

REPUBLIC OF NAMIBIA



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

Case no: I 1173/2012

In the matter between:

JACOBUS HERMANUS VAN STADEN

PLAINTIFF

and

BLAAUWBERG AUCTIONEERS CC

FIRST DEFENDANT

JAN DE KLERK

SECOND DEFENDANT

Neutral citation: *Van Staden v Blaauwberg Auctioneers CC* (I 1173/2012) [2013] NAHCMD 305 (30 October 2013).

Coram: **UEITELE J**

Heard: **17-18 & 20 September 2013 & 23 & 24 October 2013**

Delivered: **30 October 2013**

Flynote: Law of contract- Oral agreement- Plaintiff's case is one based on *rei vindicatio* alternatively *actio ad exhibendum*- Absolution from the instance-Plaintiff has alleged and proven that he is the owner of the one hundred sheep but has not alleged nor proven that the sheep were in the possession of the first defendant at the commencement of the action- Plaintiff has thus failed to prove one of the requirements of the *rei vindicatio* action- The first defendant's application for absolution from the instance succeeds- The second defendant's application for absolution from the instance must therefore fail- The *onus* is then on the second defendant to prove the oral sale agreement- The written agreement relied on by the first respondent was not signed by the plaintiff- The second defendant has failed to discharge the onus resting on him and the court accordingly find that there was no oral agreement concluded between the plaintiff and the second defendant for the sale of the one hundred sheep- The plaintiff did not prove that the one hundred sheep were still in existence and clearly identifiable and it is not evident that the second defendant can deliver them.-The Court can therefore not order the second defendant to return the sheep in its possession, when some of the sheep may not belong to the plaintiff- The plaintiff has established that the second defendant acted mala fide when it disposed of the sheep.

Summary: In this matter the plaintiff instituted action against both the first and second defendants, claiming amongst others the following relief: (1) Delivering of the 100 sheep and (2) Alternatively, plaintiff claims against first and second defendant, the one paying the other to be absolved, the amount of N\$45000.

During May 2009, and at farm Nadubib, in the district of Tsumeb, the first defendant represented by a certain Klaus Friedrich Paul Beddies, who was also acting on behalf of the second defendant made an offer to purchase one hundred sheep from the plaintiff. The plaintiff asked a price of N\$450 per sheep. The second defendant counter offered an amount of N\$300 per sheep. That amount was rejected by the plaintiff and Mr Beddies and the second defendant left the farm.

On 30 May 2009, the second defendant was allegedly informed by Mr Beddies that the plaintiff had accepted the amount of N\$ 300 per sheep and that the deal was clinched.

Second defendant then went to farm Nadubib, seized and removed the one hundred sheep, allegedly without the knowledge and consent of the plaintiff.

In terms of the pre-trial order the court was called upon to amongst others decided: (a) Whether or not any agreement in respect of the sale of the 100 sheep for the purchase amount of N\$300 per sheep was concluded between plaintiff and second defendant and (b) Whether or not second defendant is the lawful owner of the 100 sheep. In addition to the questions formulated by the parties the court is of the view that the issues confronting it is whether the plaintiff has made out a case for the court to grant him the relief that he is seeking namely the return of the one hundred sheep alternatively the value of the one hundred sheep.

When the plaintiff closed his case both the first and second defendants applied for absolution from the instance. The court granted absolution from the instance in respect of the first defendant but refused the application for absolution from the instance in respect of the second defendant.

Held that regards the second defendant the plaintiff has proven that he is the owner of the sheep and the second defendant on his own pleadings admitted that the sheep were in his possession. It thus follows that a reasonable court 'might, on the evidence before it find for the plaintiff'. The second defendant's application for absolution from the instance must therefore fail.

Held that the onus is on the second defendant to prove the oral sale agreement. It is held further that the second defendant has failed to discharge the onus resting on him and the court accordingly find that there was no oral agreement concluded between the plaintiff and the second defendant for the sale of the one hundred sheep.

Held that the plaintiff did not prove that the one hundred sheep were still in existence and clearly identifiable and it is not evident that the second defendant can deliver them. The Court can therefore not order the second defendant to return the sheep in its possession, when some of the sheep may not belong to the plaintiff. This brings the alternative basis for the plaintiff's claim into play, namely the *actio ad exhibendum*.

Held that the plaintiff has established that the second defendant acted mala fide when it disposed of the sheep. It is held further that the plaintiff has established the value of the sheep and is entitled to the alternative claim.

ORDER

- (a) The second defendant is ordered to pay the plaintiff the amount of N\$ 45 000 plus interest at the rate of 20% reckoned from the 29th day of May 2012 (the date on which the summons were served on the second defendant) to the date of payment in respect of the one hundred sheep.
- (b) Cost of suit. The cost to include the cost of one instructing and one instructed counsel. I however direct that the instructing counsel for both the plaintiff and the second defendant are not entitled to the cost of 24 October 2013.

JUDGMENT

UEITELE J

INTRODUCTION

[1] In this matter the plaintiff instituted action against both the first and second defendants, claiming amongst others the following relief:

- '1. Delivering of the 100 sheep;
2. Alternatively, plaintiff claims against first and second defendant, the one paying the other to be absolved, the amount of N\$45000.'

[2] The brief background to the plaintiff's claim is that during May 2009, and at farm Nadubib, in the district of Tsumeb, the first defendant represented by a certain Klaus Friedrich Paul Beddies, who was also acting on behalf of the second defendant made an offer to purchase one hundred sheep from the plaintiff. The plaintiff asked a price of N\$450 per sheep. The second defendant counter offered an amount of N\$300 per

sheep. That amount was rejected by the plaintiff and Mr Beddies and the second defendant left the farm.

[3] On 30 May 2009, the second defendant was allegedly informed by Mr Beddies that the plaintiff had accepted the amount of N\$ 300 per sheep and that the deal was clinched. Second defendant then went to farm Nadubib, seized and removed the one hundred sheep, allegedly without the knowledge and consent of the plaintiff. When the plaintiff discovered that the second defendant had removed the sheep from farm Nadubib, he laid charges of stock theft against both the first and second defendants. When nothing came off of the criminal charges that he laid, he decided to institute this action.

THE PLEADINGS

[4] In his particulars of claim the plaintiff alleges that he was the owner of the one hundred sheep and that the second defendant wrongfully and unlawfully removed the sheep from the plaintiff's farm. He further alleges that at the time when he instituted the action the second defendant was in possession of the one hundred sheep.

[5] The plaintiff furthermore alleges that if it be found that the second defendant is no longer in possession of the one hundred sheep, he (second defendant) disposed of the sheep with the knowledge of the plaintiff's ownership.

[6] Both the first and second defendants defended the action and filed their pleas. The first defendant admitted that it represented the second defendant during the negotiations. It also pleaded that, the plaintiff and the second defendant concluded an oral agreement for the sale of the one hundred sheep on 30 May 2009 and for the prize of N\$300 per sheep.

[7] The second defendant in his plea admitted that the one hundred sheep belonged to the plaintiff, but alleged that he and the plaintiff (the plaintiff represented by the first defendant) concluded an oral agreement in terms of which he bought the one hundred sheep from the plaintiff at the amount of N\$300 per sheep. He further pleaded that he paid the amount of N\$30 000 to the first defendant.

[8] The second defendant in his plea admitted that he entered the plaintiff's farm and removed the one hundred sheep, but denied the unlawfulness of the entry and removal. He pleaded that he entered the farm and removed the sheep pursuant to an oral sales agreement between him and the plaintiff. He further pleaded that he paid the purchase price to the plaintiff's agent (the first defendant). The second defendant furthermore admitted that he was in possession of the sheep, but qualified that admission by pleading that he has acquired ownership of the sheep.

THE ISSUES FOR DECISION

[9] During July 2013 the legal practitioners representing the parties held pre-trial conference and at that conference prepared a draft pre-trial order which I made an order of Court on 31 July 2013. In terms of the pre-trial order I am called upon to amongst others decided:

'1.1 ...

1.5 Whether or not any agreement in respect of the sale of the 100 sheep for the purchase amount of N\$300 per sheep was concluded between plaintiff and second defendant.

1.6 ...

1.8 Whether or not second defendant is the lawful owner of the 100 sheep.'

[10] In addition to the questions formulated by the parties I am of the view that the issues confronting me is whether the plaintiff has made out a case for me to grant him the relief that he is seeking namely the return of the one hundred sheep alternatively the value of the one hundred sheep.

[11] In order to answer the questions confronting me I will firstly summarise the evidence placed before me, set out the legal principles applicable to the dispute and apply those legal principles to the facts of this matter.

THE PLAINTIFF'S EVIDENCE

The evidence of Mr Alexander McDonald

[12] The plaintiff in addition to his own testimony called a certain Mr Alexander McDonald who testified that he is an expert in the field of valuing livestock. He testified that he holds the following formal qualifications; a National Diploma: Marketing and Sales Management, an Auctioneering Diploma from the South African College of Auctioneering and an International Graduate Personal Property Appraising Specialist qualification from National Auctioneers Association, Nashville, Tennessee, United States of America. He further testified that:

- (a) From 1996 to 1998 he free-lanced as an auctioneer with *inter alia* companies such as Auction World, Auction House, African Auctioneers (including government agricultural auctions) and Executive Debt Collectors.
- (b) From 1998 to 2004 he was employed as Auctioneers at Agra Windhoek, where he specialized in the auctioneering of cattle, loose-good, vehicles and heavy equipment.
- (c) In February 2004 he co-founded and currently holds 50% members interest in Namboer Auctioneers CC, a close corporation which specializes in the auctioneering of cattle, small stock, game, agricultural land and agricultural loose-goods and heavy equipment. He has also since 2004 worked as auctioneer for Namboer Auctioneers CC.
- (d) He is the owner, sole or in partnership, of eleven businesses in Namibia, of which nine of these businesses are related to the livestock industry in Namibia and that he, holds 50% members interest in FarmSpec CC, close corporation which specializes, since 2011, in the cross border speculation of cattle and small livestock between Namibia and South Africa.
- (e) As an auctioneer, he conducts approximately 8 to 10 livestock auctions per month through the central part of Namibia.

[13] As regards the value of the sheep, Mr McDonald testified that he perused the pleadings in this matter and auction sale documents from Namboer Auctioneers CC of comparable livestock auctions conducted by Namboer Auctioneers CC during the period April 2009 to July 2009 within Namibia. Based on the documents that he perused he formed the opinion that the price of N\$450 per sheep as at, during or about the end of May 2009, alternatively the beginning of June 2009, was fair and reasonable and in accordance with the prices obtained for similar livestock at public auctions in Namibia during the aforesaid period.

The evidence of Mr Jacobus Hermanus Van Staden (the plaintiff)

[14] The second witness to testify on behalf of the plaintiff was the plaintiff himself. He testified that he contacted (by telephone) the first defendant with the aim of selling a flock of sheep to them. He testified that he spoke to a certain Fanie Schoombie and Klaus Beddies. He proceeded and testified that after the telephone call, Klaus Beddies and the second defendant arrived at farm Nadubib No. 585, in the district of Tsumeb (Oshivelo) to look at the sheep. He testified that he thinks that they arrived at the farm on 23 May 2009. Klaus Beddies and the second defendant went to the sheep which were in the kraal near the house, and there were approximately 130 sheep. The sheep were young and during May 2009 the grass was green and they were in a good condition.

[15] The plaintiff testified that after Mr Beddies and De Klerk viewed the sheep they offered him an amount of N\$280 per sheep which he declined. Mr Beddies and De Klerk returned and made an offer of N\$300 per sheep which he again declined. After he refused to accept their offer they left. The plaintiff further testified that before they went to inspect the sheep he informed them that he wanted N\$450 per sheep.

[16] The plaintiff proceeded and testified that that same evening he phoned Mr Beddies and asked him, the question that 'if he were to accept the offer of N\$ 300 per sheep, they will deduct commission from the purchase price and what the amount of the commission will be'. He testified that Mr Beddies promised to get an answer to those questions and to return to him, but Mr Beddies never returned to him.

[17] He testified that he also left the farm (farm Nadubib) for Henties Bay during that weekend. He further testified that whilst he was in Henties Bay his farm labourers looked after the sheep. He went on to testify that on the Monday, (he said he thought it was the 01st of June 2009), a friend of his called him and informed him that somebody removed sheep from his farm. He testified that on the Monday when he heard that the sheep were removed, he called Mr Beddies and enquired as to who removed the sheep from his farm (farm Nadubib). Mr Beddies confirmed that the second defendant removed the sheep. Plaintiff went on to testify that the removal of the sheep was unlawful and without his consent. He further testified that the legal procedures required to remove the sheep from his farm were also not complied with.

[18] In support of his allegation that legal procedures were not complied with the plaintiff testified that when he left the farm the sheep had no ear tags on them but they were moved without ear tags. It was also his testimony that, since his farm borders the Etosha National Park he was required to 'quarantine' any animal which leaves that farm (i.e. farm Nadubib) for a period of 21 days before the animals are so removed from the farm. He also testified that it is a requirement that all the animals that are removed from the farm must be moved with an animal movement permit obtained from the directorate of veterinary services in the Ministry of Agriculture, Water and Forestry. He submitted a document which was admitted in evidence and marked as 'Exhibit A' being an 'Application for a Veterinary Movement Permit', and a document which was admitted in evidence and marked as 'Exhibit B' being a Veterinary Services Permit to move animals. He denied having completed the application marked as 'Exhibit A' and having obtained the document marked as 'Exhibit B' the permit to move animals. On the document marked as Exhibit B provision is made for a place where the sender of animals had to declare the type of animals that is being moved, the number of animals that is being moved and his stock brand.

[19] On the document marked as 'Exhibit B' the type of animals that is being moved was indicated as sheep, the number of animals that is being moved was indicated as '100' and the sender's stock brand was indicated as 'FOD00010'. The plaintiff denied

that he is the one who completed that section, he also denied that his stock brand number is 'FOD000I0'. He testified that his stock brand number is 'AOH000V0.'

[20] He proceeded to testify that during June 2009, he returned to the farm and on his return to the farm he only found 30 (one year old) lambs. He thereafter proceeded to lay criminal charges of stock theft. He testified that at one stage the first defendant paid (by electronic transfer) an amount of approximately N\$9 000 into his bank account. He stated that he called the first defendant and enquired from them what the amount was for. The first defendant's reply was that the amount was for the sheep he allegedly sold. He proceeded to state that he repaid the money the following day because he had not authorized the sale of sheep.

[21] In cross examination the plaintiff was asked by Mr Schickerling who represented the first defendant whether the first defendant or any of its employees were on farm Nadubib to remove the hundred sheep, his reply was in the negative. He was also asked whether the first defendant was in possession of the one hundred sheep at the time that he instituted the action, his reply was again in the negative.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[22] When the plaintiff closed his case both the first and second defendants applied for absolution from the instance. I granted absolution from the instance in respect of the first defendant but refused the application for absolution from the instance in respect of the second defendant. I will pause here to briefly give reasons for my decision.

[23] It is common cause that the plaintiff's case is one based on *rei vindicatio* alternatively *actio ad exhibendum*. It has been held that the owner of any movable or immovable property who institutes an action based on *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to

hold against the owner¹. In *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty)*² van der Westhuizen, AJ said at page 996 –

‘The plaintiff’s claim is –in the first place – based upon the *rei vindicatio*, which is the applicable action available to an owner, who has been deprived of his or her property against his or her will and who wishes to recover the property from any person who retain possession of it without the owner’s consent. The plaintiff in order to succeed is required to allege and prove:

- a) that he is the owner of the thing or items in issue; and
- b) that the items were in the possession of the defendant at the commencement of the action.’

[24] The applicable test to be applied by a trial Court when absolution from the instance is sought at the close of the plaintiff’s case, has been stated by Miller, AJA³:

‘... when absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter*, 1917 TPD 170 at p. 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)*, 1958 (4) SA 307 (T))’.

This approach has been followed in Namibia in a number of decisions of both the Supreme Court and the High Court⁴.

¹Chetty v Naidoo 1974 (3) SA 13 (A) at 20; Jeena v Minister of Lands, 1955 (2) SA 380 (AD) at. 382E-, 383; Also see the unreported judgement of this Court in Shukifeni v Tow-in-Specialist CC (I 2803/2009) [2011] NAHC 17 (25 January 2011).

² 1999 (2) SA 986 (T).

³In the matter of *Claude Neon Lights (SA) Ltd v Daniel*: 1976 (4) SA 403 (A), at 409 G – H.

⁴*Stier v Henke*, 2012 (1) NR 370 (SC), at 373, para [4]; *Aluminium City CC v Scandia Kitchens & Joinery (Pty) Ltd*, 2007 (2) NR 494 (HC), at 496 [12]; *Lofty Eaton v Grey Security Services Namibia (Pty) Ltd*, 2005 NR 297 (HC), at 302 C – E; *Bidoli v Ellistron t/a Ellistron Truck & Plant*, 2002 NR 451 (HC), at 453 D – F.

[25] Whereas it is correct that the *onus* in respect of the issues I mentioned above in paragraph 23 rests with the plaintiff, I do not at this stage have to decide whether he has established a *prima facie* case in the sense that I would have to if the defendant had also closed its case (which it did not do). At this stage I take the evidence produced on behalf of the plaintiff at face value and decide whether based thereon there is evidence upon which a reasonable court might find for the plaintiff.

[26] In my view a reasonable court 'might not find for the plaintiff' in respect of the first defendant but 'might find for the plaintiff' in respect of the second defendant. I say so for the following reasons. As regards the first defendant the plaintiff has alleged and proven that he is the owner of the one hundred sheep but has not alleged nor proven that the sheep were in the possession of the first defendant at the commencement of the action. Plaintiff has thus failed to prove one of the requirements of the *rei vindicatio* action.

[27] As regards the second defendant the plaintiff has alleged and proven that he is the owner of the sheep and the second defendant on his own pleadings admitted that the sheep were in his possession. It thus follows that a reasonable court 'might, on the evidence before it find for the plaintiff'. The second defendant's application for absolution from the instance must therefore fail.

THE DEFENDANT'S EVIDENCE

The evidence of Mr Petrus Jacobus Schrader

[28] After I dismissed the second defendant's application for absolution from the instance he decided to call a certain Mr Petrus Jacobus Schrader who is the sole member of the first defendant. Mr Schrader's evidence was not helpful at all because the greater part of his evidence was based on hearsay and also related to a transaction which is not the subject of the dispute before me.

The evidence of Mr Jan de Klerk (the second defendant).

[29] The second witness to testify on behalf of the second defendant was the second defendant himself. He testified that he, together with Mr Beddies went to the farm of the

plaintiff (i.e. farm Nadubib) in order to view a number of sheep which the plaintiff wanted to sell at the time. Mr Beddies was an employee of the first defendant and he basically introduced second defendant to plaintiff. He further testified that:

- (a) He noticed that the sheep to be sold were of mixed race. He also saw that the sheep had different ages but in general the condition of the sheep was poor. The sheep were basically small in physical features and further was lean.
- (b) The plaintiff wanted N\$450 per sheep which he was not prepared to pay. He was only prepared to offer N\$280 per sheep but after some discussion with Mr Beddies he raised his offer to N\$300 per sheep. He made this offer (i.e. N\$ 300 per sheep) but it was declined by the plaintiff. He further stated that after that counter offer was declined by the plaintiff they departed from the farm.
- (c) The following Saturday, the date of which he could not recall (but can remember it was in May 2009), he received a call from Mr Beddies who informed him that the plaintiff was willing to accept his offer of N\$300 per sheep. He stated that he agreed and accepted that the deal was clinched. He further testified he was not then in a position to collect the sheep on that day.
- (d) Pursuant to the sale and in compliance with his obligations he paid the amount of N\$30 000 to the first defendant on the 2nd of June 2009. Approximately one week later he drove to the plaintiff's farm in order to collect and remove the one hundred flock of sheep. Upon his arrival on the farm he saw that the plaintiff was not present. He stated that all 100 sheep were in a small camp and he told the three farm labourers present that he must collect the sheep on account of the sale he concluded with the plaintiff. They all agreed and further indicated that they were aware of the fact that he must come and load the sheep.
- (e) The date and the time of loading the sheep was done through Mr Beddies who also arranged for the transport permits and the like.

- (f) About one week after he had loaded the sheep the police arrived at his plot and told him that he was a suspect in a stock theft charge on account of the fact that the plaintiff laid charges against him and the first defendant for theft of one hundred sheep. He proceeded to testify that nothing happened and the case was apparently '*nolle*' by the prosecutor-general. He testified that he was never required to appear in court nor was he arrested by the police. He furthermore testified that on a day that he cannot remember he received a sms message from a police officer who told him that the case is not proceeding and he could deal with the sheep as he wishes.
- (g) The plaintiff visited his plot on more than one occasion and wanted to take his sheep but second defendant always directed him to the first defendant as he said he purchased the sheep through the first defendant and that he must take it up with them.

IS THE PLAINTIFF ENTITLED TO THE RELIEF HE IS CLAIMING?

[30] Ms Visser who appeared for the plaintiff submitted that the plaintiff has discharged the *onus* resting on him because he succeeded in proving that he was the owner of the one hundred sheep and that at the time that he instituted the action the one hundred sheep were in the possession of the second defendant. She further argued that if the court were to find that the sheep has been disposed of then and in that event the plaintiff has proven the value of the sheep at the time of disposal and is entitled to damages.

[31] Mr Strydom who appeared for the second defendant on the other hand argued that the plaintiff bore the *onus* to prove his allegation. He argued that where there are two mutually destructive versions (as in this case so he submitted) the plaintiff can only succeed 'if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.' He further argued that in this case the probabilities are evenly balanced and the plaintiff has thus failed to discharge the *onus* resting on him.

[32] I do not agree with Mr Strydom's approach and submissions for the following reason. In the matter of **Chetty v Naidoo**⁵ Jansen, JA said the following:

'The incidence of the burden of proof is a matter of substantive law (*Tregea and Another v Godart and Another*, 1939 AD 16 at p. 32), and in the present type of case it must be governed, primarily, by the legal concept of ownership. It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council v Rand Townships Registrar and Others*, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in *Munsamy v Gengemma*, 1954 (4) SA 468 (N) at pp. 470H - 471E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at pp. 382E, 383). { My Emphasis}.

[33] In the matter of **Shimuadi v Shirungu**⁶ a case dealing the *rei vindicatio* action Levy, J said:

'It is trite that in order to eject a defendant from immovable property, a plaintiff need only allege that he is the owner and that the defendant is in occupation thereof. *Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T); *Ontwikkelingsraad, Oos-Transvaal v Radebe and Others* 1987 (1) SA 878 (T); *Akbar v Patel* 1974 (4) SA 104 (T).

⁵ *Supra* footnote 1.

⁶ 1990 (3) SA 344 (SWA).

Should the defendant deny any one of these elements, namely that plaintiff is the owner or that defendant is in occupation, the onus is on the plaintiff to prove the truth of the element which is denied. The plaintiff would succeed in discharging the onus of proof in respect of ownership by proving registered title deeds in his favour. An inference that plaintiff is the owner would then justifiably be drawn. Should the defendant dispute the validity of the title deeds or that ownership, despite the deeds, is of a 'nominal character' ('nominale aard'), as in the present case, the *onus* is on the defendant to prove this.

In respect of occupation, the defendant may well admit such occupation but contend that his occupation is lawful. The onus would then be on him to prove such lawfulness but he is relieved of this onus if there is some form of admission on the pleadings in terms whereof plaintiff concedes that he lawfully parted with such occupation. {My Emphasis}.

[34] It thus follows that in the present matter the *onus* is on the plaintiff to prove ownership of the sheep and also to prove the fact the sheep is in the possession of the second defendant. The plaintiff's initial ownership of the sheep is not disputed by the second defendant. The second defendant however avers that he has acquired ownership of the sheep by virtue of an oral sale agreement concluded between him and the plaintiff. In this instance I am of the view that the *onus* is then on the second defendant to prove the oral sale agreement.

[35] It is common cause that when the second defendant and Mr Beddies left the plaintiff's farm no agreement was concluded for the sale and purchase of the one hundred sheep. It is further common cause that the plaintiff and the defendant never negotiated with each other directly. The plaintiff testified that a week later he called Mr Beddies and enquired from him whether any commission would be deducted if he were to accept the price of N\$ 300 per sheep. His testimony is furthermore that Mr Beddies did not give him an answer there and then, Mr Beddies promised to come back with an answer, and according to the plaintiff Beddies never came back as promised. Unfortunately for the second defendant Mr Beddies passed on sometimes in the first quarter of 2013 and as such the version of the plaintiff was not disputed or contradicted.

[36] The version of the second defendant is that he was called by Mr Beddies and informed that the plaintiff was willing to accept N\$ 300 per sheep and he then accepted that a deal was clinched. The problem with this part of the evidence is that the second defendant did not testify that he was told that the plaintiff had accepted the price of N\$ 300 per sheep but that the plaintiff was willing to accept that amount. He then assumed that a deal was clinched. It now appears that the assumption was wrong as the plaintiff denies having clinched a deal. Mr Strydom argued that I must have regard to the probabilities in order to establish whether a contract was concluded or not. In this matter the uncontradicted evidence is that the permit to move the animals (i.e. the one hundred sheep) from farm Nadubib was not issued on application by the owner of the sheep, in fact the sheep were moved from the farm in contravention of Statutory provisions without an animal movement permit. What is even disturbing is that when the second defendant went to remove the sheep from the farm he did not find the owner of the farm and the sheep on the farm, he did not even make attempts to speak to the owner of the sheep and inform him that he is collecting the sheep. The written agreement relied on by the first respondent was not signed by the plaintiff. In all these circumstances I am inclined to find that the second defendant has failed to discharge the onus resting on him and I accordingly find that there was no oral agreement concluded between the plaintiff and the second defendant for the sale of the one hundred sheep.

[37] It is a further requirement in a *rei vindicatio* action that the thing which is vindicated is still in existence and clearly identifiable.⁷ The second defendant pleaded that the one hundred sheep, had been in his possession at the time of the institution of the action, but his evidence in court was that the majority of sheep save for five or ten have been disposed of by the second defendant or have died. The plaintiff did not prove that the one hundred sheep were still in existence and clearly identifiable and it is not evident that the second defendant can deliver them. The Court can therefore not order the second defendant to return the sheep in its possession, when some of the sheep may not belong to the plaintiff. This brings the alternative basis for the plaintiff's claim into play, namely the *actio ad exhibendum*.

⁷ See the case of Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) supra footnote 2 at 996.

[38] For the *actio ad exhibendum* to succeed, the plaintiff must prove, in addition to ownership, that the defendant was in possession of the property, that the defendant disposed of the property with knowledge of the plaintiff's ownership and that the plaintiff suffered patrimonial loss, as well as the amount which the plaintiff is then entitled to.⁸ What is required is therefore an intentional act of dispossessing and an element of *mala fides*.

[39] The defendant admitted to being in possession of the sheep at the time of the institution of the action, and to subsequently having disposed of it (save for 'five or ten'). Mr Strydom who appeared for the second defendant argued that the second defendant acted on the information provided to him by Mr Beddies and also when he was informed by the police officer that the criminal charges were quashed and the criminal matter was not proceeding. The second defendant's action, so argued Mr Strydom, can therefore not be classified as *mala fide*. But the argument of Mr Strydom overlooks one crucial aspect, namely the knowledge by second defendant of the plaintiff's claim to the sheep. As argued by Ms. Visser who represented the plaintiff, a defendant who disposes of a plaintiff's property after the institution of an action in which ownership is alleged is considered to be *mala fide*⁹. In the matter of **Frankel Pollak Vinderine Inc v Stanton NO**¹⁰ Van Der Westhuizen, AJ said:

'...To focus again on the *mala fides* of the *actio ad exhibendum* I would sum up my understanding of the present state of the law thus: when a person disposes of, consumes or culpably destroys the property of another, he or she will be liable if the act took place with knowledge of the plaintiff's right or claim and that you cannot disavow knowledge if red or amber lights flash and you deliberately ignore or refrain from heeding them.'

[40] Mr Strydom attempted to down play the second defendant's knowledge of the plaintiff's claim by arguing that the present action was instituted sometime (he even attempted to argue that it was three years) after the second defendant was allegedly informed through a sms by a police officer that the criminal charges have been

⁸ Ibid at 1011.

⁹See the cases of Iderson & Flitton (Tzaneen) (Pty) Ltd v EG Duffeys Spares (Pty) Ltd 1975 (3) SA 41 (T), Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd 1975 (2) SA 420 (A).

¹⁰ 2000 (1) SA 425 at 443G.

quashed. I do not agree with Mr Strydom's assessment of the situation. In the present matter the 'red or amber lights' were clearly flashing for the second defendant, the evidence is that the plaintiff a week after he learned that the sheep have been removed from his farm, went to the second defendant's plot and laid claim to the sheep, he did not only stop there he went and laid criminal charges of stock theft. When nothing came off of the criminal charges he instituted this action. The second defendant pleaded to the plaintiff's particulars of claim on the 04th day of September 2012. In paragraph 16 of his plea the second defendant admitted the allegation by the plaintiff that the second defendant is in possession of the one hundred sheep. He pleaded as follows:

- '16.1 The second defendant admits the contents thereof. [i.e. the allegation that he is in possession of the one hundred sheep]
- 16.2 In amplification of such admission the second defendant avers that he the lawful owner of the sheep in question and respectfully refers to the contents of his plea set out hereinbefore.'

[41] The second defendant never amended its plea to reflect the fact that at the time when this action was instituted the sheep had been disposed of or some of it died. The only reasonable inference I draw from the second defendant's pleading is that the disposal of the sheep occurred whilst this action was still pending. In those circumstances the second defendant cannot disavow knowledge of the plaintiff's claim to the sheep. I therefore find that the plaintiff has established that the second defendant acted *mala fide* when it disposed of the sheep.

[42] The only aspect that remains for determination is the question of whether the plaintiff has proven the value of the sheep. I have no reason to doubt or question the expert evidence of Mr MacDonald that the value of the sheep ranged between N\$25 and N\$ 30 per kg during the time which the second defendant may have disposed of the sheep. On the second defendant's own evidence when he disposed of some of the sheep the sheep weight approximately 17 kg and he obtained N\$ 410 to N\$ 510 per carcass, this translates to the amount of N\$ 25 to N\$ 30 per kilogram testified to by Mr MacDonald. I therefore find that the plaintiff has established the value of the sheep and is entitled to the alternative claim.

[43] In the result I make the following order:

- (a) The second defendant is ordered to pay the plaintiff the amount of N\$ 45 000 plus interest at the rate of 20% reckoned from the 29th day of May 2012 (the date on which the summons were served on the second defendant) to the date of payment in respect of the one hundred sheep.
- (b) Cost of suit. The cost to include the cost of one instructing and one instructed counsel. I however direct that the instructing counsel for both the plaintiff and the second defendant are not entitled to the cost of 24 October 2013.

SFI Ueitele
Judge

APPEARANCES

PLAINTIFF:

I Visser

Instructed by Kirsten & Co Inc, Windhoek

DEFENDANT:

JAN Strydom

Instructed by Theunissen, Louw & Partners,
Windhoek