CASE NO: I 2609/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LAZARUS NGHIFENGALI HAMUTENYA	**1ST PLAINTIFF**
MAGRIETA SAKARIA	**2ND PLAINTIFF**

and

JASUVA KUVARE	**1ST DEFENDANT**
NATIONAL HOUSING ENTERPRISE	**2ND DEFENDANT**

CORAM: UEITELE, J

Heard: 12 & 13 JULY 2012

Delivered: 3 AUGUST 2012

JUDGMENT:

UEITELE, J.:

A INTRODUCTION AND BACKGROUND

[1]In thisaction the plaintiffs, who are married in community of property to each other, claimspecific performance of a sale agreement in respect of

immovable property situated in Katutura, Windhoek (Erf 15160, Katutura) from the defendant[1]. The property was and is still not registered in the defendant's name, it is still registered in NHE's name.

[2]I will briefly set out the background of the case before I go into the issue which this Court is called upon to determine.

[3]On 30 October 2010 the plaintiffs learned that first defendant intends to sell a property of his, which is Erf 15160, Katutura. The plaintiffs engaged the defendant and after a discussion and viewing of the property they agreed that they will purchase the property for an amount of N$ 50 000-00. The plaintiffs then paid the defendant an advance amount of N$5000, 00.

[4]On 02 November 2010 the plaintiffs paid the amount of N$50 000, 00; (in respect of the purchase price) into the Trust Account of BD Basson Legal Practitioners, which amount was for the benefit of the defendant.

[5]On 3 November 2010 the plaintiffs and the defendant signed a deed of sale. The deed of sale amongst others provides that:

(a) The purchase is the amount of N$50 000,00 which must be paid as follows:

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[1] I will in this judgment refer to the immovable property as the property and for the sake of convenience, to the first defendant as the defendant and the second defendant simply as "NHE"

(i) A deposit of N$10 375,00 was to be paid on the date the parties sign the agreement;

(ii) The balance of the purchase price was to be paid in cash against the registration of the property into the names of the plaintiff.

(b) The plaintiffs were liable to pay the transfer costs and the balance that was outstanding with the National Housing Enterprise (defendant);

(c) The defendant was liable to pay for all municipal services and the rates and taxes.

[6]On 12 July 2011 the first defendant through his legal practitioners of record, wrote to Sauls & Company Law Chambers informing them that the defendant is cancelling the deed of sale concluded between the plaintiffs and him, on the basis that the plaintiffs allegedly breached the terms of thedeed of sale.

[7] On 10 August 2011, the plaintiffs' legal practitioners of record addressed a letter to the defendant's legal practitioners of record denying that their clients (i.e. the plaintiffs) breached any term of the deed of sale and demanding that the defendant must comply with the terms of the deed of sale. The plaintiffs received no response to their demand and on 23 August 2011 they (plaintiffs) issued summons out of this Court in which summons they claimed specific performance from the defendant. NHE did not participate in the proceedings.

[8]The case was set down for trial on 12 and 13 July 2012 and on 12 July 2012 the case was called before me. As I have indicated above, the plaintiffs are claiming specific performance, in terms of the agreement signed on 3 November 2010. The defendant is resisting the plaintiffs claim on the basis that he had cancelled the deed of sale, as a result of breaches committed by the plaintiffs.

B ISSUE FOR DECISION

[9]The issue which I am called upon to decide is a reasonably confined one, namely whether the plaintiffs breached the agreement thus entitling the defendant to cancel the agreement.

C SUMMARY OF THE EVIDENCE

Summary of plaintiffs' evidence

[10]At the hearing of this matter, the plaintiffs testified in support of their claim and also called Ms Elmarie Thompson. The defendant testified in his case. I will thus in the next paragraphs summarize the evidence placed before me.

[11]The second plaintiff was the first to testify. Her evidence was to the effect that on 30 October 2010, a person who was employed by the defendant informed them (first & second plaintiff) that the defendant wants to sell his property. She then indicated her interest and they went to view the property. After viewing the property she indicated that she will wait for her husband (the first plaintiff). When the first plaintiff arrived home, they discussed the sale and agreed that they will purchase the

property. They then had a discussion with the defendant and after that discussion, they agreed that they will purchase the property for an amount of N$50 000, 00 and that they will also pay the balance of the amount (in respect of the loan taken by defendant) still owing to NHE.She testified that at that point in time the amount was approximately N$ 14 000-00.

[12]After they reached the agreement, the defendant indicated that he was in urgent need of money and requested the plaintiffs to pay him N$5000, 00. On 30 October 2010, the plaintiffs paid the amount of N$5000, 00 to the defendant. On 2 November 2010, the plaintiffs requested thedefendant to accompany them to BD Basson Legal Practitioners for purposes of finalizing the deed of sale. BD Basson Legal Practitioners indicated that they were busy renovating their offices and did also not have a conveyancer in their services and could thus not help them. The plaintiffs paid the amount of N$50 000, 00 (in respect of the purchase price) into the Trust Account of BD Basson Legal Practitioners. BD Basson Legal Practitioners then referred the parties to Sauls Metcalfe Attorneys.

[13]The parties then went to Sauls Metcalfe Attorneys where the deed of sale was drafted and explained to them. Second plaintiff testified and this was confirmed by first plaintiff, that the defendant was accompanied by a person whom he (defendant) said is his brother’s son and that person also acted as the interpreter for him. After deed of sale was explained to them they signed the agreement. After they signed the agreement, BD Basson

Legal Practitioners transferred the money (i.e. the N$50 000, 00) by means of Electronic Funds Transfer to Sauls Metcalfe Legal Attorneys.

[14]On 5 November 2010, the defendant requested that the plaintiffs pay him an amount of N$5 375, 00. The plaintiffs then instructed Sauls Metcalfe Attorneys to pay the defendant an amount of N$5 375, 00 for which amount the defendant received a trust cheque from Sauls Metcalfe Legal Practitioners.

[15]On 21 January 2011, the defendant went to Sauls Metcalfe Attorneys and requested an amount of N$10 000, 00, Sauls Metcalfe Attorneys then called the first plaintiff, she went there and authorized Sauls Metcalfe Attorneys to pay the defendant an amount of N$10 000, 00, but on condition that the N$10 000, 00 would be deducted from the purchase price once the property is registered in the names of the plaintiffs. She further testified that on that same day Sauls Metcalfe Attorneys issued a letter of undertaking to NHE. In the letter of undertaking, Sauls Metcalfe Attorneys advisedNHE that: "*At the request ofLASARUS AND MAGRIETA HAMUTENYA we* [Sauls Metcalfe Attorneys] *hold at your disposal the sum of N$14 328, 83 (forteen thousand and three hundred and twenty eight dollars and eighty three cents) plus ……. which amounts will be payable to you upon the simultaneous registration of the following transaction:*

> **(1)** *Registration of a transfer from NHE to JASUVA KUVARE of Erf 60 KATUTURA;*

(2) *Registration of a transfer from JASUVA KUVARE to LASARUS AND MAGRIETA HAMUTENYA of ERF 60 KATUTURA*." {My insertions}.

[16]On 9 June 2011 the defendant again went to Sauls & Company Law Chambers (the successor of Sauls Metcalfe Attorneys) requesting an amount of N$7 000, 00. On this occasion Sauls & Company Law Chambers refused to make any advance payment to the defendant. The plaintiff was called to the offices of Sauls & Company Law Chambers and there the defendant pleaded with her for the money. She called her husband who was at the Hosea Kutako International Airport at the time. He came and they paid an amount of N$7 000, 00 to the defendant. The defendant acknowledged receipt of the money and indicated that the money will be deducted from the purchase price once the property is registered into the names of the plaintiffs.

[17]On 24 June 2011 the plaintiffs were informed that the balance of the loan owed by defendant to NHE was N$16 483, 93. On 27 June 2011 they paid that amount into the trust account of Sauls & Company Law Chambers.

[18]On or about the 9 July 2011, the defendant approached the plaintiffs and indicated that he wanted more money or that the purchase price be increased. When the plaintiffs refused to give him more money or to agree to the increase in the purchase price defendant threatened to cancel the deed of sale. She further testified that the threat to cancel the

agreement were actually carried out on 12 July 2011, when the defendant through his legal practitioners of record, wrote to Sauls & Company Law Chambers (the legal practitioners then attending to the transfer of the property to the plaintiffs) informing them that the defendant is cancelling the deed of sale concluded between the plaintiffs and the first defendant, on the basis that the plaintiffs allegedly breached the terms of the deed of sale.

Summary of defendant's evidence

[19]The defendant testified in this own defense and in his evidence he confirmed that he signed the deed of sale with the plaintiffs on 3 November 2010, he also admitted that he received the amounts of N$5 000, 00, N$5 375, 00, N$10 000, 00 and N$7 000, 00 respectively. He, however, testified that the plaintiffs failed to pay him the deposit of N$10 375, 00 upon signing of the deed of sale as envisaged in paragraph 1.1 of that deed of sale.

[20]The defendant testified that,during December 2010, he concluded an oral agreement for occupation of the property by the plaintiffs prior to it being registered in the plaintiffs' names. But in cross-examination, he claimed that the oral agreement was entered into at the time when they negotiated the sale and purchase of the property, (which would have been on 30 October 2010), and the money he received in cash on 30 October 2010, was for the rent. He could however, in cross-examination, not explain why he would receive N$5,000.00 for rent on 30 October 2010 when the rental agreement was only entered into in December 2010.

[21]The defendant further testified that he has no knowledge of the payment of 2 November 2010, although he did testify that he and the Plaintiffs did attend to the offices of BD Basson Legal Practitionerssoon after they negotiated the sale and purchase of the immovable property. He also acknowledged accompanying the second plaintiff to the Bank after they left the offices of BD Basson Legal Practitioners.

[22]He further testified that on 12 July 2011, he cancelled the deed of sale with the plaintiff because the plaintiffs were in breach of the terms of the deed of sale in that they (the plaintiffs) took unreasonably long to transfer the property into their names and they failed to pay the N$10 375,00 deposit as agreed upon. The defendant further denied that Sauls & Company Law Chambers represented him. The defendant's attitude was furthermore simply that he had cancelled the deed of sale and he thus did not see the necessity of him being in court in respect of anagreement which was no longer existing.

DANALYSIS OF THE EVIDENCE AND APPLICATION OF THE LAW

[23]I have indicated above that the issue which I am called upon to decide is confined and is whether on the evidence before me, the plaintiffs were in breach of the terms of the deed of sale, entitling the defendant to cancel the agreement?

[24] The evidence is:

a. that the parties agreed to sell and purchase an immovable property for an amount of N$ 50 000-00 and the plaintiff had to pay the balance of the loan amount outstanding at NHE;

b. that the parties agreed that the purchase price was to be paid in two phases, a deposit of N$10 375 00 on the date the parties sign the deed of sale and the balance on the date the property is registered in the names of the plaintiffs;

c. that the plaintiffs paid the defendant N$ 5 000-00 on 30 October 2010 and paid N$ 50 000-00 on 02 November 2010 (the deed of sale was signed on 03 November 2010)into the trust account ofBD Basson Legal Practitioners;

d. that Sauls & Company Attorneys issued a guarantee for the purchase price to NHE;

e. that on the 08th June 2011, the first defendant signed a power of attorney authorizing Sauls & Company to Attorneys effect transfer of the property in to the plaintiff's names.

[25] The defendant is resisting the claim for specific performance on the basis that the plaintiff failed to pay the N$ 10 375-00 deposit as agreed and that the plaintiffs took too long to transfer the property into their names.

[26] I find the defendant's version that plaintiffs breached the terms of the deed of sale, to beimplausible. I say so for the following reasons: The defendant acknowledged that the purchase price was N$ 50 000-00 and that on 30 October 2010 he already received an amount of N$ 5 000-00.

The defendant alleges that he was not aware that the plaintiff paid theamount of N$ 50 000-00 to the trust account of BD Basson Legal Practitioners., which amount was transferred to Sauls & Company Attorneys. But on 05 November 2010, two days after the deed of sale was signed the defendant approached Sauls & Company Attorneys and requested an advance of N$ 5 375-00 from the purchase price, which he was paid with consent of the plaintiffs and he also agreed that that amount be deducted from the purchase price once the property was registered in the names of the plaintiffs. If he was not aware that the purchase price was deposited at Sauls & Company Law Chambers the question is who told him to go to Sauls & Company Law Chambers and request for an advance on the purchase price? The inevitable conclusion is that the first defendant was fully aware that the purchase price was deposited in the trust account of Sauls & Company Law Chambers. There is thus no merit in the first defendant’s assertion that the plaintiffs were in breach of clause 1.1 of the deed of sale.

[27] The second basis on which the defendant is opposing the plaintiffs’ claim is the allegation that the plaintiffs took too long to transfer the property into their names.

[28] It is common cause that the property was, as on 03 November 2010, when the deed of sale was signed still registered in the name of NHE. Sections 14(1)(a) and (b) of the Deeds Registries Act, Act 47 of 1937 (“the Deeds Registries Act”), in material parts read as follows:

"(1) Save as otherwise provided in this Act or in any other law or as directed by the court-

(a) transfers of land and cessions of real rights therein ***shall follow the sequence of the successive transactions in pursuance of which they are made***;

(b) it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land or of such real right…" {My emphasis}

[29] The effect of section 14(1)(a) & (b) of the Deeds Registries Act, 1937 is that the property must first be transferred from NHE to the defendant, and thereafter from the defendant to the plaintiffs. In cross examination, the first defendant was asked as to what he had done to take transfer of the property into his name and he gave no answer to that question. He was also asked whether he had complied with his obligations to pay for the municipal service and the rates and taxes, he admitted that he had not done so.

[30] It is the owner of immovable property who must transfer ownership in the immovable property to the purchaser. The defendant did not adduce any evidence to indicate what he has done to transfer the property into the names of the plaintiffs. The Plaintiffs are not the registered owners of the property, it is thus impossible for them to transfer the property in their names, as a non-owner cannot pass transfer onto him- or herself.

[31] I am accordingly satisfied that the delay to transfer and registration of the property into the names of the plaintiffs cannot be blamed on the

plaintiffs, but must be laid squarely at the defendant's door steps. I furthermore find that the plaintiffs have complied with all their obligations in terms of the deed of sale and are the innocent parties.

[32] The defendant's attitude was that he has cancelled the agreement and he can thus not be compelled to perform in respect of an agreement that does not exist. The question is thus whether there is any justification in the defendant's attitude?

[33] Christie[2] argues that the termination of a contract is a process started off by breach or repudiation … and the choice whether to terminate an agreement or not lies with the innocent party. In the South African case of ***Myers v Abramson***[3] Van Winsen J held that:

> "As a general rule a contract cannot be rescinded except by consent of both parties thereto or by order of a competent Court, on a ground recognized by law as one on which rescission can be claimed. See Wessels, Contract, vol. 1, paras. 1991 - 1996, vol. 2, para. 2917; Bacon v Hartshorne, 16 S.C. 230; Delany v Medefindt, 1908 E.D.C. 200 at p. 205. Where one party to the contract had unjustifiably repudiated it the injured party has as a general rule, the right to elect to accept the repudiation - and so by consent to put an end to the contract and sue for damages, or he is entitled to ignore the repudiation and hold the other party to the contract and claim specific performance."

[34] In this matter, I found that the plaintiffs had duly performed in terms of the agreement. It is further common cause that the plaintiffs have rejected the cancellation of the agreement by the defendant.The question

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[2] R H Christie : ***The Law Of Contract In South Africa*** 5th Ed LexisNexis at page 539
[3] 1952 (3) SA 121 (C) at page 123

which thus arises is whether the plaintiffs are entitled to specific performance?

[35] Our law is clear that a plaintiff is always entitled to claim specific performance subject only to the Court's discretion to grant or refuse an order of specific performance. See the case of ***Farmers' Cop Society (Reg) v Berry***[4]where Innes J said:

> "*Prima facie*every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze CJ in *Thompson v Pullinger* (1984) 1 OR at p 301, 'the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt'. It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of *Storey (Equity Jurisdiction*, sec 717(a)), 'it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it'. The election is rather with the injured party, subject to the discretion of the Court."

[36] Also see the decision[5] of this court where Smuts J quoted with approval[6] and described specific performance as a:

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[4]192 AD 343 at page 350

[5] The unreported judgment of***Willbard Ashipala v Sonia Nashilongo and Another Thusnelde(High Court Case*** **NO: I 3583/2007)** delivered on 28 July 2011.

[6]From ***Benson v SA Mutual Life Assurance Society*** 1986(1) SA 776 (A) at 783-785

"…cornerstone of our law relating to specific performance. Once that is realized, 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 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."{My emphasis}

CONCLUSION

[37] In the present matter, the defendant has not advanced any evidence that is impossible to perform or that an order to perform willresult in undue hardship to it. It follows that, the plaintiffsare in my

view entitled to specific performance of the deed of sale and that the defendant is obliged to take all necessary action to provide transfer of the property to the plaintiffs and that the second defendant is to be ordered to make the necessary transfer to the first defendant to achieve specific performance.

[38] As regards cost, I asked both Mr. Tjombe who appeared on behalf of the plaintiffs and Mr. Karuiahe who appeared on behalf of the first defendant to address me on the scale of costs, which I must make in this matter. Mr. Tjombe submitted arguments in this regard whereas Mr. Karuiahe did not.

[39] The basic rule is that, except in certain instances where legislation otherwise provides, all awards of costs are in the discretion of the court.[7]**.** It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and equitable one[8].

[40] There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present. In the present case, no special circumstances were placed before me.

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[7] ***Hailulu v Anti-Corruption Commission and Others*** 2011 (1) NR 363 (HC) and ***China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC*** 2007 (2) NR 674

[8] See ***Intercontinental Exports (Pty) Ltd v Fowles*** 1999 (2) SA 1045.

There is therefore, no reason to depart from this general rule. The plaintiffsare thus entitled to the costs of this action.

[41] Mr. Tjombe argued that *"the first defendant's defence to the Plaintiffs' claim is so bad in law and on the facts that the Court should exercise its discretion in favour of a punitive costs order."* He referred me to the case of ***South African Bureau of Standards v GGS/AU (Pty) Ltd***[9], where Patel, J stated:

> "Clearly there must be grounds for the exercise of the Court's discretion to award costs on an attorney and client scale. Some of the factors which have been held to warrant such an order of costs are: that unnecessary litigation shows total disregard for the opponent's rights (*Ebrahim v ExcelsiorShopfitters and Furnishers(Pty) Ltd (II)* 1946 TPD 226 at 236); that the opponent has been put into unnecessary trouble and expense by the initiation of an abortive application (In *re Alluvial Creek Ltd* 1929 CPD 532 at 535; *Mahomed Adam (Pty) Ltd v Barrett* 1958 (4) SA 507 (T) at 509B-C; *Lemore v African Mutual Credit Association and another* 1961 (1) SA 195 (c) at 199; *Floridar Construction Co (SWA) (Pty) Ltd v Kries* (*supra* at 878); *ABSA Bank Ltd(Voklskas Bank Division) v S J du Toit& Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (c) at 268D-E); that the application is foredoomed to failure since it is fatally defective (*Bodemer v Hechter*(*supra* at 245D-F)) or that the litigant's conduct is objectionable; unreasonable, unjustifiable or oppressive.

[42] I am of the view that the defendant's conduct in this matter is objectionable; unreasonable, unjustifiable, oppressiveand that it warrants me to exercise my discretion to award costs on an attorney and own client scale.

[43] I accordingly make the following order:

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[9] 2003 (6) SA 588 (TPD) at 592B-D

1. The second defendant is directed to pass transfer of the immovable property situated in Katutura, Windhoek (being Erf 15160, Katutura) to the first defendant. The first defendant is directed to take all necessary steps within 10 days from this order including paying the necessary transfer costs to pass transfer of Erf 15160, Katuturafrom the second defendant to him andsimultaneously to pass transfer of the property to the plaintiffs, and failing compliance herewith, the deputy sheriff is authorized 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 balance on the first defendant's loan account owing to it [the outstanding loan account must be paid by the plaintiffs] within 10 days of such payments and failing compliance herewith, the deputy sheriff is authorized 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 actionon an attorney and own client scale.

UEITELE, J

ON BEHALF OF THE APPELLANT: **Mr.Tjombe**
TJOMBE-ELAGO LAW FIRM INC

ON BEHALF OF THE RESPONDENT: **Mr. Karuaihe**
KARUAIHE LEGAL PRACTITIONERS