

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: A 57/2015

In the matter between:

JOHANNA INTAMBA

APPLICANT

And

UERIHEKA TJAPAKA

1ST RESPONDENT

SAMEUELINE TJAPAKA

2ND RESPONDENT

JOEL HAFENI SHAFASHIKE

3RD RESPONDENT

EMILIA NANDJILA SHAFASHIKE

4TH RESPONDENT

THE REGISTRAR OF DEEDS

5TH RESPONDENT

Neutral citation: *Intamba v Tjapaka (A57-2015) [2015] NAHCMD 218 (16 September 2015)*

Coram: **UEITELE, J**

Heard: **08 September 2015**

Delivered: **16 September 2015**

Flynote: **Statute** - Sale of the Agricultural (Commercial Land) – requirements of s 7 of the Married Persons Equality Act, 1996 (Act No.1 of 1996).

Practice – Purpose of affidavits in motion proceedings - affidavits serve to both place evidence before the court and to define the issues between the parties. - Respondents claim that the applicant had not acquired her late husband's consent in writing to purchase the farm - Insufficient facts averred to establish such lack of consent.

Summary: During 2010 the parties entered into a written sales agreement of Farm Guiganab-Ost, No. 273, Registration Division "B", situate in the District of Grootfontein, Otjozondjupa Region, measuring 3006,6982. In terms of the sales agreement the applicant had to pay a deposit in the amount of N\$ 500 000 (Five Hundred Thousand Namibia Dollars) and certain other payments owed by the first and second respondents to the Agricultural Bank of Namibia. Transfer of the farm would take place after October 2014 on payment of the balance of the purchase price.

On 06 June 2014, the 1st and 2nd respondents' legal practitioners addressed a letter to the applicant stating that the purchase price agreed upon was unrealistic and that the applicant must adjust the price to market related price. On 11 July 2014 the 1st and 2nd respondents' legal practitioners addressed another letter to the applicant stating that because the purchaser was married in community of property to the late Andrew Anyanya Intamba, she legally could not have entered into a sales agreement involving the immovable property in question without the authorization of her late husband and that that agreement is thus void.

The parties exchanged correspondences, in her final correspondence to the first and second respondents, the applicant sought an undertaking from the first and second respondents that they will not proceed the execution of the Deed of Sale they (i.e. first and second respondents) concluded with the third and fourth respondents. When the first and second respondent refuse to give the undertaking sought by the applicant, the latter approach this court in essence seeking specific performance. The first and second respondents opposed the application in their opposition they simply raised some points in limine.

Held that in application proceedings the affidavits take the place not only of the pleadings in action proceedings but also of the essential evidence which would be led at a trial.

Held further that, by electing not to answer the allegations made by the applicant in her founding affidavit in his answering affidavit, it follows that the facts raised by the applicant in her founding affidavit were not placed in dispute and must be accepted as correct.

Held further that the first and second respondents in their affidavit, had to furnish facts in the form of evidence of the nature of the applicant's and the first respondent's lack of consents from their spouses to conclude the sales agreement. The allegation, that the applicant did not have her spouse's consent to enter into the sales agreement, in the answering affidavit is a conclusion of law, it is at best for the first respondent an inference, a "secondary fact", with the primary facts on which it depends omitted.

Held further that the absence of the signatures of the late Andrew Anyanya Intamba (the husband of the purchaser) and Samuelina Tjapaka (the wife of the seller) is not evidence of absence consent from those parties. The first and second respondents have failed to establish the contravention (if any) either by the applicant or by the first respondent of s7 of the Married Persons Equality Act, 1996 or of the lack of compliance with the provision of s1 of the Formalities in respect of Contracts of Sale of Land Act, Act No. 71 of 1969.

ORDER

- 1 The first and second respondents' point *in limine* is dismissed;
- 2 The Memorandum of Agreement of Sale of the Immovable Property described as :

CERTAIN: Farm Guiganab-Ost, No. 273,

SITUATED: Registration Division "B"
Otjozondjupa Region,

MEASURING 3006, 6982 (Three Thousand and Six comma Six Nine Eight Two) Hectares

HELD By Deed of Transfer No. [T 5.....]
entered into by and between the first respondent and the applicant on 6th December 2010 is declared valid and binding;

- 3 The first and second respondents must apply for and obtain a Certificate of Waiver from the Minister of Lands and Resettlement through the Permanent Secretary as contemplated in section 17(4) of the Agricultural (Commercial) Land Reform Act, 1995 and Clause 20.2 of the sales agreement by no later than fourteen days (i.e. not later than the 01st of October 2015) from the date of this of this order.
- 4 If the first and second respondents fail or refuse to neglect to comply with paragraph 3 of this order then and in that event the Deputy Sheriff, for the District of Windhoek is ordered and authorized to apply for and obtain the Certificate of Waiver from the Minister of Lands and Resettlement through the Permanent Secretary as contemplated in section 17(4) of the Agricultural (Commercial) Land Reform Act, 1995 and Clause 20.2 of the sales agreement;
- 5 The first and second respondents are interdicted and restrained from taking any steps whatsoever pursuant to the purported agreement which the first and second respondents entered into on or about 24th July 2014 regarding the sale of the Farm by the first and second respondents to the third and fourth respondents.
- 6 If the first, second, third and fourth respondents have registered the Farm in the name of the third and fourth respondents prior to the hearing of this application pursuant to any purported agreement entered into by the aforesaid respondents, declaring that such registration is declared void and of no legal force and effect.
- 7 The first and second respondents are directed to take such steps as are necessary to pass transfer to the applicant against payment of such transfer costs as contemplated in clause 4 of the sales agreement by the applicant and any outstanding balance on the purchase price as contemplated in clause 3 of

the sales agreement not later than 10 days of such payments and if the first and second respondents fail to comply with this paragraph 7, then and in that event, the Deputy Sheriff, for the District of Windhoek is authorized to take such steps and to sign such documents as may be necessary to register the Farm in the applicant's name.

- 8 The first and second respondents must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs for this application on the scale as between attorney and client, which costs include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE J:

Introduction

[1] On 06 December 2010 and at Grootfontein, the first respondent in this application (I will, in this judgment, refer to the first respondent as the 'the seller') entered into a written agreement (I will, in this judgment, refer to the written agreement as 'the sales agreement') with the applicant (I will, in this judgment, refer to the applicant as 'the purchaser'), in terms of which the seller sold to the purchaser a certain Farm Guiganab-Ost, No. 273, Registration Division "B", situate in the District of Grootfontein, Otjozondjupa Region, measuring 3006,6982 (Three Nil Nil Six comma Six Nine Eight Two Hectares) (I will, in this judgment, refer to the this property as 'the farm').

[2] I will, below, quote the paragraphs of the sales agreement which are in my view relevant to the resolution of this matter. Clauses 1 and 3 of the sales agreement amongst others provides as follows:

‘1 **SALE AND PURCHASE**

The seller hereby sells to the Purchaser who hereby purchases the under mentioned property at the price and upon the conditions more fully describe hereinafter.

3 PRICE:

- 3.1 The purchase price of the Farm is an amount of N\$3,608,037.84 (Three Million Six Hundred and Eight Thousand Thirty Seven Namibia Dollars Eighty our Cents) calculated at an amount of N\$1,200.00 (One Thousand Two Hundred Namibia Dollar) per hectare over the 3006.6982 (Three Nil Nil Six Point Six Nine Eight Two) Hectares, payable as follows:
- 3.1.1 a deposit in the amount of N\$500,000.00 (Five Hundred Thousand Namibia Dollars) upon signing;
- 3.1.2 the annual bond payments in the amount of N\$70,000.00 (Seventy Thousand Namibia Dollars) due and owing by the Seller to the Bank for the period 2011 to 2014;
- 3.1.3 the balance of the purchase price (after deduction of the deposit and the annual bond payable) free of any interest against registration of transfer of the property into the applicant's name...'

[3] Clause 6 of the sales agreement amongst others provides as follows:

'6 POSSESSION, OCCUPATION AND TRANSFER:

- 6.1 The parties hereby record that the property shall only be transferred into the name of the Purchaser upon the lapsing of the non-alienation clause registered over the Farm in favour of the Agricultural Bank of Namibia in 2014.
- 6.2 The Purchaser shall rent the property from the Seller as from the date of signature of this agreement until the property is registered in the name of the Purchaser upon the lapsing of the non-alienation clause registered over the property in favour of Agricultural Bank of Namibia in 2014.
- 6.3 The Seller shall give free access, possession and vacant occupation of the property to the Purchaser on the date of signature of this agreement pending the fulfillment of the suspensive conditions referred to in paragraph 20 hereinunder, from which date the risk of profit or loss shall pass to the Purchaser.
- 6.4 The Seller shall ensure that all the employees have been fully remunerated and that all employees and other occupants who are not related by the purchaser have vacated the property the property on the date of signature of this agreement.

6.5 Both the seller and the Purchaser undertake not to allow any person any hunting rights on the Property from the date of signature of this agreement unless mutually agreed upon between the parties.'

[4] Clause 7 of the sales agreement amongst others provides as follows:

7 OCCUPATIONAL RENTAL:

The Purchaser shall not be required to pay any occupational rental to the seller as the deposit in the amount of N\$500,000.00 payable upon signing this agreement and the interest accruing on such amount shall be regarded and accepted by both parties as sufficient compensation for the occupation of the Farm until the date of transfer thereof in the name of the Purchaser.'

[7] On 06 December 2010 the purchaser, by cheque, paid the deposit in the amount of N\$ 500 000 to the Seller. The purchaser furthermore made the following payments:

- (a) An amount of N\$ 70 000, on 03 November 2011, to the Agricultural Bank of Namibia in respect of bond repayments due and owing by the seller to the Agricultural Bank of Namibia for the period 2010;
- (b) An amount of N\$ 60 000 to the seller; on 14th December 2014;
- (c) An amount of N\$ 206 596,44, on the 4th of September 2012 to the Agricultural Bank of Namibia in respect of bond repayments due and owing by the seller to Agricultural Bank of Namibia for the period 2012 to 2014.

I pause here and observe that all these payments were effected with cheques drawn by Mr. A A Intamba.

[8] After paying the deposit the purchaser took occupation of the farm and has been in occupation of the farm from December 2010 to the date when these proceedings were instituted, but certain events which resulted in the current proceedings transpired during the period between the purchaser taking occupation of the farm and the institution of these proceedings. I will, however, only deal with the events relevant to institution of these proceedings.

[9] On the 6th of June 2014 the seller's legal practitioners of record Dr Weder, Kauta & Hoveka Inc addressed a letter to the purchaser. That letter amongst other things reads as follows:

'You will appreciate that in terms of clause 20.7 which reads as follows:

"In the event of the property not being transferred into the name of the Purchaser for any reason whatsoever, the Seller shall repay all amounts already paid by the Purchaser to the Seller together with interest of 30% per annum on such amount."

You will appreciate that the property neighbouring this particular property was disposed of in 2013 for the amount N\$1,700.00 per hectare and hence the offered amount of N\$1,200.00 per hectare in 2010 was not realistic.

Hence we are invoking the provisions of clause 20.7 quoted above and intend offering the Farm to a third party for the amount of N\$1,700.00 per hectare with the result of reimbursing you as per the provisions of the above quoted clause 20.7

In the event that you are interested in taking up this offer of N\$1,700.00 per hectare, kindly inform us within seven (7) days of receipt hereof, failing which we will be entitled to offer the property to a third party for the amount of N\$1,700.00 per hectare.'

[10] On the 11th of July 2014 the seller's legal practitioners of record addressed another letter to the purchaser. That letter amongst other things reads as follows:

'We hold instructions that on the 06th of December 2010 and at Grootfontein, the Parties purported to enter into a sales agreement in relation to the abovementioned farm.

On account of the fact that the purported Purchaser was married in community of property to the late Andrew Anyanya Intamba, she legally could not have entered into a sales agreement in relation to the immovable property Farm Guiganab-OST, No. 273 without the authority of her late husband. In view of the above, our clients are prepared to reconstitute in the amount of N\$ 280 000-00 upon the sale of the Farm at the end of October 2014.

Kindly be advised that this constitute notice that the lease agreement is being terminated by the end of October 2014 and that you must vacate the Farm and hand over possession to our clients, failing which legal action would be taken at your own costs.'

[11] On the 24th of July 2014 the seller and her spouse (the second respondent in this application) concluded a deed of sale with Joel Hafeni Shafashike and Emilia Nandjila Shafashike (the third and fourth respondents respectively in this application). In terms of that deed of sale the seller and her spouse sold the farm to the third and fourth respondents for the sum of N\$ 4 960 009,23 (Four Million Nine Hundred and Sixty Thousand and Nine Namibia Dollars and Twenty Three Cents).

[12] As a result of the events that I set out in the preceding paragraphs the purchaser's legal practitioners (who I will refer to as Conradie & Damaseb) of record exchanged correspondences with the seller's legal practitioners of record (who I will refer to as Dr Weder). The first of the correspondences addressed by Conradie & Damaseb to Dr Weder was on 25 July 2014. In that letter Conradie & Damaseb amongst others stated that:

- (a) 'The seller and the purchaser concluded a valid Deed of Sale of the Farm on the 6th of December 2010, and that the purchaser was not prepared to renegotiate the purchase price as it has already been agreed upon. Dr Weder's attention was drawn to the cases of *Fraser and Another v Viljoen*¹ and *Johnston v Lea*²
- (b) The purchaser rejects the seller's attempts to have the purchase price revised and that the purchaser was still willing to comply with the material terms of the Deed of Sale signed on 6th December 2010. It concluded by stating that purchaser hoped that the sellers would abandon or desist in their threat to terminate the Deed of Sale.'

[13] Dr Weder replied to the letter of 25 July 2014, on 01 August 2014. In their reply Dr Weder simply stated that they took issues with all the paragraphs in the letter of 25 July 2014 and that they reiterate the seller's instructions to them conveyed on 11 July 2014 to the purchaser. Conradie & Damaseb addressed a further letter dated 12 February 2015 to Dr Weder in which they amongst others:

¹ 2008 (4) SA 106 at 110 F-G.

² 1980 (3) SA 927 at 946 H.

- (a) State that the purchaser was not prepared to renegotiate the purchase price of the Farm since the purchase price has already been agreed upon.
- (b) State that the purchaser was disturbed by the fact that the seller and her spouse entered into a deed of sale of the farm with the third and fourth respondents and that the purchaser's personal rights over the farm became vested on the 6th of December 2014.
- (c) State that the purchaser was ready and offered to make the final payment against the transfer of the farm into her name.
- (d) Put the purchaser on terms to, within ten (10) days of receipt of that letter; sign all the necessary papers for the waiver.
- (e) Requested the seller to provide Conradie & Damaseb, with the assurance that second deed of sale concluded with the third and fourth respondents would not be proceeded with.

[14] Dr Weder replied to the letter of 12 February 2015 on 16 February 2015. In their reply Dr Weder stated that seller was under no obligation to give the assurance sought, and invited the purchaser to approach the High Court for an interdict if she so chose. The letter furthermore demanded that purchaser pay rental for the month of January 2015 in the amount of N\$10 416,66 as per paragraph 7 of the sales agreement.

[15] On 13 March 2015 the purchaser approached this court on an urgent basis seeking interim relief pending the return date. The urgent application was struck from the roll for lack of urgency. On 17 March 2015 the purchaser in terms of Rule 73 (3) caused the Notice of Motion to be served on the seller. In the Notice of Motion the purchaser in essence sought³ an order of specific performance against the seller. On

³ The purchaser sought the following relief in the Notice of Motion, an order:

- '1 Declaring the Memorandum of Agreement of Sale of the Immovable Property described as a certain Farm Guiganab-Ost, No. 273, situate in the District of Grootfontein, Otjozondjupa Region, measuring 3006.6982 (Three Nil Nil Six Point Six Nine Eight Two Hectares), (hereinafter referred to as "the Farm") entered into by and between the first respondent and I on 6th December 2010.
- 2 Directing (compelling) the first and second respondents to apply for and obtain a Certificate of Waiver from the Minister of Lands and Resettlement through the Permanent Secretary contemplated in section 17(4) of the Agricultural (Commercial) Land Reform Act No. 6 of

31 March 2015 the seller and his spouse signified their intention to oppose the relief sought by the purchaser and on the 21st of April 2015 the seller and his spouse filed their affidavits opposing the purchaser's application. In the opposing affidavit the seller did not answer the allegations made by the purchaser but simply raised a point *in limine*.

[16] I will, verbatim, quote the point *in limine* raised by the seller in his opposing affidavit, he said:

'POINT IN LIMINE

10. I hereby wish to raise a point *in limine* at the outset, which I am advised by my legal practitioners of record, Mr. TK Kamuhanga, which advice I verily believe to be true and correct, if successful, will render an end to the current litigation. Towards that end, I will also not venture to deal with any of the other allegations raised by the applicant in the founding affidavit.
11. I respectfully submit that the "purported" Agreement of Sale entered between the parties on or about the 6th day of December 2010, as evidenced by annexure "J3" to the applicant's founding affidavit, is effectively *null* and *void*, for lack of:
 - 11.1 compliance with the provisions of section 7 of the Married Persons Equality Act, Act No.1 of 1996, and
 - 11.2 as well as for lack of compliance with the provision of section 1 of the Formalities in respect of Contracts of Sale of Land Act, Act No. 71 of 1969.

1995 and Clause 20.2 of the Deed of Sale of the Farm within a period of seven (7) days of this order. In the event of the first and second respondents failing or refusing to or neglecting to comply with this order directing the Deputy Sheriff, Windhoek to apply for and obtain the aforesaid waiver;

- 3 Interdicting and restraining the first and second respondents from taking any step whatsoever pursuant to the purported agreement which the first and second respondents entered into on or about 24th July 2014 regarding the sale of the Farm by the first and second respondents to the third and fourth respondents, pending the granting of the Certificate of Waiver referred to in paragraph 2 *supra*.
- 4 In the event of the first, second, third and fourth respondents having taken steps to have the Farm registered in the name of the third and/ or fourth respondents prior to the hearing of this application pursuant to any purported agreement entered into by the aforesaid respondents, declaring such a transfer null and void and of no legal force and effect.
- 5 Declaring that if the waiver referred to paragraph 2 *supra* is granted, the applicant is entitled to take the transfer of the Farm into my name. . . .

12. It is further my contention that the applicant never obtained consent in writing from her late husband at the time of entering into the above-mentioned sale agreement. I am advised that further argument in this regard will be advanced at the hearing hereof.
13. For the reasons stated hereinabove, do we pray for the dismissal of the applicant's application, with costs on the basis of one instructing counsel and one instructed counsel.'

The Law

[17] It is now well established that in application proceedings the affidavits take the place not only of the pleadings in action proceedings but also of the essential evidence which would be led at a trial. In the South African case of *Hart v Pinetown Drive-In Cinema (Pty) Ltd*⁴ Miller J said:

'It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound. For the reasons I have stated herein, I am of the opinion that there is a dearth of such facts as, if true, would support the allegations of unfair and oppressive conduct in the management of the company's affairs and the objection *in limine* must accordingly be upheld.'

[18] In the matter of *Patrick Inkono v The Council of the Municipality of Windhoek*⁵ Schimming-Chase, AJ said the following:

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but

⁴ 1972 (1) SA 464 (D).

⁵ An unreported judgment of this Court, Case No A 55/2013 [2013] NAHCMD 140 (delivered on 28 May 2013).

also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.”

[19] Where a party fails to deal with allegations by his or her opponent the allegations by the opponent will be accepted as correct. Muller J said the following in the matter of *O'Linn v Minister of Agriculture, Water and Forestry*.⁶

[8] By electing not to answer the allegations made by the applicant in his founding affidavit by way of an answering affidavit, it follows that the facts raised in applicant's founding affidavit were not placed in dispute and should be accepted. This was in fact conceded by Mr. Marcus.’

[20] I am of the view that the provisions of the Married Persons Equality Act, 1996 which are relevant to this matter are ss 6, 7 and the definition of joint estate in section 1. I will reproduce them here. Section 1 defines ‘joint estate’ as follows:

‘. . .joint estate" means the estate of a husband and wife married in community of property’;

Sections 6 and 7 of the Married Persons equality Act, 1996 provide as follows:

6 Spouse's juristic acts generally not subject to other spouse's consent

Subject to section 7, a spouse married in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

7 Acts requiring other spouse's consent

(1) Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse-

- (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;
- (b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;

⁶ 2008 (2) NR 792 (HC) at 795F – G.

- (c) alienate, cede, or pledge any shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;
- (d) alienate or pledge any jewelry, coins, stamps, paintings, livestock, or any other assets forming part of the joint estate and held mainly as investments;
- (e) alienate, pledge, or otherwise burden any furniture or other effects of the common household forming part of the joint estate;
- (f) as a credit receiver enter into a credit agreement as defined in the Credit Agreements Act, 1980 (Act 75 of 1980), and to which the provisions of that Act apply in terms of section 2 thereof;
- (g) as a purchaser enter into a contract as defined in the Sale of Land on Installments Act, 1971 (Act 72 of 1971), and to which the provisions of that Act apply;
- (h) bind himself or herself as surety;
- (i) receive any money due or accruing to that other spouse or the joint estate by way of-
 - (i) remuneration, earnings, bonus, allowance, royalty, pension or gratuity by virtue of the other spouse's employment, profession, trade, business, or services rendered by him or her;
 - (ii) compensation for loss of any income contemplated in subparagraph (i);
 - (iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;
 - (iv) income derived from the separate property of the other spouse;
 - (v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse; or

- (vi) the proceeds of any insurance policy or annuity in favour of the other spouse; or
- (j) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to any of the provisions of paragraph (a), (b), (c), (d) and (e).

(2) The consent required under subsection (1) for the performance of an act contemplated in that subsection may be given either orally or in writing, but the consent required for the performance of-

- (a) any such act which entails the registration, execution, or attestation of a deed or other document in a deed registry; or
- (b) an act contemplated in paragraph (h) of that subsection, shall, in respect of each separate performance of such act, be given in writing only.

(3) The consent required for the performance of any act contemplated in paragraphs (b) to (j) of subsection (1), except where it is required for the registration, execution, or attestation of a deed or other document in a deeds registry, may also be given by way of ratification within a reasonable time after the performance of the act concerned.

(4) Notwithstanding subsection (1)(c), a spouse married in community of property may without the consent of the other spouse-

- (a) sell listed securities on a stock exchange and cede or pledge listed securities in order to buy other listed securities; or
- (b) alienate, cede, or pledge-
 - (i) a deposit held in his or her name at a building society or bank; or
 - (ii) building society shares registered in his or her name.

(5) A spouse married in community of property may, in the ordinary course of his or her profession, trade, occupation, or business perform any of the acts referred to in paragraphs (b), (c), (f) and (g) of subsection (1), without the consent of the other spouse as required by that subsection.

(6) In determining whether a donation or alienation contemplated in subsection (1)(j) does or probably will unreasonably prejudice the interest of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the opinion of the court should be taken into account.'

[21] Having set out the law I will now proceed to consider the *point in limine* raised by the seller.

The points *in limine*

[22] By electing not to answer the allegations made by the purchaser in her founding affidavit in his answering affidavit, it follows that the facts raised by the purchaser in her founding affidavit were not placed in dispute and I accept them as correct. The purchaser in her founding affidavit states that during 2010 she and her late husband (Ambassador Andrew Anyanya Intamba) decided to purchase an agricultural farm. As a consequence of that decision the purchaser and her late husband entered into negotiations with the seller and his spouse (who were married in community of property) to purchase the farm. She further alleges that pursuant to the sales agreement she and her late husband applied for a loan to the Agricultural Bank of Namibia for the purpose of purchasing livestock. She further stated that she and her late husband submitted an application to the Permanent Secretary for the Ministry of Lands and Resettlement for a waiver as contemplated in s 17(4) of the Agricultural (Commercial Land) Reform Act, 1995.

[23] As a result of the allegations by the purchaser that she and her late husband entered into negotiations with the seller and his spouse for the sale and purchase of the farm, I enquired from Mr. Kamuhanga who appeared on behalf of the seller and his spouse on what basis the argument is advanced that the purchaser concluded the sales agreement without the consent of her husband. He replied that *ex facie* the sales agreement which was only signed by the purchaser and the seller it is evident that the consent required by the Married Persons Equality Act, 1996 was absent. I do not agree with Mr. Kamuhanga that the absence of the signatures of the late Andrew Anyanya Intamba (the husband of the purchaser) and Samuelina Tjapaka (the wife of the seller) is evidence of absence consent from those parties.

[24] The seller, in his affidavit, had to furnish facts in the form of evidence of the nature of the purchaser's and the seller's lack of consents from their respective spouses to conclude the sales agreement. As regards the evidence which the seller had to put before the court in his affidavit, I echo the words of Kumleben, then AJA, in *Radebe and Others v Eastern Transvaal Development Board*⁷: that the allegation (i.e. that the purchaser did not have her spouse's consent to enter into the sales agreement) in the answering affidavit is a conclusion of law, it is at best for the seller an inference, a "secondary fact", with the primary facts on which it depends omitted.

[25] In the matter of *Willcox and Others v Commissioner for Inland Revenue*⁸ Schreiner JA explained the concept of 'primary' and 'secondary' facts as follows:

'Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'

[26] In the instant case the seller had to state the facts on which he based his conclusion that both the seller and the purchaser did not have the consents of their respective spouses when they concluded the sales agreement. He did not do that what he did is that he pleaded a legal result. I have stated above that the payments which the purchaser effected to the seller and to the Agricultural Bank of Namibia on behalf of the seller were drawn on the cheques of the late Andrew Anyanya Intamba. There is no allegation that the purchaser stole those cheques. The purchaser and her late husband together approached the Agricultural bank to obtain a loan for the purchasing of livestock. The purchaser and her late husband together applied for a waiver from the Ministry of Lands. Why would the late Andrew Anyanya Intamba pay for the purchase of a property he did not authorise, why would he apply for a loan to buy livestock and why would he apply for a waiver if he did not consent to the purchase of a farm ? Ms Samuelina Tjapaka the wife of the seller simply deposed to a supporting affidavit in which she confirms the contents of the seller's affidavit in so far as it relates to her. She does not in her affidavit tell this court that the seller (her husband) did not have her consent when he signed the sales agreement, this omission is in my view very significant. The first and second respondents have in my view failed to establish the contravention (if any) either by the purchaser or by the seller of s7 of the Married

⁷ 1988 (2) SA 785 (A) at 793C-G.

⁸ 1960 (4) SA 599 (A) at 602.

Persons Equality Act, 1996 or of s1 of the the Formalities in Respect of Contracts of Sale of Land Act, 1969. For these reasons the seller's points *in limine* must fail.

[27] I now turn to the pivotal issue of costs. The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court.⁹ It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and an equitable one.¹⁰ There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present. Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. In this matter, Dr Akweenda who appeared for the applicant asked the court to exercise its discretion and award the costs on a scale of attorney and client basis.

[28] The basis for attorney and client costs was accurately stated by Tindall JA in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*¹¹ in the following words:

'The true explanation of awards of attorney and client costs not expressly authorized by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

[29] In the matter of *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*¹² Fabricius J said the following:

'I think it is the wrong approach to analyse each and every criticism of the launching of the attachment application individually, and then deciding whether or not it, by itself, ought to result in a special costs order. In my view a balanced view of the whole of the

⁹ *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

¹⁰ See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

¹¹ 1946 AD 597.

¹² 2014 (3) SA 265 (GP) at 290.

proceedings and the relevant facts ought to be taken. If a court is then left with that indefinable feeling, which feeling must, however, be based on rational analysis of the facts and legal principles, that something is 'amiss', if I can put it that way, it may justify that feeling by deciding that the opposing party ought not to be out of pocket as a result of the application having been launched.'

[30] This court in the matter of *Erf Sixty-Six, Vogelstrand v Municipality of Swakopmund*¹³ per Damaseb JP stated:

'[22] The second respondent asked for costs on attorney and client scale. In order to grant such an order, I must (i) be satisfied that the conduct of the applicant justifies such an order, and (ii) that a party-and-party-cost order will not be sufficient to meet the expenses incurred by the innocent party. Although I am satisfied as to the first requirement, the second respondent has not placed evidence before me to satisfy me that a cost order on the normal scale will not be sufficient to meet its costs in opposing the review. I will accordingly not grant a punitive costs order against the applicant.'

[31] I have referred to some of the more material and relevant considerations in these proceedings. Taking a balanced view of the whole of the proceedings and the relevant facts in this matter I am left with the indefinable feeling, that something is 'amiss'. In adopting this overall and balanced view of all the material facts I am of the view that the purchaser ought not to be out of pocket in these proceedings. I deem it therefore just and equitable that I make the following:

- 1 The first and second respondents' point *in limine* is dismissed;
- 2 The Memorandum of Agreement of Sale of the Immovable Property described as :

CERTAIN:	Farm Guiganab-Ost, No. 273,
SITUATED:	Registration Division "B" Otjozondjupa Region,
MEASURING	3006, 6982 (Three Thousand and Six comma Six Nine Eight Two) Hectares

¹³ 2012 (1) NR 393 (HC) para [22], at 400 F-G.

HELD By Deed of Transfer No. [T 5.....]

entered into by and between the first respondent and the applicant on 6th December 2010 is declared valid and binding;

- 3 The first and second respondents must apply for and obtain a Certificate of Waiver from the Minister of Lands and Resettlement through the Permanent Secretary as contemplated in section 17(4) of the Agricultural (Commercial) Land Reform Act, 1995 and Clause 20.2 of the sales agreement by no later than fourteen days (i.e. not later than the 01st of October 2015) from the date of this of this order.
- 4 If the first and second respondents fail or refuse to neglect to comply with paragraph 3 of this order then and in that event the Deputy Sheriff, for the District of Windhoek is ordered and authorized to apply for and obtain the Certificate of Waiver from the Minister of Lands and Resettlement through the Permanent Secretary as contemplated in section 17(4) of the Agricultural (Commercial) Land Reform Act, 1995 and Clause 20.2 of the sales agreement;
- 5 The first and second respondents are interdicted and restrained from taking any steps whatsoever pursuant to the purported agreement which the first and second respondents entered into on or about 24th July 2014 regarding the sale of the Farm by the first and second respondents to the third and fourth respondents.
- 6 If the first, second, third and fourth respondents have registered the Farm in the name of the third and fourth respondents prior to the hearing of this application pursuant to any purported agreement entered into by the aforesaid respondents, declaring that such registration is declared void and of no legal force and effect.
- 7 The first and second respondents are directed to take such steps as are necessary to pass transfer to the applicant against payment of such transfer costs as contemplated in clause 4 of the sales agreement by the applicant and any outstanding balance on the purchase price as contemplated in clause 3 of the sales agreement not later than 10 days of such payments and if the first and second respondents fail to comply with this paragraph 7, then and in that event,

the Deputy Sheriff, for the District of Windhoek is authorized to take such steps and to sign such documents as may be necessary to register the Farm in the applicant's name.

- 8 The first and second respondents must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs for this application on the scale as between attorney and client, which costs include the costs of one instructing and one instructed counsel.

SFI Ueitele
Judge

APPEARANCES**APPLICANT:****Dr S Akweenda**

Instructed by Conradie & Damaseb, Windhoek

1st & 2nd RESPONDENTS:**Mr T Kamuhanga**

Of Dr Weder, Kauta & Hoveka, Windhoek

3rd & 4th RESPONDENTS:

No Appearance

5th RESPONDENT

Government Attorney