THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 761/2018

In the matter between:

GERT JOHANNES SCHEEPERS GOOSEN	**FIRST APPELLANT**
JOHANNA MAGRIETHA GOOSEN	**SECOND APPELLANT**

and

ELSA WILHELMINA WIEHAHN	**FIRST RESPONDENT**
ABRAHAM GERHARDUS GELDENHUYS	**SECOND RESPONDENT**
PHILLIPENTIA JACOMINA JORDAAN	**THIRD RESPONDENT**
ELRETHA HUYSHAMEN NO	**FOURTH RESPONDENT**
MASTER OF THE HIGH COURT, KIMBERLEY	**FIFTH RESPONDENT**
REGISTRAR OF DEEDS, KIMBERLEY	**SIXTH RESPONDENT**

Neutral citation: *Goosen v Wiehahn* (761/2018) [2019] ZASCA 137 (1 October 2019)

Bench: Ponnan, Cachalia, Zondi, Dambuza and Nicholls JJA

Heard: 10 September 2019

Delivered: 1 October 2019

Summary: Wills – interpretation of – nature of right – right regulated by testamentary disposition – not a *pactum de contrahendo*.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Lever AJ sitting as court of first instance):

(a) The appeal is upheld with costs.

(b) The order of the court below is set aside and in its stead is substituted the following:
'The application is dismissed with costs.'

JUDGMENT

Ponnan JA (Cachalia, Zondi, Dambuza and Nicholls JJA):

[1] As Nugent JA observed 'there is nothing quite like a will for fomenting family dissension'.[1] The will in question in this case is that of the late Abraham Gerhadus Geldenhuys (the testator). The testator's property included two farms described as Hunites and Holte. In his will executed on 27 November 1990, the testator bequeathed the two farms to his spouse, Alberta Johanna Geldenhuys (Mrs Geldenhuys), subject to the following testamentary conditions:

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[1] *Van Deventer v Van Deventer & another* [2006] ZASCA 116; [2007] 3 All SA 236 (SCA) para 1.

'2.1. The spouse of my daughter, Johanna Magrietha Goosen, born Geldenhuys, will, in the event of my spouse intending to sell the properties, have the first option to buy the farm Hunites and/or the farm Holte on the following terms:

2.1.1. The purchase price of the farm Hunites will be calculated at R20.00 per morgen and the purchase price of Holte will be calculated at R30.00 per morgen.

2.1.2. The purchase price(s) mentioned above shall be payable within 5 years from date of registration together with interest calculated from date of registration of transfer on and amount and payment of which is postponed, and at the rate of 7% annum and which interest will be payable together with the capital amount.

2.2. In the event of the property(ies) being sold, the proceeds thereof together with interest must be divided as follows:

2.2.1 One half thereof to my spouse, Alberts Johanna Geldenhuys;

2.2.2. One half for equal distribution to my four children, Elsa Wilhelmina Wiehahn, (born Geldenhuys), Johanna Magrietha Goosen, born Geldenhuys, Abraham Gerharduys Geldenhuys and Phillipenta Jacomina Jordaan, (born Geldenhuys).

2.3. If my spouse does not sell one or both farms during her lifetime, the spouse of my daughter, Johanna Magrietha Goosen (born Geldenhuys), shall have the option as described in clause 2.1 above, upon the death of my spouse and for a period of 3 months thereafter, to buy the property (one or both) on and subject to the same terms as described in clause 2.1 with sub-clauses above and subject to the conditions of clause 7 below.

2.4. If the options mentioned in clause 2.1 and 2.3 are not exercised, the property shall be sold by way of public auction, subject however to the condition that if the offer received at auction is not accepted by all legatees they will not be obliged to sell the property at that auction, but will have a further 12 months to sell the property as they see fit, but will be obliged to sell the property for the highest offer received before the expiry of 12 months. In the event of a sale as provided for in this clause the proceeds will be divided in equal shares between my four children mentioned in clause 2.2.2.'

Almost three decades later, some of the testator's children are at loggerheads over the terms of clause 2.3 of the will.

[2] After the death of the testator on 26 May 1997, the farms were transferred to Mrs Geldenhuys, subject to the aforementioned testamentary conditions. During June 2000 the latter sold and transferred the farm Holte to Gert Johannes Scheepers Goosen (the

first appellant), the spouse of the testator's daughter, Johanna Magrietha Goosen (the second appellant), in accordance with the provisions of clause 2.1 of the will.

[3] Mrs Geldenhuys died on 5 December 2017. On 24 January 2017, and within three months of her death, as stipulated in clause 2.3 of the will the first appellant addressed the following letter to the fourth respondent, the Executrix of the Estate of the late Mrs Geldenhuys (the executrix):

'Exercise of Option – Farm Hunites

I hereby inform you that I am going to exercise the option on the farm Hunites, according to the terms of the Will of my late father-in-law, AG Geldenhuys.'

On 30 March 2017 the executrix entered into a written agreement of sale with the first appellant for the farm Hunites for the sum of R176 200, being R20.00 per morgen as stipulated in clause 2.1.1 of the will.

[4] Approximately two months later, one of the testator's daughters, Elsa Wilhemina Wiehahn (the first respondent), launched an urgent application out of the Northern Cape Division of the High Court, Kimberley. The appellants were cited in the application as the first and second respondents. The testator's remaining two children, Abraham Gerhadus Geldenhuys and Phillipentia Jacomina Jordaan, and the executrix, Master of the High Court, Kimberley and Registrar of Deeds, Kimberley were cited as the third to seventh respondents respectively.

[5] According to the first respondent, she was aggrieved that the purchase price, fixed for the farm Hunites in terms of clause 2.1.1 of the will, was but a tiny fraction of its actual value of some R5,2 million. She claimed that this was 'utterly unreasonable and clearly not what [her] late father contemplated at the time'. Although the original notice of motion has not been included in the record, one can certainly glean the nature of the relief initially sought by the reference to the first respondent's founding papers. In this regard her founding affidavit reads:

'11. This is an application under the common law to depart from the provisions imposed by clause 2 of [the] will and testament of Estate Late Abraham Gerhardus Geldenhuys executed on

27 November 1990 ("*the Testament*") insofar as it restricts the purchase price of the immovable property known as Farm Hunites . . . ("*the Property*").

12. In the alternative, the application seeks the removal, alternatively modification as the Honourable Court may deem fit, of the restriction imposed by clause 2 of the Testament on the Property in terms of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965.'

Later the first respondent added:

'28. The Court will note from the relief sought (in [the] main) that I essentially ask of this Court to depart from the Second and Third Restrictions of the Testament, in that the Property can be sold at market value or such lesser amount as the Court may deem fit, but that the First Respondent will still have the first option to purchase the Property should he wish to do so. In the alternative, the Court will note that I seek essentially the same relief, albeit under the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965. I submit that this is most sensible and just towards the First Respondent.'

[6] In time, the first respondent's notice of motion came to be substantially amended. In its amended form, it read:

'2. That the written agreement of sale entered into between the First Respondent and the Fifth Respondent on 30 March 2017 in respect of the property known as Farm Hunites, Farm Number 84 situated in Namaqualand, Northern Cape and held by Title Deed Number T20365/98 as registered with the Registrar of Deeds, Kimberley ("the Property") marked Annexure "F" hereto be declared to be null and void;

3. That the Fifth Respondent be ordered to deal with the Property in accordance with clause 2.4 of the will and testament of Estate Late Abraham Gerhardus Geldenhuys executed on 27 November 1990 marked Annexure "A" hereto.

4. That the Fifth, Sixth and Seventh Respondents do all things necessary so as to give effect to paragraph 3 above'.

[7] Importantly, no case for such relief had been made out in the first respondent's founding affidavit. The first hint of a claim for such relief is to be found in her replying affidavit. She there stated:

'6. However, before I do so, I wish to place the following before Court: At the heart of the First and Second Respondents' case (or defense) is the so called option that was ostensibly extended to the First Respondent in the Testament of my late father. They solely rely on clause 2.3 of the

Testament and the purported exercise of such option as a legal ground for the conclusion of the deed of sale entered into between the First Respondent and the Fifth Respondent in respect of the Property.

7. Put differently, the First Respondent contends that clause 2.3 of the Testament constitutes an option to purchase immovable property that can be exercised by him. This contention of the First Respondent is fundamentally flawed.

8. I am advised that an option (a form of a *pacta de contrahendo*) in respect of the sale of land is governed by the Alienation of Land Act 68 of 1981. In particular, section 2(1) of the Act reads:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect *unless it is contained in a deed of alienation signed by the parties thereto* or their agents acting on their written authority."

9. Accordingly, an option in respect of the sale of land must . . . be in (i) writing and (ii) signed by the parties thereto.

10. Notably the so called option was not signed by the First Respondent, rendering the option null and void or unenforceable. As a result, the First Respondent has neither a valid option in respect of the Property, nor a right to claim transfer of the Property in respect of the Deed of Sale.'

[8] That contention found favour with Lever AJ in the high court, who granted the first respondent the relief sought in her amended notice of motion. In arriving at his conclusion that she was entitled to the relief sought, Lever AJ reasoned:

'43. In my view, what is contemplated by the provisions of clause 2.3 is clearly an option. This would be subject to formalities prescribed under the Alienation [of Land] Act. It is common cause that such formalities were not complied with. In such circumstances the applicant is entitled to have the sale of the farm Hunites, entered into between the first and the fifth respondent on 30 March 2017, declared null and void as contemplated in prayer 2 of the amended Notice of Motion.'

[9] As I see it, the reasoning and conclusion of Lever AJ cannot be supported. It is important to reiterate that when interpreting a will, a court must strive to ascertain the wishes of the testator from the language used. Generally, the language used must be construed in the context of the circumstances that prevailed at the time the will was executed. Moreover, there is a presumption that 'in doubts as to the interpretation of

testamentary writings, that construction should be adopted which would give effect to the *voluntas* of the testator, rather than that which would nullify the deed.'[2]

[10] Here, the testator had directed in his will that his executor must transfer both farms to Mrs Geldenhuys, subject to the stipulated conditions. In that regard, clause 2.1 found application during her lifetime and clause 2.3 upon her death. It is clear that she had to adiate under the will before the rights conferred upon her thereunder could become enforceable. Thus, although she acquired dominium upon transfer, she was not free to simply dispose of the farms as she saw fit. Her right to do so was fettered by the right granted to the first respondent by the testator.

[11] The first respondent did not acquire a real right to immediately enforce transfer. Rather, he acquired a personal right that was enforceable: firstly, against Mrs Geldenhuys, during her lifetime, and secondly, against her executrix, upon her (Mrs Geldenhuys') death. Having elected to sell Holte, Mrs Geldenhuys was obliged to first offer it to the first appellant on the terms stipulated by the testator in clause 2.1 of the will. That she did, leading to the conclusion of the resultant agreement of sale on the terms stipulated in clauses 2.1.1 and 2.1.2 of the will. The farm Hunites, not having been sold during Mrs Geldenhuys' lifetime, fell to be dealt with by the executrix in accordance with clause 2.3 of the will. In that sense the executrix, who had 'stepped into the shoes' of Mrs Geldenhuys, was as much bound by the testamentary conditions as Mrs Geldenhuys had been during her lifetime.

[12] As with Mrs Geldenhuys during her lifetime, the first appellant had a personal right that was enforceable against the executrix, upon the former's death. Like Mrs Geldenhuys before her, the executrix was also not free to simply dispose of Hunites. Clause 2.3 of the will compelled the executrix to put the first appellant in the position to exercise the right to purchase that farm in accordance with the terms of clause 2.1. In that respect, the nature of the right conferred upon the first appellant by the testator, in terms of clause 2.3, was no different to that conferred in terms of clause 2.1. Any difference between the

[2] *Van Deventer v Van Deventer & another*, fn 1 above, para 6 and the cases there cited.

two, such as there is, related to the circumstances under which each fell to be exercised by the first appellant. The right conferred by clause 2.1 fell to be exercised by the first appellant during the lifetime of Mrs Geldenhuys, and that conferred by clause 2.3, upon her death.

[13] The first appellant could have chosen never to enforce his right in respect of either farm. In that event the will contains detailed alternative provisions. But, he had chosen in each instance to do so. The 'real source' of the right in question in this case is the 'disposition by the testator'.[3] The testamentary disposition was the 'fons et origo' of the right.[4] The right is not a *pactum de contrahendo* (an agreement to make a contract), 'as it has been regulated through a testamentary disposition'.[5] In these circumstances, the eventual acquisition by the first appellant of the property bequeathed would be an 'acquisition by succession' and the fact that some 'juristic act by the beneficiary is a pre-requisite to his acquisition is not, *per se*, a bar to such acquisition being one by succession'.[6]

[14] It follows that Lever AJ misconceived the position and that the application by the first respondent ought to have failed. Counsel for her was constrained to concede as much from the bar in this court.

[15] In the result:

(a) The appeal is upheld with costs.

(b) The order of the court below is set aside and in its stead is substituted the following:
'The application is dismissed with costs.'

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V M Ponnan

Judge of Appeal

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[3] *Executor, Estate Higginson v The Commissioner for Inland Revenue* 1931 WLD 140 at 143.
[4] *Commissioner for Inland Revenue v Estate Kirsch and Others* 1951 (3) SA 496 (A) at 506D-507A.
[5] *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* [2014] ZASCA 169; 2015 3 SA 532 (SCA) para 17.
[6] *Estate Roadknight and Another v Secretary for Inland Revenue* 1973 (2) SA 339 (D) at 341F-G.

APPEARANCES:

For Appellant:	JG Van Niekerk SC (with him SL Erasmus) Instructed by: Haarhoffs Inc., Kimberley Honey Attorneys, Bloemfontein
For Respondent:	LM Olivier SC Instructed by: Van De Wall Inc., Kimberley Pieter Skein, Bloemfontein