

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-ACT-CON-2020/01120

In the matter between:

**DR ESTER N SHAMENA-RONNI**

**PLAINTIFF**

and

**HIPPOLYTE N'SUNG-NZA MUYINGI**

**FIRST DEFENDANT**

**MIIKIENG MWAI DJUM MUYINGI**

**SECOND DEFENDANT**

**EPUPA INVESTMENT TECHNOLOGY (PTY)**

**THIRD DEFENDANT**

**REGISTRAR OF DEEDS**

**FOURTH DEFENDANT**

**Neutral citation:** *Shamena-Ronni v Muyingi* (HC-MD-CIV-ACT-CON-2020/01120)  
[2021] NAHCMD (24 August 2021)

**Coram:** MILLER AJ

**Heard:** 14, 15, 16 June & 07 July 2021

**Delivered:** 23 August 2021

**Flynote:** Action – Absolution from the instance – In a claim for specific performance based on a written deed of sale which has a suspensive condition, plaintiff required to

present some evidence on the basis of which a court, applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff. Plaintiff failing to produce evidence of compliance with the suspensive condition, absolution from the instance granted to the defendants with costs.

*Contract* – Suspensive condition – Condition in contract requiring some act to be performed in order that an obligation under the contract can come into existence – Plaintiff failing to comply with suspensive conditions.

**Summary:** The plaintiff entered into a written agreement for the sale of the immovable property – the agreement was subject to a certain suspensive condition, *inter alia*, that the plaintiff would obtain a loan from a recognized financial institution upon its usual terms and conditions for at least N\$ 3 508 645 within 30 (thirty) days after the date of signature of the agreement by the seller. The plaintiff alleges that it complied with the suspensive condition in that it obtained a loan in the amount of N\$ 2 806 916 with the balance of the purchase price being N\$ 701 729.00, to be paid by her as a deposit. The Plaintiff failed to provide proof that she accepted the loan from the bank or that she had the required deposit. As a result the first and second defendant allege no contractual obligation arose between the parties and they sold the property to the third defendant.

The first to third defendants brought an application for absolution from the instance based on the fact that the plaintiff failed to comply with the suspensive condition in that the loan amount approved was much lesser than the amount provided for in the suspensive condition.

*Held* that a suspensive condition is one, which suspends the operation or effect of one, or some, or all of the obligations under a contract until the condition is fulfilled.

*Held that* it must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e what their intention was as expressed in the contract. From the nature of the function of a suspensive condition it seems to me that this rule

should in that case, if anything, be more strictly adhered to than in regard to other terms of a contract.

*Held further that* when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

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### ORDER

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1. The application for absolution from the instance is granted.
2. The plaintiff is to pay the costs of the Defendants.
3. The matter is removed from the roll and is considered finalized.

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### JUDGMENT

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MILLER AJ:

#### Introduction

[1] This is an application for an absolution from the instance brought by the first to third defendants at the close of the plaintiff's case. For purposes of this judgment, I will refer to the parties as they are in the main action.

[2] The plaintiff seeks an order restraining and interdicting the fourth defendant from transferring certain immovable property being Erf 6088, Bach Street, Windhoek, situated in the Municipality of Windhoek ('the property') from the third defendants' name

to any other third party pending the finalisation of this action. She further seeks an order in terms whereof the third defendant is directed to sign all necessary documents as directed by the appointed conveyancers to effect transfer of the property from its name into the name of the first and second defendants.

[3] The plaintiff furthermore seeks for an order directing the first and second defendants to sign all necessary documents as directed by the appointed conveyancers to effect transfer of the property from their name into her name as well as signing all necessary documents to effect transfer of the property. In the event of the first, second and third defendant's non-compliance with the above mentioned, the plaintiff seeks for an order in terms whereof the Deputy- Sheriff for the District of Windhoek be duly authorised to sign all necessary documents as directed by the appointed conveyancers to effect transfer of the property.

#### The parties

[4] The parties to these proceedings need not be described in detail: The plaintiff is a major female dentist who entered into a sale agreement with the first and second defendant who are the registered owners of the property. The sale of the property between the plaintiff and the first and second defendant was subject to a suspensive condition.

[5] The third defendant is cited in these proceedings for reason that it purchased the property from the first and second defendants.

[6] The fourth defendant is cited in these proceedings for the reason that an interdict is sought against it not to transfer the property from the third defendants name to any other third party pending the finalisation of this action.

#### Brief factual background

[7] Most of the facts are common cause between the parties, these are that: On or about the 3<sup>rd</sup> and 4<sup>th</sup> September 2019, the plaintiff and the first and second defendant,

both acting personally, duly concluded a written Deed of Sale (deed of sale), in terms of which the first and second defendants sold the property to the plaintiff subject to a suspensive condition which reads as follows:

'This Agreement is subject to the following suspensive conditions, namely:

16.1 that the purchaser raises and receives a loan from the recognized financial institution, upon its usual terms and conditions, for at least N\$ 3 508 645.00 within 30 (thirty) days after the date of signature of this agreement by the seller;

16.1.1 the Purchase hereby undertakes to do all things and to sign all such documents as may be necessary and/or requisite in order to apply for and procure the grant of the said loan from the bank, building society or other financial institutions and to furnish written proof to the seller of the granting or refusal thereof;

16.1.2 the suspensive condition shall be deemed to have been fulfilled as soon as the purchaser or its agent has received confirmation that the loan in question has been approved by the financial institution, irrespective of any loan agreement between the purchaser and the institution regardless of any conditions imposed by the institution in granting such loan.'

[8] It is the first and second defendants' version that the plaintiff failed to comply with the suspensive condition of the deed of sale as stipulated in therein hence the agreement between the parties did not and could not create any enforceable rights.

[9] The plaintiff on the other hand alleges that she has fulfilled the suspensive conditions and thus seeks specific performance *inter alia* from the first and second defendants.

#### Plaintiff's case

[10] The plaintiff testified in support of her case as well as calling her estate agent Ms. Uripa Kahorongo. I will brief deal with both their testimonies. The following does not

purport to be a comprehensive treatment of their evidence, but merely a summary thereof in view of the issues of law and of facts summarised above, in determining whether the defendants should be granted absolution from the instance. The facts which are common cause, as set out above will not be repeated, except as may be necessary for purposes of this summary.

[11] The plaintiff testified that she concluded a written deed of sale with the first and second defendants for the purchase of the property in the amount of N\$ 3 508 645 inclusive of transfer costs. The deed of sale contained a suspensive condition. The plaintiff further testified that she complied with the suspensive condition in that she applied and secured a loan from Bank Windhoek, upon its usual terms for the amount of N\$ 2 806 916.00 on 24 September 2019 with the balance of the purchase price being N\$ 701 729.00, to be paid by her as a deposit.

[12] In support of her allegation that she complied the suspensive condition of the agreement, the plaintiff submitted the approval letter from Bank Windhoek as an exhibit, which reads:

'24 September 2019

To whom it may concern

Re: DR. ENM Shamena- Ronni- ERF 6088 BACH STREET, WINDHOEK

We hereby confirm that we have approved a loan in the above mentioned client subject to:

Purchase Price:	N\$ 3 508 645.00
Less Deposit price payable by client:	N\$ 701 729.00
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Loan amount approved:	N\$ 2 806 916.00

Please feel free to contact for further queries.

Regards,

BL MOUTON  
BUSINESS BANKER'

[13] Under cross-examination, the plaintiff's evidence is that her claim is based on the written sale agreement entered into and between herself and first and second defendants and that she regarded the contents as well as the terms and conditions of the agreement binding on her. The plaintiff confirmed that the loan approved in terms of the letter is N\$ 2 806 926 which is subject to the 20% deposit payable by her. The plaintiff further confirmed that the loan amount approved is less than the agreed purchase price as per the suspensive clause.

[14] It is the plaintiff's evidence under cross-examination that she provided documentary proof to her estate agent to provide to first and second defendants that she had the 20% deposit required and that such documents are not before court and that the 20% deposit is still available.

[15] It is further the plaintiff's evidence under cross-examination, that she has no documentary proof that she paid the required N\$ 701 729, being 20% deposit of the purchase price as a condition imposed by Bank Windhoek to the conveyancers but that she recalls making a few payments to the Dr. Weder, Hoveka & Kauta Inc of which she also has no proof. It is also the plaintiff's evidence that she signed the acceptance of the loan with Bank Windhoek on 25 September 2019 but does not know why the signed documents are not before court. The plaintiff added on that her estate agent forwarded the loan approval letter to first and second defendants on 25 September 2019.

[16] Ms Kahorongo who was called to testify by way of *supoena* testified that she was appointed by the plaintiff to facilitate the sale between the plaintiff and first and second defendants. Ms Kahorongo testified that sale of the property was subject to clause 16 of the deed of sale. Ms Kahorongo testified that Bank Windhoek approved the plaintiff's loan for N\$ 2 806 926 subject to the plaintiff paying N\$ 701 729 (20% deposit). Ms Kahorongo testified that the plaintiff was unable to sign the acceptance of loan

documents on 24 September 2019 but signed them on 25 September 2019 and that she provided the loan approval letter to the first and second defendants via whatsapp on the same day.

[17] Under cross-examination it is Ms Kahorongo's evidence that she does not know whether the plaintiff paid the required 20% deposit to the conveyancers. It is her evidence that the plaintiff did not provide her with any documents to be provided to the first and second defendants confirming that the plaintiff has the 20% deposit required. During re-examination, Ms Kahorongo testified that the deposit was never an issue because a year ago, the plaintiff applied for a loan, and she was over qualified, and as such she had demonstrated that she could afford the purchasing of the property.

[18] On a question from court whether Ms Kahorongo foresaw that the plaintiff would only be approved for 80% of the purchase price, Ms Kahorongo answered in the affirmative and added on that the plaintiff was also well aware of that. On a further question from the court to both the plaintiff and Ms Kahorongo as to why the deed of sale in terms of the suspensive clause did not clearly indicate that the plaintiff only had to obtain 80% of the purchase price and pay the 20% deposit herself and/or that the plaintiff already had the 20% in her possession. The plaintiff testified that she did not know why the deed of sale did not reflect the same. Ms Kahorongo confirmed that it is indeed a good question however, that she was not the lawyer who drafted the deed of sale despite it being on her company's letterhead and that they use already drafted templates.

[19] The plaintiff then closed her case which resulted in the defendants in moving for an application for absolution from the instance.

#### Issue for determination

[20] The issue for determination is whether the plaintiff has fulfilled the suspensive condition of the agreement pertaining to her to grant her the relief she seeks.



[21] The plaintiff was represented by Mr Muhongo and the first to third defendants by Mr Bangamwabo. Counsel filed heads of arguments for which the court wishes to thank them.

#### Submissions on behalf of the plaintiff

[22] Mr Muhongo submits that the court has to determine whether or not the contents of the letter from Bank Windhoek dated 24 September 2019 meets the hallmark of clause 16 taking into account the context of what transpired between the parties; that the plaintiff was approved (by a financial institution upon its usual terms and conditions) for a loan in the amount of the purchase price for the property as contemplated by clause 16 of the agreement; that the first and second defendants (at least until 24 January 2020) raised no demur and accepted that the plaintiff was approved for the loan in the amount of the purchase price of the property; that thereafter the first and second defendants refused to sign the property transfer documents into the plaintiffs name and that the first and second defendants - in breach of the agreement- resiled from the agreement with the plaintiff and concluded another agreement with the third defendant on 28 November 2020.

[23] Mr Muhongo further submits that Bank Windhoek would not have approved the loan in the event that the plaintiff did not have the 20% deposit available; that the plaintiff at all material times had the 20% deposit available. Mr Muhongo conceded to the fact that in respect of the aforementioned the plaintiff did not produce the best evidence but that does not mean that the plaintiff's evidence in this respect falls to be rejected.

[24] Mr Muhongo submits that the purpose of clause 16 of the agreement was- undoubtedly- to ensure that the plaintiff secure financing for the purchase of the property. Mr Muhongo submits furthermore that on the above observations, the evidence adduced by the plaintiff is of such character that this court applying its mind reasonably thereto could or might find for the plaintiff. Counsel referred the court to law dealing with the test for absolution at the end of the plaintiff's case as well as case law

dealing with the interpretation of agreements. The court will take into consideration those relevant case in arriving at its decision.

#### Submissions on behalf of the first to third defendants

[25] Mr Bangamwabo, submits that the main issue for determination is whether the plaintiff has led or produced evidence upon which a Court applying its mind reasonably to such evidence, could or might find for the plaintiff. Mr Bangamwabo, submits that in order for the plaintiff to succeed in her claim for specific performance, she must demonstrate, by way of admissible evidence, that she indeed complied with her contractual obligations as per the sale agreement, more specifically compliance with the suspensive condition as set out in clause 16 of the deed of sale.

[26] Mr Bangamwabo submits that clause 16 of the deed of sale is clear and unambiguous; that the approved loan is less than the amount as set out in clause 16.1 of the deed of sale; that there is no evidence before the court evincing that the first and second defendant were given documents from Bank Windhoek confirming the loan approval as well as the acceptance thereof by the plaintiff; that there is no evidence adduced by the plaintiff to prove that she indeed was capable of raising the 20 % cash deposit in the amount of N\$ 701 729 so as to fulfil the condition as set out in the loan approval and that the plaintiff was compensated for the expenses she incurred in respect of the rezoning of the property in the amount of N\$25 000 upon intervention by her estate agent.

[27] Mr Bangamwabo submits that it is a well established principle in our law that a condition precedent- a suspensive condition- suspends the operation of all obligations flowing from the contract until the occurrence of a future uncertain event; that the fulfilment or non-fulfilment of the condition precedent has retrospective effect. Mr Bangamwabo further submits that the suspensive condition as set out in clause 16 of the deed of sale was not fulfilled, henceforth the plaintiff's claim is meritless for it is based on a non-existing agreement; that plaintiff's failure to comply with and discharge her contractual obligation as set out in the suspensive condition is fatal to her claim for

specific performance; that there is no contractual relationship between the plaintiff and first and second defendant, as such there is no right or obligation to enforce..

### The Applicable Legal Principles

#### The Suspensive Condition

[28] In *Viviers v Ireland & Another*<sup>1</sup>, Ueitele J in dealing with a suspensive condition held that:

[22] A suspensive condition is one which suspends the operation or effect of one, or some or all of the obligations under a contract until the condition is fulfilled. Tebbutt J put it as follows in the matter of *Absa Bank Ltd v Sweet and Others*<sup>2</sup>:

-‘It is trite law that, in a contract which is made subject to a suspensive condition, the rights of the parties created by the contract remain in abeyance pending the fulfilment of the condition ... There is, however, a binding agreement between the parties, which neither can renounce pending fulfilment of the condition ...’

[23] During the period before a suspensive condition is fulfilled neither party can demand performance of the suspensive condition. If the condition is not fulfilled the contract is discharged with retrospective effect and the parties have to restore which they have performed. If the condition is fulfilled the contract, or that part of it which was suspended is deemed as regards the mutual rights of the parties to have been in force from the date the agreement was signed and not from the date that that the conditions was fulfilled.’

[29] In *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 SC paragraphs [18], the Namibian Supreme Court decided how interpretation shall be conducted in this Jurisdiction:

[18] South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension*

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<sup>1</sup> *Viviers v Ireland & Another* (I 3757/2012) [2014] NAHCMD 148 (18 May 2016).

<sup>2</sup> *Absa Bank Ltd v Sweet and Others* 1993 (1) SA 318 (C) at 322.

*Fund v Endumeni Municipality*, Wallis JA usefully summarised the approach to interpretation as follows:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.”

[30] In *Fullard v Nghaamwa*<sup>3</sup>, Angula DJP at paragraph 27 stated that:

‘The learned author of *The Law of Contract*, R H Christie, in his fourth edition at page 163 discusses the question of what amounts to a fulfilment of contractual conditions. He points out that the question whether a condition must be fulfilled in *forma specifica*, that in the exact manner stated by the parties in the agreement or *per aequipollens*, that is some equivalent manner, must be answered according to the common intentions of the parties because they are at liberty to make their contract subject to the condition that can only be fulfilled in *forma specifica* or to a condition that can be fulfilled *per aequipollens*. The learned author referred to what was stated by van den Heever JA in *Fruer v Maitlana*<sup>4</sup> at p 850:

“Where the language is plain, I think, the golden canon of interpretation has been crisply stated by GREENBERG, J.A., in *Worman v Hughes and Others*, 1948 (3) SA 495 at p. 505 (A.D.):

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<sup>3</sup> *Fullard v Nghaamwa* (HC-MD-CIV-MOT-GEN-2018/00180) [2018] NAHCMD 306 (30 August 2018).

<sup>4</sup> 1954 (3) SA 840 (A).

“It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e what their intention was as expressed in the contract.”

From the nature of the function of a suspensive condition it seems to me that this rule should in that case, if anything, be more strictly adhered to than in regard to other terms of a contract.’

### The Test for Absolution

[31] The test on absolution is trite. In *Gascoyne v Paul Hunter* 1917 TPD 170, also cited in *Stier and Another v Henke* 2012 (1) NR 370 (SC), [para 4], that the test at absolution is whether there was evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.

[32] Parker AJ in the matter of *Erasmus v Wiechmann*<sup>5</sup>, on the test of absolution from the instance held that:

‘[18] The test of absolution from the instance has been settled by the authorities in a line of cases. I refer particularly to the approach laid down by Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (A) at 92E-F; and it is this:

“[2] The test for absolution to be applied by a trial court at the end of a plaintiff’s case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

... [W]hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)).”

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<sup>5</sup> (I 1084/2011) [2013] NAHCMD 214 (24 July 2013).

[19] ... And it must be remembered that at this stage it is inferred that the court has heard all the evidence available against the defendant. (Erasmus, *Superior Court Practice* *ibid*, p B1-293).'

[33] I am of the view that the language used to frame the supervise conditions, particularly clause 16 in its entirety is clear and unambiguous. The condition must thus be fulfilled in the exact manner stated by the parties in the sale agreement. The Plaintiff submits that she complied with the suspensive condition as the letter from Bank Windhoek constitutes a fulfilment of the suspensive condition. I do not agree with her submission as the letter from Bank Windhoek is very clear that the Plaintiffs loan was approved in an amount much lesser than the amount agreed on in the deed of sale.

[34] In addition to the above, plaintiff's loan with the bank was approved subject to a condition that the plaintiff has to pay the 20% herself. From the evidence before court and the plaintiff's version it is clear that the plaintiff has not paid the 20% deposit required to activate her loan with the bank. The plaintiff testified that she provided her estate agent the necessary documents pertaining to the loan approval and the availability of the 20% deposit. On the other hand the estate agent testified that she did not receive any documents from the plaintiff to provide to first and second defendants.

[35] What this court fails to understand is that the plaintiff started off saying that she had paid the required 20% deposit to the conveyancers even though she had no documentary proof thereof and that she paid numerous amounts to them. Her estate agent testified on record that the conveyancers would not have been in a position to draft the necessary transfer documents if they were not placed in funds upon their request. Under cross examination the estate agent then testified that she is not aware whether the plaintiff had paid the 20% deposit or not. What is more confusing is that under cross-examination the plaintiff indicated to the court that she currently has the 20% deposit available.

[36] During submissions the plaintiff's counsel conceded to the fact that plaintiff indeed produced poor evidence in the aspect of the 20% deposit.

[37] In light of the aforementioned and having considered the test as set out in the *Stier v Henke* case as well as applying the above principles, I find that the Plaintiff, in my mind, has tendered no evidence upon which this court, properly directed and applying its mind reasonably to the said evidence, might find for the plaintiff at the end of the case.

[38] My finding is therefore that the plaintiff has failed to establish that she has complied with the suspensive condition by providing the obtaining the purchase price in the amount of at least N\$ 3 508 645 within 30 (thirty) days after the date of signature of the agreement by the seller.

#### Conclusion and order

[39] I have thus arrived at the conclusion that the applicant has failed to establish a case against the defendants.

[40] In the result I make the following order:

1. The application for absolution from the instance is granted.
2. The plaintiff is to pay the costs of the Defendants.
3. The matter is removed from the roll and is considered finalized.

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K Miller  
Acting Judge

APPEARANCES:

PLAINTIFF:

T Muhongo

Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek

FIRST RESPONDENT:

F Bangamwabo

of FB Law Chambers., Windhoek