LEASING ONLY THE ARABLE PORTION OF AGRICULTURAL LAND: IS THE MINISTER'S CONSENT STILL REQUIRED?

Hanekom and Another v Lombard (A33/2023) [2023] ZAWCHC 237 (7 September 2023)

For many in the real estate industry, the Subdivision of Agricultural Land Act 70 of 1970 is notorious. This is because non-compliance with section 3 thereof can sink a lease or sale transaction. The judgment discussed below is a reminder of the nasty consequences of non-compliance. It is also particularly interesting as the court rejected the tenants' argument that the fact that they leased only the arable potions of the farm (without the required Ministerial consent) was 'technically' not a transgression.

As always it remains prudent to obtain sound legal assistance before concluding transactions relating to agricultural land.

The Judgment can be viewed here

FACTS

The farm Rhenosterbosrug is made up of two adjacent agricultural properties, named Orangerie and Tweekuilen respectively, and held under a single title deed by one Lombard.

In September 2000, Lombard entered into a written lease agreement with Mr and Mrs Hanekom in terms of which *certain portions of the farm* were leased to them for an initial period of 9 years and 11 months. The lease provided for an option to renew at the will of the tenants for a further period of 9 years and 11 months. The lease was later extended and the leased premises thereafter constituted *only of the Orangerie portion* of the farm.

When the relationship between the parties soured, Lombard sought to evict the Hanekoms. Both parties approached attorneys to assist them and it was at this stage that it became apparent that the lease agreement and the option contained therein were void as it contravened section 3(d) of the Subdivision of Agricultural Land Act 70 of 1970 ("the Act"). That section requires the written consent of the Minister of Agriculture for a lease of a portion of agricultural land. This was never obtained. (The full text of section 3(d) states that no lease shall be entered into without the consent of the Minister of Agriculture "in respect of a portion of agricultural land of which the period is: (i) 10 years or longer; or (ii) is the natural life of the lessee or any other person mentioned in the lease; or (iii) which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years.")

The Hanekoms argued that Lombard was not entitled to an order for their eviction despite the "technical" voidness of the lease agreements. This was because, so they argued, the *in pari delicto* rule was applicable. (This doctrine bars a party that has suffered damage because of its own intentional wrongdoing from recovering those damages from another party whose equal or lesser fault contributed to the loss.) They argued, in other words, that as Lombard was a party to the void agreement, he could not now use that fact in his favour.

The court of first instance found that the *in pari delicto* rule was not applicable in the present matter and that the agreement and extensions were void. It granted an order for the eviction of the Hanekoms. The Hanekoms appealed this finding and also raised an additional ground in the appeal, namely that the fact that the renewal lease was in

respect of Orangerie only, it did not constitute a contravention of the Act as it was a separate standing land portion. In any event, they argued, Orangerie was the only arable part of the land, Tweekuilen being non-arable.

HELD

Was it "technically" not a contravention?

- The essence of this argument was that since the portion they leased during the renewal period was in respect of Orangerie, a separate land unit, there was no contravention of the Act; it did not constitute the lease of a portion.
- The Court held that the argument could not succeed. The property comprises of two adjacent agricultural properties that are held under a single title deed. It was always accepted that the property, the farm Rhenosterbosrug, comprises of two adjacent land units, being 'Portion 2 of the farm Tweekuilen' and 'Portion 6 of the farm Orangerie Annex 84', and was held under a single title deed. Although the farm consists of two cadastral units, both constituted indivisible units of the farm Rhenosterbosrug. Legally, one portion could not be divided from the other unless the title deed was amended.

The purpose of the Act and differentiation between arable and non-arable land

- The prohibition contained in the Act is aimed at preventing physical fragmentation of agricultural land. The meaning of a "portion" in this context refers to a part of a property existing as a whole and registered as such in the deeds office, and not to the legal description of the constituent parts of the whole property recorded in the title deed to the property.
- The Hanekoms suggested in addition that the portion of the farm that they are leasing encompasses all the arable land on the farm, and that the Tweekuilen portion, on which Lombard resides, is not arable farming land. Accordingly, they submitted, there is no fragmentation of 'agricultural capacity' of the land.
- The argument could not succeed because the Act does not provide that where a portion of agricultural land *with* 'agricultural capacity' is leased, that such lease would not require the Minister's consent. Rather, the Act clearly seeks to prevent the fragmentation of agricultural land, which includes both arable and non-arable land. In fact, what the Act seeks to prevent is the fragmentation or proliferation of agricultural land into uneconomic portions. Given the fact that all the farming activities took place on the portion Orangerie, allowing a differentiation between arable and non-arable land, as argued, would render the Tweekuilen portion an uneconomic unit. This is exactly what the Act seeks to prevent.

Par delicto: Is this rule applicable in the circumstances?

- The principle underlying the *par delicto* rule is that the law should discourage illegality and should therefore not render assistance to those who defy the law. Thus the keystone to the *par delicto* defence is that a plaintiff who has rendered performance dishonourably or with turpitude cannot institute a claim against a defendant. Absent turpitude on the part of the plaintiff, the *par delicto* rule is not available. In the present matter, at the time of the conclusion of the agreement, neither of the parties was aware of the need to obtain the Minister's consent. Lombard's failure to obtain this, in the absence of knowledge that it was required, cannot mean that Lombard entered into the agreement with turpitude or dishonesty.
- The Hanekoms' related argument that Lombard acted with turpitude because he continued collecting rental even after he learned that the agreements were void, was not substantiated on the facts. It appeared rather that Lombard attempted to terminate the lease of the premises on the current terms and conditions that were in place.

CONCLUSION

The appeal is dismissed and the Hanekoms are evicted from the portion of property they occupied.