existed. It follows that the first plaintiff did not have any option under the relocated lease to purchase the land and, even if such an option existed, some of its terms (at least the one when transfer of the land is to be given and taken) were orally agreed upon contrary to the requirements of section 1 of the Formalities Act.

The third point initially raised on behalf of the respondents (i.e. the authority of the first respondent's legal representative to have given such an option under the relocated lease agreement has not been pursued by Mr. Miller and, given the conclusion I have arrived at, it is unnecessary for me to deal with it.

In the result, the following order is made:

"1. The rule *nisi* issued on 29th September 2000 is discharged.

2. The first and second plaintiffs, jointly and severally the one paying the other to be absolved, are ordered to pay the costs of the first and second respondents."

MARITZ, J.

ON BEHALF OF THE APPLICANTS:	Adv. R. Heathcote
Instructed by:	Van Der Merwe-Greef Inc.
ON BEHALF OF THE FIRST AND SECOND RESPONDENTS:	Adv. P.J. Miller
Instructed by:	Muller & Brand