THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 377/2006

In the matter between:

STALWO (PTY) LTD **APPELLANT**

and

WARY HOLDINGS (PTY) LTD **FIRST RESPONDENT**
REGISTRAR OF DEEDS **SECOND RESPONDENT**

CORAM: **FARLAM, LEWIS, JAFTA, PONNAN *et* MAYA JJA**

HEARD: **19 SEPTEMBER 2007**

DELIVERED: **28 SEPTEMBER 2007**

Summary: Contract of sale of land – whether suspensive condition a tacit term – whether tacit term offends against sec 2(1) of the Alienation of Land Act 68 of 1981 – meaning of 'agricultural land' as defined in section 1 of the Subdivision of Agricultural Land Act 70 of 1970.

Neutral citation: This judgment may be referred to as ***Stalwo v Wary Holdings* [2007] SCA 133 (RSA)**

JUDGMENT

MAYA JA/

MAYA JA

[1] This appeal concerns the validity of an agreement of sale of land concluded by the parties. The Port Elizabeth High Court (Liebenberg J) dismissed the appellant's application to have the agreement declared binding on the parties, unconditional and of full force and effect and declined to order the respondent to pass transfer of the land to it. The appeal is with the leave of the court below.

[2] On 6 December 2004, consequent on an advertisement placed by the respondent in the East Cape Property Guide for the sale of 'PLOTS FOR LIGHT INDUSTRIAL', the parties concluded an agreement worded as follows:

'SALE FROM WARY HOLDINGS (PTY) LTD TO STALWO (PTY) LTD OF PLOTS 5, 6, 7, & 8 OF PROPOSED SUBDIVISION PORTION 54 OF THE FARM NO 8 PORT ELIZABETH FOR THE SUM OF R550 000 (five hundred and fifty thousand rand) excluding agent's commission.

Payment: Cash against transfer

Occupation: 10 January 2005

Possession: On transfer

Occupational rental: R2500 per month in advance

Agreed this 6th day of December, 2004

…'

[3] The land, which the appellant intended to use for industrial purposes, was at this stage zoned as 'agricultural land'. However, the respondent had lodged an application for its rezoning and subdivision with the relevant local authority. The appellant, aware of these facts and the possibility that the application could be rejected and the sale unravelled, duly took occupation of the land on lease and took various steps to prepare it for use. On 26

August 2005 the local authority finally granted its approval subject, however, to various conditions which included a requirement that the respondent effect certain substantial improvements relating to an access way, storm water drainage system and other essential services on the land. Consequently, the respondent sought to increase the purchase price of the property on the basis that the financial costs involved in complying with these conditions significantly exceeded its expectations when the agreement was concluded. As was to be expected, the appellant was not amenable to the increase in price. This is what sparked the present dispute.

[4] In the court below, the respondent[1] opposed the application on the basis that the agreement was invalid for two reasons. First, it did not comply with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981 (the Alienation Act) as it did not contain a material term, expressly agreed upon by the parties that it was subject to a suspensive condition that the land was to be subdivided; that it did not describe the land sufficiently and that it omitted another material term relating to payment of the agent's commission. Secondly, it was in contravention of s 3(a) and s 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970 (the Agricultural Land Act),[2] which prohibit the subdivision of agricultural land and the sale of a portion of agricultural land, without the written permission of the Minister of Agriculture, as the land in issue is 'agricultural land' within the meaning of section 1(i)(a) of the Agricultural Land Act, such permission not having been obtained in this matter.

[1] The other respondent, the Registrar of Deeds, Cape Town, abided the decision of the court below and is not involved in these proceedings.
[2] The Agricultural Land Act was repealed by the Subdivision of Agricultural Land Act Repeal Act of 1998, but this statute has not yet come into operation.

[5] The court below found that the agreement did not fall foul of the provisions of the Alienation Act. However, it concluded that the disputed land constituted 'agricultural land' and that the lack of ministerial consent rendered the agreement invalid. Leave to appeal was granted only against this finding. In this court, the respondent did not concede the correctness of the other finding of the court below relating to the Alienation Act. As it was entitled to do, in view of the fact that it did not seek a variation of the substantive order appealed against,[3] its counsel persisted with the argument advanced in the court below in this regard. The issues to be determined in this appeal therefore remain those that were before the court below, save that only the issue relating to the suspensive condition, as regards the point arising from the Alienation Act, remains in contention. I deal with them in turn.

The Alienation of Land Act

[6] Counsel for the respondent submitted that while the agreement contained the *essentialia* of a valid sale, it nevertheless failed to record a material term, expressly agreed upon by the parties prior to the conclusion of the agreement, that the sale was conditional upon the subdivision of the land. The omission conflicted with the requirements set out in s 2(1) and rendered the agreement invalid, so the argument went.

[7] Section 2(1),[4] whose objective is to achieve certainty in transactions involving the sale of fixed property regarding the terms agreed upon and

[3] See, for example, *Municipal Council of Bulawayo v Bulawayo Waterworks Co Ltd* 1915 AD 611 at 624, 631 and 632; *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) where it was held at 355: '[I]t is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge: he cannot note a cross-appeal …unless he desires a variation of the order'; *Holland v Deysel* 1970 (1) SA 90 (A) at 93D-E.

[4] According to this subsection '[n]o alienation of land … shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

limit disputes,[5] requires an agreement for the sale of land to be in writing and signed by the parties. That means that the essential terms of the agreement namely, the parties, the price and the subject-matter, must be in writing and defined with sufficient precision to enable them to be identified. And so must the other material terms of the agreement.

[8] What precisely is meant in this context by the expression 'material term' need not be decided. I say this because it was not in dispute between the parties that their agreement was subject to a suspensive condition that the land was to be subdivided in order to create the contemplated plots and that such condition constituted a material term of the contract.[6] It was merely argued on the appellant's behalf that the suspensive condition was implicit in the description '…plots 5, 6, 7 and 8 of the *proposed subdivision*' embodied in the agreement which both parties knew, in any event, could not be fulfilled without the approval of the subdivision, and that it should be 'read in' as a tacit term. In response, the respondent's counsel contended that having expressly agreed on the suspensive condition, the parties' failure to reduce it to writing precluded the appellant from importing it into the agreement as a tacit term as it now sought to do.

[9] Before a court can imply a tacit term or term implied from the facts, which it may infer from the express terms of the contract and the surrounding circumstances,[7] it must be satisfied upon a consideration, in a reasonable and businesslike manner, of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication

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[5] *Wilken v Kohler* 1913 AD 135 at 142; *Clements v Simpson* 1971 (3) SA 1 (A) at 7A-B.
[6] See in this regard *Johnstone v Leal* 1980 (3) SA 927 (A) at 937G – 938A; *Van Leeuwen Pipe and Tube (Pty) Ltd v Murray* 1985 (3) SA 396 (D); *Jones v Wykland v Properties* 1998 (2) SA 355 (C).
[7] *Alfred McAlpine & Son (Pty) v Transvaal Provincial Administration* 1974 (3) 506 at 531E-532A; *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A) at 827B-G; *Wilkins v Voges* 1994 (3) SA 130 (A).

necessarily arises that the parties intended to contract on the basis of the suggested term.[8]

[10] Regard being had to all the relevant facts, there is no dispute as to what was in both parties' minds in this matter: namely that the existence of the agreement depended wholly on the success of the subdivision application, which would create the plots of land being sold, and that even though they did not expressly say so in the agreement, they intended to contract on that basis.

[11] To find that the tacit term contended for by the appellant exists, it seems to me that once such intention is established, it matters not whether it was expressly agreed or necessarily imported that the agreement would be suspended pending approval of the subdivision application. This view finds support in *Wilkins v Voges*,[9] where Nienaber JA said:

'*A tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms – reading, as it were, between the lines – or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances.* Either way, a tacit term, once found to exist, is simply read or blended into the contract: as such it is "contained" in the written deed. Not being an adjunct to but an integrated part of the contract, a tacit term does not in my opinion fall foul of either the clause in question or the [Alienation of Land] Act.' ('Emphasis added'.)

[12] I am satisfied in the circumstances, as was the court below, that it was a tacit term of the agreement that it would remain suspended until the subdivision application lodged by the respondent was finally determined. The agreement therefore complies with the provisions of s 2(1) of the Alienation Act.

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[8] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 5312H – 533A.
[9] *Supra* at 144C-D.

The Subdivision of Agricultural Land Act

[13] I turn to consider whether or not the agreement falls foul of the provisions of the Agricultural Land Act. The only question to be decided in this regard is the nature of the land when the agreement was concluded as only a finding that it was 'agricultural land' within the meaning of the Agricultural Land Act will bring it within its purview.

[14] The definition of agricultural land is contained in section 1 of the Agricultural Land Act which reads:

'"(i) agricultural land" means any land, except-

(a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee …, but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the Gazette to be agricultural land for the purposes of this Act;

. . .

Provided that land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such.'[10]

[15] The following facts were common cause. At the time of the conclusion of the agreement, the land fell under the jurisdiction of the Nelson Mandela Metropolitan Municipality (the NMMM), a category A municipality in terms of s 2 of the Local Government: Municipal Structures Act 117 of 1998 (the Municipal Structures Act).[11] Prior to the establishment

[10] The proviso was inserted by Proclamation R100 of 1995 published on 31 October 1995.

[11] Section 2 of the Municipal Structures Act provides:

'An area must have a single category A municipality if that area can reasonably be regarded as –

(a) a conurbation featuring –

(i) areas of high population density;

(ii) an intense movement of people, goods, and services;

extensive development; and

of the NMMM,[12] the land fell under the jurisdiction of the Port Elizabeth Transitional Rural Council (the PETRC), a transitional council as contemplated in s 1 of the Local Government Transition Act 209 of 1993 (the Transition Act).[13]

[16] The first the question that arises is whether the NMMM is a 'municipal council, city council or town council' within the meaning of the definition of 'agricultural land' in the Agricultural Land Act. The latter Act does not define these terms. However, s 93(8) of the Municipal Structures Act provides that '[w]ith effect from 5 December 2000 … any reference in a law referred to in item 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996…, to a municipal council, municipality, local authority or another applicable designation of a local government structure, must be construed as a reference to a municipal council or a municipality established in terms of this Act, as the case may be.' In terms of item 2 of Schedule 6 of the Constitution 'all law that was in force when the new Constitution took effect, continues in force, subject to any amendment or repeal and consistency with the new Constitution' and 'old order legislation …does not have a wider application; territorially or otherwise, than it had before the [interim] Constitution took effect unless subsequently amended to have a wider application and continues to be administered by the authorities that

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(a) multiple business districts and industrial areas;
(b) a centre of economic activity with a complex and diverse economy;
(c) a single area for which integrated development planning is desirable; and
(d) having strong interdependent social and economic linkages between its constituent units.'

[12] In terms of the Municipal Structures Act and Provincial Notice 85 of 2000 published on 27 September 2000.

[13] In terms of section 1 '"transitional council" includes a local government co-ordinating committee, a transitional local council and a transitional metropolitan council for the pre-interim phase, and a transitional local council and a transitional metropolitan council for the interim phase'; '"interim phase" means the period commencing on the day after elections are held for transitional councils … and ending with the implementation of final arrangements to be enacted by a competent legislative authority'; and 'pre-interim phase' means 'the period commencing on the date of commencement of this Act and ending with the commencement of the interim phase'.

administered it when the new Constitution took effect, subject to the new Constitution.'

[17] To my mind, there is no question that the Agricultural Land Act is a piece of the 'old order legislation' envisaged by the Constitution and s 93(8) of the Municipal Structures Act. That being so, the words 'municipal council, city council, town council' in the definition of 'agricultural land' in the Agricultural Land Act must be construed to include a category A municipality such as the NMMM.

[18] This finding elicits another question: Did the land retain its original status as 'agricultural land' by virtue of the proviso in the definition of 'agricultural land' (as it was classified as such prior to the election of the first members of the PETRC) notwithstanding that it now falls within the area of jurisdiction of a municipal council?

[19] In this regard, the court below held:

'The proviso, in my view, provides a point in time with reference to which it must be established if land qualifies as agricultural land. If at that point in time, it is to be regarded as agricultural land it remains so notwithstanding any changes to local government structures and their boundaries. This point in time is the first election of the members of the transitional council. As stated above, it is common cause that at this point in time Portion 54 qualified as agricultural land. It follows that it remained so and still was agricultural land at the time the agreement was entered into.'

[20] This conclusion was based on the judgment in *Kotze v Minister van Landbou*.[14] In this case, Van der Westhuizen J considered whether 'agricultural land' as defined in s 1 of the Agricultural Land Act still exists in view of the constitutional changes to the system of local government in

[14] 2003 (1) SA 445 (T).

the context of category B and C municipalities. The learned judge found that the effect of s 151 of the Constitution, which provides that 'the local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic', and the Municipal Structures Act, which established new, different categories of municipalities with extended boundaries, was to create 'wall to wall municipalities' such that all land now falls within municipal jurisdictions, thereby rendering the Agricultural Land Act ineffective. He held that as this could not have been the intended result, the local government structures referred to in s 1 had to be interpreted to mean what they meant when the Act was promulgated[15] (which required a narrow interpretation of 'municipal council' to exclude latter-day municipalities such as the NMMM): in the event, the proviso meant that since all land within the Republic fell within areas of jurisdiction of transitional councils when these entities were established by the Transition Act, any land which was classified as 'agricultural land' immediately prior to the election of the first members of the transitional councils retains that classification, for as long as the proviso remains in force.

[21] Counsel for the appellant challenged the correctness of this interpretation of the proviso arguing, *inter alia*, that, if accepted, its effect would be that the status of agricultural land would remain perpetually frozen from the time when transitional councils were established and would not be determined by whether or not land is situated within the area of jurisdiction of the local government structures listed in the definition of 'agricultural land'. Developing this argument, he contended for a narrow interpretation of the proviso which, he submitted, simply served to preserve the status quo

[15] In this regard, the learned judge relied on *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA (A) at 804D-E, where this court held that 'the words of a statute must be construed (unless subsequent legislation declares otherwise) as they would have been interpreted on the day when the statute was passed.'

pending the demarcation and establishment of the final new order local government structures at which time the land fell within the jurisdiction of the NMMM and lost its historical character. I agree.

[22] The proposition that the intention of the framers of the Agricultural Land Act contemplated the concept of 'agricultural land' as fluid rather than static, changing with the expansion of local authorities and the creation of new ones, seems to me to be eminently sound. This intention can be gleaned from the wording of s 3(f) of the Act in terms of which 'no area of jurisdiction, local area, development area, peri-urban area referred to in paragraph (a) or (b) of the definition of 'agricultural land' in section 1, shall be *established on, or enlarged so as to include,* any land which is agricultural land…unless the Minister has consented in writing.'[16] In cases where the Minister granted such permission the land obviously ceased to be agricultural land. Followed to its logical conclusion, this reasoning does not permit the narrow approach adopted by the court below. Thus, any exercise in the interpretation of the proviso cannot ignore the present day municipal structures created by the Municipal Structures Act. The court in *Kotze* in my view misapplied the principle set out in *Finbro.*[17]

[23] It further seems to me that the purpose of the proviso must be determined in the light of the legislative scheme which guided the restructuring process of local government; from the promulgation of the first statute in the exercise, the Transition Act of 1993, through to the final demarcation brought about by the Local Government: Municipal Demarcation Act 27 of 1998 and the Municipal Structures Act which

[16] See also *Geue v Van der Lith* 2004 (3) SA 333 (SCA) para 8.
[17] In *Finbro* the court took the lack of any definition of the word 'mineral' as an indication that the Legislature intended it to have a wide meaning to enable the inclusion in its meaning of substances which were not yet discovered when the relevant act, the Deeds Registry Act was enacted in 1937.

established new categories of municipalities – to use existing statutory provisions until new ones could be enacted. A similar view was expressed by Conradie JA in an analogous situation in *CDA Boerdery Edms Bpk v Nelson Mandela Metropolitan Municipality*,[18] where he said:

'[I]n the process of constructing the new edifice and before it could stand on its own, some of the essential transition measures … were legislatively imperfect. They were makeshifts, intended to remain in force, messy as they were, until they were repealed by the Act that completed the design of the new structure…. But before the structure was finished, all the provinces in the new South Africa were, temporarily, intended to make do with what they had inherited from the provinces in the old South Africa.'

[24] It is well to consider that the proviso was enacted within the context of the Transition Act which, as indicated, was itself meant to provide interim measures such as the establishment of interim municipal structures to promote the contemplated constitutional restructuring of local government, pending the final demarcation of municipal boundaries. The proviso makes specific reference to 'land situated in the area of jurisdiction of a transitional council' which it states 'shall remain classified as such'. From the ordinary grammatical meaning of the words, I am unable to read any meaning other than that the proviso was meant to operate only for as long as the land envisaged therein remained situated in the jurisdiction of a transitional council. It was a simple matter for the Legislature to say so expressly if it intended such land to retain the classification after transitional councils ceased to exist.

[25] Bearing in mind the trite principle that exceptions to general rules (such as the proviso) are to be read restrictively,[19] I am persuaded that the

[18] 2007 (4) SA 276 (SCA) para 30. His was a dissenting judgment but not in relation to this dictum.
[19] *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399; *South African Broadcasting Corporation v Pollecutt* 1996 (1) SA 546 (SCA) at 556D.

Legislature enacted the proviso as a stopgap measure, based on the realisation that the effect of the Transition Act, which would establish municipalities for rural areas for the very first time, would be to include transitional councils within the meaning of 'municipal council' envisaged in the definition of 'agricultural land', thus excluding certain agricultural land from the definition – clearly an untenable situation. Therefore, once the PETRC was disestablished and the land fell within the jurisdiction of the NMMM, it ceased to be agricultural land within the meaning of the Agricultural Land Act and the agreement is not affected by the proviso. In my view, the fact that the proviso remains in the statute book takes the matter no further. Accordingly, the interpretation afforded to it by the court below and the *Kotze* judgment cannot be sustained.

[26] I am fortified in this view by the following. First, the approach adopted by the court below is incompatible with and does not give credence to the radically enhanced status and power the new constitutional order accorded to local government.[20] Municipalities are no longer the pre-constitutional creatures of statute confined to delegated or subordinate legislative powers, which could be summarily terminated and their functions entrusted to administrators appointed by the central or provincial governments. They have mutated to interdependent and, subject to permissible constitutional constraints, inviolable entities with latitude to define and express their unique character and derive power direct from the Constitution or from legislation of a competent authority or from their own laws.[21] To my mind, this status necessarily includes the competence and capacity on the part of municipalities to administer land falling within their areas of jurisdiction without executive oversight.

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[20] *CDA Boerdery v Nelson Mandela Metropolitan Municipality* 2007 (4) SA 276 (SCA) paras 33-40.
[21] *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC) paras 31 and 38; *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) para 60.

[27] In any event, the Minister, in terms of the very definition of agricultural land, retains the power to exclude any land from the exceptions imposed by it, and declare it 'agricultural land' for purposes of the Agricultural Land Act, a fact which, with respect, the learned judges in *Kotze* and the court below seem to have overlooked, their reasoning being premised on the basis that any other interpretation of the proviso would lead to the emasculation of the Agricultural Land Act. The object of the Agricultural Land Act, as expressed in its preamble, is 'to control the subdivision of agricultural land' so as to prevent the fragmentation of farming land into small, uneconomic units.[22] Section 3 of the Act still prohibits subdivision of agricultural land without the Minister's permission. Having regard to these provisions there clearly is no possibility that this objective may be thwarted.

[28] In conclusion, I am satisfied that the disputed land, which is in fact no longer used as agricultural land, is not agricultural land. The provisions of s 3 of the Agricultural Land Act have no application to the parties' agreement and the Minister's consent is not required as a prerequisite for its validity.

[29] For these reasons the appeal is allowed with costs, such costs to include the costs occasioned by the employment of two counsel. The order made by the court below is set aside and the following order is substituted:

'1. The agreement of sale entered into between the first respondent and the applicant on 6 December 2004 in respect of Plots 5, 6, 7 and 8 of the proposed subdivision of Portion 54 of the Farm Kuyga No 8, Western District Council, Port Elizabeth (the property), is declared binding on the parties and unconditional and of full force and effect.

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[22] *Geue v Van der Lith* 2004 (3) SA 333 (SCA) para 5.

2. The first respondent is ordered to take all steps and to sign all documents as may be necessary to effect transfer of the property to the applicant against compliance by the applicant of its own obligations in terms of the agreement of sale.

3. The first respondent is ordered to pay the costs of this application.'

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MML MAYA

JUDGE OF APPEAL

CONCUR:

FARLAM)

LEWIS)

JAFTA)

PONNAN)