

REPUBLIC OF NAMIBIA

CASE NO.: I 123/09

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**MR ABRAHAM MBUENDE
MRS ADOLFINE MBUENDE**

and

**MR THEO HOFFMANN
MRS JOHANNA HOFFMANN
DEFENDANT**

**FIRST PLAINTIFF
SECOND PLAINTIFF**

**FIRST DEFENDANT
SECOND**

CORAM:

Hinda, AJ

HEARD ON:

24, 26, 27 & 28/05/2010

DELIVERED ON:

15/11/2010

JUDGMENT

1. The plaintiffs are Mr. Abraham Mbuende (*first plaintiff*) and Mrs. Adolfine Mbuende (*second plaintiff*). The defendants are Mr. Theo Hoffmann (*first defendant*) and Mrs. Johanna Hoffmann (*second defendant*).

2. The plaintiffs instituted action against the defendants, which action I, for ease of reference, categorise in three parts. The first part is for an order of specific performance to transfer property. The second part is for payment of N\$ 175 000.00 for alleged improvements in terms of a current lease. The third part is for the payment of N\$ 33 835.00, paid by the plaintiffs to the defendants' conveyancer for the transfer of the property in the *bona fide* and reasonable belief that the defendants will transfer the property into the names of the plaintiffs.

3. In this judgment, I will set out the basis of each claim as *per* the plaintiffs' particulars of claim, refer to the defence/s raised by the defendants, in the plea,

evaluate the soundness of the claim/s and defence/s and then make my findings. I will set out the salient facts that have been presented in evidence by and on behalf of the plaintiffs, without attributing same to a specific witness, as well as legal submissions on behalf of the parties, respectively, under the claim headings. The defendants neither testified nor called witnesses.

AD THE FIRST CLAIM

4. The first claim is for an order for specific performance, that the defendants are ordered to take steps to pass transfer of, Farm Safneck No 167, situated in the Registration Division "M" Hardap Region (*"the property"*) to the plaintiff failing which the Sheriff or his/her Deputy be authorised to take such steps on behalf of the defendants. This claim is founded on a written agreement of sale (*the agreement*) of the property, entered into by and between the parties on 12 April 2007 at Windhoek, a copy of which was received into evidence as exhibit "B".

5. In terms of the agreement, the plaintiffs bought the property from the defendants at a consideration of N\$350 000.00.

6. However, the agreement was subject to suspensive conditions in clause 13 thereof.

Clause 13 reads:

"13.1. The agreement is subject to the granting of a

Certificate of Exemption in terms of the Land Reform Act within 90 (NINE ZERO) days from date thereof.

13.2 This Agreement is also subject to the suspensive condition that a loan of N\$ 350 000.00 secured by a Mortgage Bond to be registered over the PROPERTY, is obtained by the PURCHASER on the normal terms and conditions of Agricultural Bank within a period of 60 (SIX ZERO) DAYS from the date of a Certificate of Exemption has been issued by the Ministry of Lands and Resettlement or such extended period as the parties may agree to in writing.

13.3 In the event of the aforesaid bond not being granted within the period stipulated in Clause 13.1 above alternatively within such extended time period as the parties may have agreed to in writing then and in such event this Agreement shall lapse and shall have no force and effect.

"(my emphasis)

7. Plaintiffs obtained the Certificate of Exemption on 18 June 2007, within 90 days of 12 April 2007 and no issue arises on this aspect.

8. The plaintiffs were required in terms of clause 13.2, *supra*, to within 60 days of the date of the certificate of exemption; obtain a loan for the full amount of the purchase price, secured by a mortgage bond to be registered over the

property, on the normal terms and conditions of Agricultural Bank of Namibia. In order to comply with the suspensive condition in clause 13.2, the loan had to be approved on or before 18 August 2010, which did not happen.

9. It is an express term of the agreement that if the bond is not granted within the period as set out in Clause 13.2 (instead of 13.1 as incorrectly stated in the particulars of claim) or such extended time as the parties may agree to in writing, then the agreement would lapse and have no force and effect.

10. The loan was ultimately granted by the Agricultural Bank of Namibia on 4th October 2007, well outside the 60 days after the grant of the exemption certificate.

11. Given the above factual scenario, the plaintiffs claim, despite the objectively ascertainable non-compliance with clause 13.2 as well as the non - variation, waiver and final agreement clauses in the agreement that they are entitled to the transfer because the defendants, acting with full knowledge of their rights, instructed their conveyancer Mr. Ligthelm to proceed with the transfer of the property.

12. The plaintiffs contented that, for the defendants to have instructed their conveyancer to register and transfer the property constituted a waiver of the fulfilment of the condition stipulated in clause 13.2 and that the defendants are estopped to resile from same.

13. In answer to the above contentions, the defendants argued that the agreement came to an end on 16 August 2010 for want of compliance with clause 13.2 by the plaintiffs and could not have been revived because the formalities in respect of Contracts of Sale of Land Act 71 of 1961 which is *sine quo non* to revive the agreement has not been complied with. However, the sixty days would end on 18 August 2010.

14. The defendants' further defence to the plaintiffs' claim of specific performance are clauses 16 (waiver) and 18 (final agreement) of the agreement.

Clause 16 (waiver) reads:

"Notwithstanding any express or implied provisions of the Deed Sale to the contrary; any latitude or extension of time which may be allowed by the seller in respect of any matter of thing that the PURCHASER is bound to perform or observe in terms hereof, shall not under any circumstances be deemed to be a waiver of the SELLER'S rights at any time, and without notice, to require strict and punctual compliance with each and every provision or term hereof."

Clause 18 (final agreement) reads:

The SELLER and the PURCHASER hereby record and acknowledge that this contract constitutes the entire agreement between them and that no waiver, addition, alteration, variation amendment hereto shall be of any force or effect unless in writing and signed by both the SELLER and PURCHASER."

15. Relying on the principle that non-variation and non-waiver clauses are binding, the defendants submitted that the conditions for renewal of the initial contract were entrenched and unless they were complied with the contract could

not have been extended.

**See: S A Sentrale Ko-op Graanmaatskapy Bpk v Shifren en
Andere 1964 (4) SA 760 A**

16. It is clear from clauses 16 and 18, *supra*, that for plaintiffs to invoke waiver and for it to be of any force or effect, that the part relied on for validity had to be reduced to writing and signed by the parties. The plaintiffs failed to tender evidence regarding a written waiver.

17. It is trite that where the parties have incorporated a non-variation clause in their written agreement, any attempt to agree informally on a topic covered by the non-variation clause is not permissible.

**See: Mushimba v Autogas Namibia (Pty) Limited 2008(1) NR 253
(HC)**

18. It is also settled law that an oral agreement to alter the terms of payment (eg extension of time) where the parties are bound themselves to a non-variation clause is therefore not permissible, unless it is reduced to writing and agreed by both parties.

**See: Van Tonder en n Ander v Van der Merwe en Andere 1993 (2)
SA 552 (W).**

19. Thus, the inescapable conclusion from the admitted facts, related

hereinbefore, is that the suspensive condition in clause 13.2 was not complied with. For that reason I hold that the plaintiffs are not entitled to specific performance.

AD THE SECOND CLAIM

20. The second claim, in the alternative, is for the payment of the amount of N\$ 175 000, 00 plus interest at the rate of 20% from date of judgment. This claim is founded on enrichment as a result of improvements done to the property during the currency of a lease agreement ("*the lease*" entered into on 6 June 2006 at Windhoek. Clause 3 of the lease stipulates that the lease shall come into operation on 1st July 2007 and subsist for a period of three years. Thus at the time that the parties concluded the agreement of sale, the plaintiffs were in occupation of the property in terms of the lease. A copy of the lease, marked "G" was handed into court and accepted as evidence. It is common cause that the lease will terminate around July 2010 unless terminated earlier in terms of its provisions and was valid at the time of the hearing of this matter.

21. The plaintiffs claimed that they in the bona fide and reasonable belief that the defendants will transfer the property into their names made the improvements. The plaintiffs bolstered their claim by tendering testimony that there were various oral agreements with the defendants before the construction and renovations of two buildings and erecting a cattle proof fence.

22. The defendants opposed this claim and invoked Clause 10 of the lease which reads:

"10. Alterations, additions and improvements

10.1. The Lessee shall not make any alterations or additions to the Property without the Lessor's prior written consent, but the Lessor shall not withhold its consent unreasonably to an alteration or addition to the Premises which is not structural.

10.2. If the Lessee does alter, add to, or improve the Property in any way, whether in breach of clause 10.1 or not, the Lessee shall, if so required in writing by the Lessor, restore the Property on the termination of this lease to their condition as it was prior to such alteration, addition or improvement having been made.

The Lessor's requirement in this regard may be communicated to the Lessee at any time, but not later than the fifteen day after the Lessee has delivered up the Premises pursuant to the termination of this lease; and this clause shall not be construed as excluding any other or further remedy which the Lessor may have in consequence of a breach by the Lessee of clause 10.1.

10.3 Save for any improvement which is removed from the Property as required by the Lessor in terms of clause 10.2, all improvements made to the Premises shall belong to the Lessor and may not be removed from the Premises at any time. The Lessee shall not, whatever the circumstances, have any claim against the Lessor for compensation for any improvement or repair to the Premises (sic) shall the Lessee have a right of retention in respect of any improvement".

23. The defendants' counsel submitted that the express provisions of clause 10 of the lease agreement preclude any claim for enrichment founded on improvements since no prior written approval was obtained Clause 10 excludes

the right to compensation for improvements.

See: Volker v Maree 1981(4) SA 651 NPD at 656 C to E

24. The defendants also raised a common law defence founded on the *Placaaten*. Because of the finding that I will make on this aspect it is not necessary to deal with the imports and effect of this defence.

25. Since the lease is still valid, at the time of the hearing of this matter and given that the issue of compensation would arise only at the termination of the lease I hold that this claim for improvements is premature. Additionally, the lease agreement also has a non-variation clause (clause 16.3).

26. I am of the view further that the right to compensation, if any, would arise on vacation of the property let after the lease has terminated.

AD THE THIRD CLAIM

27. The third claim, which is also in the alternative, is for the payment of N\$ 33 000.00 plus interest at the rate of 20% per annum from date of judgment. This claim which is intrinsically linked to the first claim is that the plaintiffs paid the said amount, at the request of the defendants, to the defendants' conveyances for the latter to transfer the property.

28. The conveyancer, Mr. Ligthelm testified that after he was instructed by the defendants to transfer the property to the plaintiffs that he received a letter from

Metcalfe Legal Practitioners on 21st February 2008, informing him that the second suspensive condition had not been complied with and that the Agreement of Sale lapsed and was of no force and effect.

29. Given my finding that the plaintiffs are not entitled to specific performance and since this claim is intrinsically linked to the first claim, I am of the view that the amount claimed under this heading must be reimbursed by the defendants to the plaintiffs with interest.

30. In the result, I make the following order.

(a) The claim that the defendants take all necessary steps to pass transfer of the property to the plaintiffs is dismissed with costs.

(b) The claim that the defendants pay the amount of N\$ 175 000, 00 plus interest at the rate of 20% from the date of judgment is dismissed with costs.

(c) The defendants are ordered to repay, or cause to be repaid, the amount of N\$ 33 000. 00 to the plaintiffs inclusive of interest.

HINDA, AJ

**COUNSEL ON BEHALF OF THE
1st & 2nd PLAINTIFFS:**

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