REPORTABLE

CASE NO: SA 72/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CHARLES PETER LOCKE	**Appellant**
and	
PIETER JACOBUS VAN DER MERWE	**First Respondent**
PIETERSBURG FARMING (PTY) LTD	**Second Respondent**
TOIVO NAMBALA	**Third Respondent**
EMILIA MAGANO NAMBALA	**Fourth Respondent**
FISHER, QUARMBY & PFEIFER	**Fifth Respondent**
REGISTRAR OF DEEDS N.O.	**Sixth Respondent**

Coram: MAINGA JA, MTAMBANENGWE AJA and HOFF AJA

Heard: **15 July 2014** and **17 March 2015**

Delivered: **11 September 2015**

APPEAL JUDGMENT

MTAMBANENGWE AJA (MAINGA JA and HOFF AJA concurring):

[1] This is an appeal against a High Court judgment dismissing an application in which the appellant had sought to interdict the first, second, fifth and sixth

respondents from causing or effecting the registration of transfer in the Deeds Office, Windhoek of an immovable property known as the remaining extent of the farm 'Pietersburg' No 1347, district of Tsumeb from second respondent to third and fourth respondents and these two respondents were restrained from accepting the transfer of the farm.

[2] The application sought the interdict pending the finalisation of an action to be brought by the applicant, to wit:

> '4. That the applicant is directed to institute an action against respondents, within 30 (thirty) days from the issue of the rule *nisi*, for the relief as set out hereinafter, as well as such further relief he may deem fit, to wit:
>
> 4.1 That first respondent be directed to transfer of 49% (fourty nine percentum) of the shareholding in second respondent to applicant, alternatively such lesser percentage of such shareholding the above Honourable Court may find that applicant is entitled to;
>
> 4.2 Declaring that an agreement exists between applicant and first respondent entitling applicant to transfer of 51% (fifty one percentum) of the shareholding in second respondent (alternatively such other percentage constituting the difference between the total shareholding in second respondent and the shareholding the above Honourable Court may find that applicant is entitled to in terms of the relief sought in prayer 4.1 *supra*) after applicant obtained Namibian citizenship and against payment of the amount due by applicant in consideration thereof.'

[3] On 7 April 2003, after hearing submissions from counsel representing the parties, the High Court made the following order:

'IT IS ORDERED:

1. That judgment is hereby reserved.

2. Pending the Court's judgment, all six respondents are hereby ordered to hold back the registration of the farm "Pietersburg" No. 1347, in the district of Tsumeb.'

[4] The Court's judgment was delivered on 26 October 2012.

[5] In Chapter One of his book, *The Law and Practice of Interdicts*, C B Prest referred to what he called the dichotomy between the slowness of pace characterising ordinary civil action and the speed at which interdictory remedy may be obtained; he observed:

> 'The effect of this dichotomy, and the effect of the process in general, is frustration: on the part of the applicant who wants an immediate order; on the part of practitioners who must prepare and present the case in haste; and on the part of the court which is called upon to give a decision on conflicting and untested evidence, on occasion without full and complete argument, and often without mature consideration.'

To a very large extent, this case is, among others, a very poignant illustration of what Prest is talking about in the above passage; the court *a quo* had, and this court has, to make a decision on conflicting affidavit evidence of the parties, and the conflicting interpretations by the concerned counsel, of the statutory enactments pertinent to the case.

[6] For the sake of convenience I shall refer in this judgment, to the appellant and the respondents as they are referred to in this appeal, except where it is necessary to quote verbatim passages or extracts from the judgment *a quo* or the papers *a quo*.

[7] Part of the main background facts in this case are summarised in para 19 of appellant's heads of argument; the dispute between the parties (mainly between appellant and first respondent) concerns an agreement allegedly entered into between first respondent and appellant in relation to a purported sale of the farm 'Pietersburg' or the obtaining by the appellant of a controlling interest in the said farm (second respondent). Other facts will appear as they are elaborated by the court *a quo*. Paragraph 19 states:

> '**The relevant facts**
>
> 19. The agreement between the appellant and the first respondent (as amended), which was relied on for the relief sought, had the following salient terms:
>
> 19.1 A company (which turned out to be second respondent) would be floated and would acquire ownership of the farm;
>
> 19.2 The intention was always that the appellant would obtain beneficial ownership of the farm *via* the second respondent in that he would own the total shareholding in the second respondent, whereas the second respondent would, in turn and at all relevant times, be the owner of the farm. The appellant's ownership of the shareholding in the second respondent was thus inextricably linked to the second respondent's ownership of the farm;

19.3 The first respondent (being a Namibian) would initially own 100% of the shareholding in the second respondent;

19.4 The purchase price for the shareholding payable by the appellant would be commensurate with the price determined for the farm, which was determined at N$170.00 per hectare;

19.5 Up to the stage of the payment of N$210,000.00, the appellant would pay the first respondent's Agribank's instalments in the amount of N$4,000.00 per month;

19.6 The appellant would pay the first respondent N$210,000.00 for a 49%, alternatively a lesser but substantial minority shareholding in the second respondent, to be acquired once the appellant had permanent residence status;

19.7 The agreement was that ultimately the appellant, being a South African national – and in order to at all times comply with the Act – would only acquire the remaining (i.e. majority) shareholding in the second respondent when he would acquire Namibian citizenship;

19.8 The purchase price for the ultimate majority shareholding to be transferred to the appellant would be in the region of N$310,000.00 and was to be determined with reference to the outstanding obligation to Agribank of the first respondent at a given time.'

[8] The agreement between the parties, admittedly drafted by first respondent, was produced as Annexure 'CL1(a)' (translated 'CL1(b)'). It reads as follows:

'Proposed sale of Pietersburg

1. Company is established. Pieter sole director. (Costs for account of Charles)

2. Price will be 170-00 per ha (Jul 99)
3. a) Charles pays Landbank [Agricultural Bank] via Pieter as from Jul 99.

   b) Charles resides in [??] and exercises control over front part of house.

   c) Charles is allowed to let cattle graze on Pietersburg.

4. Jul 2001 – Co. must be in place and P/B must already be operated as a business in the Co.

5. Jul 2001: Charles pays 210 000 in cash in respect of transfer of 39% / 49% of permissible shares (%-wise).

6. Upon obtaining permanent residence (application after 2 ½ years) Charles takes over remaining 51% of shares.

7. Whatever the outstanding amount at Landbank, will then be the balance of the purchase price ± 290 000.

* in respect of point 5: Changes with purchase of aircraft. Pieter undertakes to also accept the amount that was paid on CUM ± 130 000?? as part of the payment for P.A [?].'

[9] The court *a quo* further recorded and explained the agreement as follows when it referred to appellant's case:

'<u>Allegations and contentions made by applicant</u>

[4] The applicant deposed to the founding affidavit wherein he stated, among other things, that on or about July 1999 at Oshakati, he had entered into an oral agreement, which was later reduced into writing, with the first respondent. The following terms were allegedly agreed between the parties:

(a) A company with limited liability of which the first respondent would initially be the sole shareholder would be established;

(b) The applicant would bear the costs for the establishment of the company;

(c) The purpose of the company was to acquire the farm from the first respondent;

(d) The shares in the farm would thereafter be sold to the applicant at the equivalent of N$170 per hectare;

(e) The applicant would pay monthly instalments of N$4000 of a loan that the first respondent had taken out with the Agricultural Bank of Namibia (Agribank). Agribank had at the time registered a bond in its favour over the farm. It was allegedly further agreed that the payment of the instalments entitled the applicant to graze livestock on the farm and also use the front part of another farm owned by the first respondent, namely Farm Koedoesvlei in the district of Tsumeb. The applicant stated that his cattle had commenced grazing on the farm in 2001 and that he had made certain improvements on the farm, such as the installation of a pump house and a power generator. The first respondent did not dispute such improvements.

(f) The transfer of the farm from the first respondent to the company would occur in July 2001;

(g) The purchase price of the farm would be N$510 000 and the applicant would pay an amount of N$210 000 which would entitle the applicant to the transfer of 49% of the shareholding in the company. First respondent admitted receiving the N$210 000 which was paid in July 2001 by the applicant;

(h) On the grant of permanent residence permit to the applicant, the applicant would be entitled to obtain the transfer of the remaining 51% shareholding in the company. This term was allegedly orally

amended when the parties allegedly realised that the grant of a permanent residence permit would not entitle the applicant to take up majority shareholding in the company unless he had held Namibian citizenship.

(i) It was alleged by the applicant that the first respondent had also accepted the applicant's half share in an aircraft jointly owned by the two parties to be used as payment on the remaining amount in order to acquire the remaining shareholding in the company. Such amount was calculated at N$130 000 and was paid by the applicant in July 1999. The applicant alleged that it was a tacit or implied term of the agreement that should the amount of N$210 000 be paid in full and in addition thereto an amount equivalent to the half share in the aircraft be paid, applicant would be entitled to the transfer of the remaining majority shareholding in the company. First respondent did not mention anything about an aircraft jointly owned and the payment received in respect thereof from the applicant. Additionally, no documentary evidence had been attached to the applicant's papers to prove the terms of such agreement.'

[10] The position of first respondent was stated in two answering affidavits. In his first answering affidavit first respondent denied that any agreement had been concluded between him and appellant and described Annexure 'CL1(a)' as merely a proposed sale of the farm. The court *a quo* summarised the first respondent's denials in para 6 of its judgment as based on the following grounds:

'(a) The fact that no company was in existence at the time of the conclusion of the alleged agreements;

(b) The fact that there had been neither shareholders nor directors appointed in the company;

(c) The farm was registered in his personal name at that stage;

(d) The position of the applicant as a foreigner would be largely dependent upon him obtaining Namibian citizenship;

(e) Other issues which may become relevant insofar as the consideration and purchase price of the farm was concerned and precisely what amount would be due to the first respondent and/or the company pertaining to the purchase of the shares.'

[11] The other major dispute between appellant and first respondent concerned the transfer of the remaining shareholding in second respondent. Appellant's contention that both he and first respondent had laboured under the misapprehension that he would be entitled to transfer of the majority shareholding in the company upon obtaining a permanent residence permit, and that the original agreement was amended when the two of them realised that such transfer was only possible after appellant had obtained Namibian citizenship, was denied by first respondent, who asserted that he had always known of the effect of s 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995 (hereinafter referred to as the Act), and that it was only appellant who had laboured under the mistaken view of the legal position. In his replying affidavit appellant argued that, if first respondent's denial in this regard was true, he (first respondent) had never communicated such knowledge to him (appellant). In my view, the clear implication of that denial is that first respondent, aware of the true legal position, entered into the agreement duplicitously seeking to obtain (and did obtain) financial benefits from it regardless. This inference is fortified by the way first respondent secretly proceeded to sell the farm to the third and fourth respondents and told the appellant he was only testing the market when the appellant sought to

verify the rumours he had heard regarding the secret sale of the farm; the inference is also fortified by first respondent's prevaricating attitude to the agreement. The facts show that in his second affidavit first respondent admitted that his conduct subsequent to the drafting of Annexure 'CL1(a)' showed that an agreement as alleged by appellant had come into existence yet, even after that admission, his language with reference to the agreement is replete with ambiguities such as 'a mere proposal', 'an arrangement', 'a working document', 'the proposal was not going to materialise'. Suffice it to say that the evidence in the form of annexures produced by appellant bear appellant's assertions on the dispute and that the court *a quo*, after an analysis of the various conflicting stand points of the parties concluded:

> '[26] My own view is that although the first respondent had initially denied that Annexure "CL1(a)" constituted an agreement as alleged by the applicant, in the second answering affidavit, he admitted that his conduct subsequent to the arrangement set out in Annexures "CL1" is such that an agreement as envisaged in the said annexure came into being. The two conditions to which the right to acquire ownership of the shareholding in the company had been subject to were fulfilled in that the applicant has paid the N$210 000 and has obtained permanent residence status in Namibia. This is either common cause or has not been disputed. Additionally, the concession by the first respondent that "the intention was clearly that on receipt of the full outstanding amount, the blank share transfer forms would be provided coupled with a lease agreement pending the fulfilment of the condition of acquiring Namibian citizenship" bears out this conclusion. It will be recalled that it is the applicant's case that the parties had amended the original agreement to require that the majority shareholding in the company would be transferred to the applicant upon the latter's acquisition of Namibian citizenship. The first respondent's take on this allegation was to deny that an agreement to that effect had been concluded and to characterise such allegation as bordering on the absurdity since it would

have meant, for example, that he had to wait for five years before the applicant would be obliged to pay the outstanding balance without any interest and bearing in mind the capital increase in the value of the farm.

[27] For my part, I am inclined to accept the applicant's version in this regard for the reason that such account appears to have been borne out by the contents of the cryptic notes the applicant made in his diary as reflected in Annexure "CL8(b)" read with his founding affidavit as well as the conduct of the two parties.' (My underling for emphasis.)

[12] In view of the conclusions reflected in the above paragraphs of the judgment *a quo*, what remains to be considered are the grounds on which the court *a quo* dismissed the application. I therefore now turn to a consideration and evaluation of those grounds. The concluding paragraph of the judgment *a quo* reads:

'[42] I have therefore come to the conclusion that the agreement between the parties has been hit by the relevant provisions of the Act as amended and does not create any rights or obligations between the parties. It is thus void and unenforceable subject of course to restitution. It therefore also follows that an interdict may not be granted to restrain first respondent from transferring any shareholding to third and fourth respondent or any other party. The applicant has not succeeded in establishing a prima facie right for the grant of an interim interdict. The application accordingly falls to be dismissed.'

This conclusion was reached after the court considered the effect of s 58, and s 17(2) of the Act and the agreement between the parties as amended. It should be noted that the court *a quo* made no direct finding as to the effect of s 58, apart from observing in para 34 of its judgment that:

> 'Although the effect of s 58 is not to prohibit foreign nationals from acquiring agricultural land or a controlling interest in the company owning such land, the sections clearly places restrictions on the acquisition of agricultural land by foreign nationals. One such restriction is the requirement of prior consent from the Minister.'

The court also observed in paragraph 36 of its judgment:

> 'The transfer of the controlling interest to the applicant is firstly subject to the applicant acquiring Namibian citizenship. At the time the application had been lodged, the applicant had only obtained permanent residence status in Namibia. I have already determined that the applicant and the first respondent had agreed on a new term based on the suspensive condition that applicant acquire Namibian citizenship five years after permanent residence permit had been issued to him. The permanent residence permit was issued on 13 September 2001. It is worth mentioning, however, that the agreement between the applicant and the first respondent was not even made subject to the consent by the Minister being first obtained prior to the transfer of the controlling interest in the company, which appears to suggest that the agreement was structured in such a way that it excluded the obtaining of the consent of the Minister. The consent of the Minister has been a requirement since the commencement of Part VI of the Act under which s 58 resorts.' (My underlining.)

[13] Of course it is so that the agreement between the parties in its amended form aimed at avoiding the restriction placed on the acquisition of agricultural land by the foreign national (the appellant) in that the suspensive condition mentioned envisaged that by the time the appellant would acquire the controlling interest in second respondent the requirement of prior consent by the Minister would not apply as appellant would have ceased being a foreign national. Mr Tötemeyer, for the appellant rightly submitted (para 32 of his written heads of argument):

’32.6 The remarks by the court *a quo* . . . , namely that the agreement was apparently concluded without rendering it subject to the consent by the Minister first having been obtained “*prior to the transfer of the controlling interest in the company*” is, with respect, of no relevance, because:

32.6.1 The agreement, as shown, did not require ministerial consent;

32.6.2 At the time when the interest would be transferred, the appellant – upon fulfilment of the suspensive condition – would be a Namibian citizen and would not require any ministerial consent in terms of section 58.’

With the greatest of respect, I agree with counsel, and would only add that the court did not suggest, nor could it have suggested, that there was anything illegal in the parties structuring the agreement in such a way.

[14] The refusal of relief by the court *a quo* was largely based upon the court’s reasoning that s 9(a) of the Amendment Act 13 of 2002 (the Amendment Act) which amended s 17 of the Act rendered the agreement between the parties null and void and incapable of performance. The court showed (correctly) that the Amendment Act came into operation on 1 March 2003 where as the agreement as amended had already been concluded during September 2001. Hence, in regard to the application of s 17(2) of the Amendment Act to the agreement, the court reasoned as follows:

‘[38] . . . According to the agreement between the applicant and the first respondent, . . . the applicant was to apply for citizenship only five years after permanent residence status had been conferred upon him and only

> then would he be entitled to the transfer of the controlling interest in the company. It is thus clear that the Act would have come into operation long before the applicant would be entitled to apply for citizenship. The agreement has accordingly been hit by a new development which amounts to a legal impossibility, namely the amendment to the Act. The agreement to transfer controlling interest in the company that owns agricultural land to the applicant, deemed in terms of s 17(1A) of the Act, to constitute an intention to alienate such land. Section 17(2) makes it abundantly clear that no such agreement by a company shall be of any force or effect until the owner of the land in question has first offered such land for sale to the state and has been furnished with a certificate of waiver in respect of such land. The agreement of the intended alienation clearly does not comply with s 17(2) and is *void ab initio*. The contract between the parties has accordingly become impossible of performance.' (Note my underlining and double underlining for emphasis.)

[15] The court seemingly approved of the dictum, 'relied on by the first and second respondents', which appears at 434-435 in *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 and goes as follows:

> '. . . By the civil law a contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio* (D. 50.17.185). So also where a contract has become impossible of performance after it had been entered into a general rule was that the position is then the same as if it had been impossible from the beginning: *etsi placeat extingui obligationem si in eum casum incideret a quo incipere non potest*: (D. 45.1.140, 2).' (My underlining.)

The court, also with apparent approval, referred to a passage in Lee and Honore's book, *The South African Law of Obligations*, 2 ed para 203 thus:

> '<u>A contract is void or becomes void if it is or becomes illegal or impossible in law but without prejudice to acts done or rights acquired under it while it was legal or possible</u>.' (My underlining.)_

[16] I have some difficulty with the above reasoning of the court *a quo*. The first problem is one of semantics and grammar. The underlinings in both the reasoning, and the quotations the court relied on show a scant if any regard to the meaning of the words I have underlined and the tense in which the language in the passages quoted is expressed. To begin with the court seems to pay no attention to the governing word 'UNTIL' in s 17(2). That word is not synonymous with the word 'UNLESS'. The use of the word 'until' denotes a futurity and its use in s 17(2) clearly indicates that the phrase 'shall be of no force or effect' will negate a contract only if, in future, the seller purports to sell agricultural land or to give the controlling interest in a company owning agricultural land without first offering such land to the State. Secondly there is a difference between saying a contract is null and void *ab initio* and saying a contract 'has become impossible of performance' to use the court's own phrase. Thirdly nowhere in first respondent's papers is it alleged that first respondent will not first offer the land to the State before giving appellant a controlling interest in the company (second respondent) and, if so, why. Nor is there any allegation that such a first offer to the State is impossible, or that, if he were to do so, a certificate of waiver would be refused. That no such allegations are made by first respondent is, apparently, because such allegations would be in conflict with his initial denial that in terms of Annexure 'CL1(a)' an agreement came into existence and his subsequent denial that the agreement was subsequently amended as appellant alleged.

[17] The court *a quo* quoted provisions of s 58 and s 17(2) as amended thus:

'**58 Restrictions on acquisition of agricultural land by foreign nationals**

(1) Notwithstanding anything to the contrary in any other law contained, but subject to subsec (2) and s 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

(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

(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 subsec (1)(*a*), that such company or close corporation acquired the agricultural land in question on the date on which the controlling interest so passed'.

(2A) . . . .'

(My underlining for emphasis.)

Section 17(2) (introduced by s 9 of Act 13 of 2002) ie the Agricultural (Commercial) Land Reform Amendment Act (the Amendment Act):

'17 **Vesting in State of preferent right to purchase agricultural land**

(1) Subject to subsec (3), the State shall have a preferent right to purchase agricultural land whenever any owner of such land intends to alienate such land.

(1A) Whenever one or more members of a company or close corporation which is the owner of agricultural land intends to sell or transfer-

(a) in the case of a company, any shares of the company which would have the effect of passing the controlling interest in the company to another person; or

(b) . . . or any portion of such interest, which would have the effect of passing the controlling interest in the close corporation to another person,

it shall, for the purpose of subsec (1) of this section and s 17A(3), be deemed that the company or close corporation in its capacity as owner of the agricultural land held by it, intends to alienate such land.

(2) Notwithstanding anything to the contrary in any law contained but subject to subsec (3), no agreement of alienation of agricultural land entered into by the owner of such land, or, in the case where such land is alienated by a company or close corporation in the circumstances contemplated in paras (a) and (b), respectively, of the definition of "alienate", no agreement of sale or instrument of transfer or transfer otherwise of any shares of the company or of any member's interest in the close corporation or of any portion of such interest which, but for this subsection, would have passed the controlling interest in the company or close corporation to another person, shall be of any force and effect until the owner of such land-

(a) has first offered such land for sale to the State; and

(b) has been furnished with a certificate of waiver in respect of such land.'

'Alienate' in relation to agricultural land is defined in the definition section (as amended by s 1(a) of the Amendment Act) as meaning:

> 'sell, exchange, donate or otherwise dispose of, whether for any valuable consideration or otherwise, and includes, in the case where such land is registered in the name of-
>
> (a) a company, the sale or transfer of shares of the company which results in the controlling interest in the company being passed to another person; or
>
> (b) . . . .'

[18] The court dealt with the two sections of the Act because of submissions made on behalf of first respondent, that is his case against interim relief being granted. These submissions were squarely based on the legal ground that the agreement between the parties was null and void *ab initio* for failing to meet the Ministerial prior consent in terms of s 58 of the Act and the requirements of s 17(2)(a) and (b). The court *a quo* accepted the first respondent's submissions in as far as they related to
s 17(2)(a) and (b).

[19] Counsel for first respondent further argued that the provisions of s 17(2) are clearly peremptory in nature and, in support, referred to the words of Van der Heever JA in the case of *Messenger of the Magistrate's Court Durban v Pillay* 1952 (3) SA 678 (AD) at 683D:

> 'if a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited by nullity.'

Counsel went on to refer to *Sutter v Scheepers* 1932 AD 165 regarding the inferences to be drawn by the court in determining whether a particular section should be construed to be peremptory rather than directory. He concluded the argument by saying:

> 'This is especially so because the wording employed by the legislator in section 17 is couched in the negative form as well as the fact that the section itself expressly provides that non-compliance thereof would be visited by a nullity.'

Granted that the wording 'no . . . shall be of any force and effect until' can be construed as showing that 'non compliance thereof would be visited by a nullity'. However, it is necessary to point out that the question whether the use of the word 'shall' should be construed as peremptory or not has exercised judicial minds in both the South African jurisdiction and in England. For example, in *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (AD) at 873A-B Miller JA dealt with a provision similar to s 17(2) ie para 5(1) of the conditions subject to which an application for the establishment of a township was granted. The paragraph reads as follows:

> 'No erf other than reserved erven shall be sold, transferred or built upon prior to transfer until the local authority has issued 'a certificate that' certain requirements had been satisfied.' (My underlining.)

Paragraph 7 of the agreement in that case read:

> 'That the sale hereby made is suspensive and subject to the due proclamation of the said township. Should for any reason whatsoever, and whether attributable to the fault of the seller or not, the township be not so proclaimed this sale shall be regarded as null and void *ab initio* and the seller shall refund to the purchaser all amounts paid by the latter, free of interest, and neither party shall have any further claim against the other.'

It was contended by the respondent in that case that the agreement was null and void for want of compliance with the requirements of para 5(1). The contention in question was upheld by the court *a quo*. On appeal Miller JA considered whether the agreement in that case was 'reduced to a nullity by virtue of the provision of para 5(1) of the conditions of establishment of the township. At 885D-G the learned judge of appeal remarked:

> 'The prohibitions contained in para 5(1) are reasonably clear. Moreover, they are couched in negative terms ("no erf . . . shall be sold, transferred or built upon . . .") which is generally a factor strongly indicative of an intention that anything done in breach of the prohibition will be invalid (See Steyn *Uitleg van Wette* 4 ed at 201). This, however, is no rule of thumb; the subject matter of the prohibition, its purpose in the context of the legislation (or any provisions having the force of law), the remedies provided in the event of any breach of the prohibition, the nature of the mischief which it was designed to remedy or avoid and any cognizable impropriety or inconvenience which may flow from invalidity, are all factors which must be considered when the question is whether it was truly intended that anything done contrary to the provision in question was necessarily to be visited with nullity. (See *Pottie v Kotze* 1954 (3) SA 719 (A) at 725; *Swart v Smuts* 1971 (1) SA 819 (A) at 829-30; and *cf Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 387H; *Commercial Union Assurance Co of South Africa Ltd v Clark* 1972 (3) SA 508 (A) at 518B-C.)'

(My underlining.)

The passage at 725B-E in *Pottie's* case reads:

> 'The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As *Voet* (1.3.16) puts it – "but that which is done contrary to law is not *ipso-jure* null and void, where the law is content with a penalty laid down against those who contravene it". Then, after giving some instances in illustration of this principle, he proceeds: "The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law".' (My underlining.)

It emphasises that what the court has to get at is the intention of the legislature 'after all'. See also Van Den Heever JA's remarks at 682C-E in *Messenger of the Magistrate's Court*, Durban case.

[20] Reference can also be made to the following passages in the *Palm Fifteen's* case (all applicable to the present case):

(a) at 886H-887A-B:

> 'It is clear . . . that the prohibition is of no application to a contract of purchase and sale entered into prior to the date upon which the conditions of establishment of the township became operative and assumed "the force of law" . . . for the general rule is that a statute regulates future conduct and

that, unless there are clear indications to the contrary . . . the prohibition would operate only "on cases or facts which came into existence after the statute came into operation". (*Minister of the Interior v Confidence Property Trust (Pty) Ltd and Others* 1956 (2) SA 365 (A) at 372-373; *Tuckers Land and Development Corporation (Pty) Ltd v Kruger* 1973 (4) SA 741(A) at 745E). The question in this case is whether the prohibition in para 5(1) against the sale of an unreserved erf operates upon an agreement of the kind entered into on 11 December 1969.'

(b) at 887E-F:

'It was not nor could it reasonably have been contended by Mr Reichman, for respondent, that para 5(1) of the conditions of establishment had the effect, upon proclamation, of dissolving the "very real and definite contractual relationship" between the parties, which the agreement brought about. As Centlivres CJ pointed out in the *Confidence Property* case *ibid*:

> "Very clear language would be necessary to induce (a Court) to hold that it was intended by the Legislature to destroy pre-existing rights . . . ".'

(c) at 887H:

'Since para 5(1) speaks in terms of futurity (ie as from the date of proclamation) the import of the injunction is that henceforth no agreement whereby an erf in the township is sold, shall be entered into unless the stated requirements are met. What is necessarily visualized thereby is a consensus occurring subsequently to the coming into effect of the condition.'

[21] At 889B-E the learned judge of appeal remarked further:

'When these objects of the conditions of establishment are borne in mind, it appears to me that, if para 5(1) is to be construed as necessarily rendering

> nugatory the agreement concluded prior to proclamation, the Administrators objects would be frustrated rather than served. As I have previously pointed out, upon proclamation the purchaser under the agreement acquired a right to claim transfer of the erf and the seller incurred the obligation to give transfer, which he could not do unless he met the requirements of the conditions of establishment. His duty under the agreement would be to do all things necessary in terms of the conditions of establishment to enable him to give transfer to the purchaser; if the rights and obligations under the agreement remained in force and the purchaser, by virtue of the agreement, required him to do what para 5(1) prescribed, the very purpose and object of the condition would be realized. The rendering nugatory of the pre-existing rights and obligations of the parties under the agreement, however, would release the seller from the very duty which the conditions place upon him. Nor would the purchaser's interest be advanced or protected by destruction of his contractual rights. He would be deprived of his claim for transfer or, failing transfer, damages, and might have to be content with no more than a claim for repayment of such money as he had already paid in consideration of the purchase price.'
>
> (My underlinings.)

[22] In his written submissions on behalf of appellant, Mr Tötemeyer argued that the agreement between the parties would not be invalid *ab initio* but would merely be unenforceable. He said:

> '41.1 As already submitted, such an agreement would not be invalid, but will merely be unenforceable;
>
> 41.2 All that is required is that the relevant agricultural land should first be offered to the State for sale. If a waiver certificate is given, then the agreement would become capable of performance. If not, then it would be incapable of performance. Before an impossibility of performance could be said to exist in such circumstances, it should first be established as a fact that a waiver certificate was refused (or otherwise incapable of being obtained as a matter of certainty).'

He referred to, and relied on Ramsden's *Supervening Impossibility of Performance* in the *South African Law of Contract* p 59, and the cases *Naidoo v Rammarrain* 1962 (3) SA 903 (D & CLD) and *Soorju v Pillay* 1962 (3) SA 906 (N) at p 109H-910B. The passage relied on in the *Soorja's* case reads as follows:

> 'Burne AJ, held (that) an averment that no permit had been granted was to be implied into a declaration which claimed for the buyer that he was entitled to a cancellation of a contract of sale and purchase and refund of what he had paid on the grounds that performance of the contract was impossible, because, the property had been proclaimed (as in the instant case) for ownership by the white group; he did not imply an averment that a permit would or probably would be refused if and when application were made for one. Unless such an averment is made, or is to be implied, it is not possible to hold the contract to be impossible of performance; in so far as Burne AJ, may have held, otherwise, I find myself, with great respect, unable to agree. It would be illegal to perform it and performance could not be enforced, without a permit, but not until it is known that a permit has been refused or, possibly, that on the probabilities no permit will be granted, can it be said that performance is impossible and the contract therefore discharged. I am not prepared to go so far as to imply an averment that a permit will not be granted or will be refused, or that the probabilities are such, when an application is made for the issue of one.'

The head note in that case reads:

> 'In an application by the seller for summary judgment for amounts due under an agreement of purchase and sale of certain immovable property the purchaser averred in his affidavit that the agreement was unenforceable by reason of the fact that the property could not be transferred to him because in terms of the Proclamation under "s 20 of the Group Areas Act 77 of 1957, the property fell in an area for ownership by member of the White Group and that he was a member of the Indian Group. The magistrate decided against the purchaser on the ground that s 24(1)*(a)* of the Act did not impose an absolute prohibition against transfer".

> Such transfer might be made under the authority of a permit and it was pure surmise to say that such a permit would not be granted.'

The agreement in that case was entered into on 31 October 1959, the area where the property was situated was declared to be for ownership of the white group on 1 April 1960. Appellants' reliance on that case (*Soorja's)* is unassailable and in my view Caney J's reasoning applies to the facts of the present case with equal force.

[23] To cap it all, the position as regards the operation of a suspensive condition in a contract is succinctly put by Professor Kerr in his book: *The Principles of The Law of Contract,* 6 ed, when he writes at pp 446-7:

> 'A suspensive condition is one which suspends the operation or effect of one or some, or all, of the obligations under a contract until the condition is fulfilled. As Tebutt J said in *ABSA Bank Ltd v Sweet and Others*: [1993 (1) SA 318 (C) at 322C-F]
>
> > It is trite law that, in a contract which is made subject to a suspensive condition, the rights of the parties created by the contract remain in abeyance pending the fulfillment of the condition . . . . There is, however, a binding agreement between the parties, which neither can renounce pending fulfilment of the condition. As it was put by Van den Heever J (as he then was) in *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) at 666-667:
> >
> > > The contract (in the modern sense, now that all contracts are consensual) is binding immediately upon its conclusion; what may be suspended by a condition is the resultant obligation in its eligible content.
>
> During the period before a suspensive condition is fulfilled neither party can demand performance of the suspended obligation; but a *condictio indebiti* lies to recover anything paid over in that period. If the condition "is not fulfilled the

> contract is discharged with retrospective effect and the parties have to restore that which they have performed”.’

[24] As regard the relationship of the parties in an agreement subject to a true suspensive condition (such as the one the court dealt with in *Corondimas and Another v Badat*, and the one in the present case) Professor Kerr noted in footnote 29:

> ‘There has been controversy concerning the relationship of the parties pending the fulfilment of the condition: the decision in *Corondimas and Another v Badat* 1946 AD 548, reaffirmed in *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 2 SA 872 (A) at 887C-E, was criticised, obiter, in *Truckers Land and Development Corporation (Pty) Ltd v Strydom* 1984 1 SA 1 (A).’

I do not intend to delve into that controversy, except to say that it seems to me that the decision has given rise in subsequent judgments of the courts in South Africa to language that, with respect, seems to be confusing having regard to the *ratio decidendi* of the case; the *ratio decidendi* of the *Corondimas* case is stated at 558 of that judgment:

> ‘Where and <u>agreement of purchase and sale</u> is entered into subject to a suspensive condition, no contract of sale <u>is there and then established</u>, but there is nevertheless created “a very real and definite <u>contractual relationship</u>” which, on fulfilment of the condition, <u>develops</u> into the relationship of seller and purchaser . . .’

and at 560:

> ‘. . . <u>the making of an agreement which is only to become operative as a contract of purchase</u> and sale on the obtaining of the required permit . . . is clearly not an

> attempt to contravene s 5(1) of the Act, but is a legal agreement by the making of which a definite contractual relation is established . . . though not the relationship of purchaser and seller under a contract of sale, and which, on the fulfilment of this second suspensive condition by the granting of the required permit, develops into a binding contract of purchase and sale . . .'

See *Truckers Land and Development Corporation* case, at 13G-H and Joubert JA's judgment (pp 19-26). I have underlined some parts of the quotations above to indicate what I believe is the source of the difficulty in language experienced by judges who either feel bound by the *Corondimas* decision, or feel that the decision, though criticised as contrary to the common law, should not be departed from because 'especially in cases where that decision has been acted upon for a number of years in such a manner that rights have grown under it'. (*Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 454. *Tuckers* case, at 16G-H).

In *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) at 665 Van den Heever J remarked:

> 'Alternatively Mr *Brink* contended that the action is premature in that the sale was conditional and the condition has not yet been fulfilled; the sale, he suggests, comes into being only upon the fulfilment of the condition. Some authorities use such loose language that they seem to support this contention. "Strictly speaking" says Voet (*Comment*, 28.7.1) "a condition is a postulated contingency suspending a juristic act on account of the uncertain and future event". Brusselius is even more dogmatic (*De Condilionib*, 1.1.1. et seq.): "that which does not suspend the juristic act, he says, is not a condition". Wessels on *Contract* (S 1284) says:

> "By the fulfillment of the suspensive condition, the contract comes into being; by fulfilment of the resolutive condition, the contract ceases to exist."
>
> Obviously there is something wrong here. If prior to the fulfilment of the condition there is no contract, either party would be able to resile from the agreement with impunity, which is notoriously not the case. These statements are based upon a misconception as to the true significance of Roman *dicta*.'

Vieyra J at 388A-C in *Wacks v Goldman* 1965 (4) SA 386 (W) referred to what the learned judge said in this connection (which see from 666 to the end). I endorse the same ie:

> 'See the remarks of Van Den Heever J (as he then was), in *Odendaalsrust Municipality v New Nigel Estate Gold Mining Ca Ltd* 1948 (2) SA 656 (O) at p 665 *et seq*: As pointed out by the learned Judge there is confusion of thought. The contract is not suspended. It is "binding immediately on its conclusion, what may be suspended by a condition is the resultant obligation or its eligible content" (p 667).'

However, the learned judge should, I think, have said the coming into being of the contract is not suspended, because that is what causes the confusion ie when does the contract come into being?

In *Peri-Urban Areas Board v Tomaselli and Another* 1962 (3) SA 346 (AD) it was held at 351G-H that 'the making of the contract is the legal act which disposes of the right concerned' and that the result of the fulfilment of a casual suspensive condition 'is that the contract becomes a *negotium perfectum*'.

Incidentally, the criticism of the principle laid down in several cases and affirmed in *Corondimas* case was referred to by Trollip JA in *Soja v Tuckers Land and Development Corporation* 1981 (3) SA 314 (AD) at 321G-H where the learned judge explains:

> 'The thesis is that the principle is wrong according to our common law, for the latter regards such a contract as being one of sale *ab initio* although it is subject to the suspensive condition.'

In that case, however, the learned judge took the *Corondimas* case as decisive because 'the correctness of the *Corondimas* case was not impugned before us, indeed, it was accepted by counsel for both parties as being correct'.

[25] However, to revert to the concluding paragraph of the judgment *a quo* in this case (which I have already quoted in full in para [12] above, the conclusion that-

(a) the agreement between the parties . . . does not create any rights or obligations between the parties, and

(b) the applicant has not succeeded in establishing a *prima facie* rights for the grant of an interim interdict.

begs the question as to what is meant by a '*prima facie* right'.

To begin with the decision in *Corondimas* clearly stated that in a situation where an agreement is subject to a true suspensive condition a 'very real and definite

contractual relationship' is created 'which may ripen into a contract of sale. See p 558 and 559 of that judgment; Watermeyer CJ further remarked in that case at 551:

> '. . . that relationship is not one which is forbidden by the Act or declared by it to be of no force and effect . . . . It is not forbidden, because, unless and until the Minister gives his consent no contract "whereby one party acquires or purports to acquire land" comes into existence and so soon as he has given his consent, thereby bring into existence of that nature, the condition required by the Act for its validity (*viz*, the consent of the Minister) has been fulfilled.'

What the learned Chief Justice said in this passage clearly applies, to the position in the present case when one considers the provision of s 17(2) of the Amendment Act. See also p 827E-F in the *Palm Fifteen* case.

Secondly as regard a '*prima facie* right', in *Webster v Mitchell* 1948 (1) SA 1186 (WLD) Clayden J stated at 1189:

> 'If the phrase used were prima facie case what the court would have to consider would be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right.'

Earlier at the same page the learned judge had remarked:

> 'If it is *prima facie* established though open to some doubt that is enough.'

The learned judge was obviously referring to the requirement for interim interdict as formulated at 227 in S*etlogelo v Setlogelo* 1914 AD 221. Again the facts in the

present case show that appellant did establish his right to interim relief, when one considers the admission by first respondent that his conduct subsequent to annexure ‘CL1(a)’ (‘CL1(b)’) meant that a contract between the parties had come into existence. These considerations, and the consideration I have discussed earlier in this judgment, convince me, with respect, that the *court a quo’s* conclusions cannot be upheld.

[26] What remains is to consider the way the court *a quo* dealt with the other requirements for the grant of an interdict *pendente lite*. Such other requirements were dealt with by the court below when it considered two preliminary points raised by first respondent. They are well-known and have been stated and considered in various cases starting with the oft-quoted passage in *Setlogelo* at p 227; all the requirements are summarised at p 50-51 by Prest in his book mentioned earlier in this judgment; I quote:

> ‘Briefly the requisite are that the applicant for such temporary relief must show-
>
> (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear, or if not clear, is *prima facie* established though open to some doubt;
>
> (b) that, if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the applicant if interim relief is not granted and he ultimately succeed in establishing his right;
>
> (c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.'

[27] Mr Tötemeyer made the following submission on behalf of appellant:

'28.2 In considering the urgency issue, the Court *a quo* appears to have accepted the appellant's contention that the balance of convenience favours him and that no adequate alternative remedy exists which could protect his interests. It is submitted that an enquiry on these issues, in the context of urgency, also has relevance to the aforementioned interdict requirements since, part of the enquiry relating to urgency is whether or not a party could obtain substantial redress at a hearing in due course as contemplated by High Court Rule 6(12)*(b)*.

29. It is, in any event, submitted that the other requirements for an interim interdict have also been met.'

First respondent did not in any real sense dispute the above submissions, or criticise the court *a quo's* handling of the other requirements in its consideration of the two preliminary issues of urgency and standing which issues the court decided against him. It will be noted that the court *a quo* treated those other requirements uncritically. The standing issue was raised by first respondent purely on the basis that appellant did not comply with the prior ministerial consent requirement of s 58 of the Act, nor with the first offer-to the state-and waiver certificate provisions of s 17(2) of the Act as amended. As I have already pointed out, the court rejected first respondent's submissions in this respect. Although not explicitly, the inference to be drawn from that rejection is, in my view, that the court rejected the whole legal argument upon which first respondent based his submissions. It will be noted that appellant had, on his papers, pertinently raised those other requirements for the grant of interlocutory relief. Hence in para 14 of the judgment *a quo* the court

referred to appellant's contention as to the apprehension of irreparable harm and the balance of convenience *viz* –

> 'The applicant further stated that he apprehended irreparable harm in that he would be deprived of his rights to acquire beneficial ownership of the farm; the right of occupation of the farm; the right to have his cattle graze on the farm; the utility of the improvements on the farm, and stands to lose the amount of N$210,000 which has already been paid. Applicant further submitted that the balance of convenience favoured him as opposed to the third and fourth respondents who would not suffer any prejudice since payment (by them) was only due on transfer of the farm. In the absence of the transfer, third and fourth respondents would not suffer any prejudice.'

Note that third and fourth respondents to whom first respondent had in the meantime sold the farm did not file any opposing papers, indicating thereby that they would abide the decision of the court.

The requirement that appellant had no other satisfactory remedy is raised in the submission on behalf of appellant in para 29 of Mr Tötemeyer's heads of argument where he indicated that the other requirements would be addressed in oral argument, and the cases there referred to. I will quote what was said in one of the cases – *Fourie v Uys* 1957 (2) SA 125 (CPD). There Herbstein J remarked at 128H-129A:

> 'It seems to me that our law as it appears from the cases and particularly the decisions in *Transvaal Property and Investment Co Ltd and Another v SA Townships Mining and Finance Corp Ltd* 1938 TPD 512, and *van der Merwe v Fourie*, 1946 TPD 389 at p 392 may be summarised as follows: The Court will not,

> in general, grant an interdict when applicant can obtain adequate redress by an award of damages.
>
> > "Where a party can obtain ample compensation by action, the Court will not grant the unusual relief of interdict."
>
> Per Curlewis, JP, in *Buitendash and others v West Rand Proprietary Mines*, 1925 TPD 886 at p 906. But where damages may not be an adequate remedy because of the difficulty of proving them or recovering them because respondent is a man of straw, or where by refusing the interdict the applicant will, in fact, be compelled to part with his rights, the Court will be disposed to grant the interdict.'

No contrary submissions were advanced on behalf of the respondent when oral arguments on this score were made at the hearing of this matter. It will also be noted that at the hearing of the matter, on 17 March 2015 this court requested the appellant to submit an additional note on the submission that the interdict requirements were met by the appellant. Additional heads of argument were subsequently filed for appellant on 14 April 2015 repeating and amplifying appellant's submission in para 29 of the written submissions and repeating the references (to cases) there made. There has been no additional heads of argument submitted on behalf of the respondent. In the circumstances I find that the court *a quo* by implication found that appellant had succeeded in proving those requirements.

[28] For the above reasons I come to the conclusion that the rule *nisi* should have been confirmed by the court *a quo* with costs and I make the following order:

1. The appeal succeeds with costs, including the costs of one instructing and one instructed counsel.

2. The order made by the court *a quo* is set aside and the following order is substituted:

   'The application is granted and an order is granted in terms of prayers 2.1, 2.2, 2.3 and 4 inclusive of 4.1 and 4.2 of the notice of motion.'

____

MTAMBANENGWE AJA

____

MAINGA JA

____

HOFF AJA

APPEARANCES

APPELLANT:	R Tötemeyer	
		Instructed by Theunissen, Louw & Partners
FIRST, SECOND AND FIFTH		
RESPONDENT:		T J Frank SC (with him J A N Strydom)
		Instructed by Fisher, Quarmby & Pfeifer