CASE NO. A

IN THE *HIGH COURT* OF *NAMIBIA*

In the matter between

LAZARUS NGANJONE ***APPLICANT***

versus

JOHANNES JOHNNY WILHEIKKI ***FIRST RESPONDENT***

THE REGISTRAR OF DEEDS N.O. ***SECOND RESPONDENT***

CORAM.: MTAMBANENGWE, **J.**

Heard on: *1995.06.15*

Delivered on: *1995*.09.05

JUDGMENT

MTAMBANENGWE, J.: This opposed application on notice v brought on an urgent basis. The applicant seeks a tempor interdict as *follows:*

" (a) That the First Respondent be interdicted restrained *from receiving or obtaining transf* the following property, to wit:

CERTAIN Farm ᵛNukhuwis' No. *Grootfontein*

SITUATED District of Grootl

Registration Division ᵛB'

MEASURING *6016,5498 hectares*

{hereinafter referred to as 'the *proper by Applicant* to First Respondent in t Agreement dated the 8th

interdict shall operate as an interim interdict pending the outcome of an action to be instituted by Applicant referred to infra;

(2) That the Second Respondent be interdicted and restrained from causing or giving transfer of the property to the First Respondent, pending the outcome of the action to be instituted by the Applicant referred to supra and infra;

(3) That the Applicant shall institute an action against First Respondent within 1 (one) month of the confirmation of the rule nisi referred to above, to set aside and/or declare null and void the following agreements and/or for further related or ancillary relief:

(i) The agreement of Purchase and Sale concluded between Applicant and Respondent dated the 8th November 1994 in respect of the property;

(ii) An agreement concluded between Applicant and First Respondent, inter alia relating to a donation to be made by First Respondent to Applicant in an amount of N$40 000 which agreement was concluded on the 10th November 1994 .

(d) That the costs of this application be paid by First Respondent and that costs will be sought against Second Respondent, only in the event of her opposing this application;

(e) ....»

This temporary interdict is sought on the basis:

(c) That the Applicant shall institute an action against the First Respondent within 1

of the confirmation of the rule nisi referred to above to set aside and/or declare invalid the following agreements and/or for further related or ancillary relief:

(i) The agreement of Purchase and Sale concluded between Applicant and Respondent dated the 8th November 1994 in respect of the property;

(ii) An agreement concluded between Applicant and First Respondent, inter alia relating to a donation to be made by First Respondent to Applicant in an amount of N$40 000, which agreement was concluded on the 10th November 1994.

Applicant also seeks an order of costs against first respondent; and second respondent only in the event that the latter opposes this application.

Finally applicant sought that the order set out in 2(a) and (b) be made to operate as an interim interdict pending the confirmation of the rule nisi which he initially sought on these papers.

The matter was opposed and full papers were filed, so in the end no rule nisi was issued. The matter was thus fully argued as an application for a temporary interdict pending the institution of that action contemplated by the applicant.

The background to this application can be briefly summarised as follows: In November 1994 applicant and first respondent executed two agreements between themselves both

in respect of applicant's property described in the order sought (the property) . The first agreement executed on the 8th November was characterised as an agreement of sale of the property (the sale agreement) at N$710 000. The second agreement executed on the 10th November purported to be an agreement of donation inter vivos, whereby the donor - first respondent, was to donate to the donee - applicant, N$4 0 000 payable within 30 days after the registration or transfer of the property into the name of the donor (the donation) . Clause 5 of the "sale agreement" provides that possession and vacant occupation of the property shall be given to the purchaser on the date of registration, whereas the conditions upon which applicant, as seller of the property and as donee of the N$40 000, accepts the donation are:

> "3. The Donee shall have the right to stay on the said farm Nukhuwis No. 2 68 for a period of 18 (eighteen) months after the aforementioned registration into the name of the Donor.

(4) The Donee shall have the right to keep his own stock on the said farm, with a maximum of 50 head of cattle and 120 goats but no sheep or other stock.

(5) The Donee shall be responsible for the maintenance of the farm including any buildings, fences, water installations and/or other improvements and the Donee shall look after the Donor's stock during the period mentioned in paragraph 3 hereof."

The donation agreement was signed for applicant by the attorney who drew up the two agreements on the parties' instructions, by virtue of a power of attorney given by

applicant on 8th November, 1994.

According to applicant what triggered this application is that on 25th April, 1995, wanting to ascertain when transfer of the property would take place, he (applicant) consulted his attorney of record in this matter. When the said attorney perused the two agreements he indicated to applicant that in his opinion the two agreements were not valid and advised him of certain adverse consequences to him, and that he "could also be a party or accomplice in effectively defrauding the Receiver of Revenue as well as the Land Bank or at least encourage or facilitate the commission of such illegality and its resulting consequences if the transaction was allowed to proceed." He concludes:

> "I do not want to be a party to anything of this nature and certainly, before now, also as stated before, was not remotely aware that my actions could lead to anything of this kind." (Paragraph 21 of his founding affidavit).

Applicant claims in paragraph 12 of his affidavit that the attorney who drew up the two agreements was first respondent's attorney and alleges further that the attorney and first respondent explained to him that two agreements had to be drawn up and that:

> > "The one agreement would be an agreement of sale in terms whereof it would be alleged that the farm is sold for N$710 000 (thus merely N$116 per hectare), which would then also be the contract to be submitted to the Land Bank by First Respondent. A second agreement would then however also be drawn termed a 'donation agreement' for a further amount of N$40 000 which,

together with the N$710 000, would make up the real purchase price of N$750 000 (which would amount N$123 per hectare as agreed).

In paragraph 13 he goes on to say:

> "I was made to understand by both the First Respondent and his said attorney that if the N$40 000 would be added to the N$710 000 in one and the same contract, this would not be acceptable to the Land Bank from whom the First Respondent also intended to obtain a loan to finance the purchase price. For this reason the agreement relating to the 'donation' of N$40 000 by the First Respondent to me, would not be shown to the Land Bank. The First Respondent as well as his attorney also indicated to me that the transfer duty as well as the relevant taxes payable by the First Respondent, would be higher if the purchase price is reflected is reflected as N$750 000 instead of N$710 000 and that this is why the purchase price should be reflected in the Agreement of Purchase and Sale in the lesser amount."

As would be expected there are vehement denials of these allegations by both the first respondent and the said attorney. First respondent says that in their negotiations a price of N$710 000 "<u>was considered which would have enabled</u> the applicant <u>to pay all his creditors</u>, (my underlining) and continues:

> "12.5 The applicant then decided that, over and above the N$710 000 he, by way of a separate agreement, wanted a further N$40 000 and the right to stay on the farm free of charge for a period of 18 months after the sale and with the right to keep livestock on the farm during such time. I was prepared to agree to it but suggested that we

> incorporate the above-mentioned in one agreement. He, however, insisted that the N$4 0 000 and the right to use the farm for a period of 18 months after the sale should not be part of the sale of the farm and that the payment of the said N$40 000 should be construed as a donation. He did not want his creditors to be aware of the payment of the further N$4 0 000 and he suggested that payment thereof be effected only 3 0 days after registration of the transfer of the farm, by which time he anticipated his creditor's claims to be settled. He further informed me that he wanted us to incorporate the above in a written agreement to enable him to obtain a further loan from the Land Bank in respect of the livestock that he would be allowed to keep on the farm as aforesaid. I consented to the above-mentioned as I did not think it was irregular. I wish to emphasise that:

(6) I did not think I would benefit from such a construction.

(7) I did not attempt to prejudice either the Land Bank or the Receiver of Revenue.

(8) I consented to the above-mentioned simply because the Applicant, the seller, insisted upon it."

In his further deposition first respondent says that when they approached the attorney to draft the agreements they both (he and applicant) assured the attorney that the N$40 000 was not part of the purchase price but a separate donation. In his affidavit in support of first respondent, the attorney, Mr du Toit, says that ... applicant first explained that he and first respondent wanted to enter into

an agreement of sale of the property at N$710 000 and that:

> "6.1.2 they wanted to enter into a separate agreement in terms of which the First Respondent would pay N$40 000 to the Applicant who would be allowed to stay on the farm free of charge for a period of 18 months after the sale with the right to keep livestock on the farm."

According to this affidavit, it seems the only question Mr du Toit asked the parties was "whether the said N$40 000 was part of the purchase price." He says he "informed them that transfer duty was payable on that sum if it was part of the purchase price" and they assured him that is was not, it was a separate donation and they wanted him "to prepare two separate agreements for that purpose."

There are many other disputed issues on the papers, nearly all of them touching on the credibility of the parties; and which it is not necessary to clear for the purpose of dealing with this application. These will obviously become very relevant when the parties come to give viva voce evidence in the action that applicant intends to institute. For the present purposes, however, there is no doubt in my mind that on the depositions as outlined above, that both the applicant and the first respondent knew and appreciated that the N$4 0 000 was part of the purchase price of the property. While, unlike applicant, first respondent does not say so specifically the language used in his affidavit -"a purchase price of N$710 000 was considered" (not agreed) and "the payment of the said N$4 0 000 should be construed as a donation" - leave no doubt as to what he thought it was

all about. The donation agreement itself confirms my view; the simple question arising from its provisions being: what did he think he, in terms of that agreement was paying the extra N$40 000 for? Lastly the prompt action taken by first respondent to pay transfer duty on the N$40 000 once this application was launched tell it all. (See paragraph 22.4 of his affidavit at p.66 of the papers).

At the hearing of the matter the court was advised that the application to strike out certain portions of the affidavit of first respondent would not be pursued as had been indicated in applicant's heads of argument. Oral argument therefore, was only on the merits.

Both counsel in their heads of argument dwelt at some length on submissions related to the final issue that applicant will seek to have resolved in the action contemplated, whereas the simple issue to be determined in this matter is whether the court should exercise its discretion and grant the interdict sought. It was even suggested by Mr van Rooyen for first respondent that if the court was not prepared to dismiss the application after assessing the contentions of the parties, the matter should be referred to oral evidence as a matter of urgency. I agree with Mr Totemeyer for the applicant, however, who submitted that:

> "no dispute of facts exist which prevents the determination of this matter on the papers and that reference to oral evidence of the dispute of facts on the papers is not necessary to determine the real issue in question and could in any event lead to a duplication of trial actions as such disputes are fit

to be determined at the trial action."

The requisites of an interdict pendente lite are that the applicant must show:

"(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear, or, if not clear, is prima facie established, though open to some doubt;

(9) that, if the right is only prima facie established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(10) that the balance of convenience favours the granting of interim relief; and

(11) that the applicant has no other satisfactory remedy.

See: Gool v Minister of Justice & Another, 1955(2) SA 682 (C) at pp 687-8; Pietermaritzburg City Council v Local Road Transportation Board, 1959(2) SA 758 (N) at p 772 . "

This was stated by Corbett, J. (as he then was) in L

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Boshoff Investments v Cape Town Municipality, 1969(2) SA 256 (CPD) at p 264. The learned judge proceeded to say that

"Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the courts approach in determining whether the applicant's right is prima facie established, though open to some doubt, is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to

> consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action."

In an illegal contractual situation such as this, the second and third conclusions stated by Stratford, C.J. at pp 544-5 in Jajbhay v Cassins, 1939 AD 537 still hold good generally speaking, and are worth quoting in the context of this case. In that case the learned Chief Justice was concerned to draw a distinction between the maxims: ex turpi- causa non oritur actio and in pari delicto potior est condicio defendentis. He stated the conclusions thus:

> "The second is that the rule expressed in the maxim in pari delicto potior est condicio defendentis is not one that can or ought to be applied in all cases, that it is subject to exceptions which in each case must be found to exist only by regard to the principles of public policy. Thirdly I have considered the desirability of expressing in the form of a general rule all possible exceptions to the application of the rule itself. It cannot of course, be said (as Lord Thurlow said) that a restitutio in integrum should always be allowed, for this, as story points out, nullifies the maxim. Following Hailsham's statement of the law one might say, speaking generally, that restitutio will be granted in cases where the illegal contract has not been substantially carried out, and not in those cases where the contract has been substantially preformed. But such a rule, though affording some guidance, must be subordinated by the overriding consideration of public policy (which I repeat does not disregard the claims of justice between man and man). Thus I reach my third conclusion, which is that courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the

> principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes a civil court can reasonable suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant of refusal of the relief claimed, that a court of law might well decide in favour of doing justice between individuals concerned and so prevent unjust enrichment."

(See also L Ferrari v Runch, Case No. SA 6/93, a Namibian Supreme Court judgment delivered on 14 October 19 94 at pp 17 to 18).

With the above general statement of principles applicable to a case like the present, on my analysis of the facts I find that applicant's right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear. Applicant seeks in the main action contemplated a right of restitutio in integrum by a declaration that the two contracts are null and void for illegality and should be set aside. In this connection Mr Totemeyer submitted that both agreements are illegal and purported to bind the parties to commit a crime and an unlawful act or at the very least encouraged them to do so in that it bound them to defraud the Receiver of Revenue and the public purse or encouraged them to do so, and that it was also the intention to avoid or circumvent Land Bank regulations. As such the contracts are contra bonos mores

or against public policy and therefore void and unenforceable. I agree with that submission.

In Essop v Abdullah, 1988(1) SA 424 (A) , one of the cases Mr Totemeyer referred to and relies, on the appellant failed in an appeal against the dismissal of his application in the court a quo for an interim interdict. He had entered into an agreement with respondent whereby two erven he had purchased in an area zoned for Coloureds in terms of the Group Areas Act 77 of 1957 and the Group Areas Act 3 6 of 1966 were registered in the name of respondent, he (the appellant) , an Indian, being a disqualified person in terms of a section in both Acts providing:

> "No person shall acquire or hold on behalf or in the interest of any other person any immovable property which such other person may not lawfully acquire or hold in terms of this Act."

The Acts provided further that such a disqualified person could apply to the Minister for a permit to acquire and the Minister could then direct that a permit be issued authorising the acquisition and holding of immovable property in a group area. The interim relief claimed by the appellant sought to restrain the respondent

> "from registering the transfer of the hereinafter mentioned properties to any person pending the final determination of an action which applicant (appellant) is to institute against first respondent in which applicant seeks an order, inter alia, that first respondent effect transfer of the hereinafter mentioned properties to applicant on the requisite permit being obtained in terms of the provisions of the Group Areas

Act 36 of 1966:"

Botha, J. A. rejected the argument that since it was always open and was still open to the appellant to apply for and obtain a permit in terms of section 18 of the 1957 Act or section 21 of the 1966 Act and upon the issuance of such permit the appellant could lawfully acquire and hold the erven the appellant was not such a disqualified person or the erven in question were not "immovable property which such other person", the appellant, "may not lawfully acquire or hold in terms of this Act." The learned judge of appeal said the following at p 435 A-B of the report:

> "In my opinion the Legislature clearly intended that the concept of a person who 'may not lawfully acquire or hold' the immovable property in question in a given case should be applied with reference to that moment of time which is relevant in the particular inquiry which is being undertaken. So, if A acquired immovable property in a group area on behalf of or in the interest of B and the enquiry is whether A's conduct constituted a contravention if the statutory prohibition, the decisive question is simply whether B was a disqualified person who was not in possession of the requisite permit at the time A acquired the property."

The learned judge of appeal went on to find that respondent in the agreement alleged by the appellant undertook to do that which was forbidden by the relevant sections of the relevant Acts, a "position which could not be detracted from by the mere possibility of the appellant obtaining a permit at some time in the future." He concluded:

> "Thus the contractual performance to which the respondent bound herself in terms of the agreement alleged by the appellant was to commit an illegality. It is a fundamental truism that a contract for the performance of an unlawful act will not be enforced by the courts. The reason for the principle is self evidence: no court will compel a person to perform an illegality. But that is the very object which appellant sought to achieve by means of the interdict that he applied for in the court a quo."

The position in the present case is different. The interim interdict here sought will prevent the implementation of an agreement of sale that is clearly illegal.

In another case relied on by the applicant in this matter - York Estates v Wareham, 1959(1) SA 125 (SR) Lewis, A.C.J, as he then was, stated at p 128 that the court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law; and that:

> "In fact the court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties ..... Furthermore, the court will not enforce such a contract even though the plaintiff is innocent and the defendant is setting up his own illegality. See R v Mahomond and Ispahani (1921(2) KB 716)."

In the present case to refuse to grant the interdict that is sought would be tantamount to the court turning a blind eye to an illegality that stares it in the face. It will be noted that in the York Estates case the position is made very clear that in cases of express statutory prohibition the fact that, where a permit authorising the doing of the

prohibited thing (the contract) is a prerequisite, a permit was obtained before the plaintiff sought to enforce the contract, is immaterial.

The Act:

The provisions of the Transfer Duty Act No. 14 of 1993 make it obligatory that transfer duty shall be payable on the value of any property acquired by any person (section 2) on the date of acquisition (section 3). In section 1 the "date of acquisition" is defined as:

> "(a) in the case of the acquisition of property by way of a transaction, the date on which the transaction was entered into, irrespective of whether the transaction was conditional or not or was entered into on behalf of a company already registered or still to be registered."

In terms of section 14 a declaration of value has to be made and "declared value" in relation to property means the value of the property as declared in the declaration completed in terms of section 14 (section 1) section 5(1) of the Act provides (apropos this matter):

> "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."

Section 12 prohibits a registration officer to make any record

property unless there has been produced to him or her proof, other than a receipt, for a deposit on account of the duty:

> "a that duty payable in terms of this Act or any other law has been paid in respect of the acquisition in question."

Lastly section 17 of the Transfer Duty Act provides as follows:

> "17(1) Any person who fails to comply with any requirement or demand by the Permanent Secretary under this Act or who knowingly submits or causes to be submitted to the Permanent Secretary a declaration referred to in section 14 which fails to disclose any material fact relevant to the nature of the transaction by which property has been acquired or to the consideration payable in respect of any property or to the value on which the duty is payable, shall be guilty of an offence and liable on conviction to a fine not exceeding R4 000 or to imprisonment for a period not exceeding 1 (one) year.
>
> (2) Any person who, in a declaration referred to in section 14, makes a false statement knowing it to be false shall be guilty of an offence and liable on conviction to the penalties prescribed for the crime of perjury."

It is clear that the two agreements entered into by the parties in this case fall foul of the provisions of the Transfer Duty Act No. 14 of 1993.

In the result the application succeeds with costs and I make an order in terms of paragraph 2 (a) to (d) mutatis -mutandis, of the notice of motion.