

SUMMARY OF THE JUDGMENT

BACKTRACKING ON USE OF POWER OF ATTORNEY

De Villiers v Elspiek Boerdery (Pty) Ltd and Another (16138/2012) [2015] ZAWCHC 141 (9 October 2015)

X initially granted a special power of attorney in favour of A to execute a notarial cancellation of a right of pre-emption. When the latter transaction did not proceed, he subsequently used the same power of attorney to instruct A to execute and register a 99 year lease. Was this do-able?

The Judgment can be viewed [here](#).

FACTS

De Villiers is the registered owner of four agricultural land units at De Doorns, which by reason of a condition previously imposed by the Minister of Agriculture in terms of the Subdivision of Agricultural Land Act 70 of 1970 ('the Subdivision Act'), may only be dealt with together as if they are a single land unit.

Some years ago, De Villiers approached De Kock for financial advice at a time when he had been under pressure to repay a loan. In terms of the arrangements made at that stage, De Villiers and De Kock agreed that De Kock would control and manage the property. For that purpose, an agreement of lease between De Villiers and a company controlled by De Kock, Cape Orchard Company (Pty) Ltd ('Cape Orchard') was concluded in July 2001.

The rental payable to De Villiers by Cape Orchard in terms of the lease was offset against the capital owed and the interest accruing to Cape Orchard in terms of the loan. De Kock subsequently realised that the interest accruing to Cape Orchard was exceeding the rental due by the company to De Villiers and that De Villiers' financial woes were generally increasing. In 2006, De Kock concluded that De Villiers did not have the means to repay the loan, and would only be able to do so if the property was sold.

De Kock and De Villiers then agreed upon an arrangement in terms whereof the property would be sold to a company. The arrangement contemplated that the majority of the shares in the company would be held by a trust to be established to represent De Villiers' family's interests and that the remainder of the shares would be held by Cape Orchard, representing De Kock's interests. The Trust was duly established and Elspiek (Pty) Ltd (Elspiek) was acquired for the purpose of purchasing and holding the property.

An agreement to implement the aforementioned arrangement was concluded in August 2008 between the Trust, Cape Orchard and Elspiek. Implementation of the agreement

however required the co-operation of De Villiers' two brothers, who enjoyed rights of pre-emption over part of the property. A power of attorney was executed by De Villiers in October 2008 for the purpose of enabling the registration of a right of pre-emption in favour of his brothers over the property to be acquired by Elspiek in terms of the contemplated sale. The power of attorney granted one Miller the authority to execute and register the draft document, which at that stage referred to the cancellation of the pre-existing rights of pre-emption and the creation and registration of the replacement rights of pre-emption.

One of the brothers declined to waive his right of pre-emption and the agreement consequently could not be carried through and was cancelled. De Kock/Cape Orchard thereafter acquired the entire shareholding in Elspiek.

After the arrangement to sell the property to Elspiek was frustrated, it was decided instead to enter into a 99-year lease. A registered 99-year lease would afford Elspiek the security De Kock required and, if it were in respect of the whole property (i.e. all four registered land units), would not require the consent of the Minister of Agriculture in terms of the Subdivision Act.

In May 2009, De Villiers signed a document entitled 'Notarial Contract of Lease' and in arranging for the notarial contract to be executed and registered, referred to the power of attorney previously granted to Miller in 2008 as constituting authority to act therein on his behalf. It was apparent that the 99-year lease agreement had not been in contemplation by the parties when the special power of attorney was executed in October 2008.

The 99-year lease was registered in favour of Elspiek.

De Villiers instituted action for an order declaring the notarial contract of lease, as well as the notarial cession of the lease to be declared void and that the Registrar of Deeds be ordered to deregister the lease. De Villiers' case rested on the contention that because the special power of attorney was originally executed for a different purpose (i.e. the registration of rights of pre-emption pursuant to the contemplated sale of the property to the defendant), it could not serve as authority for the purpose of notarially executing and registering the 99 year lease.

HELD:

The power of attorney used for two documents

- There was no merit in the argument that the special power of attorney could not be used for the purpose it was used for in the present matter. If regard was had to the wording of the power of attorney, it was evident that it was equally amenable for use

with the document signed in May 2009, attached thereto as it had been for the originally annexed registration of a pre-emptive right agreement. The character of the attached draft was not specified in the wording of the power of attorney and therefore the nature of the authority granted thereby had to be determined by reading it with the attachment. The two documents had to be read together as a composite instrument.

- The words "kragtens 'n volmag aan haar verleen te De Doorns op 13 Oktober 2008" in the 'Notarial Contract of Lease' document, signed by De Villiers in May 2009, clearly showed that De Villiers had decided to employ the special power of attorney document for a different purpose after it had become clear that the sale contract contemplated earlier had become frustrated.
- From a practical point of view there was nothing exceptionable about such economy of documentation.
- The power of attorney did not in itself constitute the authority given by De Villiers as principal; it merely served as evidence of the grant of the authority. Whether authority for the particular transaction was indeed granted in accordance with the tenor of the power of attorney document was a separate question of fact.
- It was evident from the reference in the 'Notarial Contract of Lease' (signed by De Villiers in May 2009) to the power of attorney document executed by him in October 2008, that it had subsequently been adopted by him to represent to the notary that Miller was authorised to represent him in the execution of the notarial deed of lease for the purpose of enabling the registration of the 99 year lease. It did not matter that the power of attorney document had originally been drafted and brought into being for quite a different purpose.
- De Villiers submitted, however, that a special power of attorney lapses when the act to which it is directed has been carried out or has fallen away. The argument was correct only insofar as it pertained to the power of attorney read as it was with the original annexure. It ignored the effect of De Villiers having subsequently used the power of attorney document with a different attachment. The latter action evidenced a separate juristic act in respect of the grant of authority for a quite different purpose.
- As noted, the power of attorney document was indeed ineffectual unless construed with an attachment initialled by the principal for identification. De Villiers' act of using the first such attachment to the power of attorney and then subsequently using the same document with a different attachment for a different purpose resulted in the bringing into being of two entirely distinguishable composite instruments.

- The evidence thus established that De Villiers did in fact authorise Miller to act as his agent in the execution of the notarial lease. It was evident from the content of the documents in the notary's protocol that the 'Notarial Contract of Lease' was annexed to the power of attorney executed by De Villiers that was presented to the notary.

De Villiers' claim on this ground therefore had to fail.

The lease was contrary to the Subdivision of Agricultural Land Act

- The argument that Elspiek leased only part of the farm as De Villiers was granted the right to use and stay in the farm house and thus contravened the Agricultural Land Act, was contrived and did not find support upon a proper construction of the agreement reached between the parties. The farmhouse and 'werf' were not excluded from the lease; rather the lessor had the right to reside in the house for as long as he wished, and to use the outbuildings on the 'werf' to the extent that they were not required for the lessee's farming operations. The fact that the lessor's right to reside on the farm did not derogate from the lease being in respect of the entire property.
- A lease is a contract for the use and enjoyment of a thing for a period and for consideration (rent). The kind of enjoyment which is conferred by the lease either is or is not stated therein. When it is stated, the lessee may not put the thing to a use other than to that stated in the lease. The kind of enjoyment expressly conferred by the lease in the current matter is in respect of the use of the entire property for the lessee's farming enterprise. The reservation of a right to the lessor to live in a house on the property and use outbuildings not required for the purpose of the Elspiek's farming activity does not detract from the 'kind of enjoyment' contracted for by the lessee.

This argument accordingly also failed.

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