

REPUBLIC OF NAMIBIA

HIGH COURT OF  
WINDHOEK



NAMIBIA, MAIN DIVISION,

JUDGMENT

Case No: I 1077/2014

In the matter between:

**MANUEL SIETA TIAGO NZIANGA**

**PLAINTIFF**

and

**SILVITY MUNGINGUISSY CARLOS FORUNATO  
GRACIANA PEREIRA DO AMARAL GOURGEL  
MONTELEONE PROPERTY THIRTY THREE CC  
THE REGISTRAR OF DEEDS**

**FIRST DEFENDANT  
SECOND DEFENDANT  
THIRD DEFENDANT  
FOURTH DEFENDANT**

**Neutral Citation:** *Nzianga v Fortunato* (I 1077/2014) [2019] NAHCMD 157 (9 May 2019)

**CORAM:** CLAASEN, AJ

**Heard:** 11 March 2019

**Delivered:** 9 May 2019

**Reasons delivered:** 21 May 2019

**Flynote:** Law of contract - pacta sunt servanda - the freedom of a party to conclude a contract. Court will give effect to intentions of the parties, as expressed in the contract.

Law of property – Sale - Land - Transfer of ownership of immovable property - Requirements for passing of ownership being registration of transfer and real agreement. Essential elements being intention of transferor to transfer ownership, and an intention of transferee to acquire ownership.

**Summary:** Whilst in a romantic relationship, the first defendant purchased two properties, with the financial assistance of the plaintiff. Subsequently, the properties were sold to second defendant. One of the properties, was transferred in the name of the second defendant, but the transfer of the second property was prevented by a caveat in the Deeds Register on instructions of the plaintiff. Plaintiff claimed to set aside sale agreements, entered into by the first and second defendants, in respect of two immovable properties. Second defendant claimed to vindicate ownership rights under the sale agreements concluded between herself and first defendant.

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## ORDER

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1. The plaintiff's claims are dismissed.
2. The transfer and registration of the ownership of the property known as Erf 1215 (a portion of Erf 604) Hochland Park, with registration division "K", Khomas Region, measuring 1582 square meters, held by Deed of Transfer T3662/2012, situated in the Municipality of Windhoek is hereby declared to be valid.
3. The Registrar of Deeds is hereby ordered to uplift the caveat (Caveat No. I 32/2014 C) registered against a unit consisting of section 33 of sectional title plan No. 22/2003, situate in the building known as Monteleone, measuring 80 square meters, held by virtue of Certificate of Registered Sectional Title.

4. The first defendant, in her capacity as sole member of the close corporation, is hereby ordered to sign all the documents necessary to effect transfer of a unit consisting of section 33 of sectional title plan No. 22/2003 situate in the building known as Monteleone, measuring 80 square meters, held by virtue of Certificate of Registered Sectional Title into the name of the second defendant.
5. In the event that the first defendant neglects or fails to, after 14 days from the date this Order is made, sign the documents necessary to effect transfer of a unit consisting of section 33 of sectional title plan No. 22/2003 situate in the building known as Monteleone, measuring 80 square meters, held by virtue of Certificate of Registered Sectional Title into the name of the second defendant, then the Deputy Sherriff for the District of Windhoek is hereby ordered to sign the documents necessary to effect transfer of the Unit in to the name of the second defendant.
6. The plaintiff is hereby ordered to hand over the original Title Deed, Certificate of Registered Title No. 22/2003 (UNIT 33) to the first defendant.
7. In the event that the plaintiff refuses or fails to hand over the original title deed in respect of a unit consisting of section 33 of sectional title plan No. 22/2003 situate in the building known as Monteleone, measuring 80 square meters, held by virtue of Certificate of Registered Sectional Title No. 22/2003 (UNIT 33) then and in that event the Registrar of Deeds is authorized to, on application by the first and second defendant, issue a duplicate original title deed in respect of that Unit.
8. The plaintiff is hereby ordered to pay the second defendant's costs such costs to include the costs of one instructing and two instructed counsel.
9. The matter is removed from the roll and regarded as finalized.

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JUDGMENT

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CLAASEN A J:

### Introduction

[1] The matter was concerned with the acquisition and alienation of two immovable properties by parties in an extra-marital affair. Once the affair was over, a dispute arose as to the ownership of the properties amidst a purchase of the properties by a third party. The third party, the second defendant seeks registration of one of the properties in her name as well as ancillary relief thereto.

### The parties

[2] The plaintiff is Mr Manuel Sieta Tiago Nzianga, a major male employed as a General in the military of the Republic of Angola.

[3] The first defendant is Ms Silvity Munginguissy Carlos Fortunato, a major female Angolan national, residing in the Republic of Angola.

[4] The second defendant Ms Graciana Pereira Do Almaral Gourgel, a major female Angolan national, residing in Windhoek, Namibia.

[5] The third defendant is Monteleone Property Thirty Three CC, a close corporation duly incorporated, whose sole member is the first defendant, with its registered address at Binneman Visser Chartered Accountants, 12 Kasteel Street, Windhoek, Namibia.

[6] The fourth defendant is the Registrar of Deeds cited in his official capacity, with his registered address at Robert Mugabe Avenue, Windhoek, Namibia.

### Summary of pleadings

[7] The matter hails from the year 2014 and has since been the subject of numerous applications between the parties. The claim by the plaintiff was that during July 2011 the plaintiff and the first defendant decided to relocate the first defendant and their two minor children to Windhoek, Namibia. The parties agreed that the first defendant will find a suitable home to be purchased with the financial assistance of the plaintiff. A property known as a unit consisting of section 33 of sectional plan number 22/2003,

situated in the building known as Monteleone, measuring 80 square meters, held by certificate of registered sectional title number 22/2003 (33) unit, hereinafter referred to as the “Monteleone property”, was identified and purchased by the first defendant. The first defendant further purchased the members interest in third defendant with the financial assistance of the plaintiff.

[8] During 2012 the first defendant communicated to the plaintiff her intention to purchase a second property, after which a property known as Erf 1215 (a portion of Erf 604) Hochland Park, with registration division “K”, Khomas Region, measuring 1582 square meters, held by Deed of Transfer T3662/2012, situated in the Municipality of Windhoek, hereinafter referred to as the “Hochland park property”, was purchased by the first defendant with the financial assistance of the plaintiff.

[9] Both properties where registered in the name of the first defendant and were subsequently sold to the second defendant. The Hochland park property was transferred and registered in the name of the second defendant, but transfer and registration of the Monteleone property could not be effected.

[10] The plaintiff claimed relief in the following terms against the defendants, namely an order setting aside the sale of immovable properties which took place between the first and second defendants, an order directing the first and second defendants to sign all the necessary documents to effect registration of the immovable properties into the name of the plaintiff, and an order directing the fourth defendant to register the immovable properties in the plaintiff’s name.

[11] The matter was defended by the first, second and third defendants. The first and third defendants’ respective defenses were struck on 02 June 2016 by Justice Miller Acting Judge, for non-compliance with the court rules. The first and third defendants brought an application for reinstatement of their defenses, which was refused on 17 August 2017. For the sake of brevity I will not set out their respective pleas.

[12] The second defendant disputed the plaintiff’s claims, and instituted counterclaims. The second defendant claimed that she is entitled to a declaration of

rights, that her title in respect of the Hochland Park property is valid and enforceable, that the plaintiff's refusal to hand the original title deed to her constitutes interference for which she seeks an interdict to prohibit the plaintiff from interfering with her right, title and ownership in respect of the Hochland park property, as well as an order to direct the plaintiff to deliver the original title deed to the second defendant.

[13] The second defendant further claimed that the caveat placed on the Monteleone property interferes with her rights to obtain registration of said property. She prayed for order to direct the plaintiff to remove the caveat placed by him in respect of the Monteleone property, and an interdict to prevent the plaintiff from taking any steps to prevent the registration of the Monteleone property into the name of the second defendant.

[14] On 12 February 2019 the legal practitioners of the plaintiff were granted leave to withdraw from record and to serve their notice of withdrawal via electronic mail on the plaintiff. On 14 February 2019 the plaintiff's erstwhile legal practitioners sent the notice with the court order dated 12 February 2019 to the plaintiff via electronic mail, and explained the nature of the correspondence as well as the need for the plaintiff to be present at the trial.

[15] On the day of trial, neither the plaintiff nor any appointed legal practitioner appeared in court. The court orderly called the plaintiff's name outside court and there was no response, which confirmed the non-appearance of the plaintiff.

[16] The second defendant made an application in terms of rule 98(2) of the High Court Rules, for absolution from the instance with costs. The court granted the application. As a result, the second defendant was the only party present at trial and the court is confined to her version herein.

#### The facts

[17] The plaintiff and first defendant were in a romantic relationship and are the biological parents of two children, whom they wanted to school in Namibia. Whilst the parties were in a relationship the first defendant purchased two properties, with the

financial assistance of the plaintiff, one being the Monteleone property and other being the Hochland park property.

[18] The second defendant, Ms Gourgel purchased both these properties from the first defendant. The ownership of both these properties forms the subject matter of this case.

[19] It was the second defendant's testimony that during September 2013, she requested her son, a certain Mr Admar Joao to be on the lookout for a retirement property in Windhoek. That aspiration brought them into contact with a certain estate agent Ms Vassallo who presented two properties to Mr Joao. After receiving this information from her son about the properties she travelled to Windhoek.

[20] She further testified that on the 19 November 2013 she concluded a sales agreement with the third defendant, Monteleone Property Thirty Three CC, represented through first defendant as sole member in respect of unit 33 in Monteleone building. A copy of the sales agreement, exhibit "E" was tendered in evidence.

[21] It was further her testimony that on 20 November 2013, herself and first defendant entered into a sales agreement, which document was submitted in evidence, exhibit "A" for erf 1215 Hochland park for the purchase price of N\$ 1 000 000-00.

[22] She testified that she travelled to Angola to arrange for the funds, where after the first defendant also came to Angola to receive the purchase prices for both properties. According to the second defendant, she and the first defendant signed a declaration of funds at the Angolan Ministry of Justice and the full purchase price of both properties was transferred to the first defendant. In support of her evidence that she effected payment, the second defendant referred the court to documents admitted in evidence that comprise of printouts from her bank as well as a written acknowledgement by the first defendant.

[23] The second defendant forwarded the proof of payment to the estate agent Ms Vassallo and to the offices of Fisher, Quarmby & Pfeifer. She testified that after she received a letter dated 18 February 2014 from the legal practitioners that the property

situated at Erf 1215 Hochland park was transferred in her name, she arranged for the transfer of the rates and services account at the municipality to her name.

[24] The witness also referred in her testimony that she became aware of letters that were exchanged between the plaintiff's legal practitioners Ellis Shilengudwa Inc and Fisher, Quarmby & Pfeifer. Given that these letters were not substantiated by evidence and I do not attach any probative value to it.

[25] The second defendant reiterated that she paid the purchase price of the Monteleone property and is entitled to have the property registered in her name.

[26] The court also heard the testimony of two more witnesses who testified on behalf of the second defendant, namely Ms Mercia Vassallo and Mr Admar Joao.

[27] Ms Mercia Vassallo is an estate agent. According to her during 2011 she was employed at Pejay Properties and she presented the Monteleone property to the first defendant, who expressed interest to purchase it. Subsequent thereto, the parties went to a legal practitioner at the offices of Ellis Shilengudwa Inc who explained the sales contract to them. She testified that the first defendant was the purchaser and the only signatory to the sales contract and that the plaintiff was present and did not challenge the contention of first defendant being the purchaser and signatory.

[28] Ms Vassallo testified that shortly thereafter the first defendant contacted her once more, looking for a bigger property at which time the estate agent presented the Hochland park property as available for sale. The first defendant expressed interest and she arranged for a contract of sale to be signed. It was Ms Vassallo's testimony that the plaintiff was present during the signing and when she informed him that Namibia permits for joint ownership of immovable property he indicated that both the properties were for the first defendant.

[29] According to Ms Vassallo she was also the agent to introduce the two immovable properties as available for sale to the son of second defendant, Mr Admar Joao towards the end of October or beginning November 2013. The first and second



defendant agreed on the sale of the properties. In response to the title deeds of the properties the first defendant informed Ms Vassallo that it was lost, but that her legal practitioners will prepare the documents for both properties.

[30] She recalled that once the payments were made the Hochland park was registered in the second defendant's name and she gave the keys to the daughter of second defendant.

[31] The third witness for the second defendant was Mr Admar Rosa Gourgel Joao. He is the son of the second defendant. He confirmed that he initiated the contact with Ms Vassallo and that after he viewed the properties and subsequently discussed it with his mother, the second defendant. The second defendant travelled to Namibia and they both went to view the properties, whether after she expressed her interest to purchase the properties. Thereafter the second defendant purchased both properties from the first defendant.

#### Issue before the court

[32] The court was called upon to consider whether or not the second defendant was eligible for a confirmation of her rights over the Hochland park property and whether she was entitled to the transfer and registration of the property known as a unit consisting of sectional title No. 33 Monteleone, situated at Pionierspark, in the municipality of Windhoek.

#### The law and application to the facts

[33] Namibia adheres to an abstract system of land registration. The abstract theory does not require a valid underlying agreement, for example a valid underlying contract of sale.

[34] In *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others*<sup>1</sup>, the two requirements for the passing of ownership, were laid down as delivery, which in the

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<sup>1</sup> 2009(1) NR 232 HC

case of immovable property, is effected by registration of transfer in the Deeds Office, coupled with a real agreement. The essential criteria of a real agreement is an intention on the part of the transferor to transfer ownership and an intention of the transferee to become the owner.

[35] In the matter before me, the uncontested evidence points to valid sales contracts concluded between the seller and purchaser, in respect of both the properties. At the conclusion of the contracts the first defendant was the registered owner of the Hochland park property and thus had the right to dispose of the property. In respect of the second property sold by the close corporation Monteleone Property Thirty Three CC, exhibit "G" indicated the first defendant to be the sole member of the close corporation. Furthermore exhibit "F" constitutes a resolution by the third defendant which states that the said third defendant is selling the property for N\$ 600 000-00 and authorized the first defendant to sign all documents in respect thereto.

[36] Though the first defendant was not before court, the court through the evidence of the second defendant and Ms Vassallo concluded that the sellers namely the first defendant and the Monteleone Property Thirty Three CC had the requisite intention to sell the properties to the second defendant.

[37] The second defendant as purchaser undoubtedly had the intention to take transfer, which was supported by her acts of paying the purchase price of both properties, commencement of paying rates and taxes and the effecting of repairs to the Monteleone property.

[38] The well-known legal principle of *pacta sunt servanda*, recognizes the freedom of a party to conclude a contract and thereafter the consequences that flow from the contract have to ensue.

[39] In conclusion, there was no evidence to contradict that valid sales contracts were concluded in respect of both the properties and the second defendant complied with all

her obligations in terms of the contracts. In the premises the court will give effect to the intentions of the parties, as it was expressed in the contracts.

### Conclusion

[40] The court was confined to the version placed on record by the second defendant, which stands undisputed and accordingly grants relief in the following terms:

### Orders

1. The plaintiff's claims are dismissed.
2. The transfer and registration of the ownership of the property known as Erf 1215 (a portion of Erf 604) Hochland Park, with registration division "K", Khomas Region, measuring 1582 square meters, held by Deed of Transfer T3662/2012, situated in the Municipality of Windhoek is hereby declared to be valid.
3. The Registrar of Deeds is hereby ordered to uplift the caveat (Caveat No. I 32/2014 C) registered against a unit consisting of section 33 of sectional title plan No. 22/2003, situate in the building known as Monteleone, measuring 80 square meters, held by virtue of Certificate of Registered Sectional Title.
4. The first defendant, in her capacity as sole member of the close corporation, is hereby ordered to sign all the documents necessary to effect transfer of a unit consisting of section 33 of sectional title plan No. 22/2003 situate in the building known as Monteleone, measuring 80 square meters, held by virtue of Certificate of Registered Sectional Title into the name of the second defendant.
5. In the event that the first defendant neglects or fails to, after 14 days from the date this Order is made, sign the documents necessary to effect transfer of a unit consisting of section 33 of sectional title plan No. 22/2003 situate in the building known as Monteleone, measuring 80 square meters, held by virtue of Certificate of Registered Sectional Title into the name of the second defendant, then the Deputy Sherriff for the District of Windhoek is hereby ordered to sign the

documents necessary to effect transfer of the Unit in to the name of the second defendant.

6. The plaintiff is hereby ordered to hand over the original Title Deed, Certificate of Registered Title No. 22/2003 (UNIT 33) to the first defendant.
7. In the event that the plaintiff refuses or fails to hand over the original title deed in respect of a unit consisting of section 33 of sectional title plan No. 22/2003 situate in the building known as Monteleone, measuring 80 square meters, held by virtue of Certificate of Registered Sectional Title No. 22/2003 (UNIT 33) then and in that event the Registrar of Deeds is authorized to, on application by the first and second defendant, issue a duplicate original title deed in respect of that Unit.
8. The plaintiff is hereby ordered to pay the second defendant's costs such costs to include the costs of one instructing and two instructed counsel.

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C CLAASEN  
ACTING JUDGE

APPEARANCES:

PLAINTIFF:

No appearance

SECOND DEFENDANT:

R TOTEMEYER SC

(together with)

S AKWEENDA

Instructed by

Tjitja Harases Inc.

Otjwarongo