

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2845/2012

In the matter between:

IMBERT NGAJOZIKWE TJIHERO
JACQUELINE GETRUD TJIHERO

FIRST PLAINTIFF
SECOND PLAINTIFF

and

UAZUVA BEN KAUARI
LYDIA NINGIREE KAUARI

FIRST DEFENDANT
SECOND DEFENDANT

Neutral citation: *Tjihero v Kauari* (I 2845/2012) [2017] NAHCMD 269 (19 September 2017)

Coram: PARKER AJ

Heard: 12 June 2017

Delivered: 19 September 2017

Flynote: Vindication – *Actio rei vindicatio* – Plaintiff must prove ownership of thing and that defendant is in possession of the thing – In instant case plaintiffs claiming ejectment of defendants from a farm on the basis that plaintiffs are owners of farm and defendants are in possession of it – Undisputed that farm is registered in names of plaintiffs who are married in community of property – Court held that that on its own is not enough to lead to the conclusion that first plaintiff purchased the farm on his own and for himself and without the concern of first defendant and, further, that that on its own cannot be the end of the matter – The court held further

that it would be idle for the court not to consider the real issue which emerged during the course of the trial – Having considered the real issue which emerged during the course of the trial, court held that plaintiffs are not owners of the farm to the exclusion of the defendants and, further, that defendants are not in possession of the whole farm but in possession of their part of the farm – Accordingly, court held that it could not say that plaintiffs have satisfied all the requisites of *actio rei vindicatio* – Court concluded therefore that the farm is the property of plaintiffs and defendants – Consequently, court dismissed plaintiffs’ claim. Principle in *Collen vs Rietfontein Engineering Works* 1948 (1) SA 43 (A) applied.

Summary: Vindication – *Actio rei vindicatio* – Plaintiff must prove ownership of thing and that defendant is in possession of the thing – In instant case plaintiffs claiming ejectment of defendants from a farm on the basis that plaintiffs are owners of farm and defendants are in possession of it – Undisputed that farm is registered in the names of plaintiffs who are married in community of property – Court held that that on its own is not enough to lead to the conclusion that first plaintiff purchased the farm on his own and for himself and without the concern of first defendant and, further, that that on its own cannot be the end of the matter – The court held further that it would be idle for the court not to consider the real issue which emerged during the course of the trial – On the totality of the evidence court found that the real issue is the initial contact between first plaintiff and first defendant and transactions that ensued from that initial contact and subsequent conduct of first plaintiff relative to those transactions – Court found further that pursuant to those transactions and subsequent conduct of first plaintiff, defendants took possession of their part of the farm and not the whole farm – Accordingly court concluded that on the determination of the real issue which emerged during the course of the trial the farm is the joint property of plaintiffs and defendants – Court accordingly concluded further that plaintiffs have failed to satisfy the requisites of *actio rei vindicatio* – Consequently, court dismissed plaintiffs’ claim.

ORDER

- (a) Plaintiffs’ claim is dismissed.

(b) There is no order as to costs.

JUDGMENT

PARKER AJ:

[1] The plaintiffs, represented by Mr Narib, instituted action proceedings against defendants, represented by Mr van Vuuren, in which plaintiffs claim: (a) an order ejecting the defendants from Farm Dankbaar No. 444, Otjozondjupa Region ('the farm'); and (b) costs of suit.

[2] It is important to prefix this judgment with some prominent and peculiar features. They are these. The plaintiffs and defendants are a group of people related by blood or marriage. First plaintiff and second plaintiff are married to each other. First defendant and second defendant are also married to each other. Even a more distinctive feature is that first plaintiff is a brother to the second defendant. Apart from this, almost all the witnesses on both sides of the suit are related to the group in some way. Take, for instance, Phillip Tjihero, a plaintiff witness; he is an uncle of both first plaintiff and second defendant. Another plaintiff witness, Edison Handura, is a nephew of first plaintiff and second defendant. Erastus Kauari, a defence witness, is first defendant's brother.

[3] What flows from this peculiarity is that, generally, apart from the parties, none of those witnesses, ie Phillip Tjihero, Albert Tjihero, Edison Handura and Erastus Kauari, gave me the impression that they had come to court to lie to the court by giving false testimonies. Of course, because events surrounding the case occurred more than 12 years ago, some of the witnesses were mistaken in certain aspects as to the facts they testified to; but when they were confronted with documentary proof or other evidence to the contrary, those witnesses most invariably did not dispute the facts presented by such documentary or other proof. Take for instance Phillip Tjihero; he could not remember certain facts due to some defective memory brought

on by a motor vehicle accident in which he was involved and which occurred in 2015, but to him it occurred last year, that is, in 2016. Nevertheless, he could recall that the N\$75,000 which first defendant transferred into his account was for him, Phillip, to buy a farm. Even when it appeared not clear from the interpretation in his cross-examination-evidence as to whether he had said it was 'to open an account' with it, he stated firmly and clearly, 'Correct; to buy a farm'. And he had testified earlier that it was 'to buy a farm' for his 'daughter', ie second defendant. I shall return to this piece of evidence in due course because of its sheer relevance, as indicated below in paras 11 and 12 of this judgment, and it is certainly crucial in these proceedings.

[4] In *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurtz* 2008 (2) NR 775 (SC) at 790 B-E, the Supreme Court confirmed the principle that -

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even though it's so doing does not exclude every reasonable doubt ... for, in finding facts or making inferences in a civil case, it seems to me that one may ... by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

[5] I have carefully considered all the evidence placed before the court, leaving nothing out, and keeping the principles in *Kurtz* firmly in my mind's eye, I make the following factual findings and arrive at the conclusions thereanent in paras 6-19.

[6] In or about 2001 to 2005 defendants who are married to each other; as mentioned previously, lived in Russia. Second defendant (the wife) accompanied first defendant (her husband) who was serving in Namibia's Embassy to Moscow, Russia. First and second defendants were desirous of acquiring a farm before they returned to Namibia after the end of first defendant's tour of duty in Russia.

[7] First defendant discussed the defendants' desire with first plaintiff in November 2001 when first defendant visited Namibia to attend his father's funeral. First plaintiff offered to assist. It is important to flag this important aspect of this factual finding. This initial contact and discussion involved only first defendant, in the absence of his wife (second defendant), and first plaintiff, in the absence of his wife

(second plaintiff). It follows that, as far as the evidence I accept goes, second plaintiff and second defendant were not involved in this crucial initial contact and transactions which ensued; and so, second plaintiff and second defendant could not testify to the said initial contact and discussions held between first plaintiff and first defendant to implement the transaction between them. It should be pointed out also that *by and large the two wives knew, and could therefore only testify to, that which their husbands chose to tell them.* (Italicised for emphasis) I use the word 'chose' advisedly, as will become apparent in due course. I shall return to this conclusion in due course.

[8] Pursuant to the initial contact and in the course of events, first plaintiff informed first defendant that he had found a farm whose price first defendant said he was comfortable with. A first farm plaintiff had found previously was too expensive for first defendant. The farm which first plaintiff and first defendant settled for in the end is Farm Dankbaar No. 444, Otjozondjupa Region, whose owner then was a Mr Volker Dieckhoff, ie the farm. The farm is the subject matter of the instant proceedings.

[9] Since the defendants were at that material time in Russia, as aforesaid, they decided that Phillip Tjihero should be asked to stand in their place and purchase the farm and register it in his name in the interim until the defendants returned to Namibia upon expiration of first defendant's tour of duty in Russia; at which time Phillip would remove his name from the register and replace it with the names of the defendants as owners of the farm. The reason why defendants preferred to enter into this arrangement with Phillip and not first plaintiff from whom first defendant had sought assistance in the aforementioned initial contact is explained below. As I have said previously, Phillip is an uncle of both first plaintiff and second defendant, who are brother and sister, as aforesaid. With the assistance of first plaintiff, Phillip opened an account in his name at Standard Bank, Okahandja ('the Phillip account'). The Phillip account was to receive monies from first defendant; and the sole purpose of the monies so received was to finance the purchasing of a farm for the defendants, and first plaintiff knew very well about the account and the purpose for which it was opened in the first place.

[10] As time went on, upon first defendant's instructions, first plaintiff got N\$50 000 from the Phillip account through Phillip and paid it over to Volker as down payment on the farm. That first plaintiff caused Phillip to withdraw N\$50 000 from the Phillip account and hand it over to him is clear from Phillip's testimony, even if first plaintiff, for reasons best known only to him, did not feel obliged to tell Phillip what the money he had caused Phillip to withdraw and give to him was for. And Phillip testified that because he trusted his 'son', ie first plaintiff, he did not ask first plaintiff what the N\$50 000 he had caused him to withdraw from the Phillip account was for; just as he did not ask first plaintiff to explain to him why subsequently he caused him to withdraw and give to him another N\$25 000 from the Phillip account. All said and done; I find that first plaintiff found Phillip to be dirigible, and he dealt with him as such, taking advantage of him, I should add. It should be remembered that the monies were in Phillip's account; and so, first plaintiff owed Phillip an explanation *at that time* – I signalize '*at that time*' – for asking Phillip to withdraw N\$75 000 from that account. But, as I have found, first plaintiff gave no explanation to Phillip *at that time*. Accordingly, I hold that any explanation which first plaintiff gave during the trial – that is, after the season is over, as it were – is irrelevant, and is rejected as an afterthought.

[11] On the evidence, therefore, I conclude that the material matter here is certainly not what first plaintiff did with the amount of N\$75 000 he caused Phillip, who trusted him and so did not ask any questions, to withdraw from the Phillip account and give to him. Surely, the material matters must be -

- (a) that upon first defendant's instructions, as I have found, first plaintiff was obliged to pay the N\$50 000 to Volker as a down payment on the farm in favour of first defendant; and
- (b) the fact that first plaintiff did not tell Phillip, the account holder of the account, what he needed the N\$75 000 which shows that first plaintiff had a hidden agenda which was against the interests of defendants as regards the Phillip account.; and so, any reason which the first plaintiff gave in his evidence during the trial for taking that amount is an

afterthought, and is accordingly rejected as irrelevant (as mentioned previously).

[12] Furthermore, on this aspect; the material matter is not whether first plaintiff was truthful when he informed first defendant that Volker insisted that he would only 'do business' with first plaintiff only and not with Phillip or any other person and that Volker was only prepared to sell the farm to first plaintiff only. Surely, on the evidence, the material matters must be the following:

(a) That defendants had initially decided to use Phillip to buy the farm for them and on their behalf is borne out irrefragably by these pieces of unchallenged evidence:

(i) the 'Valuator's Report' on a headed paper of Agricultural Bank of Namibia ('Agribank') indicated clearly and unmistakably that -

(aa) the name of applicant is Mr Phillip Tjihero, and the signature of Phillip Tjihero and the date of 13 June 2003 appear there;

(bb) the description and the extent of the property as security is as follows:

<u>Name and Extent</u>	<u>Number of Farm</u>	<u>District</u>
5562, 2664	Farm Dankbaar No. 444	Otjiwarongo

(ii) the 'Valuator's Claim' on the headed paper of Agricultural Bank of Namibia ('Agribank') indicates clearly and unmistakably that originally the applicant whose name appear there is 'P Tjihero', and a line has been ruled through 'P Tjihero' and replaced by the names 'IN and TG Tjihero' (ie first and second plaintiffs);

- (iii) First plaintiff did not tell his wife, second plaintiff, about the aforementioned initial contact he had had with first defendant and subsequent transactions that arose from that initial contact.

- (b) First plaintiff did not tell second plaintiff, about, for instance:
 - (i) the Phillip account and why it was opened in the first place and its true purpose;

 - (ii) the fact that -
 - (aa) he, first plaintiff, had made first defendant to believe that Volker was only prepared to sell the farm to first plaintiff only and not to any other person, e.g. Phillip Tjihero, and that if the defendants registered the farm in their names right away, Volker would increase the price per hectare of the farm and that it was for those reasons that first defendant agreed that first plaintiff should register the farm in his (i.e. first plaintiff's) name and that first plaintiff would remove his name from the register and replace it with defendants' names upon defendants' return to Namibia when first defendant's tour of duty in Russia expired; and

 - (bb) it was because of what he, first plaintiff, had made first defendant to believe and the aforementioned agreement mentioned in item (aa) that was why first plaintiff caused Phillip Tjihero's names appearing on the aforementioned 'Valuator's Report' and 'Valuators Claim' to be ruled out and replaced with his name and the name of his wife (second plaintiff).

[13] In virtue of the foregoing factual findings and conclusions thereanent, I am not surprised in the least that second plaintiff would testify:

'During June of 2003 my husband concluded an agreement for the purchase of the farm Dankbaar No. 444, Otjozondjupa Region with a certain Mr Volker Dieckhoff. We had to pay N\$50,000 as a deposit and we did so. We thereafter approached Agribank to assist us with the financing of the said farm. We were successful in our application for an Agribank loan which was in the amount of N\$2,120,400. We were further informed by Agribank that because we are married in community of property the farm will be registered in both our names.'

[14] I should say that (a) it is true that first plaintiff paid N\$50,000 to Volker; (b) it is true that first plaintiff and second plaintiff approached Agribank to assist with financing; (c) it is true that the Agribank application was successful; and (d) it is true that the farm is registered in the names of first and second plaintiffs. All this is well and good; but, as I have found previously, second plaintiff's husband, first plaintiff, did not tell her the truth about the aforementioned initial contact between her husband and first defendant and any subsequent transactions that arose from that initial contact. Indeed, second plaintiff testified – and this is also crucial and material:

'I was not the one having discussions around this with Mr Kauari (first defendant) and Ms Kauari (second defendant). It is only my husband who was attending to this; after agreement with Dieckhoff (Volker) that is when we went straight to the Bank (ie Agribank) to apply for the loan.'

[15] Indeed, I can see no reason, and none was shown to me, why out of the blue first defendant would go to such great lengths to concoct a story about the initial contact and the transactions between the first plaintiff and first defendant that ensued.

[16] The pieces of evidence set out in para 17 of this judgment which I accept to do cumulatively support first defendant's version that -

- (a) he informed first plaintiff that he was desirous of buying a farm and that first plaintiff offered to assist;
- (b) in the course of events, first plaintiff informed him (first defendant) that he had found the farm for him (first defendant);

- (c) because he (first defendant) did not know first plaintiff so well as to trust him, he (first defendant) decided to work rather with and through Phillip Tjihero who would buy the farm, register it in his name, and later on remove his name and replace it with the names of first and second defendants as owners of the farm when first and second defendants returned to Namibia from Russia;
- (d) pursuant to the transaction with Phillip, he (first defendant) asked first plaintiff to assist Phillip to open an account into which he (first defendant) would transfer funds which Phillip would use in buying the farm for first and second defendants;
- (e) first plaintiff informed him (first defendant) that Volker was only prepared to deal with first plaintiff and not Phillip, and further, that Volker would increase the price per hectare of the farm if the farm was registered in the defendants' names right away which would indicate that it was not first plaintiff who was buying the farm but defendants; and
- (f) because of item (e), he (first defendant) reluctantly agreed – reluctantly, because he did not know first plaintiff well enough to trust him and enter into such an important and costly arrangement with him – that second defendant should buy the farm, register it in his name in the interim, and remove his name from the register and replace it with the names of the defendants when the defendants returned from Russia; some would say what happened after the defendants returned to Namibia is *déjà vu*; and
- (g) that in the end he, first defendant, agreed to the arrangement because his mother-in-law (now deceased), the mother of both first plaintiff and second defendant, assured first defendant that she would ensure that first plaintiff removed his name from the register and replaced it with the names of defendants as the owners of the farm when the couple returned from Russia.

[17] The pieces of evidence which I stated in para 16 of this judgment cumulatively support the first defendant's version are these:

- (a) the opening of the Phillip account, for the sole purpose of being used to buy a farm for the defendants;
- (b) the transferring of funds (N\$75,000) by first defendant into the Phillip account;
- (c) Phillip's Agribank applications as evidenced by the aforementioned 'Valuation Report' and the 'Valuator's Claim';
- (d) the ruling through of Phillip's name which was on the Agribank applications and the substitution therefor with the names of first and second plaintiffs;
- (e) the withdrawing of N\$75,000 from the Phillip account by Phillip upon the urging and insistence of first plaintiff and giving the amount to first plaintiff without first plaintiff telling Phillip what he (first plaintiff) needed the money for;
- (f) the payment of N\$50,000 to Volker by first plaintiff.

[18] On the basis of the foregoing factual findings and conclusions drawn from them, I reject as false first plaintiff's version about having bought the farm on his own and for himself and without first defendant's concern. Indeed, as the evidence shows, it is the same unproven version which first plaintiff fed to second plaintiff and which second plaintiff swallowed hook, line and sinker, and peddled in her evidence. Thus, second plaintiff rehearsed before the court the version which her husband, first plaintiff, had doled out to her. As I have held previously, she was not involved in the initial contact and the transactions between first plaintiff and first defendant that ensued: she said so herself:

'I was not the one having discussions around this with Mr Kauari (first defendant) and Ms Kauari (second defendant). It is only my husband who was attending to this; after

agreement with Dieckhoff (Volker) that is when we went straight to the Bank to apply for the loan.'

[19] Accordingly, second plaintiff's version also stands to be rejected as false. She merely, as I have found previously, rehearsed in her evidence that which her husband had fed her with. I have found previously that second plaintiff came on board, as it were, when she and first plaintiff 'approached Agribank to assist us with the financing of the farm'. In any case, that the farm is registered in the names of the plaintiffs is not in dispute. But that simply is not enough to lead to the conclusion that first plaintiff bought the farm on his own and for himself and without first defendant's concern; and, furthermore, that cannot on its own be the end of the matter, as I proceed to demonstrate.

[20] Plaintiffs' claim is for recovery of an immovable property, ie the farm, from the defendants who are in possession of a part of the farm. The plaintiffs' case is therefore *actio rei vindicatio* against the defendants on the basis that plaintiffs are the owners, ie *domini*, of the farm and the defendants are in possession of it. It follows that in order to succeed in their vindicatory claim plaintiffs must prove the following elements on a balance of probabilities (*Shingenge v Hamunyela* 2004 NR 1 at 3H-I), that is, that: (a) they are the owners of the farm and (b) defendants are in possession of it.

[21] The defence of defendants is that they are in possession of a part of the farm lawfully because they are co-owners of the farm on the basis that the farm is the property of a partnership of which plaintiffs and defendants are the partners, and they (defendants) 'invested by way of contribution in the form of transfer and bond registration fees and injection of own contribution that was paid for the acquisition of Farm Dankbaar No. 444 for the benefit of the aforesaid partners. On that basis, defendants contend, 'the Farm Dankbaar is in essence a partnership property'. This is set out in defendants' plea. Thus, it appears from the pleadings that the defence the defendants have put up is that defendants and plaintiffs are partners and the farm is the property of the partners in common, that is, the farm is partnership property.

[22] As to *rei vindicatio*; I hold that from the requisites of *actio rei vindicatio* (see *Shingenge v Hamunyela*) these elements must be established in the instant proceeding:

- (a) Have plaintiffs proved they are owners of the farm?
- (b) Have plaintiffs proved that defendants are in possession of the farm?
- (c) Did a partnership with the plaintiffs and defendants exist on the basis of the partnership agreement?
- (d) Is the farm partnership property?
- (e) If a partnership existed on the basis of the partnership agreement, has such partnership been lawfully terminated and what consequences should follow upon such lawful termination?

Element (a): Have plaintiffs proved they are owners of the farm?

[23] It is not disputed that the farm is registered, as the law requires, in the names of the plaintiffs as they are married in community of property and therefore in compliance with s 17(1) of the Deeds Registries Act 47 of 1937, ownership having passed to them from a Mr Volker Dieckhoff by a deed of transfer on 1 December 2003 and in terms of s 16 of Act 47 of 1937. The title deed issued in terms of Act 47 of 1937 is proof of plaintiffs' title to the farm. ON this fact alone, without more, the first element (a) in *actio rei vindicatio* (see para 20 of this judgment) is proven.

Element (b): Have plaintiffs proved defendants are in possession of the farm?

[24] On the evidence it is not in dispute that defendants are in possession of a part of the farm, and not the whole farm; and so, element (b) of the elements of *actio rei vindicatio* is unproven. I now pass to consider Element (c).

Element (c): Did the partnership agreement come into existence?

[25] The plaintiffs aver that no partnership existed between plaintiffs and defendants. Defendants contend contrariwise. What is the basis for defendants so contending? Only this; that a written partnership agreement was entered into between plaintiffs and defendants and it forms part of the record. Defendants' argument that such partnership came into existence on the basis of the written partnership agreement does not appeal to me in the least. Why do I say so? It's this. Second plaintiff, despite sustained efforts by the defendants to persuade her to sign the agreement, did not sign it. That her signature was needed by law, ie by s 7(1) of the Married Persons Equality Act 1 of 1996, to make the agreement valid and enforceable was not lost on the defendants and their legal representative, hence the frantic efforts they made to persuade her to sign the instrument. But, as I say, she did not sign it. She did not appear at the office of Mr Hoveka (a legal practitioner) where the defendants and first plaintiff had gathered in order to sign the agreement. She had sought independent legal advice; hence her total refusal to sign the agreement. That first plaintiff signed the agreement is of no moment. Second plaintiff did not appear at Mr Hoveka's office at all, whether she told first plaintiff on the phone that she would appear at the office and sign the agreement is absolutely immaterial. Thus, the irrefragable fact – which is also common cause between the parties – is that she did not appear; she did not sign the agreement: That is relevant.

[26] On the facts of the instant case, I am surprised that Mr van Vuuren argued that second plaintiff gave the consent that Act 1 of 1996 requires. Mr van Vuuren argued that s 7(1) of Act 1 of 1996 does not say that such consent should be given in writing. That may be so; but s 7(1) of Act 1 of 1996 does not also say that the consent should not be given in writing. Mr van Vuuren's argument cannot take defendants' case on this particular aspect any further.

[27] It should be remembered that the noun 'consent' in s 7(1) of Act No. 1 of 1996 is not defined; and so, the noun 'consent' should be given its ordinary meaning. See *International Underwater Sampling Ltd and Another v MEP Systems (Pty) Ltd* 2010 (2) NR 468 (HC). And 'consent' as a noun means 'permission for something to happen or be done'. (*Concise Oxford English Dictionary*, 11th ed) I do not see – not

even with microscopic mental spectacles – any permission given by second plaintiff to the conclusion of any partnership agreement.

[28] It is rudimentary that consent to a written agreement is signified by the signature or suchlike allowable form of printed impression, eg a thumbprint, of the person whose consent is required. Consent to a written agreement cannot – as a matter of common sense and human experience – be signified by the nodding of the head of the person whose consent is required or by some cognition on his or her part.

[29] It is trite that when the parties agree to reduce their contract to writing and that they will be bound by their contract, then the contract comes into existence when, and only when, the written instrument containing it has been signed by the parties (R H Christie, *The Law of Contract in South Africa*), 3rd ed, p 118). On this common law ground alone, I hold that the partnership agreement did not come into existence. This is apart from the fact that the partnership agreement did not come into existence because it is without the consent of second plaintiff as required by s 7(1) of the Married Persons Equality Act 1 of 1996.

[30] Parties are bound by a written agreement where they have voluntarily signed the agreement (*Namibia Broadcasting Cooperation v Kruger and Others* 2009 (1) NR 196 (SC)); and I can see no principle of law that says that persons are bound by a written agreement where they have not signed it.

[31] With the greatest deference to Mr van Vuuren, I should say Mr van Vuuren misreads s 8(1) of Act 1 of 1996 in relation to the facts of the instant case when he says that that provision finds application in the issue under consideration. It does not. Section 8(1) is a protective provision, and it could have applied but for the fact that defendants entered into the transaction with first plaintiff and they (defendants) did 'know' that the transaction was 'being entered into without such consent', that is, the consent of second plaintiff (see para (a) of s 8(1) of Act 1 of 1996).

[32] In the instant case the defendants knew very well that the consent of second plaintiff which was required had not been given. There is a space on the document for second plaintiff's signature, and it is empty. Defendants, together with first plaintiff, had waited in vain for second plaintiff to arrive at Mr Hoveka's law office at which they had gathered for her to sign the instrument. She did not appear there. There is no signature of second plaintiff on the agreement. No amount of sophistry can change this irrefragable fact: the partnership agreement is 'without the consent' of second plaintiff, within the meaning of s 7(1) of Act 1 of 1996, and defendants cannot be thankful of s 8(1) of that Act, as I have demonstrated.

[33] The unassailable conclusion that the partnership agreement did not come into existence (making the plaintiffs and defendants partners) is unaffected by the following aspects which Mr van Vuuren relies on also (apart from those I have considered and rejected previously) to establish that the partnership agreement came into existence:

- (a) any transactions, eg lease agreements in respect of the farm, which Mr van Vuuren adverted to in his submission and which first plaintiff had concluded with certain persons without second plaintiff's consent:

Mr van Vuuren did not tell the court if he knows whether, for instance, the lessees in those transactions took advantage of s 8(1) of Act 1 of 1996.

- (b) anything in the plaintiff's replication:

Plaintiffs are categorical at their first port of call that no partnership existed between the plaintiffs and defendants; and so, according to them 'the purported agreement, Annexure 'A' to the plea is for this reason *void ab initio* and a nullity'.

- (c) The letter from the plaintiffs' legal representatives (Exh 'D') terminating the partnership agreement:

The fact that the plaintiffs were of the view that in September 2011 there existed a partnership agreement and were not advised by their legal representatives that no partnership agreement existed in law does not make that partnership agreement valid. In any case, any view which defendants might have entertained about the validity of the partnership agreement does not bind the court. The validity of the partnership agreement has become an issue; in that event, the court must consider the evidence and apply the law in order to determine whether, indeed, a valid partnership came into existence on the basis of the partnership agreement. This should be the position when in the instant proceedings the plaintiffs contend that no partnership existed because the partnership agreement is invalid, making the dispute one of the issues which the court must resolve. And that is what this court has done. This court cannot determine the present issue in stark disregard of s 7(1) of Act 1 of 1996.

(d) The decision in *Cussons and Others v Kroon* [2002] 1 All SA 361 (A):

I accept Mr Narib's submission that on the facts of the instant case, *Kroon* is distinguishable.

[34] Based on these reasons, I hold that no partnership existed between the plaintiffs and defendants based on Annexure 'A' (the partnership agreement). It has not been established that Annexure 'A' is valid, and is therefore a mere irrelevance. This conclusion is in respect of Element (c). I pass to consider Element (d).

Element (d): Is the farm owned by the partnership?

[35] Having found under Element (c) that there is no partnership it is otiose to consider whether the farm is partnership property. In words of one syllable: there is no partnership; and so, the farm cannot be the property of a partnership that has never existed.

Element (e): If a partnership existed on the basis of the partnership agreement, has such partnership been lawfully terminated and what consequences should follow upon such lawful termination

[36] I have found under Element (c) that no partnership existed on the basis of the Annexure 'A' (ie the partnership agreement). This conclusion also disposes of the present issue (under Element (e)); for, if there was no partnership to terminate – lawfully or unlawfully, the farm could not be partnership property on the basis *solely* of the partnership agreement. (Italicized for emphasis) I use 'solely' advisedly, as will become apparent shortly.

[37] But all this cannot be the end of the matter. Accordingly, I respectfully reject Mr Narib's submission – albeit *non totidem verbis* – that the matter should end with (a) a determination on the partnership agreement and whether the farm is partnership property; (b) the fact that the farm was duly transferred to the plaintiffs; (c) the fact that the defendants did not institute a counter claim to vindicate any rights they may have as against the plaintiffs; and (d) the fact that – as counsel put it felicitously – defendants should stand or fall by their pleadings. That may be so, but apart from those issues, I think 'it would be idle not to consider the real issue which emerged during the course of the trial, although it does not appear clearly in the pleadings'. See *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433. This principle as discussed in Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed, p 523.

[38] Indeed, I do not think the plaintiffs themselves thought that the issue of *actio rei vindicatio* is the only issue in the instant proceedings; otherwise, it is inexplicable why their counsel did not just draw the attention of the court to the Deed of Transfer only without more; for, after all, that the Deed of Transfer says that the farm was transferred to the plaintiffs is not disputed, and it is also not disputed that the defendants were in possession of the farm, albeit only a part of it, as aforesaid. The plaintiffs did not do just that. The proceedings went through the whole gamut of a trial during which this real issue emerged, namely, the aforementioned initial contact between first plaintiff and first defendant and the transactions which ensued from that initial contact, which I have discussed previously, and the subsequent conduct of not

only first plaintiff but also of both plaintiffs relative to those transactions, which I have mentioned in para 41 below. It is to that real issue that I now direct the enquiry.

[39] I find that it was pursuant to the initial contact and the transactions that ensued between first plaintiff and first defendant and the refusal of the former to carry out the terms of the transactions, when defendants returned to Namibia, which led to the first plaintiff and first defendant agreeing that plaintiffs and defendants should cooperate in running the farm as the property of plaintiffs and defendants. When it became apparent that the four could not make the envisaged cooperation work, first plaintiff and first defendant decided that the farm should be subdivided so that plaintiffs would take one part and the defendants the other part. The fact that the subdivision would not be valid until certain legal requirements were met is immaterial, and does not detract from the fact that first plaintiff and first defendant agreed such transaction.

[40] I find, further, that it was pursuant to those transactions that first plaintiff sought and obtained the consent of the Minister of Agriculture, Water and Forestry ('the Minister') in terms of the Subdivision of Agricultural Land Act 70 of 1970 to subdivide the farm. The Permanent Secretary of that Ministry, acting under a delegated power given by the Minister, granted the consent on 3 August 2010. And the consent of the Minister having been granted and consistent with the consent, first plaintiff proceeded to take the next logical step to implement the Minister's consent by getting a Professional Land Surveyor to carry out the subdivision of the farm in or about September 2010. There is more. In 23 April 2012, the legal representatives of *both* plaintiffs wrote to defendants' legal representatives thus (italicized for emphasis):

'We accordingly hold instructions to offer your client to purchase portion 1 of the Dankbaar No. 444, at 50 per cent of the debt now owned to the Agricultural Bank of Namibia.'

'We hold further instructions to advise you that the offer to purchase portion 1 of the Farm Dankbaar is valid for a period of 14 days and expires at midnight on the 08 May 2012. If your clients fail to exercise the option to purchase portion 1 of the Farm Dankbaar, our client will offer it to the general public for sale.'

'We trust the above meets your approval.'

[41] I do not for a moment think that first plaintiff did do all that I have described in para 41 above out of the goodness of his heart. He did do all that in order to implement the series of transactions that ensued from the initial contact he had had with first defendant which I have mentioned more than once. By a parity of reasoning, I find that the 23 April 2012 letter fell in the scheme and context of those transactions.

[42] It is clear from first plaintiff's conduct described in para 41 above and the minds of both plaintiffs laid bare in the 23 April 2012 letter that, as far as the farm is concerned, plaintiffs do not consider defendants as part of the 'general public'. For plaintiffs, the farm belongs to the parties in equal share. Defendants have taken possession of their part of the farm.

[43] I have demonstrated that this 'court has before it all the materials on which it is able to form an opinion, and that being the position, it would be idle for it not to determine the real issue which emerged during the course of the trial' (see *Collen v Rietfontein Engineering Works loc. cit.*); and the court having determined the real issue, the conclusion is inescapable that the farm is the property of the plaintiffs and defendants, and the basis for it, as I have shown, is not the so-called partnership agreement. In any case, that agreement, which I have found to be invalid and a fiasco, was meant to regulate how the parties were to cooperate in farming on the farm.

[44] I accept Mr van Vuuren's submission that plaintiffs' claim is based solely on ownership of the whole farm. The plaintiffs have not instituted any alternative claim. On the basis of all the materials placed before the court and on which the court has been able to form an opinion, as indicated above, I find that the plaintiffs are not owners of the whole farm to the exclusion of the defendants and the defendants are not in possession of the whole farm.

[45] Thus, having determined the real issue that emerged during the course of the trial and having formed an opinion on all the materials, as I have indicated, I cannot

say that the plaintiffs have satisfied all the requisites of *actio rei vindicatio*. It follows inevitably that the plaintiffs claim must fail; and, it fails.

[46] In obedience to Mr van Vuuren's caution to it, which Mr Narib appears to concur in, this court has steered clear from making 'a finding in favour of an accounting and debate (debatement) on the facts before it in this matter and also in the light of the fact that neither party seeks such relief'.

[47] It remains to consider costs. Every case that comes before the court brings with it its own peculiar features. The instant case is not different. I have already mentioned that if the case of the plaintiffs was merely their reliance on the fact that there was a deed of transfer indicating clearly that the farm was transferred to them, they should have pursued only that. They did not. The case went into the full length of a trial. I mention also that looking at the evidence and the real issue which emerged during the course of the trial and considering the plaintiffs' claim and the defendants' defence, it is my view that a great deal of the evidence adduced at the trial was not material to the essence of the case: it was labour lost – on both sides of the suit. Mr Narib appears to have such a view when he addressed the matter of costs; except that in counsel's view, any blame should be placed at the door of the defendants. I do not agree. I mention this in particular: evidence about (a) who donated what livestock to whom; (b) who was the original user of certain stock brands; (c) auction pens and auctions carried out at the farm and horse race at the farm and income which was derived from those activities; and (d) white and red bakkies, their prices and their respective owners.

[48] The adducing of evidence on those aspects created more heat than light in the trial and tended to befog the real issue at play; thus, prolonging unduly the trial. Furthermore, some of the legal advice given to the parties before proceedings were instituted were bad in law but the parties held on tenaciously to such bad advice and brought them into the proceedings, e.g. on the partnership agreement that it is valid when it is clearly not valid, and on whether the partnership agreement was terminated, an agreement which clearly did not exist.

[49] As I see it, this is a good case where it is fair and just in the circumstances for the court not to make any costs order. The parties should bear their own costs.

[50] In the result, I make the following order:

- (a) Plaintiffs' claim is dismissed;
- (b) There is no order as to costs.

C Parker
Acting Judge

APPEARANCES

PLAINTIFFS: G Narib
Instructed by Sisa Namandje & Co. Inc., Windhoek

DEFENDANTS: A Van Vuuren
Instructed by Grobler & Co., Windhoek