**REPUBLIC OF NAMIBIA** REPORTABLE

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: A 140/2011

In the matter between:

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| **INA BUCHHOLZ NO** | **FIRST APPLICANT** |
| **INA BUCHHOLZ** | **SECOND APPLICANT** |

And

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| **BRUNO RUDOLF EWERT** | **FIRST RESPONDENT** |
| **MARGRET EWERT** | **SECOND RESPONDENT** |
| **MINISTER OF LANDS, RESETTLEMENT AND REHABILIATION** | **THIRD RESPONDENT** |
| **HENNIE COETZER** | **FOURTH RESPONDENT** |

**Neutral citation:** *Buchholz v Ewert* (A 140/2011) [2016] NAHCMD 37 (25 February 2016)

**Coram:** PARKER AJ

**Heard**: **19 January 2016**

**Delivered**: **25 February 2016**

**Flynote:** Land – Agricultural land – Sale of – Application of the Agricultural (Commercial) Land Reform Act 6 of 1995, s 17(1) – State has a preferrent right to purchase all agricultural land – Whenever owner of such land intends to sell such land he or she must give first refusal to the State – As a matter of law and common sense the owner of such land is not capable of giving such first refusal to the State

where the owner has already directed his or her will of selling the land towards performing an act of selling to a purchaser other than the State by entering into an agreement to sell the land with such purchaser – By so acting, the owner has acted in contravention of Act 6 of 1995, s 17(1) the interpretation and application of s 17(1) of Act 6 of 1995 is extremely crucial as it lies at the heart of the scheme of the legislation and it is one provision that gives life and meaning to the object of the Act and the intention of the Legislature – Agreements entered into by contracting parties in contravention of the common law or legislation are not enforceable, and are void.

**Summary:** Land – Agricultural land – Sale of – Application of the Agricultural (Commercial) Land Reform Act 6 of 1995, s 17(1) – State has a preferrent right to purchase all agricultural land – Whenever owner of such land intends to sell such land he or she must give first refusal to the State – As a matter of law and common sense the owner of such land is not capable of giving such first refusal to the State where the owner has already directed his or her will of selling the land towards performing an act of selling to a purchaser other than the State by entering into an agreement to sell the land with such purchaser – By so acting, the owner has acted in contravention of Act 6 of 1995, s 17(1) – Applicants (owners of the land) entered into a deed of sale with the first and second respondents without having 'first offered such land for sale to the State' in contravention of s 17(1) of Act 6 of 1995 – The contracting parties having entered into the deed of settlement in contravention of the legislation the deed of sale is not enforceable and is void – Having so contravened that statutory provision the applicants (purchasers) sought an order directed to the first and second respondents (the sellers) to apply for the issue of a certificate of waiver from the Minister – Court found that the court was not competent to make such order – Consequently, court dismissed the application with costs.

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**ORDER**

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The application is dismissed with costs, and in respect of third respondent, such costs includes costs of one instructing counsel and one instructed counsel.

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**JUDGMENT**

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PARKER AJ:

[1] The matter revolves around agricultural land and the law's restriction on a foreigner's access to, and ownership of, agricultural land in Namibia. It is the product of the country's political past; a product of an intensive effort by the Government to address the need for land reform.

[2] The applicants seek the orders set out in para 1 (as amended), para 2.1, 2.2, 2.3 and 2.4 of the notice of motion. I should point out that the numbering of the paragraphs are, with respect, inelegant and confusing. Para 2.3 is a prayer for costs, and para 2.4 a prayer for 'Further and/or alternative relief'. Paragraphs 2.3 and 2.4, which are for ancillary relief, should, therefore, stand apart from the substantive relief sought in paras 2.1 and 2.2 of the notice of motion. But they have been lumped together in a confusing way.

[3] With due elimination of the inelegance and confused numbering of the paragraphs of the notice of motion as respects the relief sought by the applicants, what remains is the substantive relief sought in para 1 of the notice of motion (as amended). The grant of the other substantive relief sought in paras 2.1 and 2.2 is contingent upon the grant of the relief sought in para 1; and so, if para 1 (as amended) is rejected, para 2.1 and 2.2 cannot be successful: they too, must be rejected, as a matter of law and logic.

[4] Put simply, the 'purpose of this application is to compel the first and second respondents to sign all the necessary documentation so as to effect transfer of

Portion 10 of Farm Felsenquell No. 2, Registration Division B situate in the Grootfontein District ('the land') to the fourth respondent and also to seek an order directing the first and second respondents to submit an application of Certificate of Waiver to the third respondent in terms of the Agricultural (Commercial) Land Reform Act 6 of 1995.

[5] The first, second and third respondents have moved to reject the application. The fourth respondent has not so moved.

[6] The first and second applicants are the *intended* purchasers of the land; and I use the word 'intended' advisedly, as will become apparent in due course. The second applicant deposed to the founding affidavit in her capacity as executrix in the estate of the first applicant (her late husband). The first and second respondents are the *intended* sellers. Similarly, I use the word 'intended' for good reason here, too, as will also become apparent in due course. The third respondent is the Minister referred to in s 1 of Act 6 of 1995. Act 6 of 1995 was subsequently amended by the Agricultural (Commercial) Land Reform Amendment Act 13 of 2002 and it came into operation on 1 March 2003. The deed of sale relevant to this matter was entered into on 1 March 2004; and so, the deed of sale is subject to both Act 6 of 1995, as amended.

[7] On the facts, the determination of the instant application turns squarely on the interpretation and application of primarily s 17(1) of Act 6 of 1995. Section 17(1) provides:

'**17.** (1) Subject to subsection (3), the State shall have a preferent right to purchase agricultural land whenever any owner of such land intends to alienate such land.'

[8] I have therefore distilled from those authorities referred to me by counsel certain principles and approaches that are relevant on the points and issues under consideration in the instant matter. And I am grateful to Mr Naudé, counsel for the applicants, Mr Ntinda, counsel for the first and second respondents, and Mr

Maasdorp, counsel for the third respondent, for their industry and assistance in that regard.

[9] In the interpretation of s 17(1) of Act 1995 and other relevant provisions of that Act, as amended, I keep firmly in my mental spectacle what Professor G E Devenish in his work *Interpretation of Statutes* (1992) refers to as the holistic approach. And on that approach the learned Professor writes:

> 'Today in the United Kingdom and in Commonwealth countries there is a tendency by the courts to adopt a more holistic approach, namely, that there is only one rule or principle and therefore, according to Driedger, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'

[10] Keeping the aforementioned holistic approach in my mind's eye, I proceed to consider the scheme of Act 6 of 1995, as amended by Act 13 of 2002, the object of the legislation and the intention of the Legislature. The object of the legislation and the intention of the Legislature are captured succinctly by the Supreme Court, per Shivute CJ, in the following passage from *Schweiger v Muller* Case No. SA 3/2005 (Unreported) at para 20:

> 'It is evident … that the legislative purpose [of the LRA] is to provide for the acquisition of agricultural land by the state for the objective of land reform. Once such land has been acquired, the primary beneficiaries thereof are those Namibian citizens who do not own or have the use of any land or adequate agricultural land and foremost those Namibian citizens who have been disadvantaged by past discriminatory laws or practices. In a nutshell, therefore, the purpose of the Act is, amongst other things, to address the pressing issue of land reform, a perennial problem associated with this country's history. It is apparent from the relevant provisions of the Act that the purpose is also regulate to the acquisition of land by foreign nationals.'

[11] Shivute CJ's dictum is an interpretation and application of the long title of Act 6 of 1995 which reads:

'To provide for the acquisition of agricultural land by the State for the purposes of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices; to vest in the State a preferent right to purchase agricultural land for the purposes of the Act; to provide for the compulsory acquisition of certain agricultural land by the State for the purposes of the Act; to regulate the acquisition of agricultural land by foreign nationals; to establish a Lands Tribunal and determine its jurisdiction; and to provide for matters connected therewith.'

[12] Indeed, s 17(1), read intertectually and holistically with other related provisions of that Act, and Act 13 of 2002, provides the signposts that one must look at if one is minded to arrive at a correct interpretation and application of provisions of Act 6 of 1995, as amended, that are apropos to the determination of the present application. The first signpost is the forming of intention by an owner of agricultural land to sell such land. The second signpost is the owner actually giving the State the opportunity to exercise its preferrent right under s 17(1) by *'first'* offering such land for sale to the State' (in terms of s 17(4) of Act 6 of 1995) as required by s 2*(a)* of s 17 (as amended). (Italicized for emphasis) The third signpost is the State exercising such right (ie the right of first refusal) by either (a) the Minister (third respondent) issuing a certificate of waiver to the owner concerned or (b) the Permanent Secretary referring such offer to the Land Reform Advisory Commission in terms of s 17(5) of Act 6 of 1995 (as amended by s 9*(e)* of Act 13 of 2002).

[13] If one does not follow these three sign posts in that sequential order, one is bound to lose one's way in the thicket of the provisions of Act 6 of 1995, as amended by Act 13 of 2002. This is exactly the fate that has befallen the applicants, as I demonstrate.

[14] The applicants seek a Certificate of Waiver before having 'first offered such land for sale to the State' in direct contravention of s 17(1) of Act 6 of 1995. The applicants have disregarded the second signpost and have sought to go straight

from the first signpost to the third signpost. They were bound to get lost; as they have. Put simply; there is no legal basis in Act 6 of 1995 entitling the applicants to refuse to first offer the land for sale to the State, and then enter into a sale agreement to sell the land without having 'first offered such land for sale to the State' in terms of s 17(1)*(a)* of Act 6 of 1995; without having given the State the opportunity to exercise its preferrent right to purchase the land when the applicants 'intended to alienate the land' as contemplated in s 17(1) of Act 6 of 1995.

[15] In this regard, it is important to underline this. The term 'preferent right' and the clause 'intends to alienate such Land' in s 17(1) of Act 6 of 1995 are superlatively significant in the scheme of the legislation. The interpretation and application of s 17(1) of Act 6 of 1995 is extremely crucial as it lies at the heart of the scheme of the legislation and it is one provision that gives life and meaning to the object of the Act and the intention of the Legislature. It is the provision whose implementation leads to the practicalization of the object of the Act and the intention of the Legislature. Expunge or disregard s 17(1) of Act 6 of 1995, and you render the object of the Act otiose, and you thwart the intention of the Legislature, as the applicants have done. The Legislature could not have intended such adverse and outrageous consequences.

[16] In this regard, as I have said previously, the term 'preferrent right' and the clause 'intends to alienate such land' in s 17(1) of Act 6 of 1995 are extremely significant in the scheme of the legislation. They are at the pith and marrow of the object of the legislation and the intention of the Legislature. In the interpretation and application of s 17(1) of Act 6 of 1995, they mean (a) the State has first refusal to require every agricultural land that any owner tends to sell, that is every such land that becomes available on the market (*Du Toit v Dreyer* (I 1751/2007) [2013] NAHCMD (8 March 2013)); and so, (b) when the owner of such land forms the intention to sell such land he or she *must* first give first refusal to the State. (Italicized for emphasis)

[17] As a matter of law and common sense, such owner is not capable of giving such first refusal to the State, as Act 6 of 1995 commands in s 17(1) of the Act in peremptory terms where the owner has already directed his or her will of selling the land towards performing an act of selling the land to a purchaser other than the State by entering into an agreement to sell the land with such purchaser. If the court were to give judicial blessing to such an arrangement, the court would be rendering nugatory the clear and unambiguous provisions of s 17(1) of Act 6 of 1995.

[18] I, therefore, accept the contention by the third respondent that an owner who forms an intention to sell his or her agricultural land must first of all give first refusal to the State. It is only when the State has exercised its preferrent right and has issued a certificate of waiver that the owner can lawfully enter into a sale agreement with any other person (other than the State) with the intention of selling such land to such person. The width of the wording of s 17(1) of Act 6 of 1995 (as amended) compels this irrefragable conclusion. Indeed, the definition of 'waiver' for the purposes of Part III of the Act, entitled 'Preferrent Right of State to Purchase Agricultural Land', in s 16 of Act 6 of 1995 says it all: It is, therefore significant. It buttresses the conclusion I have reached. The section provides:

'**16.** For the purposes of this Part, 'certificate of waiver', in relation to any offer to sell agricultural land in terms of subsection (4) of section 17, means a statement in writing made by the Minister certifying that the State waives its preferent right conferred by subsection (1) of that section and does not intend to acquire the agricultural land in question at the time of the offer.'

[19] According to the scheme of s 17(1) of Act 6 of 1995, the Legislature has set out a procedure by which the State would exercise its preferential right after the owner of such land has first offered such land for sale to the State. And, as I have said previously, as a matter of law and logic, the State is not given the opportunity to exercise its preferential right in terms of s 17(1) if the owner has already offered for sale such land to a purchaser other than State and has already entered into a deed

of sale to cement the offer to sell to such that purchaser and such purchaser has accepted the offer.

[20] I have found that the applicants have contravened s 17(1) of Act 6 of 1995. Based on this fact, there is no legal basis upon which the court can order and direct the first and second respondents to submit an application for a Certificate of Waiver ex post facto the conclusion of the deed of sale in contravention of s 17(1) of Act 6 of 1995. The court is not competent to make such order. I should have said so if I had not looked at the various decided cases, eg *Sefatsa and Others v Attorney-General, Transvaal and Others* 1989 (1) SA 821, for instance, but when I do, I feel no doubt that that must be the result, that is, this court is not competent to grant the relief sought in para 1 of the notice of motion (as amended); and, *a fortiori*, it is a well-settled rule of our law that agreements entered into by contracting parties in contravention of the common law or legislation are not enforceable, and are void. (*Scheirhout v Minister of Justice* 1925 AD 417) In the instant case, the conclusion of the deed of sale is in contravention s 17(1) of Act 6 of 1995, as I have demonstrated previously, and so the deed of sale is void.

[21] One last point which I should underline is this. The fact that the third respondent had granted a certificate of waiver – which has now lapsed – after the deed of sale had already been entered into between the applicants and the first and second respondents in absolute contravention of s 17(1) of Act 6 of 1995 is of no moment. If the issue of that certificate was wrong in law, this court is not bound by it. The court is duty bound to ascertain in the instant proceeding whether the third respondent acted in compliance with Act 6 of 1995. (See *Swakopmund Airfield v Council of the Municipality* 2013 (1) NR 205 (SC), para 62.)

[22] Of the view I take of the case and the conclusion I have reached on the applicants' contravention of s 17(1) of Act 6 of 1995, I hold that *Charles Peter Locke v P J van der Merwe and Others*, Case No. SA 72/2012, referred to me by Mr Naudé, is of no assistance on the point under consideration.

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[23] Based on these reasons, the relief sought in para 1 of the notice of motion (as amended) is rejected. Having rejected the relief in para 1, as I intimated earlier, it follows, as a matter of law and logic, that the relief sought in paras 2.1 and 2.2 must also be rejected. And it serves no purpose to consider any issue about a 'nominee' provided for in the deed of sale and about which both counsel argued vigorously. It is labour lost, with respect.

[24] As respects the counter-application of the first and second respondents; having pored over the papers and having taken into account submissions by counsel, I conclude that the court is not competent to consider the counter-application in the instant proceedings. Any remedy the first and second respondents may have against the applicants does not lie in the instant proceedings. For one reason; I can see on the papers that there are likely to be genuine and substantial dispute of facts in any proceedings contemplated in the counter-application; for instance, there is the dispute as to how much of the purchase price the respondents would have to return to the applicants upon return of possession of the land to the first and second respondents, rendering any motion proceedings inappropriate. See *Mineworkers Union of Namibia v Rossing Uranium Limited* 1991 NR 299.

[25] I have not determined the merits of the counter-application; and so, I think I should not grant costs in respect of the counter-application. I shall only strike it out from these proceedings without more.

[26] In the result, the application is dismissed with costs, and in respect of third respondent, such costs includes costs of one instructing counsel and one instructed counsel.

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C Parker

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Acting Judge

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APPEARANCES

APPLICANT: A A J Naudé
Of Dr Weder, Kauta & Hoveka Inc., Windhoek

FIRST AND SECOND
RESPONDENTS: M Ntinda
Of Sisa Namandje & Co. Inc., Windhoek

THIRD
RESPONDENT: R Maasdorp
Instructed by Government Attorney, Windhoek