REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 133/2014

In the matter between:

VERONIQUE FERIAL VAN ROOI **APPLICANT**

And

TOWN COUNCIL OF REHOBOTH **FIRST RESPONDENT**
REGISTRAR OF DEEDS **SECOND RESPONDENT**
ALFRIEDA ESRA DIERGAARDT **THIRD RESPONDENT**

Neutral citation: *Van Rooi v Town Council of Rehoboth* (A 133/2014) [2014] NAHCMD 317 (30 October 2014)

Coram: PARKER AJ
Heard: **22 September 2014**
Delivered: **30 October 2014**

Flynote: Sale – Land – Contract – Cancellation – Purchaser in breach – Court held that where the contract lays down a procedure for cancellation that procedure must be followed, otherwise the purported cancellation will be ineffective – In instant case court found that the seller did not follow the procedure for cancellation upon alleged breach of a material term of the agreement – Consequently court concluded that the purported cancellation was ineffective.

Summary: Sale – Land – Contract – Cancellation – Purchaser in breach – Seller purported to cancel sale agreement on the basis that purchaser has breached

material terms of the agreement, including non-payment of the purchase price on due date – In terms of the agreement the seller was to give written notice to remedy the breach within 14 days, failing which seller was entitled to cancel the sale or claim immediate payment of the purchase price and fulfillment of all terms and conditions of the agreement – Court found that the seller had not followed the procedure for cancellation under the agreement when she purported to cancel the agreement – Consequently, court found the purported cancellation to be ineffective – Court granted order requiring the seller to follow the proper procedure if she desired to cancel agreement.

ORDER

(a) The applicant's non-compliance with the rules of court is condoned and the application is heard on urgent basis.

(b) The third respondent may, if she so desires, not later than 13 November 2014 pursue her remedy under clause 8 of the Agreement.

(c) Subject to para (b), the respondents are interdicted from carrying out on any date prior to 28 November 2014 any act for the purpose of transferring Erf No. B21 Rehoboth, Registration Division "M" Hardap Region, into the name of any person, including the applicant.

(d) If the applicant fails or refuses to remedy any breach communicated to her in terms of a written notice contemplated in para (b), read with clause 8 of the sale agreement, the respondents are discharged from the interdict set out in para (c).

(e) Each party is to pay his, her or its own costs of suit.

JUDGMENT

PARKER AJ:

[1] This application started its life as an urgent application that was to be heard at 09h00 on 13 June 2014. The application was not heard; for on that date the court ordered papers to be filed by the respondents and the applicant and the filing of heads of argument by both counsel. A new set down hearing date of 10 July 2014 was, therefore, ordered. Hearing of the application did not proceed on that date either. A new set down hearing date of 22 September 2014 was ordered and was utilized. I have set out this brief history of the matter to make the point that the relief sought in para 1 of the notice of motion was no longer relevant, and, therefore, does not warrant any treatment.

[2] This matter revolves around a sale of immoveable property, being Erf B21, Rehoboth, Registration Division “M” Hardap Region (‘the property’), entered into between the third respondent (the seller) on the one hand and the applicant and Mitta Elizabeth Witbooi, being apparently the applicant’s mother, on the other. The applicant brought the application by notice of motion in which she seeks an order in terms appearing in the notice of motion. The first respondent and the third respondent have moved to reject the application. The second respondent has not filed any papers.

[3] In virtue of the talisman on which the applicant hangs the merits of this application, it is my view that no purpose would be served to rehearse in this judgment averments that are traded between the applicant and the respondents as to why in the third respondent’s view she was entitled to cancel the agreement and why in the applicant’s view the third respondent violated the terms of the agreement when she purported to cancel the agreement. The talismanic averment of the applicant is based on the interpretation and application of clause 8 of the agreement, entitled ‘BREACH’. Clause 8 in material parts provides:

'BREACH

In the event of the PURCHASER falling to fulfil on due date any of material terms and conditions of this Agreement and remains in default after 14 (fourteen) days' written notice to remedy such breach, the SELLER or his Agent shall have the right either:

8.1. to cancel the sale by registered letter addressed to the PURCHASER, in which event the PURCHASER shall forfeit all monies paid to the SELLER or his Agent in terms hereof, without prejudice to the SELLER'S other legal rights and remedies and the right to claim damages; OR

8.2. to claim immediate payment of the whole of the purchase price and the fulfilment of all terms and conditions hereof.'

[4] On the interpretation of the chapeu and clauses 8.1 and 8.2 of the agreement which are clear and unambiguous, I conclude that the third respondent's entitlement to the remedy in clause 8.1 or the remedy in 8.2 is not absolute; the third respondent must – she has no discretion in the matter – serve a written 14 days' notice on the applicant, calling on the applicant to remedy any breach. It is only after the applicant has failed or refused to act in terms of the notice that the third respondent's entitlement to the remedy in clause 8.1 or 8.2 enures. In this regard, it must be remembered that the agreement 'is conclusive as to the terms of the transaction' respecting the sale of the property (See L H Hoffmann and D T Zeffert, *The South African Law of Evidence*, 4 ed (1988) p 291.)

[5] I respectfully reject the abortive attempt by Ms Husselmann, counsel for the first and third respondents, to argue that the third respondent gave the requisite notice in terms of clause 8. The third respondent did not. What is contained in the papers placed before the court is a letter (dated 17 April 2014) written by the third respondent to applicant and her husband and the applicant's legal representatives. The letter reads in material parts as follows:

'RE: NOTICE TO CANCEL TRANSACTION

Dear Sir/Madam

> Herewith notice of cancellation of the transaction between Mr and Mrs Van Rooi and myself in which Mr and Mrs Van Rooi offered to purchase Erf B21, Rehoboth (the property).'

[6] Doubtless, the letter does not even come close to complying with clause 8 of the agreement. On this point I accept the submission by Mr Rukoro, counsel for the applicant. 'If a contract lays down a procedure for cancellation', wrote R H Christie in his work *The Law of Contract in South Africa*, 6th ed, p 562, 'that procedure must be followed or a purported cancellation will be ineffective'. In the instant case I find that the purported cancellation is ineffective, even if in the third respondent's view the applicant has failed to fulfil on due date any material term and condition of the agreement.

[7] Ms Husselmann submitted that up to date the applicant has not shown any proof that she has paid the purchase price. That may be so; but, as I say, the procedure for cancellation provided in the agreement must be followed. For other reasons which I shall indicate in due course this unchallenged submission is relevant, though not relevant as respects the third respondent's failure to comply with the giving of notice in terms of clause 8.

[8] In virtue of the conclusion that the cancellation by the third respondent of the sale agreement is ineffective and further that payment of the purchase price has not been paid by the applicant within the time limit stipulated in clause 2 of the agreement, I need not treat extensively the position of the first respondent. I shall only say this. As an administrative body responsible for carrying out public duties relevant to the present matter, the first respondent has both the discretionary power to act or not and an obligation to perform its *ministerium* that is, its statutorily prescribed task under the Local Authorities Act 23 of 1992, read with the Registration of Deeds in Rehoboth Act 93 of 1976 which is the issuing of a clearance certificate. Thus, it is only when the first respondent is satisfied that the applicant has satisfied the statutory requirements for the issuance of a clearance certificate that the first respondent must perform its prescribed task, ie the issuance of the clearance certificate. It follows that the first respondent exercises power, which is discretionary, and, in addition, it is obliged to perform its prescribed task, also under those Acts, ie

the first respondent's *ministerium*. These are the public duties of the first respondent in terms of those Acts in relation to the issuing of clearance certificates within its area. See Nguvauva v Minister of Regional and Local Government and Housing (A 254/2010) [2014] NAHCMD 290 (2 October 2014).

[9] From the aforegoing treatment of the public duties of the first respondent, I hold that this court is not entitled to direct (as the applicant prays in para 2 of the relief sought in the notice of motion) the first respondent, an administrative body, to exercise its discretionary power in any particular manner. See *Trustco Insurance v Deed Registries Regulation Board* 2010 (2) NR 565 (HC). After the first respondent has considered an application to issue a clearance certificate, the first respondent has a duty to act or not, ie to issue or not to issue the clearance certificate, and give reasons for its decision. I need not say that, indeed, it is the administrative body, and not the court, which is given the power by the Acts to issue a clearance certificate in its local authority council area. As I have indicated infra, the first respondent has not exercised its power or performed its *ministerium*.

[10] In this regard, the first respondent has the power to act or not, that is, issue or refuse to issue, the clearance certificate and, if it refused to issue the certificate, give reasons for its inaction and inform the applicant or her legal representatives accordingly. That would be in conformity with the requirements of art 18 of the Namibian Constitution. The first respondent has not done all that. Indeed, as matters stand, the court has nothing in writing from the first respondent placed before it, indicating that the first respondent has taken a decision in which it has refused to issue the clearance certificate and the reasons for its inaction, albeit a representative of the first respondent did file an answering affidavit.

[11] I understand Ms Husselmann's argument that the first respondent has filed papers opposing the application because certain allegations against the first respondent have been made in the applicant's papers. Besides, in my view, it is proper that the first respondent has filed papers because an order is sought against it, except that, as I have said, the first respondent's papers are bereft of an essential

element, namely, whether it has issued or refused to issue the clearance certificate, and if it has refused to issue the certificate, its reasons for so refusing.

[12] In paras 2 and 3 of the notice of motion the applicant seeks final orders and yet the respondents, were given barely one day in which to deliver answering papers, and, in all, shy of two days in which to file papers and prepare for the hearing. It was, thus, due to the applicant's unwarranted conduct that the matter could not be heard on 13 June 2014 as I found it necessary that the respondents filed papers. This is an applicant who rushes to court at breakneck speed, dragging the respondents with her, and yet she had to the date of filing papers not fulfilled the terms of clause 2 of the agreement which is a material term of the agreement. That being the case it would be unreasonable and inequitable if the court were to make the order prayed for in paras 2 and 3 of the notice of motion without more or without any qualification.

[13] Furthermore, taking into account the order I have made infra, the applicant has not succeeded substantially, considering the relief she seeks. For all these reasons, in the exercise of my discretion, I hold that this is a proper case where it is fair and reasonable that the court does not grant costs against any party.

[14] In the result, I make the following order:

(a) The applicant's non-compliance with the rules of court is condoned and the application is heard on urgent basis.

(b) The third respondent may, if she so desires, not later than 13 November 2014 pursue her remedy under clause 8 of the Agreement.

(c) Subject to para (b), the respondents are interdicted from carrying out on any date prior to 28 November 2014 any act for the purpose of transferring Erf No. B21 Rehoboth, Registration Division "M" Hardap Region, into the name of any person, including the applicant.

(d) If the applicant fails or refuses to remedy any breach communicated to her in terms of a written notice contemplated in para (b), read with clause 8 of the sale agreement, the respondents are discharged from the interdict set out in para (c).

(e) Each party is to pay his, her or its own costs of suit.

C Parker

Acting Judge

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APPEARANCES

APPLICANT :	S Rukoro Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
FIRST AND THIRD RESPONDENTS:	G M Husselmann Of Van Wyk, Stanley & Partners, Rehoboth c/o Sharon Blaauw Attorneys, Windhoek