



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 907/2016

In the matter between:

FANUEL FRIDRICH

PLAINTIFF

and

PAULUS JOHANNES

FIRST DEFENDANT

**BENADE NDESHIMONA ERASTUS (THIRD PARTY)
DEFENDANT**

**SECOND
DEFENDANT**

Neutral citation: *Fridrich v Johannes & Another* (I 907/2016) [2019] NAHCMD
278 (8 August 2019)

Coram: OOSTHUIZEN, J

Heard: 12-15 February 2019 and 1 March 2019

Delivered: 8 August 2019

Flynote: Eviction – plaintiff is the registered owner of immovable property – first defendant is in occupation thereof.

Summary: Plaintiff seeks an order evicting the first defendant from Erf 180, Hakahana, Windhoek as plaintiff is the registered owner of the property which he bought from the second defendant on 1 June 2010 and first defendant is occupying the property. First defendant however alleges that he purchased the property from the second defendant during 1995. Second defendant denies the alleged sale between himself and first defendant and claims that there was a lease agreement.

Held, plaintiff's claim against first defendant succeeds on the evidence and the pleadings;

Held, first defendant's counterclaim for transfer of the property from plaintiff fails;

Held, first defendant's alternative claim for cancellation of the 1995 agreement and restitution against second defendant succeeds.

Held further that second defendant's plea and claim for unpaid rental fails.

ORDER

Having heard Ms McLeod for plaintiff, Ms Shifotoka for first defendant and Mr Siyomunji for second defendant on 1 March 2019:

IT IS ORDERED THAT:

[1] The first defendant and all persons occupying the property described as No 58, Ompilu Street (Erf 180), Checkndeya Bar, Hakahana, Windhoek are evicted therefrom.

[2] The eviction shall be effective 90 days from 8 August 2019.

[3] First defendant's cancellation of the agreement between him and second defendant is endorsed.

[4] Second defendant shall repay the first defendant the amounts of N\$8000 and N\$44 328.41 with mora interest at the rate of 20% per annum calculated from 1 November 2017 to date of payment.

[5] Second defendant shall pay the legal costs of plaintiff which shall include the costs of one instructing legal practitioner.

[6] Second defendant shall pay the legal costs of first defendant for one instructing legal practitioner (for the duration of the case) and one instructed counsel (only for trial purposes).

[7] Each party to bear its own legal costs for the 11th of February 2019.

JUDGMENT

Oosthuizen J;

Background, pleadings and evidence

[1] Plaintiff claims for the ejectment of first defendant from Erf 180, Hakahana, Windhoek on the basis that plaintiff is the registered owner of the said Erf 180 and first defendant is occupying the property.

[2] First defendant counterclaims and testified that he bought the said property from second defendant on 30 August 1995 for a purchase consideration of N\$8000, which he has paid and that he is entitled to occupy the said property which plaintiff should transfer to him as plaintiff was not the bona fide purchaser on 1 June 2010 due to the fact that plaintiff knew from 20 March 2010 that second defendant sold the property to first defendant first.

[3] Second defendant pleaded that he was entitled to sell and transfer the property to the plaintiff in 2010, which he did, as first defendant never bought the property from him but leased it and has failed to pay rent to him for all the time since 1995. Second defendant pleaded and testified that first defendant paid the N\$8000 to him as a deposit and one month's rental.

[4] It is not in dispute that plaintiff bought the property from second defendant on 1 June 2010 and that the property was registered and transferred in the name of the plaintiff on 1 July 2010, thereby creating a real right to ownership of Erf 180, Hakahana to the plaintiff.

[5] The only basis upon which the first defendant rely for transfer of the property described as No 58 Ompilu Street (Erf 180), Hakahana, Katutura, Windhoek from plaintiff to him, is that the plaintiff knew from 20 March 2010 that first defendant bought the property from second defendant already in August 1995 as the second defendant told the plaintiff so on 20 March 2010. Plaintiff denied this and testified that he only became aware of the dispute between first and second defendant after the property was registered in his name on 1 July 2010.

[6] First defendant did not claim for the voidance of the underlying sales agreement between second defendant and plaintiff, nor did he claim for the voidance of the deed of transfer to the plaintiff.

[7] In the alternative to his claim for transfer from plaintiff against payment of the transfer costs, first defendant claims against second defendant for repayment of all payments he has made to and on behalf of second defendant.

[8] Second defendant claims against first defendant for the outstanding rentals of the property for more than 15 years.

[9] First defendant pleaded a written agreement of sale, which was recorded in handwriting by the sister of second defendant and witnessed by several witnesses and signed by himself and the second defendant.

[10] An exercise book was presented in court where after true copies with sworn translations of the two pages containing the written agreement were handed up. Second defendant denied his signature and pleaded that he has never seen the document. He testified that his signature was fraudulently embedded on the document.

[11] First defendant also handed up two photographs of when the written agreement was entered into and written down by second defendant's sister on 30 August 1995. The photographs depicted inter alia the sister of second defendant writing in the book, first and second defendant and two other males witnessing.

[12] Despite second defendant's claim of an oral lease agreement, he testified that his sister wrote up a lease agreement between himself and first defendant, but it was not the agreement pleaded by first defendant and tendered in evidence. Second defendant did not call any witnesses to back up his version.

[13] Second defendant never gave a plausible explanation why he failed for more than 15 years to claim rental from first defendant and failed to collect the alleged rental or failed to eject the first defendant from the property.

Findings

[14] On a balance of probabilities the court rejects the version and the counterclaim of the second defendant, save where it coincides with plaintiff's version.

[15] The version of the first defendant is the more probable version and the court find that there was indeed a written agreement between the first defendant and second defendant whereby first defendant bought the property from second defendant for a purchase consideration of N\$8000.

[16] What was not contained in the written agreement was that first defendant was liable for municipal charges, rates and taxes. The evidence presented by first defendant that he paid same is accepted due to the proof presented by the first

defendant and due thereto that it would only be a logical result of the agreement on 30 August 1995.

[17] First defendant testified that apart from the purchase consideration it was orally agreed between him and the second defendant that he would also pay the outstanding loan the second defendant had with the National Housing Enterprise, which he did. First defendant presented proof thereof being original receipts from the NHE and statements of account. Second defendant was at a loss to explain why first defendant had the original receipts to tender in evidence and he had none. During cross-examination by counsel for second defendant it was pointed out to first defendant that all the receipts and statements of account were in the name of second defendant. First defendant however maintains that he made the payments and that is why he was in possession of the receipts and statements.

[18] First defendant has called two supporting witnesses who testified. Martin Inkumbi testified that on 14 November 1995 he witnessed the first defendant making a payment of N\$1500 to the second defendant and understood it to be part payment of the purchase price. His testimony accords with exhibit "B1A". Victoria Asser testified that on 5 September 1996 she witnessed the final payment of N\$500 made by first defendant to second defendant. Her evidence accords with exhibit "B2A". Exhibits "B1A" and "B2A" are the sworn translations of the written agreement and payments made of the purchase price, to wit N\$5000 on 30 August 1995, N\$1500 on 14 November 1995, N\$1000 on 25 April 1996 and N\$500 on 5 September 1996.

Conclusions

[19] Based on the evidence and the undisputed facts the court find in favour of the plaintiff that he bought the property from second defendant on 1 June 2010 and that the deed of transfer into plaintiff's name was executed on 1 July 2010.

[20] Plaintiff pleaded that he have no knowledge of the alleged sale agreement between first and second defendant and that he at all material times contracted in good faith with second defendant.

[21] First defendant pleaded and testified that plaintiff knew from 20 March 2010 about the sales agreement between him and second defendant (concluded on 30 August 1995) and that therefore plaintiff could not have been a bona fide purchaser.

[22] The respective assertions of plaintiff and first defendant considered in the conspectus of the evidence and the admissions by first defendant concerning the sales transaction between plaintiff and second defendant and the consequent registration of a deed of transfer in plaintiff's name, as well as the fact that first defendant never before seriously endeavoured to obtain registration in his name due to the alleged non availability of second defendant over all those years, coupled with the apparent incompleteness in the written purchase agreement with second defendant, make it difficult to accept that even if plaintiff had prior knowledge, the underlying or the real agreement between plaintiff and second defendant could be vitiated or be voidable, which in any event was not claimed. In this respect the court has considered the evidence of first defendant that he already paid the loan of second defendant with NHE during 2007, but effectively did nothing thereafter until 2010 to obtain second defendant's co-operation to register the property in his name. Until October 2017 when he counterclaimed against plaintiff and second defendant, first defendant failed to assert his claim to ownership of the property.

[23] Plaintiff has made his case for eviction of the first defendant.

[24] By selling the property to plaintiff the second defendant has breached his agreement with first defendant and first defendant's alternative claim for cancellation and repayment of monies expended, succeeds.

[25] What remains to be decided is the losses the first defendant suffered to which he is entitled by way of restitution. First defendant is entitled to the reimbursement of the purchase price of N\$8000 and all payments made to the NHE on behalf of second defendant. The municipal rates and taxes stand on a different footing. It is difficult to calculate and first defendant has enjoyed the fruit thereof by occupying the property undisturbed and paying for services thereanent.

[26] The costs of the litigation were occasioned by the actions of the second defendant. If the second defendant did not re-sell the property so opportunistically to

the plaintiff, there would have been no costs incurred by the plaintiff to evict the first defendant.

[27] First defendant has occupied and done business from the property for 19 years and will be given reasonable time to vacate the property. In the premises he will be accorded 90 days to vacate the property.

[28] The following orders are made:

[28.1] The first defendant and all persons occupying the property described as No 58, Ompilu Street (Erf 180), Checkndeya Bar, Hakahana, Windhoek are evicted therefrom.

[28.2] The eviction shall be effective 90 days from 8 August 2019.

[28.3] First defendant's cancellation of the agreement between him and second defendant is endorsed.

[28.4] Second defendant shall repay the first defendant the amounts of N\$8000 and N\$44 328.41 with mora interest at the rate of 20% per annum calculated from 1 November 2017 to date of payment.

[28.5] Second defendant shall pay the legal costs of plaintiff which shall include the costs of one instructing legal practitioner.

[28.6] Second defendant shall pay the legal costs of first defendant for one instructing legal practitioner (for the duration of the case) and one instructed counsel (only for trial purposes).

[28.7] Each party to bear its own legal costs for the 11th of February 2019.

GH Oosthuizen

Judge

APPEARANCES:

PLAINTIFF :

Ms J McLeod
SHIKONGO LAW CHAMBERS

FIRST DEFENDANT:

Mr S Maritz
DR WEDER KAUTA & HOVEKA

SECOND DEFENDANT:

Mr M Siyomunji
SIYOMUNJI LAW CHAMBERS