19/9/17

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 28637/16

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

19/09/2017

In the matter between

EXXARO COAL MPUMALANGA (PTY) LTD	**1ST EXCIPIENT**
UNIVERSAL COAL DEVELOPMENT VIII (PTY LTD	**2ND EXCIPIENT**

and

IZAK JAKOBUS GERHARDUS DE WET	**RESPONDENT**

In Re:

IZAK JAKOBUS GERHARDUS DE WET	**PLAINTIFF**

and

EXXARO COAL MPUMALANGA (PTY) LTD	**1ST DEFENDANT**

UNIVERSAL COAL DEVELOPMENT VIII (PTY) LTD	**2ND DEFENDANT**
JABHI GEJIMANI SHONGWE	**3RD DEFENDANT**
MINISTER OF MINERAL RESOURCES	**4TH DEFENDANT**
MEMBER OF EXECUTIVE COUNCIL (MEC)	
OF MINERAL RESOURCES	**5TH DEFENDANT**
REGISTRAR OF DEEDS	**6TH DEFENDANT**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] The respondent (the plaintiff in the main action) instituted action against six defendants. The relief sought is mainly against the first and the second defendants. The respondent in his action against the first defendant ("the first excipient") is claiming a declaratory order that he (the respondent) lawfully exercised an option in respect of certain immovable property alternatively the respondent seeks an order for rectification of the written agreement of sale entered into between the respondent and the first excipient.

[2] As against the second defendant ("the second excipient") the respondent seeks in the main an order declaring the agreement entered into between the first excipient and the second excipient in January 2014 to be invalid alternatively that such agreement rank after the respondent's option. The respondent further seeks an interdict against the second excipient as well as an order declaring that no mining activities may occur on the properties absent a zoning certificate allowing for the mining activities.

[3] Both the first and second excipients ("the excipients") have taken exception against the respondent's particulars of claim on the basis that the particulars lack the essential averments to sustain a cause of action. The first excipient has in addition filed a Uniform Rule 23 (1) notice to strike off certain paragraphs of the respondent's particulars of claim. Some of the grounds upon which the exception is taken by the excipients are similar and should be dealt with simultaneously. In summary, those grounds are the following:

3.1 The exercise of the option by the respondent amounts to subdivision of agricultural land as contemplated in the Subdivision of Agricultural Land Act 70 of 1970 ("SALA") and requires the written consent of the Minister of Agriculture ("the Minister"); without the allegation being made in the particulars of claim that the Minister's consent has been obtained the particulars of claim discloses no cause of action and are thus exceptiable;

3.2 The portion of the property in respect of which the option is sought to be exercised, are not sufficiently identified in order to validly exercise the option;

3.3 The respondent lays no basis for the claim that the sale agreement between the first excipient and the second excipient dated January 2014 is, void, nor does he plead the legal grounds or the essential averments to sustain that claim against the excipients.

[4] Besides the three grounds common to the excipients, the second excipient further raised the following grounds:

4.1 The respondent failed to set out a basis for the interdictory relief sought to prevent the second excipient from conducting mining activities without the requisite documentation to comply with the legislative framework; and

4.2 The respondent failed to set out a basis for the interdictory relief sought to prevent the second excipient from conducting mining activities without the requisite zoning certificate.

[5] Due to the final conclusion I reach in this judgment I do not intend to deal with all these grounds. But before I deal with the grounds of exception I, first intend to set out the factual background.

BACKGROUND

[6] The salient allegations in the particulars of claim are the following: On 4 December 2007 the respondent and the first excipient (then known as Eyesizwe Coal (Pty) Ltd) entered into a written agreement of sale. In terms of the agreement of sale the plaintiff sold to the first excipient two properties known as: the Remaining extent of the Farm Diepspruit No. 41, and the Remaining extent of Portion 1 of the Farm Diepspruit No. 41 ("the property") for the amount of R3 070 000 for mining purposes.

[7] In accordance with the agreement of sale the respondent acquired the option to lease the property from the first excipient for a period of 9 years and 11 months, subject to those portions needed and identified by the first excipient for its intended mining activities. The respondent was also obligated, in terms of the agreement of sale, to remove all the occupants residing on the property ("the Shongwe family"), their belongings together with certain places of burial.

[8] In addition, the respondent acquired the option to repurchase the property or any portion thereof on the conclusion of mining activities by the first excipient or in the event the first excipient decides to sell the property in the time period of 7 to 10 years after conclusion of the agreement of sale. Should the respondent purchase a

portion of the property, he was to obtain the necessary approvals and cause the SG Diagrams thereto to be provided within a reasonable time.

[9] Simultaneously with the agreement of sale the respondent and the first excipient concluded a written lease agreement. In terms of the lease agreement the respondent leased from the first excipient certain portions of the property for a period of 9 years and 11 months for agricultural purposes. The said portion of land was provisionally indicated on a plan but was to be finally surveyed by the first excipient. It was agreed that should the first excipient require any portion of the leased area for purposes of mining activities, the first excipient will cause a notice of excision of such portion to be provided to the respondent.

[10] It is common cause that at all relevant times between November 2007 to August 2013 the two agreements were of full force and effect and the parties complied substantially with all their obligations.

[11] On 12 August 2013, the respondent and the first excipient entered into another written agreement referred to in the papers as the relinquishment agreement. In terms of the relinquishment agreement the respondent and the first excipient agreed that a portion of the property, referred to in the agreement as the Land Use Area, and identified on a map, should be transferred to the Shongwe family and that the respondent relinquish his option to repurchase that portion. The transfer of the Land Use Area was to happen once the first excipient's mining operations were completed. During August 2013 the first excipient and the Shongwe family (represented by the third defendant) entered into a relocation agreement in respect of the Land Use Area for their relocation. The undertaking in this regard being that the first excipient will transfer the Land Use Area to the Shongwe family on the completion of the mining operations.

[12] During August 2015, before the first excipient had passed transfer to the Shongwe family, or finally surveyed its mining areas on the leased area or excised such land from the title deed, it became known to the respondent that the first excipient wanted to sell the property to the second excipient. As a result thereof, the respondent, on 21 August 2015 in a letter to the first excipient, exercised his option in writing to repurchase the property excluding the areas identified by the first excipient for its mining activities. In another letter dated 6 September 2015 the respondent amended and/or rectified the exercise of his option to the whole of the property excluding the portion identified for the relocation of the Shongwe family.

[13] The first excipient in a letter to the respondent disputed the lawful exercise by the respondent of the option on the grounds that clause 8 of the agreement of sale does not constitute an option in favour of the respondent. The respondent and the first excipient, after lengthy negotiations, could not resolve the dispute between them, hence the summons issued by the respondent.

GENERAL PRINCIPLES APPLICABLE TO EXCEPTIONS

[14] The nature of an exception is explained in Erasmus Superior Court Practice service 1 2016 D1-293:

> 'An exception is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or a plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence as the case may be.'

[15] If evidence can be led which can disclose a cause of action alleged in a pleading, that particular pleading is not exceptiable. A pleading is exceptiable only

on the basis that no possible evidence led on the pleadings can disclose a cause of action. The pleading must foreshadow the evidence. [1]

THE GROUNDS OF EXCEPTION

A. No allegation that the Minister's consent required in terms of s 3 *(a)* (i) of SALA has been procured:

[16] The excipients' exception is that the respondent has not in the particulars of claim averred that he obtained the Minister's consent to exercise the option. The submission is that the property is agricultural land as defined in SALA and in terms of s 3 *(e)* (i) of SALA the respondent could not deal with the option without the written consent of the Minister. The essence of the argument is that the written ministerial consent in terms of SALA is a prerequisite for the respondent to exercise the option. The respondent is, as such, precluded from exercising the option by virtue of the operation and effect of s 3 of SALA. Failure to acquire the consent renders the option invalid and unenforceable and consequently renders the particulars of claim exceptiable, so it is argued.

The Issue

[17] The issue to be determined is whether the respondent should have alleged that he obtained the Minister's consent in terms of s 3 of SALA in his particulars of claim; and whether such failure to allege renders the particulars of claim exceptiable. Underlying that issue is whether failure to obtain the ministerial consent renders the option invalid and unenforceable.

[1] See F J Hawkes & CO Ltd v Nagel 1957 (3) SA 126 (W) at 131A – E and Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) SA 986 (SCA) at 997.

The Law

[18] It is trite that a party wishing to rely on an exercised option must allege and prove a valid option – that is, an offer contained in an agreement which would upon acceptance thereof give rise to a valid agreement.[2]

[19] The salient provisions of SALA are contained in s 3 thereof. The section stipulates that –

> "**3. Prohibition of certain actions regarding agricultural land.**
>
> Subject to the provisions of section 2 –
>
> *(a)* agricultural land shall not be subdivided;
>
> *(b)* no undivided share in agricultural land not already held by any person, shall vest in any person;
>
> *(c)* no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;
>
> *(d)* no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either in 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, shall be entered into;
>
> a. (i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of mine as defined in section 1 of the Mines and Works Act, 1956 (Act No. 27 of 1956); and
>
> (ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act 1956;
>
> *(e)* . . .

[2] See Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamer (Pty) Ltd 1977 (2) SA 425 (A).

(f) no public notice to the effect that a scheme relating to agricultural land or any portion thereof has been prepared or submitted under the ordinance in question, shall be given,

unless the Minister [Minister of Agriculture] has consented in writing.'

[20] Section 3 of SALA provides that no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine, unless the Minister has consented in writing.

[21] The section has been interpreted in the context of an option in *Four Arrows Investments (Pty) Ltd v Abigail Construction CC and Another,*[3] as follows:

"[10] The legislature has [in terms of s 3 *(e)* (i) of SALA] prohibited the advertisement of a portion of agricultural land for sale in the absence of ministerial consent. The intention is not only to prohibit concluded sale agreements, but also preliminary steps which may be a precursor to the conclusion of a prohibited agreement of sale. In this context the grant of an option would clearly be a precursor to the conclusion of a prohibited agreement of sale, at the election of the option holder. [4]

[11] That an option falls within the ambit of the prohibition contained in the Act becomes clear when its true nature is considered:

> 'The essence of an option is that it is binding on the option grantor. It is an offer, in this case to sell property, which cannot be revoked. It is the option holder that has the choice whether to exercise its right.[5]

[12] In the present context the option grantor purports to be bound to sell a portion of the agricultural land without ministerial consent, on the election of the option holder, contrary to the provisions of the Act. The fact that the option may provide, as in the

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[3] 2016 (1) SA 257 (SCA) para 9 to 10.

[4] See Four Arrows Investments (Pty) Ltd v Abigail Construction CC and Another 2016 (1) SA 257 (SCA) para 9 to 10.

[5] See Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd 2009 (6) SA 617 (SCA) para 15.

> present case, that the option holder may only exercise the option after the consent of the Minister has been obtained, matters not. In the interim the option grantor purports to be bound to sell a portion of agricultural land without ministerial consent, which remains contrary to the provisions of the Act."

[22] From the aforesaid it is evident that SALA prohibits the sale of a portion of agricultural land without the consent of the Minister. It is also clear that the intention of the legislation is not only to prohibit concluded sale agreements, but also preliminary steps which may be precursors to the conclusion of prohibited agreements of sale. The grant of an option has been held to be a precursor to the conclusion of an agreement of sale. It is, thus, obvious that an option purporting to sell a portion of agricultural land cannot be granted or exercised without the required ministerial consent. It does not matter whether such sale of the portion of land was made conditional on the obtaining of the ministerial consent at a later date. It means that at the time the option is granted, the ministerial consent must have already been obtained.

Submissions by the respondent

[23] It is not in dispute that there is no allegation in the particulars of claim by the respondent that he obtained the Minister's consent in accordance with s 3 of SALA. In argument before me, the submission by the respondent's counsel is that it was not necessary for the respondent to make such allegations since the Minister's consent is not a requirement in the circumstances of this matter. The argument is that it must be borne in mind that the factual matrix (as contained in the particulars of claim) must be viewed through the lens that admits for a moment that every allegation therein is true. In this regard counsel relied on the authority in *Erasmus Superior Court Practice* [6]

[24] According to the respondent's counsel, the golden thread which runs throughout the factual matrix is that the respondent wanted to farm; the first excipient

[6] RS1, 2016, D1-293 ft 1.

wanted to conduct mining activities and the Shongwe-family was to be relocated, and wanted to get transfer of their portion of the property. Extensive extrinsic evidence will have to be led pertaining to the factual matrix surrounding the antecedent agreement prior to and leading up to the sale and lease agreements, as well as the facts and conduct during the time period 2007 to August 2013; August 2013 to January 2014 and finally January 2014 to August 2015. The evidence will contextualise the various agreements so as to establish the true intention of the parties, availing the correct interpretation and its legal consequences. The lease agreement stipulated that the first excipient would demarcate certain parts of the property for mining purposes. Once a part is demarcated as such, that part would be surveyed and excised, as to no longer form part of the lease area and would then be utilised by the first excipient as both owner and possessor. The remainder of the property will remain subject to the lease agreement.

[25] The sale agreement contained a term that the respondent acquire an option in terms of which the respondent would be entitled to repurchase the portion of the property that was still subject to the lease agreement, at a certain stage. The option related to –

25.1 the property or the property minus the mining portions (provided that the mining portions would have been surveyed and excised as intended in the lease agreement).

25.2 the property minus the mining portions and the Shongwe-portion (provided that the mining portions and the Shongwe-portion would have been surveyed and excised as intended in the lease and relocation agreements).

[26] The particulars of claim state that the common intention of the parties was that the respondent would be entitled to exercise his option after conclusion of the mining activities or should the first excipient intend to sell the property between 7 to 10 years after the conclusion of the sale agreement. It is common cause that the first excipient's intention to sell the property to the second excipient was conveyed within

a period of 8 years from the conclusion of the sale agreement. On the other hand, at the time the respondent exercised the option, the first excipient had not yet demarcated and excised any part of the leased area nor had the Shongwe-family area been transferred. The respondent was, thus, entitled in terms of the sale agreement to exercise his option to repurchase the property. So it was argued.

Analysis

[27] It is not in dispute that the first excipient purchased the whole property from the respondent for mining purposes. The respondent exercised his option to lease a part of the property for a period of 9 years and 11 months. It is also common cause that at all relevant times between November 2007 to August 2013 the respondent conducted farming operations on an identified part of the property ("the leased area"). The first excipient on the other hand commenced and continued its mining activities on the part of the property identified for such activities. It was a further term of the lease agreement that if the first excipient requires any part of the leased area for its mining activities, it was to give the respondent 3 months written notice of its intention to excise such part from the leased area.

[28] It is my view that for all intents and purposes the property was owned as a whole by the first excipient. The fact that a part of the property was leased to the respondent did not, in any way, mean that there were two portions of the property - one occupied by the respondent for farming activities and the other by the first excipient for mining. In my understanding, there was only one whole property utilised for two different purposes. The demarcation and excision of parts of the leased area by the first excipient for mining activities would also not create portions of the property.

[29] There was a heated debate by counsel as to the meaning of 'excise' or 'excision' in the context of the lease agreement between the respondent and the first excipient. According to the respondent's counsel, the word 'excise' 'will include

demarcation plus transferring the demarcated area on to another title deed'. This interpretation meant that each time a part of the leased area is excised for mining activities a title deed would have to be issued. I do not agree that this is what was intended by the parties.

[30] Neither the Act nor the Mineral and Petroleum Resources Development Act 28 of 2002 [which replaced the Mines and Works Act 27 of 1956] make use of the word 'excise' or 'excision', I as a result deferred to the dictionary meaning of the two words. The *Shorter Oxford English Dictionary* defines 'excise' as remove or expunge from, cut out physically; the word 'excision' is defined as the action of cutting off or removing.

[31] It could not have been the intention of the parties that every time the first excipient sought to excise (cut off or remove) a part of the leased area for its mining activities a title deed would have to be issued. In any event, who would be the new owner of the excised part? As I have already stated in paragraph [28] of this judgment, the first excipient was at all material times hereto, the owner of the whole property. The issuance of a title deed would create an absurd situation where the first excipient would transfer the excised part to itself.

[32] The aforementioned situation was further complicated by the relinquishment agreement entered into between the respondent and the first excipient in terms of which the respondent relinquished his option to repurchase the Land Use Area (an area on which the Shongwe family were relocated) from the first excipient in favour of the Shongwe family once the mining activities have been completed. It should be remembered that the first excipient had, in terms of a relocation agreement entered into between the first excipient and members of the Shongwe family, undertook to transfer the Land Use Area to the Shongwe family once he completes the mining activities. It is common cause that at the time the option was granted the relinquishment agreement, let alone the actual transfer of the Land Use Area, had not yet materialised. It is also not in dispute that at the time the respondent

exercised the option the transfer itself had not occurred. As such, even under these circumstances the whole property was still owned by the first excipient.

[33] The option which the respondent seeks to exercise is contained in clause 8 of the agreement of sale. The salient provision of the clause reads thus –

> "Die Verkoper sal die opsie hê om die Eiendom of enige gedeelte daarvan van die Koper voetstoots terug te koop met die voltooing van mynbou aktiwiteite of indien die Koper in die tydperk 7 tot 10 jaar na datum van die sluitng van hierdie ooreenkoms die eiendom wil verkoop, teen . . .
>
> Indien die Verkoper slegs 'n gedeelte van die Eiendom terug te koop, sal die Verkoper verplig wees om die nodige toestemmings te kry en LG diagramme te laat optrek op sy eie koste . . ."

[34] It is worthy to note that the clause refers to an option to repurchase the property or any portion thereof and that in the case of the repurchase of any portion of the property the Seller (the respondent) shall be obliged to obtain the necessary consents.

[35] The challenge, for the respondent, as I see it, is that, besides the repurchase of the whole property, the purported option provides for the repurchase of any portion of the property. The challenge is brought about by the *dicta* in *Arrows* which stipulates that the ministerial consent must be obtained before the option to repurchase a portion of agricultural land is granted. Even though I hold a view that the property was, at the time the option was granted or exercised, not subdivided and wholly owned by the first excipient, nevertheless, in the context of this matter, the ministerial consent was required. If clause 8 had provided only for the repurchase of the whole property without allowing for the repurchase of any portion thereof, the ministerial consent would not have been a requirement.

[36] As in *Arrows*, the fact that the agreement of sale allowed for the respondent to obtain the ministerial consent at the time he exercised the option to repurchase any portion of the property does not assist his case. The purported option, as a precursor to the sale of a portion of agricultural land is prohibited by SALA, if the ministerial consent is not available when the option is granted. In any event, in this instance, the ministerial consent was not acquired at the time the option was exercised.

[37] The amendment and/or rectification which the respondent seeks to introduce, in the alternative, for purposes of the exercise of the option to repurchase the whole property minus the Land Use Area do not assist his case, as well. Firstly, the amendment and/or rectification though in essence is not properly pleaded, but sought under the guise of a letter referred to in the pleadings as annexure "DW7", still constitutes the exercise of an option to repurchase a portion of an undivided property. That much is clear since the amendment and/or rectification is stated as follows in the letter:

> "In this regard and should we be wrong in any respect, our client hereby amends and/or rectifies the exercise of his option to the whole of the subject properties [the property]; excluding such parts to which our client is not legally entitled as a result of a transfer that has/should occur to the Shongwe Family and shall include the whole of the property save for the part over which our client cannot legally exercise the option". [my emphasis]

The option is sought to be exercised subject to the exclusion of the portion of land that is to be transferred to the Shongwe family. The argument that, in such circumstances, the first excipient as owner of the land ought to apply for the consent is not sustainable in that it is neither here nor there whether the consent is to be applied for by the first excipient or the respondent. Of importance is that the consent must be available at the time the option is granted.

[38] Secondly, the amendment and/or rectification in this instance, is in the main, not *per se,* made unviable by the respondent's undertaking to repurchase the whole property minus the Land Use Area, but, by the fact that clause 8 of the agreement of

sale is null and void and unenforceable by virtue of the unavailability of the ministerial consent.[7] A void agreement and/or term thereof cannot be rectified.

[39] Lastly, where a person applies to court to "rectify" a contract that she/he has entered into, she/he is asserting that the written contract, as it stands, does not accurately reflect the true intention of the parties, and she/he is asking the court to order that the contract be rephrased so as to accurately reflect the true mutual agreement of the parties at the time they entered into their agreement. Rectification is, thus, a remedy that is available only where all the parties to the contract were in fact of one mind, but the written contract failed to accurately express their *consensus*. Rectification is, therefore, not a remedy that is available where only one or some of the parties were under a misapprehension or mistaken impression. Rectification does not create a new contract, nor does it amend an existing contract; it merely serves to correct the written memorial of the agreement so as to accurately express the true intention of the parties.[8] This instance is not such a case. In this instance, it is not apparent from the particulars of claim that the parties are of one mind that the agreement does not accurately reflect the true mutual agreement.

[40] The reliance by the respondent on the exemption contained in s 3 of the Act does not make out a case for him. The respondent wants to argue that he is protected by the self-contained exemption to consent in s 3 *(e)* (i) of the Act which provides that no portion of agricultural land shall be sold or advertised for sale, without the written consent of the Minister, except for the purposes of mining. The contention is that since the property was purchased by the first excipient for mining purposes it was not necessary for the respondent to obtain the ministerial consent when buying back a portion of the property from the first excipient. This is not correct. In my understanding, the exemption applies only where a portion of agricultural land is purchased for mining purposes. The section cannot be interpreted to mean the purchase of portions of land for agricultural purposes, and as such, does

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[7] See *Le Roux v Nel* (246/13) [2013] ZASCA 109 (16 September 2013).

[8] See Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd [2009] (3) SA 447 (SCA).

not cover the allegations in the particulars of claim that require the first excipient to take steps to transfer available portions of the property for farming purposes. I seem to agree with the contention of the first excipient that an agricultural land even though purchased for mining operations remains agricultural land. The repurchase of a portion of land, for it not to require the written consent of the Minister must be for mining activities, once it is sold or purchased for farming the written consent of the Minister must be obtained.

[41] The respondent's counsel contends that if extensive extrinsic evidence pertaining to the factual matrix is led it will contextualise the various agreements so as to establish the true intention of the parties. The evidence the respondent calls for will not assist him to establish a cause of action. No evidence that can be led will disclose a cause of action in the circumstances of this matter. I did not get the sense that the respondent has obtained the Minister's consent and only failed to allege it in the particulars of claim. He did not acquire the consent and without it the option is void and no evidence can resuscitate it.

[42] As already stated, on 21 August 2015 in a letter to the first excipient, the respondent exercised his option in writing to repurchase the property excluding the areas identified by the first excipient for its mining activities. The respondent cannot by means of rectification exercise the option afresh. I agree with the submission that the option once exercised the respondent is bound by that election.

[43] I find it unnecessary to delve into the argument by the respondent's counsel that the Minister's approval was not required in this instance because of the applicability of s 42B (1) of the Restitution of Land Rights Act 22 of 1993 ("Restitution of Land Rights Act"). This is so because there are no allegations in the particulars of claim to bring the Shongwe subdivision under the Restitution of Land Rights Act.

[44] I have to conclude, therefore, that the absence of the allegation of this essential element, that is, the allegation that the Minister's written consent has been obtained, renders the particulars of claim exceptiable.

B. No identification of the property in the option agreement

[45] The argument by the excipients in this regard is that the respondent does not allege that at the time the agreement of sale came into existence the *merx* of the option was clearly described in the agreement of sale as is required in terms of s 6 (1) of the Alienation of Land Act 68 of 1981 ("the Alienation of Land Act").

[46] The respondent's counsel contends, on the other hand, that evidence should be led to cure any defect emanating from the particulars of claim in this regard. According to counsel, initially there was a shaft and a map attached to the lease agreement. The map is no longer there and as such evidence may assist to describe what was contained in the map.

The Law Applicable

[47] Section 6 (1) *(b)* of the Alienation of Land Act stipulates that a contract shall contain the description and extent of the land which is the subject of the contract.

[48] The principles for the identification of the *res vendita* are enunciated in *Clemens v Simpson* [9] as follows:

> "4. The test for compliance with the statute in regard to the *res vendita*, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and *consensus*.
>
> 5. In the forgoing regard there are, broadly, two categories of contract. The first is where the document itself sufficiently describes the property to enable identification on the ground . . . The second category is where it appears from the contract that the parties intended that someone, whether buyer, seller or third party, should select the *res vendita* from a genus or class. For example, is a dog breeder says to a prospective purchaser, 'I offer you the pick of this litter for R100', and the buyer accepts, no

[9] 1971 (3) SA 1 (AD) at 7F – G.

> further *consensus* is required. There is a valid sale; and the buyer may choose his pup or, in this regard to land, a prospective buyer might offer in writing to buy, at a specified price, one out of several sites in a township, the buyer to select a particular site. The seller accepts in writing. That is a valid sale as far as the *res vendita* is concerned, for the *res* is ascertainable or identifiable on the unilateral selection of the buyer."

Application of the Law

[49] It is evident from *Clemens* that, firstly, the land sold should be identifiable on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and *consensus*; secondly, where it appears from the contract that the parties intended that someone, whether the buyer, seller or third party, should select the *res vendita,* it should be selected from a *genus* or class.

[50] Clause 8 of the agreement of sale which provides for the option refers to:

> ". . . die opsie hê·om die Eiendom of enige gedeelte daarvan . . ."

The rectification of this clause, on the other hand, refers to:

> "the whole of the subject properties [the property]; excluding such parts to which our client is not legally entitled as a result of a transfer that has/should occur to the Shongwe Family and shall include the whole of the property save for the part over which our client cannot legally exercise the option".

[51] On the aforesaid, I am satisfied that there are no allegations in the particulars of claim that the portion of the property in respect of which the option was granted or was exercised existed in law at the time the option was granted or exercised or had

been defined or described at that time with sufficient particularity in order to identify it properly for purposes of the valid grant or exercise of the option and the conclusion of the agreement of sale.

[52] The argument by the respondent's counsel that the agreements must be read together and that the lease agreement stipulates how the portions are to be excised, or that evidence be led by the respondent, does not hold water. According to *Clemens* the *res vendita,* should be selected from a *genus* or class, and in the circumstances of this instance, a class ought to be created by parameters, which is not the case. Clause 8 of the agreement of sale does not comply with the requirements of Section 6 (1) *(b)* of the Alienation of Land Act in that it does not contain the description and extent of the portion of land to be repurchased by the respondent. It is my view that under such circumstances an inadequate description of the property cannot be cured by external evidence. This exception should be upheld.

C. The interdictory relief sought to prevent the second excipient from conducting mining activities without the requisite documentation (zoning certificate) to comply with the legislative framework

[53] The second excipient's submission is that no basis for an interdict is pleaded in the respondent's particulars of claim and the essential averment to sustain a cause of action in this regard are not present. The contention is that none of the three requirements for an interdict are dealt with or pleaded in the particulars of claim and as such, the particulars of claim do not disclose a cause of action in respect of the relief sought for a final interdict and are accordingly exceptiable.

[54] The respondent argument is that on the basis of the factual matrix of the present matter the interdictory relief sough is circumscribed to only relate to mining activities which are conducted outside the scope of the relevant statutory framework.

Reliance in this regard is in the judgment in *Maccsand (Pty) Ltd v City of Cape Town and Others* [10]

The Issue

[55] The issue is whether the requirements of a final interdict have been complied with and/or alleged in the particulars of claim.

The Law

[56] For a litigant to succeed in an action for final interdictory relief three requirements for a final interdict should be established, namely, a clear right, injury actually committed or reasonably apprehended, and the absence of similar or adequate protection by any other ordinary remedy. See *Setlogelo v Setlogelo* [11] as authority for the requirements of a final interdict.

Application of the law to facts

[57] Having perused the respondent's particulars of claim I am satisfied that the respondent has not complied with the requirements for a final interdict as enunciated in Setlogelo. Of importance is that no basis for the interdict is pleaded in the particulars of claim. This ground of exception renders the particulars of claim exceptiable.

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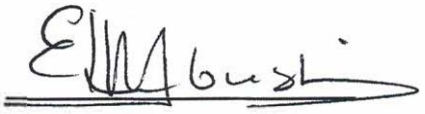
[10] [2012] ZACC 7 para 38.
[11] 1914 AD 221 at 227.

ORDER

[58] In the premises I make the following order:

1. The exception is upheld with costs which costs shall include costs of two counsel for the second excipient.

2. The particulars of claim are set aside.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	: 15 JUNE 2017
DATE OF JUDGMENT	: 19 SEPTEMBER 2017
1ST EXCIPIENT'S COUNSEL	: ADV. J.L GILDENHUYS
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2ND EXCIPIENT'S COUNSEL	: ADV. J ROUX SC
	: ADV. C.L MARKRAM
2ND EXCIPIENT'S ATTORNEY	: WEBBER WENZEL
RESPONDENT'S COUNSEL	: ADV. J. ROUX
RESPONDENT'S ATTORNEY	: BOSHOFF SMUTS INC.