REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-OTH-2022/01067

In the matter between:

NIRWANA TRADING ENTERPRISES CC	**1st PLAINTIFF**
ISSASKAR GAOSEB	**2nd PLAINTIFF**
JENNIFER TOATITE GAOSES	**3rd PLAINTIFF**

And

THEMISTOKLES DUDU MURORUA	**1st DEFENDANT**
FRIEDA MURORUA	**2nd DEFENDANT**
KHORIXAS TOWN COUNCIL	**3rd DEFENDANT**
THE REGISTRAR OF DEEDS	**4th DEFENDANT**

Neutral citation: *Nirwana Trading Enterprises CC v Murorua* (HC-MD-CIV-ACT-OTH-2022/01067) [2022] NAHCMD 584 (24 October 2022)

Coram: PRINSLOO J

Heard: **4 October 2022**

Delivered: **24 October 2022**

Flynote: Action proceedings – Court-connected mediation – Oral settlement agreement reached – Defendants no longer agree with oral settlement agreement reached in mediation – Plaintiffs seek an order declaring the settlement agreement concluded between the parties as binding and thus valid and enforceable – Fair trial rights raised by defendants – Constitutional defence cannot be substantiated.

Summary: The plaintiffs issued a summons against the defendants, it was defended by the defendants and was docket allocated to a managing judge. In terms of their joint case plan, the parties requested that the matter be referred for court-connected mediation in an attempt to resolve the issues between the parties amicably. The parties attended mediation on 2 June 2022, where after the mediator filed a report indicating that mediation succeeded and that the parties will file the settlement agreement.

The case was postponed to allow the legal practitioners to file the relevant settlement agreement. However, on 20 June 2022, the parties filed a further status report wherein the first and second defendants had a change of heart and indicated that they no longer agree with the settlement agreement and instead wanted the matter to proceed to trial. In terms of the current proceedings, the plaintiffs are seeking an order declaring the settlement agreement concluded on 2 June 2022 between the plaintiffs and the defendants as binding on the parties and thus valid and enforceable.

Held that: entering into a valid and binding agreement with another party brings about certain obligations that cannot be evaded by merely raising fair trial rights in terms of the constitution because the agreement with plaintiff no longer suits the defendants. The defendants in any event do not plead how their constitutional rights are violated.

Held that: Mediation is non-binding until a settlement is reached. If the agreement is not honoured, it will need to be enforced by a court. Once an oral settlement is reached on the day of mediation, causing whatever further steps or documentation contemplated is procedural in nature. This would be those instances where the parties for e.g. intend to be bound immediately, though expressing a desire to draw up their agreement in a more formal document at a later stage.

Held further that: the *Dumeni* case appears to be on all fours with the facts in claim one of the plaintiffs' particulars of claim and as a result I am of the view that the Formalities of Sale of Land Act cannot prevent the enforcement of the settlement agreement entered into between the parties.

The verbal settlement agreement concluded at mediation on 2 June 2022 between the plaintiffs and the first and second defendants is declared to be binding on the parties.

ORDER

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1. The verbal settlement agreement concluded at mediation on 2 June 2022 between the plaintiffs and the first and second defendants is declared to be binding on the parties.
2. The first and second defendants shall pay the plaintiff's costs of these proceedings on the scale between attorney and client.
3. This matter is postponed to 10 November 2022 for a Status Hearing at 15h00.
4. The parties must file a joint status report on or before 7 November 2022 regarding the further conduct of the matter.

JUDGMENT

PRINSLOO J:

The parties

[1] The first plaintiff is Nirwana Trading Enterprises CC, and its two members, Mr and Mrs Gaoseb, instituted action against the first and second defendants, Mr and Mrs Murorua, as well as the Khorixas Town Council and the Registrar of Deeds.

[2] The current interlocutory matter only relates to the plaintiffs and the first and second defendants (the defendants).

[3] Pursuant to the plaintiffs issuing summons against the defendants, it was defended by the defendants and was docket allocated to a managing judge. In terms of their joint case plan, the parties requested that the matter be referred for court-connected mediation in an attempt to resolve the issues between the parties amicably.

[4] The parties attended mediation on 2 June 2022, where after the mediator filed a report indicating that mediation succeeded and that the parties will file the necessary settlement agreement.

[5] On 8 June 2022 the legal practitioners of record filed a joint status report reporting as follows:

'2. The mediation session was successful in that the parties reached an amicable resolution and agreement regarding the respective claims. The parties' legal representatives are in the process of reducing the terms of the settlement to writing whereafter the parties shall attend to the signature of the settlement agreement, which shall be filed with the Honourable Court. We anticipate that the entire process will be completed within a period of one week from today.

3. In light of the above, the parties humbly pray that the matter be adjourned to 29th of June 2022 to enable the parties to finalise the settlement agreement and file same as the parties will request that the agreement be made an order of court.'

[6] The case was postponed to allow the legal practitioners to file the relevant settlement agreement. However, on 20 June 2022, the parties filed a further status report wherein the first and second defendants had a change of heart and indicated that they no longer agreed with the settlement agreement and instead wanted the matter to proceed to trial. Therefore, I intend to replicate the defendants' status report, wherein they set out their position as follows:

> '8. The First and Second Defendants submit for the purposes of Rule 38(2) and Rule 39(9) that:
>
> 8.1. This is an ADR matter, a dispute settlement matter and not a matter of law of contract and abstraction of this matter from this reality into contractual setting is a misdirection.
>
> 8.2 The (ADR) mediation settlement engagement in casu, which are not contested and which are per Practice Direction (19(7) privileged and not disclosable in any Court document or in any Court proceedings, are expressly without prejudice and;
>
> 8.3 There is no settlement to be enforced as settlement has failed on account of First and Second Defendants' clearly articulated discontentment and declinature to sign the Settlement Agreement.
>
> 8.4 The First and Second Defendants are adults in their sound and sober senses who are communicating to the world at large that they are not in agreement with the Settlement Agreement and are instead opting to vindicate their rights before the Court in terms of Article 12(1)(a) of the Constitution of Namibia.
>
> 8.5 The First and Second Defendants decline to be coerced into imposition to presently conclude an Agreement they do not want and to instead pray for administration of justice according to Law as expressed in Article 12 above.
>
> 8.6 The First and Second Defendants are per Article 12(1)(b) of the Constitution free to change their mind at any time and request the Honourable Court to acknowledge, respect and uphold the Defendants' disposition.
>
> 8.7 There are in any event other legal formalities obtaining beyond the draft Settlement Agreement presented to consummate the parties' dispute and invocation of the authority of the Court to enforce a purported without prejudice oral agreement, the Court is per its own aforementioned directions proscribed from enquiring into, is in these circumstances undesirable.

8.8 The First and Second Defendants are not in agreement with the Settlement Agreement, have unambiguously communicated their stance and pray that this be the end of the ADR process and that the matter proceed to trial in terms of Rule 39(8).'

Purpose of the application

[7] In terms of the current proceedings, the plaintiffs are seeking an order declaring the settlement agreement concluded on 2 June 2022 between the plaintiffs and the defendants as binding on the parties and thus valid and enforceable.

The application

[8] In their Notice of Motion, the plaintiffs are praying for the following relief [1]:

'1. Declaring the settlement agreement concluded between the Applicants and the First and Second Respondents as binding on the parties and thus valid and enforceable.
2. Cost of the application, on the scale of attorney-own-client in respect of one instructed counsel.
3. Further and/or alternative relief.'

[9] In support of their application, the second plaintiff deposed to an affidavit which the third plaintiff confirmed. The second plaintiff submitted that the parties negotiated in good faith and had every intention to meet their obligations in terms of the settlement agreement. The second plaintiff further submitted that although the settlement agreement was not reduced to writing at the time of mediation, this does not affect the validity of the agreement and that the agreement between the parties is legally binding. The second plaintiff submitted further that the defendants show a disregard for the ADR process and that the conduct of the respondents in the face of the mediation report and settlement agreement is unreasonable, unjustified and oppressive to the plaintiffs and the court and, as a result, prays for an adverse cost order against the respondents.

[1] I will refer to the parties as they are in the main action.

[10] The second plaintiff also proceeded to set out the terms of the agreement reached between the parties and avers that the terms of the agreement, at the time, were noted by the mediator and that the terms, as set out in the founding affidavit, are the terms the parties agreed on. I do not intend to replicate the exact terms of the agreement.

[11] In his opposing papers, the first defendant in summary alleges the following:

a) That the application for a declaration of settlement agreement as binding, valid and enforceable is contrary to the Namibian Constitution, which enjoins the court to afford the defendants their Article 12(1)(*a*) and (*b*) to have a fair hearing.
b) That the existing case law on the current subject matter overlooked Article 12(1)(*a*) right to a civil trial in circumstances where there is no waiver of this right. The first defendant submits that the related decisions were wrongly decided for violating the Article 12 rights of a litigant and invited the court not to follow the said case law.
c) That the plaintiffs are seeking to enforce a supposed oral settlement agreement, subsequently reduced to writing, which the first and second defendants declines to sign. The first defendant submits that plaintiffs seek to achieve this by employing an artificial separation of settlement negotiations from its end product, i.e. the reduction of the settlement agreement to writing. The first defendant submits that until the settlement agreement is reduced to writing and signed, the settlement cannot be considered to have been consummated.
d) That the court cannot ignore the first and second defendants' refusal to sign the agreement and this court should not hold the defendants to an oral agreement that has not been reduced to writing or signed.
e) The defendant's refusal to sign excludes consensus, and there can be no enforceable oral agreement.
f) Enforcement of the mediation settlement agreement would result in suppressing the defendants' fair trial rights.
g) The parties were not engaged in contractual negotiations but in an ADR process.

h) The dispute involves the alienation of the defendants' immovable property. Therefore, the Formalities in respect of the Contracts of Sale of Land Act, 71 of 969 (the Act) applies to claim two of the plaintiff's particulars of claim. That the court should consider enforcing an oral agreement will not cause the execution of further legal formalities pertaining to immovable property without a written deed of sale of land and the subsequent deed of transfer.

Common cause

[16] I have considered the respective affidavits before me, and the following appears to be common cause:

a) It is common cause that during the mediation process, both parties were represented by legal practitioners;
b) The defendants do not dispute that an oral settlement agreement was reached between the parties during the mediation proceedings;
c) The defendants do not assert not intending to conclude an agreement during mediation;
d) The defendants do not dispute the correctness of the terms of the agreement as set out in the founding affidavit, apart from complaining about the 'without prejudice nature of the mediation proceedings.
e) The defendants do no allege in their papers that it was a pre-condition to the validity of the oral agreement that the agreement had to be reduced to writing and be signed by the parties;
f) It is not a term of the agreement that its binding nature be postponed to its reduction to writing and signature thereof by the parties; and
g) No specific reasons were advanced by the defendants as to why the defendants no longer wish to abide by the terms of the oral agreement.

Arguments advanced by the parties

On behalf of the plaintiffs

[17] Mr Gaeb argued this matter on two fronts. Firstly, the constitutional defence raised by the defendants and secondly, the applicability of the Formalities in respect of the Contracts of Sale of Land Act, 71 of 1969.

[18] Mr Gaeb argued that the defendants' constitutional defence cannot be sustained because a) it is not the defendants' case that they did not get a fair hearing during the mediation process, and b) the defendants do not dispute that they negotiated and entered into an oral agreement during the mediation session.

[19] Mr Gaeb contended that the Formalities of the Contracts of Sale of Land Act does not apply to the current set of facts before the court as the plaintiffs' claim does not pertain to the sale of land and interest in land. Mr Gaeb argued that in the current matter neither the sale of land nor the sale of an interest in land is contemplated. Mr Gaeb submits that the case advanced by the plaintiffs is to the effect that the defendants are the nominee owners of the immovable property, who at all material times were acting on behalf of the beneficial owners, i.e. the plaintiffs.

[20] Mr Gaeb stated that the plaintiffs seek to compel the nominee owners to sign the documents necessary to permit the registration of the plaintiffs' right over a sub-divided portion of Erf 2247, Khorixas and an order directing the third and fourth defendants to so register the plaintiff's rights over the said immovable property.

[21] In this regard the court was referred to the case of *Empire Fishing Company (Pty) Ltd v Dumeni,*[2] wherein Sibeya J held that a nominee ownership agreement need not be in writing for such an agreement to have legal force.

[22] Mr Gaeb further contended that the oral agreement reached between the parties is binding and enforceable irrespective of whether it was reduced to writing or not. As a

[2] *Empire Fishing Company (Pty) Ltd vs Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022)

result, the defendants should be held to the terms of the oral agreement. Mr Gaeb submitted that the parties, by their decision to settle, indicated their willingness to abide by the settlement terms. However, the defendants now wish to repudiate the agreement without advancing any explanation.

On behalf of the defendants

[23] Mr Murorua argues that the defendants, by refusing to sign the settlement agreement, are asserting the enforcement of their fundament right to a civil trial. Mr Murorua further contended that the current matter concerns the vindication of a constitutional right and does not, as a consequence, prevail over the *stare decisis* principle binding the court to the ratios of the matters of *Soroses v Gamaseb*[3] and the cases cited therein as the matter was not decided in the context of Article 12(1)(*a*) of the Constitution.

[24] Mr Murorua submits that the mere mention and asserting of a specific constitutional right should be the end of the debate on the question, and the court should without more uphold the constitutional right to a civil trial without subjecting the defendants to the arduous task of justifying why their constitutional rights should be upheld.

[25] Mr Murorua argues that the end goal of enforcement of the oral agreement is sought through an assortment of arguments inspired by the law of contract, which suppresses the fact that the defendants indicated that they had no intention to be bound by the oral agreement. Mr Murorua further argues that ADR negotiations should not be mischaracterised as contractual negotiations, as an agreement at the end of mediation is a dispute settlement.

[26] Mr Murorua submits that the defendants are not capable of being compelled to transfer title or interest in the land in question as it is specifically proscribed by s 1 of Formalities in respect of the Contracts of Sales of Land Act.

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[3] *Soroses v Gamaseb* (HC-MD-CIV-ACT-MAT-2020-00122) [2020] NAHCMD 530 (19 November 2020).

What is mediation?

[27] Damaseb JP described the mediation process with reference to an American source as follows[4]:

'Mediation is a flexible, nonbinding dispute resolution procedure in which a neutral third party – the mediator – facilitates negotiations between the parties to help them settle. A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy. Mediation sessions are confidential and structured to help parties communicate – to clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options.'[5]

[28] Mr Murorua argued that one should not conflate the principles of mediation with contractual negotiations. In my view, mediations are more formal than negotiations, and I am further of the opinion that mediations and negotiations cannot be separated as they overlap.

[29] Mediations are a form of dispute resolution, and both negotiations and mediations are consensual rather than adversarial and produce a resolution only if both parties agree thereto. The difference between negotiations and mediations, in brief, is that negotiations involves only the parties, and mediations involve the intervention and assistance of a third party (the mediator) as a facilitator in the parties' effort to resolve their dispute. This means that the parties maintain equal control of the process, the decision on whether to settle and its terms.

[30] Within the context of mediations, negotiations are a form of communication with a definite objective: to resolve the dispute between the parties. The mediation process will result in a positive outcome if it manages to surmount or find a way around the

[4] Petrus T Damaseb Court-Managed Civil Procedure of the High Court of Namibia, 1st Ed Juta at 250.
[5] Plapinger and Stienstra ADR and Settlement in the Federal Courts: A sourcebook for Judges and Lawyers A Joint Project of the Federal Judicial Centre and the CPR Institute for Dispute Resolution (1996) 65.

obstacles standing in its way. Typically, during mediation proceedings, there will be one of three outcomes, i.e.:

a) Settlement;
b) No Settlement, which will be regarded as failed mediation; and
c) Ongoing settlement negotiations.

[31] The mediator's purpose is to assist the parties within a 'without prejudice' context to communicate, break deadlocks and avoid direct destructive confrontation. Regarding the role of the mediator during the mediation process, one can probably describe it as an assisted negotiation. Negotiations, in the context of mediation, and any context for that matter, means a process of discussing something with someone in order to reach an agreement with them.[6]

[32] The mediation process is inherently privileged, and parties are therefore free to explore all areas of the dispute and any potential solution, however unpalatable they may first seem.

[33] The defendants are disgruntled about the fact that the second plaintiff disclosed the terms of the agreement reached between the parties on the basis that whatever was said during the mediation proceedings was done without prejudice.

[34] Rule 39 (9) of the High Court Rules provides that: '. . . . anything discussed during a settlement conference is without prejudice and may not be used by any party in the proceedings to which the . . . conference relate or in any other proceedings.' Further, Practice Directive 19 (6) and (7) in terms of the Rules of Court stipulates that 'ADR sessions are conducted on a "without prejudice" basis and that . . . communications during or in respect of ADR sessions must not be disclosed in any court document or in any court proceeding.'

[6] Cambridge Advanced Learner's Dictionary, 4th Ed 5th Printing 2017 Cambridge University Press.

[35] In my view, approaching the court to enforce an agreement reached during mediation does not erode the 'without prejudice' basis on which the mediation is held. In an application to enforce a settlement agreement, it is also not irregular to disclose the terms of the agreement reached during mediation by the applicant. Any perceived prejudice falls away when a binding agreement comes into force[7]. Had it been another instance as set out above, i.e. failed mediation or ongoing settlement negotiations, the argument on the 'without prejudice principle would have had merits. That is, however, not what the position is in the matter before me. The 'without prejudice' basis also falls away in instances like this when the mediation process and the outcome thereof becomes a dispute between the parties. In order for the court to come to some kind of a decision, the court would need to know the facts surrounding the dispute and that would include the terms of the agreement as agreed/or not agreed upon between the parties in mediation.

Is an oral agreement reached during mediation binding on the parties

[36] Mediation is non-binding until a settlement is reached. If the agreement is not honoured, it will need to be enforced by a court. Once an oral settlement is reached on the day of mediation, causing whatever further steps or documentation contemplated is procedural in nature. This would be those instances where the parties for e.g. intend to be bound immediately, though expressing a desire to draw up their agreement in a more formal document at a later stage.

[37] In *AN v PN*[8] Masuku J held the when parties verbally settled their dispute at mediation and subsequent to the mediation, defendant refused to sign the written agreement that was prepared and alleged that same was devoid of its binding nature given its non-reduction to writing and signature by the parties is a fallacy.

[38] My Brother Masuku J went further and stated the following in no uncertain terms:

[7] *AN v PN* (HC-MD-CIV-ACT-MAT-2017/00135) [2017] NAHCMD 275 (27 September 2017) para 4.
[8] *AN v PN* (HC-MD-CIV-ACT-MAT-2017/00135) [2017] NAHCMD 275 (27 September 2017) para 24 -25.

'[24] It would be perverse, in the circumstances, to hold that the withdrawal of the defendant's signature to the agreement denuded the agreement of its binding nature. Parties should not be allowed to approbate and reprobate at the same time; blowing hot and cold, on the binding nature of oral agreements on them. A party, of full legal capacity, and who is duly represented at mediation, thus meeting the requirement of the equality of arms, should not lightly escape the consequences of an agreement reached thereat by belatedly having undisclosed compunctions, discomforts or nightmares about the agreement and then stating that the agreement is not binding for no other reason than that it had not been reduced to writing. As long as the parties are of age and were in full possession of their mental faculties when the agreement was made, public policy calls upon the courts to hold them to their verbal undertakings.

[25] It bears mentioning that the Court will not be party to and shall not permit the erosion of the institution of mediation, which is geared towards achieving the overriding objectives[13] of judicial case management as articulated in the rules of court by allowing spurious reasons to result in the dismantling of what is otherwise a genuine settlement agreement *inter partes*. It would be irresponsible of this court to allow parties to easily go back on their word merely because it turns out that the verbal agreement is no longer palatable, particularly for reasons that do not affect the reality of consent that accompanied the making of the oral agreement.

[39] In *Palastus v Palastus*[9] the court held that a verbal agreement concluded between the parties is binding and stated that in the event of the legal formalities not being required in the execution of an agreement, verbal agreements are binding as much as written agreement, as long as it is capable of being demonstrated that the parties reached consensus and merely desire the reduction of the verbal agreement in writing as a memorial[10].

[40] On behalf of the defendants, it was contended that unless an oral agreement reached during mediation is reduced to writing, the mediation process must be regarded as a failed mediation. I'm afraid I have to disagree with that contention as, firstly, there is no rule that an oral settlement agreement reached during mediation must be reduced to

[9] *Palastus v Palastus* (I 194-2014) [2015] NAHCNLD 29 (08 July 2015).
[10] Also see *Soroses v Gamaseb (*HC-MD-CIV-ACT-MAT-2020/00122) [2020] NAHCMD 530 (18 November 2020).

writing. Secondly, it discards the age-old notion that the 'only element that our law requires for a valid contract is consensus, naturally within proper limits – it should be *in or de re licita ac honesta.'*[11]

[41] In the matter before me it is not a case where the parties intend to postpone the creation of contractual relations until a formal contract is drawn up and executed, nor is it the case of the defendants that they did not willingly enter into the oral agreement with the plaintiffs, with an aim to settle the dispute between them. It is clear from the mediator's report and the joint status report filed by the legal practitioners dated 8 June 2022 that the parties amicably resolved the dispute and that they are *ad idem* with regard to the terms thereof, which were about to be reduced to writing by the legal practitioners.

[42] My understanding from the facts are that the defendants had a change of heart and decided that they no longer wanted to be bound to the oral agreement and therefore refuses to sign the written settlement agreement.

[43] On behalf of the defendants it was argued that a party is entitled to change their mind and the mere mention and asserting a specific constitutional right should be the end of the debate on the question and the court should without more uphold the constitutional right to a civil trial without subjecting the defendants to the onerous task of justifying why their Constitutional rights should be upheld.

[44] I take no issue with Mr Murorua's argument that Namibia is a constitutional democracy with its supreme law being the Constitution of Namibia[12] and that statutory law and common law are therefore subsidiary to the Constitution. I am however of the considerate view that the word 'constitution' is not a magic formula that can be flaunted in order to get out of a valid and binding agreement.

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[11] *Conradie v Rossouw,* 1919 AD 279 at 320 confirmed in *The Erongo Regional Council & Others v Wlotzsbaken Home Owners Association and Another* 2009 (1) NR 252 (SC) at para 50.
[12] Article 1(6) of the Constitution.

[45] Entering into a valid and binding agreement with another party brings about certain obligations that cannot be evaded by merely raising fair trial rights in terms of the constitution because the agreement with the plaintiffs no longer suits the defendants. The defendants in any event do not plead how their constitutional rights are violated.

[46] I am of the opinion that the defendants' constitutional defence cannot be substantiated. The parties are in my view bound by the oral agreement, whatever issues the defendants found after the fact to disagree upon does not change whatever already occurred and that which was already agreed upon.

Formalities of Contracts of Sale of Land Act 71 of 1969

[47] The second issue raised by the defendants are that the oral settlement agreement between the parties are of no force and effect as far as it relates to first claim because it falls short of the requirement of s 1 of the Act, as the plaintiffs' claim relates to the contract of sale of land and certain interests in land.

[48] The case advanced by the plaintiffs is to the effect that the defendants are the nominee owners of the immovable property, who was acting on behalf of the beneficial owners, namely the plaintiffs. The plaintiffs do not seek to purchase the immovable property from the defendants. They seek a declaratory order that the defendants sign the necessary documents so that the ownership of the sub-divided property is vindicated. The plaintiffs allege the following in their particulars of claim:

a) In respect of claim A the plaintiffs plead that during February 2011 the first and second defendants requested the plaintiffs to purchase Erf 2247, Khorixas, Kunene Region upon which the first and second defendants had a Permission to Occupy rights (PTO) with the understanding that a portion of Erf 2247 would be registered in the names of the second and third plaintiffs, in their personal capacity.

b) It was agreed that the plaintiffs would pay the purchase price of the property to the third defendant, who would register the property in the names of the first and the

second defendants. Once the property was registered in the names of the first and second defendants the parties would arrange for the sub-division of the property and a portion of the erf would be transferred to the plaintiffs. The sub-division was done and paid for by the plaintiffs and the property registration documents were prepared and furnished to the first and second defendants, who, according to the plaintiffs, are now refusing to sign the said documents since March 2021.

c) The plaintiffs are seeking mandamus for the registration of the plaintiffs' ownership of the sub-divided portion of Erf 2247, Khorixas.

[49] In *Empire Fishing Company (Pty) Ltd v Dumeni*[13] Sibeya J stated as follows in respected of a special plea raised of non-compliance with the Formalities in respect of Contract of Sale of Land Act:

'[53] Mr. Shikongo submitted that the alleged agreement between the parties relates to an interest in land in respect of both the plaintiff and the first defendant. The said agreement was not reduced to writing nor was it signed by both parties, and therefore offends against the Formalities of Sale of Land Act and is inevitably of no force or effect.

[54] S 1 of the Formalities of the Sale of Land Act provides that:

> "1. (1) No contract of sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority."

[55] The plaintiff, on the other hand, submitted that it does not plead a case to the effect that the plaintiff paid monies to the first defendant to purchase the land or the interest in the land from the first defendant, therefore there is no sale contemplated between the parties.

[56] The case advanced by the plaintiff is that the first defendant is the nominee owner of the immovable property who at all material times was acting on behalf of the beneficial owner, being

[13] *Empire Fishing Company (Pty) Ltd vs Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022)

the plaintiff in this instance. All that the plaintiff seeks in the present litigation is to compel the nominee owner to transfer the farm to the true owner.

[57] Mr. Chibwana referred this court to a decision of the Supreme Court of Appeal in *Du Plooy and Another v Du Plooy and Others*[14] in order to emphasise that the South African courts have recognized nominee holdings. He submitted that the agreement to transfer ownership is not required to be in writing (even though in this matter the true beneficial owner's entitlement to claim the transfer of the farm was reduced to writing). The Supreme Court of Appeal in *Du Plooy* held that:

> "[32] That does not mean that Robert Du Plooy was free to dispose of the houses. He held them, once transfer had been effected, on behalf of himself and his siblings. His nomination placed him in a position of trust in relation to all of the affairs of the family, including its proprietary interests. In that sense, he was in a similar position to the respondent in *Dadabhay v Dadabhay* who, on the strength of an oral agreement entered into with the appellant, bought a house on behalf of and as nominee for her but refused to transfer it to her when called upon to do so. This court held that the oral agreement was not hit by s 1(1) of the Alienation of Land Act 68 of 1967 because it was "in no sense a contract of sale between the appellant and the respondent" and neither was it a cession in respect of an interest in land because it was not a "cession in the nature of a sale". In the context of the particulars of claim, the court held that the word "nominee" may well have been used to denote that the respondent would act as a trustee in buying the property and would thereafter sign all documents, when called upon by the appellant, in order that it could be registered in her name".

[58] The preamble of the Formalities of Sale of Land Act sets out the objective of the Act as follows:

> "To provide for the formalities in respect of a contract of sale of land and certain interests in land; to repeal section 1 of the General Law Amendment Act, 1957; and to provide for incidental matters."

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[14] *Du Plooy and Another v Du Plooy and Others* (417/11) [2012] ZASCA 135; [2012] 4 All SA 239 (SCA) (27 September 2012).

[59] I find, after consideration of the decision in *Du Plooy*, that *Du Plooy* speaks to the objective of the Formalities of the Sale of Land Act and breathes meaning to s 1 thereof. I therefore find *Du Plooy* to be persuasive, to the extent that, a nominee ownership agreement need not be in writing for such an agreement to have legal force. This is premised on the fact that such an agreement is not a contract of sale of land or any interest in land or in the nature of a sale, and therefore s 1 (1) of the Formalities Sale of Land Act, in my view, does not find application.'

[50] The *Dumeni* case appears to be on all fours with the facts in claim one of the plaintiffs' particulars of claim and as a result I am of the view that the Formalities of Sale of Land Act cannot prevent the enforcement of the settlement agreement entered into between the parties.

Costs

[51] The only remaining issue is the issue of cost. Mr Gaeb prayed for a punitive cost order in this matter as a result of the defendants pursuant to the mediation that was successfully finalized.

[52] In this regard I will once again take my cue for Masuku J when he said the following in *AN v PN:*

'[27] In Namibia Breweries Limited v Serrao[14], this court expressed the following in respect of the circumstances in which a court may grant costs on the punitive scale:

[15] … in South African Bureau of Standards v GGS/AU (Pty) Ltd, Patel, J stated:

Clearly there must be grounds for the exercise of the Court's discretion to award costs on an attorney and client scale. Some of the factors which have been held to warrant such an order of costs are: that unnecessary litigation shows total disregard for the opponent's rights (Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (II) 1946 TPD 226 at 236); that the opponent has been put into unnecessary trouble and expense by the initiation of an abortive application (In re Alluvial Creek Ltd 1929 CPD 532 at 535; Mahomed Adam (Pty) Ltd v Barrett 1958 (4) SA 507

(T) at 509B-C; Lemore v African Mutual Credit Association and another 1961 (1) SA 195 (c) at 199; Floridar Construction Co (SWA) (Pty) Ltd v Kries (supra at 878); ABSA Bank Ltd (Voklskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd 1995 (3) SA 265 (c) at 268D-E); that the application is foredoomed to failure since it is fatally defective (Bodemer v Hechter (supra at 245D-F)) or that the litigant's conduct is objectionable; unreasonable, unjustifiable or oppressive.'

[28] I am inclined to agree with the plaintiff's argument that the defendant's pursuit in these proceedings is consistent with the general tenor of the immediately preceding exposition of the law. The defendant demonstrated a disregard of the agreement reached and threw the parties back to square one, as it were, doing the overriding objectives of judicial case management a serious and unacceptable assault in the process. Furthermore, this conduct has contemporaneously immersed the plaintiff in the pools of an avoidable and unnecessary expense.'

[53] I fully concur with the position taken by the court in the aforementioned matter.

Order

[54] In the result, the following order is made:

1. The verbal settlement agreement concluded at mediation on 2 June 2022 between the plaintiffs and the first and second defendants is declared to be binding on the parties.
2. The first and second defendants shall pay the plaintiff's costs of these proceedings on the scale between attorney and client.
3. This matter is postponed to 10 November 2022 for a Status Hearing at 15h00.
4. The parties must file a joint status report on or before 7 November 2022 regarding the further conduct of the matter.

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JS Prinsloo

Judge

APPEARANCES

PLAINTIFFS:	K Gaeb Of Sisa Namandje & Co. Inc., Windhoek
DEFENDANTS:	L Murorua Of Murorua Kurtz Kasper Incorporated Windhoek