



**IN THE NORTH WEST HIGH COURT  
MAFIKENG**

**CASE NO.: 1582/10**

In the matter between:

**BARNARD WILHEMINA JACOBA N.O.**

**Applicant**

and

**AQUARUUS PLATINUM (SA) (PTY) LTD**

**1<sup>st</sup> Respondent**

**MAGALIESBURG PROPERTIES (PTY) LTD**

**2<sup>nd</sup> Respondent**

**E H J ENGELBRECHT**

**3<sup>rd</sup> Respondent**

**S E F ENGELBRECHT**

**4<sup>th</sup> Respondent**

**E H J ENGELBRECHT**

**5<sup>th</sup> Respondent**

**BRINK BONSMMA & DE BRUYN ATTORNEYS**

**6<sup>th</sup> Respondent**

**THE REGISTRAR OF DEEDS (PRETORIA)**

**7<sup>th</sup> Respondent**

**KGOELE J**

**DATE OF HEARING : 15 NOVEMBER 2012**

**DATE OF JUDGMENT : 11 JANUARY 2013**

**FOR THE APPLICANT : Adv Abrie van der Nest**

**FOR THE 5<sup>TH</sup> RESPONDENT : Adv Danie Prinsloo**

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**JUDGMENT**

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## **KGOELE J:**

### **Introduction**

- [1] The applicant is a major female pensioner and widow, residing on a portion (formerly known as the Remaining Extent of Portion 11) of the current portion 100 of the farm Spruitfontein 341, district Rustenburg, North West Province.
- [2] The first respondent is AQUARIUS PLATINUM (SA) (PTY) LTD, a private company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, having its registered office at Great Wall Building, 5 Skeen Street, Bedfordview, care of Brink Bosman & de Bruyn Attorneys (ie the sixth respondent), 467 Fehrsen Street, Brookly, Pretoria.
- [3] The second respondent is MAGALIESBURG PROPERTIES (PTY) LTD, a private company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, having its registered office at First Floor, Building 5, Harrowdene Office Park, Western Service Road, care of Brink Bonsma & de Bruyn Attorneys (ie the sixth respondent), 467 Fehrsen Street, Brooklyn, Pretoria.
- [4] The third respondent is EDUARD HERMANUS JACOBUS ENGELBRECHT, a major male person, residing on a portion of the farm Spruitfontein 341, Rustenburg, North West Province.

- [5] The fourth respondent is SOPHIA ELIZABETH FREDERIKA ENGELBRECHT, a major female person, residing on a portion of the farm Spruitfontein 341, Rustenburg, North West Province.
- [6] The third and fourth respondents are married to each other in community of property.
- [7] The fifth respondent is EDUARD HERMANUS JACOBUS ENGELBRECHT, a major male radio technician, residing at Metropol Crescent no. 27, Kempton Park. The fifth respondent is the son of the third and fourth respondents.
- [8] The sixth respondent is BRINK BONSMAN & DE BRUYN, a firm of attorneys practicing as such at 467 Fehrsen Street, Brooklyn, Pretoria.
- [9] The seventh respondent is THE REGISTRAR OF DEEDS, Merino Building, corner of Bosman and Pretorius Streets, Pretoria.

### **Purpose of the application**

- [10] The main purpose of this application is to obtain an order directing the seventh respondent to transfer a portion formerly known as the Remaining Extent of Portion 11, hereinafter referred to as (“the Property”) of Portion 100 of the farm Spruitfontein 341, Registration Division JQ, North West Province, presently registered in the name of the fifth respondent, into the name of the applicant.

[11] In order to obtain the aforesaid relief, certain transfers of the property to the second, third and fourth respondents will have to be cancelled, as set out in the notice of motion.

### **Relevant background and facts**

[12] The applicant and her deceased husband were the registered owners of a 0.125 undivided share in the Remaining Extent of the farm Spruitfontein 341, Registration Division JQ, North West Province, measuring 2 129.6842 hectares (“the farm”).

[13] They had concluded a partition agreement (“the partition agreement”) with all the other owners of undivided shares in the farm and, in terms of the partition agreement, Portion 11 and Portion 21 of the farm were allocated to them for their exclusive possession and use.

[14] The partition agreement had never been formally registered and the applicant alleges that despite diligent efforts, she is not able to obtain a copy thereof. However, the allegations contained in the preceding paragraphs are common cause and are corroborated by the facts enumerated hereunder.

[15] The third and fourth respondents were also owners of undivided shares in the farm and certain portions of the farm had likewise been allocated to them in terms of the partition agreement.

[16] During the latter part of the previous decade, the first respondent became interested in purchasing the farm, or certain portions thereof, for mining purposes.

[17] In order to purchase the farm, the first respondent had to obtain the undivided shares in the farm from the respective owners thereof. After acquiring such shares, the first respondent would have had subdivided the farm – largely in accordance with the specifications of the partition agreement – and then retransfer certain portions of the portions, allocated in terms of the partition agreement, to the former owners of undivided shares in the farm.

[18] On or about 15 July 2000 and at the Property, the applicant and her deceased husband concluded a written option agreement (“the option agreement”) with the first respondent, duly represented by one FHS Hayman, in terms whereof they granted an option to the first respondent to purchase their undivided share in the farm.

[19] According to the applicant the material express, alternatively tacit, further alternatively implied terms of the option agreement were the following:-

19.1 That the applicant and her deceased husband were the registered owners of 0.125 undivided share in the farm;

19.2 That they had signed the partition agreement, which still had to be registered, and were entitled to:-

- (a) Portion 11 of the farm, measuring 235.6385 hectares
- (b) Portion 21 of the farm, measuring 26.3365 hectares

19.3 They had granted an option to the first respondent to purchase:-

- (a) A portion of the aforesaid Portion 11, measuring 123.15 hectares
- (b) The whole of the aforesaid Portion 21, measuring 26.3365 hectares

[20] The first respondent duly exercised the option in accordance with the option agreement during or about November 2000.

[21] During or about the first semester of 2001, the applicant and her deceased husband received a document, styled "FIRST ADDENDUM TO AGREEMENT OF SALE" ("the addendum"), from the first respondent. The said agreement is annexed to the papers and is marked annexure "D", an incorrect and unsigned copy of the addendum.

[22] Neither the applicant nor the deceased signed annexure "D", since it contained obvious errors as indicated in manuscript on the said annexure. In essence, the first respondent confused the southern and northern Portion 11 of the farm.

[23] The southern portion of Portion 11 of the farm constitutes the Remaining Extent of Portion 11 and thus "the Property" as hereinbefore defined. This is clearly reflected on a surveyor's diagram of Portion 11, a copy of which is annexed hereto and marked annexure "E".

[24] As has been stated above, the applicant and her deceased husband share in the farm was duly transferred into the name of the first respondent on 19 February 2002 (see annexure "F" hereto) in accordance with the terms of the option agreement (annexure "C") and the addendum (annexure "D").

[25] On even date and in breach of the terms of the option agreement and the addendum, the said undivided share was transferred into the name of the second respondent, which had at the stage been known as "Trojan Exploration (Pty) Ltd". Annexure marked "JJ", is a copy of the deed of transfer. On the last page thereof there is a change of the second respondent's name which had been endorsed.

[26] On 14 July 2006, the holders of undivided shares in the farm, including the first and second respondents, transferred Portion 11 of the farm, by way of a deed of transfer in terms of section 26 of the Deeds Registries Act, 47 of 1937, into the names of the first and second respondents.

[27] On the same date, the first and second respondents transferred certain portions of Portion 11, measuring in total 124.7277 hectares, into the name of the first respondent. Annexure marked "LL" is a deed of partition transfer in confirmation of this registration.

[28] Nevertheless and still on 14 July 2006, the second respondent applied for and obtained a certificate of consolidated title in respect of the following portions of the farm:-

(a) The Remaining Extent of Portion 11 (ie the property);

- (b) The Remaining Extent of Portion 12; and
- (c) The Remaining Extent of Portion 13.

- [29] Annexure marked “MM” is a copy of the aforesaid certificate in terms whereof the second respondent had become the registered owner of the property “under Deed of Partition Transfer T 06/86475”. However, the last-mentioned deed of transfer, a copy of which is annexed hereto marked “NN”, records a transfer of “Portion 128 (a portion of portion 11) of the farm” from the first respondent to The South African National Road Agency Limited.
- [30] According to annexure “MM” the three portions of the farm, referred to above, were consolidated into Portion 100 of the farm.
- [31] On 1 October 2007, Portion 100 of the farm was registered in the names of the third and fourth respondents. Annexure marked “OO” is a copy of the deed of transfer evidencing the allegations contained in this paragraph.
- [32] Finally under this paragraph, Portion 100 of the farm was transferred into the name of the fifth respondent on 28 March 2008, subject to a usufruct in favour of the third and fourth respondents. Annexure marked “PP” is a copy of a deed of transfer confirming this transaction, which had been handled by Geyser. Again, the applicants do not have a copy of the agreement that formed the basis of this transfer.
- [33] In essence the fifth respondent was the only one that opposed this matter as he had filed his answering affidavit, and submissions were made in court on his behalf. The 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> & 7<sup>th</sup> respondents did not

appear in court. Although Mr Prinsloo, appearing for the fifth respondent indicated that he is also appearing for the 3<sup>rd</sup> & 4<sup>th</sup> respondents, they did not file any answering affidavits.

[34] The parties agreed and were allowed to make submissions in respect of a *Point in Limine* that was raised by the fifth respondent to wit: “that the property referred to in the pleadings no longer exists as a separate property. The so called “the Property” cannot be transferred”.

### **Submissions**

[35] The fifth respondent submitted that the so called “the Property” that is the subject matter of this matter no longer exist and this court cannot grant a relief that cannot be implemented. As it appears from the second page of Annexure “MM” the remaining extents of Portion 11, 12 and 13 of the farm Spruitfontein were consolidated into the land described as Portion 100 of the farm Spruitfontein 341, Registration Division J.Q. North West Province (“the consolidated property”) measuring two hundred and sixty four comma five seven hectares. It does no longer exist as a separate property. In the premises the applicant cannot obtain an order that the so called “the Property” be transferred into her name.

[36] Applicant on the other hand, although in a way conceding to the above submissions, contends that the portions that make up the consolidated property can still be identifiable in terms of the Certificate issued in terms of section forty of the Deeds Registry Act, 47 of 1937 which was issued by the Deeds Registry, it is attached as Annexure “MM”. The second page thereof still bears the Deed of Partition Transfer numbers

of each portion. Again, the portion or portions consolidated can still be physically identifiable.

[37] According to the applicant, the Deeds Office can simply subdivide the said property back again to its original form, and thereafter transfer can be effected.

[38] Both counsel did not refer this court to any authority in support of their submissions.

[39] From the submissions made in court, it seems that the fifth respondent is not necessarily refusing to give the property back to the applicant, but alleges that legally the transfer of “the Property” as such and as prayed for by the applicant cannot be effected to the applicant.

## **Analysis**

[40] The Deeds Registries Act 47 of 1937 allows for subdivision of the land. Generally speaking, the subdivision of all land requires the consent of one or more local or other authorities in terms of various statutes and/or ordinances that need to be complied with prior to registration of the transaction in the Deeds Registry. For example:-

- The relevant Ordinances in the various provinces dealing with the subdivision of land
- The subdivision of Agricultural Land Act No. 70 of 1970

[41] I also managed to get one matter, the matter of **Calcutt (Born Hyden) & Others v Maclean & Others [2010] JOL 26117 (ECP)** wherein the following were sought:-

*“[6] The applicants seek a declaratory order as follows:-*

- 1. That the deed of donation dated 19 July 2001 was cancelled*
- 2. That the deed of donation dated 15 December 2004 is void **ab initio**; and*
- 3. That the deed of sale entered into between the First Applicant and the Kini Bay Trust relating to Erf 105 Kini Bay includes that portion of property which was the subject matter of the deed of donation dated 19 July 2001”*

*[7] On this basis the applicants seek the following additional orders:-*

- 1. That the consolidation of Erf 125 Kini Bay with Erf 97 Kini Bay to create Erf 126 Kini Bay be set aside*
- 2. That the first, fourth and fifth respondents, jointly and severally be directed to take all steps necessary to procure the subdivision of the property previously known as Erf 125 Kini Bay from Erf 126 Kini Bay*
- 3. That the first, fourth and fifth respondents, jointly and severally, be directed to take all steps necessary to procure the registration of transfer of Erf 125 into the name of the First Applicant, and to effect the consolidation of Erf 125 Kini Bay with Erf 105 Kini Bay, and that the first, fourth and fifth respondents, jointly and severally, be ordered to pay all the costs associated therewith”.*

[42] Although the application in this matter did not succeed, I am of the view that it is worth quoting to demonstrate that the consolidation of land / lands can be reversed and the land be again subdivided & transferred to the relevant parties.

[43] As correctly submitted by the counsel for the applicant, I am of the view that the consolidated property can be reversed to its original state. The certificate of consolidated title issued in terms of section fourty of the Deeds Registry Act, still contain the three consolidated property Deed of Partition Transfers numbers on it. There is also a diagram SG No 7719/2003 annexed thereto which can assist in the re-subdivision. This is the reason why I fully agree with counsel for the applicant that “the Property” the applicant seeks transfer of can still be identifiable. It can therefore later be transferred to the applicant once consolidation had been reversed and re-subdivision effected.

[44] On the same breath I agree with the counsel for the defendant that the “property” as described by the plaintiff in the notice of motion no longer exist, therefore prayers no. 3 of the applicant’s notice of motion cannot be granted without reversal of the consolidated properties and sub-division thereof taking place first.

[45] The point *in limine* taken by the defendant is one that has its object the delaying of the applicant’s claim until some defect is remedied. Because the fifth defendant does not object to the said portion 11 being re-transferred back to the applicant, I am of the view that all the respondents in this matter will not be prejudiced by the applicant amending his pleadings to reflect the prayers that prays for the reversal of the consolidation of the portion referred to as portion 100

and the re-subdivision thereof wherein the defect that is apparent in the applicant's pleadings can be cured. Fortunately the respondent's counsel also indicated that the fifth respondent does not necessarily object to the applicant amending / supplementing her notice of motion on the same papers to reflect the amended prayers.

## **Order**

[46] Consequently the following order is made:-

- 46.1 The point *in limine* raised by the fifth defendant is upheld;
- 46.2 The applicant is granted leave to amend / supplement his pleadings and/or notice of motion;
- 46.3 Costs will be costs in the main cause.

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**A M KGOELE**  
**JUDGE OF THE HIGH COURT**

### ATTORNEYS:

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