IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

APPEAL CASE NO: AR 233/09

In the matter between:

COLCHESTER ZOO SA INVESTMENTS (PTY) LIMITED APPELLANT

and

WEENEN SAFARIS CC RESPONDENT

JUDGMENT Delivered on:_____

NICHOLSON J

[1] During or about July and August 2005 the parties entered into an option agreement relating to a game farming business on the Farm Geluk. The appellant was intending to commence a game farm near Colenso and had already purchased three adjacent properties and the two relevant properties in question were to be incorporated in that endeavour.

[2] In terms of the written option agreement the respondent granted to the appellant an option to purchase the business comprising the two immovable properties described more fully in the written agreement for the sum of R3,25 million. The option further provided that the option could only be exercised after the approvals referred to in clause 3 had been obtained, which related to approval from the authorities for the sub-division.

[3] It is common cause that the land in question was agricultural land.

[4] The option stated that it would expire 30 days after notification by the respondent to the appellant that the approvals in clause 3 had been granted. In consideration for the option the appellant paid the sum of R150 000.

[5] In the event of the option being exercised by the appellant it was provided that an agreement on the terms and conditions set out in a written agreement annexed would come into being.

[6] The respondent undertook to do all things necessary to obtain the approvals referred to in clause 3. The respondent approached the Department of Agriculture and Land Affairs for the necessary permission but required a water certificate which was not provided. The respondent declined to pursue the matter of the water certificate any further and the application became doomed to failure.

[7] On behalf of the respondent a letter was sent on 10 November 2006 to the effect that the respondent no longer considered the option to be of any force and effect and not binding on it. The farm was offered to the appellant for £3,25 million which at the prevailing exchange rate amounted to about R45,8 million. The respondent maintains that the last mentioned offer was a joke but that is disputed.

[8] This is an appeal from the decision of the Court *a quo* refusing an application for the following relief:

> "(1) It is declared that the written agreement of option to purchase signed on behalf of the applicant on the 11 August 2005 and on behalf of the respondent on 27 July 2005, annexed to the founding affidavit is valid and binding between the parties.
>
> (2) The respondent is directed to take all reasonable steps, without undue delay, to obtain the approvals referred to in clause 3 of the said agreement.
>
> (3) The respondent is interdicted and restrained from alienating the immovable property referred to in the said agreement for as long as the agreement remains in force.
>
> (4) The respondent is ordered to pay the costs of this application."

[9] The Court *a quo* held that the written option was covered by the definition of sale in the Act and dismissed the application. Mr Ploos van Amstel SC argued that the Court erred in that regard as an option to purchase is not a sale.

[10] Section 3 of the Sub-division of Agricultural Land Act, No 70 of 1970 when it came into effect on 2 January 1971 provided that:

> "Subject to the provisions of Section 2 –
>
> (a) agricultural land shall not be subdivided;
>
> (b) no undivided share in agricultural land not already held by any person, shall vest in any person;
>
> (c) no part of any undivided share of agricultural land shall vest in any person if such part is not already held by any person; unless the Minister has consented in writing to the subdivision or vesting concerned."

[11] There were two subsequent amendments to the section in question which are relevant to this matter. Sub-sections (d), (e) and (f) were introduced by Act 55 of 1972, with effect from 2 June 1972.

[12] Sub-section (e)(i) provided that no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not shall be sold or advertised for sale unless the Minister of Agriculture has consented thereto in writing.

[13] It is clear that the above prohibition on a sale means that no agreement of sale of agricultural land shall be entered into. See *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 AD at 887 G - H.

[14] Act 18 of 1981 introduced an extended definition of sale to include a sale subject to a suspensive condition and this came into effect on 4 March

1981. This was clearly a response by the legislature to the cases mentioned below.

[15] Mr Ploos van Amstel submitted that the appeal depended on a proper interpretation of what a sale is in the relevant legislation. The Courts have held that the proper approach to the interpretation of a statute is to seek the intention of the legislature. The rules of interpretation are set out in *S v Toms: S v Bruce* 1990 (2) SA 802 (AD) at 807H-808A where the Court stated as follows:

> "The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so... would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account... The words used in an Act must therefore be viewed in the broader context of such Act as a whole... When the language of a statute is not clear and unambiguous one may resort to other canons of construction in order to determine the Legislature's intention." (Case references omitted)

[16] Where no problem arises and the words are capable of only one meaning, effect must be given to such meaning. See *Public Carriers' Association v Tollroad Concessionaries* 1990(1) SA 925 AD at 942 I to 943 B.

[17] I accept also that the Act must be interpreted restrictively as it represents a radical departure from the common law. In *Regering van die Republiek van Suid-Afrika v Disotto and Others* 1998(1) SA 728 SCA the

Court held as follows with respect to the Agricultural Credit Act at page 735 D - E:

> "Die Wet moet beperkend vertolk word omrede dit 'n ingrypende inbreukmaking op die gemeneregtelike beginsels met betrekking tot die oordrag van eiendomsreg daarstel en ander skuldeisers daardeur benadeel kan word (vgl Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A) op 423D)."

[18] In *Van der Bijl and Others v Louw and Another* 1974 (2) SA 493 (C) Baker J, dealt with the purpose of the Act at 499D:

> "The purpose of the Act is manifest: its object is to prevent the subdivision of economic units of farming land into non-viable (uneconomic) sub-units or smaller units."

[19] Sales subject to a suspensive condition have been considered by the Courts over the years. In *Corondimas and Another v Badat* 1946 AD 548 a contract was concluded "subject to permission under the pegging Act". Watermeyer CJ said the following about the nature of a contract subject to a suspensive condition at page 551:

> "Such an agreement is clearly subject to a true suspensive condition. It is an agreement to buy and sell if the Minister grants a permit to the parties to enter into it. According to the decision of this Court in the case of Provident Land Trust v Union Government 1911 AD 615, when a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled. In other words, the prohibited contract (e.g. a contract of sale), which is declared null and void by s 5 (2) of the Act, unless the Minister consents to it, cannot come into existence unless and until that condition is fulfilled. Until that moment, in the case of a sale subject to a true suspensive condition, such as this is, it is entirely uncertain whether or not a contract of sale will come into existence at some future time. Until that moment there is certainly a legal relationship, contractual maybe (see Goudsmit para 61; Voet 18.1.24; Leo v Loots 1909 TS 366) existing between the parties, which may ripen into a contract of sale, but, in the particular case in which the coming into existence of a contract of sale is made, by agreement between the parties, to depend upon consent to it having been given by the Minister, that relationship is not one which is forbidden by the Act or declared by it to be of no force and effect."

[20] In *Sentraal-wes Personeel Ondernemings (Edms) Bpk v Nieuwoudt* 1979 (2) SA 537 (C) certain agricultural land was incorporated into a municipality for the establishment of a township but the announcement by the Administrator in terms of s 20 (6) (b) Ord 33 of 1034 (C) had not yet taken place when the defendant and the plaintiff entered into a written contract of sale for the purchase of a stand in the proposed township. Clause 6 of the contract reads as follows:

> "This sale is suspensive and subject to the proper proclamation of the township. In the event of the township not being proclaimed for any reason whatever and regardless whether or not this is due to the failure of the seller, then this agreement of sale shall be regarded as void from the beginning and the seller shall pay to the purchaser all amounts paid by the latter free of interest and no party shall have any further claim against the other".

[21] As the defendant in that case fell into arrears with her annual payments the plaintiff claimed the amount from her. At the conclusion of the plaintiff's case the defendant applied for absolution from the instance and judgment in terms of her counterclaim for the amount already paid. The magistrate declared the contract void and granted absolution and judgment in terms of the counterclaim.

[22] In an appeal, to the High Court it was held, that clause 6 had to be regarded as constituting a suspensive condition and that pending the fulfillment of the suspensive condition, the contract could not be described as a contract of sale. It was further held by Vivier J, that the word "sale" in section 3 (e) of the Subdivision of Agricultural Land Act 70 of 1970 as

amended was used in the context in the sense which the Courts had over the years assigned to it.

[23] This principle has been applied in this country and abroad for many years. Lord COLERIDGE described in *Barlows v Teal* 15 QBD 403 at 405 how to interpret words that have received attention by the courts.

> "Acts of Parliament use forms of words which have received judicial construction. In the absence of anything in the Acts showing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them."

[24] In Niewoudt's case the Court concluded that the contract was not a sale within the ambit of section 3 (e) of that Act.

[25] As I have mentioned Act 18 of 1981 was thereafter passed which introduced an extended definition of sale to include a sale subject to a suspensive condition and this came into effect on 4 March 1981.

[26] To determine whether a sale, either on its own or subject to a suspensive condition, would include an option it is necessary to consider the nature of an option. The Courts have dealt with the nature of options and rights of pre-emption and in *Hirschowitz v Moolman and Others* 1985 (3) SA 739 (AD) Corbett JA (as he then was) held as follows at 765 G – 766 E:

> "It may be accepted, as conceded by counsel for respondents, that where A grants to B a right of pre-emption in respect of A's land, A does not thereby enter into a contract for the sale of that land or even offer to sell that land to B. Respondent's counsel submitted, however (a) that the grant of such a right is a contract whereby A undertakes and is obliged to sell the land to B if (i) the contingency bringing the right of pre-emption into operation has supervened

> and (ii) B has exercised the right of pre-emption in writing; (b) that the grant amounts to a promise by A to sell the land to B upon the happening of certain events, ie a pactum de contrahendo; and (c) that a pactum de contrahendo must itself comply with any formalities which are requisite to the validity of the proposed second contract. This submission seems to me to be sound.
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> A pactum de contrahendo is simply an agreement to make a contract in the future (see Montrose Diamond Mining Co v Dyer 1912 TPD 1 at 5; Lugtenborg v Nichols 1936 TPD 76 at 79; I Wessels Law of Contract 2nd ed para 217; De Wet and Yeats Kontraktereg en Handelsreg 4th ed at 29; Joubert Law of South Africa vol 5 para 117). It was a class of contract "very well known in the Civil Law" (see McIlrath v Pretoria Municipality 1912 TPD 1027 at 1037 - per WESSELS J, BRISTOWE J concurring). Often the pactum provides that the conclusion of the second (future) contract is to depend upon some contingency. In McIlrath's case, for example, the plaintiff contracted with the municipality to execute for a term of years such cartage work as the municipality might from time to time require at certain specified cartage rates. The contract was construed as placing no legal duty upon the municipality to employ the plaintiff; but once it decided to call upon plaintiff to do certain work, it was obliged to pay him for the work at the stipulated rates. Similarly, the portion of an option constituting the agreement to keep the offer open is often referred to as a species pactum de contrahendo (see Anglo Carpets (Pty) Ltd v Snyman 1978 (3) SA 582 (T) at 585H; De Wet and Yeats (op cit at 29 - 30);Joubert Law of South Africa vol 5 paras 117 and 118; Kerr Law of Contract 3rd ed at 47). Here the conclusion of the "second" contract is dependent upon the contingency of the option-holder deciding to accept the offer contained in the option. In my view the grant of a right of pre-emption also constitutes a kind of pactum de contrahendo, the conclusion of the "second" contract being dependent on the contingencies mentioned above.
>
> In general a pactum de contrahendo is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves; Montrose Diamond Mining Co v Dyer 1912 TPD 1 at 5."

[27] It is clear that a sale subject to a suspensive condition is qualitatively different to an option or a right of pre-emption. In the former situation if the condition comes about there is a binding contract between the parties. In the situation of an option if the respondent acquires the requisite permission it is still open to the present appellant as the option holder to elect whether to enter into a contract on the terms provided. The option giver would be bound if the option holder elected to exercise his rights.

[28] I accept that sales with suspensive conditions are subject to the Act, even if the suspensive condition posits the permission of the Minister. In *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 SCA the Court dealt with a matter where the owner of a farm had sold an undivided portion of his land without the consent of the Minister as required by the Act, but subject to the suspensive condition of such consent being obtained. In an appeal against the refusal in a Provincial Division of an application for an order declaring the agreement invalid for want of compliance with s 3(e)(i), the Supreme Court of Appeal held that the meaning of s 3(e)(i), read with the definition of "sale" in s 1 of the Act, which stated that "'sale" includes a sale subject to a suspensive condition', was on first impression clear, and it also seemed clear that, in view of the definition, the agreement under consideration fell squarely within the ambit of the prohibition contained therein. (Paragraph [4] at 338B.)

[29] The Supreme Court of Appeal held, further, that the Court *a quo's* conclusion of absurdity was unjustified also because it was based on the false supposition that the Legislature intended only to prevent an owner of agricultural land from parting with an undivided portion of that land without the Minister's consent. That this was not the only purpose of the Act was clear from s 3(e)(i), which prohibited also advertisements for sale. Since advertisements would obviously precede the actual sale, it was by no means absurd to infer that the Legislature intended to prohibit any sale of an undivided portion of farmland, whether conditional or not, unless the

subdivision had actually been approved by the Minister. (Paragraph [15] at 343J - 344C.)

[30] Options and sales subject to suspensive conditions are very different but Mr Hartzenberg submitted that an option is a preliminary step to a sale which is similar to advertising. Advertising is prohibited because it relates to expenses that a purchaser might incur in going to a farm to inspect it when a sale was not possible.

[31] An option imposes no obligations on the holder who is merely insisting on the option giver putting his house in order, as far as the obtaining of ministerial permission is concerned, before the option holder decides whether or not to buy. The effect was to prefer the option holder to other potential buyers in the event of such consent being granted. I cannot see that this would result in absurdity.

[32] Even if it was strange that options are not mentioned the Court in the Geue matter held that courts were not entitled, under the guise of absurdity, to avoid the clear intention of the Legislature merely because they regard particular consequences to be harsh or even unwise. Moreover, once the intention of the Legislature was clearly established, it could be dangerous to speculate as to why it would have intended a particular result. It would thus serve no purpose to speculate why the Legislature had wanted to prohibit a sale subject to a suspensive condition of the kind in that case. (Paragraph [15] at 344C - E.)

[33] The Court held that if the legislature wanted the Court to ascribe a meaning to the word 'sale' which was different to how the term had been understood and interpreted in the past it would have to give some clear indication of this intention where necessary through legislative amendment. See page 342 F.

[34] In none of the cases brought to my attention was a sale interpreted to include an option to purchase. The option does not, in my view, undermine the objects of the legislation, it merely gives the appellant an advantage over competing purchasers, which seems to me to be unobjectionable.

[35] I accept Mr Ploos van Amstel's argument that parties are entitled to arrange their affairs in such a manner so as to remain outside the effect of a particular statute. See *Michau v Maize Board* 2003 (6) SA 459 SCA at 464B.

[36] The meaning contended for by Mr Hartzenberg would mean that the Court would have to insert words, to the effect that a sale, includes an option to purchase or any right of pre-emption, embodied in a contract. If one is to interpret the Act restrictively it is not possible to include an option in the definition of sale. The previous case law shows how the Courts have adopted a restrictive interpretation on the word 'sale' and I am enjoined to adopt a similar approach.

[37] Mr Hartzenberg also argued that various provisions in the option agreement created rights and obligations in the parties. These consequences were such as would undermine the intention of the legislature in prohibiting sales pending the requisite ministerial authority.

[38] He made mention firstly of the sum of R150 000 which was paid by the appellant to respondent in terms of clause 4.

[39] Secondly he drew attention to the obligation in clause 5 on respondent to prevent hunting, culling or capture of wild animals and to maintain the land, fences, roads and buildings thereon until the appellant was able to take transfer and occupation.

[40] Finally he mentioned the obligation on respondent in terms of clause 6 to continue to burn firebreaks on the land in accordance with good farming practice.

[41] I do not believe that these requirements carry the day in what is a question of interpretation of a statute. The appellant was receiving a preference to other potential buyers of the property in terms of the option and he had to pay consideration for that benefit.

[42] The reciprocal obligations on the respondent were imposed to ensure that if the appellant eventually exercised his right to enter into the sale

agreement, which he was not obliged to do, the land would be in its pristine state.

[43] I do not believe that a sale can be interpreted in the relevant legislation to include an option.

[44] I would therefore propose that the following order be made:

(a) The appeal succeeds.

(b) The respondent is ordered to pay the appellant's costs of appeal.

(c) The order made by the court is set aside and replaced with the following order:

(1) It is declared that the written agreement of option to purchase signed on behalf of the applicant on the 11 August 2005 and on behalf of the respondent on 27 July 2005, annexed to the founding affidavit is valid and binding between the parties.

(2) The respondent is directed to take all reasonable steps, without undue delay, to obtain the approvals referred to in clause 3 of the said agreement.

(3) The respondent is interdicted and restrained from alienating the immovable property referred to in the said agreement for as long as the agreement remains in force.

(4) The respondent is ordered to pay the costs of this application.

Balton J

I agree.

JUDGMENT RESERVED ON: 4TH AUGUST 2009

JUDGMENT HANDED DOWN: 7TH OCTOBER 2009

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