

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

Case no:13203/2023P

In the matter between

WETLANDS COUNTRY RETREAT (PTY) LTD
(Registration Number: 2008/011285/07)

FIRST APPLICANT

RENSBURG BOERDERY (PTY) LTD
(Registration Number: 2018/306669/07)

SECOND APPLICANT

And

SCHÜTMANN AGRI (PTY) LTD
(Registration Number: 2020/727828/07)

RESPONDENT

JUDGMENT

PITMAN AJ

[1] The first applicant is the registered owner of two farms, the possession of which is at the core of this application. The second applicant is an entity to which the first applicant granted the right to lease the farms to the respondent. The precise nature of the relationship between the applicants is not set out in the papers, but is irrelevant because what is set out above is common cause.

[2] The respondent initially leased the farms for the period 1 September 2020 to 30 August 2022. A further written lease was then concluded in order that the respondent could continue on the farms, this time for the period 1 September 2022

until 31 August 2023. A portion of this written lease forms the basis of the dispute between the parties. The applicants allege that the lease terminated by agreement on 31 August 2023 and that the respondent is obliged to vacate. It has refused to do so and, as a consequence, the applicants allege that they are entitled to orders removing the respondent and interdicting it from using the farms any longer or inciting or allowing anyone else to do so. The respondent alleges that the written lease provided it with an option to purchase, as set out in clause 16 thereof. It alleges it exercised that option and it is therefore entitled to remain occupying the farms until the transfer takes place. The applicants deny that an alleged option to purchase was agreed in the signed lease agreement. The applicants put up a copy of the lease they say they agreed to, which has clause 16 deleted in manuscript. The respondent, on the other hand, put up a copy that did not have clause 16 deleted. The respondent alleges that its version of the written lease was what was agreed. It alleges that the copy put up by the applicants, with clause 16 deleted, is a fraud.

Clause 16 of the lease document reads as follows:

“16. SPECIAL CONDITIONS

16.1 The Lessor on behalf of the registered owner of the farms hereby grants the Lessee an option to purchase the farms on or before 31 August 2023.

16.2 The parties hereby agree that the purchase price will be an amount of R10 800.00 per hectare and guarantee(s) for the purchase price will be delivered within 30 (thirty) days from the date on which the option is exercised, alternatively, if such is exercised less than 30 (thirty) days before the expiry of the lease, then such guarantee(s) are to be provided before the expiry of the lease.....”

There are an additional two sub clauses which are irrelevant at this point.

[3] This application was launched as an urgent application on 5 September 2023 for a hearing on 13 September 2023. The urgent relief sought by the applicants (and I summarise) was that the respondent be ordered, within three days from the date of

the order, to remove, and be interdicted from grazing, any and all livestock under its control on the farms and the removal of all farming equipment and implements under the control of the respondent from the farms. Further that the respondent be interdicted from thereafter re-entering the farms or from permitting anyone else to do so. In the event of the respondent not complying, the applicants sought the authorisation of the court to remove the respondent's livestock and take them to "*the nearest pound in Utrecht*" and also to remove the equipment and other movable assets belonging to the respondent still remaining on the farm. Costs are sought on an attorney and client scale.

[4] Effectively, the relief sought amounts to an eviction of a commercial entity although, for reasons I remain unsure of, the applicants have been reluctant to call it that. The relief sought is final relief.

[5] The notice of motion called upon the respondent to file its notice of intention to oppose by 17h00 on 5 September 2023, and an answering affidavit, if any by 18h00 on 8 September 2023. The respondent opposed and delivered an answering affidavit dated 8 September 2023. It is deposed to by one Johan Schutte, the authorised director of the respondent. The applicants delivered an answering affidavit dated 11 September 2023.

[6] The matter initially came before Mossop J on 13 September 2023. With his authority, and by consent, it was adjourned to the opposed role for argument on 12 of February 2024. In addition, Mossop J granted the respondent leave to supplement its answering affidavit and he also recorded that the respondent's rights, as far as taking issue with the urgency of the matter, were reserved. Costs were also reserved.

[7] The respondent did not, however, deliver a supplementary affidavit. The applicants delivered a one-page supplementary affidavit dated 23 January 2024 complaining about the respondents failure to do so and warning the respondent that late filing of the permitted supplementary affidavit would not be entertained, so as not to derail the opposed hearing on 12 February 2024. It also dealt with ancillary matters relating to the respondents tender in its opposing affidavit regarding certain

“rental” payments it was prepared to make and the applicants’ attitude thereto. It is not necessary to deal with that issue any further at this stage. The respondent then, however, delivered a further answering affidavit to this supplementary affidavit wherein it, *inter alia*, indicates that it is of the view that it was not necessary to file a supplementary affidavit. It dealt with other issues which are also irrelevant at this stage, in my view.

[8] As a consequence of the dispute about the *“option”* clause, as it arose in these papers, it is common cause that the respondent saw fit to, on 31 January 2024 only, commence an action against the applicants for declaratory relief to the effect that the option *“is a valid option which was properly and legally exercised by plaintiff”* (respondent) together with relief flowing therefrom relating to the transfer of the farms to the respondent. This was brought to the court’s attention in the respondent’s heads of argument and a copy of the summons was attached thereto. The action was launched after all the initial affidavits in this application had been delivered. The final *“answering affidavit”* by the respondent referred to above, is dated the same day i.e. 31 January 2024. Precisely why the respondent chose to pursue the action at this late stage is far from clear. It was argued by the respondent’s Counsel that the summons is necessary to provide a platform for a determination of a dispute about whether the option was actually agreed and whether it was then properly and legally exercised. There is no counter application for such relief when one would have expected such, if the alleged *“dispute”* is *bona fide* raised, in my view. Whatever the reason may be, however, for reasons I will provide below, I do not need to decide that issue.

[9] The application was argued before me on 12 February 2024.

[10] In argument, Counsel for both sides accepted that the pivotal issue for a determination of this application involved the alleged option to purchase, as set out above. They accepted that there exists a genuine dispute of fact as to whether that option, as expressed in writing in the lease document, was agreed or not. The applicants’ argument, however, was that even if the option as set out in clause 16 had been agreed as contended for by the respondent, the respondent still could not succeed in its defence of the application because the option had not, on the

respondent's own version, been validly accepted and exercised. Alternatively, it was argued by the applicants, that the option was coupled with a suspensive condition, being the delivery of the guarantee/s timeously as offered, failing which the option become void and unenforceable. On either scenario, it was argued, the respondent, even in the face of the dispute of fact regarding the existence of the option, had acquired no right to purchase the farms and accordingly no right to remain on them because the guarantees had not been delivered. The applicants argued that that issue could and should be determined on the papers in the applicant's favour and would prove to be dispositive of the application. They further argued that the issue of summons, after the fact, was irrelevant and simply a duplication of what could and should be determined on these papers. The evidence on the pivotal issue, so it was argued, is before me already.

[11] Respondent's counsel argued that his client should have the right to lead evidence about what clause 16 means and requires. He provided no basis in law for how such evidence would be admissible but submitted that there was a history leading up to the relevant written lease document and that the applicants had changed their requirements about the option in the run up to the final written version produced by the applicants containing the version of clause 16 referred to above. In my view, even if such evidence were admissible to an interpretation of clause 16, (and it seems unlikely to me, but I express no decision on the point) such evidence simply demonstrates a shift in the requirements of the applicants while negotiating the further lease and cannot effect an interpretation of the terms of clause 16 as is alleged by the respondent to have been agreed. The respondent's version is that clause 16 of the lease was agreed in that form by it.

[12] The respondent must therefore establish that it has properly and fully accepted and exercised the option, if it is entitled to remain on the farms and that it has complied with any suspensive conditions as may have been applicable to the option. The following legal principles are of application.

[13] An option is an offer to enter into a main agreement together with a *"concluded subsidiary contract (the contract of option) binding the offeror to keep*

that offer open for a certain period." It is a contract complete in itself.¹ An option to buy land concerns a transaction relating to a future sale of land. As such, as a bare minimum the option must include the description of the land and the purchase price and must be in writing.² The option must also be accepted and exercised in the terms thereof. In *Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) LTD* 2009 (6) SA 617 (SCA), the position was that the alleged option read as follows, as set out in the headnote:

"The respondent hired certain premises from the trust of which the appellants were trustees. The agreement of lease contained, inter alia, an option to purchase the leased premises on condition that: (i) the sectional title register in respect of the premises was opened within 24 months of conclusion of the lease; and (ii) the option was exercised by way of a written contract of sale drawn up by the trust's attorneys and signed by the parties within 24 months of conclusion of the lease; and (iii) the written contract of sale was drawn up after the approved plan had been delivered to the trust's attorneys by the land surveyors, in which the premises leased and sold were reflected as a sectional title unit."

[14] In the majority judgement Lewis J wrote, at paragraph [17]:

"The fact that Goldco's right could not be exercised simply by notifying the trust (in writing) does not mean that there was no right conferred on Goldco. The written contract envisaged in the option clause was, in my view, no more than a prescribed mode of acceptance: the conclusion of a written contract, drafted by Rossouws, and signed by the parties."

[15] As far as suspensive conditions go; non-fulfilment thereof usually renders the contract void.³

¹ Christie's The Law of Contract in South Africa, Lexis Nexis, 6th Edition at page 57.

² *Hersch v Nel* 1948 (3) SA 68(A) at 700-702; *Van Aardt v Galway* 2012 (2) SA 312 (SCA) at [14]

³ *Southern Era Resources Ltd v Farndell NO* 2010 (4) SA 200 (SCA) at [11]; *Red Dunes of Africa CC v Masingita Property Investment Holdings (Pty) Limited and others*; *Red Dunes of Africa CC v Masingita Property Investment Holdings (Pty) Limited and others* [2015] JOL 33328 (SCA)

[16] As set out above, the respondent claims it exercised this option. It sets out how it did so in paragraphs 4.13 of the answering affidavit where the deponent for the respondent says the following:

“4.13 On 31 July 2023, Hartzenberg (the respondents attorney) informed Van der Merwe (the applicants’ attorney), in writing, that:

‘4. Our instructions are to exercise the option on behalf of our client, our client hereby purchasing the aforesaid farms from Wetlands Country Retreat (Pty) Ltd, at a purchase price of R10,800 per hectare for a total purchase consideration of R14,954,312,00... (The farms comprising of 1384.6586 hectares)’

5. Our client will deliver the guarantee for the purchase price within 30 (thirty) days from the date hereof, but, in any event, not later than 31 August 2023...”.
(My underlining).

[17] Thirty days from the date of the “acceptance” of the option was 30 August. The “acceptance” provided for possible delivery only on 31st August. The “acceptance” was therefore not in the terms required by the option. The option did not permit a day longer than 30 after acceptance unless *“if such is exercised less than 30 (thirty) days before the expiry of the lease, then such guarantee(s) are to be provided before the expiry of the lease.....”*. On that basis alone, in my view, the respondent, on its own version, did not exercise its option as agreed.

[18] Alternatively, and on an assumption that the acceptance conveyed in the letter referred to above was proper, it is common cause that the guarantees referred to by the respondent’s attorney in exercising the option have never been delivered and remain undelivered. They have never been tendered by the respondent either. In fact, the respondent does not deal with the guarantees at all in the answering affidavit nor in its last affidavit dated 31 January 2024. In oral argument, Counsel for the respondent argued that by disputing the existence of the option, the applicants made it impossible for the respondent to comply. No facts are set out in the papers justifying such a submission, however.

[19] On the papers, the respondent's explanation for not delivering the guarantees or even tendering them in order to perfect the option, is not dealt with. The answering affidavit deals with correspondence involving argument between the parties relating to the existence or otherwise of the option in the written lease agreement, with the respondent taking the view, in the face of the applicants' denials in that regard, that it (the respondent) now in fact owned the property and all it had to do was tender "*occupational rental*", which it did. It went as far as alleging in the answering affidavit that because it had accepted the option, a valid "*purchase and sale*" agreement was "*immediately brought into being.*" It alleged that it had become "*the owner of the farms and as such is entitled to remain in occupation thereof.*" It accordingly asserted that it had acquired "*independent title to the farms*" and that the applicant accordingly had no *locus standi* in relation to the farms any longer. That argument is self-evidently incorrect. I do not intend to deal in any detail with it, save to say, that it is trite that ownership of land can only transfer upon registration and any rights asserted before then could only be personal rights and not rights arising from ownership.

[20] To perfect the option, the respondent ought to have delivered guarantees as required, even if the option itself was being disputed. The dispute did not render performance impossible. As I pointed out to the respondent's Counsel during argument, the respondent was represented by attorneys at the time who could not have been ignorant to the fact that to exercise the option, as they had indicated the respondent was doing, the guarantees need to be timeously delivered.

[21] The respondent bore an onus of proving that it had accepted and complied fully with the terms of the option that it says it relies on. What it had to establish was the acceptance by it of the offer to purchase the land at the agreed sum, and the provision and delivery of the guarantees within 30 days from the date of which the option was exercised. Those are the terms of the option the respondent was required to give effect to. In its replying affidavit the applicant in fact argues that "*The respondent did not deliver any guarantees. Accordingly, and on the respondent's own version the alleged option was not validly exercised.*" It also alleged that the option relied upon by the respondent "*contains a suspensive condition that the*

guarantee ...had to be provided within 30 days from the date on which the respondent exercised the option..."

[22] The respondent's counsel argued that the required delivery of the guarantee/s was not a term of the option. I cannot agree. Not only is it clearly apparent from a reading of clauses 16.1 and 16.2 that the option included the requirement that the guarantee/s be provided as agreed, but that is how it was accepted by the respondent. Had the respondent genuinely believed that the guarantees were nothing more than a requirement for an inclusion in a full deed of sale ultimately, I have no doubt that its attorneys would either have not referred to them at all in purporting to accept the option or would have qualified the delivery of the guarantee/s in the acceptance letter on that basis.

[23] The respondent's counsel also argued that even if the provision of the guarantees was a term of the option, the lease itself had a breach provision in paragraph 11 which provided for what he called a *lex commissoria*. Clause 11 of the lease is a commonly found breach clause which entitles a lessee to cancel or claim specific performance subject to the prior dispatch of a written notice demanding that the breach be remedied. The application before me has nothing to do with the cancellation of the agreement or a claim for specific performance. This matter concerns the requirements of the allegedly agreed option clause and whether the respondent fulfilled it.

[24] At the hearing the respondent persisted with the argument that the matter was not urgent and ought not to have been launched as an urgent application. In my view events had superseded that submission but even if they hadn't I am satisfied that the matter was properly before court in urgent circumstances permissible by this Court, and it was ripe for hearing.

[25] Respondent's Counsel argued that the dispute of fact on the papers regarding whether the option was agreed or not, should be referred to oral evidence or trial or that the application be stayed, pending a determination of the action. The applicant argued that the respondent had, in this application, put up a defence, with the factual basis supporting it, to the relief sought, being that it had validly fulfilled and exercised

the option it had been given. I am satisfied that the question whether the respondent had done so on its own version was an issue that could be dealt with on these papers and that any referral for oral evidence was not necessary in the circumstances.

[26] As a result, I am satisfied that:

- a) The lease terminated on 31 August 2023.
- b) This Court is able to decide the exercise of the option issue on the respondent's version on these papers without the need for oral evidence or trial.
- c) The determination of that issue, as set out below, disposes of the application.
- d) If there was no option agreed, the respondent has acquired no rights, either personal or real, entitling it to remain on the farms.
- e) If there was an option agreed, and as alleged by the respondent, on its own version the respondent has failed to accept and/or exercise the relevant option in its entirety and fully and accordingly it did not, and cannot, have acquired the right to purchase the farms from the first applicant.
- f) As a result, the respondent has acquired no rights, either personal or real, entitling it to remain on the farms.

[27] The notice of motion requires the respondent to vacate the farms within three days of this order. Considering the nature of the enterprise I'm of the view that the *dies* are too short. Considering the livestock has to be rounded up and transported out, I am of the view that seven days is more reasonable.

[28] Because my decision is based on this narrow issue, it is not necessary that I deal with any of the allegations made by the respondent as to the possible fraudulent manipulation of the written lease document. I do not, as a result, intend to do so.

[29] In the result I make the following orders:

1. The respondent is ordered, within 7 (seven) days from date of this order:
 - a) To remove any and all livestock under its control from the farms known as:
 - i. The Remainder of Portion 1 the farm Vredehof Number 17, Registration Division HT, Province of KwaZulu-Natal.
 - ii. The Remainder of Portion 2 the farm Vredehof Number 17, Registration Division HT, province of KwaZulu-Natal, "Hereafter the farms".
 - b) To remove any and all farming equipment, implements and movable assets belonging to or under its control currently kept on or at the farms.
2. The respondent is, after complying with paragraph 1 above, interdicted from entering the farms or from permitting any employee, agent representative or person through or under it from entering the farms.
3. The respondent is interdicted from preventing or inciting, or using any other person or entity to prevent or incite, the applicants or their representatives or employees, or any other person under control of the applicants, to enter and take possession of the farms and to conduct farming activities on them.
4. In the event of the respondent failing to comply with paragraph 1 above, the applicants are authorised to, at the cost of the respondent, remove the respondent's livestock and take them to the nearest pound in Utrecht and place any of the respondents farming equipment and movable assets still remaining on the farms in storage.

5. The respondent is ordered to pay the costs of this application.

PITMAN AJ

Date reserved: 12 February 2024

Date delivered: 23 February 2024

For Applicant: Adv Botes SC – Adv Gous

Instructed by: Van Der Merwe & Associates

Email: legal5@vdmass.co.za

Tel: 087 654 0209

Ref: I RAUCH/zl/ MW0020/4

c/o Botha & Olivier Inc

Tel: 033 342 7190

Email: sanet.botha@bando.co.za

cathys@bando.co.za

For Respondents: Adv Hattingh

Instructed by: Hartzenberg Incorporated

Email: f.hartzenberg@hartzlaw.co.za

Tel: 012 362 8994

Ref: F HARTZENBERG/LS/SCH2734

c/o Venn Nemeth & Hart Attorneys

Ref: J ASKEW/BERNICE