REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2020/00050

In the matter between:

DESMOND HENRY HOWARD **APPLICANT**

and

WIL-MERIE HOWARD **RESPONDENT**

Neutral Citation: *Howard v Howard* (HC-MD-CIV-MOT-GEN-2020/00050 [2020] NAHCMD 366 (10 August 2021)

CORAM: MASUKU J
Heard: **3 February 2021**
Delivered: **10 August 2021**

Flynote: Settlement agreement dispute – disputes of fact – the proper approach thereto – the role of the overriding objectives of judicial case management in the exercise of the court's discretion in terms of rule 67 – interpretation of documents – approach thereto.

Summary: The parties in the matter were married to each other. They entered settlement terms and obtained a divorce. What brought the matter before court for determination is a term in the settlement agreement, namely, whether payment of money and transfer immovable to the respondent was in conformity with the term of the settlement agreement. The respondent also contended that there were material

factual disputes of fact, which rendered the matter unsuitable for resolution on motion.

Held: that a mere denial does not presuppose the existence of a dispute of fact. Where a dispute of fact is alleged to be foreseeable, it should arise before and or during correspondence between the parties before the proceedings are launched.

Held that: there are no admissible factual grounds placed before court to challenge the valuations placed before court apart from the say so of the respondent.

Held further that: in terms of the judgment of *Konrad v Nepanda* 2019 (2) NR 301 (SC), the court should be very slow to dismiss applications in which a dispute of fact has arisen. It should consider referring the matter to oral evidence, or trial, in order to give effect to the overriding principles of judicial case management.

Held: that when one considers the clause of the agreement its intention was to enrich the respondents' estate with the stated amount, this was carried out by the applicant in transferring immovable property in part and paying cash.

Held further that: in determining what the performance ought to have been the court needed to take into consideration the intention of the clause, and whether the dual performance by the applicant would take away from this intention.

Held: that the courts, in interpreting documents, including contracts, it should adopt a sensible meaning as opposed to one that leads to insensible or unbusinesslike results thereby, undermining the purpose of the agreement.

Held that: The word property may include singular and plural, and interpreting the clause restricting it to the singular is not correct in the circumstances.

The court found that the intention of the agreement had been met by the applicant and that the hybrid performance served to enhance the estate of the respondent in the amount agreed to.

ORDER

1. The Applicant is ordered to transfer the following properties into the name of the Respondent in accordance with Clause 3.3. of the settlement agreement signed by the parties, namely:
   1.1 Erf No.3259, Otjomuise (Extension No.8), Windhoek, held by Transfer Deed No. T 0077/2018.
   1.2 Section No.118 as shown and more fully described on Sectional Plan No. SS 105/2016 in the development scheme known as 77 On Independence, held by Deed of Transfer No. ST 2547/2016, (hereinafter referred to as 'the properties').

2. That the Respondent is ordered to sign all documents and to do all things necessary to so effect transfer of the properties into her name within thirty (30) days from the date of this order, failing which the Deputy Sheriff for the District of Windhoek is hereby authorised to sign such documents and do such things on the Respondent's behalf to effect transfer of the properties into the name of the Respondent.

3. The Applicant is ordered, as undertaken, to pay the transfer duties in respect of the transfer of the properties into the name of the Respondent, in accordance with the provisions of Section 3(1) of the Transfer Duties Act, No. 14 of 1993.

4. That the joint value of the properties be determined as N$2,700 000.00 as set out in annexure 'DH5' and 'DH6', alternatively, that the joint value of the properties be determined as the aggregate between the valuation of N$2,700 000.00 and the joint market value of a further sworn valuation from an accredited and independent valuator obtained by the respondent (at her own cost) in respect of the value of the properties.

5. In the event of the joint value of the properties to be determined in accordance with paragraph 4 above, being less than N$2,900 000.00, the applicant is to pay to Respondent the difference between N$2,900 000.00 and the determined joint value of the properties.

6. The Applicant shall be entitled to deduct from the amount paid, if any, as set out in paragraph 5 above, such amounts reasonably expended by the Applicant in respect of Municipal rates and taxes, maintenance and security of the properties as from 31 December 2019 until the transfer of the properties to the Respondent.

7. The Respondent is ordered to pay costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner.

8. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] It is a fact of life that relationships have their ebbs and flows. In some cases, it gets worse and they end up being terminated altogether. In the instant case, the parties, namely the applicant and the respondent, were joined together in matrimony but the marriage relationship ended up being moribund, when a decree of divorce was issued by this court.

[2] The parties, being civil in their conduct of the divorce proceedings, entered into a settlement agreement regarding the proprietary consequences of the marriage. A dispute has since arisen regarding one of the terms of the settlement agreement

and it relates to property or money, that the applicant undertook to transfer to the respondent pursuant to the decree of divorce.

[3] The main bone of contention, it would seem, is whether the applicant could, at his election transfer immovable property and/or money to the amount agreed *inter partes*. Another contentious issue relates to the meaning of 'immovable property' as employed in the settlement agreement. Does it mean one immovable property or it is a generic term that may refer to more than one immovable property.

The parties

[4] The applicant is Mr. Desmond Henry Howard, a male Namibian adult. He is an architect by profession and resides in Walvis Bay. The respondent, on the other hand, is Ms. Wil-Merie Howard, a female adult who resides in Swakopmund, within this court's jurisdictional sphere.

Background

[5] As foreshadowed in the opening paragraphs of this judgment, the parties, before their divorce was granted, entered into a settlement agreement in Windhoek and this was on 9 November 2017. A final decree of divorce was subsequently issued by this court on 22 February 2018. In terms of the final decree of divorce, the settlement agreement signed by the parties, was to be made an order of court.

[6] It is important to mention that in the divorce proceedings, the applicant was the plaintiff and the respondent was the defendant. The contentious clause in the agreement, and which is the main basis of the dispute is clause 3.3, which reads as follows:

'The plaintiff shall pay an amount of N$2,900 000.00 to the Defendant on or before 31 December 2019, alternatively transfer immovable property into the Defendant's name in such value on or before such date.'

[7] The applicant, in line with the agreement in question, transferred to the respondent two properties, namely Erf No. 3259, Otjomuise (Extension No.8, held by Deed of Transfer No. T0077/2018. This property was valued at N$1,285 000.00. He also transferred section No. 118 as shown and more fully described on Sectional Plan No. SS 105/2016 in the development scheme known as 77 On Independence, held by Deed of Transfer No. ST 2547/2016. The latter property was valued at N$1,415 000.00.

[8] Realising that the joint value of the properties do not meet the amount of N$2,900 000.00 recorded in the agreement, the applicant offered to make up for the difference by paying an amount of N$200 000 to the respondent. Relevant documents were prepared by the applicant's legal practitioners to enable him to comply with his obligations in terms of the agreement. It is his case that the respondent flatly refused to sign the relevant documents.

[9] It would appear that the respondent contends that she prefers that the applicant should pay the amount of N$2,900 000.00 to her in cash, rather than to transfer the properties mentioned above. Furthermore, the respondent took issue with the valuations of the property, in essence contending that the valuation attached was not done by someone who is independent. Furthermore, she refused to contribute to the transfer duty of the properties in question.

[10] In her answering affidavit, the respondent moved the court to dismiss the application for the reason that there are disputes of fact, which cannot be resolved on the papers. These allegedly existed even before the application was launched and they relate to the value of the property, who should pay for the evaluation, who should elect the valuer, the number of properties to be transferred to her in terms of the agreement. On this ground alone, the application, contends the respondent, should be dismissed with costs.

[11] The respondent accused the applicant of having prepared a 'wish list', called the notice of motion and moved the court not to grant an order in respect of the same. It is the respondent's case that the court should not grant the relief sought in the 'wish list'. It was alleged that the notice of motion is not a reflection of the court

order issued and in terms of which the agreement was made an order of court. The applicant is accused of moving the court impermissibly, to execute terms not included in the settlement agreement.

Determination

[12] It is necessary, first of all, to deal with the contention that the case is afflicted by material disputes of fact, which render it inappropriate to decide it on motion. The disputes alleged by the respondent have been mentioned in paragraph 10 above. The applicant contends that these are not genuine disputes of fact and those that can properly regarded as foreseeable before the launching of the application.

[13] I am of the considered view that the applicant is eminently correct in submitting as he does, that there are no genuine or *bona fide* disputes of fact in this matter. The respondent, in her papers, merely denied the facts alleged by the applicant and that does not, without more, amount to a genuine dispute of fact.[1]

[14] For an applicant to be punished, so to speak, by having the application dismissed because there is a dispute of fact, it must be such that the dispute was foreseeable in the sense that in the exchange of correspondence or other contact between the parties, the respondent's position is made known and when properly characterised, it amounts to a dispute of fact. In that case, an applicant may be accused of being reckless in not paying heed to the looming dispute, which is obvious.

[15] In the instant case, what does appear is that the applicant tried to communicate his intentions regarding the compliance with the settlement agreement by making his intentions known. The respondent does not appear, for the most part, to have taken any position before this application was launched that would be regarded as notice of a genuine dispute of fact.

[16] The issue about the valuation of the property does not, in my considered view, amount to a genuine dispute of fact. There are no admissible factual grounds placed

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634C-I.

before court that would be regarded as meet to effectively challenge the valuations placed before court by an expert employed by the applicant.

[17] It must be mentioned in this regard, that in arguing that there is a dispute of fact, the respondent attached a valuation by Mr. Dudley Hite, which attaches value of the property on 77 Independence Avenue different from that by the applicant's expert. It must be readily mentioned that the valuation relied upon by the respondent is not the valuation of the property the applicant intends to transfer to the respondent. It is the valuation of another property altogether, although it alleged to be similar to that intended to be transferred.

[18] There is no plausible reason proffered as to why the exact property was not evaluated on behalf of the respondent. The applicant points out that he was not approached for access and that he been, he would have facilitated access for the respondent's expert to do a valuation of the very property now forming the subject of the alleged dispute. I will accordingly not lend credence to the valuation filed on the respondent's behalf for the reason stated above.

[19] Likewise, the issue about the appointment of the valuer and the number of properties that would be transferred to the respondent by the applicant cannot be regarded as issues raising genuine disputes of fact. If anything, these are fictitious and seem geared to prevent the matter from proceeding.

[20] It must be mentioned that even if the respondent was correct in stating as she does that there are genuine disputes of fact afflicting the matter, it is in the rare cases that the court would be minded to dismiss the application. In this regard, sight must not be lost of the fact that rule 67(1), which governs these matters, prescribes that where a matter is found to be unsuitable to be decided on affidavit, the court 'may dismiss the application or make any order that the court considers suitable or proper with the view to ensuring a just and expeditious decision . . .' (Emphasis added).

[21] In this regard, it must be mentioned that what must guide the court's exercise of its discretion in dealing with the application, must be ensuring a just and expeditious decision on the matter. A dismissal of the application in order for the

dispute to be lodged as an action does not normally ensure a just and expeditious determination of the matter. To the contrary, it requires a lot of time and a running up of costs.

[22] It is perhaps opportune that reference is made to the judgment of the Supreme Court in *Konrad v Nepanda*[2] where the Supreme Court pertinently dealt with the question of the proper approach to rule 67. The court remarked in the following manner:

> ''[14] While it is within the discretion of the Court *a quo* to have dismissed the application since it could not be decided on affidavit, it should not follow that the application will always be dismissed with costs in such a case. There may be circumstances that will persuade a Court not to dismiss the application, but to order the parties to trial together with a suitable order as to costs. Also, in a proper case and where the dispute between the parties can be determined speedily, it might even be proper to invoke the provisions of the rules of court as to the hearing of oral evidence.
>
> [15] . . .
>
> [16] The exercise of the Court's discretion in Rule 67 should be read with the overriding objectives of the rules of Court to facilitate the resolution of disputes justly, efficiently and cost effectively as far as practicable. By dismissing the case the Court *a quo* left the issue as to the putative marriage and proprietary consequences of the parties unresolved despite the disputes being alive in Court. In this instance, the Court *a quo* failed to resolve the dispute justly, efficiently and cost effectively.'

[23] It is accordingly clear that the Supreme Court has infused the overriding objectives in the exercise of the court's discretion imbued by rule 67. In any event, it does appear to me that the portion of the rule underlined in paragraph 18 above, resonate with the provisions of rule 1(3) in any event. This being the case, even if I had agreed and was of the view that genuine disputes of fact arise in this matter and which cannot be resolved on affidavit, I would in all probability, have been disinclined to dismiss the application. It is not in the interest of either of the parties, who were

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[2] *Konrad v Nepanda* 2019 (2) NR 301 (SC) para 14-16.

divorced some years ago that the issues about their marriage should be allowed to fester and be prolonged unduly.

[24] I am of the considered view that in the instant case, there are no genuine disputes of fact that arise. If they did arise, which is not the case, I would have been inclined to exercise the court's discretion against dismissing the application in reverence to the overriding objectives of judicial case management as articulated in *Konrad* above.

Clause 3.3

[25] Clause 3.3 has been quoted in full above and there is no need to repeat its contents. In construing this clause and the agreement generally speaking, the court is alive to the injunctions spelt out by the Supreme Court in *Total Namibia (Pty) Ltd V OBM Engineering and Petroleum Distributors*[3] the Supreme Court stated that:

> ' [17] interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they are at the time of the contract. The background was famously referred to by Lord Wilberforce as the matrix of fact but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes anything which would have affected the way in which the language in the document would have been understood by a reasonable man.'

[26] The respondent argues that the clause 3.3, properly understood, afforded the applicant two different and distinct options. First, he could have transferred the amount of N$2,900 000.00 to the respondent at the time stipulated. The second option, was for him to transfer immovable property to the respondent, which stands at the value of N$2,900 000.00.

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[3] *Total Namibia (Pty) Ltd V OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) paras 17-24.

[27] It is the respondent's case that it was accordingly not open to the applicant to resort to a hybrid performance, so to speak, by transferring two properties and cash to the respondent. The argument went further to the point where it was argued on the respondent's behalf that the applicant, if he chose not to comply with the first option, he had to transfer one immovable property to the respondent of the value that is stated in the agreement.

[28] It was argued on the applicant's behalf that the interpretation contended for by the respondent is incorrect and mechanical. It is the applicant's contention in this regard that properly viewed, the clause in question had one intention, namely, to enrich the respondent's estate by an amount of N$2,900 000.00. In this regard, it was up to the applicant to either pay the amount only, or to transfer immovable property and also pay cash for the difference – as long as the respondent's estate is enriched in the stated amount.

[29] The question for determination is whether the respondent is correct in her interpretation, namely, that the applicant can choose either to pay her money or in the alternative, transfer property to the stated value and that there is no hybrid performance, consisting partly of cash and property?

[30] In dealing with this question, I am of the considered view that it is necessary to call in aid the wisdom imparted by O'Regan AJA in the *Total Namibia* case. She reasoned as follows in the course of her judgment:

'[18] whatever the nature of the document, consideration must be given to the language used in the light of the ordinary 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 weighed 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.'

[31] I am of the considered view that when one considers the clause in question, its intention was to enrich the respondent's estate by adding value thereto in the stated

amount of N$2,900 000.00. This was to be done by paying cash or transferring immovable property to her. She cries foul that the applicant can only perform in terms of one of the two alternatives but not a mixture of both.

[32] It appears that the applicant intends to transfer property to the respondent. He states that he does not have property that meets the amount in question to the cent, neither does he have the money required in cash. It is for that reason that he offered a sizable portion of the value by which the estate is to be enriched, by transferring immovable property, whose value falls short by N$200 000.00 which he has offered to pay in cash and the respondent refuses acceptance, stating that her preference is for the first alternative in the agreement, with no property being transferred to her.

[33] I must state that from my reading of the clause, the respondent has no right to claim a preference. It is the applicant who can choose how the respondent's estate is enriched, either by transfer of cash or immovable property. In this regard the respondent raised objections about the property in Otjomuise, which in my view, do not stand up to scrutiny as the property is registered in the applicant's name and has no encumbrances attaching to it that would affect her ownership of the property.

[34] When it comes to the hybrid performance, the view that I take is that it is important first and foremost, to consider the intention of the clause. It is, as stated earlier, to enrich the respondent's estate in the amount stated. Does it matter whether it is enriched by cash or immovable property? I do not think so. That is the election, it would seem, given to the applicant in terms of the agreement.

[35] The next question to ask is whether the hybrid performance would in any manner, shape or form, serve to diminish the value of the enrichment of the estate in real terms? It would appear that the respondent does not say that it would do so. Her only anchor is the wording employed in the agreement. She does not say that her estate would be diminished by a dual performance.

[36] It is in cases like these, where the approach in *Total Namibia* becomes relevant. The court stated that in construing the document in question, the court must

adopt a ‘sensible meaning’ as opposed to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

[37] I am of the considered view, as mentioned above, that the purpose of the clause was to enrich the respondent’s estate by the value stated. It would be sensible, in the circumstances, where as the applicant states, he does not have the cash ready for payment to the respondent and also does not have property standing to the exact value required, to make up for the shortfall in cash.

[38] At the end of the day, the intention of the clause is met, namely, the enrichment of the respondent’s estate. I do not think that the hybrid performance in any way diminishes or affects the value that is to be added to the respondent’s estate. Her preference for cash is one thing but the reality of the document is the applicant’s election. He has stated his position and inability to fully meet the demands of either alternative.

[39] In the premises, I come to the view that it would have been within the contemplation of the parties that a situation may arise in which, if the applicant, as he chose to do, opted to transfer immovable property, its value may not have been equivalent to the amount to the last cent. It is highly unlikely that the applicant would have been able to transfer property valued at the exact amount of N$2,900.000.00

[40] It may have been more or less and in which case, and to ensure that the respondent’s estate is enriched to the amount stated in the agreement, the applicant could resort to the other mode to make up for the shortfall. This does not prejudice the value of the respondent’s enrichment in accordance with the clause in question.

[41] A lot of song and dance made during argument, regarding the meaning of ‘property’ and as to whether it is singular or plural. This came about as it was argued on the respondent’s behalf that if the applicant chose to transfer property, it was to be one property, meeting the value to cent. I do not agree.

[42] The word property may include the singular or the multiple. I do not think that it would make sense to interpret the clause as referring to one single property. If

anything, the performance by the applicant leaves the respondent as the owner of immovable properties. The applicant's actions must be commended for demonstrating his commitment to enriching the respondent as agreed to by the parties in the settlement and as subsequently ordered by the court. In any event, there is nothing in the wording that tends to suggest that the use of the word 'property' meant the singular and excluded the plural.

[43] It became clear, during argument, that the applicant, wisely, conceded on the issue of the transfer costs. He no longer persisted in the respondent having to pay the transfer costs related to the property. The respondent's opposition in this regard, was understandable. The impact of the respondent having to bear the transfer costs would result in her estate being diminished, contrary to the intention expressed in clause 3.3.

Conclusion

[44] I am of the considered view, having regard to what is stated above, that the applicant has made a case for the relief sought. I consequently do not share the view expressed by the respondent that the applicant came to court, probably carrying a basket, together with a 'wish list'. The relief sought by the applicant is competent in the circumstances of this case.

Costs

[45] The ordinary rule is that costs follow the event. There are no facts or circumstances placed before me that would suggest a plausible reason for departing from the beaten track. Costs will accordingly follow the event.

Order

[46] Having regard to what has been stated above, the following order commends itself as being appropriate to issue in this case, namely:

1. The Applicant is ordered to transfer the following properties into the name of the Respondent in accordance with Clause 3.3. of the settlement agreement signed by the parties, namely:
   1.1 Erf No.3259, Otjomuise (Extension No.8), Windhoek, held by Transfer Deed No. T 0077/2018.
   1.2 Section No.118 as shown and more fully described on Sectional Plan No. SS 105/2016 in the development scheme known as 77 On Independence, held by Deed of Transfer No. ST 2547/2016, (hereinafter referred to as 'the properties').

2. That the Respondent is ordered to sign all documents and to do all things necessary to so effect transfer of the properties into her name within thirty (30) days from the date of this order, failing which the Deputy Sheriff for the District of Windhoek is hereby authorised to sign such documents and do such things on the Respondent's behalf to effect transfer of the properties into the name of the Respondent.

3. The Applicant is ordered, as undertaken, to pay the transfer duties in respect of the transfer of the properties into the name of the Respondent, in accordance with the provisions of Section 3(1) of the Transfer Duties Act, No. 14 of 1993.

4. That the joint value of the properties be determined as N$2,700 000.00 as set out in annexure 'DH5' and 'DH6', alternatively, that the joint value of the properties be determined as the aggregate between the valuation of N$2,700 000.00 and the joint market value of a further sworn valuation from an accredited and independent valuator obtained by the respondent (at her own cost) in respect of the value of the properties.

5. In the event of the joint value of the properties to be determined in accordance with paragraph 4 above, being less than N$2,900 000.00, the applicant is to pay to Respondent the difference between N$2,900 000.00 and the determined joint value of the properties.

6. The Applicant shall be entitled to deduct from the amount paid, if any, as set out in paragraph 5 above, such amounts reasonably expended by the Applicant in respect of Municipal rates and taxes, maintenance and security of the properties as from 31 December 2019 until the transfer of the properties to the Respondent.

7. The Respondent is ordered to pay costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner.

8. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANT:	C. Van Der Westhuizen Instructed by Dr. Weder Kauta & Hoveka Inc.
RESPONDENT:	R. Heathcote SC Instructed by Francois Erasmus & Partners