

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40101/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
01/02/2019	
DATE	
SIGNATURE	

In the matter between:

**THE TRUSTEES OF THE BUSH WILLOW TRUST
TRUST NO T2235/98**

Plaintiff/Respondent

and

**ILKLEY GAME RANCH CC
REGISTRATION NO CK2011/010000/23**

First Defendant/Applicant

STEVE MARK GERONDEANOS

Second Defendant/Applicant

**SOUTHERN THORNIBUSH NATURE
ASSOCIATION**

Third Defendant/Applicant

J U D G M E N T

MASHILE, J:

INTRODUCTION

[1] To avoid confusion, I refer to the parties as they are referred to by their respective Counsel. Thus, the Plaintiff, the First, Second and Third Defendants as "the Bush Willow", "Ilkley", "Gerondeanos" and Thornibush respectively. This is an exception directed against Claims A and B of the Plaintiff's particulars of claim. The basis of the exception is that the particulars of claim lack averments necessary to sustain the claims. The Plaintiff instituted an action against the Defendant seeking the following under Claim A:

"1.1 an order directing Second Defendant forthwith to transfer to Plaintiff the following immovable properties:

1.1.1 portion 263 (a portion of portion 216) of the farm Guernsey 81, registration division KU, Limpopo Province, measuring 37,9176 hectares ('portion 263');

1.1.2 portion 264 (a portion of portion 216) of the farm Guernsey 81, registration division KU, Limpopo Province, measuring 29,3979 hectares ('portion 264')

1.2 Alternatively to prayer 1.1, an order:

1.2.1 directing Second Defendant to transfer portions 263 and portion 264 back to First Defendant; and

1.2.2 directing First Defendant to thereafter transfer the said portions to Plaintiff subject (as title deed conditions) to the provisions of clauses 7.1 and 7.2 of Thornybush's amended constitution, mutatis mutandis;

1.2.3 alternatively to prayer 1.2.2, directing First Defendant to:

1.2.3.1 register title deed conditions against portions 263 and 264 in accordance with clauses 7.1 and 7.2 of Thornybush's amended constitution;

1.2.3.2 deliver a transfer notice to Plaintiff and all other members of Thornybush, in accordance with the provisions of clauses 8.2 and 8.3 of the amended constitution, offering portions 263 and 264 for sale at the purchase price and on the same terms and conditions as the sale to Second Defendant; and

1.2.4 declaring that Plaintiff and the other members of Thornybush shall have an irrevocable option to purchase the said portions, for a period of 30 days after receipt by them of such transfer notice, in accordance with the provisions of clause 8.4 of the constitution; and

1.2.5 directing First Defendant to register a title deed condition against the remainder of the Ilkley farm (as defined above) in accordance with the provisions of clauses 7.1 and 7.2 of Thornybush's amended constitution."

In the alternative to Claim A, the Plaintiff seeks the following under Claim B:

"2.1 an order declaring that:

2.1.1 Second Defendant is a member, alternatively is obliged to become a member, of Thornybush;

2.1.2 portion 263 and portion 264 (being subdivided portions of the Ilkley farm), constitute "properties" as defined in Thornybush's amended constitution;

2.1.3 Second Defendant is bound, in respect of portion 263 and portion 264:

2.1.3.1 by the provisions of Thornybush's amended constitution;

- 2.1.3.2 *in particular, by the prohibition against sale or transfer of the said portions contained in clause 5.6 of Thornybush's amended constitution;*
- 2.1.4 *to act, or refrain from acting, in accordance with the provisions of clauses 6.1, 6.2, 6.10, 6.11 and 6.12 of Thornybush's amended constitution;*
- 2.2 *an order directing Second Defendant to register title conditions in respect of portion 263 and 264 substantially in accordance with clauses 7.1 and 7.2 of Thornybush's amended constitution;*
- 2.3 *an order interdicting Second Respondent from operating a bed-and-breakfast or other business on portion 263 and/or portion 264;*
- 2.4 *an order interdicting and restraining Second Defendant from selling, transferring, disposing of or otherwise alienating portion 263 and/or portion 264 (or any portion(s) thereof) other than in accordance with the provisions of clauses 8.1 to 8.4 of Thornybush's amended constitution."*

BACKGROUND FACTS

- [2] The material facts from which the two claims emanate are that Bush Willow and Ilkley are contracting parties and that they are governed and bound by the provisions of Thornybush Nature Association Constitution, as amended ("*the Constitution*"). Both parties are members of the Association. In particular, Ilkley and its properties known as portion 263 and portion 264 are subject to the Constitution. Clause 8 of the Constitution restricts the sale or transfer of any member's property subject to the Constitution and stipulates:

"8. SALE OR TRANSFER OF PROPERTY

- 8.1 No member shall sell, transfer, dispose of or otherwise alienate the whole or any portion of its property other than in accordance with this constitution or with the consent in writing of every other member of the association.
- 8.2 Any member (including the estate of any member)

(hereinafter referred to as 'the selling member') desiring to sell or transfer its property or any portion of its property (hereinafter referred to as 'the property') shall be obliged to offer the property to the other members of the association (hereinafter referred to as 'the other members') by giving notice in writing thereof (hereinafter referred to as 'the transfer notice') to each of the other members.

8.3 *The transfer notice shall state the purchase price (which shall sound in money and be payable in South African currency) and the terms and conditions upon which the selling member is prepared to sell the property.*

8.4 *The other members shall have an irrevocable option to purchase the property for a period of 30 (thirty) days after receipt by the other members of the transfer notice at the price and upon the terms and conditions set out in the transfer notice and subject to the provisions hereof, and the option shall be exercisable by notice in writing given to the selling member at any time within the prescribed period.*

8.5 *If more than one of the other members exercises the option, then such members shall acquire the property equal undivided shares.*

8.6 *If none of the other members exercise the option within the prescribed period, then the selling member shall be entitled for the period of 90 (ninety) days after the expiry of the prescribed period to sell the property to any third party provided that..."*

[3] In contravention of clause 8.1, without following the provisions of clauses 8.2 and 8.4, and without the written consent of all members of Thornybush, Ilkley sold and transferred portions 263 and 264 to Gerondeanos. Gerondeanos was at all material times, before Ilkley's sale and transfer of the properties to him, a 50% member and the manager of Ilkley. Gerondeanos had also been the representative of Ilkley when the amendment to the Constitution was executed. He was

aware of the contents of the Constitution, of the obligations arising under it and the rights of Bush Willow therein.

- [4] In terms of the doctrine of notice, Gerondeanos is bound by the prior obligations owed by Ilkley to Thornybush and Bush Willow, and of the corresponding rights of Bush Willow and Thornybush. Bush Willow is and was at all material times ready, willing and able to purchase portions 263 and 264 at the price and on the terms and conditions as Ilkley sold and transferred to Gerondeanos. Had Ilkley given the requisite notice in terms of clause 8, Bush Willow would have exercised its pre-emptive right to acquire the properties in terms of clause 8.4. Bush Willow has elected to exercise its pre-emptive right to do so. Neither Ilkley nor Gerondeanos has complied with the obligations imposed on them and in respect of portions 263 and 264 under the Constitution.

ISSUES

- [5] The issue is simply whether or not the particulars of claim of Bush Willows are excipiable. Bush Willows believes that they are not especially insofar as the exceptions raised under Claim A are not dispositive of the case as a whole or a material part and avoid the leading of unnecessary evidence at trial. If it fails to accomplish that objective then it should be dismissed. The Plaintiff further argues that the exceptions taken are spurious in that they do not raise genuine substantive questions of law, which may potentially dispose of the case

in whole or part and neither is 'a very clear, strong case' put up by Ilkley and Gerondeanos in that regard.

THE LAW

- [6] In *Sun Packaging (Pty Ltd v Vreulink* 1996 (4) 176 (A) the Court stated that:

"...an excipient has the duty to persuade the court that upon every interpretation which the pleadings in question, and in particular the document on which it is based, can reasonably bear no cause of action ...is disclosed failing this the exception ought not to be upheld."

- [7] The ruling in the *Sun Packaging (Pty) Ltd* case *supra* was echoing the judgment in *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893 where the following was stated:

"It seems to me that insofar as there can be an onus on either party on a pure question of law, it rests not upon the plaintiff but upon the excipient. It is the excipient who is alleging that the summons does not disclose a cause of action and he must establish that in all its possible meanings no cause of action is disclosed."

- [8] In *McKenzy v Farmers' Co-operative Meat Industries Ltd* 1922 AD it was held that a cause of action comprises:

"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

- [9] In order for an exception to be upheld, it must be dispositive of the case as a whole, or a material part and avoid the leading of unnecessary evidence at trial. If it does not have that effect the exception should not be entertained.

THE EXCEPTION TO CLAIM A

- [10] Ilkley and Gerondeanos contend that upon a proper construction of Clause 8 of the Constitution, the extent to which a member of Thornybush exercises his or her pre-emptive right stipulated in Clause 8.4 is dependent upon the extent to which the other members of Thornybush also exercise or do not exercise the pre-emptive rights. Ilkley and Gerondeanos conclude from this that for Bush Willow to have acquired a right of pre-emption in respect of the whole of portions 263 and 264, all the other members of Thornybush, with the exception of Ilkley and Bush Willow, must have elected not to exercise the option.
- [11] Ilkley and Gerondeanos further argue that the Particulars of claim state that Bush Willow has elected to exercise the option. The absence of a concomitant allegation in the particulars of claim to the effect that the other members of Thornybush, aside from Ilkley and Bush Willow, elected not to exercise the option renders Claim A to lack averments necessary to sustain a cause of action against Ilkley and Gerondeanos and as such, is excipiable.

[12] I am at loss why Ilkley and Gerondeanos is urging this Court to read into the language of the Constitution that Ilkley's obligation to issue a transfer notice and Bush Willow's ensuing pre-emptive right to purchase under clause 8.4 are qualified and revocable when it is manifest from the language of the Constitution that they are not dependant on any member exercising or not exercising its option to purchase AS PER THE PRE-EMPTIVE CLAUSE

[13] In this regard it is noteworthy that Clause 8.2 of the Constitution imposes an obligation on the selling member or his or her estate to advise the other members of his or her intention to sell. Once that has occurred, Clause 8.4 in terms of which the other members shall have an irrevocable option to purchase the property for a period of thirty days becomes relevant. Upon the expiry of the thirty-day period afforded the other members to purchase, the seller is at liberty for a period of 90 days from the expiry of the 30 days to sell to an outsider.

[14] The Constitution makes no provision that the other members are under any obligation whatsoever to declare that they are not interested to purchase. Thus, at the expiry of the 30 day period it is assumed that they will not be purchasing. However, had one or two of them exercised their pre-emptive right to purchase, the property would have to be transferred to those other members in an equal undivided share. Accordingly, on a plain reading of the provisions of Clauses 8.2 and 8.4 the contention of Ilkley and Gerondeanos is misguided and without

merit.

[15] I agree with Bush Willow that if there are other members of Thornibush who have exercised their pre-emptive rights to acquire the portions of the property concerned, and Ilkley has sold and transferred ownership in contravention of the Constitution, Ilkley and Gerondeanos still have opportunity to join those parties and allege and prove the acquisition in their plea. There was thus no need for Bush Willows to aver that the other members did not exercise their option. Besides, it is not one of the *facta probanda* of the claim of Bush Willow. See the *McKenzy* case *supra*.

[16] The exception to Claim A ought to fail for another reason. Central to the assertion of Ilkley and Gerondeanos's is that in terms of Clause 8 of the Constitution, the pre-emptive right of Bush Willow is conditional upon other members not exercising their rights. Coupled with this is that as Bush Willow has failed to plead that the other members of Thornybush "elected *not to exercise the option*", as a matter of law it could not have acquired a right of pre-emption, and has no rights, in respect of the whole or any part of portions 263 and 264.

[17] It is immediately evident that neither the one nor the other of these grounds of exception leans on the alternative Claim A relief sought in prayers 1.2.1 and 1.2.3 to 1.2.5 of the particulars of claim, which derive their strength from the prohibition in Clause 8.1. Since it is trite that an

exception should only be upheld in those instances where it is dispositive of the whole claim or an extensive portion of it, the exception to Claim A should be dismissed. See, *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) 706E.

THE EXCEPTION UNDER CLAIM B

[18] Ilkley and Gerondeanos' assertion in this regard is tersely that Bush Willow does not have *locus standi*. Claim B of the particulars of claim of Bush Willow is premised upon the doctrine of notice and Gerondeanos being bound by the terms of the constitution. That being the case, even if Gerondeanos is bound by the terms of the constitution and Bush Willow entitled to the declaratory relief sought in paragraphs 22.1 and 22.1.1 to 22.1.3 of the particulars of claim, only Thornybush would be entitled to the relief sought in paragraphs 22.2 and 22.3 of the particulars of claim, inasmuch as the rights in regard to such relief are in terms of the constitution exclusively those of Thornibush and not of the other members. Accordingly, Bush Willow therefore, concludes Ilkle and Gerondeanos, lacks *locus standi* in regard to the relief sought in terms of paragraphs 22.2 and 22.3 of the particulars of claim.

[19] In the alternative to Bush Willow failing in its claim to order Gerondeanos to transfer the properties to itself or Ilkley and the latter then to Bush Willow, Bush Willow in essence wants to have

Gerondeanos declared a registered owner so that he can be subjected to all the terms and conditions imposed on the other members of Thornibush. Of the two exceptions to Claim B, I turn first to the question of *locus standi*.

[20] The relationship between Thornibush, an association, and its members is contractual. See, *Turner v Jockey Club of SA* 1974 (3) SA 633 (A) 645B-C; *Motaung v Mukubela NNO*; *Motaung v Mothiba NO* 1975 (1) SA 618 (O) 626D-F. Any member of Thornibush, Bush Willow included, has direct, real, and substantial interest in ensuring that:

- 20.1 The terms of the Constitution are enforced;
- 20.2 The property of the association is properly dealt with in accordance with the Constitution; and
- 20.3 Their respective rights to compliance with the Constitution are enforced.

It is as a result of the above that every member of Thornybush has the right to approach a court to restrain any person or entity which is improperly dealing with the affected properties, infringing the Constitution, or dealing with property in contravention of the Constitution. See, *Pillay v Harry* 1966 (1) SA 801 (D).

[21] In view of the provisions of the Constitution, it is not apparent why Ilkley

and Gerondeanos approach this matter on the understanding that only Thornibush has *locus standi*. The purpose of this kind of an association is to govern the relationship between the members inter se and between the members and the association. Clause 22.5 provides:

"the trustees and/or members shall be entitled to institute legal proceedings on behalf of the association by way of...action or otherwise in any court having jurisdiction for the purposes of restraining or interdicting breaches of any of these provisions."

- [22] Clause 22.5 in fact puts the argument of Ilkley and Gerondeanos to rest. It provides that notwithstanding anything to the contrary contained in clauses 22.1 to 22.4 inclusive, the trustees and/or the members shall be entitled to institute legal proceedings on behalf of the association by way of application, action or otherwise in any court having jurisdiction for the purposes of restraining or interdicting breaches of any of these provisions. The words, "the trustees and/or members shall be entitled to institute..." are a clear indication that the members of Thornibush do have *locus standi* as well.

- [23] There are of course other clauses in the Constitution that invalidate Ilkley and Gerondeanos' assertion in this regard. Clauses 6 and 7 of the Constitution on which Ilkley and Gerondeanos rely, are unequivocal in their imposition of rights and obligations on individual members and registered property owners. Perhaps it could be instructive to refer to what these two clauses provide to illustrate that the members have *locus standi*. Clause 6 stipulates:

- "6.1 *Each of the members shall drop all fences between their respective properties and shall not erect any fences between their respective properties without the prior written approval of the association.*
- 6.2 *No member shall erect or allow the erection of any building or other structure on its property other than in accordance with this constitution or with the prior written consent of the association, which consent shall not be withheld unreasonably."*

[24] Dealing with title deed conditions, Clause 7 provides that each member agrees and undertakes at its cost to register a title deed condition against its property i: the appropriate deeds office in tens of which:

- "7.1 the registered owner/s for the time being of the property shall be obliged to become a member of the association;
- 7.2 the registered owner/s of the property shall not be entitled to sell or transfer the property without the prior written consent of the association, which consent shall not be withheld unreasonably."

[24] Clause 1.4 provides that:

"This constitution shall be binding on and enforceable by the members and their successors in title and their estates, heirs, executors, administrators, trustees, assigns, liquidators, curators or other legal representative of the members as fully and effectually as if they had signed this constitution in the first instance."

The clause constitutes further proof that the Constitution makes it clear that members retain the right to enforce compliance with constitutional provisions inter se. The notion that only Thornibush has *locus standi* must therefore be rejected as its premise is fallacious having regard to the provisions of the Constitution.

[25] Lastly and in regard to the relief sought in paragraph 22.4 of the particulars of claim, Ilkley and Gerondeanos contend that for reasons similar to those sought in Claim A, Bush Willow is not entitled to the relief it seeks in Claim B. This argument is a misapprehension of the fact that Claim B is no more than enforcement of precise provisions of the Constitution on the basis that these are binding upon Gerondeanos under the doctrine of notice. Conversely, Claim A is founded upon the exercise by Bush Willow of its pre-emptive rights or an entitlement on its part to transfer of the property.

[26] The interdependence that Ilkley and Gerondeanos seek to create between claim A and B stands on shaky grounds. The position is that there is no correlation between the grounds of the exception raised in Claim A and those in Claim B. Save for the distinction that I have drawn between Claim A and Claim B, nothing need be said on this subject.

[27] Against that background, I am constrained to dismiss all of the exceptions to both claims and I make the following order:

- 1. The exceptions are dismissed;**
- 2. Ilkley and Gerondeanos are ordered to pay the costs including those consequent upon the employment of two Counsel.**



**B A MASHILE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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Instructed by: Unknown

Date of Hearing: 03 September 2018

Date of Judgment: 01 February 2019