



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: I 1611/2015

In the matter between:

JOHANNES HENDRIK CLOETE

PLAINTIFF

and

DOROTHA BARBARA HAITENGI

FIRST DEFENDANT

DAWID PAULUS CLOETE

SECOND DEFENDANT

THOSE PERSONS LISTED ON ANNEXURE "A"

THIRD DEFENDANT

TO DEFENDANT 68

Neutral citation: *Cloete v Haitengi* (I 1611/2015) [2019] NAHCMD 241 (16 July 2019)

Coram: PARKER AJ

Heard: 5, 6, 7 December 2018; March 5, 6, 7, 14; April 9; May 16;
11 June 2019

Delivered: 16 July 2019

Flynote: Land – Agricultural Land – Subdivision of – Prohibition of sale and subdivision of agricultural land in Rehoboth District without consent of Minister of Agriculture – In terms of Subdivision of Agricultural Land Act 5 of 1981 (Rehoboth) – Plaintiff seeking to set aside sale of undivided agricultural land and subdivision of agricultural land – Interpretation of ‘subdivision’ and verb derivative ‘divide’ turns on question of mixed fact and law – Words ‘subdivision’ and ‘divide’ must be given their ordinary meaning – Sale of undivided portion of farm without consent of Minister of Agriculture – Fencing off of that entire undivided portion of undivided portion of the farm resulted in that portion of the farm being cut off from the farm – That undivided portion was registered by first defendant as her own property – The nature of fencing done and the obtaining of the Land Title for the fenced off portion amount to subdivision as a matter of fact and law – Both the sale and subdivision require consent of the Minister of Agriculture – Since such consent was not obtained court finding the sale and subdivision offensive of Act 5 of 1981 (Rehoboth) and therefore illegal and invalid – Consequently, Court setting aside both the sale and subdivision.

Summary: Land – Agricultural Land – Subdivision of – Prohibition of sale and subdivision of agricultural land in Rehoboth District without consent of Minister of Agriculture – In terms of Subdivision of Agricultural Land Act 5 of 1981 (Rehoboth) – Plaintiff seeking to set aside sale of undivided agricultural land and subdivision of agricultural land – Interpretation of ‘subdivision’ and verb derivative ‘divide’ turns on question of mixed fact and law – Words ‘subdivision’ and ‘divide’ must be given their ordinary meaning – First defendant acquiring through sale agreement undivided portion of agricultural land –Thereafter first defendant fencing off entire undivided portion of the farm depicted on the Land Title which first defendant obtained – Court finding that both actions carried out without consent of Minister – Court finding that obtaining such consent peremptory – Accordingly, in the absence of the Minister’s consent the sale and subdivision are both illegal and invalid – Consequently, court setting aside both the sale and subdivision.

ORDER

- (a) The sale of land by Gerson Uazeua (seventh defendant) to Dorothea Barbara Haitengi (first defendant) is set aside.
- (b) First defendant must remove the fences she erected on the farm within 30 days from the date of this order; failing which,

JUDGMENT

PARKER AJ:

[1] This matter concerns a piece of land, namely, Farm Fyndraai No. 250, Rehoboth district ('the farm'). There are 70 defendants, but only first defendant and second defendant ('defending defendants') entered appearance to defend the action. Mr Rukoro represents plaintiff, Ms Katjaerua represents first defendant, and Ms Jason second defendant. The names of third to sixty-eighth defendants are listed in Annexure 'A' filed of the record.

[2] Plaintiff seeks the relief set out in his amended Particulars of Claim ('POC') that was issued from the Registrar's office on 2 February 2017.

[3] First defendant's amended plea to the amended POC was issued from the Registrar's office on 12 April 2017. The first defendant's amended plea is, as I understand the pleadings, built on these main pillars, namely: (a) that, there is no legal impediment to a portion of the farm being fenced (off) by one of the owners who hold an undivided share in the farm; (b) that, while admitting that she did put up some fences on a portion of the farm, she did so after obtaining consent; (c) that, the fences she has erected on the farm do not constitute subdivision as contemplated in Subdivision of Agricultural Land Act 70 of 1970; and (d) that, she is a bona fide purchaser on the basis that she did not know of any prior agreement between plaintiff and second defendant or plaintiff and 41st defendant respecting the farm.

[4] The following are not only undisputed but also indisputable: (a) Plaintiff, second defendant and those listed in Annexure 'A' (apart from seventh defendant) are heirs in the Johannes Andrias Cloete estate ('the estate') of which the farm forms a part. The farm was owned in undivided shares by those heirs. Second defendant sold his undivided shares of 461115 hectares (undivided portion) of the farm to plaintiff and thereafter sold same to seventh defendant. The reason for such change of mind, as was led in evidence, was that plaintiff, having failed to pay what second defendant considered to be the true purchase price of that portion of land, second defendant aborted the initial sale and sold that same portion of land to seventh defendant. Forty-first defendant also sold her shares of 461115 hectares (undivided portion) of the farm to the self-same seventh defendant.

[5] Furthermore, seventh defendant in turn sold what he had purchased, totalling 92,2230 hectares (undivided portion) of the farm to first defendant ('the sale'). It was on the basis of the sale that defendant came to 'own' 92, 2230 hectares (undivided portion) of the farm ('the Haitengi undivided portion'). She proceeded to obtain, and did obtain, registration in her name on 25 October 2013 of the Haitengi undivided portion, held under Land Title No. 250. First defendant acquired, by the sale, ownership of the Haitengi undivided portion without obtaining consent from the Minister of Agriculture ('the Minister') as the law peremptorily required in terms of s 3 of the Agricultural Land Act 5 of 1981 (Rehoboth).

[6] To continue with the undisputed or indisputable facts; first defendant fenced off the Haitengi undivided portion without first obtaining consent of the Minister of Agriculture as the law peremptorily required her to do in terms of s 3 of the Agricultural Land Act 5 of 1981 (Rehoboth). It is worth noting that the provisions of s 3 of Act 5 of 1981 are on all fours with the provisions of s 3 of subdivision of Agricultural Land Act 70 of 1970. It may be mentioned in parentheses that Act 5 of 1981 (Rehoboth) repealed Act 70 of 1970, making the latter Act not applicable in Rehoboth. And since Namibia's Independence the Minister responsible for Agriculture has replaced the Kaptein's council referred to in s3 of Act 5 of 1981 (Rehoboth). Second defendant obtained a certificate of waiver whereby the Minister of Lands and Resettlement certified that the State waives its preferential right to purchase agricultural land in terms of the Agricultural (Commercial) Land Reform Act

6 of 1995 (as amended) in respect of the farm. This waiver, it must be said, is irrelevant in the instant proceedings. Significantly, when second defendant sold to plaintiff 46, 1115 hectares (undivided portion) of the farm (being second defendant's shares), the consent of the Minister of Agriculture was obtained as required by law, as aforesaid.

[7] It is (a) the failure to obtain the Minister's consent when first defendant purportedly 'acquired' ownership of the aforementioned Haitengi undivided portion of the farm ('Issue (a)'), and (b) the failure to obtain the Minister's consent when first defendant fenced off the Haitengi undivided portion of the farm that are at the centre of the matter in the instant proceedings ('Issue (b)'). As respects these two central issues there are no material factual dispute between plaintiff and the defending defendants. I use 'factual' advisedly, as will become apparent in due course. It is to these two central issues that I now direct the enquiry.

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Issue (a)

[8] As I have found previously, it is not in dispute that the Minister's consent was not obtained when sixth respondent sold, and first defendant bought, the 92,2230 hectares (undivided portion) of the farm, ie the sale. As a matter of law, it matters not if the sale of the Haitengi undivided portion was in market overt, as the evidence is found to show. It is also immaterial that the heirs in 'Annex A' agreed to the sale. All of them and plaintiff and second defendant are not the Minister of Agriculture. The irrefragable conclusion is, accordingly, that the sale is simply illegal and invalid in terms of Act 5 of 1981 (Rehoboth).

[9] Indeed having found that the sale is illegal and invalid, it is otiose to consider the second issue, ie Issue (b). I only do so for the sake of completeness.

Issue (b)

[10] The consideration of Issue (b) turns primarily on the interpretation and application of the word 'subdivision' as used in s 3 of Act 5 of 1981 (Rehoboth), which as I have found previously, are a rehearsal of s 3 of Act 70 of 1970, whose title

is significantly '**Prohibition of certain actions regarding agricultural land**'. Act 5 of 1981 (Rehoboth), put simply and categorically, prohibits, among other actions, subdivision of agricultural land 'unless (The Kaptein's council) ie the Minister has consented in writing'.

[11] Mr Rukoro submitted that the fencing of the Haitengi undivided portion by first defendant constitutes subdivision within the meaning of s 3 of Act 5 of 1981 (Rehoboth) and therefore offensive of this Act. Mr Rukoro relies on *Theron and Another v Tegethoff and Others* 2001 NR 203 (HC) in support of his argument. Ms Katjaerua argued the other way that the fencing that first defendant 'erected does not amount to sub-division of agricultural land'. Counsel relies on *Coetzee v Coetzee* [2016] 4 All SA 404 (WCC); and *Adlem v Arlow* (782/11) [2012] ZASCA 164 (19 November 2012) to support her argument.

[12] With respect, I should say, all these cases are of no real assistance on the point under consideration. All of them decided the point as to the purpose of Act 70 of 1970 (a South African Act, which applies to Namibia); and so, for my present purposes I shall not put any currency on those cases in interpreting and applying s 3 of Act 5 of 1981 (Rehoboth).

[13] In *International Underwater Sampling Ltd and Another v MEP Systems (Pty) Ltd* 2010 (2) NR 468 (HC) where a word that was not defined in the applicable statute, namely, 'necessaries', I said the following;

'[7] In determining the second question, I keep it firmly in my mental spectacle that the word "necessaries" is not defined by the Interpretation of terms (ie definitions) section of the aforementioned 1861 Act or 1840 Act. It has been said that in legislation the principal function of a definition section is to shear away some of the vagueness and ambiguities which would otherwise surround the terms defined. (Thorton, *Legislative Drafting*, 3 ed. (1987) 56). And according to Devenish, *Interpretation of Statutes* (1992) 242, the purpose of a definition section in a statute is to demarcate and define certain seminal terms or phrases in legislation. And in his work *The Interpretation of Statutes* at 112, Du Plessis writes:

“In a statute where such a definition clause occurs, the words and phrases it contains acquire, for purposes of that particular statute, a technical meaning which often deviates from their ordinary meaning in colloquial speech. It therefore follows that such words and phrases are as a rule not to be understood in their ordinary sense”, but in accordance with the meaning ascribed to them by the definition clause”.

[8] Thus, it follows inexorably from the textual authorities that if in a statute a word or phrase has not been defined, such word or phrase should as a rule be understood in its ordinary sense.

[9] I have taken some time to discuss the aspect of statute law concerning the definition of words and phrases in the definitions section of a particular statute in order to make these points. The word 'necessaries' is not, as I have mentioned previously, defined in the Admiralty Court Act, 1840, or the Admiralty Court Act, 1861, and so the word must be understood in its ordinary sense. That being the case, I for one do not intend to adopt without question the definitions of the term “necessaries” in the authorities referred to me by counsel on both sides of the suit. To do so is to catapult, without justification, these judicial definitions to the level of legislative definitions; that is, as if those judicial definitions have been enacted by Parliament in the Acts. In my opinion, those judicial definitions must be seen merely as guides to assist in understanding the word “necessaries” in its ordinary sense: see the definition of 'necessaries' in, for instance: *The Riga* (1872) LR 3 A & E 516; *The River Rima* [1987] 3 All ER 1 CA; *The River Rima* [1988] 2 All ER 641 [1988] 1 WLR 758 HL); *Weissglass N.O. v Savonnerie Establishment* 1992 (3) SA 928 (A); *Namibia Ports Authority v MV 'Rybak Leningrad ...* In his authoritative work *A Dictionary of Modern Legal Usage* 2 ed (1995), Bryan A Garner defines “necessaries” as follows: “In legal sense, necessaries is the usual term for things that are indispensable...” The common thread that lies at the interiority of these dictionary meanings is that in its ordinary sense necessaries is that which are required for a given or particular purpose.

[11] I discern a clear intention on the part of Parliament not to give a technical meaning to necessaries; otherwise Parliament would have defined the word in the legislation. I do not

therefore think it would be right or proper, or that the court is entitled, to ascribe a technical meaning to “necessaries” in the 1840 and 1861 legislation.’

[14] To bring the discussion home, the *Shorter Oxford English Dictionary* 6ed (updated 2006) defines the verb ‘subdivided’ thus: ‘divide again after a first division; break up into subdivisions’, and the noun ‘subdivision’ in this way: ‘**1.** Each of the parts into which a division is or may be divided; a secondary or subordinate division... **2.** The action or process of subdividing; the fact of being subdivided, an instance of this’.

[15] In the instant proceedings, ‘subdivide’ and ‘subdivision’ are not defined. I find that the intention of the Parliament is not to give a technical meaning to ‘subdivision’ and its verb derivative ‘subdivide’. ‘It may be that the legislation is deliberately vague in the matter, in order that common sense should prevail according to the circumstances of every case.’ (Per Lord Parker LCJ in *Social Fertility Ltd v Breed* [1968] 3 All ER 193 at 196) *Breed* was relied on in *International Underwater Sampling Ltd and Another*.

[16] In my view, Parliament did not want to give a fixed and immutable technical meaning to ‘subdivide’ and ‘subdivision’ in order to allow the court to interpret the words, taking into account not only the ordinary and grammatical sense of the words, but also practical and reasonable considerations so that the interpretation arrived at meets the circumstances of the particular case the court is seized with, that is, ‘in order that common sense should prevail according to the circumstances of every case.’ (*Social Fertility Ltd v Breed* [1968] 3 All ER 193 at 196, per Lord Parker LCJ.) From the grammatical and ordinary meaning of ‘subdivide’ and ‘subdivision’, I hold that whether there has been a subdivision of agricultural land in terms of Act 5 of 1981 (Rehoboth) is a matter of mixed law and fact.

[17] As a matter of fact, as regards the action that first defendant has taken, namely, fencing off the entire Haitengi undivided portion, has resulted in the farm having been broken up to set aside the Haitengi undivided portion from the remainder of the farm. That is subdivision (see the *Shorter Oxford English Dictionary*, loc cit).

[18] Different considerations would arise that would not catch the fencing within the preview of the grammatical and ordinary meaning of 'subdivision'; that is to say, if all that first defendant did was to pen up by a fence a patch of the Haitengi undivided portion in order to protect her horticultural products and fruit trees. That would be 'partial partition', as Ms Katjaerua submitted, as opposed to total partition, because such penning up by a fence will make the fenced off part lie within the confines of the Haitengi undivided portion. That is not what first defendant did: she fenced off the entire Haitengi undivided portion in order to 'break' it off from the farm. That, to use Ms Katjaerua's own words, amounts to a 'complete annexing of land from another'. First defendant, by use of a fence, set aside completely the undivided Haitengi portion from the farm. That, as a matter of fact, is subdivision. The farm was divided again because there has been a subsequent division of the farm by first defendant's action: It resulted in a secondary or subordinate division of the farm. (See the *Shorter Oxford English Dictionary*, loc cit)

[19] Indeed, first defendant did not end there. She decided to make this factual situation become a legal reality by, as I have found previously, applying for, and obtaining, the aforementioned Land Title No.250. That Land Title does not cover only a patch of the undivided Haitengi portion of 92, 2230 hectares (undivided portion) of the farm but the entire undivided Haitengi's portion of the farm.

[20] It follows inexorably that as a matter of fact and law, the nature of the action of fencing by first defendant is an action of subdividing'. (See the *Shorter Oxford Dictionary*, loc cit) *Pace* Ms Katjaerua, *Coetzee v Coetzee* is no authority that 'partitioning of agricultural land does not amount to subdivision'. Indeed, I do not read *Coetzee v Coetzee* as interpreting the word 'subdivision'.

[21] Ms Katjaerua submits that 'no evidence was led by the plaintiff which supports the contention that fencing amounts to subdivision.' With the greatest defence to Ms Katjaerua, the submission has no merit. As I have demonstrated previously, the question as to whether the fencing amounts to subdivision in terms of Act 5 of 1981 (Rehoboth) is a question of mixed fact and law. In the instant proceedings, there is no factual dispute as to whether first defendant has fenced off the Haitengi undivided portion. And the question of law whether the fencing, i.e. the nature of fencing in

these proceedings, amounts to subdivision within the meaning of the Act is a question determined by authoritative legal principles. It is a question of law. It is not a question of fact that is capable of proof, and therefore the subject of evidence adduced for that purpose (see *President of the Republic of Namibia and others v Vlasiu* 1996 NR36).

[22] The unimpeachable conclusion is, therefore, that the nature of fencing that first defendant has put up around the entire 92,2230 hectares (undivided portion) of the farm, the Haitengi undivided portion, amounts to subdivision, and it is offensive of Act 5 of 1981 (Rehoboth). It follows that the issuance of Land Title 250 is illegal; and so, Land Title 250 is invalid and of no force. The Registrar of Deeds for the Rehoboth District is a party to these proceedings (fourth defendant) but he or she chose not to take part in the proceedings; and so, any order made respecting the issuance of Land Title 250 binds him or her. The Master of the High Court (third defendant) stands in the same boat.

Other Matters

[23] I note that no order has been sought against second defendant - not in the pleadings or arising from the evidence. I wish to note further that the conclusions I have reached are unaffected by whether the estate of the Late Johannes Andrias Cloete has been finalized or not finalized. These are matters, which the Minister of Agriculture may take into account when application for consent to subdivide the farm is made to him or her. Similarly, the conclusions are unaffected by the issue of *fideicommissum* regarding the testament of Johannes Andrias Cloete. In addition, I do not think it is the burden of this court in the instant proceedings to deal with the reason why the sale between second defendant and sixth defendant was not challenged by plaintiff. This issue is outwith the matter in the instant proceedings.

[24] As respects costs; I make the following observations. The case started with summons issued from the Registrar's office on 21 May 2015; but the POC was amended on 17 February 2017, that is, almost two years after the issue of the summons. Between 21 May 2015 and 17 February 2017, motion proceedings were instituted by plaintiff to be heard on 22 April 2016. The relief sought there is

substantially similar to that sought in the instant proceeding. Then there was an application by plaintiff to condone plaintiff's/applicant's non-compliance with a court order.

[25] The aforementioned series of conduct must in a greater measure be placed at the door of plaintiff. Besides, in the nature of the case, all the evidence adduced on both sides of the suit was not really necessary. As I have noted more than once, the issues raised by the pleadings did not require much of the oral evidence adduced. The essence of the dispute on the pleadings turned primarily on the interpretation and application of legislation, seeing that, as I have noted previously, plaintiff seeks no order against second defendant in respect of the aforementioned abortive sale. For these reasons, I think in the circumstances it will be fair and just that I make no order as to costs in favour of any party. The parties should pay their own costs.

Conclusion

[25] In the result, I make the following order:

1. Judgment for the plaintiff in the following terms:
 - (a) The sale of land by Gerson Uazeua (seventh defendant) to Dorothea Barbara Haitengi (first defendant) is set aside.
 - (b) First defendant must remove the fences she erected on the farm within 30 days from the date of this order; failing which the Deputy Sherriff for the district of Rehoboth is authorized to remove the fences within 10 days from the expiration of the 30 days' period and to recover the cost of such removal from first defendant.
2. There is no order as to costs.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF:

S. RUKORO

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FIRST DEFENDANT:

E M KATJAERUA

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SECOND DEFENDANT
RESPONDENT

A JASON

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