REPUBLIC OF NAMIBIA **Reportable**

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION

JUDGMENT

CASE NO. I 3943/2010

In the matter between:

ANDREAS VOGT **PLAINTIFF**

And

YANNA ERASMUS **FIRST DEFENDANT**

RUDI ERASMUS **SECOND DEFENDANT**

Neutral citation: *Vogt v Erasmus (I 3943 / 2010)[2014] NAHCMD 200 (25 June 2014)*

Coram*:* DAMASEB, JP

Heard: **04-06 March 2013, 02-04 April 2013 and 12 April 2013**

Delivered: **25 June 2014**

Flynotes: Law of Contract – Damages arising from breach of a written contract between the parties – Duty to mitigate loss rest on the aggrieved party – Legal principles on mitigation of losses reiterated – Aggrieved party who took reasonable steps also entitled to recover losses occasioned by the taking of these steps – Held that the employ of an

estate agent is reasonable enough to entitle the plaintiff to recover agent's fees from the defendants.

ORDER

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1. The defendants are ordered to pay to the plaintiff, jointly and severally, the one paying the other to be absolved, the amount of N$ 100 000.
2. Interests a *tempore morae* at the rate of 20% per annum on the amount of N$ 100 000;
3. Cost of suit, to include the costs of one instructing and one instructed counsel.

JUDGMENT

DAMASEB JP:

[1] This is a claim for the payment of N$ 100 000 as damages resulting from breach of a written contract entered into between the plaintiff and the defendants. The subject of the agreement of sale is an immovable property. The parties had agreed, pending the defendants finding the finances to pay the purchase price, that the defendants would lease the property at a monthly occupational rental fee. The parties had also agreed that the defendants would vacate the property upon cancellation of the sale agreement and that no tenancy would be created by any prior occupation.

[2] The agreement was subject to a special condition that should the purchasers be in breach, the plaintiff was entitled to sell the property to a third party. The defendants could not secure the purchase price within the agreed period as a result of which, after the plaintiff had allowed them extensions, they repudiated the agreement. The plaintiff accepted the repudiation, cancelled the agreement and sold the property to a third party.

[3] The dispute that has arisen relates to whether the plaintiff, in mitigation of his damages arising from the repudiation, should have sold the property when and at the price he did.

Common cause facts

[4] The plaintiff and the defendants entered into a written contract on 28 April 2009 for the purchase of an immovable property situated at Erf 3295, 19 Galen Street, Windhoek West, measuring in extent 1500 square meters ('the property') which, if the defendants honoured the agreement, was to be sold for N$ 1.3 million. Transfer was agreed to take place on 28 April 2010 so as to allow the defendants to secure the purchase price from a pension pay-out due to the second defendant from Germany. Pending the transfer of the property the defendants were to pay to the plaintiff monthly occupational rent in the amount of N$ 3500. The defendants took occupation of the property immediately after the conclusion of the agreement.

[5] The defendants were unable to pay the purchase price on due date and the plaintiff extended the effective date to 31 July 2010 and eventually to 30 September 2010. It is common cause that the defendants, although repeatedly encouraged by the plaintiff to do so, did not seek any loan finance to purchase the property and entirely relied on the pension pay-out from Germany in order to buy the property.

[6] In the event, the defendants repudiated the agreement on 30 July 2010 after the plaintiff had granted them the extensions to allow them to secure the funds to purchase the property, claiming that they did not secure the pension payments from Germany to buy the property. The plaintiff accepted the repudiation on 6 August 2010, cancelled the agreement and thereafter sold the property to a third party through the services of an estate agent, Mrs Cotting Bauer. The estate agent was appointed on 2 August 2010. That is even before the plaintiff accepted the repudiation. It needs to be stated that the appointment of the estate agent occurred after the repudiation by the defendants. Nothing therefore turns on this fact.

[7] The property was sold to Mr Jaarsveld after being in the market for three months at the price of N$ 1 280 000. The price included the estate agent's commission of N$ 80

000. The actual amount received from the sale was therefore N$ 1 200 000. The purchase price was thus N$ 20 000 less than what the plaintiff had agreed to sell it to the defendants. Mr Jaasveld, an employee of Nedbank registered a bond after the purchase in the amount of N$ 1 560 000.

The plaintiff's claim

[8] The essence of the plaintiff's claim is that in an effort to mitigate his damages, he engaged the services of an estate agent who then sold the property. The actual amount received from the sale was less than what it would have been had the plaintiff sold the property to the defendants. The plaintiff claims damages, being the difference between the amount that he ought to have received had the property been sold to the defendants and the amount that he received from the subsequent sale plus the agreed agent's commission which he paid to the estate agent who sold the property for him. It is the plaintiff's case that the market value of the property at the time of the repudiation was N$ 1 148 200 and that he had mitigated his losses by selling the property to a third party for the purchase price of N$ 1 280 000.

The defence

[9] In summary, the defendants deny that the plaintiff mitigated his loss or that he is entitled to the damages claimed. In addition, they deny that the market value of the property at the time of the repudiation was what the plaintiff claims and further deny that the plaintiff is entitled to recover the agent's commission as damages.

Legal and factual issues to be determined by the court

[10] The court is called upon to determine whether the plaintiff is entitled to the damages as claimed. The plaintiff bears the *onus* in that respect. The defendants bear the *onus* on the question whether the plaintiff failed to act as a reasonable seller, faced with repudiation, would have done.

The plaintiff's evidence

[11] The plaintiff testified and called two witnesses, the estate agent and a property valuator. The plaintiff testified that he inherited the property from his late parents and

effected some renovations to it with the intention of selling it. He tried to sell the property himself by advertising it amongst a close circle of friends and acquaintances. The first defendant and her husband who were acquaintances of the plaintiff showed an interest in purchasing the property which, at the time, the plaintiff was marketing for N$1.3 million. The defendants agreed to pay an occupational rent of N$3 500 although the market related rental was N$ 6000. That the defendants were renting the property at a price considerably less than the market related rental is common cause.

[12] The plaintiff testified that he specifically wanted to sell the property to someone who would appreciate the property because he had significant sentimental value for the property because it was the house that he grew up in and that he had to get rid of the property to avoid having to incur the expenses of its upkeep and maintenance.

[13] Following repudiation by the defendants, the plaintiff appointed Mrs Jasmine Kotting-Bauer on 2 August 2010 as the estate agent, to sell the property as he was entitled to do in terms of the agreement. He justified the employment of the estate agent as follows:

a) The experience he had with the defendants, by trying to sell the property himself, convinced him that it was preferable to use the services of an estate agent as that would relieve him from having to look for potential buyers;
b) That estate agents have a wider network of contacts which made the sale of a home easier;
c) He needed to have the property sold off as quickly as possible as it was a financial burden for him in that it required regular inspection and maintenance by him personally. He testified that as long as the property remained unsold, he bore the responsibility to pay for water and electricity; maintain the alarm system; attend to the garden, and check on the property every day to make sure that there was no burglary. He took the view that it would have been disastrous not to have engaged an estate agent.

[14] It transpired under cross examination that the plaintiff appointed the estate agent under a sole and exclusive mandate before the defendants moved out of the property. The exclusivity had the effect of excluding the possibility of the property being marketed

by another estate agent, or by himself if he secured a buyer on his own. It was suggested to him in cross-examination that the manner in which he went about having the property sold in order to mitigate his damages was not what a reasonable seller would have done. It was implied in the questioning of the plaintiff that a reasonable seller would have researched the market to establish if he could get an estate agent who charged better commission; would have availed the property for sale to a larger pool of estate agents and/or attempted to sell it himself by placing advertisements in newspapers. The plaintiff reiterated that it was more practical for him to engage the services of one estate agent whom he trusted than deal with a 'plethora' of estate agents. He denied that a reasonable man would have investigated the market first by getting quotes for commission from different estate agents before giving the mandate to sell the property. According to him a reasonable seller would appoint an estate agent to market and sell the property for him.

[15] It was also put to the plaintiff under cross examination that a reasonable seller, in an attempt to mitigate his losses and to make a profit, would have kept the property in the market for a reasonably longer period of time than he did and not to accept the first serious offer that came – as the plaintiff allegedly did. The plaintiff reiterated that he considered the price of N$ 1 200 000 reasonable at the time because he had to get rid of the property to avoid having to incur the expenses of its upkeep and maintenance. He also testified that he was under some pressure to accept any offer that was on the table – even to his own detriment – and that testing the market and waiting indefinitely for a higher offer would have been less probable in the circumstances, considering that he had tried to sell the property for three years (before he contracted with the defendants) without any success, and that a reasonable purchaser in his shoes would have taken any offer on the table to mitigate his/her losses.

[16] Mr Botes, for the defendants, suggested to the plaintiff that there was no legal basis for claiming the agent's commission from the defendants and that, in any event, such damages are 'special damages' which ought to have, but were not, separately claimed. In response to this line of questioning, the plaintiff reiterated that such costs resulted from the breach of contract by the defendants and that he would have been in a much worse situation had he not done anything. He maintained that the steps he took

were done in an attempt to mitigate his losses, and that he was at the mercy of the market. The plaintiff further testified that all decisions and steps taken by the estate agent were in her discretion as a professional and that the fact that the house was sold within three months of him engaging the estate agent, was proof that he had made the right decision in using the services of an estate agent.

Plaintiff's valuations of the property

[17] As regards the market value of the property, the plaintiff testified that he obtained valuations for the property after the repudiation. Mr Chris Erb provided a valuation of N$ 1 560 000 while Mr Scholtz provided a valuation of N$ 1 100 000. That notwithstanding, the property was sold for N$ 1 280 000.

[18] Mr. Petrus Jurie Scholtz, a property valuator, was called as a witness by the plaintiff. This witness testified that he valuated the plaintiff's property at N$ 1 148 200. He acknowledged that his valuation of the property differed from that of Mr Chris Erb, due to different methods used in evaluating the same property. This witness testified that property valuations reflect the amount to be financed by the bank and to be ultimately received by the seller. Accordingly, agent's fees are separate costs to be financed individually by the client and thus need not be reflected in the property valuations.

[19] The last witness for the plaintiff was Mrs. Cotting Bauer, an estate agent engaged by the plaintiff to sell the property. She confirmed that her mandate was to sell the property at not less than N$ 1, 5 million, excluding agent's fees. The agreed agent's commission was seven percent. She marketed the house under a sole and exclusive mandate for a period of three months. She disputes the defendants' suggested premise that a sole and exclusive mandate made the profitable sale of the house much more unlikely. Mrs Bauer also disagreed with the defendants' suggested view that the more the estate agents, the better the market and stated that there is a limited client pool seeking to buy homes at a given time and different estate agents would most probably contact the same clients. She opined that the employment of an exclusive agent with a sole mandate was more efficient and promising in that more work is done by the agent with the sole mandate than a general estate agent. Mrs Bauer sought to debunk the

notion that the greater the number of estate agents marketing a property the greater the chances of it fetching the best possible price at the market and the greater the number of potential buyers.

[20] Mrs Bauer testified that 90% of property sales are done through estate agents and that the involvement of an estate agent is essential in the sale of property because of the number of hours (on average 80 hours of work), the type of marketing skills required to convince a potential client in buying the property, knowledge of the property, area, connection with the banks and the general market and a client-base. She testified that the property was advertised for N$ 1, 6 million inclusive of N$ 100 000 agents' commission, viewed by at least 30 customers and up to the time that she received the first written offer, most people that she showed the property were willing to only pay N$ 1 million for the property. The first written offer was from the Cuban Doctor, Mrs Santana who was only willing to pay N$ 1 150 000 as she still wanted to renovate the property and from Mr Jaasveld who eventually bought the property for N$ 1 280 000. Mrs Bauer further testified that the plaintiff had no choice but to accept an offer lower than the valuations done because the market in Windhoek West at the time was depressed and there was no guarantee that the market would soon improve.

Things plaintiff allegedly failed to do as would a reasonable man

[21] Through cross-examination of the plaintiff, and in particular Mrs Bauer, Mr Botes suggested the following as the steps and measures the plaintiff either failed to take or unreasonably took:

The suggested actions a reasonable seller would have taken

[22] It was put to the plaintiff that a reasonable seller would not have appointed a sole agent with an exclusive mandate. He would, in particular not have excluded himself from the possible self-marketing of the property. It was also suggested that a reasonable seller would not have accepted the first serious offer that came about. A reasonable seller, it was suggested, would have kept the property a little longer in the market and would have rented it out temporarily whilst testing the market. In similar vein, it was suggested that a reasonable seller would have considered offering the

property to the defaulting defendants at the price he actually sold it and would in that way have eschewed incurring the agent's commission.

Alleged unreasonable conduct of the estate agent

[23] It was put to Mrs Bauer that she brought only about six potential buyers to inspect the property. This much was confirmed by the domestic worker who saw the potential buyers come and go. It was also suggested that she failed to place street signs showing the property was for sale so as to make the property more visible to potential buyers. It was also suggested that she marketed the property only once. It became clear that she has only placed six advertisements of the property in the Republikein, two in the Allgemeine Zeitung and one advertisement in the Property news. No advertisement was placed in *The Namibian*. She also registered the property on her website to which other estate agents have access, but due to her sole mandate, other estate agents were not able to sell the property and therefore would have no interest in attempting to sell the property.

The defendants' evidence

[24] Of the two defendants only the first defendant testified. Thereafter two further witnesses were called on the defendants' behalf to deal with the market value and valuation of the subject property.

[25] The first defendant, Mrs. Yanna Erasmus, was married to the second defendant in community of property in 2008. She testified that a deed of sale was entered into on 28 April 2009 for a price based on an evaluation that was done at that point in time. Upon signature of the agreement, the defendants moved into the house, took care of the house and made several alterations to its structures. All this was done during the one year period within which the defendants were supposed to secure funds to purchase the property. However, the defendants were confronted with the prospect of not going through with the purchase as the second defendant was unable to find employment in Namibia and could only secure a job by June 2010 in South Africa. Given that he was to relocate to South Africa on a job prospect, he was not willing to return to Namibia. First defendant, faced with a situation of being compelled to join her

husband in South Africa, informed the plaintiff on 30 July 2010 that it was highly likely that she too may move to South Africa to join the second defendant and as such, they would be not be able to purchase the property. The first defendant gave the impression that she and the second defendant were most reluctant to move to South Africa but that they were forced by the circumstances to do so and therefore to repudiate the contract with the plaintiff. Incongruously though, she suggested in cross-examination that if the plaintiff had offered the property to them at the reduced price for which he ultimately sold it, they would have considered buying it.

[26] The first defendant admitted that the plaintiff had on several occasions extended the payment and transfer period and counsel for the plaintiff suggested to her that the defendants took advantage of the plaintiff's kindness in allowing them to rent below the property's market related rental value so as to sort out their lives before repudiating the contract. Ms Bassingthwaighte, for the plaintiff, put to her that the defendants knew well in advance, at the very least by April 2010, that it was highly likely that they would move to South Africa but waited until 30 July 2010 to inform the plaintiff. The first defendant further suggested that she did not breach the contract but rather repudiated it and that the plaintiff was not entitled to claim damages because what they did was repudiation and not a breach of contract.

[27] The first defendant testified that the plaintiff never told her that he intended reselling the property and that had she known that the plaintiff offered the house at that price, she would have made a plan to buy it as this was a bargain. The reality of the property sale was first telephonically communicated to her by the Estate agent, Mrs Bauer, who brought prospective buyers to view the property. She, however, testified that she personally never saw any prospective buyer visit the house and none was communicated to her by her mother who stayed at home with the domestic worker while she was at work. As a result, she felt that it was her obligation to keep the house clean for inspection in an attempt to assist in the sale of the property. Under cross-examination, the first defendant further testified that she never saw any advertising boards outside the house or down the street from the property. She commented that it was not unreasonable that the plaintiff employed the services of an estate agent to sell the property for him but that the manner in which the advertisement and the marketing

was done was not commendable. According to her, the plaintiff did not mitigate but authored his own damages by giving a sole and exclusive mandate to one estate agent and by so doing limiting the market from which a higher price would have been secured.

[28] Ms Frieda So-Oabes, who at the material time was the domestic worker of the defendants from the period of 2009-2010, testified that the defendants moved out of the Gallen Street property in August 2010 although she could not estimate when exactly they moved out. She also testified that during the month of August, a lady, who on the probabilities could only have been estate agent Mrs. Bauer, came to the Gallen Street property no more than six times, accompanied by potential buyers. She maintained that to her recollection Mrs. Bauer did not bring more than eight potential buyers to the property.

[29] Mrs. Andrie Holz was called as an expert on behalf of the defendant, both as an appraiser and estate agent. She valued the property at N$ 1 315 000. She testified that 75% of the property sales are done through estate agents compared to 25% of sales which are done through private sales. The salient aspects of her evidence in respect of the dispute are that she evaluated the subject property by using what she termed ‘the only credible accepted method for determining the market value of a property’. The expert opined that a sole mandate limits the market and that the plaintiff’s decision was not favorable to the probable sale of the property. On the issue of estate agent’s fees, Mrs Holtz differed from Mr. Scholtz when she testified that agent’s commission is, according to common practice, included in the comparable sales as against the version that the purchase price is what the client should get and the agents’ commission is an expense that the seller will have to pay on his own.

Counsels’ submissions

[30] Ms Bassingthwaighte submitted that a good market is determined by reference to the potential buyers to whom the property is being marketed and not by the number of estate agents engaged to market it. Counsel disagreed with the defendants’ propositions that a higher price is guaranteed when the property is marketed in an open market and submitted that the present case demonstrates that even in a closed market

comprising of friends and acquaintances, the plaintiff was able to reach agreement with the defendants for the purchase of the property. It was further submitted on behalf of the plaintiff that a reasonable seller in the same circumstances the plaintiff found himself would have made use of an estate agent to resell the house considering the hardship he experienced in the wake of the defendants' repudiation. The granting of a sole and exclusive mandate, it was submitted on behalf of the plaintiff, was in the circumstances not unreasonable. Plaintiff's counsel also submitted that the difference in valuation should not be taken rigidly as various methods may be used to arrive at the value of the property. Ms Bassingthwaighte relied on several South African authorities which were approved by our Namibian courts on the general principles of damages. The authorities referred to also relate to the market value and most importantly, the duty to mitigate the plaintiff's losses.[1] As regards the valuation by Mrs. Holtz, counsel termed it 'too liberal' and that her valuation, which included agent's commission, should not be considered and that the court should accept the evidence of Mrs. Bauer as to the price range that potential buyers were offering when the property was placed on the market by the estate agent. I find merit in this submission. It accords with my view of the legal position relative to mitigation of damages when a sales agreement is breached. The open market is in such circumstances not the sole determining factor for measuring if the frustrated seller acted reasonably.

[31] On the question of whether the plaintiff acted reasonably in mitigating his losses, plaintiff's counsel submitted that the *onus* rested on defendants to prove that there were other reasonable and less costly remedies which the plaintiff ought to have adopted.[2]

[32] Mr Botes, although acknowledging the thrust of the general principles governing mitigation of damages, drew a distinction between 'general' and 'special' damages, the former naturally flowing from an unlawful breach of contract while the latter requires to be specifically pleaded and proved. He submitted that a patrimonial loss arising from an expense incurred from the payment of an estate agent qualifies as a special damage as

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[1] Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines 1915 AD 1 at 22;Celliers v Papenfus and Rooth 1904 TS 73 at 84; Wolff & Co v Bruce, Mavers & Co (1889) 7 SC 133 at 135.
[2] Counsel relied on the case of Holmede Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 at 689 which was approved in the case in Kalipi Ngelenge t/a Rundu Construction v Anton E van Schalkwyk t/a Rundu Welding & Construction 2010 (2) NR 406 (HC).

it does not flow from a normal breach of contract since this is a discretionary exercise on the part of the seller and need not be incurred in order to sell a property. As regards the duty to mitigate, counsel for the defendants acknowledged the *onus* that rested on the defendants and submitted that same was discharged. Counsel based his submission on the conclusion that a sole mandate can never be a reasonable step[3] as it removes the property from the open market thus doing violence to the best price principle. Mr Botes submitted that the costs incurred in respect of the estate agent are too remote.

[33] As regards market value, Mr Botes submitted that the market value is the best price obtained from a normal working market were the property was left on it for a considerable and reasonable time to produce the best price and result in a profitable sale for the plaintiff. Mr Botes argued quite forcefully that the offering of the property for sale to one estate agent, with a sole mandate, violates the market forces being allowed to play their role. He also argued that the house was not placed in the market for a reasonable time as Mrs Bauer made the court to believe. It is further counsel's submission that the plaintiff failed to give the defendants an opportunity to purchase the house at a lower price or to further rent the house until the house was eventually sold. In addition to proving on a preponderance of probabilities that the plaintiff did not take reasonable steps to mitigate his losses, it is also counsel's submission, that the plaintiff deliberately failed to do so and is thus, in law, not entitled to the damages claimed.

[34] Mr Botes further argued that I must disregard as irrelevant the plaintiff's evidence about the difficulties he experienced in his initial efforts at selling the property himself prior to the agreement with the defendants. He detailed these efforts as follows: that it is the plaintiff himself who extended the period within which transfer must be done until end April 2010 and this did not demonstrate a situation of a person in an emergency to sell the house. Accordingly, apart from the difficulties in maintaining the house by paying for the municipal bills, there is no other form of emergency that existed prior to the agreement and as such there existed no kind of emergency when the defendants eventually repudiated the contract.

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[3] Holmede Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 at 689.

[35] Ms Bassingthwaighte countered Mr Botes' suggestion and pointed out that the circumstances under which the plaintiff found himself before the repudiation determined whether he needed to mitigate his losses or not. She further argued that the breach of contract created something of an emergency and the plaintiff found himself in a position of embarrassment as a consequence of the breach, and as such, the measures which he took to extricate himself from such situation should not be weighted in nice scales. Mrs Bassingthwaighte is supported by authority in that score.

[36] As I understand the defendants' case, as amplified by Mr Botes in his the written and oral arguments, the plaintiff must be non-suited on the following alternative grounds: Firstly, in that he, by appointing Ms Bauer under a sole and exclusive estate agent's mandate, interfered with the operation of the open market which, if left to operate as it should, would have given him a better price than the one at which he sold it. Secondly, it is postulated by the defendants that the plaintiff acted hastily in accepting the first serious offer made without seeking higher offers. Thirdly, Mrs Bauer is criticized for not making sufficient effort in the marketing of the property. Finally, the defendants' case is that the estate agent's commission is a special damage and ought to have been so pleaded and proved but was not.

The applicable legal principles

[37] Where a buyer or purchaser has repudiated the contract, the seller may elect to claim damages in addition to any other remedies that are available to him or her. Innes, J in *Dennil v Atkins*[4] *& Co* stated at p 289 that:

> 'In the absence of circumstances of aggravation, such as fraud, the party in default is only liable for the damages which may be fairly considered to have been within the contemplation of the parties . . . . Consequential damages or those which arose from subcontracts not notified, and therefore not in the contemplation of the parties at the time the contract was entered into, cannot as a rule be recovered. In the case of a contract of sale, it is settled law that the purchaser, if the contract is repudiated, may claim as one of his remedies the difference between the market price and the contract price . . . the injured party should be fairly and reasonable indemnified for a breach of contract. . . . The rule is a general working one;

[4] Dennil v Atkins & Co 1905 TS 282.

for it places the purchaser in practically the same position as he would have been in if the contract had been carried out. If he has to buy in the market at an enhanced price he recovers the difference from the seller.'

[38] Furthermore, it was observed by Corbett JA (as he then was) in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*[5] that:

'To ensure that undue hardship is not imposed on the defaulting party . . . the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach. The damages described in limb (a) . . . are often labeled "general" or "intrinsic" damages, while those described in limb (b) . . . are called "special" or "extrinsic" damages.'

The 'reinstatement' of the plaintiff should be done without undue hardship to the defaulting party.[6]

Duty to mitigate loss caused by a breach

[39] The rule on mitigation of damages places a duty on the plaintiff to take all reasonable steps to mitigate the loss consequent on the repudiation/breach, and debars him/her from claiming any part of the damage which is due to his neglect to take such steps. The *onus* of proving the damage rests on the plaintiff throughout and the defendant has the *onus* of proving that the amount claimed by the plaintiff does not represent the true amount because of plaintiff's failure to take reasonable steps.[7] The test is an objective one, ie what a reasonable man in the same circumstances would have done in an attempt to mitigate his/her damages. The emphasis is thus on what the reasonable man should have done and not what he/she has done. This common law

[5] 1977 (3) SA 670 (A) at 687D – 688A as cited in the Namibian case of Kalipi Ngelenge T/A Rundu Construction v Anton E van Schalkwyk T/A Rundu Welding & Construction 2010 (2) NR 406 (HC) at 409F-H.
[6] Victoria Falls Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at 22.
[7] Jayber (Pty) Ltd v Miller & Others 1980 (4) SA 280 (W).

principle was approved by the Namibian Supreme Court in *Transnamib Holdings Ltd v Engelbrecht .*[8]

[40] The defendants' suggested premise that mitigation only occurs by selling the property at a profit is not supported by authority. Each case must be considered on its facts: there may well be cases were that is justified and the only damage the plaintiff may claim will be the expense incurred in selling the property, to the extent there was a net loss. In other situations, such as the present, the loss may arise from having to sell the property at less than the market price in order to mitigate one's loss. In the latter respect, it is just as much the duty of a frustrated seller to avoid deterioration of the *res,* a fall in the market, or insolvency, by reselling the property - and if sold for a lower price, he or she should be able to recover the difference from the defaulting purchaser.[9]

Subsidiary principles

[41] In considering whether the *onus* has been discharged, courts take cognizance of the fact that the aggrieved party is normally acting under some embarrasment on account of the repudiation or breach. The measures which the plaintiff is forced to adopt following the repudiation in order to extricate himself/herself ought not to be weighted in nice scale and the court should not be astute to hold that the *onus* has not been discharged.[10] The requirement of mitigation is satisfied if the plaintiff has acted reasonably in the adoption of the remedial measures. The duty to take reasonable steps to mitigate any threatening damage does not require the injured party to undertake unusual or extraordinary measures in order to mitigate his/her loss - in any event not if the adoption of such measures is likely to be problematical.[11] A plaintiff who has taken reasonable steps to mitigate his loss may also recover damages for any loss caused by such reasonable steps.[12]

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[8] 2005 NR 372 (SC) at 381A.
[9] Wolff & Co v Bruce, Marvers & Co (1988) 7 SC 133 at 135.
[10] Holmede Brickwork (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A) at 689;
[11] Kerr, *Principles of the Law of Contract* (1989), p 588; Belcher C I, *Norman's Purchase and Sale in South Africa*, (4th Ed) 1972, p 431-432.
[12] In the case of *Modimogale v Zweni & Another* the court was faced with the issue of what the amount of damages to be awarded was when the plaintiff hired services of a taxi to continue with her business after her car was involved in a collision with the defendant's car. The court upheld her claim and reasoned that the defendants failed to prove that she could have avoided the loss at a lower expense. The court further pointed out that it was reasonable in her circumstances to hire a taxi in order to avoid loss of profit and

[42] Is the purpose of the rule on limitation of damages not that upon the other party committing the breach, the innocent party must not sit back and say, well, he breached the contract; he must now pay me what I have bargained for. Rather should he not do the best he can to limit his losses? It appears to me to be the latter. In doing so one of two possibilities arises: he may make a profit, in which case the guilty party owes him nothing, or he may come short compared to what he would have received from the guilty party. The amount by which he comes short is his damages, and it would include any recoverable expense he incurred in trying to find an alternative buyer.

The court's findings on the disputed issues

[43] It is common cause that the plaintiff sold the property at a price which is N$ 20 000 less than what he would have received if the defendants bought the property. It is common cause that the agent's commission of N$ 80 000 was included in the price that the plaintiff obtained from the eventual purchaser. Had the property been bought by the defendants, the plaintiff would not have incurred the expenses relating to agent's commission. The defendants maintain that the plaintiff would have gotten a better price if he appointed more estate agents to market the property, or to also try himself to sell the property, or to the defendants in order not to pay estate agent's commission.

[44] With respect, Mr Botes argument that the expenses incurred in respect of the estate agent are too remote, flies in the face of the evidence whose tenor was that the appointment of an estate agent is normal practice and that the majority of sales of residential property in this country happen through an estate agent.

[45] I agree with plaintiff's counsel's submission that the employment of an estate agent was reasonable in the circumstances of the case, not least because it was common cause that (a) the majority of immoveable property sales in this country

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that it was a reasonable and necessary expenditure. Most importantly, the court found that it was imprudent of the plaintiff to fix her car and pay out a larger amount in an attempt to mitigate her losses before she was sure that the defendants will compensate her and such steps were reasonable enough and the plaintiff was therefore not required to mitigate her loss to any greater extent. In addition, the case of *Bosch v Purity Insurance Co Ltd* suggests that costs associated with the compliance of this duty will be recoverable.

happen through an estate agent and (b) the first defendant considered it normal practice for a seller to market immoveable property through an estate agent. Accordingly, in the circumstances the plaintiff is entitled, in law, to recover the expenses caused by taking such a reasonable step. In so finding, I also find that the defendants failed to establish on balance of probabilities that it was unreasonable for the plaintiff to engage the services of an estate agent. I also find that the suggested premise that offering the property for sale to a bigger number of estate agents would garner greater interest and price is not borne out by the evidence. I find it more plausible, as explained by Mrs Bauer, that at any given time the pool of potential buyers remains the same and that it is more probable than not that most estate agents would be tapping into that same pool at any given point of time. The plaintiff explained that engaging more than one estate agent would have cost him logistical difficulties in that he would have had to make arrangements to allow all of them access to the property with all the attendant risks. I see nothing unreasonable about this explanation for why he appointed an agent with a sole mandate.

[46] No doubt the number of things that the plaintiff could have done to get a better price is limitless. But can it justifiably be said that the steps he took to mitigate his loss were not reasonable? As to that he bears no *onus*, the defendants do. It does not avail the defendants to provide a list of things which the plaintiff could have done to lessen his loss, unless they can also show that that which he did was not what a reasonable seller in his position would have done. I am not here dealing with a seller who sat back and allowed his losses to accumulate. Faced with a predicament in which he was placed by the defendants' repudiation, he immediately sprang into action in order to sell the property. He appointed an estate agent to sell the property. That estate agent got him a price less than what he would have got if the defendants bought the property. The defendant obtained two valuations for the property, one at a higher value (Chris Erb[13]) and the other at a low value (Mr Scholtz[14]). As is common cause, the estate agent even marketed the property at 1.6 million. These are hardly the actions of a seller who, as alleged, made no attempt to obtain the best price possible.

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[13] N$ 1 560 000.
[14] N$ 1 100 000.

[47] I will assume as correct the defendants' expert version that the preoperty was worth N$ 1,3 million. That said, the dispute about the market price is really an academic one. I fail to see how in this case, it impacts on the question whether the plaintiff should have accepted the offer he did. If the suggestion of the defendants is that because the actual value was more than what the plaintiff sold it for, the plaintiff could not have accepted a price lower than what he had originally agreed with the defendants, it defeats the whole purpose of mitigation. What that means is that he should have hung on to the property until he got a price equal or more than what was agreed with the defendants. Had he in fact done that and in the process incurred more losses and perhaps not even got a buyer or the price he actually sold it for, he would, in my view, have been the author of his own damages.

[48] The unspoken premise underlying the defendants' stance that the price at which the property was sold was not the true market price or the higher price the plaintiff could have got, is that there was some guarantee that the property would be sold at that price or more. That would stretch the obligation to mitigate one's damages in the face of repudiation to horizons not intended by the common law.

[49] Assuming as I have that the defendants are correct that the market value on the strength of which the property was sold was lower than what it ought to have been marketed for, it still leaves unanswered the question whether at a higher market value the property could have been profitably sold. The question, it appears to me, is not so much whether the market value was not properly tested but whether the circumstances in which the repudiation placed the plaintiff justified his selling the property when he did, at the price and in the circumstances he did. The undisputed evidence of the plaintiff is that the position he found himself after the breach was no different from the one he was in before the sales agreement entered into with the defendants, ie that he found it difficult to sell the property himself and that it was a burden maintaining it. The plaintiff's evidence, which I find established on preponderance of probabilities, is that the repudiation left him in a position where he had to place the property in the market immediately in order not only to continue suffering the inconvenience and burden of maintaining the property, but to obtain the best possible a price he could.

[50] Although the accusation of the defendants stringing along the plaintiff was denied, the probabilities favour the conclusion that the defendants at the time that they sought and were granted extensions by the plaintiff had no reasonable prospect of raising the funds to buy the property and that, in any event, the second defendant's relocation to South Africa by force of circumstances made their purchase of the property unlikely. I am satisfied that they were not altogether frank with the plaintiff in that respect and that their holding back on informing the plaintiff that the sale was off was unreasonable and added to the plaintiff's embarrassment when they repudiated.

[51] I am satisfied that the defendants failed to discharge their onus that the plaintiff did not act as a reasonable man ought to have done. In so finding, I am satisfied that the defendants' repudiation placed the plaintiff in an embarrassing position of an 'emergency' (as that word is used in the authorities). I am satisfied on a balance of probabilities that the plaintiff, on account of the defendants' repudiation, was placed in a position where he had to take steps which might otherwise not have commended themselves in circumstances of normalcy.

[52] I am satisfied, to the required standard of proof that, placed in the position that the plaintiff was by the defendants' repudiation, a reasonable man would have acted in the way he did, by appointing an estate agent to sell the property for him. The steps he took associated therewith must not be weighed in nice scale. The step he took in appointing an estate agent was not considered unreasonable by the defendants. Rather, they take issue with the fact that he appointed an estate agent with a sole and exclusive mandate. This approach is too pedantic and approximates placing in nice scale the steps taken by a seller placed in an emergency by the conduct of the defendants. It may be the attitude adopted by a seller desiring to sell his property under normal circumstances, what we are faced with here is what a reasonable seller, faced with the repudiation and finding himself in an emergency, would have done. The defendants, in my judgment, have fallen short of discharging the onus that a reasonable man would have acted otherwise than what the plaintiff did – except to list a host of possible things that a seller would normally do to fetch the best price on the market.

<u>The order</u>

[53] I have concluded that the steps taken by the plaintiff were reasonable and, accordingly, the plaintiff is entitled to his damages as claimed. There is no basis for deviating from the general rule that costs should follow the event. In the premises, judgment is granted in favour of the plaintiff for:

1. The defendants are ordered to pay to the plaintiff, jointly and severally, the one paying the other to be absolved, the amount of N$ 100 000.
2. Interests a *tempore morae* at the rate of 20% per annum on the amount of N$ 100 000;
3. Cost of suit, to include the costs of one instructing and one instructed counsel.

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P T Damaseb

Judge-President

APPEARANCE

FOR PLAINTIFF	N Bassingthwaighte
ON INSTRUCTIONS OF	LorentzAngula Inc, Windhoek
FOR DEFENDANTS	LC Botes
ON INSTRUCTIONS OF	Kirtsen & Co Inc, Windhoek