REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no**:** HC-MD-CIV-ACT-CON-2021/01565

In the matter between:

LOIDE SHAANIKA **PLAINTIFF**

and

JJJ TRANSPORT CC **DEFENDANT**

Neutral Citation: *Shaanika v JJJ Transport CC* (HC-MD-CIV-ACT-CON-2021/01565) [2022] NAHCMD 688 (16 December 2022)

Coram: SIBEYA J
Heard: **08 and 11 August 2022**
Delivered: **16 December 2022**

Flynote: Law of Contract - Suspensive conditions discussed – Must be logically connected to the nature and purpose of the contract - Legality of settlement agreements for want of compliance with statutory requirements - Closeness of the relationship between the settlement agreement and the illegal factor is an important consideration in the determination of the ultimate enforceability of the settlement agreement.

Summary: On 19 April 2021, the plaintiff instituted action against the defendant. The cause of action was premised on a settlement agreement concluded between the parties and which was subsequently made an order of court.

In terms of the settlement agreement the plaintiff and the defendant entered into an indefinite lease in respect of immovable property known as Portion 1 and 2 to which the temporary numbers I 1052 and I 1054 were allocated by the Oniipa Town Council. It was agreed that the defendant shall continue to occupy both Portion 1 and 2 at a fixed rental amount of N$9 500 per month commencing on 1 October 2017 with an increase of 10% per annum with effect from 1 October 2018.

The plaintiff pleaded that the defendant, despite continuing to occupy the premises concerned, breached the agreement by failing to pay rental amount from 1 May 2018 to the date of issuing of summons.

The defendant vehemently defended the action and raised a special plea stating that Portion 1 and 2 fall under the control of the Oniipa Town Council and in terms of s 30 (1) of the Local Authorities Act 23 of 1992 (hereinafter referred to as 'the Act') only the Oniipa Town Council with the prior written approval of the Minister of Urban and Rural Development may lease Portion 1 and 2, and such approval was not obtained.

On the merits, the defendant further pleaded that clause 11 of the settlement agreement contained a suspensive condition whereby the whole agreement was subject to the determination of ownership of portion 1 by the Oniipa Town Council. The defendant pleaded further that the Oniipa Town Council declined to exercise its jurisdiction and the suspensive condition was not fulfilled and the settlement agreement should, therefore, be discharged with retrospective effect.

Held that - The obligation to pay rent, at all material times, existed independently from the determination of ownership of portion 1 of land by the Oniipa Town Council as such the intention of the parties was not to subject the settlement agreement to a suspensive condition.

Held further that - The closeness of the relationship between the settlement agreement and the illegal factor is an important consideration to determine the ultimate enforceability of the settlement agreement. The closer the relationship, the more tainted the settlement agreement becomes and the stronger the position opposing enforcement. However, if the factor is collateral and remote, it may be considered insignificant and immaterial. On the other hand, if the factor presents a serious question of illegality, it may taint the settlement agreement.

Held further that – The defendant's claim of illegality for breach of s 30 (1) *(t) (iii)* of the Act is collateral and remote to the plaintiff's claim which is a claim for rental expressly agreed to by the defendant.

Held further that – If the defendant seeks to resile from the settlement agreement, the proper approach is first to seek to resile from the effects of the court order and thereafter as a matter of consequence seek to resile from the effects of the settlement agreement as court order remains valid and binding until rescinded and set aside.

The plaintiff's claim therefore succeeds.

ORDER

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1. The defendant's special plea is dismissed.

2. The Plaintiff's claim against the defendant succeeds for:

    2.1. Payment of the amount of N$638 962.40.

    2.2. Interest on the amount of N$399 351.50 at a rate of 20% per annum from May 2018 to date of final payment.

    2.3. Costs of suit.

3. The matter is finalised and removed from the roll.

JUDGMENT

SIBEYA J:

Introduction

[1] Contractual interpretation is a key battleground in much commercial litigation. This court has consistently held, for decades, that the interpretative process is one of ascertaining the intention of the parties, being what they meant to achieve. In such exercise, the court must consider the circumstances surrounding the contract in order to determine the intention of the parties at the conclusion of such contract.

[2] Furthermore, parties to contracts should effectively and clearly communicate any and all suspensive conditions as these conditions usually create lacunas in contracts which may be exploited. This, the parties should bear in mind to avoid an unfavourable interpretation of a contract in the unfortunate event of litigation.

Parties and representation

[3] The plaintiff is Ms Loide Shaanika, a major female teacher residing at Oranjemund, Republic of Namibia.

[4] The defendant is JJJ Transport CC, a close corporation, duly registered as such in terms of the laws of the Republic of Namibia, with its registered address situated at Erf 1051 Extension 3, Ondangwa, Republic of Namibia.

[5] The plaintiff is represented by Mr Namandje, while the defendant is represented by Mr Chibwana. The litigation history between the parties is pertinent to this action.

History and Background

[6] The background of this matter appears to be common cause.

[7] During 2015, the defendant instituted action against the plaintiff, amongst others, under case number I 1707/2015 (hereinafter referred to as the 'first matter').

[8] During 2016, the plaintiff also instituted action against the defendant under case number I 46/2016 (hereinafter referred to as the 'second matter').

[9] Both the first and second matters were defended and on 22 May 2017 the first and second matters were consolidated under case number I 1707/2015.

[10] The first matter became settled on 19 September 2017 between the parties prior to commencement of the trial in the second matter.

[11] The parties proceeded with trial before Oosthuizen J in the second matter on 19 and 20 September 2017. It appears from the facts that after the commencement of the trial, the defendant, who was legally represented at the time, initiated settlement proposals with the plaintiff which culminated in the parties concluding a settlement agreement. The settlement agreement was consequentially made an order of court and is presently the epicenter of the dispute in *casu.*

[12] The relevant portion of the settlement agreement which is clauses 5 to 12 provides as follows:

'5. The parties withdraw all claims instituted against each other, each party to pay its own legal costs.

6. It is recorded that portion 2 of the concerned land belongs to the plaintiff and ownership thereof is not in dispute.

7. The defendant shall continue to occupy both portions of land "portion 1 and portion 2", to which the temporary numbers I 1052 and I 1054 were allocated by the Oniipa Town Council at the fixed rental of N$9,500.00 per month, commencing on 1 October 2017. Such rental shall increase by 10% annually with effect from 1 October 2018.

8. The defendant shall have the right to freely sublet the structures on portion 2 of the land during the subsistence of this agreement.

9. This agreement is not a concession of ownership of or rights in respect of portion 1 of the land to the other party and is with full reservation of each parties' (sic) rights in that regard.

10. This agreement shall not be disclosed by either party to the Oniipa Town Council.

11. This agreement is entered into, subject to the determination of ownership of portion 1 of land by the Oniipa Town Council and the lease agreement shall endure until the final determination of ownership of the land and in case of any judicial process in relation to the allocation, at the finalization of such judicial proceedings.

12. The defendant shall continue to maintain the improvements and/or structures on the two portions of the land and keep them in the condition they have been in and shall not make any improvements or alterations thereon, without the written consent of the plaintiff.'

The Pleadings

[13] On 19 April 2021, the plaintiff instituted action against the defendant. The cause of action was premised on the aforesaid settlement agreement between the parties.

[14] It was evident that in terms of that settlement agreement the plaintiff and defendant entered into an indefinite lease in respect of immovable property known as Portion 1 and 2 to which the temporary numbers I 1052 and I 1054 were allocated by the Oniipa Town Council ("the Council").[1] The agreement further provides that the defendant shall continue to occupy both Portion 1 and 2 under temporary number I 1052 and I 1054 at a fixed rental amount of N$9 500 per month commencing on 1 October 2017.

[15] The settlement agreement further provided under clause 7 that the rental shall increase by 10% annually with effect from 1 October 2018.

[16] The plaintiff pleaded that the defendant, despite continuing to occupy the premises concerned, breached the agreement by failing to pay rental provided for under clause 7 with effect from 1 May 2018 to the date of issuing of summons.

[1] Clause 7 of the settlement agreement attached to the plaintiff's particulars of claim marked 'A'.

[17] The plaintiff pleaded that the outstanding rental amount from May 2018 currently stands at N$934 591.92 subject to increment under clause 7 of the settlement agreement.

[18] The plaintiff contended that the defendant unlawfully breached the settlement agreement and, despite demand, has failed to pay the outstanding rentals and as a result the plaintiff prays for:

(a) Payment of the amount of N$638 962.40.

(b) Interest on the amount of N$399 351.50 at a rate of 20% per annum from May 2014.

(c) Costs of suit.

[19] The defendant vehemently defended the action and raised a special plea that the immovable property falls under the control of the Council and in terms of s 30(1) of the Local Authorities Act 23 of 1992 (hereinafter referred to as 'the Act') only the Council with the prior written approval of the Minister of Urban and Rural Development ("the Minister") may lease immovable property falling under jurisdiction of the Council.

[20] The defendant further pleaded that the settlement agreement is unlawful for being contrary to the provisions of s 30(1)*(t)(iii)* of the Act. The defendant claims that the said provision was contravened as prior written approval of the Minister was not obtained at the time when the immovable property falling under the Council, in terms of the proclamation made by way of ss 2 and 3 of the Local Authorities Act, and which is subject to s 30(1)*(t)(iii)* of the Act, was leased.

[21] In the circumstances, the defendant concludes that the settlement agreement is unlawful, alternatively, the settlement agreement was entered into without complying with statutory requirements, and is therefore null and void.

[22] On the merits, the defendant pleads that clause 11 of the settlement agreement contained a suspensive condition. Clause 11 stipulated that:

'[11] This agreement is entered into, subject to the determination of ownership of portion 1 of land by the Oniipa Town Council and the lease agreement shall endure until final determination of ownership of the land and in case of any judicial process in relation to the allocation, at the finalization of such judicial proceedings.'

[23] It came to the fore that the Council, by letter of its Chief Executive Officer dated 4 January 2018 but stamped 4 January 2019, notified both parties of its decision regarding the land in dispute. The letter provided that:

'We hereby would like to inform you that your item has been tabled to the Management Committee and the Council meeting which was held on the 11 October 2018. The subject matter was resolved under the Council Resolution No.: OTC/11/10/2018-2, below are the recommendations brought forth:

- That Council leaves it up to your lawyers (your legal representatives) to take care of this issue;
- Furthermore, kindly note that this transaction took place before the proclamation of Oniipa town therefore it is up to the law to make a decision.'

[24] In this connection, the defendant contended that the Council declined to exercise jurisdiction, as such, the suspensive condition was not met and the settlement agreement should be discharged with retrospective effect.

The pre-trial order

[25] This court in *Mbaile v Shiindi*[2] discussed the importance of listing issues in dispute between the parties, and remarked as follows in para [10]:

'The stage of the pre-trial hearing is arguably the most crucial procedural step leading to the trial. It requires of the parties or their legal representatives to analyse the pleadings and documents filed of record with an eagle eye and in order to unambiguously lay the factual issues in dispute before court. Inevitably, at this stage, the pleadings would

[2] *Mbaile v Shiindi* (HC-NLD-CIV-ACT-DEL-2018/00316) [2020] NAHCNLD 152 (22 October 2020).

have been closed and discovery occurred.[3] The parties are therefore duty bound to strip the pleadings and documents filed of record to their bare bones in order to identify the real issues for resolution by the court. Parties should further be mindful that they are bound to the issues which they bring to court for determination. It is not the responsibility of the court to navigate through various issues raised for determination in order to pinpoint what is relevant, but that of the parties to bring forth their disputes and point out the issues for determination from their dispute.'

[26] Just as it is important for the parties to list the issues in dispute, so is it vital for the parties to clearly set out the issues that are not in dispute or which are common cause between them. This will surely limit the court's time and focus on real issues necessary for the resolution of disputes between the parties. Parties should, therefore, assist the court to identify the undisputed facts way before the commencement of the trial and which comes to the aid of the court already during preparation to hear the trial. The parties are further bound to the issues listed for determination and the listed undisputed issues.

[27] The parties, in a joint pre-trial report dated 8 August 2022 which was made an order of court on 9 August 2022, by agreement, listed the following issues of fact for determination by the trial court:

(a) Whether or not the Council has finally determined ownership of the land as provided for under clause 11 of the Settlement Agreement?

(b) Whether or not the plaintiff terminated the lease agreement between the parties?

(c) Whether or not the defendant was obligated to make rental payments after the determination by the Council?

(d) Whether or not the defendant continued to occupy portion 1 of the disputed properties after the determination by the Council?

[3] Rule 26 of the Rules of the High Court.

(e) Whether or not the plaintiff breached clause 10 of the settlement agreement between the parties?

(f) Whether after the determination by the Council the plaintiff is still entitled to enforce the settlement agreement between the parties?

[28] The parties similarly listed all issues of law to be determined by the trial court, which were:

(a) Whether or not, in law, the plaintiff should be granted the orders sought?

(b) Whether or not, in law, the defendant was obligated to make rental payments?

(c) Whether or not the defendant is, by virtue of estoppel, compromise and peremption and the fact that it initiated and proposed the settlement terms agreed upon by the parties before Oosthuizen J during September 2017, is precluded from attacking the settlement agreement and the court order confirming it, by way of a special plea filed on 04 July 2022?

(d) Whether estoppel, compromise and or peremption apply in circumstances that would render an unlawful settlement agreement made a court order, at the instance of the defendant, enforceable?

(e) If the question posed under paragraph (c) above is answered in the negative and the question posed in paragraph (d) is answered in the affirmative, whether or not the settlement agreement relied upon by the plaintiff is invalid on the grounds pleaded in the defendant's special plea?

[29] The parties agreed on the following fact as constituting common cause between them:

(a) That the defendant has not been paying monthly rental as pleaded in the particulars of claim to this date but remains occupying the land concerned.

Legal Issues

[30] Despite the pre-trial order setting out an array of issues to be determined by this court, the legal consideration in actual fact evolves only around two crisp issues of law, namely:

(a) Whether the suspensive condition as set out in clause 11 of the settlement agreement was fulfilled, and if not;

(b) Whether the settlement agreement is contrary to the Act.

[31] I deem it now appropriate at this stage to consider the evidence led in order to determine whether each party's respective claim was proven or not.

Plaintiff's case and argument

[32] The plaintiff was the sole witness for her case.

[33] The bone and marrow of the plaintiff's case is simply that in terms of the settlement agreement the plaintiff and defendant entered into an indefinite lease in respect of immovable property known as Portion 1 and 2 to which the temporary numbers I 1052 and I 1054 were allocated by the Council. The defendant shall continue to occupy both Portion 1 and 2 under temporary number I 1052 and I 1054 at a fixed rental amount of N$9 500 per month commencing on 1 October 2017. An increase of 10% per annum was agreed to with effect from 1 October 2018.

[34] The plaintiff testified that, despite occupying the said portions, the defendant failed to pay the rental amount from 1 May 2018.

[35] The plaintiff contended that the defendant unlawfully breached the settlement agreement and, despite demand, has failed to pay the outstanding rentals. The plaintiff, therefore, prays for payment in the amount of N$638 962.40, interest on the amount of N$399 351.50 at a rate of 20% per annum from May 2014 and costs of suit.

[36] Mr Namandje argued that the settlement agreement was a compromise which the defendant, at own peril and instance, initiated and which was subsequently made an order of court.

[37] Mr Namandje argued further that if the defendant seeks to resile from the effects of the settlement agreement on the premise of a purported illegality, the defendant must first seek to resile from the effects of the court order and then later from the effects of the settlement agreement.

Defendant's case and argument

[38] During the trial, the defendant opted not to call any witnesses. The defendant took a strong view that the legal issues between the parties and serving before this court are matters for legal interpretation.

[39] The first legal point raised by the defendant is that clause 11 of the settlement agreement contained a suspensive condition which was not fulfilled.

[40] Mr Chibwana submitted that the Council declined to exercise jurisdiction over the disputed land resulting in the suspensive condition not being met. Mr Chibwana submitted that the settlement agreement should be discharged with retrospective effect and in this regard laid great store on the decision of this court in *Kazekuundja v Kritzinger*[4] where it was held that:

> '[17] A suspensive condition in an agreement which is fulfilled is deemed to be in force from the date the agreement was signed and not from the date the condition was fulfilled. If the condition is not fulfilled timeously the agreement is discharged with retrospective effect.'

[41] Mr Chibwana further challenged the legality of the settlement agreement which the plaintiff seeks to enforce by way of the present proceedings. He argued that the immovable property falls under the control of the Council and in terms of s 30(1) of the Act only the Council with the prior written approval of the Minister may lease such property.

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[4] *Kazekuundja v Kritzinger* [2019] NAHCMD 202 (21 June 2019) at para 17.

[42] Mr Chibwana who appeared to have several arsenals in his string argued further that the lease purportedly entered into between the plaintiff and the defendant in respect of the immovable property has been ongoing for more than twelve (12) months, which is in further contravention of s 63(1)*(a)* of the Act.

[43] The defendant strongly contends that the settlement agreement is unlawful in that it is contrary to the provisions of s 30(1)*(t)(iii)* of the Act for lack of prior written approval of the Minister while the property was part of the Council as per the proclamation made by way of ss 2 and 3 of the Act. The agreement was, therefore, unlawful, alternatively, the settlement agreement was entered into without complying with statutory requirements and is thus, null and void.

[44] To buttress the above, Mr Chibwana argued that the courts have considered the importance and effect of s 30(1)*(t)* of the Act. Masuku J in *Kamwi v Chairperson of Local Authority of Katima Mulilo,*[5] while addressing a sale of a municipal property discussed the effect of s 30(1)*(t)* and remarked as follows:

> '[50] As pointed out earlier, the provisions of s. 30(1)(t) of the Act provide that the Minister shall determine the conditions for the sale or disposal of an immovable property. The statutory power to determine the conditions of sale or disposal of an immovable property falls squarely lies exclusively with the Minister. Accordingly, the first and second respondent do not have the power to direct the Minister to approve the sale or to motivate to the Minister reasons why certain immovable must be disposed to a particular individual at a specific purchase price. Such an exercise derogates from the statutory requirement given to the Minister by the Legislature in its manifold wisdom.
>
> [51] The intention of the Legislature is clear, that is, the conditions for the sale or disposal of immovable property in a local authority, can only be determined by the Minister. As indicated above, the first and second respondent are not vested with the power to dictate to or prevail upon the Minister the conditions of sale of an immovable property.'

[45] As if a party is precluded from raising a legal point for determination, Mr Chibwana argued that the defendant is entitled in these proceedings to question the legality of the contract.

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[5] *Kamwi v Chairperson of Local Authority of Katima Mulilo* [2018] NAHCMD 367 (15 November 2018).

Discussion: *Does clause 11 of the settlement agreement contain a suspensive condition, which if not fulfilled, terminates the agreement?*

[46] As enunciated above, Mr Chibwana argued with all force and might that the Council declined to exercise jurisdiction and as a result the suspensive condition was not fulfilled. The settlement agreement should, therefore, be discharged with retrospective effect.

[47] The plaintiff was as silent as a church mouse, in respect of this contention raised by the defendant, no argument whatsoever was advanced by the plaintiff and Mr Namandje to attempt to counteract such contention.

[48] The question to be addressed by the court is whether the said argument is sound in law, and if so, what effect will it have on the settlement agreement.

[49] Clause 6 and 7 of the settlement agreement serves as the point of departure and they provide that:

> '6. It is recorded that portion 2 of the concerned land belongs to the plaintiff and ownership thereof is not in dispute.
>
> 7. The defendant shall continue to occupy both portions of land "portion 1 and portion 2", to which the temporary numbers I 1052 and I 1054 were allocated by the Oniipa Town Council at the fixed rental of N$9,500.00 per month, commencing on 1 October 2017. Such rental shall increase by 10% annually with effect from 1 October 2018.'

[50] From the above, it is apparent that ownership of portion 2 of the concerned land is not in dispute. Ultimately therefore, the dispute revolves around portion 1 only.

[51] Furthermore, it is clear as day that the defendant agreed to pay the plaintiff rental in the amount of N$ 9 500 per month for both portion 1 and 2 combined, while being well aware that ownership of portion 1 is in dispute.

[52] To add fuel to the fire, the parties agreed that the settlement agreement is subject to the determination of ownership of portion 1 by the Council.[6] It is in this respect that the defendant content that a suspensive condition existed, which had not been met. The suspensive condition, is in my view not logically connected to the nature and purpose of the settlement agreement.

[53] In *Swart en 'n Ander v Cape Fabrix (Pty) Ltd*[7] the Supreme Court of Appeal and its predecessor have stated that one considers the contentious words in a contract by having regard to their context in relation to the contract as a whole and by taking into account the nature and purpose of the contract.

[54] In *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[8] Wallis JA in the Supreme Court of Appeal said the following regarding interpretation:

'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 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. 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. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

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[6] Clause 11 of the settlement agreement attached to the plaintiff's particulars of claim marked 'A'.
[7] *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979(1) SA 195 (A) at 202C and *List v Jungers* 1979 (3) SA 106 (A) at 118G-H.
[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[55] Wallis JA in the Supreme Court of Appeal in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[9] continued to remark that:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.'

[56] Accordingly a court is now at liberty to depart from the words used, even when they are clear and unambiguous when considered in the context of the document as a whole if, having regard to admissible background and surrounding factors, it is evident that they would lead to a result contrary to the purpose and intention of the parties or the legislature as the case might be.

[57] As stated in *Endumeni (supra),* a court cannot make a contract for the parties or transform a process of interpretation into one of legislating from the bench.

[58] More recently Wallis JA had this to say in *Commissioner For The South African Revenue Service v Bosch and Another:*[10]

'The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA [*Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950

[9] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.
[10] *Commissioner For The South African Revenue Service v Bosch and Another* 2015 (2) SA 174 (SCA) at para 9.

(4) SA 653 (A) at 664G – H] referred to as 'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene'

[59] The position in our law is well expressed by Wallis JA in *Educated Risk Investments 165 (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others*,[11] that 'in interpretation the words must be taken as the starting point and construed in the light of their context and purpose and where applicable the dictates of the Constitution'.

[60] While the object is to determine the meaning to be given to the words used, it remains the primary function of the court to gather the intention of the parties or the legislature by reference to those words; and this can only occur if the object and purpose of the contract or the legislation (in which case it would include the mischief sought to be remedied) are brought into consideration when examining the words used in the context of both the document as a whole and the context or factual matrix in which the document came to be produced.

[61] The issue before court remains the proper interpretation of the settlement agreement, and its intended scope or purpose.

[62] In *casu,* it is apparent that the obligation to pay, at all material times, existed independently from the determination of ownership of portion 1 of land by the Council. It is therefore, in my view, fair to conclude that the intention of the parties was not to subject the settlement agreement to a suspensive condition.

[63] Clause 7 relates to payment of rental and is unambiguous and warrants an interpretation equitable to both parties. In this connection an interpretation in favour of the defendant would result in the plaintiff walking away empty-handed which, within the context of the agreement and the settlement provided for therein, would be most inequitable to the plaintiff.

[64] What is difficult to fathom, is how the agreement to pay rental can be suspended if ownership in respect of portion 2 is not in dispute while such portion 2 forms an integral part of the leased property. It would be irrational, in my view, to

[11] *Educated Risk Investments 165 (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others* 2016 (6) SA 434 (SCA) para 19.

attempt to separate the rental of portion 1 from portion 2 while the agreement between the parties refers to unified rental payment for both portions without distinction.

[65] Accordingly, I find that the defendant remained obliged to make payment of the agreed rental amount in terms of the settlement agreement, for both portions to the plaintiff.

[66] This brings me to the next enquiry and that is whether or not the contract is contrary to the Act.

Discussion: *Is the contract contrary to the Act?*

[67] Before I dwell into the discussion herein, I find it fair to quote verbatim the relevant sections of the Act.

[68] Section 30(1)*(t)(iii)* of the Act provides as follows:

'Subject to the provisions of subsections (2) and (3), a local authority council shall have the power – (t) subject to the provisions of part XIII, to – (iii) sell, let, hypothecate or otherwise dispose of or encumber any such immovable property, with the prior written approval of the Minister and subject to such conditions if any, as may be determined by him or her, any immovable property and subject thereto that the Minister may determine the method of sale, excluding a sale by auction, letting or hypothecation to be applied by a local authority council in respect of the immovable property.'

[69] Section 63(1)*(a)* of the Act further provides that:

'Subject to subsections (2) and (3) of this section and section 30 (1) (t) (iii) and (3) (c), the approval of the Minister is not required in relation to – (a) the letting of immovable property other than townlands or any portion of such townlands by any local authority council for a period not exceeding 12 months;'

[70] Section 63(2) of the Act further enunciates that:

'A local authority council shall, before any immovable property is sold, disposed of, or let, hypothecated or otherwise encumbered, whether by way of tender or private transaction, first consult the Minister on its intention to so sell, dispose of or let, hypothecate or otherwise encumber such property, and after having consulted with the Minister, on such conditions as approved by the Minister, cause a notice to be published in at least two newspapers circulating in its area on one occasion in a week for two consecutive weeks...'

[71] It is common cause that the lease agreement exceeds twelve months. This was even conceded by the plaintiff under cross-examination. There is also no factual dispute that, on face value, the settlement agreement does not strictly comply with s 30(1)*(t)(iii)* of the Act for lack of prior written approval of the Minister.

[72] I find myself duty-bound to consider whether or not a demand connected with an illegal transaction is capable of being enforced at law. In *casu*, the question is whether or not the plaintiff requires the aid of the illegal transaction to establish her case. If the plaintiff cannot open her case (institute an action) without showing that she has contravened the law, the court will not assist her, whatever her claim in justice may be against the defendant.[12]

[73] If the plaintiff can make out a good case without relying upon an illegal act or transaction, it is probably because the act or transaction is only collaterally and remotely related to the cause of action.

[74] The closeness of the relationship between the settlement agreement and the illegal factor is an important consideration to determine the ultimate enforceability of the settlement agreement. The closer the relationship, the more tainted the settlement agreement becomes and the stronger the opposition to enforcement. However, if the factor is collateral and remote, it may be considered insignificant and immaterial. On the other hand, if the factor presents a serious question of illegality, it may taint the settlement agreement.

[75] In the present matter, the defendant's claim of illegality for breach of s 30(1)*(t)(iii)* of the Act is collateral and remote to the plaintiff's claim which is a claim for rental expressly agreed to by the defendant.

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[12] George A. Strong. *The Enforceability of Illegal Contracts*. 12 Hastings L.J. 347 (1961). Available at: https://repository.uchastings.edu/hastings_law_journal/vol12/iss4/1.

[76] Furthermore, the settlement agreement was a valid compromise between the plaintiff and the defendant concluded at the proposal and instance of the defendant. In *Karson v Minister of Public Works,*[13] the nature of a compromise was stated as follows:

'It is well settled that the agreement of compromise, also known as transaction, is an agreement between the parties to an obligation, the terms of which are in dispute, or between parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by dismissing his claim or by increasing his liability'

[77] The legal challenge of illegality was not raised before Oosthuizen J when the parties settled their disputes and had the settlement agreement made an order of court. The defendant had an opportunity to raise the illegality issue which it failed to do. On the basis of once and for all rule, which discourages hearing matters on a piecemeal basis, the defendant could be found not to succeed to escape the obligations from the settlement agreement which was made an order of court.

[78] In *Hamilton v Van Zyl,*[14] it was held that not only can the original cause of action no longer be relied upon, but a defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.

[79] In *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd*,[15] Gubbay CJ in the Supreme Court of Zimbabwe explained the effect of a compromise as follows at 139 A:

'Its effect is the same as res judicata on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved.'

[80] Gubbay CJ continues at 139 B that:

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[13] *Karson v Minister of Public Works* 1996 (1) SA 887 ECD at 893F-G; *Mbambus v Motor Vehicle Accidents Fund* (case No I 3299-2007) [2013] NAHCMD 2 (14 January 2013) para 7.
[14] *Hamilton v Van Zyl* 1983 (4) SA 379 ECD at 383 G – H.
[15] *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 ZSC.

'As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action.'

[81] and at 139 C:

'Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal.' Own emphasis

[82] The above authorities are a true exposition of our law. I further find that the principle of compromise also serves as a crucial tool to ensure finality to disputes. Parties should not easily be allowed to resile from a compromise lest there be no finality to resolving disputes as parties may go around in circles and thus, contrary to attaining justice. Justice demands fair conclusion of disputes.

[83] Another consideration worth addressing is the contention raised by Mr Namandje, that the settlement agreement was not simply made between the parties and then implemented but was also made an order of court. The settlement agreement, in this matter, was made an order of this court and, therefore, one cannot resile from it without rescinding the court order. The moment a settlement agreement is made an order of court it no longer retains the characters of a settlement agreement but it assumes the authority of an order of court. It would merely an academic exercise to attempt to resile from the settlement agreement while leaving the concerned order of court unscratched.

[84] The proper approach is first to seek to resile from the effects of the court order and thereafter as a matter of consequence seek to resile from the effects of the settlement agreement. It should be known that a court order remains valid and binding until rescinded and set aside. When an order is not rescinded, it commands compliance.

[85] I agree with Mr Namandje that, upon becoming aware of the illegality, the defendant's took no step to rescind the court order which made the impugned settlement agreement an order of court. In *Minister of Police v Van Der Watt and Another*[16] it was held that:

[16] *Minister of Police v Van Der Watt and Another*, South African Supreme Court of Appeal, Case No. 1009/2021; unreported judgment delivered on 21 July 2022.

'In *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others* . . . the Court pointed out that the proper enquiry is, however, not to start with the settlement agreement concluded but to start with the court order made. The court reasoned that, as long as the court order existed, it cannot be disregarded. It remains valid and extant until set aside.'

[86] In *casu*, up until this very moment in time the court order was not set aside, it, thus, still stands and such order cannot simply be disregarded or ignored. It is a non-starter to attempt to challenge the legality of a settlement agreement which was made an order of court while remaining content with the court order.

[87] As I draw curtains to a close, I take note that the defendant seeks to resile from a compromise (the settlement agreement) with terms which it proposed at its instance. The difficulty that the defendant is seized with is that the settlement agreement was concluded on its proposed terms. Parties should not easily be allowed to resile from the terms which they proposed to the opposing party upon which a compromise or agreement was reached. Failure to apply this principle strictly may result in the abuse of processes.

Conclusion

[88] The defendant, despite raising several claims against the plaintiff during its action which was settled between the parties, it did not raise the legality of the lease of the land. It should be emphasized that the settlement agreement was concluded at the defendant's behest and made an order of court. It did not initially raise non-compliance with s 30 of the Act. It raised that point not by way of a rescission application so as to denude the order of Oosthuizen J of its legitimacy and regularity. Instead, it introduced an ineffectual Special Plea, which, in my view, is doomed to fail as a result.

[89] In view of the foregoing findings, decisions and conclusions, I find that the plaintiff's case succeeds on a balance of probabilities while the defendant's special plea and plea to the merits falls to be dismissed.

Costs

[90] It is well established in our law that costs follow the event. No compelling reasons were placed before the court why the said principle should not be followed and no persuasive reasons are apparent from the evidence to that effect. Consequently, the plaintiff is awarded costs.

Order

[91] In the result, I order as follows:

1. The defendant's special plea is dismissed

2. The Plaintiff's claim succeeds and the defendant for:

    2.1. Payment of the amount of N$638 962.40.

    2.2. Interest on the amount of N$399 351.50 at a rate of 20% per annum from May 2018 to date of final payment.

    2.3. Costs of suit.

3. The matter is finalised and removed from the roll.

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O S Sibeya

Judge

APPEARANCES:

PLAINTIFF:	S Namandje Of Sisa Namandje & Co. Inc Windhoek.
DEFENDANT:	T Chibwana Instructed by Dr Weder, Kauta & Hoveka Inc. Windhoek.