

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. I3244/2014

In the matter between:

THE BOARD OF INCOPORATORS OF THE AFRICAN METHODIST EPISCOPAL CHURCH	1ST PLAINTIFF
THE BOARD OF TRUSTEE OF THE NAMBIA ANNUAL CONFERENCE OF THE FIFTEENTH DISTRICT OF THE AME CHURCH	2ND PLAINTIFF
DAWID RWHYNICA DANIELS, JR	3RD PLAINTIFF

and

PETRUS SIMON MOSES KOOPER	1ST DEFENDANT
TIMOTHEUS DAUSAB	2ND DEFENDANT
ABRAHAM JAGGER	3RD DEFENDANT
HENDRICK /GARISEB	4TH DEFENDANT
NEW AFRICAN METHODIST EPISCOPAL CHURCH	5TH DEFENDANT

Neutral Citation: *The Board of Incorporators of the African Episcopal Church v Kooper* (I 3244/2014) [2019] NAHCMD 139 (6 May 2019)

CORAM: MASUKU J.

Heard on: 18, 19, 20 July; 1 August 2017, 23 October 2018

Delivered on: 06 May 2019.

Flynote: Law of property – ownership of property – *bona fide* possession of property – ejectment. Law of Evidence – failure to call a witness who is available – adverse inference drawn therefrom – whether a witness needs to be authorised to give evidence on behalf of a legal entity. Rules of court – Rule 93 – compliance therewith.

Summary: The plaintiffs sued the plaintiff for ejectment from certain landed property, claiming that they were the owners of the property, alternatively, they were the *bona fide* possessors of the property in question. The defendants, although they raise certain defences in their plea, did not call witnesses in support of their case. The defendants claimed that they were in lawful possession of the property and that the plaintiffs had no sustainable case against them.

Held – that from the evidence adduced by the plaintiffs, a case for ownership of the property had not been made out, as there were no documents of title proving ownership.

Held further that – on the balance, the plaintiffs had made out a case for *bona fide* possession but because the defendants did not call witnesses in support of their defences, the defendants had failed discharge the evidential burden for a case for their case of possession.

Held that – because the 2nd defendant and the 5th defendants did not call witnesses, it was proper to draw an adverse inference against them.

Held further that – because the defendants failed to call evidence in support of their defences, they should be held to have failed to have discharged the evidential burden on cast on them.

Held that – a witness does not need to be given authority to testify on behalf of a legal entity, as the giving of evidence is a volitional act of the potential witness.

Held further that – a witness who intends to testify should file a witness' statement and that failure to do so precludes that witness from giving evidence unless the court, on good cause shown, holds otherwise, this is to ensure a level field so that the other party is not taken by surprise.

The case based on ownership was not upheld but the case based on *bona fide* possession was upheld and the order for ejectment was accordingly granted.

ORDER

1. The defendants and all those who are holding the property described as Erf. 140, Hoachanas, under the said defendants be and are hereby ejected from the said property.
2. The defendants are ordered to hand over the keys to the premises situated at Erf 140 Hoachanas to the plaintiffs within thirty (30) days from the date of this order.
3. The Defendants be and are hereby ordered to pay the costs of this action jointly and severally, the one paying the other to be absolved.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] This is an action in which the plaintiffs essentially seek the ejectment of the defendants from landed property described as Erf. 140 Hoachanas. Needless to say, the action is defended thus culminating in a fully blown trial, which saw both sets of protagonists tendering evidence in support of their respective cases.

Background

[2] As indicated above, the trial revolves around the property described in para [1] above. It is the plaintiffs' case that the property, which amongst other things houses a church building, belongs to the plaintiff, or in the alternative, the plaintiffs have a claim to *bona fide* possession of the same. The plaintiffs further claim that the defendants unlawfully despoiled them of this property, hence the claim for ejectment.

The pleadings

The plaintiffs

[3] In their combined summons, the plaintiffs aver that they are the owners, alternatively, the *bona fide* possessors of the property, which they describe as follows in the particulars of claim, "Erf 140, Hoachanas, Portion 2 (a portion of portion 1) of the FARM Hoachanas, No. 120, General Plan ANo.466/97, original diagram A353/97 as further subdivided by virtue of General Plan "MF50" of 5th April 2000, annexed hereto as "MF1", "MF2", "MF3" and "MF4" ("the property). It is further averred by the plaintiffs that the defendants are in unlawful occupation of the property, hence the order for their eviction.

The 1st and 2nd defendants

[4] The defendants filed different pleas in response to the claim. The 1st and 2nd defendants filed their plea in which they denied that the plaintiffs are the owners of the property in question nor are they the *bona fide* possessors thereof, it is further averred. These defendants alleged further that the

property in question belongs to the Government of the Republic of Namibia, ("GRN"). It is the said defendants' further averral that the documents attached by the plaintiffs, referred to in the immediately preceding paragraph do not constitute proof of ownership of the property but they are merely drawings describing the property.

[5] Whilst admitting that they are in occupation of the property, the said defendants deny the unlawfulness of their occupation of the property. In particular, it is alleged that the 1st defendant is a Pastor of the New African Methodist Episcopal Church, of which the 2nd defendant is a member. It is averred in that regard that the church of which the 1st defendant serves as Pastor, lawfully conducts church activities in the property and furthermore that the said church funds and manages a private school and a hostel, which are both situated on the property. It is alleged therefor that the two defendants are in lawful possession of the disputed property.

The 5th defendant

[6] The 5th defendant, on the other hand, in its plea also denies that the plaintiffs are the owners nor the *bona fide* possessors of the property in question. It also alleges that the property is registered in the name of the GRN. It repeats the contention that the documents filed in support of the plaintiffs' claim do not show ownership of the property.

[7] Significantly, the 5th defendant avers further that to the extent that the plaintiffs may have had any right to occupy the property in question, which right is in any event denied, such right ceased to exist during 1956 when the Bishop of the AME Church, Rev. Gow colluded with the then Government and agreed to the community of Hoachanas being forcibly removed from the property. Lastly, the 5th defendant avers that it lawfully conducts its Church activities on the property and has done so for a period of 10 years and is as such in lawful possession of the property. Like the 1st and 2nd defendants, the 5th defendant claims that it funds and manages a private school and hostel on the property.

[8] The 5th defendant further avers that the buildings of the property were built by the Community of Hoachanas in the 1950s, 1978 and 1993, respectively. In the alternative, and in the event the court finds that the plaintiffs do have a possessory rights to the property, which is denied, it is the 5th defendant's case that the said possessory rights became prescribed in terms of s. 12 (3) of the Prescription Act.¹

[9] It was on the foregoing bases that the defendants prayed that the plaintiffs' claim should be dismissed with costs.

The pre-trial order

[10] In terms of the provisions of rule 24, the parties submitted a joint pre-trial order, which was adopted and made an order of court by Mr. Justice Miller on 19 May 2016. In terms of the said order, it was recorded that the 3rd defendant, Mr. Abraham Jagger had passed on in the course of time. Facts which were placed in dispute were the following:

- a) the defendants dispute the ownership of the property by the plaintiffs and the alleged *bona fide* possession of the property;
- b) the alleged unlawful occupation of the property by the defendants;
- c) whether the buildings on the property were constructed by the community of Hoachanas or by the plaintiffs;
- d) whether the hostel and school buildings were erected with foreign aid before Namibia gained her independence or by the plaintiffs.

[11] The pre-trial order proceeded to outline the issue of the law to be resolved as follows:

- a) whether the defendants are in unlawful possession of the property;
- b) whether the plaintiffs possessory rights ceased in 1956;
- c) whether the plaintiffs' possessory rights prescribed; and
- d) whether the annexures **MF1** to **MF4** are proof of ownership as alleged by the plaintiffs.

¹ Act No. 68 of 1969.

These were the issues it was agreed, would be submitted to the court for determination during the trial.

Conduct of trial

[12] The trial commenced in earnest and the plaintiff, upon whom the onus rested to prove that their claim was good, adduced the evidence of four witnesses. At the close of the plaintiffs' case, the defendants moved, as they were entitled to, an application for absolution from the instance. This application was fully argued by the parties and it was dismissed with costs.

[13] Thereafter, the trial proceeded with the defendants adducing their evidence at the end of which the trial was finalised and final submissions were made on behalf of both sets of protagonists. A rendition of the salient portions of the evidence will be conducted and an analysis thereof will be conducted with a view to coming to a conclusion on the all-important question, namely, whether the plaintiffs have proved their entitlement to the order sought on a balance of probabilities.

The evidence adduced

Rev. Jonas !Nakom

[14] Rev. !Nakom is the Chairperson of the Trustee Board of the Immanuel AME church in Hoachanas. He was assigned as a pastor to the Immanuel AME church on 28 August 2005 but, has since that date, been unable to access the church or the congregation. According to Rev !Nakom, a delegation was sent to the Immanuel AME church in Hoachanas with the aim of informing the congregation that first defendant had been relieved of his pastoral assignment. This delegation was unable to enter the church building as it was locked and was also informed by 2nd and 3rd defendants that the church keys were not in their possession.

[15] The 2nd and 3rd defendant further informed the delegation of their decision to withdraw from the AME church and it was subsequent to this that

the 1st and 4th defendants were expelled from the AME church with no rights and privileges. Despite this expulsion, the defendants refuse, despite demand, to hand over the keys to the church building. The defendants, he further testified, had since established and incorporated the New AME church where 1st defendant is the pastor and, they, to date, continue to use the premises of the Immanuel AME church at Erf 140 Hoachanas. It is the testimony of Rev. !Nakom that the conduct of the defendants has served to deprive the true and rightful members of the Immanuel AME church access and enjoyment of the property in that, the 1st plaintiff has been unable to engage in church activities. It was on 15 September 2005 that the Board of trustees of the Immanuel AME church resolved that proceedings be instituted against the defendants.

Rev Andreas Biwa

[16] He is a full member of the AME church and a member of the Zacheus Thomas Trinity AME church in Keetmanshoop. Rev. Biwa led the delegation of the meeting held on 12 March 2005 at the Immanuel AME church with the 2nd and 3rd defendant to inform the congregation about the relieving of 1st defendant from his pastoral assignment. It was established, in a report dated 31 March by Rev. Biwa that members of the Immanuel AME church still regarded themselves as members of the church. It was his further testimony that he, in a letter authored by him, requested 1st, 2nd and 3rd defendants to hand over the keys and assets within 14 days to the remaining members of the Immanuel AME church. He further testified that he as well as Mr. Hanse, in their various capacities, were mandated to assist the Trustee Board of the Annual Conference in bringing these proceedings to this court. Rev. Biwa also testified that the conduct of the defendants has served to deprive the members of the AME Church access and enjoyment of the property.

Rev. Willem Simon Hanse

[17] Rev. Hanse is a pastor at the St. Mark AME Church in the Gibeon district. In his testimony, he gave a brief background of the establishment of the AME Church in Hoachanas amongst other things. In a report compiled by

the Secretariat titled 'Conference Room paper No VI/10 on 16 March 2016, National Archive Library Accession No. 9471, the inhabitants of Hoachanas petitioned the territorial Government to construct a permanent Immanuel AME Church. This structure was built from the inhabitants' own pockets.

[18] He went on to testify that the permission to occupy or PTO on Erf 140 Hoachanas, was granted in favour of the AME Church in 1952 by virtue of the Native Proclamation Act 31 of 1933 and the Regulations issued under Government Notice No. 133 of 1933. The Regulations required the 1st plaintiff to erect a proper building on the site for religious purposes. The AME Church, he further testified, has to date never been evicted from these premises and it is therefore, the owner of the buildings, alternatively, the *bona fide* possessor thereof.

[19] It was his further testimony that the 1st defendant was a Pastor in the Immanuel AME Church, whereas the second and third defendants were members of the Board of Trustees of the Immanuel AME Church and they performed their respective functions in the building which they now claim does not belong to the AME Church. Rev. Hanse went further in his testimony and stated that as per the Pastors' Annual Reports, it is clearly illustrated that the 1st defendant, as Pastor of the Immanuel AME Church was in charge of the AME Church property at Hoachanas to wit, Erf 140.

[20] The 1st defendant was aggrieved, as was the third defendant, he further testified, that the Hoachanas district was divided in various parts and consequently threatened that the pastors should move their separate ways and this led to the creation of a new pastoral charge called Hoachanas East. This came after there was a move by the presiding Elder W.A Baile for the church property to be insured with the Local Authority.

[21] Despite the lack of a cornerstone, he further stated in his evidence, it in no way negated the valid existence of the church nor precludes the church from declaring the property as AME property. Church property is collectively owned by the church and the Board of Incorporators is charged with the responsibility to oversee, control and manage all the assets of the church. The

AME Church is incorporated and the Board of Incorporators is the legal representative of the church with the rights to sue and be sued in matters, which relate to the property rights of the church, he further testified.

[22] The further testimony of Mr. Hanse was to the effect that according to The Doctrine and Discipline of the African Methodist Episcopal Church Book, all titles of real, personal and mixed property held at the General, Annual Conference level or by the local churches, shall be held in trust for the African Methodist Church. From 2006 until 2013, the Immanuel AME Church at Erf 140 was responsible for the monthly water and electricity charges and were paid for by the AME Church.

[23] On 5 March 2005, the first and fourth defendant walked out during the Bishops Address at St Ebenezer AME Church, Katutura. It was as a result of this conduct that 1st defendant was relieved of his pastoral assignment at the Immanuel AME Church in Hoachanas. On 12 March 2005, a delegation was sent to access the Immanuel AME to inform the congregation about the relieving of 1st defendant from his pastoral assignment and it was established, in a report dated 31 March by Rev. Biwa that members of the Immanuel AME church still regarded themselves as members of the church. Rev. Biwa, in a letter authored by him, requested the 1st, 2nd and 3rd defendant to hand over the keys and assets within 14 days to the remaining members of the Immanuel AME church.

[24] He testified further that the 1st and 4th defendants were summoned for a disciplinary hearing on 23 July 2005 but did not show up, no final decisions were taken until 25 August 2005 when the Committee on Ministerial Efficiency sat for the final time to discuss the disciplinary hearing and give first and fourth defendant an opportunity to be heard. The charges levelled against them being that they had unilaterally and against the advice of fellow presiding elders called an unauthorised AME Church Conference meeting at St. Peter's AME Church Maltahohe.

[25] The 1st defendant made common cause with fourth defendant and stated to the presiding elders that he was tired of the American Domination of

the Namibia Annual Conference and supports the fourth defendant. He further stated that he does not recognise his suspension by Bishop Green Sr. and continues to illegally occupy the building of the Immanuel AME Church, Hoachanas. It was as a result of this conduct that first and fourth defendants were expelled from the AME Church without any rights and privileges and, this was formally done on 27 August 2005.

[26] On 12 September 2005 and 25 October 2005, Rev. Jonas !Nakom wrote to the 1st and 4th defendants, informing them he was now assigned to the Immanuel AME Church effective 28 August 2005 and requested that they, within two days, deliver all administrative documents and fixed asset keys.

[27] On 23 November 2005, the defendants sent an invitation letter to Dr. Hendrik Witbooi of the AME Church inviting him to the establishment of a new AME Church. The defendants established and incorporated the New AME Church, an association not for gain, with registration no. 21/2006/279. The New AME Church was officially launched on 11 December 2005 with 1st defendant as its Pastor and the 2nd and 4th defendants as members.

[28] It was his further testimony that that the defendants continue to use the premises of the AME Church at Erf 140 Hoachanas as if it belongs to their New AME Church. This they do because they are in possession of the AME Church building. Since 25 September 2005 Dr. Andreas Biwa and Rev. Hanse, in their various capacities, were mandated to assist the Trustee Board of the Annual Namibia Conference in approaching this court.

[29] Finally, it was the testimony of Rev. Hanse that, because of the conduct of the defendants, the AME Church has been put in a position where it has been unable to continue church activities, sermons as well as rituals at Hoachanas. Further, that the official and full members of the AME Church are denied access and enjoyment of the property. Rev. Hanse contends that the defendants are no longer members of the AME Church and have by virtue of their conduct deprived the church elders access to a church in which they have invested immeasurable time and finances. It is for the above reasons

that the plaintiffs sought the ejectment of the defendants from the premises in question.

Defendants

Rev. Petrus Simon Moses Kooper

[30] It was his evidence that he is the Traditional Chief of the Kai //Khaun Traditional Authority and Pastor of the fifth defendant which was established on 11 December 2005 as an incorporated association not for gain in 2006, with Registration No. 21/2006/279.

[31] It was his evidence that he does not possess the property at Erf 104 Hoachanas and that the 5th defendant, regards the buildings on Erf 140 as community property as it was utilised by the community and not exclusively by the AME Church. According to 1st defendant, the AME Church is controlled by a board of incorporators or a Board of Trustees, all of whom are resident in the United States of America. He thus contends that the Trustee Board of Namibia Annual Conference of the Fifteenth District of African Methodist Episcopal Church does not have any *locus standi in judicio*. I interpose to mention that this is an issue that was settled in the application for absolution from the instance and put to eternal rest. It cannot be resurrected by a witness' statement.

[32] He went further to state that the plaintiff is not entitled to an eviction for the reasons that Erf 104 Hoachanas does not belong the AME Church, that it is situated on state land on which the community built a church amongst other things. The building, he further testified, never belonged to the AME Church and that all the plaintiffs can claim is that in March 1952 the PTO was granted by the then Administrator general for the AME Church to occupy a site in Hoachanas for the purposes of erecting a church. However, that in 1959 the community was forcibly removed from Hoachanas to Itzawisis and that any right to occupy which the AME Church might have enjoyed, ended on the date that the permit was revoked.

[33] According to the Doctrine and Discipline of the AME Church, he further stated, it is a pre-condition that, for any property to be declared the property of the AME Church, there has to be a cornerstone ceremony. Rev. Kooper testified that no such ceremony was conducted and as a result thereof the property at Erf 104 Hoachanas does not belong to the AME Church, he contends that the church was built by the community of Hoachanas and that not all of them were members of the AME Church and that the AME Church contributed to the erection of the building.

[34] Hoachanas, he further proceeded in his evidence, has been proclaimed as a settlement and Erf 104 Hoachanas has been reserved by the state for educational purposes, the school and hostel built thereon operate as a private school and is supported by the community and with subsidies from the Ministry of Education. It was his further testimony that the AME Church has not and does not make any financial or other contribution towards the upkeep of the school and hostel.

[35] Finally Rev. Kooper denied that any lawful basis exists for an ejectment order against the defendants and that, neither the plaintiffs, nor the AME Church can claim any legal title to the premises save for a very vague reliance on a property claim based on projects being set up and conducted in the name of the church. In a valedictory statement, he mentioned that the plaintiffs do not have any possessory or other superior right to occupy, use and enjoy the premises and that the defendants are therefore in lawful occupation and entitled to the use and enjoyment of the premises.

Common cause facts

[36] Having heard the evidence and considering the submissions made in the matter, I am of the view that there are certain matters which are common cause between the parties, or which can be described as not seriously disputed. The enumeration of these may assist in narrowing down the issues on which findings of fact may be deemed necessary. I list the common cause facts below:

- (a) that the plaintiff was granted a PTO in 1952 by the Administrator-General in respect of the property in question;
- (b) the property in question includes a church building, a private school and a hostel;
- (c) the plaintiff has remained in occupation of the said property from that date until 2005, when the respondents moved into the property;
- (d) in March 2005, the church split when the 1st defendant and those like-minded decided to break away from the plaintiff, which was administered from the USA;
- (e) a splinter group called the Exodus AME Church, left the church and commenced worship in structure made of corrugated iron sheets;
- (f) in August 2005, the 1st defendant, who had been a Pastor of the plaintiff, was expelled as a Pastor of the church;
- (g) after his expulsion, the 1st defendant's group continued to occupy the church building in Hoachanas and to hold church services thereat;
- (h) the 5th defendant was established in or about 11 December 2005;
- (i) after the defendants occupied the property, the plaintiff wrote letters to the defendants requesting that the keys to the structures be given to them. This was not done.

Analysis of the evidence

[37] The plaintiff's evidence, it must be mentioned, was adduced generally in matter-of-factly manner. Although the witnesses were quizzed in cross-examination and tactfully so, I may add, by Mr. Corbett, then for the defendants. I formed the distinct impression that they, for the most part, were not ruffled by searching the cross-examination to which they were subjected. They generally stood up well to contentions and propositions put to them on behalf of the defendants.

[38] One issue that I can state without equivocation, is that I am not satisfied that the plaintiffs managed to make a case for ownership of the property in question. To this extent, I agree with Mr. Philander for the defendants that a case for ownership of the property has not been established

regard had to the evidence and the requirements a person in their shoes has to prove.

[39] When one reads the heads of argument filed by Mr. Kauta on behalf of the plaintiffs, together with his oral argument presented at the conclusion of the trial, one gets a distinct impression that the plaintiffs rather seemed to harp in favour of an order for possession of the property, rather than ownership. In this regard, it would seem that there were insuperable difficulties in their way. It is, for instance, clear from the heads of argument that Mr. Kauta argued that Exhibit 5, submitted in evidence by the plaintiffs' shows that the plaintiffs had established an unanswerable case for possession². I will deal with this submission in due course.

[40] It is common cause that for a plaintiff to obtain an order for the ejection of defendant based on ownership, the plaintiff must allege and prove title to the property from which the defendant is sought to be evicted.³ I can state without fear of contradiction that the documents filed by the plaintiffs in support of their case fall short of proving that they had title to the property. The PTO they filed in support of their claim does not, in my view support a claim for ownership. This is because the conditions of granting a PTO stipulated clearly that the said document 'shall not convey ownership in the land'.⁴

[41] It therefor follows that the only requirement that the plaintiffs were able to prove, is that the defendants are in occupation of the property. There is no real dispute in that regard and this I can confidently say without fear of contradiction, is common cause. In the premises, I am of the view that the onus was on the plaintiffs to show that they had title to the property in question and they failed to prove that. In that event, it is in my view proper to conclude that their claim based on ownership cannot succeed in the circumstances.

² Para 27.7 of the plaintiffs' heads of argument.

³ *Concor Construction (Cape) (Pty) Ltd v Santam Bank Ltd* 1993 (3) SA 930 (A); *Viviers v Ireland and Another*, 2016 (3) NR 644 (HC) at para [17].

⁴ Reg. 3 (a) made under the Proclamation No. 31 of 1932. PLEASE QUOTE

[42] That is not, however, the end of the case, I say for the reason that it is clear that the plaintiff adopted a double-barrelled approach to the claim by pleading *bona fide* possession of the property in question, in the alternative. It is accordingly appropriate that the court should interrogate the sustainability of this alternative claim.

[43] In this regard, I am of the considered opinion, as recorded in the common cause facts above, there is no dispute that the plaintiff was granted the PTO and that was around 1956. It took possession of the property in question until 2005 as aforesaid. What I intend to do at this juncture, is to deal with the case for the defendants. I propose to do so in turn.

The 3rd defendant

[44] In this regard, it must be mentioned that the 3rd defendant passed on to the celestial jurisdiction. For that reason, no order can be realistically enforced against him. I should also mention that as a result of him predeceasing the trial, he did not tender any evidence at the trial. More importantly, whatever conclusion the court may reach on this matter, it is clear that even if he had at any stage occupied the premises in question, he no longer does and no order can be enforced against him at this stage as the order sought appears to have been of a personal nature.

The 2nd defendant

[45] The 2nd defendant is alive and well. He attended the proceedings from inception of the trial. His presence was duly confirmed by the 1st defendant during the trial, when he was subjected to cross-examination by Mr. Kauta. The pre-trial order indicates that the 2nd defendant would be called to testify as a witness. He was not so called and no reason has been proffered to the court as to why he was not called in spite of the indication in the pre-trial order.

[46] What is the effect of a person who is a party to trial proceedings but who, for no reasons advanced to the court, does not come forward to be examined at all? All that is properly before court is the plea that the 2nd

defendant filed. Is there some kind of metamorphosis that takes place, which elevates or changes the nature of the plea to evidence that the court can take into account in dealing with the probabilities of the matter? I think not.

[47] It is critically important for parties to testify and if necessary, to call witnesses to testify on their behalf. If they do not do so, they shoot themselves in the foot as the plea filed, including a witness' statement filed in terms of rule 93, do not through some magic wand, become evidence that the court may take into account in weighing the probabilities. Furthermore, it is my considered view that any questions put in cross-examinations to the plaintiff's witnesses for and on behalf of a defendant who is subsequently not called to put a version, do not through some metamorphosis, turn into evidence that may work in the defendant's favour.

[48] One of the imports of putting questions in cross-examination to witnesses, is to alert that witness as to what the examining lawyer's client will say in the witness box. If that witness is not called, the propositions put to the witness being cross-examined, do not then via some legal or forensic osmosis, become elevated to evidence by the witness who was never called and which the court may take into the equation when considering the evidence and where the probabilities of the case lie.

[49] The authors Schmidt & Rademeyer⁵ state the following, regarding the failure to give or adduce evidence:

'When a litigant fails to adduce evidence about a fact in issue, whether by not giving evidence himself or by not calling witnesses, it goes without saying that he runs the risk of his opponent's version being believed. If he bears an evidential burden and does nothing to discharge it, he will necessarily suffer defeat. The fact that evidence is not adduced to contradict an opponent's version does not necessarily mean, however, that that version will be accepted. Whether it is accepted depends on the probative strength of the opponent's evidence, that is to say, on whether it was really strong enough to cast an evidential burden on the side failing to present evidence . . . Another more difficult question is whether an unfavourable

⁵ CWH Schmidt & H Rademeyer, Law of Evidence, Lexis Nexis, 2008, at 3-34.

inference can be drawn if evidence is not given. Apparently, it can be. In a noted passage Solomon JA in *Sampson v Pim* 1918 AD 657 662 stated that if a witness was available to confirm a party's allegations and he was not called to give evidence the inference would be overwhelming that his evidence would have been unfavourable to the party calling him. A similar inference can be drawn if a party himself fails to give evidence.'

[50] In the instant case, it would appear to me that the plaintiff *prima facie* succeeded in proving possession of the property. In the premises, it would seem to me, there is nothing to be said for the 2nd defendant who decided not to adduce any evidence. The defence that he sought to advance therefor remains in the plea and whatever may have been asked in the cross-examination of the plaintiff's witnesses remains interned in the cross-examination and can go no further. I accordingly draw an adverse inference against the 2nd defendant in the circumstances and find that there is no basis upon which the plaintiff cannot be granted the order it seeks on the basis of possession of the property.

The 5th defendant

[51] The position of the 5th defendant, is, in my considered view not any better. When the 1st defendant took the witness' stand, he intimated that he was going to give evidence on his behalf and would also do so on behalf of the 5th defendant. Mr. Kauta took issue with the 1st defendant's assertion that he would also adduce evidence on behalf of the 5th defendant as well. In this regard, it was put to him that there was no authority or resolution for him to so testify on behalf of the 5th defendant, being a legal *persona*.

[52] I will not delve into the exchange in the battle of wits between Mr. Kauta and the 1st defendant regarding this issue. It is plain that he was not authorised by the 5th defendant to testify on its behalf. He did, however, mention under cross-examination that instructions were given to his lawyers to prepare the necessary instruments to enable him to so testify.

[53] In my view, it is necessary to decide the question whether a witness is required to be authorised, in order to competently adduce evidence on behalf of a legal entity. It is accepted, almost readily that in application proceedings, it is customary for persons who depose to affidavits on behalf of a legal *persona*. Is there a similar requirement in relation to action proceedings?

[54] I think it is necessary to make the basic proposition that a decision to give evidence in a matter is a personal decision of the potential witness concerned. In that regard, a person need not be authorised to give evidence as that will depend on the basic question whether that person is possessed of information that might assist the court to decide a dispute before it. In this regard, as long as the person is competent, that person has the right to adduce evidence.

[55] In this regard, I think it is important not to confuse the applicable position with that which applies in application proceedings. What must be made clear is that even in application proceedings, a deponent to an affidavit does not need authority from the Board to give evidence in the form of an affidavit because that is the volitional act of the party and he or she does not need authority to do so. In this connection, it is important not to confuse authority to initiate or oppose application proceedings with the decision to give evidence.

[56] Where a person purports to initiate or to defend proceedings on behalf of a legal *persona*, that person invariably requires authority to initiate or defend and to prosecute those proceedings. To depose to an affidavit in support of the case for the legal *persona* though, is not a matter that needs authority as that is a *persona* decision of the potential deponent.

[57] In regard to my finding on this point, I seem to be in good company because that is an issue that the learned Judge President faced, albeit in a different form, namely in an application in *Otjonzondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd*.⁶ In dismissing an attack on the authority of a deponent to an affidavit, which the learned JP held to be weak, he relied on *Ganes v*

⁶ *Otjonzondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd* 2011 (1) NR 298.

Telecom Namibia Ltd,⁷ where the Supreme Court of South Africa poignantly said:

‘The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.’

[58] In view of the short treatise above, I come to the conclusion that it was incorrect not to allow the 1st defendant to adduce evidence on behalf of the 5th defendant. To the extent that it was put to him that he needed authority to give evidence on behalf of the 5th defendant, that was a wrong proposition in law. Unfortunately, the defendants’ counsel did not object to the proposition and the court was not required to consider this issue closely and to make a ruling in that regard. There is otherwise nothing that the 1st defendant would have had to be authorised to do regarding his adduction of evidence, which would, in any event, have had to be within the normal evidential rules of admissibility and relevance.

[59] The only difficulty that the 1st defendant probably found himself in, is that he did not file a statement which would in due course constitute his evidence he intended to adduce on behalf of the 5th defendant. This would have been necessary to enable the plaintiff to take whatever instructions it would feel are necessary for purposes of preparing for trial, particularly for cross-examining the 1st defendant in respect of the evidence he would adduce on behalf of the 5th defendant.

[60] Rule 93(5) reads as follows:

‘If a witness’ statement for use at the trial is not served within the time specified by the court the witness may not be called to give oral evidence, unless the court on good cause shown, permits such witness to give oral evidence.’

[61] The import of this sub-rule, is that any witness intended to be called by a party, should file his or her statement within the time period that the court

⁷ *Ganes v Telecom Namibia* 2004 (3) SA (SCA) 615 at 625G-H.

would stipulate in the pre-trial or other subsequent order. If that potential witness' statement is not filed within that time, then that witness may not be called, unless the court, on good cause shown, allows the said witness to testify.

[62] In the current case, the position of the 1st defendant was somewhat different. I say so for the reason that he had been identified and notified as a potential witness and in fact gave his statement, which was given to the plaintiff. In my view, the 1st defendant was to play a double role, namely as a witness in his own case and that of the 5th defendant. In that regard, his statement should have made that position very clear, and if possible, should have had portions where he clearly gives evidence in respect of his own case and another clearly marked, where he adduces evidence on behalf of the 5th defendant.

[63] It is, in my view improper and unfair to ambush the other party by allowing a witness who has committed to filing a witness' statement in support of a certain party, to then seek to adduce evidence midstream on behalf of another party without having properly and timeously filed the statement of the evidence proposed to be adduced on behalf of the new party. This is particularly the case where no proper application and good cause is shown as to why that witness should be allowed to testify at the trial and without any previous warning and requisite leave. The danger and prejudice to the opposing party is manifest. The plaintiff in this case would not have been alerted to the evidence proposed to be led on behalf of the 5th defendant, thus depriving the plaintiff of the opportunity to deal with same at the appropriate juncture.

[64] To this extent, I am of the considered view that Mr. Kauta's objection to the 1st defendant attempt to adducing evidence on behalf of the 5th defendant was correct in law although based on the wrong legal premise. The objection was particularly in keeping with the rules of court and with propriety and fairness to the plaintiffs in particular. I therefor come to the conclusion that the 1st and 5th defendants shot themselves in the foot in not following the correct procedure and that if there is any disadvantage they faced, it is one of their

own making and one that was avoidable and one that they could have averted by following the provisions of the rules to the letter.

[65] The long and short of this is that there was no evidence led on behalf of the 5th defendant in this matter. For that reason, it then appears to me that the 5th defendant is in a similar position as the 2nd defendant, who decided not to testify and in respect of whom I have, in terms of the law, drawn an adverse inference. I cannot, however, close my eyes to any evidence properly adduced by the 5th defendant, contained in his witness' statement, which also enures to the 5th defendant's benefit.

[66] What I cannot do, however, is to find that the additional defences raised by the 5th defendant, namely that it is not in unlawful occupation of the property and the positive statement that it is in lawful possession thereof are proved on a balance of probabilities. Furthermore, the 5th defendant raised the plea of prescription, relying, as it did in its plea, on the provisions of s. 12(3) of the Prescription Act. This plea remained interred in the pleadings and never saw the light of day at the trial.

[67] Having accepted that the plaintiff *prima facie* established at the least *bona fide* possession of the property in question, there is nothing to be said and considered on behalf of the 5th defendant as it did not call any witness to deal with the defences raised in its plea. In this regard, what is sauce for the goose must be sauce for the gander, as this is the same position the court adopted in respect of the 2nd defendant in this particular connection.

The 1st defendant

[68] As indicated above, the 1st defendant adduced evidence in this matter and asked the court to dismiss the plaintiff's claim. His position was that the 5th defendant was in lawful occupation of the premises and that with all said and done, the plaintiff had failed to show that it was the owner of the property nor that it was in lawful occupation of the premises in question.

[69] With the finding I have made in respect of the other defendants regarding the question of ownership, I must state that this also holds true for this defendant. What I need to consider, in the light of the *prima facie* evidence adduced by the plaintiff regarding whether it was in *bona fide* possession of the property in question, is whether the 1st defendant's evidence managed to discharge the evidential burden on it by way of the evidence he adduced.

[70] It is now trite that where parties to a cause adduce evidence that is discordant, the court has employed the principles in *Life Office of Namibia Ltd v Amakali*,⁸ where the court cited with approval the formula suggested in *SFW Group Ltd v Martell Et Cie And Others*,⁹ where the court stated as follows:

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn, will depend on a variety of factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events . . .'

[71] I will apply those of the techniques that apply in deciding the disputes that arise in this matter. In my view, the 1st defendant did not perform admirably as a witness. When subjected to the searching light of cross-examination at the hands of Mr. Kauta, I hold the view that he did not come out unscathed in his credibility. In a few instances, he appeared to be overheating and at times avoided answering the questions put to him directly. This did not do his credibility a world of good.

⁸ 2014 NR 1119 (LC) at p. 1129-1130.

⁹ 2003 (1) SA (SCA) at p. 14H – 15E.

[72] In order to illustrate some of the issues in relation to which he appears to have been ruffled and seriously too, during cross-examination, I will refer, where necessary, to the record. One issue that sticks out like a sore thumb, related to the question of how the 5th defendant could have been in possession of the property before it was properly and lawfully incorporated. This arose because as held for a fact above, the church split occurred in early 2005, around March and the 5th defendant was only brought into existence in December 2005. In probing this issue, the following exchange took place between Mr. Kauta and Rev. Kooper, the 1st defendant:

'Q: Now you will agree with me prior to the 5th defendant as a legal entity can only answer to facts after its creation through its functionaries. Is it not?

A: Correct.

Q: So how do you today honestly stand before a Court and say it was possessing a church building when it did not exist?

A: As I have already stated the people did not move out from that building after I broke away from the AME church. Still the people went on holding their services in that same building until such time when I was expelled. So they were as from that time onwards the possessor in that building.

Q: Sorry. Who was the possessor, the people?

A: The people and the community, is the owner of those buildings.

Q: I am not dealing with ownership please and I can guarantee we will deal with it. I am dealing more with possession. So when you say the people, the community was possessing the building, it includes you, right?

A: Yes.'

[73] Furthermore, the following exchange took place regarding the split:

'Q: Now let us look at what you call the split. 5th defendant was not a member of the Emmanuel AME Church. Is that correct?

A: Yes. The former members, they were former members.

Q: No no. The question is simple. The 5th defendant was never a member of the Emmanuel AME Church at Hoachanas"

A; Yes. Never

Q: Is that correct?

A: Never.

Q: So you will agree with me that cannot be a split because you split from something that you were a party to. Is that correct?

A: We split from the AME Church.

Q: Excuse me.

A: We split from the AME Church.

Q: It could never have split because it was never party to the Emmanuel AME Church?

A: Yes.

Q: This 5th defendant is a legal entity and you remember, just to take you back a bit. You remember that you are a beneficiary of the judgment by this Court because it is a legal entity. You remember that? Is that correct?

A No answer.

COURT: Pastor do you want to answer the question? And if do not let me know that I can record.

A; I am not in full agreement with the question and therefore I do not have answer to it'.

[74] It is clear that the 1st defendant could not deny that when he and his colleagues and followers occupied the premises, the 5th defendant had not been established and it could not occupy the premises before it was legally an entity that had rights in terms of the law. Clearly, and I find this for a fact, the 5th defendant did not occupy the premises legally as by the time it was formed in December 2005, it had, according to the 1st defendant, already in occupation. There was no formal or other process by which the occupation of the property was handed to the 1st or the 5th defendant.

[75] The inescapable conclusion is that the 1st defendant exploited the fact that he was the Pastor of the church in Hoachanas before his expulsion and it

would appear that his followers, and not the 5th defendant, continued to occupy the premises as if nothing had happened concerning the 1st defendant's expulsion. There is no explanation of how the defendants took possession of the property that had been occupied by and used by the 1st defendant for decades before the 1st defendant's expulsion.

[76] The 1st defendant further failed to explain how the 5th defendant could have been able to pay electricity and water bills for the property, as alleged by the defendants in circumstances where the latter was not a legal entity in law. This issue remains unanswered and impels me to find for the plaintiff regarding its case for *bona fide* occupation of the premises in question.

[77] Another important issue to take into consideration that does not cast the defendants in a favourable light is that from the evidence, it is clear that the plaintiff demanded keys to the premises from the defendants and the latter totally refused to hand same over. There was, in my view, no legally recognised manner in which the defendants took over the property from the plaintiff, it being established and common cause that the plaintiff had been in occupation since the 1950s. It cannot be that when you decide to occupy property without any lawful authority to do so, you can then be regarded in law as being a lawful occupant thereof.

[78] There is no doubting that the plaintiff had over decades occupied and used the structure, which was allotted to it by the colonial administration via the PTO. Not only did the plaintiff occupy the premises, but it also performed its ceremonies in the said structure. Evidence, in the form of pictures was produced and could not be gainsaid. Church services, funerals and weddings, among other ceremonies, were conducted in that property by the plaintiff and this cannot be gainsaid. I therefor hold this for a fact.

[79] Another issue that seems to imperil the defendants' case relates to the fact that the Pastors of the plaintiff used to file what I can call returns to the 1st plaintiff on a yearly basis regarding the reports of their respective churches and this included a section that stipulated the property owned by the plaintiff. These are annexed to the plaintiff's witness' statements. These show

indubitably that there was a church building in Hoachanas which was regarded even by the 1st defendant at the time as belonging to the plaintiff. There seems to be no explanation as to how that occupation then passed to the defendants, which Mr. Kauta referred to as a leap of logic.

[80] The answer proffered by the 1st defendant that the property was for the community and was built by them does not really meet the objective facts for the reason that the PTO did not offer the property to the community as the 1st defendant attempted to testify in cross examination. This was not part of his witness' statement but he sought include it conveniently during his oral evidence. There is no denying that the property was given to the plaintiff to occupy the premises.

[81] Even if it was true that members of the community participated in the construction of the structures, and I make no finding on that issue, that did not necessarily mean that the property had not been handed to the plaintiff for use. The issue of the property being built for the community must, in any event, be regarded as an afterthought as it was not mentioned by the 1st defendant in his witness' statement and I accordingly do so. The probabilities in my view favour the plaintiffs in this regard. Theirs is a plausible story, which has no unexplained gaps regarding the right they seek to enforce regarding the occupation of the property in question.

[82] I should maybe comment on one issue upon which the defendants harped with a degree of monotony. It is that the church building in Hoachanas does not have a cornerstone, contrary to the prescripts of the Doctrine and Discipline of the AME Church. Whilst it is true that the cornerstone may not have been laid in line with the requirements, that cannot, on its own, be a ground for saying the church building does not belong to the 1st plaintiff when factually, the said plaintiff has occupied same over decades and has previously conducted services and other church activities in the said building without demure. That, in my view, would be tantamount to putting form above substance. I accordingly reject this as a basis for saying the building in question does not belong to the 1st plaintiff.

[83] I should also state that the 1st defendant testified that the PTO granted to the plaintiff was at some stage revoked. There was no admissible evidence adduced by the defendants in this regard. The 1st defendant claimed that he had that document in his possession but it is a fact that it was never discovered and the only time it was mentioned, was during the 1st defendant's cross-examination. I accordingly reject this assertion as it is simply not based on any admissible evidence.

[84] There are many other unsatisfactory aspects of the 1st defendant's case but I do not find it necessary to canvass all of them in this judgment. All in all, I am of the considered view that the plaintiff has managed to show on a balance of probability that the property in question was given to the plaintiff to occupy for church purposes.

[85] The defendants' case that the property belongs to the Government is in my view neither here nor there, as the defendants did not consider it proper to join the Government who they claim owns the property. The fact that the property may vest in the Government does not necessarily lead to a conclusion that the plaintiff does not have rights to occupy the property in question. If indeed the position is that the property belongs to the Government, it is the latter that can, in appropriate ways, seek to have the plaintiff vacate the property. From the evidence before me, that time has not come and this issue is not alive issue before me.

Conclusion

[86] In the premises, I am of the view, having regard to the evidence led that whilst the plaintiffs may not have succeeded in showing that they are the owners of the property in question, they have, however, on a balance of probabilities shown that they are the *bona fide* possessors of the property in question and they are, for that reason, entitled to the order ejecting the defendants from the property in question.

[87] I accordingly grant the following order:

1. The defendants and all those who are holding the property described as Erf. 140, Hoachanas, under the said defendants be and are hereby ejected from the said property.
2. The defendants are ordered to hand over the keys to the premises situated at Erf 140 Hoachanas to the plaintiffs within thirty (30) days from the date of this order.
3. The Defendants be and are hereby ordered to pay the costs of this action jointly and severally, the one paying the other to be absolved.
4. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku

Judge

APPEARANCE:

PLAINTIFFS: P. Kauta
Of Dr Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANTS: R. Philander
Of ENS Africa-Namibia, Windhoek