

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case no: HC-MD-CIV-ACT-CON-2017/04679

In the matter between:

WATANI FARMING CC

PLAINTIFF

and

USAKOS TOWN COUNCIL

DEFENDANT

Neutral citation: *Watani Farming CC v Usakos Town Council* (HC-MD-CIV-ACT-CON -2017/04679) [2020] NAHCMD 83 (9 March 2020)

Coram: OOSTHUIZEN, J

Heard: 4-6 June 2019, 30 October 2019, 2 December 2019

Delivered: 9 March 2020

Flynote: Interpretation of a Deed of Sale concerning immovable property. Specific performance.

Summary: Deed of Sale provide for a purchase price and how and when it should be paid. Neither plaintiff nor defendant understood the import and meaning of the clear provisions of Clause 2.1(a) of the Deed of Sale although it is unambiguous.

Held, The Deed of Sale is still valid and operative.

ORDER

Having heard **Mr Murorua**, counsel for the plaintiff and **Mr Boesak**, counsel for the defendant and having read the documents filed of record -

IT IS ORDERED THAT:

[1] Plaintiff's claim for specific performance of the Deed of Sale succeed.

[2] Plaintiff shall pay the purchase price of N\$1,5 million to defendant with interest at the rate of 18% per annum as from 11 April 2013 within six (6) months from 9 March 2020.

[3] In the event of plaintiff failing to pay the purchase price and interest as ordered, defendant shall apply the provisions of Clause 12 of the Deed of Sale.

JUDGMENT

OOSTHUIZEN J:

The Parties, Pleadings and the Deed of Sale

[1] The plaintiff in this matter is Watani Farming CC, a close corporation registered in accordance with the Close Corporation's Act, Act 26 of 1988.

[2] The defendant is Usakos Town Council, a local authority and juristic person, constituted and established as such under the applicable provisions of the Local Authorities Act, 23 of 1992.

[3] On 11 April 2013 at Usakos, the parties entered into a written Agreement in terms of which the plaintiff purchased from the Defendant an immovable property namely Portion "23" (a portion of portion A") of Farm Usakos Nord No.: 40 for a purchase price of N\$ 1 500 000 (One million five hundred thousand Namibian Dollars) payable within 6 (six) months from date of sale. A copy of the Agreement is attached to the particulars of claim as Annexure "POC 1".

[4] The plaintiff instituted action against the defendant claiming:

'a) An order that the Defendant take all necessary steps to pass transfer of the property to the plaintiff.

b) An order, that should the defendant fail within 30 days of the Court's order to take the necessary steps to effect conveyance of the property, that that Deputy Sheriff be directed to perform all acts necessary on behalf of the Defendant to effect conveyance of the property.

c) Alternatively, cancellation and damages in the amount of N\$ 1 500 000 (One million five hundred thousand Namibian dollars).

d) Interest thereon at the rate of 20% per annum from the date of judgment to the date of final payment.

- e) Cost of suit.

- f) Further and or alternative relief.'

[5] Plaintiff avers that it duly complied with all its obligations under the agreement, in particular that it tendered to the defendant a guarantee for the payment of the purchase price as required by clause 2 of the Deed of Sale.

[6] Plaintiff further avers that it demanded conveyance of the property but the defendant despite demand, refused and or failed to accept the tender and refused to appoint conveyancers to complete the sale and or to make the conveyance to the plaintiff as required by clause 15.2 of the Deed of Sale.

[7] Plaintiff avers that the defendant breached the contract between the parties by failing to complete the sale and to effect conveyance of the property to the plaintiff, that the defendant's failure to effect conveyance constitutes repudiation of the Agreement between the parties.

[8] Plaintiff furthermore avers that the defendant's failure and refusal to perform its obligations under the contract constitutes a breach of Contract and has caused the plaintiff to suffer damages and thus entitling the plaintiff to claim damages in the form of: literal performance of the contract and monetary value of performance being the replacement value of lost or forgone property.

[9] The defendant pleaded that the agreement was concluded on 11 April 2013. It further avers that the plaintiff tendered a guarantee for payment of the purchase price after the period within which it was supposed to tender the guarantee, had lapsed.

[10] Defendant further pleaded that the plaintiff breached the contract by not complying with Clause 2 of the contract and thus the contract concluded between the parties is null and void. Defendant pleaded that the parties entered into a contract of sale which was subject to a suspensive condition. Plaintiff failed to comply with the suspensive condition and as a result the contract is null and void.

[11] The relevant parts of the Deed of Sale are:

'2.1 The purchase price of the property is the sum of N\$1 500 000.00 (One Million Five Hundred Thousand Namibian Dollars) and is payable as follows: -

(a) The total purchase price in cash or per bank certified cheque within Six (6) months from date of sale, provided that should payment be late, interest at the rate of 18% per annum is payable..

SUSPENSIVE CONDITIONS:

2.2 It is suspensive a condition of this contract that if the payments as set out below are not made timeously this contract will be null and void and notwithstanding the provision of Clause 7 (date of sale and occupation, occupation shall not be given prior to the fulfilment of these conditions).

Payments:

Method A: The total purchase price in cash or per bank certified cheque within 24 hours from date of sale.

.....

Method C: Provide a Bank or Building society guarantee to seller payable against registration of transfer within 48 (forty eight) hours.

2.3 It shall also be suspensive condition of this contract that if a bank guarantee as provided for in Method C is not provided within 48 hours after it was requested, this contract shall be null and void and notwithstanding the provision of Clause 7 (date of sale and occupation), occupation shall not be given prior to the fulfilment of this condition.

Clause 3

Should Clause 2.1 of this agreement not be properly completed or should one of the alternative methods of payment which is not applicable not be properly struck out and initialled, then in such event the method of payment contained in Clause 2 (A) shall be applicable and the seller shall be entitled to claim immediate payment of the unpaid portion of the purchase price plus interest at the rate of (16%) sixteen percent per annum thereon calculated from date of sale to date of payment.'

[12] Clause 7.1 of the Deed of Sale provides that subject to clause 2.3, the date of sale shall be the date of signing of the Deed of Sale by or on behalf of the Seller (defendant).

[13] Clause 15 of the Deed of Sale provides for transfer and reads:

'15.1 Transfer of the ERF shall be given to the PURCHASER as soon as possible after payments of the full purchase price plus interest, if payment of interest is applicable or provision of an acceptable Financial Institution guarantee in respect of any unpaid amounts under clause 2.4.

15.2 Such transfer shall be effected by the PURCHASER, after instructions to the SELLER's attorneys, without undue delay after full payment of the purchase price (and interest if applicable) and within a reasonable period after the PURCHASER obtained and submitted a clearance certificate to the SELLER's attorney and the PURCHASER had complied with all conditions of this agreement to effect such transfer.

15.3 The PURCHASER shall pay the necessary costs referred to in clause 16 on demand and sign the necessary documents within thirty (30) days after requested to do so by the

SELLER or its agent. Without limiting the rights of the SELLER in respect of other provisions hereof, the seller may apply clause 12 of this Agreement should the PURCHASER fail to comply with such request or demand or fail to take transfer within a reasonable period or fail to obtain a clearance certificate.'

Evidence

[14] In support of its claim, Mr Augustinus Katiti testified that he is an adult male and sole member of the plaintiff, which carries on business at No: 10 Olga Street, Klein Windhoek, Republic of Namibia. He confirms that the main claim is for delivery of the immovable property which arose from a Deed of Sale concluded between himself (acting on behalf the plaintiff) and with the defendant. He confirms that the plaintiff bought immovable property namely Portion "23" (a portion of Portion "A") of Farm Usakos Nord No: 40 for a purchase price of N\$ 1 500 000. 00 payable against registration of transfer.

[15] Mr Katiti further testified that the plaintiff complied with all its obligations in terms of the contract and that the plaintiff provided a loan pre-approval letter or Bank guarantee for the payment of the purchase price to Usakos Town Council as required by clause 2 of the Deed of Sale. He further testified that the plaintiff has demanded transfer of the property in dispute from the defendant but to no avail.

[16] Mr Katiti further testified that the defendant only acquired a certificate of Registered Title in respect of Portion "23" of the Farm Usakos Nord No: 40 on 30 October 2015 and that the defendant was therefore not in a position to pass conveyance in respect of a subdivided unit at any time prior to this date.

[17] It is the position of the plaintiff that after the conclusion of the Deed of Sale on 11 April 2013 no deed of transfer has been prepared for the transfer and registration of property into the name of plaintiff and consequently it was never requested by the transfer attorneys to supply a bank guarantee for the purchase price and therefor the suspensive conditions in terms of clause 2.2 were never triggered.

Pre-trial report and order

[18] The parties concluded a pre-trial agreement on 7 March 2019.

[19] The Managing Judge, Ueitele J, made it a Pre-Trial Order on 26 March 2019.

[20] The issues of fact to be resolved during the trial were set out to be:

[20.1] Whether the suspensive conditions in terms of clause 2.2 were triggered in particular whether the payments were or weren't made timeously to render the contract null and void.

[20.2] Whether in terms of payment method C, the plaintiff had provided a Bank guarantee to the defendant against registration of transfer.

[20.3] Whether in terms of clause 2.3 the Bank guarantee as provided for in payment method C was requested by the defendant and the plaintiff failed to provide same within 48 hours of it being requested.

[20.4] Whether the stage of registration of transfer was reached as required in payment method C.

[20.5] When a conveyancer was appointed to prepare deeds and documents.

[20.6] When the sub-division of land into various units was effected for purpose of sale and production of Certificate of Registered Title by the Transferee.

[20.7] Objective value of defendant's performance i.e to transfer land.

[21] The parties agreed and the court ordered that the trial must resolve as a matter of law whether the suspensive conditions was triggered and what the damages would be for breach of contract.

[22] It was agreed and ordered that:

[22.1] The contract of sale was concluded on 11 April 2013 and the property was not transferred to date by the defendant to the plaintiff.

[22.2] No deed of transfer has been prepared to date and the plaintiff has not paid the purchase price to date.

[22.3] Certificate of Registered Title (Title Deed) in respect of the property was only issued on 30 October 2015 to the defendant.

Common cause facts

[23] The Deed of Sale attached to the particulars of claim as "POC1" is the exclusive memorial of the agreement reached between the parties.

[24] None of the parties have claimed for the rectification of the Deed of Sale.

[25] The Deed of Sale includes a non-variation clause (which is embodied in clause 23 of the agreement) and no consensual variation or addition, reduced to writing and signed by both parties, were agreed upon. The clause also contains a prohibition to rely on any terms or conditions not expressly contained in the Deed of Sale.

[26] Plaintiff did not pay any amount of money on the agreed purchase price despite requests for payment by the defendant during July 2013, August 2013 and November 2014 (Exhibits 10 to 12), neither did plaintiff supply any bank guarantee for payment during all that time and/or subsequent to 30 October 2015 to date of trial (and beyond). Plaintiff only tenders payment upon registration and transfer of the property in its name.

[27] Plaintiff still tenders performance.

[28] Defendant declined to put any evidence before the Court.

[29] The Deed of Sale was never amended, no variation thereof took place and it was never cancelled by the defendant.

Applicable law

[30] In *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 SC paragraphs [18], [19], [23] and [24], on pages 739 to 741, the Namibian Supreme Court decided how interpretation shall be conducted in this Jurisdiction:

“[18] South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality*, Wallis JA usefully summarised the approach to interpretation as follows:

‘Interpretation is the process of attributing meaning to the 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. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.’

[19] For the purposes of this judgment, it is not necessary to explore fully the similarities and differences that characterise the approaches adopted in the United Kingdom and South Africa. What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.

[23] Again this approach seems to comport with our understanding of the construction of meaning, that context is an important determinant of meaning. It also makes plain that interpretation is ‘essentially one unitary exercise in which both text and context, and in the case of the construction of contracts, at least, the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing the contract. This unitary approach to interpretation should be followed in Namibia. A word of caution should be noted. In accepting that the distinction between ‘background circumstances’ and ‘surrounding circumstances’ should be abandoned, courts should remember that the construction of a contract remains, as Harms JA emphasised in the *KPMG* case, ‘a matter of law, and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses’.

[24] The approach adopted here requires a court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate textual context, as well as against the broader purpose and character of the document itself. Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears ambiguous. Consideration of the background and context will be an important part of all contractual interpretation.”¹

Findings

[31] The Deed of Sale between the parties is still operative and valid.

[32] Clause 2.1 (a) is the only clause dealing with the purchase price of N\$1,5 million and how and when it should be paid.

[33] None of the suspensive conditions were triggered and none of the payment methods contained in Clause 2.2 have application and Clause 2.3 similarly have no application.

[34] Clause 3 provides useful guidance in the interpretation of the Deed of Sale. Clause 2.1 was indeed properly completed and the parties have in any event not

¹ Footnotes were removed from the quoted paragraphs but the reader is referred to the authorities quoted in the original Total (op cit) Judgement.

made an election in terms of the payment methods available under Clause 2.2, because Clause 2.1(a) is clear and unambiguous.

[35] Clause 15 very clearly in the context demand for payment before transfer is to take place.

[36] Both parties are still bound to their Deed of Sale dated 11 April 2013 ("POC1" to the particulars of claim).

[37] Both parties' legal representatives were given ample time and opportunity to address the court on the consequences and interpretation of the Deed of Sale.

[38] Plaintiff and Defendant were wrong in their subversive interpretation of the clear provisions of the Deed of Sale.

[39] Plaintiff and its witness were the primary cause of the litigation and the delay in finalizing the sale due to the erroneous stance they took throughout.

[40] Defendant itself is not to be absolved from its erroneous stance that the Deed of Sale became null and void.

[41] No cost order will be made and each party shall bear its own costs in view of the above and fitting to the orders made hereunder.

[42] In the premises the following orders are made:

[42.1] Plaintiff's claim for specific performance of the Deed of Sale succeed.

[42.2] Plaintiff shall pay the purchase price of N\$1,5 million to defendant with interest at the rate of 18% per annum as from 11 April 2013 within six (6) months from 9 March 2020.

[42.3] In the event of plaintiff failing to pay the purchase price and interest as ordered, defendant shall apply the provisions of Clause 12 of the Deed of Sale.

H Oosthuizen
Judge

APPEARANCES

PLAINTIFF : Mr Murorua
 Murorua Kurtz Kasper Incorporated

DEFENDANT: Mr Boesak
 Instructed by Conradie & Damaseb Legal Practitioners