THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 782/11
Reportable

In the matter between:

EUGENE ADLEM **FIRST APPELLANT**
JOSEPH ADLEM **SECOND APPELLANT**

and

NESTOR ALGEMUS ARLOW **RESPONDENT**

Neutral citation*: Adlem v Arlow* (782/11) [2012] ZASCA 164 (19 November 2012).

Coram: Cloete, Cachalia, Shongwe and Theron JJA and Erasmus AJA

Heard: **6 November 2012**

Delivered: **19 November 2012**

Summary: Land — Subdivision of Agricultural Land Act 70 of 1970 — the word 'portion' in inter alia s 3(*d*) must be interpreted as meaning a part of property (as opposed to the whole property) registered in the Deeds Registry, and not as having the meaning used in the Deeds Registry to describe the whole property.

ORDER

On appeal from: North West High Court, Mafikeng (Leeuw JP sitting as court of first instance):

1 The appeal succeeds, with costs.

2 The order of the high court as amended on 18 August 2011 is set aside and the following order substituted:

'(a) The question raised is decided in favour of the defendants.

(b) The plaintiff is ordered to pay the defendants' costs occasioned by the argument.'

3 The order in para 2(b) above is provisional. Should either party wish to make submissions in regard thereto, written argument must be delivered within ten days of this order (in which case the other party may make contrary submissions within a further ten days), failing which the order shall become final.

JUDGMENT

CLOETE JA (CACHALIA, SHONGWE AND THERON JJA AND ERASMUS AJA CONCURRING):

[1] This appeal concerns the correct interpretation of the Subdivision of Agricultural Land Act 70 of 1970, and in particular s 3(*d*) thereof. The commencement of the Subdivision of Agricultural Land Repeal Act 64 of 1998, that repeals the whole of Act 70 of 1970, has not yet been promulgated.

[2] On 14 August 2008 the parties entered into a written agreement of lease. The relevant terms of the lease are the following:

'1. **HUUR**

Die **VERHUURDER** verhuur hiermee 'n wooneenheid in die kompleks op die **EIENDOM** in klousule 3 [sic] beskryf aan die **HUURDER**, wat deur die **HUURDER** gehuur word onderhewig aan die bepalings en voorwaardes van hierdie ooreenkoms.

2. **PERSEEL**

Die **EIENDOM** bekend as Plaas JP 73 Koppieskraal Skuinsdrift (hierna "die **EIENDOM**")

[There is no paragraph 3.]

4. **HUURTERMYN**

4.1 Die **EIENDOM** word aan die **HUURDER** verhuur vir 'n periode van 9 JAAR EN ELF MAANDE wat begin op 1 Augustus 2008 en eindig op 30 Junie 2016.

4.2 Die **HUURDER** behou die reg voor om na verstryking van die huurtermyn genoem in paragraaf 4.1 die eerste opsie uit te oefen om die huurtermyn te verleng vir 'n verdere nege jaar en elf maande waarna die **HUURDER** na verstryking van hierdie tydperk weereens die reg uitoefen om die eerste opsie te hê om die huurkontrak te verleng vir 'n verdure nege jaar en elf maande.'

[3] The respondent, as the plaintiff, instituted an action against the appellants, as defendants, in the North West High Court, Mafikeng, in which he claimed ejectment of the appellants inter alia on the basis that the lease (annexed to his particulars of claim marked "B") was void as it contravened s 3(*d*) of the Act. The appellants brought nine counterclaims, some of which were abandoned.

[4] When the matter came before the high court (Leeuw JP) the parties agreed that what was described as 'a point of law' would be argued — apparently because not all of the witnesses were available. The court was informed that if the point of law was decided in favour of the respondent, that would put an end to most of the issues between the parties. In the event, the court upheld the respondent's argument and granted an order ejecting the appellants from the property and a further order dismissing those of their counterclaims that remained. The court subsequently granted leave to appeal to this court.

[5] It appears that the parties adopted, and the court sanctioned, an informal procedure based on rule 33(4). That is not acceptable. As this court held in *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para 21:

'It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. Where issues are to be separated rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.'

(See also *Denel Edms Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3.)

[6] The question for decision was formulated before the appeal was heard, as follows:

'Whether on the assumption that (as alleged by the defendants) the written lease signed by the parties on 14 August 2008 (Annexure "B" to the particulars of claim) constituted a lease by the plaintiff to the defendants of the whole of the property owned by the plaintiff comprising Remaining Extent of Portion 16 (a portion of portion 3) and Remaining Extent of Portion 3, both of the farm Koppieskraal 73, registration division JP, North West Province, and held by the plaintiff in terms of title deed T24269 04, such lease was in contravention of s 3(*d*) of the Subdivision of Agricultural Land Act and therefore void in as much as the property was agricultural land, and only Remaining Extent of Portion 16 and Remaining Extent of Portion 3 were leased; the lease was for an initial period of nine years and 11 months and conferred a right on the defendants to renew the lease for two further successive periods of nine years and 11 months each; and the consent of the Minister of Agriculture to the conclusion of the lease, was not obtained.'

The essence of the question is therefore whether the Act rendered the lease void.

[7] It will be noted that clause 2 of the lease quoted in para 2 above refers to the whole of the farm Koppieskraal 73. The appellants however sought rectification of that clause to substitute the following description of the property: Remaining Extent of Portion 3 of the farm Koppieskraal 73, JP North West Province and Remaining Extent of Portion 16 (a Portion of Portion 3) of the farm Koppieskraal 73, JP North West Province. It is common cause that

the respondent held both pieces of land in terms of title deed T24269 04. It is also common cause that the lease was for an initial period of nine years and 11 months and conferred a right on the defendants to renew the lease for two further successive periods of nine years and 11 months each; and that the consent of the Minister of Agriculture to the conclusion of the lease, was not obtained.

[8] Section 3 of the Act provides that (subject to the provisions of s 2, which are not applicable to the present appeal):

'(*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;

. . .

(*d*) no lease 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, shall be entered into;

(*e*) (i) 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, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act No 27 of 1956); and

(ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956;

. . .

unless the Minister has consented in writing.'

[9] The purpose behind the Act has been dealt with in a number of decisions. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) the Constitutional Court said in para 13:

'The essential purpose of the Agricultural Land Act has been identified as a measure by which the legislature sought in the national interest to prevent the fragmentation of

agricultural land into small uneconomic units. In order to achieve this purpose the legislature curtailed the common-law right of landowners to subdivide their agricultural property. It imposed the requirement of the Minister's written consent as a prerequisite for subdivision, quite evidently to permit the Minister to decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation.'

In *Geue v Van der Lith* 2004 (3) SA 333 (SCA) this court said, in paras 5 and 15:

'[T]he learned Judge commenced his motivation by identifying the essential purpose of the Act as an attempt by the Legislature, in the national interest, to prevent the fragmentation of agricultural land into small uneconomic units. This proposition, incidentally, is well supported by authority (see, for example, *Van der Bijl and Others v Louw and Another* 1974 (2) SA 493 (C) at 499C-E; *Sentraalwes Personeel Ondernemings (Edms) Bpk v Wallis* 1978 (3) SA 80 (T) at 84E-F; and *Tuckers Land and Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) at 153H-154A). In order to achieve this purpose, the Legislature curtailed the common-law right of landowners to divide their agricultural property by imposing the requirement of the Minister's consent as a prerequisite for subdivision, quite evidently with the view that the Minister should decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation.

. . .

The purpose of the Act is not only to prevent alienation of undivided portions of land. The target zone of the Act is much wider.'

The broadenening of the 'target zone' of the Act by the amendment of its terms was dealt with in *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) at 162B-D where the court held:

'In this connection it seems to me to be of some importance to bear in mind that s 3 in its original form included only paras (*a*), (*b*) and (*c*), which were repeated in the same form in the 1974 substitution quoted earlier. It seems to me to be a clear inference that the Legislature in 1974 considered that the existing three paragraphs were not sufficient by themselves to prevent the mischief of the division of agricultural land into uneconomic units, and therefore that it found it necessary in addition to prohibit (*inter alia*) long leases of portions of agricultural land and the sale of erven (whether surveyed or not) on such land. In other words, in my view, the primary purpose of the extension of the prohibitions in the section was to improve the means of achieving the original purposes of the Act . . . .'

In *Tuckers Land and Development Corporation (Pty) Ltd v Truter* 1984 (2) SA 150 (SWA) the court held at 153G-H and 154B-C:

'The basic object and purpose of the Act was obviously to prevent the subdivision of agricultural land into uneconomic portions. The long title of the Act, prior to its amendment by s 9 of Act 55 of 1972, was "To control the subdivision of agricultural land", and this was changed by the amending section referred to, the long title after the amendment reading "To control the subdivision and, in connection therewith, the use of agricultural land".

. . .

Apart from prohibiting the subdivision of agricultural land without the written consent of the Minister, the Act *inter alia* also provides that no undivided share in agricultural land shall vest in any person without the Minister's consent (s 3(*b*)) and that no lease in respect of a portion of agricultural land for a period of 10 years or longer, or for other long terms, shall be entered into without the Minister's written consent (s 3(*d*)).

The clear impression one gets from reading the Act as a whole is that the object and purpose thereof is to prevent subdivision of agricultural land into uneconomic units, and furthermore to prevent the *use* of uneconomic portions of agricultural land for any length of time'

(to which I would add) 'and furthermore to prevent encroachment on the use of agricultural land so as to threaten its viability as such'.

[10] The respondent's argument, upheld, as I understand the judgment, by the court a quo, is succinctly stated in the heads of argument as follows:

'Section 3(*d*) relates to "a portion of agricultural land" being any portion whether such portion is a registered portion of agricultural land or an unregistered (a surveyed or non-surveyed) portion of agricultural land. It is submitted that the wording "a portion" should be interpreted widely and given its general dictionary meaning.'

The consequence of this argument is that a piece of land that has already been subdivided and registered in the Deeds Registry could not be sold or let in terms of a long lease without the consent of the Minister. Counsel gave several examples to illustrate why in his submission this should be so. In the one example, counsel postulated the case where five pieces of land are all held under separate title deeds by one owner, and the owner wants to sell the middle portion which is surrounded by the other four and which has the only water supply necessary for the farming of all portions. In another example,

counsel postulated the case where several pieces of land are held by one owner who is a cattle farmer and who wants to sell one portion that is adjacent to the others to a person who wishes to establish a game farm thereon, with the attendant risk that the cattle farming enterprise on the other portions would be threatened by disease emanating from the wild animals on the game farm. These, said counsel, are examples of why the Act was amended to enable the Minister effectively to veto the sale of the one portion, so preserving the use of all portions concerned as agricultural land.

[11] In advancing his argument, the respondent's counsel relied on the long title to the Act, substituted by s 9 of the Subdivision of Agricultural Land Amendment Act 55 of 1972, which reads:

'To control the subdivision and, in connection therewith, the use of agricultural land.'

The submission was that the statute is aimed at controlling the use of agricultural land as much as the subdivision thereof.

[12] I cannot agree with counsel's interpretation. So far as the long title of the Act is concerned, what is sought to be controlled is not both the subdivision and also the use of agricultural land, but the subdivision and, *in connection therewith*, the use of such land. The Act does not confer on the Minister the power to control the use of agricultural land absent a contemplated subdivision, whether in the literal sense as envisaged in s 3(*a*) and (*e*)(i), or the extended sense as envisaged in s 3(*d*) (a lease for 10 years or longer) and 3(*e*)(ii) (a right for 10 years or longer).

[13] The correct interpretation in my view is that advanced on behalf of the appellants, namely that the word 'portion' in s 3(*d*) and in s 3(*e*)(i) and (ii) means a piece of land that forms part of a property registered in the Deeds Registry; and, on the authorities I have quoted, the prohibition is aimed at preventing physical fragmentation of the property, and the use of part of the property under a long lease ─ as well as (I would add) the granting of a right for an extended period in respect of the property. In other words, the word 'portion' in inter alia s 3(*d*) must be interpreted as meaning a part of property (as opposed to the whole property) registered in the Deeds Registry, and not

as having the meaning used in the Deeds Registry to describe the whole property.

[14] Thus interpreted, s 3(*d*) of the Act does not on the appellants' case apply to the lease in question as the whole of the property owned by the respondent was leased to the appellants. The parties were agreed that in the event of the court coming to this conclusion, the whole of the (amended) order made by the court a quo should be set aside, costs in this court should be awarded to the appellants and the matter should be referred back to the high court to continue with the trial. Nothing was said about the costs occasioned by the argument in the high court. I see no reason why the appellants should not be awarded those costs as well; but provision will be made for further argument on this question in case either party wishes a different order to be made.

[15] The following order is made:

1 The appeal succeeds, with costs.

2 The order of the high court as amended on 18 August 2011 is set aside and the following order substituted:

'(a) The question raised is decided in favour of the defendants.

(b) The plaintiff is ordered to pay the defendants' costs occasioned by the argument.'

3 The order in para 2(b) above is provisional. Should either party wish to make submissions in regard thereto, written argument must be delivered within ten days of this order (in which case the other party may make contrary submissions within a further ten days), failing which the order shall become final.

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T D CLOETE

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	P J van der Walt Instructed by: F & F van der Walt Attorneys, Rustenburg Bezuidenhouts Inc, Bloemfontein
For Respondent:	S Güldenpfennig Instructed by: Spector Attorneys, Johannesburg Hill McHardy & Herbst Inc, Bloemfontein