

REPORTABLE

CASE NO.: SA 17/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between

LAURENT ANDRÈ RAYMOND MAROT

First Appellant

ANNIE RENEE MAROT

Second Appellant

BENOIT RENÈ RAYMOND MAROT

Third Appellant

and

LANCE CLIFFORD COTTERELL

Respondent

Coram: SHIVUTE CJ, MARITZ JA and MAINGA JA

Heard: 26 June 2013

Delivered: 26 March 2014

APPEAL JUDGMENT

SHIVUTE CJ (MARITZ JA and MAINGA JA concurring):

[1] The appellants, who are all foreign nationals, entered into an agreement with the respondent, a Namibian citizen, in terms of which they purported to purchase 50% member's interest in a close corporation known as Wildlife Conservation Namibia CC (the close corporation) and 100% of the respondent's claims against the close corporation. The Memorandum of Agreement of Sale (the

agreement) included a clause providing that the agreement was in effect a sale of 50% of the immovable property and 100% of the movable property owned by the corporation.¹ It is common cause that the immovable property in question is commercial agricultural land and that the appellants were entitled to take possession of the immovable property on signature of the agreement. The agreement further provided that N\$1 million was payable on the date of signature and would not be refundable should the agreement be cancelled due to the purchasers having breached any of the terms and conditions contained therein.

[2] The appellants paid the N\$1 million to the respondent as a 'deposit'. Subsequent to this payment, the respondent alleged that he became aware of the provisions of s 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the Act), which, amongst others, prohibits a foreign national from entering into an agreement 'with any other person' in terms of which a right of occupation or possession of agricultural land is conferred on the foreign national for a period exceeding 10 years or for an indefinite period without the consent of the Minister of Lands and Resettlement (the Minister). The respondent accordingly instructed his legal practitioners to cease forthwith with the implementation of the agreement. Subsequent to this instruction, the appellants instituted proceedings in the High Court to recover the N\$1 million they had paid to the respondent, as well as N\$410 010,25 for damages which they had allegedly suffered as they maintained that the respondent's instruction to his legal practitioners not to proceed with the

¹ Clause 3.1, headed 'The Property' reads: 'It is expressly recorded that the sale and purchase as provided herein is, in effect, a sale of 50% of the immovable property and 100% of the movable property *voetstoots* and the purchaser therefore accepts the property'

implementation of the agreement constituted a repudiation of the agreement, which repudiation they had accepted.

[3] The appellants' claims were met with a special plea of illegality. The respondent contended that the agreement was void *ab initio* as it contravened the provisions of s 58(1)(b)(ii) of the Act. The respondent also instituted a counter-claim conditional upon the special plea failing and alleged in turn that the appellants had repudiated the agreement which repudiation the respondent had accepted.

[4] At the request of the parties, the special plea was argued separately. The High Court upheld the special plea, reasoning that the agreement is one in contravention of s 58(1)(b) of the Act and is accordingly void *ab initio*. It concluded that the Court would not entertain any claim based on such a contract.

[5] The appellants accordingly appealed to this Court. The appeal was argued on behalf of the appellants by Mr Töttemeyer, assisted by Mr Strydom, while Mr Heathcote, assisted by Ms Bassingthwaighe, argued on behalf of the respondent. The Court is indebted to counsel for the extensive and helpful submissions made to it.

[6]

Is the Agreement in contravention of the Act?

[7] The right to acquire, own and dispose of property whether immovable or movable in Namibia has been conferred to 'all persons'. However, such a right is subject to the rider that Parliament may by legislation prohibit or regulate the right

to acquire property by persons who are not Namibian citizens. Article 16 of the Namibian Constitution says so and provides in full that:

[8]

'All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.'

[9] Subsections (1) and (2) of s 58 of the Act, evidently promulgated in terms of the proviso in Art 16, provide as follows:

'58 Restriction on acquisition of agricultural land by foreign nationals

(1) Notwithstanding anything to the contrary in any other law contained, but subject to subsection (2) and section 62, no foreign national shall, after the date of commencement of this Part, without the prior written consent of the Minister, be competent-

(a) to acquire agricultural land through the registration of transfer of ownership in the deeds registry; or

[10]

(b) to enter into an agreement with any other person whereby any right to the occupation or possession of agricultural land or a portion of such land is conferred upon the foreign national-

(i) for a period exceeding 10 years; or

[11]

(ii) for an indefinite period or for a fixed period of less than 10 years, but which is renewable from time to time, and without it being a condition of such agreement that the right of occupation or possession of the land concerned shall not exceed a period of 10 years in total.

(2) If at any time after the commencement of this Part the controlling interest in any company or close corporation which is the owner of agricultural land passes to any foreign national, it shall be deemed, for the purposes of subsection (1)(a), that such company or close corporation acquired the agricultural land in question on the date on which the controlling interest so passed.'

[12] 'Agricultural land' is defined in s 1 of the Act as meaning,

'any land or an undivided share in land, other than-

(a) land situated in a local authority area as defined in section 1 of the Local Authorities Act, 1992 (Act 23 of 1992);

(b) land situated in a settlement area as defined in section 1 of the Regional Councils Act, 1992 (Act 22 of 1992);

(c) land of which the State is the owner or which is held in trust by the State or any Minister for any person ;

(d) land which the Minister by notice in the Gazette excludes from the provisions of this Act.'

[13] 'Controlling interest' is defined as follows:

"controlling interest", in relation to-

(a) a company, means-

(i) more than 50 percent of the issued share capital of the company;

(ii) more than half of the voting rights in respect of the issued shares of the company; or

(iii) the power, either directly or indirectly, to appoint or remove the majority of the directors of the company without the concurrence of any other person; or

(c) a close corporation, means more than 50 percent of the interest in the close corporation.'

[14]

[15] 'Foreign national' is defined in s 1 as meaning,

'(a) a person who is not a Namibian citizen;

(b) in relation to a company-

(i) a company incorporated under the laws of any country other than Namibia; or

(ii) a company incorporated in Namibia in which the controlling interest is not held by Namibian citizens or by a company or close corporation in which the controlling interest is held by Namibian citizens; and

(c) in relation to a close corporation, a close corporation in which the controlling interest is not held by Namibian citizens.'

[16] By enacting s 58 of the Act the Legislature chose to regulate rather than prohibit the acquisition of agricultural land by foreign nationals. This scheme is sanctioned by Art 16 of the Constitution. The constitutionality of the section cannot therefore and does not arise in the present proceedings. As previously mentioned, the appellants are foreign nationals as defined by the Act. It is also common cause

between the parties that the property concerned is agricultural land as defined by the Act, and that the consent of the Minister was not obtained for the sale of 50% collective member's interest in the close corporation to the appellants. The issue in contention is whether s 58 of the Act finds application on the facts of this case.

Counsel's submissions

[17] Mr Tötemeyer's first argument concerns the term '*controlling interest*' which, as already noted, is defined by the Act in relation to a close corporation as being more than 50% of the interest in the close corporation. He contends that the agreement is not hit by s 58(1)(a) read with subsec (2) because the appellants had not acquired controlling interest in the corporation and so the Minister's consent was not required. In the submission of counsel, the right to own and dispose of property conferred to persons by Art 16 includes the right to use and enjoy such property. Close corporations, so the argument runs, do not have bodies to kick or souls to damn. Accordingly, the right to use and enjoy property is exercised by the human agents of the corporation, namely the members. It follows then, so it is argued, that a close corporation that owns agricultural land cannot 'possess' or 'occupy' such land other than by means of humans possessing or occupying such land on its behalf.

[18]

[19] Counsel proceeded to argue that a 50% member of a close corporation by virtue of his or her membership in the corporation, has possessory rights over the property in the corporation: he or she is entitled to a right of occupation of the agricultural land owned by a close corporation of which he or she is a member and

is entitled to conclude an agreement with fellow members giving him or her even exclusive occupation of such property. Section 58(1) of the Act does not render the acquisition (without ministerial consent) of a 50% member's interest in a close corporation that owns agricultural land illegal and likewise would not render rights of possession which flow from such acquisition illegal. In terms of the Close Corporations Act 26 of 1988 (the Close Corporations Act), members of the corporation may by agreement regulate its internal affairs and agree on anything relating to them, as long as it is not inconsistent with the provisions of the Close Corporations Act, so it is contended.

[20] Counsel further argues that the principles relating to close corporations 'to a large extent' resemble those of partnerships. After mentioning the similarities, he submits amongst other things, that the relationship between the members of a close corporation resembles that of partners in a partnership. Consequently, so he submits, the principles relating to partnerships 'to a large extent' find application to the relationship between members of a close corporation. Since the rights of members of a close corporation and partners are allegedly akin, each partner has the right to engage in any act concerning the management of the affairs of a partnership, including the right of possession of the partnership property. Counsel argues furthermore that to interpret s 58 as precluding members of a close corporation from dealing with its property would amount to an unjustified interference with the right of Namibian citizens to deal with their property as they please.

[21] In Mr Tötemeyer's further submission the phrases '*subject to*' used in the introductory part of s 58(1) and '*or*' used at the end of s 58(1)(a) meant that s 58(1)(b) has no bearing at all on possessory rights flowing from a member's interest of a foreign national in an agricultural land-owning close corporation. According to counsel, s 58(1)(b) deals with rights afforded to foreign nationals in the context of lease agreements, habitation, usufruct and the like, whilst s 58(1)(a) pertains to the transfer of ownership in the deeds registry. The use of the word '*or*' at the end of s 58(1)(a) signifies that two separate and disjunctive concepts were intended by the legislature when enacting s 58(1).

[22] As I understand it, the gist of counsel's argument is that s 58(1)(b) does not restrict rights of occupation or possession of commercial agricultural land by foreign nationals who are members of a close corporation owning such land and who have legitimately acquired non-controlling interest in the close corporation. Thus, no ministerial consent is required in those circumstances. This interpretation, according to counsel, is in line with a purposive and liberal interpretation of Art 16 of the Constitution. It also accords with the common law rights of such a foreign national member and would be in line with presumptions of interpretation that the legislature does not intend harsh, unjust and unreasonable consequences or absurd or anomalous results.

[23] Mr Heathcote, on the other hand, contends in the first place, that there is no such principle in our law that a member of a close corporation *qua* member has possessory right over the property of the corporation. Secondly, counsel argues that even if such a principle had existed, it is excluded by the provisions of s 58(1)

of the Act which commences with the phrase: *'notwithstanding anything to the contrary in any other law contained'* Thus even if it is to be assumed that Mr Töttemeyer's argument based on the alleged resemblance between partners and members in a partnership and close corporation respectively is correct, the above phrase displaces the alleged legal principles relied on by the appellants and replaces them with the provisions of that section.

[24]

[25] Mr Töttemeyer's submissions cannot be accepted as correct. To start with the argument based on the meaning of 'subject to' and the use of the word 'or' in s 58, the phrase *'subject to'* must be interpreted in the context it is used. As stated in *S v Marwane* 1982 (3) SA 717 (AD) at 747 which authority was cited by counsel for the appellants, the expression 'subject to' is ordinarily:

'...to establish what is dominant and what is subordinate or subservient; that to which a provision is "subject", is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be "subject to" the other specified one'

[26] The above conclusion was reached with reference to the entire context in which the phrase was used, including the provisions to which a certain section is *'subject to'*. In this case, s 58(2) merely aims to further regulate the provision contained in s 58(1)(a), hence the term *'for the purpose of s 58(1)(a)'*. The phrase *'notwithstanding anything contrary in any other law contained'* applies to both

scenarios in subsecs (1)(a) and (b) irrespective of the use of the conjunctive 'or' at the end of s 58(1)(a). Subsection (2) does not envisage a separate prohibition other than that found in subsec (1). As regards counsel for the appellants' argument pertaining to subsecs (1)(a) and (b), which refer to different prohibitions, I agree with the submission, save for the limitation counsel seeks to ascribe to subsec (1)(b)(ii) that a sale of member's interest in a close corporation is excluded from that section automatically by virtue of the membership of the close corporation. Subsection (1)(b) clearly prohibits a foreign national from entering into *'an agreement with any other person whereby any right to the occupation or possession of agricultural land or a portion of such land is conferred upon the foreign national'* This is a phrase of wider import and makes no distinction between the different types of agreements in terms of which such a right of occupation or possession can be conferred. 'Any other person' evidently includes a Namibian citizen who is a member of a close corporation seeking to dispose of his or her member's interest in the agricultural land-owning close corporation.

[27]

[28] This interpretation is furthermore supported by that part of the provision in s 58(1) that states that 'notwithstanding anything to the contrary in any other law contained'. 'Any other law' would include the law of partnership and close corporations. Thus, even if the contention that there is a resemblance between a close corporation and a partnership is to be accepted, or that a member of a close corporation *qua* member is entitled to occupy or possess immovable property belonging to the corporation, an agreement whereby a foreign national purports to acquire a member's interest in a close corporation owning agricultural land for the

periods prohibited in s 58 without the Minister's consent would also fall foul of the provisions of that section.

[29]

[30] As regards the argument by counsel for the appellants that the interpretation above of s 58 severely restricts the constitutional right of Namibian citizens to own property to the extent that they will not be free to dispose of their property as they wish, the short answer is that the right to own or dispose of property like many other constitutional rights is not unlimited. Such right is subject to the restrictions contemplated in the Article. The proviso in Art 16 evidently authorises the limitation of the rights of Namibian citizens to the extent that they may wish to dispose of commercial agricultural land to a foreign national. In other words, a limitation to that effect is constitutionally sanctioned and any Namibian citizen wishing to dispose of his or her commercial agricultural land to a foreign national will have to bear the provisions of the constitution and the law in mind when doing so. To my mind, s 58 of the Act constitutes a permissible limitation and its provisions are clear. There is no ambiguity or absurdity in its provisions. As the law stands, a foreign national may occupy or possess agricultural land for those periods not prohibited by s 58(1)(b) of the Act and provided that the Minister's consent has been obtained. Moreover, I agree with counsel for the respondent's submission that exclusive possession of immovable property is an incident of ownership of immovable property, not of membership in a close corporation that owns immovable property.

[31] The argument regarding the proposed assimilation of partners and members in partnerships and close corporations respectively cannot also not be

correct as it loses sight of the fact that the phrase 'notwithstanding anything in any other law contained . . . ' in s 58(1) overrides any other law or legal principle which conceivably has the effect of affording foreign nationals the right to occupy or possess agricultural land indefinitely without prior written consent of the Minister by virtue of their membership in a close corporation. Quite apart from the fact that no such principle or right exists in our law, the argument seemingly conflates the two very distinct business vehicles and appears to ignore the juristic nature of a close corporation as opposed to a partnership.

[32] The principles relating to the juristic nature of close corporations are trite. However, in the light of the facts of this appeal, it has become necessary to restate them herein. I find the summary given in *The Guide to the Close Corporations Act and the Regulations* by Geach and Schoeman at pp 501–502 succinct and useful. I refer only to some of the principles set out therein and I paraphrase the passage omitting reference to authorities in the process:

Although a corporation does not have a physical existence, it is an entity distinct from its members. The property of the corporation belongs to it and not to its members. A member of the corporation does not have a real right in the property of the corporation but merely has a personal right to claim a share of the surplus assets of the corporation if the corporation is deregistered or dissolved. Likewise, the profits of the corporation belong to it and not to its members. Only after a payment is made according to the provisions of the Close Corporations Act do the members obtain a right thereto. No member can treat the corporation's assets or profits as his or

her own irrespective of the extent of his or her interest or control over the affairs of the corporation. Moreover, a member stands in a fiduciary position to the corporation and must therefore exercise his or her powers for the benefit of the corporation. A corporation is very different from a partnership or a firm.

[33] Mr Töttemeyer, as an alternative argument, seeks to differentiate between two periods during which different circumstances allegedly existed entitling the appellants to the possession of the immovable property. He argues that in terms of clause 10.2 of the agreement, the right of occupation arose some 14 months before the member's interest would have passed onto the appellants (a period of less than 10 years). The agreement is thus not for a 'period exceeding 10 years' or 'for an indefinite period' nor for a period renewable for more than 10 years. Therefore, so the argument develops, s 58(1)(b)(ii) finds no application. The second period was described as the period from 2 June 2010 onwards. In terms of this period, it is argued that the right of occupation directly flowed from the transfer of the member's interest and the rights acquired by the appellants as a result thereof. It is therefore not the type of occupation or possession contemplated by the legislature in terms of s 58. If the agreement as per clause 10.2 continues to be in operation during the 'second period', then the parties were entitled to conclude an agreement for the second period to regulate the exercise of that right during that period.

[34] Counsel for the respondent, on the other hand, maintains that this argument is premised on the assumption that the right to possess the immovable property is

an automatic right flowing from the member's interest held in the close corporation, which in his submission, is contrary to the juristic personality of a close corporation.

[35] As regards the argument concerning the period during which the appellants may occupy the immovable property before member's interest passes to them, it is indeed so that the first period does not exceed 10 years nor is it renewable for more than 10 years as contemplated by s 58(1)(b)(i). A perusal of the agreement bears out Mr Tötemeyer's argument that the agreement does in fact entitle the appellants to possess the immovable property prior to the member's interest passing to them. However, Mr Heathcote is undoubtedly correct in his submission that the so-called temporary possession is premised on an erroneous assumption that the right to possess the immovable property automatically flows from the member's interest held in the close corporation. The argument clearly ignores the legal principles applicable to a close corporation as juristic person. As already mentioned, a member of a close corporation does not have possessory rights over the property of the close corporation merely by being a member thereof. The property belongs to the close corporation. A member may not occupy or possess the close corporation's property until such time that the corporation has passed a resolution or there is an underlying agreement to that effect. It is true that a member of a close corporation is entitled to participate in the management of the corporation's business, but this is a far cry from dealing with the assets of the corporation as if it was the member's personal property.

[36] Regarding the legality of the alleged second period, it is common cause that the agreement does not make provision for the appellants' possession of the immovable property to continue for a period not exceeding 10 years. In fact, the period for such possession is not specified at all. In the absence of such stipulation, it is a fair assumption that the possession would pass to the appellants for an indefinite period.

[37] The second period described by Mr Tötemeyer is clearly in contravention of s 58(1)(b)(ii), because as mentioned already it is for an indefinite period. The agreement between the parties was clearly to confer a right to the occupation or possession of agricultural land upon foreign nationals; for an indefinite period, and the Minister's consent had not been obtained. Therefore, in the light of what has been discussed in the preceding paragraphs of this judgment, the agreement in both periods is evidently in contravention of s 58(1)(b)(ii).

Severability of the Agreement

[38] The appellants' counsel argues in the further alternative that in the event that it is held that clause 10.2 of the agreement (the impugned clause) is illegal on any basis, then it should be severed from the rest of the agreement. The impugned clause reads:

'The purchaser is entitled to take possession of the immovable property and movable property on date of signature of this agreement.'

[39] Counsel further contends that the rights conferred on the appellants in terms of the contract, include rights of occupation or possession which a member would have had *qua* member. If the impugned clause were to be severed, those rights would arise *ex lege* as from 2 June 2010, the so-called second period. The rights conferred on the appellants would therefore only operate for a short period and be merely subsidiary or collateral rights and are thus severable from the remainder of the contract. The substance of the contract would, however, remain intact, so counsel submits.

[40] The respondent's counsel counter argues that the impugned clause is not severable as it taints the entire agreement. The appellants would not have concluded the agreement had the effect thereof not been that they have possession of both the immovable and movable property. The nature of the movable property is such that the appellants had to have possession of the immovable property too. In any event, so counsel contends, severability could not succeed as the appellants relied on the lawfulness of the entire contract.

[41] In order for a provision to be severed from an agreement to render the remaining part legal and enforceable, one has to consider, amongst others, whether the provision concerned embodies the main purpose of the transaction as a whole or whether the agreement is made up of several distinct provisions. The former would result in the entire contract being illegal as the said provision cannot be severed from the contract.² If the illegal provision is merely an additional stipulation not going to the principal purpose of the contract, it is severable. The

²See Principles of the Law of Contract by Kerr, 6 ed at pp 162-166.

intention of the parties must also be considered. I respectfully agree with the proposition made by Professor Kerr that the crucial question is whether the parties would have entered into the agreement if the phrase in question had been expunged.³ I am persuaded that the parties would not have entered into the agreement had the impugned clause not been part of it. In their particulars of claim, the appellants alleged amongst other things, that the impugned clause was a 'material' term of the agreement. This allegation was admitted by the respondent. It is thus common cause that the impugned clause was a material term without which the agreement would not have been concluded. Furthermore, as previously noted, clause 3.1 starts by stating that 'It is expressly recorded that the sale and the purchase as provided herein is, in effect, a sale of 50% of the immovable property and 100% of the movable property.' The agreement continues to stipulate the manner in which payment is to be effected, which incorporates the sale and purchase of the property in question, as in many other clauses. I am accordingly persuaded that the impugned clause cannot be severed from the rest of the agreement as it is a material term thereof. The parties clearly wished to sell and buy 50% ownership of the close corporation and for the purchasers to occupy the immovable property as soon as possible. In any event, the agreement would remain illegal since, as stated above, it does not comply with the relevant provisions of the Act.

Alternative relief sought by the appellants

³ Op.cit. p 165. The proposition was made in a case concerning a lease but Kerr points out in fn 794 that the proposition is not confined to contracts of lease and relies for this proposition on *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 where at 430G-H it was stated as follows: 'A useful test which can be applied in deciding whether a particular provision of a contract is subsidiary to the main purpose, and therefore severable from the rest, is to determine whether the parties would have entered into the contract without that provision'. The case concerned an agreement to effect customs clearance of imported goods.

[42] The appellants prayed in the alternative that in the event that the agreement is found to be illegal, then the order in the court below dismissing the claims should be substituted for an order granting the appellants leave to amend their particulars of claim so as to plead severability. The issue of severability has been raised and decided in the context of the special plea. Given my conclusion that the impugned clause was not severable from the rest of the contract, the alternative relief sought by the appellants cannot be entertained.

[43] In the result, I find that the High Court was correct in holding that the agreement was illegal and void *ab initio*. I would make an order dismissing the appeal.

Costs

[44] The appellants have been unsuccessful and there is no good reason why they should not be ordered to pay the costs of the appeal. I am also satisfied that the matter justifies the employment of two instructed counsel.

Order

[45] The following order is made:

[46]

1. The appeal is dismissed.
2. The appellants are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved. Such costs are to include the costs of two instructed and one instructing counsel.

SHIVUTE CJ

MARITZ JA

MAINGA JA

APPEARANCES

APPELLANT:

R Töttemeyer assisted by
J A N Strydom

Instructed by Theunissen Louw & Partners

RESPONDENT:

R Heathcote assisted by
N Bassingthwaighte

Instructed by Kirsten & Co