



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2017/03312

In the matter between:

LUCIA PANDULENI HAMUTENYA

PLAINTIFF

and

NAMBOER DORDABIS AUCTIONEERS CC

FIRST DEFENDANT

PIET COETZEE

SECOND DEFENDANT

ALEX MCDONALD

THIRD DEFENDANT

Neutral citation: *Hamutenya v Namboer Dordabis Auctioneers CC* (HC-MD-CIV-ACT-OTH-2017/03312) [2020] NAHCMD 366 (21 August 2020)

Coram: MILLER AJ

Heard: 20 – 23 July 2020

Delivered: 21 August 2020

Flynote: Law of contract – Memorandum of agreement (deed of sale) concluded by the plaintiff and the first defendant – Court asked to determine whether a further agreement (addendum) to the original memorandum of agreement was indeed concluded between the parties.

Law of Evidence – Factual disputes – Approach to determination – Where court is confronted with two mutually destructive versions – Court adopted the dictum formulated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) 11 (SCA) at 14I-15D para 5 – Court to make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities – Court applied that test – Consequently, the court found the plaintiff's version improbable – Court found the defendants' evidence credible – Court found that an addendum to the original agreement was concluded.

Summary: The plaintiff and the first defendant represented by the second defendant entered into a memorandum of agreement for the sale of land by the plaintiff to the first defendant in February 2013, subject to the fulfillment of a number of suspensive conditions – The defendants' case is that a further agreement was entered into in May 2013, which is an addendum to the original agreement, while the plaintiff denied signing the addendum and stated that she only became aware of that addendum during the present litigation – The main difference between the original agreement and the addendum concerned the payment of the purchase price – The purchase price of N\$100 000 in terms of the addendum became payable upon signature of the agreement, and not upon registration of the transfer as originally foreshadowed in the original agreement – It is common cause that the purchase price was indeed paid; a cheque for that amount was received by the plaintiff and banked by her into her bank account – The court was asked to determine whether the addendum to the original agreement was indeed entered into – The court heard the evidence of the plaintiff and the witness of the defendants, Ms Sharon Jansen van Rensburg who both presented conflicting versions to an extent – The court adopted the dictum from *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) 11 (SCA) at 14I-15D para 5, where it was held that when the court is to resolve a factual dispute and it is confronted with mutually destructive versions, the court has to make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities – The court found the evidence of Ms Sharon Jansen van Rensburg to be credible, and found the evidence of the plaintiff inherently improbable – Consequently,

the court concluded that the plaintiff and the first defendant did indeed conclude the addendum to the original agreement.

ORDER

1. The plaintiff and the first defendant concluded the addendum to the Deed of Sale.
2. The plaintiff is ordered to pay the costs, including the costs consequent upon the amendments.
3. The costs consequent upon the amendments are limited to N\$20 000.

JUDGMENT

MILLER AJ:

[1] This dispute is about a certain piece of land, owned by the plaintiff and occupied by the first defendant. The plaintiff seeks the eviction of the defendants from the land. The defendants resist the claim and allege that they are in fact entitled to lawfully occupy the land.

[2] Before I get to the resolution of the dispute, it is necessary to clarify an issue that arose when the land was transferred unto the name of the plaintiff some years ago. When the land was transferred to the plaintiff, the relevant title deed erroneously described the land as 'Portion 27 of portion 26 of Farm Dordabis No. 98, Khomas Region, Windhoek, Republic of Namibia'. This error, which has since been rectified, filtered through to the agreement concluded or allegedly concluded between the parties, the pleadings and the pre-trial order.

[3] It is now common cause that the title description of the land is 'Remainder of Portion 26 of Farm Dordabis No. 98'. This of course necessitated the required amendments to the documents, the pleadings and the pre-trial order.

[4] I can now safely accept that the dispute concerns the occupation of that piece of land by the defendants.

[5] It is likewise common cause that in February 2013 the plaintiff and the first defendant concluded a Deed of Sale in terms whereof the plaintiff sold the land for an amount of N\$100 000. The sale was subject to the fulfillment of a number of suspensive conditions. It was agreed that the registration of transfer into the name of the first defendant would take place upon the fulfillment of the suspensive conditions and that the payment of the purchase price would be made upon the registration of the transfer to the first defendant. A firm of legal practitioners, Diekmann & Associates was tasked to attend to the anticipated transfer in terms of the agreement. A certain Ms Sharon Jansen van Rensburg, a legal secretary in the employ of Diekmann & Associates attended to the transaction and the dealings between the parties in fulfillment of the mandate given to Diekmann & Associates.

[6] It is the case of the defendant that on 17 May 2013 the parties concluded a further agreement as an addendum to the original agreement. The main difference between the original agreement and the addendum concerned the payment of the purchase price. The purchase price of N\$100 000 in terms of the addendum became payable upon signature of the agreement, and not upon registration of the transfer as originally foreshadowed in the original agreement. It is common cause that the purchase price was indeed paid; a cheque for that amount was received by the plaintiff and banked by her into her bank account.

[7] The plaintiff denies that she signed the addendum and states that she first came to learn of it after the present litigation had commenced.

[8] The defendant clearly bears the onus to prove that the parties concluded the addendum. During the course of the hearing, I was requested to determine only that issue, and I will do so.

[9] I heard the evidence of the plaintiff and Ms Sharon Jansen van Rensburg. They were the only witnesses and to an extent they present conflicting versions as to the issue. Whilst the plaintiff denies any knowledge of the addendum or that she has signed it, the evidence of Ms Sharon Jansen van Rensburg is that Diekmann & Associates received instruction to prepare the addendum. Having done so, she forwarded the draft to the parties and made a contemporaneous note on the file that she had forwarded the draft to the plaintiff by email. She recalls receiving the purchase price and handing a cheque to either the plaintiff or somebody associated with the plaintiff, subsequent to the addendum being signed. It is apparent from the evidence of Ms Sharon Jansen van Rensburg that she had assumed that the addendum had been signed by both parties, following which she proceeded in terms of the agreement. She cannot definitely admit or deny the version of the plaintiff as to her signing or not signing the agreement but the totality of the evidence points to that being the case.

[10] The approach to resolving issues of fact when there are mutually destructive versions was dealt with by the Namibian Courts in adopting the approach formulated in *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie & Others*.¹ The relevant passage reads as follows:

[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and

¹ *Stellenbosch Farmers' Winery Group Ltd v Martel et Cie* 2003 (1) SA 11 (SCA).

blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail'. (See *U v Minister of Education, Sports and Culture and Another* 2006 (1) NR 168 (HC); *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC)).

[11] In cases where the probabilities are even, the party bearing the onus must fail. (*Ostrich Namibia (Pty) Ltd v African Black Ostriches (Pty) Ltd* 1996 NR 139 (HC)).

[12] The evidence of Ms Sharon Jansen van Rensburg strikes me as credible. She clearly has no personal interest in the matter. Her version is an objective account of what she can recall. She cannot recall specific details for instance as to who gave which specific instruction at any given time. There are no inherent or external improbabilities in her evidence and as a whole her evidence is consistent with the remainder of the facts.

[13] The evidence of the plaintiff, apart from her say so, is in some aspects thereof, inconsistent with common cause facts and likewise inherently improbable. The main concern regarding her evidence is her conduct and action around the payment of the purchase price at the time it was made and her acceptance thereof without more. The plaintiff is a qualified legal practitioner who at some stage practiced as an advocate. She would have been aware that the purchase price would be payable only upon registration of the property of transfer. She acknowledges that the purchase price was paid long before registration took place. I would have expected of a person of her

standing and knowledge to have questioned or at least enquired about this sudden change of events. On her own evidence she simply accepted the payment and banked the proceeds. Logic suggests that she would have been aware of the fact that the date for payment was advanced, so to speak, because of some intervening cause. These facts have the result that the plaintiff's say so rings hollow.

[14] The probabilities ultimately prevail with the result that I conclude that the plaintiff and the first defendant did indeed conclude the addendum to the agreement.

[15] As to costs, they will follow the result, including the costs occasioned by the amendment of the pleadings and the pre-trial order.

[16] I therefore make the following order:

1. The plaintiff and the first defendant concluded the addendum to the Deed of Sale.
2. The plaintiff is ordered to pay the costs, including the costs consequent upon the amendments.
3. The costs consequent upon the amendments are limited to N\$20 000.

K Miller
Acting Judge

APPEARANCES:

PLAINTIFF: U KATJIPUKA-SIBOLILE
Of Nixon Marcus Public Law Office, Windhoek

FIRST AND SECOND
DEFENDANTS: F ERASMUS
Of Francois Erasmus & Partners, Windhoek

THIRD DEFENDANT: No appearance