CASE NO.: I 4574/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ASPARA SINCLAIR **PLAINTIFF**

And

CHARLES DIERGAARDT **DEFENDANT**

CORAM: **MILLER, AJ**

Heard on: 16-18 May 2011, 07 June 2011

Delivered on: 22 June 2011

JUDGMENT

MILLER, AJ.: [1] In this matter, which commenced before me as a trial, the plaintiff, who was represented by Mr. Conradie, seeks the following relief.

"

1. The return of plaintiff's cattle or, in lieu thereof, payment of its (sic) value calculated on the date of judgment;
2. The delivery of all fruits (or payment of their value) that have accrued to the Defendant;

3. Costs of suit;
4. Further or alternative relief."

[2] Plaintiffs claims are resisted by the defendant who was represented by Mr. van Vuuren.

[3] At the heart of the dispute lies a written agreement concluded between the parties on 07 November 2008. It reads as follows:

"Mondrundum (sic) of Agreement

Signed between:

Charles Diergaardt

ID No. 561004 08 000 41

Residing at Wendelstein 1026

Stock Brand No. SOCOOODO

Andre Sinclair Aspara

ID No. 600523 002 93

Residing at Kaukurust 114

The parties to this agreement agree:

1. To borrow (sic) N$2500 x 4 = N$10 000-00 to

   Andries Sinclair Aspara

2. To put 4 cattle Bonsmara type in as security for the period Nov – Dec 31, 2008.
3. That Aspara would (sic) pay back an amount of N$14 000-00 to Charles Diergaardt for the amount advanced to him on 31 November 2008.

This done and signed on 7 November 2008 at Gobabis in the presence of the undersigned witnesses.

_____

C. Diergaardt

_____

A.S. Aspara

[4] It is common cause between the parties that the signatures on the agreement are those of the plaintiff and the defendant respectively.

[5] The following facts are also not placed in issue by either of the parties.

(a) The defendant advanced the sum of N$10 000-00 to the plaintiff.

(b) The plaintiff delivered 4 head of cattle to the defendant.

(c) The loan of N$10 000-00 together with an amount of N$4 000-00 was paid by the plaintiff to the defendant albeit it not on 31 December 2008 as provided for in the written agreement, but in instalments subsequent to that date and that the defendant accepted payment.

(d) The defendant is still in possession of the cattle delivered to him by the plaintiff.

(e) The defendant has tendered the return of the N$14 000-00 paid to him by the plaintiff.

(f) The defendant refuses to return the cattle to the plaintiff.

[6] It is apparent from par. 8.2 of the defendant's plea that the defendant's refusal to return the cattle is based on the averment that plaintiff breached a material term of

the agreement by not making payment on 31 December 2008 and that in terms of the express terms of the agreement, the defendant had taken ownership of the cattle as from that date.

[7] The sole issue in dispute before me was whether upon the plaintiff's failure to pay the sum of N$14 000-00 by 31 December 2008, the parties concluded further verbal agreements in terms whereof the plaintiff was given further extensions of the date for payment. The plaintiff testified that such agreements were indeed entered into. The defendant took issue with that contending that the only agreement concluded was the written agreement concluded on 7 November 2008.

[8] The plaintiffs' difficulty is that he did not allege in his particulars of claim that any further verbal agreements were concluded subsequent to 31 December 2008.

[9] This necessitated Mr. Conradie to seek an amendment to the plaintiffs particulars of claim to include the necessary averments that further agreements were concluded. The proposed amendments were understandably resisted by Mr. van Vuuren.

[10] It seemed to me however, that there was a possibility that given the facts which were common cause and the defence advanced by the defendant, that defendants' entitlement to ownership or otherwise of the cattle, based on the written agreement, which according to the defendant was the only agreement could possibly dispose of the case. I accordingly directed in terms of Rule 33 that the following issues be separated from the other issues.

"If the defendant is entitled to claim that he is not obliged to return the cattle and instead to retain possession thereof, whether by virtue of the written agreement

concluded between the parties and if not whether by way of any rule of substantive law".

[11] I directed the parties to file heads of argument which they subsequently did and postponed the matter to 7 June 2011, on which date I heard counsels arguments. I thereafter reserved judgment.

[12] Mr. van Vuuren sought to persuade me that clause 2 of the agreement properly interpreted means that should the plaintiff fail to repay the loan and the interest by 31 December 2008, the defendant would without more become the owner of the cattle. He points firstly to the evidence of the plaintiff which was to the effect that should the plaintiff have died for instance, the defendant could keep the cattle. Furthermore he argues with reference to dictionary meanings of the word "pledge' that forfeiture of the things pledged follows upon non-payment of the principal debt.

[13] Clause 2 of the agreement on my reading of it is clear and unambiguous. The clause provides in clear terms that the four cattle were delivered to the defendant as security. It was in effect a pledge in *securitatem debiti.*

If the words in the clause are not ambiguous, it is not permissible in interpreting that clause to have regard to extraneous evidence in order to ascertain the meaning thereof. In ***Union Government v Vianini Ferro – Concrete Pipes (Pty) Ltd 1941 AD 43*** at p. 47 Watermeyer JA said:

> *"Now this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may*

be given save the document or secondary evidence of its contents nor may the contents be altered, added to or varied by said evidence."

[14] In ***National Board (Pretoria) (Pty) Ltd vs Estate Swanepoel 1975 (3) SA 16*** court stated that:

"When a jural *act is embodied in a single memorial all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act."*

[15] Likewise in ***Warman vs Hughes 1948 (3) SA 495 (A)*** the court stated at p. 505 that:

"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain not what the parties intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract."

[16] As far as Mr. van Vuuren seeks to rely on dictionary meanings, that does not assist him. In law a pledge in *securitatem debiti* must be returned to the pledgor once the principal debt and other charges agreed upon are paid. Admittedly in certain circumstances the court is permitted to have regard to extraneous evidence but none of those arise in the matter before me.

[17] Mr. van Vuuren's agreement that clause 2 of the agreement is to be understood that the Defendant acquired ownership without more, once the debt was not repaid upon the date due for payment, creates a further problem for the defendant. The clause, thus interpreted, is plainly a *pactum commissorium*.

[18] In ***Meyer vs Hesseling 1992 (3) SA 851 (NMS)*** the court stated the following on p. 863:

> *"The classical example of a pactum commissorium which the common law refuses to countenance arises from an agreement in terms of which the lender secures the debt of the borrower through a mortgage or pledge over the property of the borrower and there is a stipulation that if the money so loaned is not paid on due date, the lender would be entitled to become the owner of the security pledged or mortgaged, regardless of its value. The public policy objection to this kind of arrangement seems to be based on two grounds. The first ground is that such an arrangement is oppressive to the borrower because his position is weaker than that of the lender when the agreement is entered into and such an agreement gives to the lender the unfair advantage of being able to take for himself property for in excess of the quantum of the loan when the date for payment of the loan arrives and the borrower is unable to repay. The second objection is that such an agreement would often result in parate executie or some form of self-help without recourse to the courts. "*

It was conceded by Mr. van Vuuren in the heads of argument he had prepared that clause 2 of the agreement is a pactum commissorium and therefore illegal and not capable of being enforced."

[19] In an effort to overcome this difficulty he contended if I understood him correctly, that the entire agreement was illegal. Consequently plaintiff could not sue on that illegal agreement. The fact of the matter is though that only clause 2 would be incapable of being enforced and not the entire agreement. That portion of the agreement which provides for the granting of a loan and the terms for repayment are

separable from the illegal clause 2 and enforceable in law. Mr. van Vuuren's argument also begs the question on what basis the Defendant could acquire rights of ownership from an illegal contract.

[20] It follows that on either basis the defendant is not entitled to retain the cattle on the basis that he is the owner thereof. The cattle must be returned to the plaintiff together with their progeny.

[21] I must add that the plaintiff made no attempt to establish the value of the cattle through expert testimony to that effect and effectively abandoned that portion of the relief claimed.

[22] There will accordingly be judgment for the plaintiff in the following terms:

1. The defendant is ordered to return the cattle pledged by the plaintiff together with their progeny, if any.
2. Costs of suit.

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MILLER, AJ

ON BEHALF OF THE PLAINTIFF:	Mr. Conradie
INSTRUCTED BY:	Conradie & Damaseb
ON BEHALF OF THE DEFENDANT:	Mr. van Vuuren
INSTRUCTED BY:	R. Olivier & Co.