CASE NO. A 7/96

JOHN ERICH MEINERT versus 1.HERMAN BIEWENGA 2. THE REGISTRAR OF DEEDS

HANNAH. J.

1996/01/19

CONTRACT

Interpretation of Where there is an ambiguity it is permissible to have regard to subsequent conduct of the parties. However, if a lacuna in the agreement can be filled by an implied term such an enquiry is unnecessary.

Repudiation of Depends on the character of the contract, the number and weight of the wrongful acts or ascertain, the intention indicated by such acts or words etc.

CASE NO. A. 7/.

IN THE HIGH COURT OF NAMIBIA

In the matter between

JOHN ERICH MEINERT **APPLICANT**

versus

HERMANUS BIEWENGA **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS **SECOND RESPONDENT**

CORUM: HANNAH, J.

Heard on: 1995-12-07

Delivered on: **1996-01-19**

JUDGMENT

HANNAH, J.; In this application the applicant seeks an order declaring a certain agreement entered into by himself and the first respondent on 30th August, 1994 to have been validly cancelled, an order requiring the first respondent to remove all his property and livestock from the land which is the subject of the agreement and an order for costs.

The circumstances giving rise to the application are as follows. On 30th August, 1994 the applicant and the first respondent (I will refer to him as the respondent as the second respondent has taken no part in the proceedings) entered into a written agreement whereby the applicant agreed to buy, and the respondent agreed to purchase, a section of approximately 2 100 hectares of farm Okatunde in the district of Gobabis for an amount of N$205-00 per hectare. The only clauses of the agreement which are of any real relevance to the application are clauses 5, 8 and 9 and I will set these out in full.

5. POSSESSION

Possession and vacant occupancy of the PROPERTY will be granted to the BUYER on 1 December 1994, after which it will be at the sole risk, profit or loss of the BUYER.

8. OCCUPATIONAL RENT

Should the date of occupation and possession not coincide with the date of transfer, the party enjoying occupation and possession of the PROPERTY, while it is registered in the name of the other party, will pay occupational rent in the amount of N$l 500-00 per month, or part thereof, to the other party quid pro quo, calculated from 1 December 1994 to date of registration of the property in the name of the buyer.

9. BREACH OF CONTRACT

Should the BUYER fail to comply to any terms or conditions of this Deed of Sale on the date of expiry, the SELLER or his agent reserves the right to:-

(a) cancel the sale by registered letter addressed to the BUYER, whereafter the BUYER loses all amounts paid to the SELLER or his agent, in terms hereof, without impairing the SELLER'S other rights and remedies and the right to claim indemnification,

or

(b) claim immediate payment of the selling price and demand compliance of all the terms and conditions hereof."

The agreement was written in the Afrikaans language and the clauses just set out are taken from the English translation made by a sworn translator annexed to the applicant's founding affidavit. Both counsel for the applicant and counsel for the respondent are fluent in both Afrikaans and

English and during the hearing both attempted to indulge in some criticism of the translation but as they were unable to agree I refused to entertain the criticism. This country is no longer bilingual and even if I were conversant with the Afrikaans language myself it would not be permissible for me to compare the Afrikaans text with the English text and depart from a translation by a sworn translator without the agreement of the parties. It is equally impermissible for counsel to give their personal views of the correctness of such a translation unless they are agreed upon the matter.

Following the conclusion of the agreement the respondent paid a deposit of N$100 000 as provided for in the agreement and took

possession of the property. There then followed one or two minor disputes which I find unnecessary to describe in detail. One concerned the removal of certain game from the property and this, according to the respondent, led to damage being caused to a boundary fence. The respondent alleges that the applicant agreed to repair the fencing but did not and eventually he repaired it himself at a cost of approximately N$2 500-00. The applicant denies damaging the boundary fence as alleged by the respondent but admits causing some damage to inner fencing. He avers that following a request by the respondent he instructed his workmen to repair the damage but before they could complete the necessary work they were ordered off the property by the respondent.

Whatever the rights and wrongs may be concerning the fencing dispute it is common ground between the parties that the respondent sent a letter to the applicant dated 30th May, 1994 and it is this letter which lies at the heart of the present application. The letter was written in friendly terms and begins:

> "Dear Johnny,
>
> I would like to bring several matters to your attention and I would appreciate it if we could discuss them."

The letter then continues by expressing the hope that the transfer of the property had been concluded and mentioning a problem with one of the border lines which would have to be attended to at some future time. Then in the next paragraph the respondent states:-

> "I will however not pay occupational rent for May 1995, but will use the money for the reparation of border and encampment fences, damaged by the game catching process."

The penultimate paragraph refers to a problem with one of the dams and the letter concludes:-

> "Johnny, I would appreciate it if you would contact me in order to sort out these matters.
>
> Regards
>
> Hermanus"

As I have said, the letter was written in friendly enough terms but that cannot be said for the reply. By letter dated 7th June, 1995 and sent by registered post the applicant's attorneys wrote stating that they acted on behalf of the applicant and, having referred to the contract of sale and in particular clause 8, the letter continues:-

> "Our client furthermore instructed us that you have breached the contract by refusing to pay the occupational rental for the month of May 1995, which refusal is contained in your letter to our client dated 30 May 1995.
>
> As a result of your abovementioned breach, our client is entitled to cancel the contract, as stipulated in clause 9 thereof.
>
> You are hereby informed that our client herewith cancels the contract with immediate effect and reserves his rights to take further legal action against you as provided in the contract."

The respondent did not accept the cancellation. Indeed on 6th June, 1995 the respondent paid the sum of N$l 500-00 directly into the applicant's bank account. The applicant avers in his founding affidavit that this payment was in respect of occupational rent for

June, 1995, but this is denied by the respondent. He alleges that it was in respect of rental for May and sets out details of previous payments made by him in support of this allegation. As counsel for the applicant based part of one of his arguments on the dates of these payments I will set them out. Rental for January, 1995 was paid by cheque dated 28th January, that for February by cheque dated 2 8th February, that for March by cheque dated 31st March, that for April by cheque dated 2nd May, that for May by cheque dated 6th June paid directly into the applicant's bank account and that for June by bank transfer made on 28th June. The applicant does not appear to dispute the respondent's averment that it was agreed that rental need not be paid for December, 1994.

Having regard to the documents filed in support of the respondent's claim that the payment made on 6th June was in respect of rental for May and the failure of the applicant to deal with the documentary evidence in his replying affidavit other than to make a bald denial I accept that what the respondent states is correct. And I reject the contention made by the applicant in his replying affidavit that the respondent made the payment in question after he had been apprised of the contents of the cancellation letter by the attorneys responsible for the conveyancing and who received a faxed copy of the letter on 7th June. This contention is based on an assertion that the payment was made on 8th June, an assertion which is not only at odds with the date on the deposit slip annexed to the applicant's founding affidavit but is in conflict with what the applicant expressly states in his founding affidavit. It may be that by some other means the respondent got wind of the imminent cancellation but that must remain speculation.

To complete the history of this matter, the conveyancing attorneys wrote to the applicant's attorneys by letter dated 12th June, 1995 stating that they had been consulted by the respondent on that day but, in the circumstances, could act neither for him nor the applicant. However, they placed on record that the respondent's position was that he refused to accept the cancellation and if the applicant persisted in stopping the transfer of the property he should bring an application. This the applicant did on 5th July, 1995.

Mr Heathcote appeared on behalf of the applicant and his argument was essentially this. He submitted that clause 9 of the agreement is a forfeiture clause which entitled the applicant to cancel the agreement if the respondent failed to comply with any of the terms or conditions including the condition requiring the respondent to pay occupational rent in the amount of N$l 500-00 per month. Counsel then pointed to the respondent's letter dated 30th May, 1994 and his action in not paying rent for that month by the end thereof and submitted that the respondent was clearly in breach of the condition pertaining to payment of occupational rent. A further submission made in the alternative was that by couching the letter in the manner he did the respondent repudiated the agreement. These submissions require close analysis.

The first point to be considered is whether clause 8 required the respondent to pay occupational rent at the end of each and every month of his occupation pending transfer of the property into his name, as Mr Heathcote submitted that it did, or whether the clause

only required occupational rent to be paid for the whole period of occupation at the point in time when transfer of the property actually took place, as Mr Coetzee submitted that it did. In support of his submission Mr Heathcote relied on the fact that rent was paid by the respondent on a monthly basis and in all instances, save two, before the end of each month. It is obvious, said Mr Heathcote, that the parties themselves accepted that rent was to be paid on a monthly basis and this is as good a guide as any when deciding what meaning should be given to the clause. But if that is not good enough then Mr Heathcote submitted that it was an implied term of the contract that the rent would become due and payable at the end of each and every month and in support of this submission he relied on the following passage in Cooper: South African Law of Landlord and Tenant at page 134:-

> "In the absence of agreement to the contrary, rent is payable on the expiration of a lease or, if the lease is periodic, on the expiration of each period, i.e. at the end of the day, week, month, year, as the case may be, in which event it is said that rent is payable in arrear."

Clause 8 of the agreement, as with the other clauses, falls to be interpreted with a view to ascertaining the intention of the parties having due regard to the words used in their proper contextual setting, and to any permissible background circumstances: Total South Africa (Pty) Ltd v Bekker N 0 1992 (1) SA 617 (A) at 624F. The clause is contained in a contract of sale of land and it is clear from the opening words of the clause that its purpose is to require the party occupying the land on and after 1st December, 1994 to pay rent to the other party until such time as the land becomes

registered in the name of the buyer. Although the purpose of the clause is not, therefore, to create a lease but to compensate the party not in occupation on and after 1st December, 1994 the position is, nevertheless, similar to that of a lease for a fixed period.

The clause stipulates the amount of rent to be paid, namely N$l 500-00 per month, or part thereof, and it specifies the period during which it is to be paid, namely from 1st December, 1994 until the date the property is registered in the name of the buyer. But it makes no express provision for when the rent is to be paid during that period.

If it can properly be said that this lacuna in the clause creates an ambiguity it is permissible, in so far as it may be necessary, to have regard to the subsequent conduct of the parties to establish their common intention: MTK Saaqmeule (Pty) Ltd v Killyman Estates (Pty) Ltd 198 0 (3) SA 1(a) at 12 F - H; Twenty Seven Bellevue C C v.Hilcove 1994 (3) SA 108 (A) at 114 C. However, if the lacuna can be filled by a term implied by law it becomes unnecessary to embark on such an enquiry. As I have already said, the position in the present case is similar to that of a lease for a fixed period where, in the absence of agreement to the contrary, rent is payable after the lessor has fulfilled his obligations, i.e. on the expiration of the lease: Cooper (supra) at p. 134; Ebrahim, N.O. v Hendricks 1975 (2) 78 (CPD) at 81 E. It is not, in my view, similar to a periodic lease, as Mr Heathcote contended, because it is clear that it was not the intention of the parties that the land would be occupied periodically from month to month. The intention of the parties was

that the land would be occupied from one fixed point in time to another. The sole purpose of reference being made to "month, or part thereof" was to enable rent to be calculated. In my view, therefore, it would be proper to hold that clause 8 included an implied term that rent was payable at the end of the fixed period, namely when the property was registered in the name of the buyer. Viewed in this way there is no ambiguity in the clause and it becomes unnecessary to have regard to evidence indicating how the parties themselves may have understood the contract, an exercise which is, in any event, often fraught with pitfalls.

If I am wrong in construing clause 8 in the manner just set out and the rent was due and payable before the date when the property was registered in the name of the buyer the fact remains that the clause makes no provision for rent to be paid at any particular time. Mr Coetzee submitted that in these circumstances rent was only claimable by the applicant on demand and the applicant was not entitled to cancel the contract before making such demand for payment on or before a specified date, reasonable in the circumstances. And that, it is common cause, the applicant did not do. Having regard to cases such as Breytenbach v Van Wijk, 1923 AD 541 I am of the view that there is merit in this submission and it must be upheld.

Anticipating the possibility that his first submission might be rejected Mr Heathcote submitted in the alternative that by evincing an intention in his letter dated 30th May, 1994 not to pay rent for the month of May the respondent repudiated the agreement. Mr

Heathcote submitted that the respondent could not set-off the cost of repairing the damage done to the fencing because the amount involved was an unliquidated amount for damages and not a liquid claim. And in so far as the relationship between the parties may be regarded as that of landlord and tenant, giving the tenant the right in certain circumstances to deduct the amount of repairs to the property from rent, the alleged debt in the present case was not based on a legal claim capable of prompt ascertainment. See Lester Investments (Pty) Ltd v Narshi, 1951(2) SA 464 (C) at 469. Furthermore, the evidence suggests, submitted counsel, that the repairs had not in fact been effected and the sum of N$2 500-00 referred to in the respondent's answering affidavit is only an estimate of the cost involved.

Mr Coetzee advanced various arguments why Mr Heathcote's alternative submission should be rejected. It will suffice if I deal with one only. The most compelling argument advanced concerns the intention of the respondent and whether his act in writing the letter dated 30th May to the respondent evinced an intention no longer to be bound by the contract. In Re Rubel Bronze and Metal Co and Vos (1918) 1KB 315 McCardie, J said at p. 322:-

> "The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not as a rule be deemed to amount to repudiation. .. But, as already indicated, a deliberate breach of a single provision in a contract may under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain ... In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the

deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case."

This passage was cited with approval by Lewis, J in Schlinkmann v Van der Walt and Others, 1947 (2) SA 900 (EDL) at p. 919 with the additional observation that the onus of proving that the one party has repudiated the contract is on the other party who asserts it. See also Van Rooyen v Minister van Openbare Werke, 1978 (2) SA 835 (A) at 845.

What is important to bear in mind in the present case is that the essence of the agreement which it is alleged the respondent repudiated is the sale and purchase of land and the payment of occupational rent must be regarded as being only an ancillary matter. Compared to the sale it was a relatively minor matter not at all vital to the contract. See Estate S Narhan v Estate W Grix. 1911 NPD 262. Further, the letter relied upon by the applicant evinced an intention not to pay rent in respect of one month only and not only gave a rational explanation for not doing so but left the door open for discussion. In my opinion, when regard is had to these factors and the general circumstances of the case the applicant has come nowhere near establishing a deliberate and unequivocal intention on the part of the respondent no longer to be bound by the contract. Mr Heathcote's alternative submission must therefore also be rej ected.

The conclusions I have thus far reached are sufficient to dispose of the application in favour of the respondent but one other matter was argued by Mr Coetzee and I will deal with it, albeit briefly. Mr

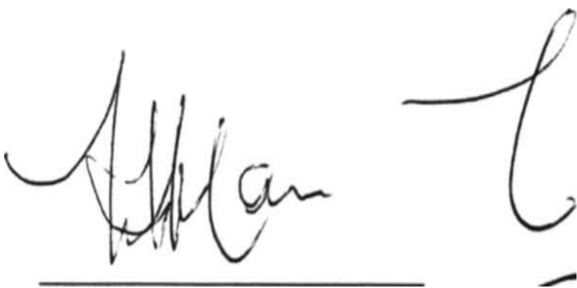
Coetzee pointed to the fact that clause 9 of the agreement provides that:-

> "Should the BUYER fail to comply to (sic) any terms or conditions of this Deed of Sale on the date of expiry, the SELLER or his agent reserves the right to:-
>
> (a) cancel ..."

Mr Coetzee submitted that effect must be given to the words "on the date of expiry" which I have underlined and these words can only mean that the applicant can only exercise his right to cancel if at the date when the sale was due to be completed the respondent was in breach of any terms or conditions.

The opening words of clause 9 are either poorly drafted or badly translated but whichever it be I must do the best I can to interpret them. If the words "on the date of expiry" were to be deleted the clause would make perfectly good sense and the position would be that the applicant could exercise his right to cancel whenever the respondent was in breach of a term or condition. However, in construing a legal document the Court should incline towards supposing that every word and every phrase is intended to have some effect or to be of some use. This, of course, is a matter of common-sense. At the outset I must therefore suppose that the words in question were intended to alter the sense of the clause as it would have been had the words not been included. The main difficulty I have is in the use of the word "expiry". This connotes at the end or termination of something rather than when something is completed. However, although it would appear inexact language was used it seems

clear that the parties were intent upon limiting the right to cancel to a breach which occurred at the end of the transaction rather than at an earlier stage. It may well be that what the parties had in mind were the draconian consequences which would follow upon a cancellation for say failure to pay one monthly instalment of rent on time, assuming that my interpretation of clause 8 is wrong. If the words "on the date of expiry" in clause 9 were to be ignored this would result in the respondent forfeiting his deposit of N$100 000-00. For the foregoing reasons Mr Coetzee's submission must be upheld. This constitutes a further reason for refusing the relief sought.



HANNAH, JUDGE

In the result the application is dismissed with costs.