CASE NO.: I 2077/2010

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LAURENT ANDRé RAYMOND MAROT	**1ST PLAINTIFF**
ANNIE RENEé MAROT	**2ND PLAINTIFF**
BENOIT RENé MAROT	**3RD PLAINTIFF**

and

LANCE CLIFFORD COTTERELL	**DEFENDANT**

CORAM: MILLER, AJ

Heard on: 09 March 2012

Delivered on: 23 March 2012

JUDGMENT:

MILLER, AJ: [1] Article 16 of the Constitution articulates the fundamental right to own and dispose of property. Section 16 (1) provides that:

> " (16 (1) All persons shall have the right in any part of Namibia to acquire, own and dispose 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."

[2] On 03 March 1995 the Agricultural (Commercial) Land Reform Act, Act 6 of 1995 was published in Government Gazette No. 1040 and became law from that date – I shall continue to refer to this piece of legislation simply as "the Act".

[3] Part VI of the Act contains legislative provisions which curtail the rights of non-Namibians to acquire or occupy agricultural land in Namibia. For the purposes of this case it is necessary only to refer to the provisions of Section 58 (1) and Section 58 (2) of the Act read with the relevant definition found in Section 1 thereof. Section 58(1) and 58(2) read as follows:

> "
>
> **RESTRICTION ON ACQUISITION OF AGRICULTURAL LAND BY FOREIGN NATIONALS**
>
> 58. (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
>
> (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 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.

[4] Section 1 of the Act defines "agricultural land" as "... 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);

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

(c) land which the Minister by nature in the Gazette excludes from the provisions of this Act".

[5] At issue in these proceedings and raised by way of a special plea is whether or not a written agreement concluded between the plaintiffs, as purchasers, and the defendant, as seller on 02 April 2009, falls foul of Section 58 of the Act, is for that reason an illegal contract and whether or not it is for those reasons *void ab initio.*

[6] It is common cause that the plaintiff purchasers are all foreign nationals. It is also common cause that an immovable property described in the agreement as "Remaining Extent of Farm Groot Sandhup No. 1224, Registration Division "B", Otjozondjupa Region, Measuring 3181, 9196 hectares in agricultural land as defined in Section 1 of the Act.

[7] The agreement is structured as a sale of 50% of the member's interest in a close corporation styled Wildlife Conservation CC, CC/2008/0492, which owns the land in question.

[8] In terms of Clause 2 of the agreement the defendant sold 50% of the member's interest in the close corporation and 100% of the defendant's claims against the close corporation to the plaintiffs in the following proportions:

(a) First plaintiff – 20% of the total of the member's interest and 40% of the claims.

(b) Second plaintiff – 20% of the total of the member's interest and 10% of the claims.

(c) Third plaintiff – 10% of the total of the member's interest and 10% of the claims.

[9] Clause 4 of the agreement determines the price to be the sum of N$2, 400, 000.00 (Two million four hundred thousand Namibian dollars). One million Namibian dollars were payable on the date of signature of the agreement and the balance was to be paid by not later than 01 June 2010. The initial amount was paid but consequent upon a failure on the part of the defendant to honour his obligation to transfer the member's interest to the plaintiffs, no further payments were made.

[10] Instead the plaintiffs issued summons claiming payment of the one million Namibian dollars already paid and for payment of an additional N$410, 010.25 they claim they had suffered as damages.

[11] In the special plea the defendant raises the illegality of the agreement as I had stated earlier. The challenge is formulated in paragraphs 4 and 5 of the plea and reads as follows:

"

4. The purported agreement between the parties, annexure "A" to the particulars of claim, is illegal as it is specifically prohibited and declared of no force or effect in terms of the provisions of the Agricultural Act as follows:

4.1 In terms of the provisions of section 17 of the Act – the agreement in effect amounts to the sale of 50% of agricultural land and has the effect of passing a controlling interest in a close corporation owning agricultural land to another party. No waiver certificate has been obtained.

4.2 The whole agreement constitutes an evasion of the provisions of section 17 of the Act. Only after defendant signed the agreement, defendant was so advised.

4.3 The provisions of section 58 – the plaintiffs, as foreign nationals, are not entitled in terms of the provisions of the agreement to take possession and occupation of agricultural land for an indefinite period without prior written consent from the Minister of Lands and Resettlement and Rehabilitation having been obtained.

4.4 The provisions of Clause 10.2 of Annexure "A" constitute a contravention of the provisions of section 58 of the Act as the Minister's written consent was not obtained.

[12] In order to consider this challenge it is necessary firstly to have regard to some of the other clauses in the agreement which bear upon the issue.

[13] I refer firstly to Clause 3 of the agreement which reads as follows:

"

3. THE PROPERTY

3.1 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:-

3.1.1 in its present condition, *voetstoots*, without liability by the Seller for defects, latent or patent, or any damages or loss suffered by the Purchaser by reason of such defects;

3.1.2 without any warranties of any nature, either express or implied;

3.1.3 subject to all conditions set out or referred to in the current or prior title deeds relating to the immovable property and all other conditions which may exist in regard to the immovable property.

3.2 The Purchaser acknowledges, that, to the extent that it has been deemed necessary, he has:-

3.2.1 inspected the immovable property and the movable property;

3.2.2 is fully acquainted with the nature, extent, condition and location of the immovable property and with the position of the beacons in respect thereof, which beacons the Seller shall not be obliged to point out;

3.2.3 examined the title deed(s) in respect of the immovable property and any conditions applicable thereto.

3.3 The Seller shall not be liable for any deficiency in the extent of the immovable property that may be revealed, nor shall he benefit from any excess.

3.4 The Seller and the Purchaser agree that the Purchaser shall be entitled, after date of signature of this agreement, to effect alterations and/or improvements to the immovable property at his own expense."

Clause 3 of the agreement must be read together with Clause 10 thereof which in turn reads as follows:

"

10. BENEFIT / POSSESSION

10.1 All income derived by or for the benefit of the Close Corporation, shall accrue for the benefit of the Purchaser with effect from date of signature of this agreement, from which date all risk in respect of the Close Corporation, the immovable property and the movable property, shall pass to the Purchaser.

10.2 The Purchaser is entitled to take possession of the immovable property and movable property on date of signature of this agreement."

[14] Mr. Heathcote SC together with Mr. Barnard appeared for the defendant. Mr. Totemeyer SC together with Mr. Strydom appeared for the plaintiffs.

[15] Mr. Heathcote relies primarily on the way Clause 10 of the agreement is phrased. It is plain in its meaning and purpose, he contends.

[16] What Clause 10 achieves in the context of the agreement as a whole is that the plaintiffs, who admittedly are foreign nationals acquire the right to sole possession of and to occupy agricultural land for an indefinite period, he submits.

[17] Mr. Heathcote did not pursue the challenge on the basis that the plaintiffs had acquired a controlling interest in the close corporation.

[18] Mr. Totemeyer's response to this is best summarized in paragraph 3 of the plaintiff's supplementary Note to their Heads of Argument. The passage I have in mind reads as follows:

> "It is submitted that once a 50% member's interest in the CC owning agricultural land is acquired, the members of the CC would be entitled to exercise rights of occupation or possession in respect of that property (and to agree with their fellow members how and to which extent they would be entitled to occupy or use the farm".

[19] In argument before me the this point was developed into an argument that the agreement in question grants the plaintiffs as members certain rights, one of which is the right to occupy any property, should the close corporation be the owner of any. Mr. Totemeyer points to Article 46 of the Close Corporations Act, Act 26 of 1988.

[20] Section 46 (a) provides that "every member shall be entitled to participate in the carrying on of the business of the corporation". Section 46 (b) provides that with the exception of certain types of transactions, members shall have equal rights in regard to the management and representation of the corporation.

[21] None of these provisions strike me as per se granting any member the right to occupy immovable property. They clearly deal with matters entirely different.

[22] The argument eventually evolves into one that the rights of the plaintiff to occupy the land is an inherent right, as part and parcel, of a bundle of rights, which accrues from the fact that they are members of the Close Corporation concerned. As Mr. Totemeyer put it during argument the right to occupy arises *qua* membership and not *qua* agreement.

[23] This submission may have some merit were the membership of the Close Corporation confined to a single member.

[24] It simply cannot be that where there are four members as is the case here, each can claim for himself or herself the right to occupy the whole or any portion of the land without the consent of and to the exclusion of the other members, merely by virtue of that membership. It is certainly in that situation a matter upon which the members must agree.

[25] This is precisely what the agreement contemplates, Clause 10 of the agreement settles the question as to who will be entitled to occupy the land. The right to occupation is conferred upon the plaintiffs by the agreement itself and is not to be derived from the fact they are members.

[26] I conclude therefore that the agreement is one in contravention of Section 58 (1)(b) of the Act. In ***Müller v Schweiger 2005 NR. 98***, van Niekerk, J dealt with Section 58 of the Act. Having found that the agreement in that case was one in contravention of this Act, she concluded that the effect of that is that the agreement was *void ab initio*. I respectfully agree with those conclusions.

[27] Plainly a recognition of this agreement will undermine the very purpose of the Act. The plaintiff's claims are based entirely upon the agreement, which I have found to be *void ab initio*. The consequence of that is that the Court will not entertain any claims based on such a contract. ***Wessels: The Law of Contract In South Africa*** Par. 644.

[28] In the result I made the following order:

1) The special plea is upheld.
2) Plaintiff's claims are dismissed.
3) The plaintiffs are ordered to pay the defendants costs jointly and severally, the one paying the other to be absolved.
4) The defendant's costs will include the costs of one instructing and two instructed counsel.

_____

MILLER AJ

ON BEHALF OF THE APPLICANT:	Mr. Heathcote SC, assisted by Mr. Barnard
Instructed by:	Theunissen, Louw & Partners
ON BEHALF OF DEFENDANTS:	Mr. Totemeyer SC, assisted by Mr. Strydom
Instructed by:	Kirsten & Company