



**REPORTABLE**

CASE NO: SA 97/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**JACOBUS SCHNEIDERS**

**First Appellant**

**ENGELBERTHA SCHNEIDERS**

**Second Appellant**

and

**ADRIANA JACOBA VAN DER MERWE**

**First Respondent**

**CATHERINE BEUKES (PREVIOUSLY MÖGEL)**

**Second Respondent**

**Coram:** DAMASEB DCJ, HOFF JA and UEITELE AJA

**Heard:** 27 March 2024

**Delivered:** 22 May 2024

**Summary:** The respondents (as plaintiffs in the court *a quo*) issued summons against the defendants (the appellants in this Court) seeking an ejectment of the defendants from Erf 724, Rehoboth (the property) on the basis that the plaintiffs are the registered owners of the property and the defendants are unlawfully occupying the property.

The defendants defended the action and alleged that, when they sold the property to the plaintiffs, they entered into an oral agreement with the plaintiffs that the property would be retransferred back to them once the bond (which they assisted to repay) has been fully paid to Standard Bank. Unfortunately, the oral agreement to retransfer the property to the defendants, was not reduced to writing and the husband of the second plaintiff who was party to the oral agreement had passed away and the wife, the second plaintiff, the sole heir of the estate and co-registered owner of the property is seeking the ejectment of the defendants from the property. The defendants counterclaimed and demanded transfer of the property to them, payment for improvements they effected to the property, payments they made towards rates and taxes and contribution towards the bond payments they assisted to pay.

The court *a quo* found that the oral agreement to retransfer the property to the defendants was a contract for the sale of land and was therefore of no force and effect as it was not reduced to writing as required by s 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969. The court dismissed parts of the defendants' counterclaims. The defendants were aggrieved by the court's finding and appealed against the entire judgment of the court *a quo* but the notice of appeal was filed out of time causing the appeal to lapse. Appellants promptly sought condonation and reinstatement of the appeal.

*Held that*, an applicant seeking condonation must offer a clear and cogent explanation as to why the delay has occurred. The explanation proffered was not flagrant and the appellants enjoyed prospects of success on appeal.

*Held further that*, there was no evidence on record that the parties agreed to conclude a contract of sale and purchase for Erf 724, Block B, Rehoboth, once the bond in favour of Standard Bank was fully repaid. The High Court had thus erred and misdirected itself in that regard.

*Held further that*, the agreement between the plaintiffs and the defendants lacked two *essentialia* of a contract of sale and was therefore not a contract for the sale of land

as contemplated in the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 and that that Act was therefore not applicable.

---

## APPEAL JUDGMENT

---

UEITELE AJA (DAMASEB DCJ and HOFF JA concurring):

### Introduction

[1] This is an appeal which raises the question of the applicability of s 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969, to an oral agreement concluded between the second respondent and her late husband, and the appellants, to retransfer an immovable property to the appellants.

[2] The appellants in this appeal are Jacobus Schneiders and Engelbertha Schneiders who are married to each other in community of property. They were the defendants in the court *a quo*. The first respondent, who was the first plaintiff in the court *a quo*, is Adriana Jacoba van der Merwe in her official capacity as the nominee of Fisher, Quarmby & Pfeifer Attorneys, the agents of the executrix in the Estate of the late Lloyd Ettiene Mögle who died at Khomas Region on 14 May 2014. The second respondent, who was the second plaintiff in the court *a quo*, is Catherine Beukes (previously Mögle) the surviving spouse of the late Lloyd Ettiene Mögle. She is also the appointed executrix in the Estate of the late Lloyd Ettiene Mögle.

[3] I will, in this judgment and for the sake of convenience, refer to the appellants as the Schneiders, the first respondent as Ms Van der Merwe and the second respondent as Ms Beukes. Where I need to refer to the respondents collectively I will

refer to them as they were in the court below, namely as the plaintiffs and will refer to the appellants as they were in the court below, namely as the defendants.

[4] On 31 January 2019, the plaintiffs commenced proceedings in the High Court against the defendants, in terms of which they sought the ejectment of the defendants from an immovable property described as Erf 724, Block B, Rehoboth, Republic of Namibia. The defendants defended the plaintiffs' action and in addition counterclaimed. The crux of the defendants' defense was that they denied being in unlawful occupation of Erf 724, Block B, Rehoboth. They claimed that they were in occupation of the property pursuant to an oral agreement (between them on the one side and the second plaintiff and her late husband on the other side) that once the mortgage bond registered over the property in favour of Standard Bank was paid off the property would be retransferred to them.

[5] In their counterclaim the defendants, apart from the costs of suit, sought an order directing the retransfer of the immovable property described as Erf 724, Block B, Rehoboth, Republic of Namibia to them and payment of four different amounts, which are as follows: firstly, an amount of N\$39 587,34 allegedly being 25 per cent of the bond payments; secondly, an amount of N\$37 440 being rates and taxes that they have allegedly paid in respect of the immovable property; and thirdly, an amount of N\$96 870 being in respect of improvements which they allegedly effected to the immovable property. In the alternative, the defendants claimed an amount of N\$973 897,34. They also claimed interest *a temporae mora* in respect of the four monetary claims.

### The background facts

[6] I will in the next paragraphs briefly summarise the background facts which gave rise to the plaintiffs instituting their action. During August 1981 the defendants acquired Erf 724, Block B, Rehoboth, Republic of Namibia (I will, in this judgment, for the sake of convenience refer to this erf as the property) and became the registered owners of that property since then. During the period over which the defendants were the owners of the property they had a loan with the Agricultural Bank of Namibia. During the year 2011 the defendants fell in arrears with the repayments of that loan. When Mr Schneiders realised that the Agricultural Bank of Namibia may take steps to recover its debt from them he approached the late Lloyd Ettiene Mögle (the late Mögle) who was a childhood friend of the Schneiders' son and conveyed to him his financial difficulties. He conveyed to the late Mögle that he needed an amount of N\$200 000 and the late Mögle also indicated that he needed an amount of N\$90 000 to purchase a motor vehicle and to pay the second plaintiff's medical bills.

[7] From the record it appears that Mr Schneiders and the late Mögle then agreed that the Schneiders will 'sell' the property to the late Mögle. To finance the 'sale' the late Mögle had to obtain a loan from Standard Bank Namibia. The late Mögle was at the time married (in community of property) to Ms Beukes. The late Mögle secured the loan (in the amount of N\$367 000) from Standard Bank and as security for the loan the late Mögle and his surviving spouse (Ms Beukes) registered a mortgage bond over the property in favour of Standard Bank.

[8] Mr Schneiders alleges that he and the late Mögle further agreed that, from the proceeds of the sale, the Schneiders will take an amount of N\$260 000 and the late

Mögle will take an amount of N\$90 000. They allegedly furthermore agreed that the Schneiders will repay 75 per cent of the loan repayments while the late Mögle will repay 25 per cent of the loan repayments. There is a dispute as to what the further exact terms of the oral agreement were, but the Schneiders allege that they (that is, him and the late Mögle) further agreed that, the Schneiders will remain in occupation of the property and that upon the repayment of the loan the late Mögle and Ms Beukes will retransfer the property to the Schneiders. Ms Beukes on the other hand alleges that the agreement was that, the Schneiders will repurchase the property from the Mögles once the bond had been repaid.

[9] Shortly after (that is approximately after three years) the agreement between the Schneiders and the late Mögle, Mr Mögle passed on on 14 May 2014. After the passing of Mr Mögle the life insurance paid off the loan amount at Standard Bank. Ms Beukes (in her capacity as the executrix in the Estate of the late Mögle) alleging that the Schneiders refused to repurchase the property as agreed and also to vacate the property, through her agent (the first plaintiff) instituted proceedings in the High Court seeking the eviction of the Schneiders from the property, and as I indicated the Schneiders defended the action and instituted a counterclaim.

#### The High Court

[10] The court *a quo* identified the 'crisp' issue for determination between the parties as: whether the oral agreement entered into between Ms Beukes and her late husband on the one side and the Schneiders on the other side to retransfer the property to the Schneiders after the bond in favour of Standard Bank was repaid, was valid and enforceable.

[11] The matter was set down for trial and was heard on 17 to 19 February 2021. At the commencement of the trial, the plaintiffs' counsel applied in terms of rule 99(3) of the Rules of the High Court and submitted that the defendants had the duty to begin. The court *a quo* ruled that the duty to begin was on the defendants. This is because – so the court *a quo* held – the defendants had raised a special defence to the effect that there was an oral agreement between them and the plaintiffs that the property will be transferred back to the defendants once the bond was repaid. In accordance with the ruling by the court *a quo*, the defendants began with their case and led evidence (only Mr Schneiders testified for the defendants). The plaintiffs closed their case without calling any witness.

[12] Mr Schneiders' evidence was, in summary as follows: He and his wife acquired the property during 1981 and constructed a residential dwelling on that property during 1982 and have lived on that property since 1982. Over the period which they lived on the property, they improved and renovated the property. Mr Schneiders testified that he knew the late Mögel who was a school friend of his son, whom he supported during his (Mögler) studies at the University of Namibia. They had a good relationship.

[13] During April 2011 he experienced financial pressure, having lost all his work from the North due to a flood. This resulted in him not being able to repay his Agricultural Bank loan. The outstanding amount at the time was N\$200 000. He then called Mögler to inform him of his financial predicament. From the discussion, it was clear that Mögler was also experiencing financial pressure. The Schneiders and the

Mögles met during April 2011. During that meeting, it became clear that the Schneiders needed an amount of N\$200 000 and the Mögles needed N\$90 000 to purchase a vehicle and pay medical bills for Ms Beukes.

[14] The parties agreed that the moneys they so needed will be raised by the defendants selling the property to the Mögles. The sale would be financed by a loan which the Mögles would seek from Standard Bank. Mr Schneiders further testified that Standard Bank first required to evaluate the property. The bank valued the property for approximately N\$600 000 at the time. However, the Mögles only qualified for a bond in the amount of about N\$360 000. During 2011, the parties signed a deed of sale in respect of the property. They, however, agreed that the property will be transferred back into the names of the Schneiders once the bond is fully repaid. He further testified that they agreed to share the repayment of the loan on a pro-rata basis, the Mögles would repay 25 per cent and the Schneiders would repay 75 per cent of the loan.

[15] Pursuant to the agreement the Mögle's secured the loan and a mortgage bond in the amount of N\$367 000 was, on 17 June 2011, registered over the property in favor of Standard Bank. On 17 June 2011 the property was transferred into the names of the Mögles by way of Deed of Transfer Registration No. 404/2011. The Mögle's continued to occupy the property. He further testified that there was never an agreement for them to vacate the property or pay rental in respect of their occupation. He testified that Standard Bank paid out the loan amount on 17 June 2011, and the late Mögle received the amount of N\$90 000 from him. Upon the late Mögle's request, he advanced a further amount of N\$6 000 to him towards the end of



2011. Shortly after the loan amount was dispatched, the late Mögle resigned from his employment. This resulted in him being unable to pay the 25 per cent of the loan repayment and as a result Mr Schneiders was compelled to pay 100 per cent of the monthly loan repayment instalments to Standard Bank. He testified that he had paid the amount of N\$158 349,37 in respect of the bond repayments from the year 2012 until 2014.

[16] Mr Schneiders further testified that on 13 February 2013, the late Mögle and the Schneiders met at the late Mögle's home in Windhoek. Ms Beukes was still at work. The purpose of the meeting was to set out the agreement regarding the retransfer of the immovable property into the Schneiders' name, once the entire bond was repaid. Upon Ms Beukes' return from work, she refused to sign the agreement. The late Mögle and the Schneiders' however signed the agreement. The late Mögle was shocked and disappointed about her refusal to sign the agreement. He continued and testified that on 14 February 2013 and upon the request of the late Mögle, he took him to make an affidavit which he later on handed to the Schneiders together with an envelope. The affidavit confirmed the agreement which the parties concluded. He later opened the envelope and discovered that it was a handwritten last will and testament of the late Mögle (in his own handwriting) which also confirmed the agreement between the parties.

[17] Mr Schneiders further testified that after the late Mögle's passing and after Ms Beukes was appointed as executrix of the Estate of the late Mögle, he made arrangements for a meeting to be held between his wife and the appointed agent of the executrix. The purpose of the meeting was to amongst other matters discuss the

issue of the retransfer of the property to him and his wife and to ascertain what the outstanding balance on the bond repayments were at that point in time as the bond was registered in the name of Ms Beukes and her late husband. He further testified that he had not only paid 100 per cent of the bond repayments, but his monthly payment also covered the monthly instalments of a life insurance policy over the late Mögle's life. This policy paid out after the passing of the late Mögle which extinguished the entire Standard Bank loan. He testified that they were never in unlawful occupation and possession of the property. He denied that there was ever a rental agreement between them and for them to pay rent.

[18] After hearing evidence the High Court on 3 September 2021 gave an order but only delivered its reasons on 29 September 2021. The High Court found that the agreement to retransfer the property to the defendants was invalid and unenforceable and also dismissed parts of the defendants' counterclaim (prayers 1, 4, 5 and 6 of the counterclaim were dismissed). The court in coming to that conclusion reasoned as follows:

[1] In this matter the plaintiffs seek an ejectment order against the defendants, claiming that Erf 724, Block B, Rehoboth ("the property") is lawfully owned by the second plaintiff and her late husband, Lloyd Mögle. In their defense, the defendants claimed that after they sold the property to the plaintiffs, it was orally agreed that the property will be resold back to them. The crux of the matter is whether such an oral agreement is valid and enforceable when it comes to the sale of land.

[2] ...

[38] The crisp issue for determination is whether the oral agreement entered into between the second plaintiff, her late husband, Mr. Mögle and the defendants to

retransfer the property to them (defendants) after it was sold to the second plaintiff and her late husband Mögle was valid and enforceable.

In terms of the Formalities in respect of Contracts of Sale of Land Act, 1969 (Act 71 of 1969), such a contract shall be of no force or effect. Section 1 reads:

“1. Formalities in respect of contracts of sale of land and certain interests in land (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”. (My emphasis).

[39] The first defendant testified that he was involved in property development for many years and knew that any agreement relating to the sale of land must be in writing. He testified that he was negligent in not reducing that oral agreement to writing. The only conclusion this court can come to is that, the oral agreement to retransfer the property to the defendants is of no force or effect. The lawful owners of property are the second plaintiff and her late husband.

[40] The counterclaim of the defendants for improvements effected to the property is without foundation. That is so, because having regard to the nature of the improvements and the intention of the defendants when they effected those improvements, it was clear that they became permanent attachments and the property of the owner of the property<sup>1</sup>.

[41] The municipal rates and taxes that the defendants paid whilst residing in the property, the plaintiffs have agreed to pay that and to be offset against the bond payment that the defendants paid in the amount of N\$158 349,37.’

[19] In line with its findings that the oral agreement (to resell the property to the defendants) was invalid and unenforceable the High Court ordered the eviction of the defendants from the property and dismissed prayers 1 (the claim for the retransfer of

---

<sup>1</sup> *Macdonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 467.

the property to the defendants), 4 (the claim for the payment of the improvements to the property), 5 (the alternative claim for the payment of N\$973 897,34) and 6 (the claim for costs) of the defendants' counterclaim.

[20] As regards, the defendants' claim to be paid the amount N\$37 440 being rates and taxes which they have allegedly paid in respect of the property, the court *a quo* directed the defendants to ascertain and account for the municipal rates and taxes that they have paid from 17 June 2011 to 4 June 2019 and held that the plaintiffs are liable to pay the amount so determined to the defendants. As regards the claim to be paid the amount of N\$39 587,34 the alleged 25 per cent of the bond payments, the court *a quo* advised the defendants to lodge a claim against the Estate of the Late Mögle in terms of s 31 of the Administration of Estates Act 66 of 1965.

[21] The court *a quo* furthermore ordered the defendants to pay the costs occasioned by the claim in convention and the claim in reconvention, such costs to include the costs of one instructing and one instructed legal practitioner on the scale as between attorney and client.

[22] The defendants are aggrieved by the judgment and orders of the High Court, hence this appeal against the entire judgment and orders of the High Court.

#### The appeal

[23] The defendants raised three main grounds of appeal and about six subsidiary grounds. The grounds of appeal are in summary the following:

- (a) the learned judge *a quo* erred and misdirected himself in relation to the interpretation of s 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969;
- (b) the learned judge *a quo* erred and misdirected himself by not taking into consideration the fact that the jurisdictional requirement for the application of s 1 of the Formalities in respect of Contracts of Sale of Land Act is that a sale should have taken place between the defendants and the second plaintiff and her late husband in respect of the property;
- (c) the learned judge *a quo* erred and misdirected himself in that the court *a quo* did not have regard to the fact that one of the two essential characteristics of a sale, the price that was to be paid for the thing sold, was absent;
- (d) the court *a quo* misdirected itself on the law in that it failed to have regard to the true nature of the agreement between the second plaintiff and her late husband and the defendants;
- (e) the court *a quo* misdirected itself in fact by failing to have regard to the fact that in essence, the first plaintiff and the second plaintiff were trustees over the defendants' properties as opposed to sellers of the property;

- (f) the court *a quo* misdirected itself on the facts, in that there was no evidence that served before the court that reflected an agreement of sale of the property between the second plaintiff and her late husband and the defendants;
- (g) in the absence of evidence of a sale of the property between the defendants and the second plaintiff and her late husband, the court *a quo* misdirected itself by arriving at the conclusion that the oral agreement entered into between the parties needed to be reduced to writing flowing therefrom that s 1 of the Formalities in respect of Contracts of Sale of Land Act, applies;
- (h) the learned judge *a quo* misdirected himself in law when he ordered the defendants to pay the plaintiff's costs on a higher scale.

[24] Whilst the defendants raised numerous grounds of appeal summarised in the preceding paragraph, the defendants in essence attacked the judgment *a quo* in two main respects and only two aspects remain for determination by this Court.

[25] The defendants have framed the two aspects which this Court must determine as to whether:

- (a) the oral agreement (the special defence of the oral agreement to retransfer the immovable property to them) raised by the defendants against the eviction claim amounted to a contract of sale; and

- (b) section 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 found application to the facts of this case.

#### Submissions on appeal

[26] Counsel for the defendants in summary argued that a contract of sale of land is an agreement in terms of which the seller promises to sell and deliver land to the purchaser, who in turn agrees to pay the seller an amount of money. The parties must intend to purchase and sell, and there must be agreement by the parties on the essentials of the contract – consent and intention, the land sold and the price. Counsel proceeded and argued that from this statement it is clear that the *essentialia* of a contract for the sale of land are; first the identity of the purchaser and the seller, second the identity of the immovable property and thirdly the purchase price.

[27] Counsel continued and argued that the contract of sale of land is required to embody all the essential and material terms and must identify with sufficient accuracy the foregoing *essentialia*.<sup>2</sup> Counsel proceeded and argued that as it appears from the facts of this case, the transaction alleged by the defendants lacks the essential elements of a contract of sale. The defendants' plea is simply that 'the parties agreed that the immovable property will be transferred into the names of the deceased and the second plaintiff and once the full loan amount is repaid, the said property will be retransferred into the names of the defendants'. From the above it is clear that an essential element of a sale, being the price to be paid for the thing sold, was absent

---

<sup>2</sup> Counsel relied on *Mungur v Minister of Rural Development and Land Reform* (478/2011) [2014] ZAECPHC 86 (11 December 2014) para 3. See also *Vihajo v Kamukuenjandje* (HC-MD-CIV-ACT-OTH-2019/04316) [2021] NAHCMD 17 (24 January 2022) paras 31-34.

and there was as such no contract for the sale of land. Counsel for the defendants thus argued that because of the absence of a contract of sale of land, s 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 does not find application to the facts of this case.

[28] Counsel for the plaintiffs on the other hand argued that the oral agreement pleaded and testified to by the defendants, even if the defendants term it an agreement for the 'retransfer' of the property, bore the hallmarks of an agreement for sale in respect of an immovable property. This is so, argued counsel, because in essence, the parties (that is, the defendants and the second plaintiff and her late husband) agreed to a payment of a determined amount of money (ie the defendants' settlement of 75 per cent of the mortgage bond) in exchange for a transfer of an identified immovable property. The agreement, argued counsel for the plaintiffs, is therefore subject to s 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969.

[29] Counsel for the plaintiffs further argued that there is another basis on which the defendants appeal must fail. He argued that in their evidence in the court *a quo*, Mr Schneiders, with respect to their compliance with the term of the oral agreement that they must pay 75 per cent of the loan amount, testified that he had paid the amount of N\$158 349,37 in respect of the bond repayments from year 2012 until 2014 and that the life policy paid out after the passing on of the late Mögle which extinguished the entire Standard Bank loan. On this version, the defendants did not comply with the terms of the oral agreement that they seek to assert, argued counsel. The defendants' non-compliance disentitles them to an order directing the



enforcement of the oral agreement. Counsel continued and argued that the defendants did not lead any evidence why their non-compliance with the oral agreement does not, as it should, disentitle them to the transfer (ie a claim for specific performance) of the property.

### The legal principles

[30] The legal principles applicable to this matter are rather straight forward and are easy to find. The contract of sale, as it is known in our law today, derives its origins from the Roman consensual contract of *emptio venditio*.<sup>3</sup> Early Roman-Dutch Law writers were of the view that there is no sale without a price and there can equally be no sale without a thing to be sold. The Roman-Dutch lawyers followed these guidelines closely in their definitions of the contract of sale. For example, Voet said:

‘Purchase, as distinguished from lease, it is a *bonae fidei* contract, resting on consent, by which it is arranged that merchandise shall be exchanged at a definite price.’<sup>4</sup>

[31] In modern Roman-Dutch Law the Judicial Committee of the Privy Council in *Treasurer-General v Lippert*,<sup>5</sup> approved of De Villiers CJ’s definition in the court *a quo* that:

‘A sale is a contract in which one person (the seller or vendor) promises to deliver a thing to another (the buyer or empor), the latter agreeing to pay a certain price.’

---

<sup>3</sup> The term *emptio venditio* is the Latin term used to refer to the buying and selling of something. H G M Mackeurtan *Mackeurtan’s Sale of Goods in South Africa* p 1.

<sup>4</sup> D 18.1.1.2. quoted by D J Löt: *Die Koopkontrak: n Historiese terugblik* (1991) *De Jure* 217.

<sup>5</sup> *Treasurer-General v Lippert* (1883) 2 SC 172.

[32] According to Mackeurtan,<sup>6</sup> purchase and sale (*emptio venditio*) is a mutual contract for the transfer of possession of a thing in exchange for a price. It has three essentials: consent (*consensus ad idem*); a thing sold (*merx*); and a price (*pretium*). In general terms, the essential elements of a contract of sale are no different from the essential elements of any other contract.<sup>7</sup> There must be contractual capacity and consensus, the agreement must be legal (not contrary to public policy), performance must be possible, and any formalities required by law must be complied with.<sup>8</sup>

[33] The contract of sale does, however, have a number of additional substantive requirements (known as *essentialia*), which are assimilated into the general contractual structure. Of course, like any contract, the requirement of consensus, or agreement, is the most important general element. In *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia*<sup>9</sup> this Court held that the *essentialia* of a contract of sale are identification of the seller and the purchaser, identification of the *merx* (the thing sold and purchased), and the price at which the property was sold.

### Discussion

[34] I find it appropriate to commence the discussion of the appeal by first setting out the reasoning that informed the court *a quo* to make the orders that it made. I have quoted the reasoning earlier in this judgment. From that reasoning, the findings of the court are not expressly set out but it appears that the court found that the oral

---

<sup>6</sup> *Supra*, footnote 3.

<sup>7</sup> R H Christie *Business Law in Zimbabwe* (1998) at 141.

<sup>8</sup> S van der Merwe; L F van Huyssteen; M F B Reinecke and G F Lubbe *Contract: General Principles* 2 ed (2001).

<sup>9</sup> *Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia* 2014 (2) NR 464 (SC) para (70).

agreement between the Schneiders and the Mögles to retransfer the property to the Schneiders amounted to a contract of sale. I say so because the learned judge stated that 'in their defense, the defendants claimed that after they sold the property to the plaintiffs, it was orally agreed that the property will be resold back to them'. He continued and said:

'The first defendant testified that he was involved in property development for many years and knew that any agreement relating to the sale of land must be in writing. He testified that he was negligent in not reducing that oral agreement to writing. The only conclusion this court can come to is that, the oral agreement to retransfer the property to the defendants is of no force or effect.'<sup>10</sup> (My emphasis).

[35] One of the grounds on which the defendants base their appeal is the contention that the court *a quo* erred when it found that the oral agreement that was concluded between the Schneiders and the Mögles was a contract for the sale of land. The question is thus, was the court *a quo* applying the correct test – namely whether on a balance of probabilities the oral agreement between the parties was that of a sale of land? Counsel for the defendants submitted that on the evidence that was placed before the court *a quo*, the court was wrong in its conclusion that the oral agreement was one for the sale of land. Counsel for the plaintiffs on the other hand submitted that the court *a quo* was correct in that finding, because the oral agreement between the parties bore all the hallmarks of a contract for the sale of land.

---

<sup>10</sup> *Van der Merwe v Schneiders* (HC-MD-CIV-ACT-CON-2019/00337) [2021] NAHCMD 427 (22 June 2021) para 39.

[36] The Court *a quo* made a factual finding that the defendants and the plaintiffs, orally agreed that the property will be resold to the defendants once the installments in respect of the mortgage bond which was registered in favour of Standard Bank was repaid in full. It is a well-established principle of our law that a court of appeal cannot decide the matter afresh and substitute its decision for that of the court of first instance; it would do so only where the court of first instance did not exercise its discretion judicially or by showing that the court of first instance exercised the power conferred upon it capriciously or upon a wrong principle or materially misdirected itself in fact or in law.<sup>11</sup>

[37] In the present matter, the only evidence that is on record is the evidence of Mr Schneiders, the plaintiffs did not give evidence. Mr Schneiders' evidence is uncontradicted. He testified that the oral agreement between him and his wife on the one hand and the late Mögle and Ms Beukes on the other hand was that as soon as the Standard Bank loan was repaid the late Mögle and Ms Beukes would retransfer the property to the defendants. I have read the record of trial proceedings in the High Court and I did not come across any evidence that the parties agreed that the late Mögle and Ms Beukes would resell the property to the defendants once the bond in favour of Standard Bank is repaid in full.

[38] Mr Schneiders' evidence is to the effect that, during April 2011 the late Mögle and Ms Beukes on the one hand and he and Ms Schneiders on the other hand signed a deed of sale in respect of the property. He testified that they pertinently agreed that that the property will be retransferred into his wife and his name (the

---

<sup>11</sup> Compare *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) and *Engelbrecht v Transnamib Holdings Ltd* 2003 NR 40 (LC).

Schneiders' names) once the bond is fully repaid. Mr Schneiders further testified that on 13 February 2013, the late Mögle and the defendants met at the late Mögle's residence. Ms Beukes was still at work at the time they so met. The purpose of the meeting was to set out the agreement regarding the retransfer of the immovable property into the defendants' names once the bond is fully repaid. When Ms Beukes returned from work she refused to sign the version of the oral agreement which was reduced to writing. The defendant tendered into evidence as Exhibit 'G 1' a copy of a document headed 'Deed of Transfer'. The original document was in the Afrikaans language and it is headed '*Oordrag Ooreenkoms*'. Loosely translated it means 'Transfer Agreement' and not 'Deed of Transfer'. This agreement was signed by the defendants and the Late Mögle. Clause (d) of Exhibit 'G 1' reads as follows, I quote verbatim:

'd) Furthermore that the said parties agrees that the property Erf 724 Block B Rehoboth will retransferred or reregistered in the names of Jakobus and Engelbertha Schneiders when the bond (loan) at Standard Bank is settled in full.'

[39] In view of what I have stated in the preceding paragraphs and on the basis of the court *a quo* holding that the onus was on the defendants, I am satisfied that the defendants have discharged the onus resting on the them that their occupation of the property was and is lawful. I also find that the defendants discharged the onus resting on them that they concluded an oral agreement for the retransfer of property to them once the mortgage bond to Standard Bank was fully repaid. I find furthermore that, the court *a quo* misdirected itself when it found that the defendants and the plaintiffs concluded an oral agreement that the defendants would repurchase the property

once the bond is paid in full. This thus justifies this Court's interference with the factual finding of the court *a quo*.

[40] Part of the question that the court *a quo* had to deal with is the interpretation of s 1(1) of the Formalities in respect of Contracts of Sale of Land Act. This Court<sup>12</sup> quoting with approval from *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>13</sup> expressed itself as follows regarding the current legal position in respect of the interpretation of statutes:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.' (My emphasis).

[41] Section 1(1) of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 (the Act) provides that:

'(1) No contract of sale of land or any interest in land (other than a lease, mynpatch 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.'

---

<sup>12</sup> *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* CC 2015 (3) NR 733 (SC) paras 17-20.

<sup>13</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[42] The words of the Act are clear and invite of no ambiguity. In plain and simple English the Act provides that a contract, (which is concluded after the Act came into operation) for the sale of land or interest in land will not be valid except if it is reduced to writing.

[43] The long title of the Act is equally straightforward. It states that the purpose of the Act is:

‘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.’ (My emphasis).

[44] In *Hirschowitz v Moolman & others*<sup>14</sup> Corbett JA opined that:

‘The object of the subsection<sup>15</sup> and its predecessors was to avoid, as far as practicable, uncertainty and disputes (possibly leading to litigation) regarding the contents of contracts for the sale of land (recognising that such contracts were, as a rule, transactions of considerable value and importance) and to counter possible malpractices, including perjury and fraud in connection therewith . . . What the subsection requires is that (at least) all the material terms of the contract be reduced to writing and signed by the parties.’

[45] From what I have stated above it is clear that the Act only finds application to contracts of sale of land or contracts for the sale of interest in land. The critical question in this matter therefore is whether the oral agreement that was concluded between the Schneiders and the Mögles was a contract for the sale of land.

---

<sup>14</sup> *Hirschowitz v Moolman & others* 1985 (3) SA 739 (A) at 757-758.

<sup>15</sup> That is s 1(1) of the Act.

[46] In view of the authorities that I have referred to in the preceding paragraphs the question 'whether the oral agreement that was concluded between the Schneiders and the Mögles was contract for the sale of land' must be answered in the negative. I say so because, in my view two of the *essentialia* of a contract of sale namely the intention to sell and purchase a piece of land (Erf 724) and the price at which the land is to be sold are missing. Counsel for the plaintiffs' argument is that the parties agreed to a payment of a determined amount of money (ie the defendants' settlement of 75 per cent of the mortgage bond) in exchange for a transfer of an identified immovable property, is palpably wrong. The 75 per cent which the defendants had to pay was not paid in exchange for the defendants receiving the property. The defendants had to pay 75 per cent towards the liquidation of the late Mögle's loan to Standard Bank. There was thus no determined purchase price for the property.

[47] Counsel for plaintiffs' argument that the defendants have not complied with the terms of the oral agreement is equally fallacious. I say so for the following reason: Mr Schneiders' uncontested evidence is that after the late Mögle resigned from his employment, he was unable to continue with the payment of 25 per cent of his bargain as a result the Schneiders paid the entire installment including the premiums in respect of the late Mögle's life cover/insurance until when the insurance paid off the loan.

[48] I therefore find that the court *a quo* erred and misdirected itself on the facts and on the law when it concluded that the oral agreement between the parties was a



contract for the sale of land and that s 1 of Formalities in respect of Contracts of Sale of Land Act 71 of 1969 applies to the oral agreement.

#### Application for condonation and reinstatement

[49] I have indicated that the court *a quo* delivered its judgment on 3 September 2021 but only released its reasons on 29 September 2021. From the affidavit deposed to by Mr Schneiders in support of his application for the condonation of the late filing and reinstatement of the appeal, it appears that Mr Schneiders was personally at court on 3 September 2021 when the High Court granted its orders. He deposed that he immediately gave instructions to his erstwhile legal practitioner, to lodge an appeal to this Court against the findings of the High Court. Mr Schneiders deposed that the legal practitioner advised him that they would have to wait for the reasons of the High Court to be released before they could lodge an appeal.

[50] As it turned out, the advice by erstwhile legal practitioner was incorrect.<sup>16</sup> Rule 7(1) of the Rules of this Court<sup>17</sup> provide that a litigant must file his or her notice of

<sup>16</sup> *Fischer v Seelenbinder & another* 2020 (2) NR 596 (SC).

<sup>17</sup> Rule 7(1)-(3) reads as follows:

#### **'Instituting an appeal**

7(1) Every appellant in a civil case who has a right of appeal must file his or her notice of appeal with the registrar and the registrar of the court appealed from and serve a copy of the notice on the respondent or his or her legal practitioner within 21 days or such longer period as may be allowed on good cause shown, after -

- (a) the judgment or order appealed against, including a judgment or order of the Income Tax Special Court in terms of the Income Tax Act, 1981 (Act No. 24 of 1981), has been pronounced;
- (b) in a case where leave to appeal is required, an order for leave to appeal has been granted; or
- (c) a direction of the High Court has been set aside.

(2) The appellant must file an order granting the leave referred to in subrule (1)(b) simultaneously with the notice of appeal.

(3) The notice of appeal referred to in subrule (1) must -

appeal with the registrar of this Court within 21 days after the judgment or order appealed against has been pronounced. It follows that the appeal had to be noted within 21 days from 3 September 2021, which had to be by latest 5 October 2021. The appeal was, however, only lodged with this Court on 10 November 2021 which is approximately 35 days late.

[51] Rule 8(1) of the Rules of this Court requires an appellant in a civil appeal to file four copies of the record of the proceedings with the registrar of this Court. The record must be filed within three months of the date of the judgment or order appealed against, which had to be by latest 3 December 2021. The record of appeal was, however, only filed on 18 October 2023 which is approximately 23 months late. The late noting of the appeal and late filing of the record of proceedings necessitated the launching of a condonation application and an application for the reinstatement of the appeal. The condonation and reinstatement applications are unopposed.

[52] Rule 7(4) and (6) of the Court's Rules require a respondent who intends to oppose an appeal to, within 21 days or such longer period as may be allowed on good cause shown file a notice to oppose. If the, notice to oppose the appeal is filed by a legal practitioner that legal practitioner must, within 21 days after filing the notice to oppose the appeal file a power of attorney authorising him or her to oppose the appeal. The legal practitioners for the plaintiffs only filed the notice to oppose the appeal and the power of attorney contemplated in the rules on the date of hearing the appeal. The legal practitioners, however, filed an application for condonation of their

---

(a) state whether the whole or part of the judgment or order is appealed against, except that where an appeal is noted against an order where reasons have not been given, this rule must be complied with not more than 14 days after the reasons have been given . . . .'

non-compliance with rule 7(4) and (6). The plaintiffs' condonation application is also not opposed.

[53] Our courts have considered the question of condonation, and it is now settled that a litigant in an application for condonation is required to meet two requisites of good cause before such litigant can succeed in such application.<sup>18</sup> Firstly, a reasonable and acceptable explanation for the delay must be established, and secondly, the court must be satisfied that there are reasonable prospects of success on the merits of the case. I am satisfied that the defendants have provided a reasonable explanation for the non-compliances with the rules of this Court. The merits and prospects of success are self-evident from the discussion in this judgment. I am further satisfied that the defendants have met the twin requirements to explain their non-compliance with the rules of this Court and on that basis their non-compliance is condoned.

[54] Having found that the court *a quo* erred in its findings, it follows that the orders of that court must be set aside as they are hereby set aside. In this Court, the defendants indicated that they are abandoning all their prayers in the counterclaim except the claim for the retransfer of the property into their names as per the oral agreement.

### Costs

---

<sup>18</sup> *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J-552A-E; See also *Channel Life Namibia v Otto* 2008 (2) NR 432 (SC) at 439-440; *Beukes & another v SWABOU* (SA10-2006) [2010] NASC para 12 and *Shilongo v Church Council of the Evangelical Lutheran Church* 2014 (1) NR 166 (SC).

[55] There is no reason to depart from the general rule that costs must follow the result. The plaintiffs must therefore pay the defendants, costs both in this Court and the court *a quo*.

#### Order

[56] For the reasons and conclusions reached in this judgment, I make the following order:

1. The appellants' failure to comply with the Rules of Court is condoned.
2. The respondents' failure to comply with the Rules of Court is condoned.
3. The appeal is reinstated.
4. The appeal succeeds and the judgment and order of the High Court is set aside and replaced by the following order:
  - '(a) The plaintiffs' claim is dismissed.
  - (b) The plaintiffs must transfer the immovable property situated at Erf 724, Block B, Rehoboth, Namibia to the defendants.
  - (c) The plaintiffs must pay the defendants' costs in respect of the claim and the counterclaim on a party and party scale.'
5. The respondents must pay the appellants costs of the appeal, to include the costs of one instructing and two instructed counsel.

---

**UEITELE AJA**

---

**DAMASEB DCJ**

---

**HOFF JA**

APPEARANCES

APPELLANTS:

R Heathcote (with him L Ihalwa)

Instructed by Henry Shimutwikeni & Co  
Inc.

RESPONDENTS:

T Muhongo

Instructed by Fisher, Quarmby & Pfeifer