CASE NO.: SA 15/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between

FRANCOIS DOMINICUS THERON	1ST APPELLANT
CATHARINA JOHANNA THERON	2ND APPELLANT

And

JUTTA MARIA THERISIA TEGETHOFF	1ST RESPONDENT
GOTTFRIEDT TSUSEB	2ND RESPONDENT
THE REGISTRAR OF DEEDS N.O.	3RD RESPONDENT

CORAM: Strydom, C.J., O'Linn, A.J.A., et Chomba, A.J.A

HEARD ON: 11/04/2002

DELIVERED ON: 19 June 2002

APPEAL JUDGMENT

STRYDOM, C.J.: This is a matter which started as an urgent application in the High Court. On 29th September 2000 Levy, A.J., granted a rule *nisi* to the appellants of which the relevant parts read as follows:

> "2. That a rule *nisi* do hereby issue calling upon the first and second respondents to show cause on 30th October 2000 at

10h00, why an order in the following terms should not be made final:

2.1 interdicting and restraining the first respondent from effecting registration of the properties known as:

CERTAIN: Remaining extent of Farm Okauakondu-Noord No 10
(hereinafter referred to as the “
SITUATE: Registration Division “H” measuring 2017,2889 hectares

HELD BY: Deed of Transfer No. T 989/1981

And

CERTAIN: Remaining extent of Farm Okanapehuiri No 19

SITUATE: Registration Division “J” measuring 2906,1460 hectares

HELD BY: Deed of Transfer No. T 761/1975

(hereinafter referred to as the “Properties”) into the name of the second respondent pending the outcome of an action to be instituted by the applicant/s against first respondent for an order in terms whereof it is declared that the first applicant has effectively executed an option granted to him by the first respondent, to purchase the aforementioned properties;

2.2 interdicting and restraining the second respondent from receiving transfer of the aforementioned properties into his name, pending the outcome of the action referred to in paragraph 2.l *supra*;

2.3 granting leave to the third respondent to register a caveat against the title deeds of the aforementioned properties, pending the outcome of the action referred to in paragraph 2.1 *supra*;

2.4 the costs of this application be costs in the cause.

3. That first applicant institute action against first and second respondents for the relief as set out in paragraph 2.1 *supra*, within 14 days from the date of the rule *nisi* referred to above is confirmed.

4. That the relief as set out in paragraphs 2.1 – 2.3 *supra*, shall become operative with immediate effect pending the return date of the application and act as an interim interdict."

The rule was on various occasions extended by agreement between the parties and was finally heard on 23 February 2001 by Maritz, J, who discharged the rule and ordered the appellants to pay the costs. Various points were argued in the Court *a quo* but the finding of the Court, which affected the position of the appellants, was that, at the time when the appellants exercised the option to buy, such option was no longer alive. All the grounds of appeal, which overlap to a great extent, were aimed at this finding.

Mr. Heathcote appeared on behalf of the appellants and Mr. Miller for the 1st and 2nd respondents. The 3rd respondent was not represented. For the sake of convenience I will hereinafter refer to the parties as they appeared in the Court *a quo.*

In an affidavit the 1st applicant set out the background of the matter. He stated that he first leased the above properties from the husband of the 1st respondent and after his death, he entered into a new lease with her. This was in 1993. This latter agreement, which was in writing, contained an option to purchase the properties, as was indeed also the case in regard to previous agreements. This lease terminated in 1996 but the 1st applicant and 1st respondent again entered into a further written agreement on the 19th August 1996. In terms of paragraph 6 thereof the 1st applicant was again granted an option to purchase the properties. This agreement was terminable on 12

months notice by either party. Then, it seems quite unexpectedly, the 1st applicant was given 12 months notice, through the legal practitioners of the 1st respondent, of the termination of the lease agreement. This happened during 1998 with the result that the 1st applicant had to vacate the properties on the 31st July 1999. 1st Applicant was able to lease another property some 130 kilometres away to which he then moved his livestock. Notwithstanding the fact that he had vacated the properties he continued to correspond with the legal practitioners of the 1st respondent and, so it is alleged, it was orally agreed that he would still be able to purchase the properties. This however never materialized as no written agreement was entered into. 1st applicant said that as a result of these negotiations he was on the 18th November 1999 informed by the legal practitioners of the 1st respondent, by letter, that the previous lease agreement was reinstated and the letter furthermore stated that he would " have all rights and obligations in terms of the previous contract." 1st Applicant said that this meant that the option contained in the agreement of the 19th August 1996 was explicitly relocated. He again moved back onto the properties in February 2000.

1st Applicant said that a further factor which had a bearing on the situation was the fact that 1st respondent on 22 November 1999 granted a written general power of attorney to one Edda Susanna von Dewitz, the daughter of the 1st respondent. 1st applicant alleged that soon after Ms. Von Dewitz was appointed she became obstructive and he said that it was as a result of her intervention that the 1st respondent entered into the sale agreement with the 2nd respondent. Nevertheless during a meeting held with Ms. Von Dewitz

during December 1999 1st applicant said that it was again confirmed that he would have the first option to buy the properties and he attached the written minutes of the negotiations, which took place on that occasion.

The 1st applicant said that he became aware of the deed of sale that was entered into by the 1st and 2nd respondents during the middle of April 2000. It seems, in order to safeguard his rights, 1st applicant by letter dated the 20th April 2000 exercised the option as contained in the agreement dated 19 August 1996. This letter was served on the 1st respondent by the deputy sheriff of Walvis Bay where the 1st respondent resides. Thereafter various attempts were made to solve the impasse. At one stage the 1st respondent wrote that she was not going to sell the farms to anyone. From the correspondence attached it seems that attempts were also made to get the 2nd respondent to cancel the deed of sale that he had with the 1st respondent. When it became clear that the 2nd respondent was not willing to step down, the legal practitioners of the 1st respondent advised 1st applicant's legal practitioners that they would now go ahead to effect transfer of the properties in the name of the 2nd respondent. This then resulted in the bringing of the urgent application.

In her replying affidavit the 1st respondent denied that the applicants could exercise any option and she denied that they did so validly. The affidavit also gave notice of various points that would be argued at the hearing of the matter. These points, in so far as it was necessary to deal therewith for purposes of the judgment, were all resolved, by the Court *a quo,* in favour of the applicants.

1st respondent also denied that her legal practitioners, at the time, had the authority to write the letter of the 18th November 1999 whereby the lease agreement of 19 August 1996 was relocated. No argument was addressed to us in this regard and neither, so it seems, did it play any role in the Court *a quo.*

The pertinent question which must be answered is whether the letter of 18 November 1999,

whereby the terminated lease agreement of 19 August 1996 was relocated, also revived the option which is set out in clause 6 of the agreement. Although the parties differ in their interpretation of this letter the fact that it was written and that as a result thereof the applicants returned to the properties and regularly paid the rent, which was accepted by the 1st respondent, is not in issue. Bearing these facts in mind it is understandable that Mr. Miller, in the Court *a quo*, and also in this Court, did not rely on the 1st respondent's allegation that her legal practitioners had no authority to write the letter of 18 November 1999.

Mr. Heathcote submitted that the option contained in the lease agreement of 19 August 1996, was valid. When the agreement was terminated by notice the right to exercise the option also came to an end. However, on a proper interpretation of the letter of the 18th November 1996, the applicants' right to an option to buy the properties was revived. This revival was not governed by the provisions of the Formalities in respect of Contracts of Sale of land Act, Act 71 of 1996. In this regard, Counsel referred the Court to cases such as

Neethling v Klopper en Andere, 1967 (4) SA 459 (A), Van Deventer v Engelbrecht, 1995 NR 257 and Amoretti v Tuckers Land and Development Corporation (Pty) Ltd., 1980 (2) SA 330. Counsel further submitted that any evidence of subsequent negotiations between the parties to change the terms of the option was inadmissible as those negotiations were never reduced to writing and therefore fell foul of the formalities legislation. Counsel submitted that, in any event, these negotiations were no more than alternative methods to sell the property and was not meant to amend the existing option. If it were an amendment then it did not affect the material terms of the agreement. Mr. Heathcote also submitted that the learned trial Judge misdirected himself by not appreciating that at this stage the applicants only needed to show that they had a *prima facie* case.

Mr. Miller, on the other hand, submitted that the parties never intended to revive the option clause as previously contained in the lease agreement of 19 August 1996. This is brought out by the letter of the 18th November 1999 and a relocation of the option clause, as it previously existed, would have run counter to the intention as expressed in the letter. Counsel also submitted that the clause containing the option was so vague and ambiguous that it was impossible to give any clear meaning to it.

The two documents that are relevant to this issue are the lease agreement of 19 August 1996 (the lease agreement) and the letter of 18 November 1999 (the letter). The lease agreement was in Afrikaans and the translated version, which was accepted by the parties, reads as follows:

"The Lessor is the registered owner of the farm Okauakondu North No. 10 as well as Okanapehuri No 19, better known as Okasise, referred to in this agreement as the property.

Whereas the Lessor is willing to lease the property and the Lessee is willing to rent the property the two parties agree as follows:

1. The rent compensation shall be the sum of N$2000-00 per month, payable to the Lessor into her account, number 042869382, Standard Bank Walvis Bay on or before the 7th day of each month. The rent can be changed by mutual agreement.

2. The period of lease shall commence on 1 September 1996 and shall continue indefinitely, unless either the Lesser 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.

3. The Lessee shall himself be responsible for the maintenance of water installations, fences and pipelines. Where improvements are effected in respect of the provision of water, the Lessor shall pay out the improvements or the Lessee shall be entitled to remove them upon expiry of the agreement.

4. The Lessee shall not be responsible for damage as a result of fire or storm.

5. From this agreement excluded (are) the dwelling house and the dwelling unit at the post. The two sheds on the property may be used by the Lessee as storage place.

6. In terms of an option which exists since 1 October 1988 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.
(My emphasis).

7. After the commencement of this agreement the Lessee shall be responsible for the two workers who are presently

on the farm who will pay them wages and give them rations as agreed with them.

8. The lessee shall not allow any person to hunt on the farm, only the Lessee shall have the right to shoot one buck per month to the workers.

9. The lessees shall have the right to remove or have removed any person from the property who is not employed by him and thus enters upon the property unlawfully.

10. The Lessee may use all implements/tools and engines and material presently on the property.

11. Save for own consumption, no wood may be removed from the property or be sold.

12. Upon the death of the Lessee his heirs shall be entitled to continue with the agreement."

Clause 6 is certainly not a shining example of clarity. The last sentence, read in context with the rest of the clause, is capable of more than one meaning that is if one can determine what it was that the parties had in mind. However, for purposes of this judgment, I will accept the argument of Mr. Heathcote that at this stage of the proceedings the Court will not look too closely at the terms as the parties may, at the trial, be able to clear them up.

The second document, which is relevant is the letter written by the legal practitioners of the 1st respondent to the 1st applicant on the 18th November l999. The heading and contents of this letter is as follows:

"MATTER **EXTENSION OF EXISTING LEASE AGREEMENT BETWEEN THE PARTIES SUBJECT TO CERTAIN AMENDMENTS**

Dear Sir

> This letter serves to confirm that the previous lease agreement between the parties, which has in the meantime 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 until such time the farms have duly been transferred into the new owners name.
>
> The monthly rental will remain N$2000-00 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 whereof 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."

A reading of the option as contained in clause 6 of the agreement and the offer made in the letter, concerning the sale of the farms, in my opinion clearly demonstrates the differences between the two instruments of writing. To avoid any uncertainty I will accept the meaning of clause 6, as it was understood by the 1st applicant as set out in his letter of 20 April 2000 when he purportedly exercised the option. These are as follows:

(i) The purchase price would be determined by a valuation of the Agricultural Bank and to this must be added a further 10%.

(ii) Notwithstanding the exercise of the option the 1st applicant shall continue to lease the properties.

(iii) The sale of the properties is subject to a suspensive condition and will only become effective on the death of the 1st respondent.

(iv) On the death of the 1st respondent the sale agreement shall become of full force and effect.

(v) The purchase price, as determined in (i) above, shall become payable into the estate of the 1st respondent.

The letter of 20 April 2000, signed by the 2nd applicant in terms of a general power of attorney, made it clear that the option, which was exercised by the 1st applicant, was the option as contained in clause 6 of the agreement. What is also clear, and what all the parties accepted, was that the option contained in clause 6 of the agreement lapsed when the agreement was terminated by notice on 31st July 1999. The background to the letter of 18 November 1999 was that it was written after further negotiations between the 1st applicant and the 1st respondent and/or her legal practitioners. The 1st applicant set this out in his founding affidavit wherein he stated that notwithstanding the fact that he had vacated the properties after the termination of the agreement he continued negotiations with the legal practitioners of the 1st respondent. 1st Applicant said that as a result of these negotiations he received the letter dated the 18th November 1999. This is also evidenced by the letter itself where it states that the letter "serves to confirm that the previous lease agreement between the parties....will be used as the basis for an oral lease agreement....", and where it states in the penultimate paragraph that it is "recorded that both parties intend to enter into an agreement of sale...."

Bearing the above in mind it seems to me that the letter was not a unilateral offer made by the 1st respondent or her agents but that it correctly reflects what was negotiated and agreed between the parties. The only point of dispute was whether the option clause contained in clause 6 of the agreement was revived. 1st Applicant's contention that it was so revived is based on the words in paragraph three of the letter namely "Mr. Theron will furthermore have all rights and obligations in terms of the previous contract....." (See para. 8.7(i)(b) of the founding affidavit.) There is no allegation that it was so expressly agreed and whether the said option was so relocated depends therefore on an interpretation of the letter of 18 November 1999.

It was pointed out by Mr. Miller that in construing a document, such as the letter, the Court would have regard to the whole document. In my opinion that is a correct statement of the law. (See e.g. Cinema City (Pty) Ltd. v Morgenstern Family Estates and Others, 1980 (1) SA 796 (AD) at 803 G –H.) The first two paragraphs clearly only deal with the terms of the lease agreement as contained in the agreement of 19 August 1999 which will, as was stated, form the basis of an oral lease agreement between the parties. There is however also a reference to the transfer of the farms in the name of the new owners. I again agree with Mr. Miller that that can only have reference to the fourth paragraph. The third paragraph which, according to the applicants, revived the previous option clause, is followed by the fourth paragraph in which the parties recorded their intention to enter in an agreement of sale in terms whereof the farms are sold to the 1st applicant and each party will do whatever is necessary to effect transfer of the properties as soon as possible. It seems

to me that the intention, which was expressed in this paragraph, is in all respects in conflict with the option previously granted to the 1st applicant and contained in clause 6 of the agreement of 19 August 1999. The suspensive condition did not now play any role and the sale agreement would immediately become effective. Once this happened any lease agreement between the parties would come to an end. Transfer into the name of the new owners would be given as soon as possible and it can be accepted that it was implied that the purchase price would have been payable against transfer of the properties. Also as far as the purchase price was concerned it seems that the previous calculation based on a valuation of the Agricultural Bank plus 10%, was something of the past. It is not clear when the amount was determined but 1st applicant stated that the 1st respondent wanted N$700 000-00 and he was willing to pay that amount.

To say under these circumstances that the parties still intended to relocate the option as contained in clause 6 and which is to be read into or implied in the words set out in the third paragraph of the letter, would run counter to the expressed intention of the parties as recorded in the letter. At the time when the parties negotiated the terms as contained in the letter the said option was no longer valid. 1st Respondent clearly did not want it back. She wanted to sell the properties and collect the purchase price before the advent of her death and what is more the 1st applicant was willing to comply. In my opinion what is set out in the fourth paragraph of the letter is clear and accords with what is maintained by the 1st respondent, namely that the option was no longer valid. The interpretation suggested by the applicants would require the

reading in, by way of interpretation, of words which do not explicitly appear in the letter and which would in my opinion be in conflict with the clear meaning of the letter.

What was set out in the letter of 18 November 1999 was again confirmed during a meeting between Ms. Von Dewitz and the applicants in early December 1999 and recorded in a written minute. These minutes were attached and relied upon by the applicant to prove that the option was relocated. In these minutes it was stated that Ms. Von Dewitz wanted the total amount for the farms in cash and that the applicants agreed to pay the amount requested. In so far as it reflects subsequent conduct of the parties it confirmed what was set out in the letter of 18th November. It was also recorded that Ms. Von Dewitz confirmed that Mr. Theron had the first option to purchase the properties. Mr. Heathcote argued that this was a reference to the option contained in clause 6 of the agreement of 19 August 1999 and therefore proof that that clause was relocated. I do not agree. It follows immediately in the minutes on her claim to be paid in cash for the farms and the applicants' agreement with that and can, in my opinion, at most be seen as a layman's oral assurance that they can buy the farms.

Under the circumstances I agree with the learned Judge *a quo* that it was not intended by the parties that the letter of 18 November 1999 should revive the option contained in clause 6 of the lease agreement of 19 August 1996. It therefore follows that the exercise of the option during April 2000, and again in September 2000, by the 1st applicant was without any legal effect. Because of

the conclusion to which I have come it is not necessary to deal with any of the other submissions raised by Counsel.

In the result the following order is made:

The appeal is dismissed with costs.

_____
STRYDOM, C.J.

I agree,

_____
O'Linn, A.J.A.

I agree,

_____
CHOMBA, A.J.A.

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