

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/02437

In the matter between:

**GERHARD OTTO ZIMNY**

**PLAINTIFF**

and

**THOMAS JOHAN BROWN VAN WYK**

**DEFENDANT**

**RISA DREYER**

**FIRST THIRD PARTY**

**DR. WEDER, KAUTA & HOVEKA INC.**

**SECOND THIRD PARTY**

**Neutral citation:** *Zimny v van Wyk* (HC-MD-CIV-ACT-CON-2021/02437)  
[2024] NAHCMD 170 (15 April 2024)

**Coram:** SCHIMMING-CHASE J

**Heard:** 7 – 9 & 11 August 2023

**Delivered:** 15 April 2024

**Flynote:** Contract — Signature — It is a trite principle of the law of contract that a person who has signed a contractual document thereby signifies his assent to the contents of the document.

Contract — Interpretation — Proper approach to interpretation of contracts — Ordinary grammatical meaning applied in the absence of absurd results.

Contract — Interpretation — Construction of contract matter of law and not of fact — Interpretation of contracts matter for court and not witnesses.

**Summary:** The plaintiff sued the defendant for payment of the amount of N\$1 050 000, being the vatable amount payable to the Receiver of Revenue on the sale of an immovable property from the plaintiff to the defendant. The plaintiff was, at all material times, registered for VAT. The defendant, at all material times, was not registered for and did not register for VAT. The contract of sale provided that in the event that the defendant was not registered for VAT, in order for supply to be zero rated, the defendant undertook to apply for registration of VAT, and transfer would not be effected prior to the date upon which the defendant registered for VAT.

The defendant filed a third party notice seeking an indemnification from the first and second third parties (in the event that the defendant was found liable to pay the VAT amount), on the grounds that transfer and registration of the property was conditional and would not be effected prior to the date upon the defendant registering for VAT purposes, and this registration becoming effective in accordance with the relevant VAT legislation. The defendant also sought to hold the third parties liable for incorrect advice relating to the liability to pay VAT.

The defendant also claimed payment of the amount of N\$48 000 from the third parties, being an overpayment of applicable transfer duties. This was based on a dispute between the third parties and the defendant as to the applicable purchase price in terms of the contract, on which transfer duty was calculated in terms of the Transfer Duty Act 14 of 1993.

*Held that*, in interpretation of contracts it is trite that words are to be given their ordinary grammatical meaning unless to do so would result in an absurdity.

*Held further that*, interpretation is a matter of law and not of fact, and is a matter

for the court and not for witnesses to decide.

*Held further that*, the terms of the contract were clear that any VAT which may become payable if the transaction is not regarded as a zero rated supply, would be excluded from the purchase consideration, and the defendant would be responsible to pay VAT in addition to the purchase consideration. The contract further provided that in the event of the defendant not being registered for VAT, in order for supply to be zero rated, the defendant undertook to apply for registration for VAT purposes as soon as possible, and that transfer would not be affected prior to the date upon which the registration of defendant for VAT purposes become effective in accordance with the VAT legislation.

*Held further that*, from the clear grammatical terms, the defendant undertook to apply for VAT. The failure to do so, rendered the defendant liable to pay VAT, and therefore the plaintiff's claim against the defendant for the payment of VAT succeeded.

*Held further that*, as regards the claim between the defendant and the third parties, and on the evidence, the defendant's contention that he was advised differently by the third parties on his liability to pay VAT was unsustainable. The terms of the contract clearly provided otherwise.

*Held further that*, although the third parties should have considered not passing transfer until the defendant registered for VAT as set out in the agreement, the loss fell squarely within the responsibility of the defendant, who contractually undertook to pay VAT. The defendant was also made aware on more than one occasion that transfer was imminent and did nothing. In any event, the defendant continues to reside on the property and was not prepared to return the property to the plaintiff.

*Held further that*, as regards the overpayment of N\$48 000 by the third parties, it was clear from the contract that the purchase price was N\$7 million and not N\$7,6 million (which was the amount to be allocated to transfer costs). The third parties calculated the transfer duties on an incorrect amount and accordingly

were liable to the defendant for this amount.

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**ORDER**

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1. The plaintiff's claim against the defendant succeeds.
2. The defendant is ordered to pay the amount of N\$1 050 000 to the plaintiff.
3. The defendant is ordered to pay interest on the aforesaid amount at the rate of 20% per annum a *tempore morae* calculated as of 19 March 2021 to date of final payment.
4. The defendant is ordered to pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.
5. The defendant's claim against the third parties partially succeeds.
6. The third parties are ordered to pay the defendant the amount of N\$48 000, jointly and severally the one paying the other to be absolved.
7. The third parties are ordered to pay interest on the aforesaid amount at the rate of 20% per annum calculated as of date of judgment to date of final payment.
8. The defendant and third parties shall each pay their own legal costs.
9. The matter is regarded as finalised and removed from the roll.

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**JUDGMENT**

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SCHIMMING-CHASE J:

Introduction and parties

(i) In this action, the court must determine which of the parties before court is liable, if at all, to the plaintiff, in the amount of N\$1 050 000, being the vatable amount payable to the Receiver of Revenue on the sale of an immovable property from the plaintiff to the defendant.

(ii) The plaintiff is Gerard Otto Zimny, a major retired male, resident in Windhoek. The defendant is Thomas Brown van Wyk, a major male duly registered medical practitioner with specialisation in oncology practising as such in Windhoek.

(iii) The first third party<sup>1</sup> is Risa Dreyer, a major female legal practitioner and conveyancer, practising as such in terms of s 87 of the Legal Practitioners Act 15 of 1995 ('the Legal Practitioners Act'), under the name and style of Dr Weder, Kauta & Hoveka Incorporated.

(iv) The second third party is Dr Weder, Kauta and Hoveka Incorporated ('WKH'), an incorporated body with liability guaranteed by its members, conducting business as legal practitioners with the necessary fidelity fund certificate prescribed by s 20(1) of the Legal Practitioners Act.

The pleadings

*Plaintiff's claim against defendant*

(v) The plaintiff's claim emanates from a written agreement concluded between himself and the defendant at Windhoek on 2 October 2020, in terms of which the plaintiff sold to the defendant certain immovable property, namely a commercial farm, described as Portion 2 (Brokenthal) (a portion of portion A) of

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<sup>1</sup> The plaintiff issued third party notices to the first and second third parties on 24 August 2021.

the Farm Vaalgras No 1 No 38, measuring 2034,1076 hectares, in the Registration Division "M" and held by Deed of Transfer No 1383/2013 ('the property').

(vi) The purchase consideration for the property was expressed as follows in the written agreement –

'4. Purchase Price

The purchase price is the sum of N\$7, 600,00 (seven million six hundred thousand Namibia Dollars) (which amount includes transfer costs up to and including N\$600,000) payable as follows:

4.1 The full purchase price is payable against registration of transfer of the property into the name of the purchaser. All payments in terms hereof shall further be made free of exchange at the address of the conveyancers as appointed in paragraph 1.1.4 hereof or at such other address or to such person as the seller may nominate in writing.'

(vii) The plaintiff's grounds for relief relate to the payment of Value-Added Tax ('VAT') in the amount of N\$1 050 000, which the plaintiff alleges is owed to him by the defendant, based on the following provisions contained in the parties' written agreement:

'5. VAT

The parties record and agree that:

5.1 It is hereby recorded that any VAT (Value Added Tax) which may become payable under this agreement if the transaction is not regarded as zero rated supply, is excluded from the above-mentioned consideration and shall be payable by the purchaser in addition to the consideration.

5.2 For purposes of the aforesaid the Seller confirmed that he is in fact registered for VAT purposes and that the registration number is \_\_\_\_\_.<sup>2</sup>

<sup>2</sup> Section left blank in the contract. It is common cause between the parties, however, that the plaintiff was registered for VAT.

5.3 For purposes of the aforesaid the purchaser confirmed that he is fact NOT REGISTERED for VAT purposes.

5.4 In the event of the Purchaser not being registered for VAT, in order for supply to be zero rated, the Purchaser hereby undertakes to apply for registration for VAT purposes as soon as possible hereafter and it is recorded that registration of the Property in the name of the Purchaser will not be affected prior to date upon which the registration of the Purchaser for VAT Purposes becomes effective in accordance with the VAT legislation.'

(viii) In this regard, transfer of the property was, in terms of clause 6 of the written agreement, to be passed by the second third party, WKH. It is not in dispute that the first third party, Ms Dreyer, was the conveyancer who took instructions and arranged for passing of transfer of the property to the defendant.

(ix) The plaintiff alleges that he complied with all his obligations in terms of the agreement. It is not in dispute that the defendant took transfer of the property and that he resides there with his family.

(x) The plaintiff pleads that the defendant breached the written agreement in that he failed to pay VAT as required by clause 5.1 of the agreement. In particular that he

(a) failed or refused to apply for registration of VAT;

(b) caused and took transfer of the property into his name during about December 2020 without having applied for or having been registered for VAT.

(xi) The plaintiff further pleads that the sale of the property was not zero rated and attracted VAT at the rate of 15 per cent on the purchase consideration (excluding transfer costs) in the total amount of N\$1 050 000. This VAT amount

was levied and charged to the plaintiff by the Receiver of Revenue.

(xii) The plaintiff duly paid the aforesaid VAT amount of N\$1 050 000 to the Receiver of Revenue on or about 19 March 2021 as the plaintiff was obliged to do in terms of the Value-Added Tax Act 10 of 2000 ('VAT Act').

(xiii) In the premises, the plaintiff pleads that the defendant is liable to the plaintiff in the amount of N\$1 050 000, which the defendant refuses to pay despite having taken transfer of the property.

*Defendant's defence(s) to the plaintiff's claim<sup>3</sup>*

(xiv) The defendant at the outset raised a special plea that clause 5.4 of the agreement created a condition precedent, to the effect that the registration of the property in the name of the defendant would not be effected prior to the date upon the defendant registering for VAT purposes in accordance with the relevant VAT legislation. In the premises, so it was pleaded, the transfer of the property was conditional upon the defendant having registered for VAT, so that the supply would be zero rated and accordingly not attract any VAT liability.

(xv) It was further pleaded that transfer was effected by the plaintiff's agent (the third parties) upon the plaintiff's instruction and without the defendant's knowledge or the defendant having been forewarned. The defendant never waived (nor intended to waive) his entitlement to his rights contained in clause 4.5, or any other rights he may have had.

(xvi) The plaintiff is, in the circumstances, not entitled to rely on the provisions of clause 5.1 of the agreement 'in the absence of the condition precedent having been met, and the defendant's obligations remained conditional on him having registered for VAT prior to the date upon which the property was transferred'.

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<sup>3</sup> The defendant pleaded to the plaintiff's claim, and the plaintiff replicated thereto. The defendant also delivered a statement of claim against the third parties. The third parties defended the claim against them and delivered a plea to the defendant's statement of claim. The defendant replicated to the third parties' amended plea.



The plaintiff's entitlement to claim, as he does, has not arisen and the plaintiff has no cause of action.

(xvii) The plaintiff's plea on the merits, apart from admitting the citation of the parties, the terms of the written contract and the fact that the property was indeed transferred into his name, are bare denials.

(xviii) The plaintiff, in his replication, pleaded that in the event that any rights may have been found to have been created *vis-a-vis* the defendant by clause 5.4 of the written agreement, same were waived by the defendant by virtue of the defendant's following conduct:

(a) The defendant failed to take reasonable steps to register for VAT between 2 October 2020 when the agreement was signed, and 11 December 2020, when transfer of the property into the defendant's name took place.

(b) The defendant failed to object to transfer after having been informed that transfer of the property was imminent, and took transfer instead.

(c) The defendant failed to rely on the provisions of clause 5.4 after being informed that transfer was imminent.

(xix) The plaintiff further replicated that by virtue of the aforementioned conduct, the defendant, by his conduct, negligently represented to the plaintiff and to the first and second third parties that the defendant had elected not to register for VAT. The plaintiff, to his prejudice, relied on the aforementioned representation and allowed the transfer of the property to the defendant to proceed. Accordingly, the defendant is estopped from relying on clause 5.4 of the agreement.

*Defendant's claim against third parties*

(xx) The defendant's claim for indemnification against the third parties is premised on the following.

(xxi) The first and/or second party prepared and drafted the agreement of sale of the immovable property on the instruction of the plaintiff. The defendant was liable for the costs of preparation of the agreement. In terms of the agreement, WKH was nominated by the plaintiff as the conveyancers who would deal with all aspects of the transfer of the property.

(xxii) The purchase price for the property was agreed to be N\$7,6 million which amount included the transfer costs up to and including N\$600 000. The agreement provided that the defendant would be liable to pay any VAT attracted by the transaction if it was not regarded as a zero rated supply, and the parties acknowledged that the defendant was not registered for VAT. The defendant pleads that clause 5.4 contained an express agreement that Ms Dreyer and/or WKH would not effect transfer of the property prior to the defendant registering for VAT in accordance with the applicable legislation.

(xxiii) The defendant pleaded that at all material times the third parties owed the defendant a duty of care in light of the provisions of clause 5.4. Despite this duty of care, Ms Dreyer and WKH made the following material misstatements and/or misrepresentations to the defendant:

(a) that the transfer duties were to be charged and thereafter paid in an amount of N\$7,6 million;

(b) that transfer duties in the amount of N\$502 000 became payable.

(xxiv) As a direct result of the representation, the defendant paid the amount of N\$644 001,50 into WKH's trust account, which included the transfer duties as demanded. In making the representations, Ms Dreyer and or WKH were negligent in one or more respects:

(a) all duties including transfer duties and stamp duties should have been calculated on a selling price of N\$7 million as opposed to the amount of N\$7,6 million;

(b) in terms of s 2(a)(iv) of the Transfer Duty Act 14 of 1993 (as amended), the correct amount of transfer duties payable on the selling price of N\$7 million is N\$454 000, as opposed to N\$502 000.

(xxv) In the result, the first and second third parties negligently misrepresented the correct legal and factual position to the defendant who in turn, and to his own detriment, acted on the misrepresentations.

(xxvi) The defendant further pleads that during a consultation with Ms Dreyer, and prior to finalising the agreement, the defendant explained to Ms Dreyer that the property would not be utilised for commercial purposes. Ms Dreyer then represented to the defendant that because he was not registered for VAT, the transaction would be zero rated.

(xxvii) Furthermore, in preparing the draft agreement for the parties, Ms Dreyer or WKH represented to the defendant that –

(a) VAT would only become payable by the defendant in terms of the agreement, if the transaction was not rated as a zero supply.

(b) They were fully aware of the intention of the parties that the registration (and transfer) of the property into the defendant's name would not be effected prior to the date upon which he had effectively registered for VAT purposes in terms of the applicable VAT legislation, and that.

(c) The third parties were reasonably aware of the defendant's confirmation in clause 5.3 of the agreement that he was not registered for VAT.

(xxviii) The defendant pleads that the third parties, in the circumstances, acting reasonably, ought not to have effected transfer of the property without further notice to the defendant, without the defendant having registered for VAT, and despite the contract still being conditional. Further, that the transaction was a commercial transaction which would not be zero rated and would attract VAT, in the circumstances.

(xxix) Thus, so the defendant alleges, in effecting the transfer in those circumstances and in contravention of clause 5.4 of the contract, the third parties acted negligently and in breach of their duty of care owed to the defendant. Had the defendant been afforded an opportunity to register for VAT and provided proper notice by the third parties, he would have registered accordingly, and the transaction would in those circumstances be zero rated. No VAT would have been payable in the circumstances. Alternatively, and in the event that the transaction was not zero rated, the defendant would have been able, as a registered VAT vendor, to have off-set his output VAT against input VAT and be reimbursed for the difference in as far as his output was the greater.

(xxx) Therefore, and in the event that the court finds that the defendant is liable to the plaintiff for the amount of N\$1 050 000, representing the vatable amount on the property transaction, the defendant claims an indemnification from the third parties, being the damages suffered in the loss of this amount, plus payment in the amount of N\$48 000 being the overpayment of transfer duties.

*Third parties' defence(s) to defendant's claim for indemnification*

(xxxi) The third parties deny liability towards the defendant. They plead, firstly, that the agreement was drafted and prepared upon instructions of the defendant. They deny that on a proper interpretation of the written agreement, the third parties would not effect transfer of the property prior to the defendant having registered for VAT. They plead that Ms Dreyer advised the defendant to discuss the possibility of registering as a VAT vendor with his bookkeeper, because he was required to do so within a reasonable period of time after the agreement was concluded.

(xxxii) It is pleaded that it was not part of the mandate of the third parties to advise the defendant on whether or not he would qualify for registration as a VAT vendor, or what processes he would have to follow for these purposes. In this regard, it is pleaded that costs were charged for the preparation of the agreement only, and that the defendant made the election not to apply or register for VAT, as contemplated by clause 5.4 of the agreement.

(xxxiii) The third parties deny that it was the intention of the parties that transfer would only take place after the defendant had registered for VAT, as it was not even certain whether he would be able to register for VAT. The agreement, in any event, provided that any VAT, which became payable would be paid by the defendant in addition to the consideration.

(xxxiv) The third parties plead that on a proper interpretation of that clause, and even if a condition precedent existed, transfer of the property could proceed in spite of their failure to act in terms of clause 5.4.

(xxxv) As regards the amount of transfer duty, the defendant pleads that the purchase price was expressed to be N\$7,6 million in terms of the contract, and transfer duty was calculated on that amount in terms of the Transfer Duty Act.

#### Common cause facts and issue(s) for determination

(xxxvi) In essence, the court has to determine whether the defendant is liable to the plaintiff for the amount of N\$1 050 000. In the event that the court finds in favour of the plaintiff, the court must determine whether the third parties are liable to indemnify the defendant for this amount. The court is also to determine whether the third parties are liable to the defendant in the amount of N\$48 000 being overpayment of transfer duties on the transaction transferring the property to the plaintiff.

(xxxvii) Due to the extensive evidence led, and for purposes of brevity, I set out the common cause facts, together with facts received in evidence that

are either undisputed, or not meaningfully disputed based on the relevant principles relating to the evaluation of evidence.

(xxxviii) The citation of the parties is not in dispute. The written agreement relating to the sale of the immovable property is not disputed. It is not disputed that ex facie the agreement, the VAT amount payable was excluded from the N\$7 million purchase price. The property was transferred to the defendant on 11 December 2020. The defendant resides there with his family, and refuses to move. The defendant paid the plaintiff the amount of N\$7 million for the purchase of the property. The plaintiff paid the amount of N\$1 050 000 to the Receiver of Revenue on 19 March 2021. The plaintiff was at all material times registered for VAT.

(xxxix) It is now apparent from the evidence led that the agreement was drafted and prepared by Ms Dreyer on instructions of the defendant, and that she personally consulted with the defendant on one occasion before the agreement was signed. Ms Dreyer represented the defendant, and not the plaintiff, in the transaction involving the property. The defendant was referred to WKH by the plaintiff, who was a long standing client of the firm. The defendant and Ms Dreyer had one face-to-face consultation at the offices of WKH to discuss the draft agreement. No application for a zero rating (discussed further below) was requested from or prepared by Ms Dreyer.

(xl) To date, the defendant has not paid the VAT amount to the plaintiff, never registered for VAT, and never took any steps to do so.

## Evidence

### *The plaintiff's evidence against the defendant*

(xli) In his evidence in chief, the plaintiff confirmed the written agreement and its terms, in particular that the defendant would pay the amount of N\$7 million, and in addition to this amount an amount of N\$600 000 towards transfer costs. He maintained that the purchase amount was N\$7 million and no more. He

underscored the provisions of clause 5 of the agreement (set out above) and confirmed that the agreement expressly recorded that he was registered for VAT whilst the defendant was not. Reference was made to clause 5.1, which provided expressly that any VAT that may become payable in terms of the agreement, if the transaction is not zero rated supply, would be excluded from the purchase consideration and payable by the defendant in addition to the purchase consideration.

(xlii) As background to the transaction, the plaintiff testified that during 2020 and due to his deteriorating health, he decided to put his commercial farm, the property, on the market and move permanently to Windhoek. He asserted that he was, however, at no point in a hurry to sell his farm. The plaintiff contacted Mr Maans Dreyer, an estate agent, and asked him whether he knew of any purchaser(s), who would be interested to purchase the property. Initially, he wanted N\$7,5 million (excluding VAT and transfer duties).

(xliii) At some point thereafter, Mr Dreyer introduced the plaintiff to the defendant who was very eager to purchase the property, but, at the time, he encountered difficulty in securing funds. The plaintiff informed the defendant that he was in no rush and that he could take his time in trying to secure funds.

(xliv) The defendant later approached the plaintiff and informed him (the plaintiff) that his financial institution was only willing to extend an amount of N\$7 million excluding transfer costs to him and that he could thus not afford more than that. The plaintiff accordingly agreed to reduce the purchase price to N\$7 million excluding VAT and transfer costs.

(xlv) After the plaintiff agreed to the aforesaid price reduction, the defendant said he would purchase the farm, and advised that the necessary formalities needed to be complied with. The defendant asked the plaintiff who his lawyers were at the time. The plaintiff referred the defendant to WKH. The defendant indicated that he would make use of that firm too.

(xlvi) From that point, the defendant took charge of the process. The plaintiff

never appointed conveyancers, nor did he meet with them or instruct them in the transaction. All of that was done by the defendant. The plaintiff further never discussed any agreement terms with any legal practitioners. The defendant also arranged for the preparation of the sale agreement through the third parties. On a specific day, the defendant arrived at the plaintiff's house with the agreement and presented it for signature. The plaintiff asked whether it was not supposed to be signed in the presence of the lawyers. The defendant responded in the negative, and said that he had everything sorted. The plaintiff and the defendant signed the agreement in each other's presence on 2 October 2020, and the defendant took it along with him.

(xlvii) From that date, the plaintiff was contacted from time to time, by the defendant, personally, and by one Amoré from Ms Dreyer's office to provide certain information for preparing the transfer documents (all of which the plaintiff provided) and to sign documents for the transfer.

(xlviii) According to the plaintiff, the defendant started taking over operations on the farm almost immediately after the agreement was signed, and before transfer of the property. He took over the employment of one of the plaintiff's employees (whom he dismissed a short while later) and even started building labourer accommodation on the property. The defendant permitted the plaintiff and his life partner to continue utilising the farmhouse for as long as the plaintiff needed, as the defendant in any event still had to sell his house in Windhoek. Whilst utilising the farmhouse the plaintiff also agreed to assist the defendant with management of the farm.

(xlix) The plaintiff testified that he and the defendant never expressly discussed his registration for VAT. As far as he was concerned and according to the terms of the contract, either the defendant would register for VAT, or he would be liable to pay the VAT amount to the plaintiff. Either way it did not matter to the plaintiff, as the purchase price did not include VAT and the ball was in the defendant's court on that score, so to speak.

(l) Some two months after the agreement was signed, the property was



transferred to the defendant on 11 December 2020. A final account of the transfer was issued to the plaintiff by WKH.

(li) The plaintiff recalled that once or twice before transfer, he enquired about the status of the transaction as he wanted to be kept abreast of the matter and because he was advised by Mr Dreyer (the estate agent) to do so. However, he never placed pressure on anyone for the transfer to go through. According to the plaintiff, the defendant put pressure on the conveyancer to get the transfer through even though the plaintiff did not regard the matter to be urgent.

(lii) On or about 10 January 2021, the defendant's wife informed the plaintiff's life partner that they should make plans to leave the farmhouse as soon as possible. They then moved out in a matter of days. From there the defendant ignored all the plaintiff's calls and text messages.

(liii) During February 2021, the plaintiff's bookkeepers contacted him and asked who would be paying the VAT on the sale of the property to the defendant in the amount of N\$1 050 000. The plaintiff informed that the purchase price excluded VAT and any VAT payable was for the defendant's account. His bookkeepers (Ms Angela Bank) contacted the defendant who allegedly informed Ms Bank that the transaction was apparently zero rated and that his lawyers were handling it. Upon further enquiry, it was confirmed that the defendant was not registered for VAT and that the transaction was not zero rated. The plaintiff accordingly became liable to the Receiver of Revenue to pay VAT in the amount of N\$1 050 000, which was paid to the Receiver of Revenue on or about 19 March 2021. The amount therein differs slightly because there was some input VAT that was credited against the output VAT. The amount is in any event not in dispute.

(liv) According to the plaintiff, the defendant ignored all the plaintiff's attempts to contact him and would not address the VAT issue, or pay the VAT. The plaintiff instructed legal practitioners to address a letter of demand to the defendant, which was done on 7 April 2021. The defendant replied and alleged that he should have received notice to comply with clause 5.4 of the sale

agreement and if such notice had been given, the defendant would have registered for VAT.

(iv) The plaintiff reiterated that the defendant never informed him that he wanted to register or was in the process of registering for VAT and if he wanted to, he had ample opportunity to do so. The defendant was aware of the terms of the agreement (it was, after all, drawn up on his instructions) and there was no requirement that the plaintiff had to give him notice to comply with clause 5.4 of the agreement. In fact, that clause placed a responsibility on the defendant to apply for registration for VAT 'as soon as possible'. If anything, it was the defendant who had a duty in terms of that clause. In breach thereof, he failed to take any steps whatsoever to register for VAT; had he complied with his obligations, the plaintiff would never have become liable to the Receiver of Revenue for VAT on the sale of the property.

(vi) The plaintiff stated that despite knowing that he was not registered for VAT, the defendant took no steps whatsoever to register for VAT. The defendant also failed to object to the transfer of the property proceeding on the basis of clause 5.4 after being informed more than one occasion that transfer was to proceed. He accepted transfer of the property without objection or demur.

(vii) The plaintiff was cross examined at length about a number of issues that are irrelevant to his claim against the defendant, especially given that the agreement is clear (clause 5.1) that the defendant was responsible to pay VAT in addition to the purchase consideration being N\$7 million plus transfer costs of N\$600 000. However, the plaintiff's evidence, on the issues underlying his claim against the defendant in terms of the agreement, was not disturbed, in my view.

(viii) In this regard, it is clear firstly that it was not the plaintiff that appointed the third parties but the defendant. This was confirmed by Ms Dreyer in her evidence (which I deal with below). It is also clear that the plaintiff was not involved in the drafting of the agreement, and only signed the necessary documents he was responsible for as the seller of the property to effect transfer

of the property to the defendant. The agreement was signed by the parties as testified to by the plaintiff.

(lix) Some cross examination was devoted to whether the property was sold was a going concern, and that only a piece of land was being purchased. The plaintiff agreed that he had sold all his cattle and was no longer farming commercially. This, however, does not detract from the express provisions of the agreement. The defendant paid the purchase price in the amount of N\$7 million to the plaintiff and the plaintiff paid VAT on the amount to the Receiver which he claims from the defendant in these proceedings. As at the date of hearing, the defendant remains unregistered for VAT and he remains in occupation of the property. He has not paid to the plaintiff the VAT amount he undertook to be responsible for in terms of the agreement.

*Evidence of Ms Angela Bank, the plaintiff's bookkeeper*

(lx) Ms Angela Bank testified shortly. I only deal with the relevant parts of her evidence necessary for a determination of this matter. Ms Bank is a major female in the employ of Practical Accounting and Taxation CC, a duly registered Namibian close corporation. Part of her duties at this accounting firm includes preparing clients' books of account for purposes of calculating VAT returns. The nature of her duties is administrative and she works under the supervision of a duly registered accountant, one 'Karola'. The plaintiff is one such client.

(lxi) During February 2021, and whilst preparing the plaintiff's accounting books for the calculation of the plaintiff's VAT due on 25 March 2021, she came across the transaction forming the subject matter of this action. She contacted the plaintiff who informed her that the agreement of sale provided for the defendant to pay VAT. Ms Bank informed her superior about the issue and her superior directed her to obtain more detail.

(lxii) Ms Bank then contacted the defendant telephonically. He informed her that the transaction is zero rated, and his lawyers were handling the matter. This was not clear to Ms Bank and so she approached her superior who reviewed

the matter and instructed that the transaction could not be zero rated if the defendant was not also registered for VAT. On 22 February 2021, Ms Bank emailed the defendant and asked about the payment of VAT, so that it could be paid to the Receiver of Revenue on the plaintiff's behalf, but the defendant did not respond to her queries. Ms Bank's evidence on these aspects of her evidence remained largely unchallenged in cross examination by and on behalf of the defendant and the third parties.

*The defendant's evidence against the plaintiff and third parties*

(lxiii) The defendant recalls that it was during May 2020 that he became interested in purchasing the plaintiff's farm. He recalls travelling there to have a look at it during lockdown, in the absence of an estate agent.

(lxiv) Initially, the plaintiff indicated that he was selling the property for N\$7,5 million; however, the defendant was unable to pay that purchase price because it was unaffordable, and he would not have been able to maintain both bond payments (he had not at that time sold his property in Windhoek) at that selling price. The defendant reiterated that he made it clear to the plaintiff that the eventual purchase price together with the transfer costs that needed to be paid was the extent of the financial exposure that the defendant had appetite for.

(lxv) Therefore, had he known that he would need to pay an additional amount of VAT on the purchase price he would simply not have been able to proceed with the transaction.

(lxvi) From what the defendant now understands (as opposed to at the time of being advised by Ms Dreyer) is that he would have needed to pay the VAT amount, and if registered for VAT, he could have reclaimed it. However, he would firstly have needed to pay that amount, which would mean he would have had to have had access to the purchase price, transfer costs and then of course the VAT amount. The defendant testified that never contemplated having to come up with the additional N\$1 050 000 and secondly, he did not intend to farm commercially nor was he registered for VAT and as such, he would never

have been able to reclaim the VAT.

(lxvii) The defendant eventually agreed to purchase the farm from the plaintiff for N\$7 million.

(lxviii) According to the defendant, the plaintiff insisted that WKH, and specifically Mr Sarel Maritz, who was apparently the plaintiff's longstanding attorney; attend to the drafting of the contract and the transfer of the farm.<sup>4</sup>

(lxix) The defendant testified that he met Ms Dreyer on one occasion during September 2020. From the email records in his possession, he discussed the transaction with Ms Dreyer telephonically before she prepared the draft agreement. The defendant pointed out that Ms Dreyer drafted the agreement and it was Ms Dreyer who included clauses 5.1 and 5.4 of the agreement. He informed Ms Dreyer that he needed to have the transaction structured in a way that would enable him to borrow the maximum possible bond amount from a financial institution.

(lxx) It is for this reason that he transmitted an email to Ms Dreyer on 9 September 2020 providing her with the valuation of the farm; asking about an appropriate value for loose goods; informing that the plaintiff would carry the agent's costs; and reminding that the entire transaction needed to be kept to N\$7,5 million because this was his budget.

(lxxi) On 10 September 2020, Ms Dreyer replied to the defendant's email. She informed the defendant that she did not know what the value of the loose goods was and that an inventory would need to be set up for these purposes. She also requested several documents, which she required in order to draft the agreement.

(lxxii) On 17 September 2020, Ms Dreyer informed the defendant's wife (who also testified) that the draft agreement had been finalised and she asked for finality in regards to the purchase amount of the loose goods as well as who

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<sup>4</sup> This aspect is no longer in issue.

would be responsible for the agent's commission.

(lxxiii) The defendant responded to her email on 18 September 2020 and informed her that the loose goods would only amount to approximately N\$350 000 so that would not make much difference to the potential structuring of the purchase price. The defendant confirmed that the agent's commission would be paid by the plaintiff, and that the final purchase price was N\$7 million.

(lxxiv) The initial meeting with Ms Dreyer took place at the offices of WKH in one of the boardrooms. Only the defendant and Ms Dreyer were present at the meeting. Thereafter, all correspondence was either telephonic or via email. The purpose of the meeting was to go through the purchase agreement. Ms Dreyer took the defendant through the draft agreement which she had completed by that time.

(lxxv) Ms Dreyer indicated that the purchase price in clause 4 of the agreement was N\$7,6 million and that this amount included transfer costs up to and including N\$600 000.

(lxxvi) The defendant testified that he understood that the actual purchase price of the property was N\$7 million. Therefore, any taxes or duties needed to be calculated on the amount of N\$7 million and not an amount of N\$7,6 million.

(lxxvii) However, if regard is had to the transfer duty – Form B (declaration by purchaser) – which was prepared by WKH, it is clear that the transfer duty was charged and paid on an amount of N\$7,6 million. This, the defendant states is not correct as it is common cause that the actual purchase price for the property was only N\$7 million.

(lxxviii) When it came to the discussion on clause 5 of the agreement, which deals with the VAT issue, Ms Dreyer specifically asked the defendant whether he was registered for VAT to which he responded in the negative, as it is not necessary for doctors to be registered for VAT. She then asked the defendant whether he was going to utilise the farm as a commercial farm and he

responded in the negative, as he is a doctor and not a farmer. The farm would be utilised as a residence for him and his family.

(lxxix) According to the defendant, Ms Dreyer indicated that in those circumstances the transaction would be zero rated and that no VAT would be payable, seemingly because the property was going to be utilised for residential purposes. Ms Dreyer apparently also indicated to the defendant that should he start utilising the farm for commercial purposes he should speak to his accountant / tax consultant so that they could advise him on registration for VAT. The defendant maintained that as he had no intention to farm commercially so there was no reason to register for VAT.

(lxxx) With this in mind, and having no reason to doubt Ms Dreyer's advice, the defendant never gave the issue of VAT, or more importantly, the need to register for VAT a second thought. He also never deemed it necessary to seek any tax advice or alternative legal advice as he had no reason to doubt that Ms Dreyer's advice was sound as she was a commercial attorney and conveyancer that specialised in property transactions, working for a very large commercial legal firm.

(lxxxi) The defendant testified that he knew that he had previously purchased residential properties and VAT had never been an issue with respect to these properties and as such he had no reason to think that the transaction would attract any VAT liability. Had he known that VAT would have become payable on this transaction and that as such he would have been liable in terms of clause 5.1 to pay the VAT, he would have immediately registered as a VAT payer and sought advice from a tax consultant in regard to the structure of the agreement. However, it is doubtful that he would have been able to have raised an additional N\$1 050 000, even as bridging finance.

(lxxxii) As regards clause 5.4 of the agreement, the defendant testified that this clause was inserted in the draft, prepared by Ms Dreyer, a commercial attorney and conveyancer, with full knowledge of the fact that the defendant was purchasing a farm from the plaintiff, and that he was at his limit with regard to

financial exposure. According to the defendant, Ms Dreyer was also well aware that the defendant was not registered for VAT but nevertheless, and in these circumstances, allowed the transfer of the property and registration thereof in his name.

(lxxxiii) According to the defendant, Ms Dreyer completed and finalised the agreement and sent the defendant a finalised copy thereof on 29 September 2020. The agreement was then signed by both the plaintiff and the defendant, personally, on 2 October 2020, and the defendant returned the signed agreement to Ms Dreyer on 8 October 2023.

(lxxxiv) On 12 October 2020, the defendant received a request from a certain Amoré Haccou<sup>5</sup> requesting him to attend to WKH's offices for signature of transfer documents. On 28 October 2020, Ms Haccou informed the defendant that the plaintiff had also signed the necessary documents and proceeded to request that he (the defendant) provide her with the FIA form and original deed of transfer no T1383/2013. It is accepted that the original deed of transfer would have been in the plaintiff's possession.

(lxxxv) What was important from Ms Haccou's email of 28 October 2020, according to the defendant, is the following paragraph:

'Also according to Bank Windhoek a bond of N\$5,850,000.00 will be registered and the remaining balance of N\$1,750,000 will be paid by yourself. Kindly confirm if that is correct. We acknowledge that N\$600,000 of the purchase price is part payment of the transfer costs leaving a balance of N\$44,001.50 which must be paid by yourself.'

(lxxxvi) Then, and on 1 December 2020, Ms Haccou sent an email to the defendant where she stated as follows:

'I have pleasure in confirm that the above transfer will be lodged at Windhoek Deeds Office tomorrow, the 2<sup>nd</sup> of December 2020.

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<sup>5</sup> The conveyancing secretary of Ms Dreyer.



I will confirm the day before the transaction is to be registered for the proof of payment of the remainder of the purchase price in the amount of N\$1,150,000.00.

Registration is to be expected within 5 to 7 working days.'

(lxxxvii) The defendant testified that the aforementioned amount of N\$1 150 000 was paid to WKH on 9 December 2020. On 11 December 2020, a further amount of N\$5 850 000 was seemingly paid from the defendant's loan account with Bank Windhoek to the plaintiff.

(lxxxviii) The defendant maintained that at no time prior to registration did Ms Dreyer, or for that matter her office, ever ask the defendant whether he had registered for VAT, or whether he was going to register for VAT, premised on the fact that VAT would now become payable, or put differently the transaction would not be zero rated. The defendant remained under the impression that the transaction would be zero rated as he had been advised by Ms Dreyer and continued to act on the strength of this belief.

(lxxxix) The defendant reiterated that had Ms Dreyer or anyone else told him that they were unsure of the VAT implications of the transactions or that there would be VAT applicable he would have immediately taken steps to obtain sound tax advice from a specialist, and then have registered for VAT.

(xc) The defendant was not aware of any further correspondence or telephone calls from WHK to him informing him that the registration and transfer had indeed been completed. The actual transfer and the finalisation of the transaction only came to his attention during the beginning of 2022 when the plaintiff's life partner congratulated him on the purchase of his 'new farm' and informed him that the money had been paid into the plaintiff's bank account. This was the first time that the defendant became aware that the transaction had actually been completed.

(xci) Thereafter, and sometime during February 2021, the defendant received a call from a certain Ms Bank informing him that there was an amount of N\$1

050 000, which the plaintiff needed to pay to the Receiver of Revenue for the VAT that became payable pursuant to him selling his farm to the defendant. The defendant immediately told her that he did not know what she was speaking about because he had been informed by the lawyers handling the transfer the transaction was zero rated and that no VAT was payable. In any event, he told her that he would contact the attorneys and ask them what was going on.

(xcii) The defendant then contacted Ms Dreyer and told her about the VAT payment enquiry. The defendant then reiterated to Ms Dreyer that she had informed him that the transaction was zero rated and he asked her what was going on. She then confirmed that the transaction was zero rated and told him that she just wanted to go and make sure about this with her colleagues and would call back.

(xciii) Ms Dreyer reverted and informed him (the defendant) that she had spoken to her colleagues and that the transaction was actually not zero rated and that the defendant should have registered for VAT within a period of three weeks after the transfer had taken place. The defendant reminded her that she had told him that in the circumstances of this transaction that it was not necessary for him to register for VAT and that the transaction was zero rated.

(xciv) The defendant then received an email from Ms Bank at some stage which he ignored. Sometime later, the defendant received a call from Mr Etzold of Etzold-Duvenhage, who informed him that he had been instructed by the plaintiff to claim payment from the defendant of the VAT amount that the plaintiff paid to the Receiver of Revenue pursuant to the sale of his farm to the defendant.

(xcv) The defendant told Mr Etzold that he had been previously contacted by the plaintiff's bookkeeper and that he had ignored her, because according to the information that he had received from Ms Dreyer, the transaction was zero rated and that it did not attract VAT; more importantly, that the defendant was not liable to pay the VAT. Thereafter, he received a letter of demand on 7 April 2021

(xcvi) In cross examination by counsel for the plaintiff, the defendant confirmed that he had a consultation with Ms Dreyer before the agreement was signed. He confirmed that the draft agreement was discussed and that Ms Dreyer went through the agreement with him clause by clause. The defendant also confirmed that the purpose of the consultation with Ms Dreyer was to find ways to structure the agreement so that it could fit into his budget, and also to go through the agreement so that he could properly understand its terms. According to the defendant, most of the discussion during the consultation related to structuring the agreement to fit into his budget.

(xcvii) The defendant maintained that Ms Dreyer's advice to him was that as he did not have intention to farm commercially, but would rather use the property as a residence, that the transaction would be zero rated, and that Ms Dreyer had a duty of care as his representative to properly advise and explain to him that VAT would be payable on the transaction if he was not registered for VAT. In fact, in response to a question from the plaintiff's counsel as to what he would have done if Ms Dreyer had properly advised him, he stated that he would in all probability have cancelled the transaction.

(xcviii) The defendant testified that upon receipt of Ms Dreyer's advice, he decided not to register for VAT, and took no steps to register for VAT. The defendant did concede that the contract was clear about his responsibility to pay VAT. He stated that as a specialist attorney who gave legal advice, he relied on Ms Dreyer's advice, and thus, the third parties were liable for the VAT payment.

(xcix) In response to the question on why clause 5.4 was put into the agreement, if Ms Dreyer's advice was according to the defendant 'different', the defendant responded that he was not a specialist. He also agreed that one did not have to be a specialist to understand the implications of clause 5. 4, and testified that he did not understand the clause like that.

(c) The defendant conceded that he was liable to pay VAT in terms of clause 5.4, and also that he did not take any steps when he was informed that transfer of the property was imminent to halt the transfer in terms of that clause. His

explanation was that he thought that he did not have to register for VAT, based on the advice given by Ms Dreyer.

(ci) During cross examination on behalf of the third parties, it was put to the defendant that Ms Dreyer would deny that she provided the advice as testified by him. In fact, her evidence would be that that was the opposite of how the law relating to VAT liability works, and that the actual advice provided was captured in clause 5.4 of the contract. The defendant remained steadfast that Ms Dreyer provided different advice, as set out in his evidence in chief.

#### *Evidence of third parties*

(cii) Ms Dreyer testified on behalf of both third parties. She is a director at WKH and a qualified legal practitioner and conveyancer since 2012. She drafted the agreement between the parties. The portions of her evidence relevant to the determination of this matter are, firstly, that she conceded that she acted on behalf of the defendant and that the agreement was incorrect in so far as it referred to WKH acting for the plaintiff in this particular transaction.

(ciii) All instructions before her meeting with the defendant came from the defendant's wife, who informed Ms Dreyer that the defendant was not registered for VAT. Based on this information, she included clause 5.3. After receiving the plaintiff's information via email, Ms Dreyer proceeded to draft the agreement. She requested confirmation of the purchase price, and the defendant confirmed initially that the purchase price of the property was N\$7 million, and that the plaintiff would pay the estate agent's commission.

(civ) After emailing the draft agreement to the defendant on 18 September 2020, she met with the defendant to discuss the draft agreement. The purchase price reflected in the draft agreement was N\$7 million. They went through the entire agreement together. She specifically asked the defendant whether he was registered for VAT, or whether he was going to register for VAT, to which he responded in the negative. He told her that he did not intend to register for VAT.

Ms Dreyer could not recall whether there was a discussion as to whether the defendant planned to farm commercially or not, but she explained clause 5.1 of the agreement to him, and advised that if the seller is registered for VAT, VAT would become payable. In this regard, clause 5.1 of the agreement provides and recognised that VAT may become payable.

(cv) As a conveyancer, Ms Dreyer was aware that zero rating requires an application to the Receiver of Revenue to be made and that both parties must be registered for VAT for such an application to be made. Applications for zero rating are only attended to by WKH, if the client specifically requests it. It does not automatically form part of their mandate, and was certainly not part of Ms Dreyer's mandate with this particular transaction.

(cvi) Ms Dreyer recalled telling the defendant that he should discuss registering for VAT with his accountant, and whether this would be possible or advisable. Whether the defendant was eligible for VAT registration was not something that Ms Dreyer could speak or advise on. If the defendant decided to do so, this was something his bookkeeper had to assist him with. She disputed the defendant's evidence on this score that she advised him only to consult his bookkeeper when he starts to farm commercially.

(cvii) On 29 September 2020, Ms Dreyer received an email from the defendant that the purchase price should include transfer costs and amount to N\$7,6 million. She accordingly amended the draft agreement and transmitted the revised draft agreement to the defendant on 29 September 2020.

(cviii) Ms Dreyer testified that once the purchase price was increased, the transfer costs would also increase, as the Receiver of Revenue calculates transfer costs on the purchase price contained in the deed of sale. Transfer costs were accordingly correctly calculated and charged on the purchase price of N\$7,6 million. Whatever arrangements were made between the purchaser and the relevant financial institution were not Ms Dreyer's concern.

(cix) Ms Dreyer testified that in her experience it takes about one month to

register for VAT, and there was ample time for the defendant to register for VAT (should he have been eligible), or to instruct the conveyancers to hold back the registration of transfer. However, the defendant did not do so despite being informed on more than one occasion that transfer of the property would soon take place. Where a client who purchases property indicates that s/he intends to register for VAT, and requests that the transfer be held back for these purposes, Ms Dreyer and her team will do so. According to her, the defendant and his wife 'did what they could to make sure the transfer took place.'

(cx) The transfer was lodged on 1 December 2020 and the property was registered on 11 December 2020.

(cxi) The defendant called her during February 2021 and asked about the zero rating. After drawing his file, she replied that a zero rating was not applied for, and that she was not instructed to do so. Further, she reminded him that he indicated that he would not register for VAT.

(cxii) During cross examination on behalf of the defendant on the quality of the preparation of the draft agreement and registering transfer without double checking that the defendant was registered for VAT, Ms Dreyer responded that she is not responsible as an attorney, and in particular a conveyancer, to register clients for VAT. It was never her duty, and that is why she advises her clients, and advised the defendant, to consult with a bookkeeper or an accountant. She advised on the terms of the agreement which she went through with the defendant clause by clause. As far as she was concerned, she had executed her mandate.

(cxiii) Ms Dreyer was also cross examined on the purchase price; however, she remained steadfast that the purchase price was N\$7,6 million.

(cxiv) It was further put to Ms Dreyer on behalf of the defendant that as the attorney and conveyancer for the defendant who was paid for her services, it would have been prudent to contact the defendant before passing transfer to establish whether or not he was registered for VAT, as this is what clause 5.4 of

the agreement provided. She responded that the clause was for the defendant's benefit, and in any event, the onus was on the defendant and not on her to ensure that he registered for VAT in the circumstances. She advised him on the terms of clause 5.4 and what his rights and obligations were, she also advised him to go to a professional in that field, As far as Ms Dreyer was concerned in spite of the provisions of clause 5.4, she executed her mandate and duty properly. She was also not aware, at the time of transfer, whether the defendant was registered for VAT.

(cxv) Ms Dreyer testified that the plaintiff was registered for VAT, and the property sold was a commercial farm; because of that, the transaction attracted VAT. The only way in which the defendant could avoid paying VAT would be through a zero rated transaction. For this purpose, the defendant would have to register for VAT, first, and within 21 days after the date of transfer, an application would have to be made to the Receiver of Revenue for the transaction to be zero rated. That application would depend on whether the defendant could satisfy the Receiver of Revenue that it is a zero rated transaction. So what the defendant intended to do with the property was irrelevant. Ms Dreyer, however, conceded that her explanation may not have been as clear.

(cxvi) Finally Ms Dreyer was cross examined on the failure to inform the defendant that transfer was registered. She responded that he was informed in advance that transfer would be registered in a matter of days, and that was sufficient to put him on terms to request that a hold be placed on the transfer because of the VAT issue.

### Discussion

(cxvii) The proper approach to the interpretation of an agreement remains a matter of law and not of fact. Interpretation is a matter for the court and not for witnesses.<sup>6</sup>

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<sup>6</sup> *Total Namibia (Pty) v OBM Engineering and Petroleum Distributors* CC 2015 NR 733 (SC) para 19.

(cxviii) To my mind, the terms of inter alia clause 5 and, in particular clause 5.4, of the written agreement, following its ordinary grammatical meaning, are clear.<sup>7</sup> There are no absurd results.

(cxix) As regards the case between the plaintiff and the defendant, it is undisputed from the evidence that for the period of 2 October 2020 (when the sale agreement was signed) and 11 December 2020 (when transfer of the property took place) the defendant took no steps to register for VAT.

(cxx) The defendant's evidence was in fact, that he elected not to register for VAT on the advice of Ms Dreyer. I deal with this aspect when determining the claim of the defendant against the third parties.

(cxxi) The defendant is a highly educated professional medical practitioner. The terms of the contract are not overly complicated either. Payment of VAT on the amount of N\$7 million was payable by the defendant in terms clause 5.1, if VAT became payable and if the transaction is not zero rated. The defendant could not wish this provision away if he tried. More importantly, the defendant took possession of and resides on the property, with no intention to leave.

(cxxii) It is also clear that the defendant was informed more than once prior to transfer, that the transfer was proceeding. Correspondence was specifically transmitted to the defendant on 12 and 28 October 2020. On 1 December 2020, he was advised that the transfer would be lodged with the Registrar of Deeds, and that registration would take place in five to seven days.

(cxxiii) Moreover, it is not in dispute that each and every clause of the contract was explained to the defendant, who is certainly not an ignorant signatory.<sup>8</sup>

<sup>7</sup> Words used in a contract must be given their ordinary grammatical meaning, unless doing so will produce an absurd result. *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767E – 768E; *National Address Buro v South West African Broadcasting Corporation* 1991 NR 35 (HC).

<sup>8</sup> The caveat subscriber principle will not be enforced if the terms of the contract have been inadequately or inaccurately explained to an ignorant signatory. *Katzen v Mguno* [1954] 1 All SA



(cxxiv) To all intents and purposes the defendant conceded the plaintiff's claim during cross examination, especially that the plaintiff is entitled to be compensated as claimed in the particulars of claim. His case is that the amount claimed should be paid by the third parties.

(cxxv) As regards the defendant's stance that clause 5.4 of the sale agreement is a condition precedent or even a suspensive condition, it is trite that the effect of non-fulfilment of such a clause renders the agreement void,<sup>9</sup> which would mean that the defendant would have to tender transfer of the property back to the plaintiff, and the plaintiff would have to repay the purchase price to the defendant. However, the defendant made it clear that he has no intention to leave the property.

(cxxvi) For the foregoing reasons, I find that the defendant's defences to the plaintiff claim must fail.

(cxxvii) I now consider the defendant's claim against the third party.

(cxxviii) As regards the claim for indemnification, there is a dispute of fact between the defendant and Ms Dreyer as to the discussion around clause 5.4, and exactly what was explained to the defendant. It will be recalled that according to the defendant, Ms Dreyer specifically asked the defendant whether he was registered for VAT to which he responded in the negative, as it is not necessary for doctors to be registered for VAT. She then asked the defendant whether he was going to utilise the farm as a commercial farm and he responded in the negative, as he is a doctor and not a farmer. Ms Dreyer then indicated that in those circumstances the transaction would be zero rated and that no VAT would be payable, because the property was going to be utilised for residential purposes. She apparently also indicated to the defendant that should

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<sup>9</sup> *Legate v Natal Land and Colonizaion Co Ltd* (1906) 27 NLR 439 at 455; *Ex parte de Villiers: In re Carbon Developments (Pty) Ltd (in liquidation)* 1993 (1) 493(A) at 505 A-B *Mudge v Ulrich NO and Others* 2007(2) NR 567 HC.

he start utilising the farm for commercial purposes he should speak to his accountant / tax consultant so that they could advise him on registration for VAT.

(cxxix) With this in mind, and having no reason to doubt Ms Dreyer's advice, the defendant never gave the issue of VAT or more importantly the need to register for VAT a second thought. He also never deemed it necessary to seek any tax advice or alternative legal advice as he had no reason to doubt that Ms Dreyer's advice was sound as she was a commercial attorney and conveyancer that specialised in property transaction, working for a very large commercial legal firm.

(cxxx) Ms Dreyer's evidence was that she specifically asked the defendant whether he was registered for VAT, or whether he was going to register for VAT, to which he responded in the negative. He told her that he did not intend to register for VAT. Ms Dreyer could not recall whether there was a discussion as to whether the defendant planned to farm commercially or not, but she explained clause 5.1 of the agreement to him, and advised that if the seller is registered for VAT, VAT would become payable.

(cxxxi) Ms Dreyer recalled telling the defendant that he should discuss registering for VAT with his accountant, and whether this would be possible or advisable. Whether the defendant was eligible for VAT registration was not something that Ms Dreyer could speak or advise on. If the defendant decided to do so, this was something his bookkeeper had to assist him with. She disputed the defendant's evidence that she advised him only to consult his bookkeeper when he starts to farm commercially. She said that was not the legal position and she would not have advised him as such.

(cxxxii) A difficult hurdle that the defendant faces is that clauses 5.1 and 5.4 of the agreement explain in clear terms that –

- (a) any VAT which may become payable under the agreement if the transaction is not regarded as a zero rated supply, is excluded from the

above mentioned consideration and is payable by the defendant in addition to the consideration; and

(b) in the event that the defendant is not registered for VAT, in order for the supply to be zero rated, the defendant undertook to apply for registration for VAT purposes as soon as possible, and it was recorded that registration of the property would not be effected prior to the date upon which the registration for VAT purposes becomes effective in accordance with the VAT legislation. (Emphasis supplied.)

(cxxxiii) The effect of what the defendant testified he was advised goes against these provisions. The defendant knew he was not registered for VAT at the time he signed the agreement. In fact, he never intended to register for VAT (on his own version). He also knew he was responsible to pay VAT in terms of clause 5.1, and that in terms of clause 5, if he was not registered he would have to register as soon as possible. The contract placed the onus fairly and squarely on the defendant to register for VAT. His version cannot be reconciled with the clear provisions of the contract.

(cxxxiv) There is much to be said about the third parties' effectively passing transfer before the defendant's registration for VAT. That clause is essentially for the benefit of the defendant, and even if the third parties were negligent, that negligence, if any, did not cause or contribute to the defendant's losses in this matter. This is not only because of the clear provisions of the agreement he signed, but because the defendant had at least two occasions where he was made aware that transfer was proceeding, and one email where transfer was indicated to be imminent.

(cxxxv) Given the provisions of the contract, the defendant cannot now attempt to hold another party liable for his own inaction, given his clear responsibilities under the contract. He resides on the property today, not having paid VAT, and that failure must be placed squarely at the defendant's door. I, therefore, find that the third parties are not liable to the defendant for an indemnification and that the defendant must comply with his responsibilities in

terms of the agreement and pay the plaintiff the amount claimed.

(cxxxvi) Finally, I deal with calculation of the transfer duty. This claim of the defendant arises out of the third parties' alleged incorrect calculation of the transfer duties payable.

(cxxxvii) Ms Dreyer maintained in her evidence that the transfer duties were correctly worked out on an amount of N\$7,6 million as opposed to N\$7 million. However, and to my mind, it was clear from the evidence of the plaintiff and the defendant that the purchase price was only N\$7 million. This is the amount that VAT was paid on by the plaintiff. The agreement itself says that the purchase price was N\$7,6 million, '(which amount includes transfer costs up to and including N\$600,000)'. (Emphasis supplied.)

(cxxxviii) Section 5 of the Transfer Duty Act 14 of 1993 (as amended) provides as follows:

'Value of property on which duty is payable

5. (1) The value on which the duty shall be payable shall, subject to the provisions of this section –

(a) where consideration is payable by the person who has acquired the property, be the amount of that consideration; and

(b) where no consideration is payable, be the declared value of the property.'

(cxxxix) Section 7 of the Deeds Registries Act 47 of 1937 (as amended) provides that –

'There shall for the purpose of the payment of the duty be excluded from the consideration payable in respect of the acquisition of any property -

(a) transfer duty or any other duty or tax payable in respect of the acquisition of the

property; and

(b) the costs or fees payable in connection with the registration of the acquisition of the property.'

(cxl) I bear in mind that the plaintiff testified that the defendant would pay the amount of N\$7 million, and in addition to this amount, an amount of N\$600 000 would go towards transfer costs.

(cxli) For the foregoing reasons, I find that the amount on which transfer duties should have been calculated is N\$7 million and not N\$7,6 million. The defendant's claim, for overpayment of duties against the third parties in the amount of N\$48 000 meets with success.

#### Conclusion

(cxlii) For the foregoing reasons, I make the following order:

1. The plaintiff's claim against the defendant succeeds.
2. The defendant is ordered to pay the amount of N\$1 050 000 to the plaintiff.
3. The defendant is ordered to pay interest on the aforesaid amount at the rate of 20% per annum a *tempore morae* calculated as of 19 March 2021 to date of final payment.
4. The defendant is ordered to pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.
5. The defendant's claim against the third parties partially succeeds.

6. The third parties are ordered to pay the defendant the amount of N\$48 000, jointly and severally the one paying the other to be absolved.
7. The third parties are ordered to pay interest on the aforesaid amount at the rate of 20% per annum calculated as of date of judgment to date of final payment.
8. The defendant and third parties shall each pay their own legal costs.
9. The matter is regarded as finalised and removed from the roll.

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E M SCHIMMING-CHASE  
Judge

## APPEARANCES

## PLAINTIFF:

C van der Westhuizen  
Instructed by Etzold-Duvenhage,  
Windhoek

## DEFENDANT:

JP Ravenscroft-Jones  
Instructed by Evert Gous Legal Practitioners,  
Windhoek

## THIRD PARTIES:

S Vlieghe  
Of Koep & Partners,  
Windhoek