

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2017/02930

HC-MD-CIV-ACT-OTH-2015/00819

In the matter between:

ERNEST KAZEKUUNDJA

PLAINTIFF/DEFENDANT

and

JAN JACOB KRITZINGER

1ST DEFENDANT

WALDHEIM VIHAJO

2ND DEFENDANT/ PLAINTIFF

Neutral citation: *Kazekuundja v Kritzinger* (HC-MD-CIV-ACT-OTH-2017/02930)
[2019] NAHCMD 202 (21 June 2019).

Coram: OOSTHUIZEN, J

Heard: 13-15 November 2018, 16 January 2019

Delivered: 21 June 2019

Flynote: Settlement agreement — for transfer of property — made an order of court — Payment within three months — alternatively guarantee from financial institution — Meaning and effect.

Summary: Plaintiff in Case Number HC-MD-CIV-ACT-OTH-2017/02930 (hereinafter “the main case”) and defendant in Case Number HC-MD-CIV-ACT-OTH-2017/00819 (herein after “the eviction case”) is Ernest Kazekuundja who is residing at the property which he claims should be registered in his name and from which he is sought to be evicted by the plaintiff in the eviction case, Waldheim Vihajo (the second defendant in the main case).

Plaintiff in the main case, claims against the first defendant therein and against Mr Vihajo for orders setting aside the registration of the property in the name of second defendant (Vihajo) and directing first defendant (Mr Kritzinger) to sign all documents necessary to cause registration of the property in the plaintiff’s name, alternatively authorising the deputy sheriff to sign, against payment in the amount of N\$235 000.

Second defendant in the main case is also the plaintiff in the eviction case wherein he claims for the eviction of Mr Kazekuundja from the property registered in his (Vihajo's) name.

Plaintiff in the main case (as well as the first defendant therein) relies on a settlement agreement reached between the parties in a previous case between them (Case No:l 356/2013) on 19 August 2015 and made an order of court on 20 August 2015.

Plaintiff in the main case has pleaded that he complied with his obligations in terms of the agreement in that he provided a letter from Bank Windhoek confirming that a loan for the amount payable had been granted.

First defendant in the main case pleaded a denial that plaintiff complied with his obligations and pleaded that -

Clause 1 of the settlement agreement, in mandatory terms, required payment of the purchase price in full and final settlement within three months after the settlement agreement was made an order of court. Plaintiff failed to do that and the agreement had lapsed and became impossible to perform. Kritzinger further pleaded that plaintiff was required to provide a guarantee from a financial institution within three months (if he did not pay). First defendant (Kritzinger) further pleaded that the letter from the bank, dated 11 December 2015, was provided well beyond the three months period and in any event did not constitute a guarantee from a financial institution, still subject to approval by plaintiff, once certain conditions were met.

First defendant in the main action sold the property to the second defendant (plaintiff in the eviction case). The property was registered and transferred in the second defendant's name before the end of 2016.

Plaintiff took issue with the regularity of Vihajo's title in that Vihajo knew or ought to have known that plaintiff had a right to the property and Vihajo was thus not a *bona fide* purchaser.

The Namibian Supreme Court has restated and adopted the interpretational approach followed in *Endumeni*. Interpretation is a process of giving contextual meaning to words in a document by reading the provisions in light of the document as a whole and taking account of the document's circumstances and reason for its coming into existence. The language used in view of the ordinary rules of grammar and syntax, context, purpose and the material known to those responsible for the drafting, should be considered. It is an objective process which prefer a sensible meaning above the meaning which leads to insensible or unbusinesslike results. The sensible meaning should not undermine the apparent purpose of the document. The words actually used in the document should not be subjected to substitution of what judges regard as reasonable, sensible or businesslike. In a contractual context judges should be alert not to make a contract for the parties other than the one the parties in fact made.

Held, plaintiff in the main case did not comply with his obligations under the settlement agreement in that payment of the purchase price was not made within

three months of the settlement agreement being made an order of court and a guarantee for the purchase price was also not forthcoming within three months.

Held, further that first defendant in the main case did not frustrate the condition concerning a guarantee in that he was entitled to refuse the signing of a deed of sale until the fulfilment of the payment/guarantee condition.

ORDER

[1] Plaintiff's (Mr. Kazekuundja's) claims in the main case are dismissed with costs to include the costs of one instructing and one instructed counsel of the defendants (Mssrs Kritzinger and Vihajo).

[2] Plaintiff in the eviction case is granted an eviction order against the defendant therein (plaintiff in the main case) and everyone else on the property claiming occupation through Mr Kazekuundja, with costs for one instructing and one instructed counsel.

[3] Mr Kazekuundja shall vacate and leave the property to wit Erf 9535 (a portion of erf 9197), Katutura (extension No 16), in the municipal area of Windhoek, Registration Division "K", Khomas Region on or before 31 July 2019, whereafter the deputy sheriff of Windhoek is authorised to evict Mr Kazekuundja with the assistance of the Namibian Police Force if need be.

JUDGMENT

Oosthuizen J;

Background

[1] Plaintiff in Case Number HC-MD-CIV-ACT-OTH-2017/02930 (hereinafter "the main case") and defendant in Case Number HC-MD-CIV-ACT-OTH-2017/00819

(herein after "the eviction case") is Ernest Kazekuundja who is residing at the property which he claims should be registered in his name and from which he is sought to be evicted by the plaintiff in the eviction case, Waldheim Vihajo (the second defendant in the main case).

[2] Plaintiff in the main case claims against the first defendant therein and against Mr Vihajo for orders setting aside the registration of the property in the name of second defendant (Vihajo) and directing first defendant (Mr Kritzinger) to sign all documents necessary to cause registration of the property in the plaintiff's name, alternatively authorising the deputy sheriff to sign, against payment in the amount of N\$235 000. The alternative claim for damages was not proceeded with.

[3] Second defendant in the main case is also the plaintiff in the eviction case wherein he claims for the eviction of Mr Kazekuundja from the property registered in his (Vihajo's) name but occupied by Mr Kazekuundja (plaintiff in the main case). Mr Vihajo did not proceed with his damages claim based on reasonable market related rental.

[4] Plaintiff in the main case (as well as the first defendant therein) relies on a settlement agreement reached between the parties in a previous case between them (Case No:l 356/2013) on 19 August 2015 and made an order of court on 20 August 2015.

[5] The settlement agreement between Mssrs Kazekuundja and Kritzinger dated 19 August 2015 recorded the following relevant portions:

'WHEREAS the plaintiff instituted an action in the above Honourable Court against the defendant for an order that the defendant take all necessary steps to pass transfer of the property to plaintiff pursuant to an agreement entered into between the parties;

AND WHEREAS the defendant entered an appearance to defend the action;

AND WHEREAS the parties have now arrived at an all-inclusive agreement in settlement of the dispute between the parties which they hereby desire to record in writing and have made an order of court.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. That the plaintiff shall pay to the defendant, the amount of N\$235 000.00 in full and final settlement of the claims between the parties within three months from date that this settlement is made an order of court.

2. The aforesaid amount shall be paid into the nominated account of the defendant's legal practitioners, on or before the due date without deduction, free of exchange and/or bank charges thereon.

3. The defendant agrees to transfer the immovable property situated at erf 9535, Mungunda Street, Katutura to the plaintiff. The defendant agrees to sign all documentation relating to the aforesaid transfer within a reasonable time from date that plaintiff pays the aforesaid amount into the account of the defendant's legal practitioners or alternatively provide a guarantee from a financial institution that the plaintiff is granted a loan for the amount payable to the defendant.'

[6] Plaintiff in the main case has pleaded that he complied with his obligations in terms of the agreement in that he provided a letter from Bank Windhoek confirming that a loan for the amount payable had been granted.

[7] The aforesaid letter reads as follows:

'11 December 2015

Mr Eren-Fried Kazekuundja
PO Box 99337
Eros
Windhoek
Namibia

APPROVAL: ERF 9535, MUNGUNDA STREET, KATUTURA, WINDHOEK

We would like to confirm that a Mortgage bond was granted over the above-mentioned property on 09/12/2015.

Special conditions:

- A 1st Covering Mortgage Bond for N\$308 000.00
- Fire Insurance: N\$285 000.00 to be obtained.
- Life Insurance: N\$308 000.00 to be obtained.
- Direct settlement of IL: 5002412688

- MLR (11.25%)
- Term 240 months
- Please confirm acceptance of above conditions

Also note that these conditions must be in place or met before registration can take place.

Kind regards

Elista van Wyk

SALES CONSULTANT'

[8] Plaintiff alternatively pleaded that in the event the court finds that he did not comply with his obligations, the financial institution required a signed agreement of sale in order to consider his loan application; that an agreement of sale was drafted by Kritzinger's conveyancers and that plaintiff signed it on 23 September 2015; and that Kritzinger, with the intention to frustrate plaintiff's compliance to provide a guarantee, despite numerous requests refused to sign the agreement. Plaintiff should therefore be deemed to have complied with his obligation within 3 months after the settlement agreement was made an order of court on 20 August 2015.

[9] First defendant in the main case pleaded a denial that plaintiff complied with his obligations and pleaded that -

Clause 1 of the settlement agreement, in mandatory terms, required payment of the purchase price in full and final settlement within three months after the settlement agreement was made an order of court. Plaintiff failed to do that and the agreement had lapsed and became impossible to perform. Kritzinger further pleaded that plaintiff was required to provide a guarantee from a financial institution within three months (if he did not pay). First defendant (Kritzinger) further pleaded that the letter from the bank, dated 11 December 2015, was provided well beyond the three months period and in any event did not constitute a guarantee from a financial institution, still subject to approval by plaintiff, once certain conditions were met.

[10] On plaintiff's alternative claim that first defendant wilfully frustrated plaintiff's attempts to provide a guarantee within three months, first defendant pleaded that

plaintiff breached the settlement agreement in failing to pay as agreed and failing to provide a guarantee as agreed. Kritzinger testified that the settlement agreement did not oblige him to sign a deed of sale before payment into the designated account or a guarantee that the amount will be paid by a financial institution, within the three months period.

[11] It is common cause that first defendant in the main action sold the property to the second defendant (plaintiff in the eviction case) and that the property was registered and transferred in the second defendant's name before the end of 2016.

[12] Plaintiff's issue with the contents of the preceding paragraph is that Vihajo knew or ought to have known that plaintiff had a right to the property and was thus not a *bona fide* purchaser.

The applicable law

[13] The Namibian Supreme Court¹ has restated and adopted the interpretational approach followed in *Endumeni*.² Interpretation is a process of giving contextual meaning to words in a document by reading the provisions in light of the document as a whole and taking account of the document's circumstances and reason for its coming into existence. The language used in view of the ordinary rules of grammar and syntax, context, purpose and the material known to those responsible for the drafting, should be considered. It is an objective process which prefer a sensible meaning above the meaning which leads to insensible or unbusinesslike results. The sensible meaning should not undermine the apparent purpose of the document. The words actually used in the document should not be subjected to substitution of what judges regard as reasonable, sensible or businesslike. In a contractual context judges should be alert not to make a contract for the parties other than the one the parties in fact made.

¹ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC), par [18].

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). See also *Panamo Properties v Nel* 2015(5) SA 63 (SCA).

[14] Meaning is to be given to the language used in the contract. In other words, the intention of the contracting parties is to be gleaned from the provisions in the agreement.³

[15] The above equally applies to the wording of a guarantee. I use the phraseology of Maritz JA in paragraph [13] of *Standard Bank v Council of the Municipality of Windhoek*⁴ next: 'it is important that the guarantee's substance and legal character must be ascertained from its formulation, purpose, effect and application'.

[16] A real right generally prevails over a personal right (even if the personal right is prior in time). If a real right is obtained and registered with the knowledge of a preceding personal right, the purchaser may be bound to give effect thereto.⁵

[17] A suspensive condition in an agreement which is fulfilled is deemed to be in force from the date the agreement was signed and not from the date the condition was fulfilled. If the condition is not fulfilled timeously the agreement is discharged with retrospective effect.⁶

[18] The doctrine of fictional performance comes into play where a party to a contract prevents the fulfilment of a suspensive condition with the intention to frustrate it in order that he may not become bound to perform under the contract; then the unfulfilled condition will be deemed to be fulfilled against the frustrating party.⁷

Application of the law on the facts of this combined cases.

[19] It is common cause that the plaintiff in the main case did not pay the agreed purchase price of N\$235 000 within three months calculated from 20 August 2015 into the nominated account of first defendant's legal practitioners.

³ The Law of Contract, RH Christie, 4th edition, p 163, referred to and adopted in *Fullard v Nghaamwa* (HC-MD-CIV-MOT-GEN-2018/00180) [2018] NAHCMD 306 (30 August 2018), par 27

⁴ 2016 (1) NR 51 (SC), p58.

⁵ *Meridian Bay Restaurant (Pty) Ltd v Mitchell* SC NO 2011(4) SA 1 (SCA) par [12].

⁶ *Viviers v Ireland and Another* 2016 (3) NR 644 (HC) at par [23].

⁷ *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD at 588-589; 590.

[20] It is also clear that the "guarantee" provided was not provided to the legal practitioners of the first defendant within three months from 20 August 2015. *Vide* the letter from Bank Windhoek to the plaintiff on 11 December 2015 in par [7] above.

[21] A guarantee instead of payment was clearly intended in clause 3 of the settlement agreement. The guarantee, in the context of the settlement agreement, had to be provided within the three months from 20 August 2015 and had to be a confirmation/guarantee that plaintiff is already granted a loan for the agreed amount. Only thereafter the first defendant was required to sign all documentation relating to the transfer within a reasonable time, not before. If the signing of a deed of sale was required as part of the transfer documentation it is an obligation which would arise after payment, alternatively an accepted guarantee. The process of transfer was suspended on condition of payment within three months and in the absence of payment, a financial guarantee for payment (within three months).

[22] The settlement agreement was already part and parcel of an agreed solution to resolve disputes concerning the sale and transfer of the property.

[23] The guarantee required from the financial institution was that the plaintiff is granted a loan for the purchase price payable to first defendant without making it conditional on plaintiff's performance concerning ancillary conditions imposed by the bank.

[24] The letter the plaintiff relied upon is a confirmation addressed to the plaintiff that a Mortgage Bond was granted/approved over Erf 9535, Mungunda Street, Katutura, Windhoek on 9 December 2015 upon 7 (seven) special conditions required from plaintiff which must be in place or met before registration can take place.

[25] The letter did not constitute a timeous guarantee for payment of the purchase price to the first defendant. The letter incorporated conditions over which the first defendant had no control. It created ancillary conditions not embodied in the settlement agreement. Plaintiff in any event failed to prove that he accepted and complied with the conditions.

[26] I find that the letter did not constitute the required guarantee in full and final settlement of the disputes relating to the transfer of the property to the plaintiff. The settlement agreement was therefore discharged with retrospective effect and became unenforceable.

[27] In the premises the first defendant in the main case was justified to sell the property to the second defendant (plaintiff in the eviction case) and the necessity to decide whether Mr Vihajo was a *bona fide* purchaser does not arise.

[28] The following orders are made:

[28.1] Plaintiff's (Mr. Kazekuundja's) claims in the main case are dismissed with costs to include the costs of one instructing and one instructed counsel of the defendants (Mssrs Kritzinger and Vihajo).

[28.2] Plaintiff in the eviction case is granted an eviction order against the defendant therein (plaintiff in the main case) and everyone else on the property claiming occupation through Mr Kazekuundja, with costs for one instructing and one instructed counsel.

[28.3] Mr Kazekuundja shall vacate and leave the property to wit Erf 9535 (a portion of erf 9197), Katutura (extension No 16), in the municipal area of Windhoek, Registration Division "K", Khomas Region on or before 31 July 2019, whereafter the deputy sheriff of Windhoek is authorised to evict Mr Kazekuundja with the assistance of the Namibian Police Force if need be.

GH Oosthuizen
Judge

APPEARANCES:

PLAINTIFF(S):

ENS Africa/Namibia
Legal practitioner for plaintiff in the main case
per R Rukoro (instructing) and
T Muhongo (instructed)

DEFENDANT(S):

Sisa Namandje & Co. Inc
Legal Practitioner for defendants in the main case
and plaintiff in eviction case.
per N Mhata (Instructing) and
John - Paul Ravenscroft-Jones (instructed)