REPORTABLE
CASE NO.: SA 6/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE ERONGO REGIONAL COUNCIL **FIRST APPELLANT**

THE MINISTER OF REGIONAL, LOCAL GOVERNMENT AND HOUSING **SECOND APPELLANT**

THE CHAIRPERSON OF THE TOWNSHIPS BOARD **THIRD APPELLANT**

and

WLOTZKASBAKEN HOME OWNERS ASSOCIATION **FIRST RESPONDENT**

KERRY SEAN McNAMARA **SECOND RESPONDENT**

CORAM: Strydom, AJA, Chomba, AJA and Mtambanengwe, AJA.

Heard on: 2008/10/16

Delivered: 2008/03/17

APPEAL JUDGMENT

STRYDOM, AJA:

[1] This is another salvo fired in a rather longstanding legal battle between the respondents and the appellants. On previous occasions the parties were fortunate to resolve their disputes by settlements which were then made orders of the Court. These settlement agreements were relevant to the proceedings in the Court *a quo* and the appeal presently before this Court. I will later refer more fully thereto.

[2] This appeal is against a judgment and orders of the Court *a quo* whereby the appellants were ordered to comply with the terms of a settlement agreement which was entered into by the parties on the 10th November 2006 and which was thereafter made an order of Court.

[3] The first respondent is a voluntary association representing 104 members out of 110 persons who are lessees of sites in the small holiday resort and fishing village

of Wlotzkasbaken, situated some 35 km to the north of Swakopmund. The second respondent, who joined the application in his personal as well as his capacity as a member of the first respondent, is a lessee of one of the mentioned sites.

[4] The first appellant is an elected body established in terms of the Regional Councils Act, Act 22 of 1992 (the Act).

[5] The second and third appellants were cited for the interest that they might have in the proceedings and no orders were asked against them save an order for costs if they should oppose the application.

[6] The history of Wlotzkasbaken, and how it came about that it fell under the jurisdiction of the first appellant, is not in dispute. According to the first respondent the 110 erven were surveyed and laid out during the late 1960's. During 1972 the town was declared a peri-urban area and no further erven were laid out. Then, under the Local Authorities Act,

Act No. 23 of 1992, Wlotzkasbaken was a village until by Government Notice 22 of 1993 it became a settlement area in terms of the Act and was then, in terms of the provisions of the Act, under the jurisdiction of the first appellant.

[7] The first appellant is tasked by the Act to develop, maintain and provide certain services to areas under its jurisdiction. It is common cause that one of the duties of the first appellant is to develop settlement areas to become townships and to establish local authorities. (See in particular sections 28 to 32 of the Act). This is the process which is presently afoot in regard to Wlotzkasbaken and which has given rise to the disputes between the parties.

[8] In order to establish a township the Township and Division of Land Ordinance, No. 11 of 1963 (the Ordinance), provides for the steps to be taken in order to achieve such proclamation. In this regard it is common cause that the

approval of the Namibia Planning Advisory Board, in terms of sec. 4 of the Ordinance, was already obtained on 1 December 1998. A township layout was completed in terms of sections. 4 to 9 of the Ordinance and application was made to the Townships Board for the establishment of the township of Wlotzkasbaken which, when proclaimed, would consist of 258 erven. This approval was obtained on 21st September 1999. On 11 December 2002 a new General Plan for the Township was approved by the Surveyor-General of Namibia. This was done in terms of sec. 11 of the Ordinance.

[9] What remains was certain amendments to the General Plan which became necessary because alignment of some of the existing erven did not agree with the new outlay and in certain instances access to some of the previous erven was blocked. After the Surveyor-General's approval of the amended plan sec. 12 of the Ordinance required the opening

of a townships register to lay for inspection in the deeds office to be followed by the actual proclamation of the township in terms of sec. 13 of the Ordinance.

[10] According to Mr. Simon, a town and regional planner, the taking of these steps should not take longer than 3 months. Mr. Stubenrauch, who is likewise a town planner and who was involved in the planning and outlay of Wlotzkasbaken, stated that it would be more realistic to estimate a period of 8 to 12 months to complete these steps.

[11] Whilst this process was continuing disputes developed between the respondent and the first appellant which led to legal proceedings being instituted by the respondents. The nature of the disputes is not relevant to these proceedings but in due course the matter culminated into the first settlement agreement dated 6th November, 2000 (the 2000 agreement).

[12] This agreement provided as follows:

> "The parties hereto have reached a settlement in the following terms which they agree will be made an order of court:
>
> 1. The applicants withdraw the application on the basis set out hereafter and each party bears their own costs, save that the costs as between the applicants and first and third respondents are reserved for determination.
>
> 2. The applicants record that they support the establishment of a township for Wlotzkasbaken.
>
> 3. The respondents agree that the first applicant's members will have the right to pre-emption in respect of such members' site **remaining after the final proclamation of a township and on which such members' dwelling is situated** at purchase prices to be determined by the second respondent in conjunction with first respondent at the upset prices for vacant erven (determined in accordance with the standard or usual practices adopted by local authorities in Namibia for determining such prices) for the purpose of a public auction or tendering process as required by the Local Authorities Act in respect of the sale of the sites of the township to be established, **should second respondent resolve to sell same.**"

(my emphasis).

[13] Notwithstanding the above agreement further disputes developed which again induced the respondents to make application to the Court. The basis of the disputes is also not

relevant to the determination of this case. Again the parties were able to resolve their differences and a second settlement agreement was concluded on the 10th November 2006 (the 2006 agreement). These proceedings were seemingly between the same parties who are now before this Court. The first appellant was therein cited as the second respondent and the second appellant as the first respondent.

[14] The 2006 agreement was also made an order of Court. Its terms were as follows:

> "The parties have reached a settlement in the following terms which they agree will be made an order of court:
>
> 1. The applicants withdraw their application on the basis set out hereafter and each party bears their own costs.
>
> 2. The applicants record that they support the establishment of a township for Wlotzkasbaken **and the parties agree that all erven situated at Wlotzkasbaken will be sold upon the applicants having withdrawn their application.**
>
> 3. The applicants record that they accept the proposed township

layout of 258 erven (drawing No W97007/TB/FIG9) subject to the following:

4. The Wlotzkasbaken Home Owners Association and its members have a pre-emptive right in respect of the erven **upon which their structures are located,** at purchase prices to be determined by the Erongo Regional Council in conjunction with the Minister of Regional, Local Government and Housing at the upset prices for vacant erven (determined in accordance with the standard or usual practices adopted by the local authorities in Namibia for determining such prices) for the purposes of public auctions or tendering processes as require by the Local Authorities Act, and as agreed upon in terms of the Agreement of Settlement concluded during November 2000, which was already made an order of court; and

5. The parties agree that the lease agreements entered into by and between the 1st applicants' members and the 2nd respondent will be renewed on an annual basis until date of exercise of the right of pre-emption by the Wlotzkasbaken Home Owners Association and its members in accordance with clauses 4 and 6 of this agreement, subject to the terms and conditions as contained in the standard lease agreement of the Erongo Regional Council at the time; and

6. The pre-emptive rights of the Wlotzkasbaken Home Owners Association and its members referred to in clause 4 above, shall be exercised by the Wlotzkasbaken Home Owners Association and its members within 90 (ninety) days after receipt of written notification of the purchase price payable."

(my emphasis).

[15] Then on the 20th July 2007 an advertisement appeared

in a local newspaper, *Die Republikein*, under *The Market Place/Die Mark*, in which the first appellant extended the following invitation to the public:

> "**LEASE OF RESIDENTIAL ERVEN (PLOT)**
>
> **AT WLOTZKASBAKEN**
>
> The Erongo Regional Council as part of its mandate in terms of the Regional Council Act, 1992 (No. 22 of l992) section 28J(i), 31 and 32 has erven for lease at Wlotzkasbaken settlement.
>
> Application forms for lease of plots as well as site plans can be obtained from Erongo Regional Council, contact person.
>
> The Chief Regional Officer
> Erongo Regional Council
> Private Bag 5019
> Swakopmund
> Tel No: (064) 4105729
> Fax No: (064) 4105702
>
> Those people who had previously expressed interest are still encouraged to re-apply.
>
> Closing date: 17 August 2007"

[16] The advertisement offered all erven for lease and did not distinguish between those already leased to the first and second respondents and the other vacant sites, nor was the township as yet proclaimed.

[17] The respondents reacted to this advertisement by

sending a letter through their legal practitioner to the legal practitioner of the appellants in which they, *inter alia*, referred to the 2006 agreement and pointed out that by putting up the 258 erven for lease the appellants were in breach of the said agreement. They required an unequivocal written undertaking from the appellants that they would desist from leasing the erven and, failing such undertaking, the respondents stated that they would lodge an application to enforce the terms of their agreement with the appellants.

[18] No such undertaking was forthcoming from the appellants. In fact their legal practitioner, by letter dated the 30th July 2007, denied that his clients were in breach of the agreement and pointed out that sale of the erven could only take place once the township had been proclaimed. Until such time the appellants were entitled to lease the erven which would in no way prejudice the respondents. The letter

confirmed the right of pre-emption of the respondents in regard to sites occupied by them when eventually the erven were sold. The letter ended by warning those persons who had sublet their sites that they had acted in breach of their agreements and reserved the rights of the appellants thereto.

[19] The respondents were not satisfied with that answer and they thereupon launched the present proceedings, on an urgent basis, wherein they claimed the following:

> 1. That the forms and service…
>
> 2. Issuing a rule *nisi*, returnable on Friday, 28 September 2007 at 10h00, calling upon respondents or any other interested parties to show cause why an order in the following terms should not be granted:
>
> 2.1 That the first respondent be directed to comply with the terms and provisions of the agreement of settlement concluded between applicants and first to third respondents on 10 November 2006 and made an order of the above Honourable Court on 20 November 2006 under case number (P) A 338/2000, annexure "B" to the founding affidavit of Martin Moeller in this matter;

2.2 That the first respondent be interdicted and restrained from leasing erven in the Wlotzkasbaken settlement pursuant to its invitation of 20 July 2007, annexure “F” to the founding affidavit or a similar such invitation to that effect;

2.3 Save as authorized by annexure “B” aforesaid and subject thereto, that the first respondent be interdicted and restrained from leasing, or advertising an intention to do so, erven in accordance with the layout plan, annexure “C” to the said affidavit, until it has been amended and the township proclaimed, which would give rise to the establishment of those erven;

2.4 Save as authorized by annexure “B “ aforesaid and subject thereto, that first respondent is interdicted and restrained from leasing the erven to be established upon proclamation of the township of Wlotzkasbaken by reason of its agreement to sell same, as set out in annexure ”B”

2.5 That first respondent shall pay the applicants’ costs, and in the event of any of the other respondents or parties opposing this application such respondents shall pay applicants’ costs jointly and severally with first respondent;

2.6 Grant such further or alternative relief as the Honourable Court may deem fit;

3. That the relief sought in prayers 2.1 to 2.4 *supra*, shall operate as an interim interdict, pending the return day of the said rule *nisi.*”

[20] On this occasion the parties were not able to resolve their disputes and, as previously stated, the matter ran its course and an order, as set out in the Notice of Motion, was granted by the Court *a quo* in favour of the respondents. By agreement between the parties, which agreement is reflected in the Court's order of 16 August 2007, the matter was not heard on an urgent basis, with the result that the order made was not in the form of a rule *nisi* but was a final order made by the Court.

[21] Counsel for the appellants, Mr. Semenya, assisted by Mr. Hinda, submitted that in order to determine the legal interest of the respondents in the matter one should start with the lease agreement between the parties. In terms thereof the respondents had no more than a right to lease certain designated portions of properties.

[22] Thereafter the 2000 agreement granted the respondents a right of pre-

emption in respect of each such member's site remaining after the final proclamation of a township and on which such member's dwelling was situated at a purchase price to be determined as set out in the 2000 agreement.

[23] Counsel further submitted that the 2006 agreement slightly altered the 2000 agreement in regard to the content of the respondents' right of pre-emption to erven upon which their structures were located. Counsel submitted that it is significant that the settlement agreement created a legal right to the respondents in respect of a very reduced portion of the leased area. It limited the appellants to those portions on which their structures were located which would be much less than what they were occupying in terms of their agreements of lease.

[24] Counsel then referred to the advertisement which appeared in *Die Republikein* and stated that it was the case of the respondents that this advertisement breached their right of pre-emption. This was denied by the appellants.

[25] Against this background Mr. Semenya argued that the Court *a quo* as well as the respondents conflated two different concepts in law, with each other. These concepts were the right of pre-emption and the right to exercise an option. With reference to the case of *Owsianick v African Consolidated Theaters (Pty) Ltd,* 1967 (3) SA 310 (AD) counsel explained the difference between a right to pre-emption and an option. On the basis of this difference Counsel submitted that the respondents, who were the holders of pre-emptive rights, could not compel the grantor of those rights, the first appellant, to sell the sites, as the rights so held only arose if and when the grantor thereof should decide to sell. However, in contrast to that, the holder of an option obliged the grantor of the right to sell once the option was exercised.

[26] According to Counsel for the appellants the respondents

would just have to bide their time until and unless the respondents should decide to proclaim the township and then to sell the erven. Until such time they remained leaseholders of the 104 sites which leases, in terms of the settlement agreements, they were entitled to have extended year after year. Regarding clause 2 of the 2006 agreement Counsel argued that the respondents had no legal interest in respect of the unencumbered erven, those were the remaining erven in respect of which the respondents did not hold pre-emptive rights, and, according to Counsel, that clause did therefore not grant them any right to insist on the sale of those erven or, for that matter, any of the erven.

[27] Mr. Semenya's argument that the respondents were only trying to protect their pre-emptive rights is not correct. This was made abundantly clear by Mr. Smuts, assisted by Mr. Tötemeyer, when he addressed this Court on behalf of the respondents.

[28] Mr. Smuts did not have any problem with the law as set out by Mr. Semenya and the differences, pointed out by him, that exist between an option and a pre-emptive right. Counsel however, referred to the two settlement agreements and demonstrated the differences between the 2000 and 2006 agreements. The 2000 agreement was that the respondents' right of pre-emption would arise only if the first appellant decided to sell the erven they occupied. In 2006, however, the parties agreed that all erven situated in Wlotzkasbaken would be sold in consequence of the respondents having withdrawn their application.

[29] Mr. Smuts submitted that by the 2006 agreement the first appellant had bound itself to sell all the erven and by offering those very erven now for lease clearly evinced an intention not to comply with the 2006 agreement.

[30] The issues to be decided in this matter seem to me to be twofold, namely:

1. What the meaning of clause 2 of the 2006 agreement is, seen in the context of the various agreements between the parties and the background as it appears in the documents before the Court, ; and

2. Whether the advertisement appearing in *Die Republikein* of 20 July 2007 when the first appellant offered these erven for lease evinces an intention no longer to be bound by the 2006 agreement, or an important part thereof.

[31] In the recent case of *Coopers & Lybrand v Bryant,* 1995 (3) SA 761 (A) the Appeal Court of South Africa again summarised the rules of construction in the interpretation of documents. At p 767E to 768E the following was stated:

"According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary

meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. (*Principal Immigration Officer v Hawabu and Another,* 1936 AD 26 at 31, *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd,* 1934 AD 458 at 465-466, *Kalil v Standard Bank of South Africa Ltd,* 1967 (4) SA 550(A) at 556D)…

The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself…..

The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ supra;

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted. (*Delmas Milling Co Ltd v du Plessis,*1955 (3) SA 447 (A) at 454G-H; *Van Rensburg en Andere v Taute en Andere,* 1975 (1) SA 279(A) at 305C-E; *Swart's* case *supra* at 200E-201A & 202C; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others,* 1994 (2) SA 172(C) at 1801J).

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."

[32] Bearing in mind the "golden rule" as set out above in the *Coopers & Lybrand*–case, *supra*, it is clear that the background against which the two settlement agreements were concluded was to ensure the smooth development of a settlement area to a proclaimed township with the advantages which such a development would bring to the township, such as the possibility to convert leasehold into property ownership, better services etc., when in each instance their right of pre-emption arose.

[33] This is so because a reading of the two agreements shows that in each instance the parties agreed to certain rights which would ensure that those existing leaseholders would be able, if so advised, to convert their lease holding into property rights on the basis of certain formulae as set out in the agreements once the erven were sold.

[34] It is against this background and in this context that the Court must look at

the agreements between the parties.

[35] It is immediately clear that there are significant differences between the two agreements. Those which are relevant to this case I have highlighted herein before when the agreements were quoted. The first difference deals with the object of the respondents' right of pre-emption. Except that it forms part of the context against which the Court must interpret the instrument it does not take the matter any further. The second, and more significant difference, relates to how and when this right could be exercised by the respondents.

[36] In the 2000 agreement the right of pre-emption was to be exercised in regard to the sites occupied by members of the first respondent "should second respondent resolve to sell same." (As previously pointed out the second respondent in those proceedings has now been sited as the first respondent in the present proceedings.)

[37] This agreement therefore accorded with what both Counsel argued in respect of a right of pre-emption namely, that the right could only be exercised if and when the grantor thereof should decide to sell the property which was subject to the right, and the decision to sell was solely within the discretion of the grantor of the right.

[38] Once the 2000 agreement was made an order of Court the respondents withdrew their application against the appellants.

[39] The 2006 agreement differed from the 2000 agreement in that the parties then agreed “that all erven situated at Wlotzkasbaken will be sold upon the applicants having withdrawn their application.” (clause 2)

[40] In my opinion the grammatical meaning of what is set out above is clear. The reference to “all erven” makes it clear that the parties meant all 258 erven in the new, to be proclaimed township, would be sold. Such interpretation is

not repugnant or inconsistent with the agreement as a whole nor does it result in any absurdity. In fact nothing of the sort was pointed out by Mr. Semenya. In anticipation that the erven would be sold, the 2006 agreement also provided for a time frame in which members of the first respondent must exercise their rights of pre-emption, namely 90 days after the first appellant has given notice of its determination of the price of the properties. There was no such determination in the 2000 agreement seemingly because of the uncertainty of when and if the first appellant would decide to sell the sites. In the context of the 2006 agreement the setting of a time frame by the parties upon which the respondents must exercise their rights supports the interpretation of clause 2 of the agreement namely, that the words “all erven……will be sold” must be given its ordinary grammatical meaning.

[41] Clause 2 of the 2006 agreement clearly is inconsistent, in the above respect, with the provisions of the 2000

agreement and where that is so, effect must be given to the provisions of the later agreement as a deliberate change of language in a document such as the present *prima facie* imports a change of intention. The 2000 agreement left sale of the erven completely within the discretion of the grantor of the right, i.e. the first appellant. In terms of the 2006 agreement the first appellant was bound to sell upon the withdrawal of the application then instituted by the respondents. (See in this regard *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co. Ltd.* 1947 (2) SA 1269 (A) at 1279; *Minister of Defence v Mwandinghi,* 1993 NR 63 (SC) and *Moodley v Umzinto Town Board,* 1998 (2) SA 188 (SCA).)

[42] Clause 2, as a term of the 2006 agreement, imposed bilateral duties on the parties, that meant that it required of both parties to perform what was required of them in terms of the agreement. In this instance the duty was on the

respondents to first withdraw their application and once this was done the duty was then on the appellants to sell all erven.

[43] It is common cause that the respondents have performed their obligation and they have withdrawn their application against the appellants. It is therefore now the duty of the appellants to perform their part in terms of their undertaking. No time within which this undertaking must be performed was laid down by the parties. However, where a bilateral contract does not stipulate a time for performance, in this instance the performance by the appellants, the law implies the concept of a reasonable time, as was also pointed out by Mr. Smuts. (See in this regard *Willowdene Landowners Ltd v St Martin's Trust,* 1971 (1) SA 302 (TPD); *Cardoso v Tuckers Land and Development Corporation,* 1981 (3) SA 54 (WLD),)

[44] The above cases set out what should be taken into account to determine, in the peculiar circumstances of each case, what a reasonable time would be. Mr. Simon, the townplanner who deposed on behalf of the respondents, and Mr. Stubenrauch, the townplanner deposing on behalf of the appellants, both gave their estimates. That of Mr. Stubenrauch is somewhat longer than that of Mr. Simon. He estimated that it would still take 8 to 12 months to complete the outstanding steps and to proclaim the township. Although I am not called upon to determine what in the circumstances would be a reasonable time to proclaim the township these estimates are relevant to determine what the parties were contemplating when they entered into the 2006 agreement.

[45] Bearing in mind what has been set out above, I agree with Mr. Smuts that clause 2 of the 2006 agreement is clear and unambiguous. Its terms created a bilateral agreement

where the respondents would withdraw their application, and upon that having occurred, the respondents agreed to sell all the erven situated in the to be proclaimed township of Wlotzkasbaken. It was common cause that this could only happen once the township was proclaimed and it is in this regard that the concept of a reasonable time applies. The period of a reasonable time also only applies to the time necessary to convert the settlement area into a proclaimed township upon which the erven could then be sold.

[46] What is the effect of this agreement? It was common cause that in terms of the 2006 agreement the respondents have a pre-emptive right to buy the erf or erven on which their structures are located. It however does not end there. By their agreement the parties converted their right of pre-emption, which was, as was correctly argued by both Counsel, uncertain as to when, if ever, it would be exercisable, into certainty, by agreeing that the appellants

would in fact sell all erven which would then enable them to exercise their pre-emptive rights.

[47] I can find nothing repugnant or *contra bonos mores* in such an agreement nor was it argued that that was the case. Mr. Semenya's argument that the 2000 and 2006 agreements only established for the appellants a bare pre-emptive right must be rejected for the above reasons.

[48] The appellants' counsel however argued that in regard to the unencumbered erven, those are the erven not subject to a pre-emptive right, the agreement cannot require of the appellants a duty to sell. Counsel argued that the respondents have no legal interest in those erven which would enable them to enforce their bargain.

[49] It is not quite clear to me what Counsel meant by the words "legal interest". No authority was quoted to us which

would support such an argument. If thereby is meant that an enforceable contract could only come into being when such legal interest exists, be it in the form of some or other consideration or underlying right, then I must differ.

[50] As far back as 1919 the South African Appeal Court held in the case of *Conradie v Rossouw,* 1919 AD 279 at 320:

> "According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid agreement arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (Grotius 3.6.2). The promise must have been made with the intention that it should be accepted (Grotius 3.1.48); according to Voet the agreement must have been entered into *serio ac deliberato animo*. And this is what is meant by saying that the only element that our law requires for a valid contract is *consensus*, naturally within proper limits – it should be *in* or *de re licita ac honesta.*"

(See further *Bank of Lisbon and South Africa Ltd v De Ornelas and Another,*1988(3) SA 580 (AD) at 599B and *Meyer v Iscor Pension Fund,* 2003 (2) SA 715 (SCA) at 733E).

[51] In my opinion clause 2 of the 2006 agreement complied fully with what was stated in the *Conradie*-case, *supra,* by De Villiers, AJA. It was never argued that there was no consensus amongst the parties or that they did not contract with a serious and deliberate intention. It could also not be said that the clause was contrary to public policy. It is a natural consequence that erven in a newly proclaimed township will be sold. The selling of the erven would also be in the interest of the respondents as it would speed up the proclamation of the township which in turn would enable them to acquire title in such property as is set out in the 2006 agreement. The sale of all erven could in time open the door for the establishment of a local authority with powers to levy rates and taxes and provide proper services.

[52] I therefore agree with Mr. Smuts that clause 2 of the 2006 agreement constitutes a valid and enforceable bilateral agreement namely that upon withdrawal of the application the

appellants were obliged to sell all erven in the proclaimed township of Wlotzkasbaken, of course subject to the constraints of a reasonable time in which to proclaim the township. The Court *a quo* correctly found that the respondents' justiciable right arose out of the 2006 agreement.

[53] Once the terms of the agreement are determined the Court must now consider whether the advertisement whereby the public was invited to lease erven in Wlotzkasbaken constituted a breach of the agreement between the parties.

[54] Mr. Smuts submitted that the first appellant committed an anticipatory breach whereby an intention was evinced by the first appellant to be no longer bound by the 2006 agreement. In this regard Counsel relied on the case of *Tuckers Land and Development Corporation (Pty) Ltd. v Hovis,* 1980 (1) SA 645 (A).

[55] This case was further explained by the Constitutional

Court of South Africa in the case of *Barkhuizen v Napier,* 2007 (5) SA 323 (CC) which confirmed that good faith underlies our law of contract. The following was stated on 346 – 347:

> "[80] The requirement of good faith is not unknown to our common law of contract. It underlies contractual relations in our law. The concept of good faith was considered by the Appellate Division in *Tuckers Land and Development Corporation v Hovis,* albeit in the context of whether the doctrine of anticipatory breach should be grafted in our law. The Court was concerned, in particular, with whether the doctrine of anticipatory breach relates to a breach of an existing obligation. The Court observed that in Roman law courts generally had wide powers to complement or restrict the duties of parties, and to imply contractual terms in accordance with the requirement of justice, reasonableness and fairness. The concepts of justice, reasonableness and fairness constitute good faith…"

The Court then quoted with approval the following excerpt from the *Tuckers Land*–case, namely:

> "[81] It should be said that it is now, and has been for some time, felt in our domain, no doubt under the influence of the English law, that in all fairness there should be a duty upon a promisor not to commit an anticipatory breach of contract, and

such a duty has in fact often been enforced by our Courts. It would be consonant with the history of our law, and also legal principle, to construe this as an application of the wide jurisdiction to imply terms conferred upon by the Roman law in respect of the *judiciae bonai fidei.* It would not be inapt to say, elliptically, that the duty flows from the requirement of *bona fides* to which our contracts are subject, and that such duty is implied in law and not in fact."

[56] Mr. Semenya conceded that to sell property does not include the leasing thereof. It was never, in my opinion, contemplated by the parties, when the 2006 agreement was concluded, that the sites, in the to be proclaimed township, would be leased. The obligation undertaken by the first appellant in terms of the 2006 agreement was to sell all erven. This meant, in this particular instance, that they would take all necessary steps to proclaim the township in order to fulfill their obligation to sell the erven and that they would do so within a reasonable time. The invitation to the public to lease the said erven was clearly not such a step and was in direct conflict with what first appellant had undertaken to do.

I agree with Mr. Smuts that the right acquired by the respondents in terms of their agreement with the appellants was the right to have all the erven sold once the township was proclaimed. The intention to lease those erven was a breach of the right of the respondents to have the erven sold.

[57] The intention of the first appellant not to comply with their obligation was made clear by the fact that since the 2006 agreement no further steps were taken to have the township proclaimed. The reason for this is to be found in the affidavit of the deponent on behalf of the first appellant who candidly stated that it was no longer a priority of the first appellant to proclaim Wlotzkasbaken as a township as it only ranks fourth after three other settlement areas. It was furthermore pointed out by Mr. Smuts that it was now contended by Mr. //Garoeb that it was never the intention of the parties that all erven should be put up for sale.

[58] In regard to the test which a Court should apply in order to establish an anticipatory breach of the contract, the following was stated in the *Tuckers Land*-case, *supra*, at p. 653B – E:

> "What the proper test is to be applied to the promisor's conduct is not obvious, as there appear to be, conflicting *dicta* in this regard. This Court, however, seems to have gravitated in the direction of an objective test based upon the reasonable expectation of the promisee. In *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou,* 1978 (2) SA 835(A) at 845 *in fine*-846A it is pointed out that 'om 'n ooreenkoms te repudieer, hoef daar nie ……'n subjektiewe bedoeling te wees om 'n einde aan die ooreenkoms te maak nie'.
>
> In *Ponisamy and Another v Versailles Estates (Pty) Ltd,* 1973 (1) SA 372(A) at 387B the following passage from the judgment of Devlin J in *Universal Cargo Carriers Corporation v Citati,* (1957) 2 QB 401 at 436 is cited with approval:
>
> 'A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must 'evince an intention' not to go on with the contract. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfill his part of the contract.'

The test here propounded is both practicable and fair, and this is the test which I propose to apply in the present case."

> ('to repudiate an agreement, there need not be…… a subjective intention to bring an end to the agreement.' - my free translation of the afrikaans excerpt from the *Van Rooyen*-case, referred to above.)

[59] The full excerpt of what was said by Rabie JA (as he then was) in the *Van Rooyen*-case, *supra*, at p 845 -846 is the following:

> "Om 'n ooreenkoms te repudieer, hoef daar nie, soos in die aangehaalde woorde uit *Freeth v Burr* te kenne gegee word, 'n subjektiewe bedoeling te wees om 'n einde aan die ooreenkoms te maak nie. Waar 'n party, bv, weier om 'n belangrike bepaling van 'n ooreenkoms na te kom, sou sy optrede regtens op 'n repudiering van die ooreenkoms kon neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom. (Kyk De Wet en Yeats *Kontraktereg en Handelsreg* 3de uitg 0p 117)."

(To repudiate an agreement, there need not be, as was stated in the words cited from *Freeth v Burr* , that there be a subjective intention to bring an end to the agreement. Where a party, e.g., refuses to comply with an important term of the agreement, his conduct could, legally speaking, amount to a repudiation of the agreement, even if he was of the opinion that he properly complied with his obligations). – my free translation.

[60] The decision of the first appellant to lease the sites is in conflict with their undertaking to sell all erven upon withdrawal

of the application against them. The conduct of the first appellant was such that it would lead a reasonable person to the conclusion that it evinced an intention not to fulfill its part of the contract.

[61] As was found by the Court *a quo* effect should be given to the rule *pacta sunt servanda* and to allow the appellants to renege on their contract would be "stultifying and subverting the principle of the rule of law, which is firmly imbedded in Namibia's constitutionalism….."

[62] I have therefore come to the conclusion that the appeal should be dismissed and the following order is made:

1. The appellants' appeal is dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

2. Such costs to be paid jointly and severally by the appellants, the one

paying the other to be absolved.

_____
STRYDOM, AJA

I agree.

_____
CHOMBA, AJA

I agree.

_____
MTAMBANENGWE, AJA

Counsel on behalf of the 1st appellant: MR. I A M SEMENYA, SC
Assisted by: Mr. G S Hinda

Instructed by: Shikongo Law Chambers

Counsel on behalf of the 2nd and 3rd appellants No appearance

Instructed by: The Government Attorney

Counsel on behalf of the 1st and 2nd respondents: Mr. D F Smuts, SC
Assisted by: Mr. R Tötemeyer

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