NOT REPORTABLE

CASE NO: I 1509/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SAAMSPAN FARMING CC **PLAINTIFF**

and

MARLIZE WEAKLY **DEFENDANT**

CORAM: **HOFF, J**

Heard on: 11 October 2010

Delivered on: 14 October 2010

Reasons on: 05 November 2010

JUDGMENT
Exception

HOFF, J: [1] This is an exception taken to the particulars of claim of plaintiff on the basis that it lacks the necessary averments to sustain a cause of action

[2] This Court dismissed the exception on 14 October 2010 indicating that reasons would be provided in due course. These are the reasons.

[3] The parties concluded a written agreement of sale of land for the purchase price of N$120.000.00.

The parties agreed that the purchase price of the property amounted to 30 cows with calves which had to be delivered within 90 days.

The parties subsequently amended the agreement of sale pertaining to the purchase price and agreed orally that the defendant shall pay to the plaintiff the sum of N$120.000.00 together with the delivery of six young breeding cows/heifers in good condition.

[4] The exception relates to the no-compliance of a non-variation clause contained in paragraph 7 of the initial contract which reads *inter alia* as follows:

> "... that the terms of the agreement constitutes the whole agreement between the seller and the purchaser and that no variation, alteration, modification or suspension of any of the terms of this agreement of sale shall be of any force or effect unless committed to writing and signed by the seller and the purchaser."

[5] It is common cause that the amended agreement was an oral agreement.

[6] The exception was thus taken against the particulars of claim since the plaintiffs did not attach or plead a *written* amended agreement between the parties and that plaintiff could not rely on any term of the oral agreement which is in violation of the non-variation clause.

[7] It was submitted on behalf of the defendant by Ms Angula that it is now settled law that if a written contract provides that any variation of its terms should be in writing, the parties will be bound to such a provision and any purported variation which is not in writing will be void.

[8] This Court was referred to *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA760 (A)* which confirmed an Orange Free State Provincial Division decision that a clause in a written agreement which provides *that "any variations in its terms of this agreement … shall be in writing otherwise the same shall be of no force or effect"* does not bring about a substantial limitation of contractual freedom and is binding: consequently evidence of an oral agreement varying the written in inadmissible.

[9] In *Brisley v Drotsky 2002 (4) SA 1 SCA* the Supreme Court of Appeal in South Africa re-affirmed the principle laid down in *Shifren (supra)* viz. that an entrenchment clause in a written contract providing that all amendments to the contract have to comply with specified formalities is still binding and remains in force.

[10] It was further contended on behalf of the defendant that in terms of section 1 of the Formalities in Respect of Contracts of Sale of Land no contract of sale of land shall be of any force or effect if concluded after the commencement of that Act (Act 71 of 1969) unless it is reduced to writing and signed by the parties thereto or by their agents acting on their authority.

[11] The plaintiff pleaded in its particulars of claim that plaintiff duly complied with its obligations by effecting delivery and transfer of the immovable property to the defendant. This must be taken to be true. The dispute was the exact amount to be paid. It furthermore must be accepted that the amount of N$120.000.00 was paid since plaintiff sues for specific performance in terms of the agreement namely the delivery of 6 young breeding cows/heifers in good condition,

alternatively for payment of the sum of N$36.000.00 being the value of 6 young breeding cows/heifers in good condition.

[12] Paragraph 5 of plaintiff's amended particulars of claim reads as follows:

> "A dispute arose between the plaintiff and the defendant as to the purchase price to be paid in terms of the written agreement of sale aforesaid, whereafter on 28 June 2007 the plaintiff – represented by Mr Mathiam Hoffmann – and the defendant – represented by Mr Poenie Weakly – entered into an oral agreement in terms of which the dispute between the plaintiff and the defendant concerning the purchase price was settled on the basis that the defendant shall pay to the plaintiff the sum of N$120.000.00 together with the delivery of 6 young breeding cows/heifers in good condition."

[13] In a letter dated 28 June 2007 (and marked "C") the legal representatives of the plaintiff stated inter alia the following:

> "We confirm that the matter has been settled as follows:
>
> 1. Mr Weakly will deliver 6 (six) cows to Mr Hoffmann before the end of the week;
>
> and
>
> 2. Mr Hoffmann will be entitled to the full N$120.000.00 on the day of registration.
>
> Over and above the 6 (six) cows and the N$120.000.00, the parties shall have no further claims against each other."

[14] Subsequently in a letter dated 11 July 2007 addressed to plaintiff's legal representatives by defendant's legal representatives the following appears *inter alia:*

> "We confirm that you informed writer hereof that the final purchase price is N$120.000.00 plus 6 head of cattle.
>
> We will contact you immediately after date of transfer to make the necessary arrangements for the delivery of 6 head of cattle.
>
> We further confirm that as date hereof no party shall present or in future have any further claim(s) the other in respect of the property subject to their respective rights as per the deed of transfer and that Fisher, Quarmby & Pfeifer will ensure to effect transfer of the property to our client immediately."

[15] It was submitted by Ms Angula that no authority was referred to by counsel appearing on behalf of the plaintiff that such a valid oral compromise could be concluded in violation of a non-variation clause. She submitted, with reference to the case of *Karson v Minister of Public Works 1996 (1) SA 887 ECD,* that even where there was such a compromise, the terms of such comprise must have been in writing in compliance with the non-variation clause of the written agreement.

[16] In *Karson (supra)* the court held in order for there to be a valid compromise or transaction there must have been a dispute or uncertain obligations which the parties by mutual assent had agreed to resolve by creating a fresh set of contractual rights and obligations.

[17] The court on the facts in *Karsen (supra)* found that at best for the plaintiff the payment made *"in full and final settlement for all amounts due and owing in respect of the purchase of the property"* was an invitation to the defendant to *vary* the contractual relationship then existing between them under the deed of sale.

[18] It is in this context that it was held at p 894 H that such *variation* would in any event have been unenforceable due to it not having been reduced to writing and signed by the parties as required by the deed itself.

[19] In the present case the plaintiff did not plead that there was an oral *variation* of the written contract concluded between the parties, but that there was a compromise i.e. settlement by agreement of a dispute. The dispute related to the purchase price.

[20] A compromise, being a contract must thus reflect that there was consensus between the parties.

[21] Being a contract, a compromise can only be a valid compromise agreement, i.e. a binding agreement of compromise, if there was an *offer* of compromise which was *accepted* by the other party.

[22] In *Karson (supra) at 893 f* 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–"

[23] In *Georgias and Another v Standard Chartered Finance Zimbabwe Ltd. 2000 (1) SA 126 ZSC Gubbay CJ* 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."

[24] It was submitted by Mr Corbett that in the present case no such right was reserved by anyone of the litigants.

[25] *Gubbay CJ* continues at *139 B* as follows:

> "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."

and at 139 c

> "Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal."

[26] In Hamilton v Van Zyl 1983 (4) SA 379 ECD at 383 G – H 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.

[27] It appears from the aforesaid that a valid compromise had been concluded between the plaintiff and the defendant and as a result the non-variation clause (in the absence of any suggestion that the right to rely thereon was reserved) is of no force or effect.

[28] Plaintiff's particulars of claim do disclose a cause of action and in the circumstances the exception cannot be upheld.

HOFF, J

ON BEHALF OF THE PLAINTIFF: **ADV. CORBETT**

Instructed by: **FISHER, QUARMBY & PFEIFER**

ON BEHALF OF THE FIRST DEFENDANT: **MS ANGULA**

Instructed by: **LORENTZ ANGULA INC.**