REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 41/2014

In the matter between:

FESTUS NGHIPONA **PLAINTIFF**

And

ESTER NGHIPONA (born IIPINGE) **DEFENDANT**

Neutral citation: *Festus Nghipona vs Nghipona* (I 41/2014) [2016] NAHCNLD 09 (12 February 2016)

Coram: CHEDA J

Heard: **19/08; 21/09; 26/10; 16/11; 07/12/2015 & 28/01/2016**

Delivered: **12 February 2016**

Flynote: A party who signs a handwritten agreement but refuses to sign a typed one cannot be allowed to resile from it without just cause. Agreement is legally binding.

Summary: Plaintiff sued defendant for divorce. This action was defended. The matter was referred to mediation where an agreement was reached. Due to time constraint it was handwritten and signed by the parties including their legal

practitioners. The matter was set down for a Restitution of Conjugal Rights, but plaintiff refused to sign the typed version of the agreement. There was no reasonable excuse given. Another legal practitioner was appointed *amicus curiae* for him but to no avail. There was no lawful impediment why the agreement should not be enforceable.

ORDER

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1. The handwritten settlement agreement is declared valid and binding on both parties.
2. The matter should be set down on the unopposed motion court roll

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JUDGMENT

CHEDA J:

[1] In this matter plaintiff issued out summons for divorce against defendant. Defendant entered an appearance to defend. The matter was referred to case management and eventually found itself in mediation. After protracted negotiations, an agreement was reached and was reduced into writing.

[3] The parties had this agreement reduced into writing before a mediator. It was handwritten and was signed by both parties in the presence of their legal practitioners who also signed as witnesses. The said agreement was supposed to have been typed and made an order of court.

[4] Ms. Mugaviri for plaintiff appeared in court for an application for Restitution of Conjugal Rights order and advised that plaintiff had refused to sign the typed agreement but he did not offer any meaningful reason why he was now seeking to disassociate himself from the agreement. It seems that he was now resiling from the agreement given. Ms. Mugaviri felt there was now a conflict of interest and she withdrew from the proceedings. This move was indeed in order and was indeed professional.

[5] In light of this new development I asked both legal practitioners for the parties to depose to affidavits to slow stating what transpired during mediation. This was to ascertain whether plaintiff was put under any form of pressure to sign the agreement. There is nothing in their affidavits which suggests any wrong doing on any body's part who attended mediation, the mediator included.

[6] I allowed both counsel to withdraw from the proceedings and new legal practitioners were appointed, to act *amicus curiae* which they did. Mr. Nyambe and Ms. Amupolo represented plaintiff and defendant respectively. The court must express its gratitude for their acceptance to do community service in this regard. I should like to add that they also handled this matter professionally.

[7] In their submissions they made it clear that they found no meaningful and legal reason why the handwritten agreement should not be made a court order. Ms. Amuplolo referred the court to the celebrated case of *South African Railways and Harbour v National Bank of South Africa Ltd 1924 AD 704,* where the rule regarding the determination of the validity of a contract was discussed extensively. In that case Wessels JA (with whom other members of the court concurred stated:

> "The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with

> what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract."

[8] The law could not have been made clearer than in the above matter. The agreement which is now being disputed by plaintiff was born out of protracted negotiations which culminated into a handwritten agreement and was duly signed by all the parties. The legal practitioner and a mediation report resulted in success at mediation.

[9] The correct legal position with regards to contracts is that parties must consent. Such consent requires proof of one sort or the other. It has to be established that there was a meeting of the minds, commonly referred to as *ad idem*. In *casu* the agreement had all the hall marks of a legally binding contract. Plaintiff for his selfish purposes now seeks to resile form the contract. This cannot be allowed in a civilized Society. The law expects every other party to be honourable and perform its part. It cannot be allowed to stubbornly wriggle out of a contract at will. If this conduct were to be allowed all commercial and some other activities would cease to exist. This point was forcefully made in *Irvin & Johnson (SA) Ltd v Kaplan 1940 CPD 647, at 651* where Davis J remarked:

> "If this were not so, it is difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would become relevant and no party to any contract would be safe: the door would be opened wide to uncertainty and even to fraud."

[10] Plaintiff consciously signed the agreement and whatever was going on in his mind at the time or thereafter, cannot be known by anybody unless and until he discloses it and is therefore irrelevant at this stage. The court and indeed any other party involved in this case, for that matter, cannot read plaintiff's mind construction from his face, but can only rely on his external manifestations. His external manifestations point to a voluntary desire to enter into a contract and he cannot in the absence of any legal reason be allowed to resile from it.

[11] For that reason, by appending his signature on the said agreement, he intended to make good the agreement and by so doing was undertaking to fulfil his part of the agreement without let up or hindrance.

[12] These courts are loathe in allowing litigants to seek to resile from legitimate contracts. They will, therefore, not allow themselves to play into the whims and caprices of the category of plaintiff. This would be a waste of time and indeed undesirable.

[13] Mr. Nyambe for plaintiff, submitted that he took instructions, but, he was unable to proffer any lawful, let alone, meaningful reason why plaintiff was now seeking to resile from the agreement. The court is indeed grateful to Mr. Nyambe's conduct and professional handling of this matter.

[14] In light of the fact that there is no reason for plaintiff's kind of conduct, the only irresistible conclusion which can be drawn by the court is that plaintiff is a very obdurate character. This conduct cannot be allowed as it not only causes undue suffering on the other party, but, is a complete waste of time for the court as well. In our law an agreement needs not be typed in order for it to be valid. Therefore, plaintiff's stance is of no force or effect in these proceedings.

[15] I find no reason that can justify me halting the natural, logical and legal conclusion of such a legal process. The agreement is legally binding and it must be enforced.

[16] The order of this order is that;

1. The handwritten settlement agreement is declared valid and binding on both parties.
2. The matter should be set down on the unopposed motion court roll

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M Cheda
Judge

APPEARANCES

PLAINTIFF:	M.M Nyambe Of Shikongo Law Chambers, Ongwediva
DEFENDANT:	M.M Amupolo Of the Directorate of Legal-Aid, Oshakati