THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 88/06

In the matter between :

VAN DEVENTER, J J Appellant

and

VAN DEVENTER, C W J First Respondent

CRONJE, W A Second Respondent

Before:	**ZULMAN, FARLAM, NUGENT, MLAMBO JJA & MALAN AJA**
Heard:	**14 NOVEMBER 2006**
Delivered:	**24 NOVEMBER 2006**
Summary:	**Will – interpretation – price of farm to be its 'Land Bank valuation' – does not require Land Bank itself to determine the price.**
Neutral citation:	**This judgment may be referred to as Van Deventer v Van Deventer [2006] SCA 144 (RSA)**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] There is nothing quite like a will for fomenting family dissension. In this case it is the brothers Van Deventer who are at loggerheads over the terms of a clause in the joint will of their late parents. Among the property of their parents were two farms known respectively as 'Dartmouth' and 'Oatlands'. In their joint will made on 13 June 1991 they bequeathed Dartmouth to their son Johannes (the appellant) and Oatlands to his brother Christoffel (the first respondent) subject in each case to a life usufruct in favour of the surviving testator. Dartmouth was bequeathed to Johannes subject to the following additional testamentary condition (my shortened translation): [1]

'If [Johannes], after the death of the survivor, decides to sell [Dartmouth] then our son Christoffel…must be given the first option to purchase the said property at the Land Bank[2] valuation as established at the time of the sale. The option must be exercised in writing within a period of 60 (sixty) days after the option has been given.'

(Although expressed as an option the condition more accurately confers a right of pre-emption.)

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[1] 'Indien ons gesegde seun, na die afsterwe van die langslewende van ons sou besluit om ons voormelde plaaseiendom te verkoop sal ons seun CHRISTOFFEL WESSEL JACOBUS VAN DEVENTER die eerste opsie gegee word om die gemelde eiendom te koop teen die Landbank waardasie soos vasgestel ten tye van sodanige verkoping. Die opsie moet skriftelik, binne 'n periode van 60 (sestig) dae nadat sodanige opsie gegee is, uitgeoefen word.'

[2] This is a reference to the Land Bank (now known as the Land and Agricultural Development Bank of South Africa) that was established by the Land Bank Act 18 of 1912 and that has continued to exist since then. The 1912 Act was superseded by the Land Bank Act 13 of 1944, which was in turn superseded by the Land and Agricultural Development Bank Act 15 of 2002.

[2] Mr van Deventer senior died in 1993 and Dartmouth was transferred to Johannes subject to the conditions in the will, both of which were recorded in the title deed. In February 2004 Mrs van Deventer died and in consequence the usufruct expired.

[3] Towards the end of 2003 Johannes granted an option to a company known as Ivory Sun Trading 77 (Pty) Ltd (in which the second respondent has an interest) to purchase Dartmouth for R2 400 000.[3] At about the same time he caused the farm to be valued. The valuer concluded that its market value (the price that would be paid in the open market by a willing buyer to a willing seller) was R3 002 284.

[4] When Ivory Sun Trading expressed its intention to exercise its option Johannes offered to sell the farm to Christoffel for its market value as established by the valuer. Christoffel's response was that he was entitled to be offered the farm at its 'Land Bank valuation' before it was sold to a third party. Johannes, through his attorneys, then wrote to the Land Bank requesting it to value the farm but the Land Bank declined to do so. That set the scene for the dispute that is now before us.

[3] The option was later extended and the price reduced to R2 100 000.

[5] Because the Land Bank declines to value the farm Johannes contends that the testamentary condition (now incorporated in the title deed) is impossible to fulfill and he applied to the High Court at Pretoria for a declaration that the condition is invalid and is to be disregarded. Fourie AJ dismissed the application but granted leave to appeal to this court. (In view of its findings it was not necessary for the court below to deal with an alternative claim that I will return to later in this judgment.)

[6] Although the condition is registered against the title of the property it has its origin in the will of the testators and falls to be construed in that context. When interpreting a will, as with any document, a court must strive to ascertain the wishes of the testator from the language that he or she has used, and generally, the language must be construed in the context of the circumstances that prevailed at the time the will was made.[4] Moreover, there is a presumption that

[4] The Hon M M Corbett, Gys Hofmeyr and Ellison Kahn *The Law of Succession in South Africa* 2 ed esp 448 and 451.

'in doubts as to the interpretation of testamentary writings, that construction should be adopted which would give effect to the *voluntas* of the testator, rather than that which would nullify the deed.'[5]

[7] Before turning to the construction of the condition that is now in issue it is convenient to describe the functions of the Land Bank. (The Land Bank has been renamed the Land and Agricultural Development Bank[6] but for convenience I will continue to refer to it by its former name.) The Land Bank was established for the purpose of advancing loans to farmers and agricultural co-operatives so as to promote agriculture in the national interest. At the time that the will was executed the activities of the Land Bank were governed by the Land Bank Act 13 of 1944. Section 70 of the Act provided for the appointment by the Land Bank of valuators 'to inspect and value properties for the purposes of this Act.' The reason that the Land Bank required property to be valued is self-evident: generally the Land Bank advanced moneys against the security of fixed property,[7] which necessarily required the Land Bank to assess the value of the property. Section 50 of the 2002 Act now provides that 'the Bank may at any time require a valuation in respect of any security or collateral or property relevant to any agricultural

[5] *Dwyer v O'Flinn's Executor* (1857) 3 SC 16 at 32; *Villet's Estate v Villet's Estate* 1939 CPD 152 at 156; *Ex Parte Kock NO* 1952 (2) SA 502 (C) at 511D-F.
[6] By the Land and Agricultural Development Bank Act 15 of 2002.
[7] Section 25 of the 1944 Act.

financial service rendered or offered by the Bank' and provides for the appointment of valuers for that purpose.

[8] Apart from valuing property for its own purposes, until recently the Land Bank also played a role in the valuation of farmland for the purpose of calculating estate duty. The Estate Duty Act 45 of 1955 levies estate duty (in appropriate cases) on the 'fair market value' of property in the estate of a deceased person.[8] Until 1 February 2006[9] the 'fair market value' of immovable property upon which *bona fide* farming activities were being conducted[10] was, at the election of the executor, either its fair market value, or the 'aggregate of the fair agricultural or pastoral value of the land and the value which any improvements situated thereon may be expected to add to such value of the land' (referred to in the Act as its 'surface value') together with the fair market value of any mineral rights attaching to the land.[11] The Act provided further that the 'surface value' of the land was to be determined by a Land Bank valuator appointed in terms of s 70 of the Land Bank Act, who was required to value the property 'as though he were

[8] Section 5(1)(g).
[9] This definition was inserted in the Estate Duty Act 45 of 1955 by s 1 of the Estate Duty Amendment Act 59 of 1957 and replaced with effect from 1 February 2006 by s 1(1) of the Revenue Laws Second Amendment Act 32 of 2005.
[10] Amended in 1988 to refer to immovable property on which 'a *bona fide* farming undertaking is being carried out': s 7 of Act 87 of 1988.
[11] In the present case the mineral rights have been alienated and no longer attach to the land.

making a valuation for land bank purposes'. If that value was not accepted by the fiscus it was to be determined by the board of the Land Bank.[12] (With effect from 1 February 2006 the 'fair market value' of immovable property on which a *bona fide* farming undertaking is being carried out is its market value reduced by 30 percent.)[13]

[9] Whether the criteria that are used by the Land Bank when valuing farmland for its own purposes are the same as those that were used when valuing farmland for purposes of estate duty is not altogether clear from the evidence (the former definition in the Estate Duty Act seems to suggest that they were)[14] but that is not material for present purposes. What is clear is that the value that the Land Bank attributes to farmland – whether in the conduct of its own business or when valuing it for purposes of estate duty – does not necessarily coincide with its value on the open market.[15] Indeed, it was accepted by both counsel that the value that the Land Bank attributes to land is generally far lower than its market value.

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[12] Section 1(2)(b)(i) of the Estate Duty Act.
[13] Definition of 'fair market value' amended by s 1(1) of Act 32 of 2005.
[14] Section 1(2)(b)(ii), which required a valuer to value land in accordance with the Land Bank's instructions 'as though he were making a valuation for land bank purposes'.
[15] For a discussion of 'Land Bank value' for estate duty purposes see D Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty* 2004 ed para 29.5.

[10] It was submitted on behalf of Johannes that the phrase 'Land Bank valuation' in the testamentary condition refers to an amount that is to be determined by the Land Bank itself. In other words, so it was submitted, the testators appointed the Land Bank to determine the price at which the farm was to be offered for sale to Christoffel, and moreover, it was submitted, the Land Bank was required to set the price with reference to the market value of the farm. Because the Land Bank's functions do not extend to appraising property on behalf of third parties, which is no doubt why it declined the request to do so in the present case, it was submitted, the condition is not possible of fulfillment and must be regarded as not having been inserted.

[11] I do not think that submission correctly reflects the meaning of the condition. It must have been well-known to the farming community, which included the testators, that the value that the Land Bank attributes to farmland does not necessarily coincide with its market value. No purpose would thus be served by appointing the Land Bank to value the farm if it was to be given its market value, for its market value would be capable of being established by any valuer. If it was to be valued in accordance with the criteria that are applied when valuing farmland for the Land Bank, that

would similarly be capable of being done by any valuer who had knowledge of those criteria. On either approach there is no apparent reason for the testators to have required the valuation to be done by the Land Bank itself. In my view it is clear that what the testators had in mind was merely to ensure that the price at which the farm was offered to Christoffel would be the amount which would be attributed to it if it was being valued by the Land Bank. To the extent that there might be any doubt in that regard that is also the construction to be preferred in order to avoid invalidity.

[12] Precisely what criteria are to be used in valuing the farm (i.e. those that are applied when determining its value as collateral, or those that were formerly applied when determining its value for estate duty purposes, if those criteria differ) is not a matter that we are called upon to decide. Whichever are the appropriate criteria to be applied there is no suggestion that the amount is not capable of being determined by a valuer who has knowledge of those criteria and in those circumstances there are no grounds for finding that the condition cannot be given effect.

[13] There is another, subsidiary, matter. As an alternative to his claim for the condition to be declared invalid, Johannes claimed an order (my translation) [16]

'declaring that, in so far as a Land Bank valuation might exist, it refers to market value and not merely to surface value and/or value for farming purposes'.

What seems to have prompted that alternative claim (the basis on which it was made was not articulated in the founding affidavit) was that upon the death of Mrs van Deventer the farm was valued by a Land Bank valuer for purposes of estate duty in accordance with the procedure formerly provided for in the Estate Duty Act. The standard-form report that the valuer was required to complete required him to provide his estimate of the surface value of the farm as contemplated by the Estate Duty Act (which he placed at R1 076 331) and also to insert its market value (which he placed at R2 010 000). What seems to have been contemplated by the alternative claim was that in the event that a court were to find that the Land Bank has indeed valued the farm (when it was valued after the death of Mrs van Deventer) the value that the Land Bank attributed to it was the latter value and not the former. In view of my finding that the condition does not call

[16] '…dat verklaar word dat, insoverre 'n Landbankwaardasie mag bestaan, dit verwys na markwaarde en nie bloot na oppervlaktewaardes en/of waardasie vir boerderydoeleindes.'

upon the Land Bank to value the property the alternative claim is not material and also falls to be refused.

[14] In my view the court below correctly refused the relief that was claimed. The appeal is dismissed with costs.

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R.W. NUGENT
JUDGE OF APPEAL

ZULMAN JA)
FARLAM JA) CONCUR
MLAMBO JA)
MALAN AJA)