



CASE NO: I 3583/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WILBARD ASHIPALA

PLAINTIFF

and

THUSNELDE SONIA NASHILONGO

FIRST RESPONDENT

ONGWEDIVA TOWN COUNCIL

SECOND RESPONDENT

CORAM: Smuts, J

Heard on: 1 and 2 March 2011 and 21 July 2011

Delivered on: 28 July 2011

JUDGMENT

[1] **SMUTS J:** [1] This is an action for specific performance of a sale agreement in respect of immovable property in Ongwediva (Erf 3627 Ongwediva). The issues in dispute between the parties are relatively confined.

[2] [2] The plaintiff approached the first defendant to purchase the property in question in December 2005. They met on 16 December 2005. After the plaintiff viewed the property, the parties agreed on a purchase price of N\$80,000.00. But the property was not registered in the name of the first defendant. It was still in the name of the Ongwediva Town Council, subsequently joined as second defendant. The first defendant had purchased the property from the Ongwediva Town Council under a loan financing scheme for low cost housing known as the Build Together Scheme.

[3] [3] Shortly before the sale, the first defendant enquired from the Council as to the outstanding amount on this loan and in respect of other charges owing in respect of the property. The Council provided a certificate in respect of the property certifying that the amount owing under the Build Together loan was N\$22,500.00 and that a further amount of N\$2,496.63 was owing in respect of other charges. The total sum thus certified as owing to the Council as at 12 December 2005 was N\$24,996.63. The certificate was however issued on 14 December 2005.

[4] [4] After viewing the property, the plaintiff, who gave evidence, stated

that he had the total purchase amount with him in cash. After being informed that there was money still owing to the Council, he proceeded to pay the sum of N\$55,003.67 into the first defendant's banking account at Nedbank in Oshakati. His evidence was further that he then proceeded with the first defendant, who was accompanied by her younger brother to the offices of the Council. He testified that he paid the further sum of N\$24,996.63 to the Council by handing over the cash amount to the first defendant who in turn paid it over to a cashier at the Council. The plaintiff received the original receipts for the two separate amounts which made up the sum of N\$24,996.63. Thus, he testified, he had paid the purchase price in full.

[5] [5] After this had been done, the parties then proceeded to a legal practice (Hitula Associates) where the first defendant knew an employee. The first defendant provided the instructions to that employee to prepare a deed of sale for the parties to sign which was then duly done and signed by the parties. Shortly afterwards (in January 2006) the plaintiff was granted occupation of the property and has been in the occupation ever since. The plaintiff caused the Council to transfer the local authority accounts into his name and has since his occupation paid all rates and taxes and other local authority charges.

[6] [6] The key factual dispute between the parties concerns the payment of the sum of N\$24,996.63 to the Council. The first defendant denies that the plaintiff paid this sum. In her evidence she stated that she attended to that payment, with the assistance of her younger brother.

[7] [7] She further testified that on 12 October 2007 she wrote a letter of cancellation of the agreement to the plaintiff (on the basis of his alleged failure to pay this sum). This letter is short and stated the following:

“I refer to the above matter and to my several telephone requests for you to pay the balance of the purchase price of N\$24,996.63. Despite my several demands you have refused to pay the money. In terms of clause 12 of the agreement of sale I hereby cancel the agreement for non-payment of the balance you owe.”

[8] Shortly afterwards, the plaintiff approached this Court in an urgent application issued on 28 November 2007 to interdict the first defendant and the Council from transferring the property to the name of the first defendant or to any other person or entity other than the plaintiff, pending the finalisation of an action for specific performance. Certain other relief was sought. The plaintiff feared that the first defendant intended to sell the property to someone else. At the same time, the plaintiff instituted his action for specific performance against the first defendant, seeking an order that she take all necessary steps to pass transfer of the property to him and an order that if she failed to do so within 10 days of a Court order, that the deputy sheriff be authorised to take the steps on her behalf. The interim interdict was not opposed. The parties instead focussed upon the action.

[8] [9] In the first defendant's plea, two defences were essentially raised.

In the first instance, it was contended that it was legally impossible for her to provide specific performance by virtue of the fact that the property was not registered in her name but in that of the Council. Her further defence was that she had cancelled the sale in terms of the letter of cancellation quoted above and tendered the return of the sum of N\$55003,37.

[9] [10] In view of the first defence, the plaintiff subsequently applied for the joinder of the Council. It was common cause between the parties that the application for joinder, which was unopposed, had been granted. This brought about an amendment of the particulars of claim to include reference to the Council and to seek relief against the Council to effect transfer of the property to the plaintiff. The Council has not defended the action and thus abides the outcome of the action.

[10] [11] In her plea, the first defendant admitted the agreement between the parties. That agreement first sets out the names of the parties and their identity numbers and their marital status and provides for a full description of the property in question. It then provides that the seller had agreed to sell and that the purchaser had agreed to purchase the property subject to certain conditions which were set out. The first condition merely provides:

“The seller hereby sells to the purchaser who hereby purchases the property.”

[11] [12] Of relevance to this matter is clause 2 which states:

“The purchase price of the property shall be the sum of N\$80,000.00 (eighty thousand Namibian Dollars) and it is hereby recorded that the said amount was already paid by the purchaser to the seller on the 16th day of December 2005.”

[13] There then followed a series of clauses which are of a standard nature in sales of immovable property such as the obligation on the purchaser to provide an acceptable bank or building society guarantee to the seller for the full purchase price and to sign the necessary documentation and the like.

[12] [14] The first defendant did not in her plea seek the rectification of the deed of sale with reference to the term which recorded that the amount had already been paid by the purchaser to the seller on 16 December 2005. Nor did the plaintiff seek the rectification of terms which stated that the purchaser provide an acceptable bank or building society guarantee to the seller. Mr Narib who appeared for the plaintiff, stated that it was not necessary for the plaintiff to do so and that terms of that nature are merely standard and had been included and should be regarded as *pro non scripto* by virtue of the express acknowledgement and recordal that the full purchase price had been paid. In view of the evidence of the parties and specifically that of the first defendant who had stated that the agreement had been prepared by an acquaintance of hers in the employ of the legal practitioner firm in question who was not a qualified practitioner and upon her instructions so that it could be signed straightaway, I am inclined to accept this submission by Mr Narib.

[13] [15] The plaintiff gave evidence to the effect outlined above. It was put to him in cross-examination that he had not paid the disputed sum to the Council. He was adamant in his version that he had done so and was not shaken in his cross-examination and did not deviate from this or other elements of his evidence in cross-examination. When he was asked as to whether the cashier would also give evidence on his behalf, he confirmed that this would be the case. He was then asked as to whether he had discussed the matter with her during the intervening years. Except for speaking to her at Court (shortly before they gave evidence in March 2011), he denied that he had met with her and discussed the matter during the intervening years.

[14] [16] The cashier, Ms Renate Namugongo testified for the plaintiff. She stated that she had done so because of a subpoena which had been served upon her. Ms Namugongo stated that she recalled that the plaintiff and first defendant were together when the payment in question was made. She recalled that the plaintiff had given the cash to the first defendant to pay the amounts and that this had occurred at the cubicle where she served the public. She then proceeded to issue a receipt in her own handwriting in respect of the Build Together Scheme and provided a computer generated receipt in respect of the other charges owing to the Council.

[15] [17] Ms Namugongo confirmed her own handwriting on the receipt for the Build Together loan and confirmed that the other receipt was issued by her.

Ms Namugongo stated that she had been contacted in 2007 by the attorney who had at time acted on behalf of the plaintiff, a certain Mr Josua of Conradie & Damaseb. She had then confirmed the receipt and that she recalled payment had been thus made and provided a confirmatory affidavit in respect of the interim interdict which the plaintiff had then brought.

[16] [18] In cross-examination she stated that she had spoken to and met with the plaintiff subsequent to making her affidavit in 2007. She stated that this had occurred in 2008 when working at the Oshakati Town Council where she is currently employed. At that time was also a cashier at the Oshakati Town Council and had recognised the name of the plaintiff when he had come to pay an account there. They then briefly discussed the matter.

[17]

[18] [19] When asked as to why she would remember the transaction and the fact that the plaintiff had paid over the cash amount to the first defendant in her presence for payment, she stated that she had specifically recalled the transaction because of the large cash amount involved, referring to it as “**huge**” and that it was out of the ordinary. Although she did not at that stage know the first defendant by name, she had recognised her as a person who had on previous occasions paid accounts at the cash office of the Ongwediva Town Council where she worked.

[19] [20] The plaintiff also called Mr Josua, formerly of Conradie & Damaseb. He confirmed that the plaintiff had provided him with the original receipts from the Council and that he had acted for the plaintiff at the time. A

candidate legal practitioner of the plaintiff's current firm of legal practitioners was called to give evidence as to the fact that the original receipts had gone missing. But it turned out that it was common cause that the plaintiff was given the original receipt and came to possess it. This was not essentially put in issue and the first defendant subsequently confirmed this.

[20] [21] At the close of the plaintiff's case, Mr Namandje, who represented the first defendant applied for absolution from the instance on the basis of impossibility of performance and furthermore that there was no evidence prior to the purported cancellation of the agreement that the specific documents referred to in the further particulars to the particulars of claim as necessary for the first defendant to complete in order to effect transfer, had been sought from her. After carefully considering the application for absolution and the submissions which had been advanced by the respective parties and together with the evidence, I declined the application. I further deal with the issue of impossibility of performance below.

[21] [22] The first defendant as well as her brother gave evidence in support of her case. She confirmed that she had obtained the certificate setting out the outstanding balances in respect of her indebtedness on the Build Together loan as well as the other charges owing to the Council. This was done in advance of the sale. As I have already pointed out, the versions of the first defendant and plaintiff diverged when it came to the payment of these accounts.

Her evidence, supported by her brother, was to the effect that the two of them had proceeded to the Council offices prior to meeting the plaintiff and that her brother had physically made the payment on her behalf and in her presence. According to them, they met with the plaintiff subsequently and proceeded to Nedbank in Oshakati for the payment of the further sum into the first defendant's account and thereafter went to the offices of Hitula Associates to sign a deed of sale. The first defendant stated that she had arranged this with an acquaintance of hers and provided the instructions for the terms set out in the deed of sale.

[22] [23] The first defendant denied having made a declaration at the police station to the effect that she had sold the house for the sum in question. This declaration was not provided in evidence but had been attached to the plaintiff's affidavit in support of the interim application in this matter. She was unable to explain why the identity number given for her in that short statement differed with only one digit from her actual identity number and the address given was the former erf number allocated to her mother's house where she stayed at the time. The erf number had subsequently changed. She was unable to provide an explanation as to why her full names and this erf number should have been provided as well as the identity number which was only one digit out.

[23] [24] The first defendant's explanation for having the large amount of cash available – some N\$25,000.00 – to pay the account was not in my view convincing. She said that her occupation as a self-employed business woman involved selling items. When pressed, although only to a very limited extent on this issue, she merely stated that she was always collecting money and was

always selling and thus having money available. I found this somewhat unconvincing in the context of a low income housing loan recipient and without any further explanation as to the nature of her sales and in the context of the facts viewed as a whole. The first defendant also failed to provide any explanation as to why the deed of sale, prepared upon her instructions, should have contained clause 2 which stated that the purchase price had already been paid in full. Apart from this clause and the purchase price and the names and details of the parties and the description of the property, I agree with Mr Narib's submission that the further terms would appear to be of a standard nature. These further terms seemed to have been included by the drafter who was not a legal practitioner but merely an employee of that office. They contained no specific reference to the parties or to the actual transaction and would usually be encountered in deeds of sales of immovable property. This would also explain why there were not consequential amendments to them to take into account that the full purchase price had already been paid.

[24] [25] The first defendant's explanation for the plaintiff having had the original receipts in respect of the sums paid to the Council, is also in my view unconvincing. She stated that she had given him the receipt to show that the house had no debt and wanted **"to be fair on him"**. Exhibiting the receipt to him or providing a copy would have had the same effect. When it was put to her that she thus obtained no proof of her assertion that she had paid the amount, she stated in response that she often gave her customers original slips from books when selling items.

[25] [26] The plaintiff stated that he had retained the deposit slip of his payment of the sum into the first defendant's Nedbank account and had retained the original receipts of his payments to the Council. He had stated this when asked as to why he had not paid the cash amount to the first defendant. He said he did not do so as he required proof of payments thus made by him by retaining documentary receipts to establish that.

[26] [27] Although the first defendant stated that she was not involved in the changing the name of the accountholder with the Council from her name to that of the plaintiff very shortly after the sale, she did not dispute that the plaintiff had from then onwards paid all the charges to the Council and also did not dispute that the account was in his name. She also confirmed that he took occupation very shortly after the sale. She conceded that she had not taken any legal steps to evict the plaintiff but said that she had approached the Police to do so when seeking to cancel the sale.

[27] [28] The first defendant also testified that immediately after seeing the amount paid into her Nedbank account, she proceeded to repeatedly ask the plaintiff to provide the balance and that he had responded that she should proceed to transfer to the property into his name and that he would return from Oranjemund in January (2006) and would then pay the balance, when he took occupation. This was not however put to the plaintiff at all. She also stated that she **"kept on asking the plaintiff to pay"** the balance and that he merely had responded that he would pay in the future. This was also not put to the plaintiff in cross-examination.

[28] [29] A further factor which I take into account with regard to the first defendant's credibility, is that her counsel put to Ms Namugongo that she (Ms Namugongo) had landed into trouble because of her unlawful involvement and collusive conduct with the plaintiff and departed the employment of the Council as a consequence. When I enquired from Mr Namandje whether there would be evidence to this effect when he put this to Ms Namugongo, he responded by stating that the first defendant would give evidence to that effect. When she gave her evidence however she was not able to provide any support for the allegation of collusive or unlawful conduct on the part of Ms Namugongo.

[29] [30] In cross-examination, the first defendant also stated that she did not expect the plaintiff to buy her house on 16 December 2005. This would in my view seem to contradict her own version as to the need to pay off her loan and Municipal charges for the purpose of the sale.

[30] [31] The first defendant furthermore did not oppose the interim relief and also in her plea admitted the agreement. She did not deny that clause 2 did not reflect the reality and also did not apply for rectification of the agreement. The first defendant furthermore did not create a favourable impression as a witness. She was evasive about an elementary question as to the proximity of Ongwediva to Oshakati. Whilst the plaintiff was also not entirely satisfactory, in denying that he had ever met with Ms Namugongo after the sale agreement in December 2005 until meeting at Court, this was not an aspect which is material to the case. I also take into account that the parties gave evidence about the

key events more than five years after the fact.

[31] [32] On the material issues, the plaintiff's evidence was satisfactory and he was corroborated by Ms Namugongo, an independent witness, who favourably impressed me as a witness. I accept her version. Her explanation for remembering the payment in question when approached by Mr Josua less than two years afterwards (at the time of the application for an interim interdict) is plausible with reference to the large amount involved and having seen the first defendant on prior occasions at the offices of the Council. I accept her version and that of the plaintiff in respect of the crucial question as to the payment of the local authority charges and reject the version of the first defendant and her brother. The version of the plaintiff, supported by Ms Namugongo, is also supported by the terms of the agreement prepared on the instruction of the first defendant. It is also supported by the fact that he retained the original receipt. These contemporaneous manifestations constitute objective facts which were not put in issue by the first defendant and were also persuasive to me in accepting the plaintiff's version and in rejecting the first defendant's version in the context of the probabilities and upon the totality of her evidence.

[32] [33] Having thus found that the plaintiff had duly performed in terms of the agreement, the question arises as to whether he is entitled to specific performance.

[33] [34] Mr Namandje argued on behalf of the first defendant that he was not on the grounds of impossibility of performance. The impossibility contended

for is because the property was at the time – and still is – registered in the name of the Council and that the first defendant would not be in a position to give transfer. Mr Namandje also submitted that the granting of specific performance is a discretionary matter and that the plaintiff had not made out a case as to why he should obtain such an order against the Council. It was however not disputed that the Council was the registered owner and that the first defendant had purchased the property from the Council with its assistance through a Build Together loan which had been discharged in full following the plaintiff's payment of the outstanding amount of that loan.

[34] [35] Mr Namandje correctly accepted that the first defendant bears the onus of establishing the impossibility to perform.¹

[35] [36] The starting point however in a contractual context, is that a plaintiff would be entitled to claim specific performance of the defendant's contractual obligations subject only to the qualification that the Court has a discretion to grant or refuse an order of specific performance. This right has been described as a

[36]

“cornerstone of our law relating to specific performance. Once that is realised, it seems clear, both logically and as a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not

¹Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982(1) SA 398 (A) at 442-443.

affect the plaintiff's right in some way or another. The degree to which it is affected depends, of course, on the nature and extent of the rule; theoretically, I suppose, there may be a rule which regulates the exercise of the discretion without actually curtailing it but, apart from the rule that the discretion is to be exercised judicially upon a consideration of all relevant facts, it is difficult to conceive of one. Practically speaking it follows that, apart from the rule just referred to, no rules can be prescribed to regulate the exercise of the Court's discretion.

This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle (Ex parte Neethling (supra at 335)). It is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy (cf De Wet and Yeats Kontraktereg en Handelsreg 4th ed at 189). Furthermore, the Court will not decree specific performance where performance has become impossible. Here a distinction must be drawn between the

case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all. (See De Wet and Yeats (op cit at 189 n 61 and the cases there cited); and see too in this connection Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd (supra at 441 - 3).”²

[37] [37] The first defendant has however not in my view discharged the onus upon her to establish the impossibility of specific performance. Her intention was after all to pass transfer to the plaintiff once she had obtained registration of the property from the Council after her outstanding indebtedness on her loan had been settled. The first defendant has furthermore provided no reason whatsoever why this simple transaction cannot proceed, especially given the fact that the outstanding balance had been paid. She has provided not reason why she cannot sign and proceed with the necessary documentation in order for this to occur. The fact that she may have to pay conveyancing fees and transfer costs does not in any way amount to an objective impossibility in the sense accepted by the authorities.³ Mr Namandje’s submission that ownership would not pass where a real agreement is defective with reference to the recent judgment of the Supreme Court of Appeal in South Africa in Lagator McKenna Inc and another v Shea and others⁴ is however taken out of the

²Benson v SA Mutual Life Assurance Society 1986(1) SA 776 (A) at 783-785

³Christie: The Law of Contract in South Africa, (5 d) 2006 525-526 and the authorities collected there.

⁴2010(1) SA 35 (SCA) at 44

context of that case and does not provide any support for his contention.

[38]

[39] [38] It cannot be said on the facts of this matter that there was not a real intention on the part of the first defendant to effect transfer of ownership and for the first defendant to become the owner of the property. All that was merely required was for her to sign the necessary documentation and if need be pay the necessary transfer costs in order to effect transfer of the property into her own name. No evidence was provided as to why this could not occur. The first defendant, having entered into the agreement of sale had the duty to place herself in a position to give transfer. It would be no defence to an action for specific performance for her to fail to take those steps and state that she was not the registered owner.⁵ The first defendant provided no explanation as to why she could not procure transfer of the property. The fact that she was not registered owner – of itself – would not preclude enforcement of the sale by way of specific performance.⁶

[40] [39] I accordingly conclude that the first defendant did not discharge the onus of establishing an impossibility to comply with the terms of the agreement.

[41] [40] I understood Mr Namandje to contend that it was also impossible by virtue of the fact that the plaintiff had abandoned any relief or order against the Council and that specific performance could only occur if an order were to be made against the Council. He referred to paragraph 44 of Mr Narib's heads

⁵Stieger v Selling 1915 NPD 609 (Full Bench)

⁶Benkenstein v Neisius and Others 1997(4) SA 835 (C) at 847-848.

of argument on behalf of the plaintiff which stated:

“No order is sought against the second defendant, and to the extent that pleadings reflect a prayer against the second defendant, same is hereby expressly abandoned.”

[42] [41] When I enquired from Mr Narib in reply concerning this issue in view of the fact that the Council is the registered owner and that transfer would need to be effected from the Council (presumably to the first defendant and then to the plaintiff), he referred me to Steiger v Selling.⁷ He contended that it was the duty on the part of the first defendant to place herself in a position to give transfer to the plaintiff and that the plaintiff would only need to require an order compelling the first defendant to act accordingly. But he said he would prefer to withdraw the abandonment in the event that I find that I find that relief would be necessary against the Council to achieve specific performance. Mr Namandje submitted that once the relief was abandoned, it could not be reinstated. I disagree that this would be the case in this instance.

[43] [42] Firstly, abandonment by a party can occur only upon having full knowledge of his or her rights.⁸ The plaintiff would not appear to be aware of the extent of his rights in this regard. But more importantly, the abandonment was not pleaded and was merely contained in counsel's heads of argument. It was

⁷1915 NPD 609 at 617

⁸ Borstlapp v Spangenberg 1974(3) SA 695 (A);

Grobbelaar and another v Council for the Municipality of Walvis Bay and another 1997 NR 259 (HC).

in my view in the form of a legal concession made by a party's representative which, if incorrect, should not be binding upon that party and capable of being withdrawn. A severe injustice could otherwise result. In my view, it would, despite the dictum in Steiger v Stelling,⁹ be necessary to grant an order against the Council to pass transfer to the first defendant who must then in turn pass transfer to the plaintiff to effect specific performance (in accordance with the Deeds Registries Act, 1947). This is in essence what was sought in the amended particulars of claim and not opposed by the Council, even if the plaintiff had not sought the proper sequence as required by the Deeds Registries Act.

Conclusion

[44] [43] It follows that the plaintiff is in my view entitled to specific performance of the contract of sale and that the first defendant is obliged to take all necessary action to provide transfer of the property to the plaintiff and that the Council is to be ordered to make the necessary transfer to the first defendant to achieve specific performance. The plaintiff is also entitled to the costs of this action.

[45] [44] I accordingly make the following order:

[46]

1. The second defendant is directed to pass transfer to the first defendant. The first defendant is directed to take all necessary steps within 10 days from this order including paying the

⁹*supra*

necessary transfer costs to pass transfer of Erf 3627 Ongwediva from the second defendant to her and, thereafter to pass transfer of the property to the plaintiff within 10 days of such transfer to her, and failing compliance herewith, the deputy sheriff is authorised to take such steps as may be necessary and to sign such documents as may be necessary to give effect to this order.

2. The second defendant is directed to take such steps as are necessary to pass transfer to the first defendant against payment of such transfer costs by the first defendant and any outstanding charges owing to it by the plaintiff within 10 days of such payments and failing compliance herewith, the deputy sheriff is authorised to take such steps as may be necessary and to sign such documents as may be necessary to give effect to this order.
3. The first defendant is directed to pay the costs of this action.

Smuts, J

ON BEHALF OF PLAINTIFF

Mr G Narib

Assisted by:

Instructed by: Kwala & Company Inc

ON BEHALF FIRST RESPONDENT

Assisted by:

Mr S Namandje

Instructed by:

Sisa Namandje & Co