

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-OTH-2022/01067

In the matter between:

NIRWANA TRADING ENTERPRISES CC **1st**

PLAINTIFF

ISSASKAR GAOSEB **2nd**

PLAINTIFF

JENNIFER TOATITE GAOSES **3rd**

PLAINTIFF

and

THEMISTOKLES DUDU MURORUA **1st**

DEFENDANT

FRIEDA MURORUA **2nd**

DEFENDANT

KHORIXAS TOWN COUNCIL **3rd**

DEFENDANT

THE REGISTRAR OF DEEDS **4th**

DEFENDANT

Neutral citation: *Nirwana Trading Enterprises CC v Murorua* (HC-MD-CIV-ACT-OTH-2022/01067) [2023] NAHCMD 398 (13 July 2023)

Coram: PRINSLOO J

Heard: 16 May 2023 and further arguments on 3 July 2023

Delivered: 13 July 2023

Flynote: Action proceedings – Oral Settlement agreement – Enforceable and Valid – Effect of settlement agreement made an order of court – The order brings finality to the *lis* between the parties – A defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.

Summary: The matter before the court follows from a ruling handed down by this court in *Nirwana Trading Enterprises CC v Murorua* delivered on 24 October 2022, wherein it was held that the verbal settlement agreement reached at mediation on 2 June 2022 between the plaintiffs and the first and second defendants was binding on the parties. Following this judgment, the plaintiffs are seeking an order to the effect that the court declares that the settlement agreement reached during mediation on 02 June 2022 is binding and valid between the parties and that it be made an order of court and be declared enforceable, in the terms as fully set out in the notice of motion. The first and second defendants oppose the relief sought by the plaintiffs.

Held that the defendants were duly represented during the course of the mediation proceedings and, as a result, were properly advised on the nature of the settlement proposed and the consequences of the said settlement agreement.

Held further that the defendants accepted that the terms of the settlement agreement, as set out in para 5 below, reflect what the parties agreed upon.

Held that although the defendants are critical of the judgment dated 24 October 2022, this judgment was not appealed and, therefore, still stands.

Held that the verbal agreement does not deal with the sale of immovable property or the sale of an interest in land. The plaintiffs' claim was not premised on the sale of land. If the settlement agreement related to the sale of land, one would have expected the agreement to deal with it specifically. There is no reference to any sales agreement in the terms of the settlement, and there is no reference to payment apart from the fact that the plaintiffs had to pay for the transfer costs.

Held that the verbal settlement agreement reached at mediation on 2 June 2022 between the plaintiffs and the first and second defendants is, as a result, hereby made an order of court.

Held that the protracted arguments on the purported non-compliance with the Formalities of the Sale of Land Act does not find application in respect of the settlement agreement before this court. The original lis between the parties fell away, and it is clear that the defendants are not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.

Held that the compromise reached between the parties extinguishes the plaintiffs' original cause of action and the settlement or compromise reached between the parties is not subject to the provisions of the Formalities of Sale of Land Act. The plaintiffs will therefore be able to enforce the said settlement agreement as agreed between the parties on 22 June 2022. The plaintiffs' application succeeds.

ORDER

1. The settlement agreement reached during mediation on 02 June 2022, and which was declared binding and valid between the parties, is hereby made an order of court and is declared enforceable, in the following terms:

1.1 The first and second defendants are directed, within 14 days to sign all documents necessary to permit the registration of the plaintiff's rights over

the subdivided portion of Erf 2247, Registration Division “A”, Khorixas, Kunene Region, Republic of Namibia, failing which the court authorises and directs the Deputy Sherriff to sign all necessary documents on behalf of the first and second defendants to effect registration of the plaintiffs right over the sub-divided portion of Erf 2247, Registration Division “A”, Khorixas, Kunene Region, Republic of Namibia.

1.2 The plaintiffs shall bear the transfer costs in respect of the aforesaid transfer of property rights by the Defendants.

1.3 The first and second defendants are directed, within 14 days, to transfer all amounts in the total of N\$72 000 (Seventy Two Thousand Namibia Dollars) held in the family banking account to the plaintiffs.

2. The cost of this application is payable by the first and second defendants. Such cost includes the cost of one instructing and one instructed counsel. Cost shall not be limited to rule 32(11).

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

JUDGMENT

PRINSLOO J:

Introduction

[1] The application before me follows from a ruling by this court in *Nirwana Trading Enterprises CC v Murorua*¹ delivered on 24 October 2022 (referred to as the October 2022 judgment), wherein it was held that the verbal settlement agreement reached at mediation on 2 June 2022 between the plaintiffs and the first and second defendants was binding on the parties.

¹ *Nirwana Trading Enterprises CC v Murorua* (HC-MD-CIV-ACT-OTH-2022/01067) [2022] NAHCMD 584 (24 October 2022).

[2] The plaintiffs are Nirwana Enterprises CC and Mr and Mrs Gaoseb (the Gaosebs). The defendants, a married couple, are Mr and Mrs Murorua (the Muroruas), the Khorixas Town Council and lastly, the Registrar of Deeds.

[3] The parties have now returned to court, and the plaintiffs are seeking the following relief:

‘1. The settlement agreement reached during mediation on 02 June 2022 and declared as binding and valid between the parties per annexure “G1” to be made an order of court and be declared enforceable, in the following terms:

1.1 The First and Second Defendants be directed, within 14 days to sign all documents necessary to permit the registration of the Plaintiff’s rights over sub-divided portion of Erf 2247, Registration Division “A”, Khorixas, Kunene Region, Republic of Namibia, failing which the court authorises and directs the Khorixas Town Council and the Registrar of Deeds to sign all necessary documents on behalf of the First and Second Defendants to effect registration of the Plaintiffs right over sub-divided portion of Erf 2247, Registration Division “A”, Khorixas, Kunene Region, Republic of Namibia.

1.2 The Plaintiffs shall bear the transfer costs in respect of the aforesaid transfer of property rights by the Defendants.

1.3 The First and Second Defendants be directed, within 14 days, to transfer all amounts in the total of N\$72 000 (Seventy Two Thousand Namibia Dollars) held in the family banking account to the plaintiffs.

2. Cost of this application, only if opposed.

3. Further and/or alternative relief.’

[4] The background of the matter is that on 02 June 2022, the parties attended court-connected mediation proceedings. During the said proceedings, the parties reached a settlement in respect of all the claims of the plaintiffs. The settlement reached between the parties was not reduced to writing at the said time, but they agreed that the legal representatives would draft the settlement agreement and then all the parties concerned would sign it. However, the defendants declined to sign the written

agreement once drafted, and the plaintiffs brought an application to this court to declare the oral settlement agreement binding on the parties.

[5] The terms of the oral agreement reached during the mediation are common cause between the parties and are set out in the founding affidavit deposed to by Mr Issaskar Gaoseb. The terms were recorded as follows:

‘11.1 The First and Second Defendants will cause to sign all documents necessary to permit the registration of the Plaintiffs’ right over a sub-divided portion of Erf 2247, Registration Division “A”, Khorixas, Kunene Region, Republic of Namibia;

11.2 The Plaintiffs shall bear the transfer costs in respect of the aforesaid transfer of property rights by the defendants;

11.3 The Plaintiff shall remain with the sole management of the current lease agreement in respect of Erf 2247, Registration Division “A”, Khorixas, Kunene Region, Republic of Namibia;

11.4 The defendants shall reimburse to the plaintiffs an amount of N\$125 000.00 (One Hundred and Twenty-Five Thousand Namibia Dollars) being payments in respect of renovation costs incurred by the Plaintiff within 12 (twelve) months from date of this agreement.

11.4.1 The monies to be reimbursed by the Defendants to Plaintiffs shall be reduced from the total monthly rental payments received in the amount of N\$10 450.00 (Ten Thousand Four Hundred and Fifty Namibia Dollars) from date of signing of this agreement until 31 May 2023.

11.4.2 Despite the aforesaid, the Defendants shall be liable to effect monthly payments to the Plaintiffs until full satisfaction of the amount stated under 13.3 (sic) above.

11.5 The Defendants, in particular the Second Defendant, shall cause to transfer all amounts in the total of N\$72 000.00 (Seventy-Two Thousand Namibia Dollars) held in the family banking account to the plaintiffs.’

Opposition

[6] In their answering affidavit, the defendants raised a number of issues in respect of the current application and the relief sought by the plaintiff. These issues can be summarised as follows:

a) The relief sought in this interlocutory application is incompetent in law, firstly for violation of the Formalities in respect of Sale of Land Act 71 of 1969 (the 'Act') and secondly for being procedurally irregular because the plaintiffs are seeking to pursue the relief set out in the particulars by way of an interlocutory application.

b) The current application is in violation of the defendants' rights to property which are protected by Article 16 of the Constitution.

c) Transfer of immovable property can only be attained through a sale agreement, donation agreement, rectification agreement, exchange agreement, and inheritance – testate or intestate. The plaintiffs presented none of these instruments and instead sought to enforce the settlement agreement reached at mediation.

d) The agreement was declared as binding and valid between the parties, and the judgment of this court should be enforced by way of execution proceedings and not by means of a further interlocutory application.

If the plaintiffs are advancing a case of being beneficial owners, they must prove their title to the property by adducing evidence in court per the Act.

e) The plaintiffs seek a mandamus for the registration of the plaintiffs' ownership of the property. The interdictory relief is problematic as the requirements have not been met.

f) If the plaintiffs are advancing a case for beneficial owners, which is disputed, then they must prove their title to the property by adducing evidence in court in accordance with the Formalities in respect of Sale of Land Act, 71 of 1969.

g) The court cannot come to the assistance of the plaintiffs and unlawfully compel the defendants to conclude a commercial contract. The court can however enforce a contract once the parties have entered into a commercial contract. The defendants have not entered into a deed of sale or deed of donation with the plaintiffs, and there was, therefore, no enforceable contract between the parties.

h) The enforcement of a settlement agreement made by court order is done through execution proceedings via the office of the Deputy Sherriff and not by way of an interlocutory application.

Replying papers

[7] Having considered the defendants' answering papers, the plaintiffs replied as follows:

a) The second defendant is the biological mother of Ms Gaoses, the third plaintiff and, therefore, the mother-in-law of the second plaintiff. The second defendant was married to the late father of Ms Gaoses, who was the first Permission to Occupy (PTO) holder of the property in question. The first defendant and Ms Gaoses' father were brothers.

b) In further amplification, Mr Gaoseb set out the background that gave rise to the initial agreement between the parties that ultimately gave rise to the institution of the action, in that the Muroruas requested the Gaosebs to pay for the purchase price of the property when it was set to be sold by the Khorixas Town Council as they were unable to do so. The understanding was that the property would be subdivided, and the subdivided portion would be transferred to the Gaosebs. The Goasebs paid the purchase price, and in correspondence dated 16 November 2021, the Muroruas confirmed that they were fine with signing off the subdivision document.

c) Mr Gaoseb further submitted that the relief sought relates to a settlement agreement that has been declared binding and valid between the parties. It is clear from the defendants' papers that they accept that the agreement reached during mediation is binding and valid but fail to establish facts upon which they will be entitled to refuse compliance with said agreement.

d) The defendants have not taken issue with the other terms of the settlement agreement and, in their answering papers, admit that a deed of transfer exists between the parties but that they refuse to sign it.

e) The defendants, duly represented by a legal practitioner, accepted to settle the matter on the basis that the parties would conclude a Deed of Donation in order to give transfer to the subdivided portion of the property subject to the plaintiffs being responsible for the transfer costs.

f) Mr Gaoseb again reiterated that the plaintiffs' application is not premised on the Formalities in respect of the Sale of Land Act but based on the enforcement of the settlement agreement.

g) Mr Gaoseb also repeated that the defendants are the nominee owners of the property in question, and the parties concluded a partially written, partially oral agreement to have the Gaosebs purchase the property, and the plaintiffs signed all the official documents relating to the purchase and subdivision of the property.

h) The parties agreed to have the property subdivided and the portion transferred to the plaintiffs. A deed of transfer exists on the defendants' own version, which they refuse to sign. The plaintiffs simply demand that the defendants sign those transfer documents per the agreement to facilitate the transfer of the subdivided plot.

Arguments advanced by the parties

[8] Both counsel advanced comprehensive arguments, and at the court's request, the legal practitioners filed further notes on argument on 3 July 2023, addressing the issues raised with them on 18 June 2023. I want to express my gratitude to the legal practitioners for their industry in this regard.

[9] I intend to refrain from replicating the arguments so advanced. I will, however, refer to the crux of the respective arguments. If, in this judgment, I use the words 'submit' and 'argue' and their derivatives, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

On behalf of the plaintiffs

[10] Mr Chibwana submitted that the defendants never disputed the settlement terms reached during mediation and did not dispute that the agreement is binding on both parties (plaintiffs and defendants). Mr Chibwana further submitted that the arguments on the settlement are now res judicata.

[11] Mr Chibwana persisted with his argument that the Formalities in respect of the Sale of Land Act does not apply to the facts as the plaintiffs' claim was not based on the said act either.

[12] Regarding the enforceability of the settlement agreement, Mr Chibwana contended firstly that the defendants participated in the settlement discussions and proposed and agreed to the settlement terms, which is an insurmountable legal hurdle in the defendants' defence. Secondly, the fundamental principle of the law is that the parties must be made to comply with their contractual obligations to avoid far-reaching implications for the country. Thirdly, the effect of the settlement order is to change the status of the rights and obligations between the parties as a substantive contract that exists independent from the original cause comes into existence. Fourthly, counsel contended that the defendants are not entitled to go behind the compromise and raise defences to the original cause of action. Lastly, the defendants settled the matter and indicated their willingness to and partially complied with the settlement agreement, pre-empting their right to attack the settlement agreement.

[13] On the Formalities in respect of the Sale of Land Act, Mr Chibwana submitted that the court had already ruled on this issue and concluded that the Act cannot prevent the enforcement of the settlement agreement. Mr Chibwana further argued that there was no contract for the sale of land or a contract for sale of any interest in land as contemplated under s 1(1) of the Act, and it was pleaded in the particulars of claim how the agreement on the transfer of rights came about.

[14] As a result, Mr Chibwana argued that the court should hold that the settlement agreement is enforceable and that the defendants' conduct, given the facts of the matter, should be held to be frivolous.

On behalf of the defendants

[15] It is the argument of Mr Murorua, the defendants' counsel, that the current application is improper as, firstly, the matter is res judicata. Secondly, the court is functus officio in relation to the order of 24 October 2022, and thirdly, there is a violation of the Act. As a matter of law, it is not prosecutable on the basis of an interlocutory application.

[16] Mr Murorua again referred the court to s 1(1) of the Formalities in respect of the Sale of Land Act, which provides that 'no contract of sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority'.

[17] He further argued that the plaintiffs, have for purposes of the current application, not put up any signed contract of sale of land or a deed of donation, which requires compliance with the aforesaid formalities set out in s 1(1) of the Act and the court cannot compel the defendants to enter into a contract for the sale of land, and the oral agreement reached during mediation is not a deed of sale or deed of donation.

[18] Counsel submitted that the effect of the non-compliance with the requirements of the Act is that the contract shall have no force or effect. Further to this, Mr Murorua argued that the enforcement of a settlement agreement which has already been made an order of court is carried out through execution proceedings with the office of the Deputy Sherriff and not by further interlocutory proceedings to circumvent the Act.

[19] It was further argued that the defendants are not nominee owners on behalf of the plaintiffs, and the plaintiffs must first prove title to the property by way of action proceedings before they can claim registration of transfer of the said property. Mr Murorua vehemently argued that the enforcement of the settlement agreement and the further agreements flowing from the settlement agreement, which is affected by the Act and that the enforcement of the settlement agreement insofar as it involves the transfer of land must take account of the Formalities in respect of the Sale of Land Act, which legislation is not ousted by enforcement of a settlement agreement.

[20] The defendants further conclusively established their title to the immovable property, whereas the plaintiffs' claim is untested to date.

[21] Mr Murorua further advanced argument in respect of a vindication action and the principles of rei vindication and submitted that the claim for enforcement of the oral settlement agreement is *non sequitur* and res judicata as the settlement agreement had already been made an order of court.

Request for further arguments

[22] Having considered the arguments advanced by the legal practitioners, I posed the following questions to them and directed that they file further notes on argument:

'The Parties are to file further notes on argument on or before 3 July 2023 addressing the following:

The relief sought is two-fold firstly, that the settlement agreement be made an order of the court and secondly, that the court then grants an order enforcing the said order.

It is the court's understanding that the defendants take no issue with ruling on the binding nature of the settlement agreement and the logical effect that flows from that is that the settlement agreement be made an order of court.

An argument was advanced on behalf of the defendants that there is a dispute of fact between the parties and further advanced defences in respect to the cause of action as set out in the POC (specifically in respect of the Formalities in respect of the Sale of Land Act 71 of 1969). However, given the settlement agreement:

a) Does the compromise reached not extinguish the original cause of action?

- b) The effect of a settlement in terms of the principles laid out in *Shaanika v JJJ Transport CC* (HC-MD-CIV-ACT-CON-2021/01565) [2022] NAHCMD 688 (16 December 2022) by Sibeya J wherein the court dealt with the compromise with reference to *Hamilton v Van Zyl*,² and *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd*.³
- c) In light of the compromise can it still be argued that plaintiffs are seeking to pursue the relief set out in the particulars by way of an interlocutory application?
- d) Can it be said in light of the compromise that there is still a factual dispute between the parties; and
- e) Is the court functus officio on the issue of enforcement?’

Discussion

[23] It is common cause that the defendants were duly represented during the course of the mediation proceedings and, as a result, were properly advised on the nature of the settlement proposed and the consequences of the said settlement agreement.

[24] The defendants accepted that the terms of the settlement agreement, as set out in para 5 above, reflect what the parties agreed upon.

[25] During the previous proceedings, the court was called upon to determine the status of the oral settlement agreement reached during court-connected mediation and whether it was binding on the parties. This court held that the oral settlement agreement is binding on the parties, and the defendants accepted this finding made by the court.

[26] Although the defendants are critical of the judgment dated 24 October 2022, this judgment was not appealed and, therefore, still stands.

[27] What now serves before this court is what would logically follow on the findings made regarding the binding nature of the settlement agreement, i.e. an order declaring the settlement agreement an order of court. The defendants do not oppose this. In fact, their argument was advanced from the point of view that the settlement was already

² *Hamilton v Van Zyl* 1983 (4) SA 379 ECD at 383 G – H.

³ *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 ZSC.

made an order of court and that there is no need for the plaintiffs to seek an enforcement order as the said enforcement would be done via the office of the Deputy Sherriff.

[28] In the October 2022 judgment, the terms of the settlement agreement were not considered as it was not required for the court to do so at the time. However, when the court is requested to make the settlement agreement an order of court, it is necessary to consider the terms of the agreement as part of the court's judicial oversight role.

[29] In *Maswanganyi v Road Accident Fund*⁴ in the minority judgment, the court at paras 57 and 58, in which Zondi JA and Mocumie JA concurred, held:

'The court must be satisfied that the order that it is required to make is competent and proper in the sense that it will have the power to compel the person against whom the order is made, to make satisfaction. Secondly, it must satisfy itself that the agreement is not objectionable and that it must hold some practical and legitimate advantage. Where necessary, the court must play an oversight role when it is of the opinion that the terms of the agreement are inadequate. In such instances, it may even insist that the parties effect the necessary changes to the terms of the settlement agreement as a condition for the making of the order.'

[30] The terms of the agreement between the parties, as apparently proposed by the defendants if regard is to be had to the argument of Mr Chibwana, deal with the transfer of rights over the subdivided portion of the immovable property in question and the monetary payment in respect of renovations and the transfer of funds from a family account.

[31] This verbal agreement between the parties is brought into perspective by the background facts set out in the original particulars of claim and in the plaintiffs' replying papers.

⁴ *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA).

[32] The verbal agreement does not deal with the sale of immovable property or the sale of an interest in land. I previously held on the argument advanced that the plaintiff's claim was not premised on the sale of land, and I stand by that finding. If the settlement agreement related to the sale of land, one would have expected the agreement to deal with it specifically. In fact, there is no reference to any sales agreement in the terms of the settlement and no reference to payment apart from the fact that the plaintiffs had to pay for the transfer costs.

[33] Paragraph 11.1 of the founding papers reads as follows:

'The First and Second Defendants will cause to sign all documents necessary to permit the registration of the Plaintiffs' rights over a sub-divided portion of Erf 2247, Registration Division "A", Khorixas, Kunene Region, Republic of Namibia.' (my emphasis)

[34] I reiterate that these terms were agreed upon with the benefit of legal advice. If the sale of land was involved, I have no doubt it would have been dealt with by the legal practitioners with the necessary particularity.

[35] Therefore, having considered the terms of the settlement agreement, I cannot find it to be objectionable or incompetent in light of the findings in the October 2022 judgment, after having considered the dicta in *Empire Fishing Company (Pty) Ltd v Dumeni*⁵ and the cases considered therein, with specific reference to *Du Plooy and Another v Du Plooy and Others*⁶ and *Dadabhay v Dadabhay*.⁷ The latter has similar facts to the case before me.

[36] As a result, the oral settlement agreement reached at mediation on 2 June 2022 between the plaintiffs and the first and second defendants is hereby, made an order of court.

⁵ *Empire Fishing Company (Pty) Ltd vs Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022).

⁶ *Du Plooy and Another v Du Plooy and Others* (417/11) [2012] ZASCA 135; [2012] 4 All SA 239 (SCA) (27 September 2012).

⁷ *Dadabhay v Dadabhay* 1981 (3) SA 1039 (A).

The effect of a settlement agreement which is made an order of court

[37] In *Seagull All-Fish CC v Tuyeni Kumwe Food and Commodity Distributors CC and Others*,⁸ Angula DJP stated as follows:

[13] The purpose of a settlement agreement being made an order of court is, in the event of non-compliance, the party in whose favour the order operates should be in position to enforce it through execution or contempt proceedings. Once a settlement agreement has been made an order of court, it will be treated like and interpreted like all court orders. The order brings finality to the *lis* – the lawsuit, between the parties. The dispute thus becomes *res judicata*, which literally means the ‘matter is judged’. An order based on a settlement agreement which makes provision for the payment of a judgment debt by installments might pose a challenge in enforcing by way of execution because the amount that remains owed might have to be determined, which may require going back to court just to determine the balance outstanding before the authorisation of a warrant of execution.⁹

[38] In a more recent judgment of *Shaanika v JJJ Transport CC*¹⁰ Sibeya J stated as follows in respect of compromise:

[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*,¹¹ the nature of a compromise was stated as follows:

“It is well settled that the agreement of compromise, also known as a 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

⁸ *Seagull All-Fish CC v Tuyeni Kumwe Food and Commodity Distributors CC and Others* (HC-MD-CIV-ACT-CON 2833 of 2017) [2019] NAHCMD 135 (24 April 2019).

⁹ *Eke v Parsons* [2015] ZACC 30.

¹⁰ *Shaanika v JJJ Transport CC* (HC-MD-CIV-ACT-CON-1565 of 2021) [2022] NAHCMD 688 (16 December 2022).

¹¹ *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.

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 the 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*,¹² 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*,¹³ 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:

“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

¹² *Hamilton v Van Zyl* 1983 (4) SA 379 ECD at 383 G – H.

¹³ *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 ZSC.

may go around in circles and thus, contrary to attaining justice. Justice demands fair conclusion of disputes.’

[39] What should have been a cost-effective settlement of the matter has evolved into a protracted legal battle fueled at the instance of the defendants.

[40] The protracted arguments on the purported non-compliance with the Formalities of the Sale of Land Act does not find application in respect of the settlement agreement before me. The original lis between the parties falls away as can be seen from the cases referred to above. However, the defendants persist in wanting to argue the merits of the original cause of action, and it is clear that the defendants are not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.

[41] To avoid any further doubt in this matter, it should be clear that this court is of the view that the compromise reached between the parties extinguishes the plaintiffs’ original cause of action and the settlement or compromise reached between the parties is not subject to the provisions of the Formalities of the Sale of Land Act. The plaintiffs will therefore be able to enforce the said settlement agreement as reached between the parties on 22 June 2022.

[42] The order of this court is therefore as follows:

1. The settlement agreement reached during mediation on 02 June 2022, and which was declared binding and valid between the parties, is hereby made an order of court and is declared enforceable, in the following terms:

- 1.1 The first and second defendants are directed, within 14 days to sign all documents necessary to permit the registration of the plaintiffs rights over the subdivided portion of Erf 2247, Registration Division “A”, Khorixas, Kunene Region, Republic of Namibia, failing which the court authorises and directs the Deputy Sherriff to sign all necessary documents on behalf of the first and

second defendants to effect registration of the plaintiffs right over the subdivided portion of Erf 2247, Registration Division "A", Khorixas, Kunene Region, Republic of Namibia.

- 1.2 The plaintiffs shall bear the transfer costs in respect of the aforesaid transfer of property rights by the Defendants.
- 1.3 The first and second defendants are directed, within 14 days, to transfer all amounts in the total of N\$72 000 (Seventy Two Thousand Namibia Dollars) held in the family banking account to the plaintiffs.
2. The cost of this application is payable by the first and second defendants. Such cost includes the cost of one instructing and one instructed counsel. Cost shall not be limited to rule 32(11).
3. The matter is regarded as finalised and removed from the roll.

JS Prinsloo

Judge

APPEARANCES:

PLAINTIFFS:

T Chibwana
Instructed by
Sisa Namandje & Co. Inc., Windhoek

DEFENDANTS:

L Murorua
Of Murorua Kurtz Kasper Incorporated
Windhoek