



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

**JUDGMENT**

Case no: HC-MD-CIV-ACT-OTH-2019/00768

In the matter between:

**GODFRIED MUVANGUA**

**PLAINTIFF**

and

**FREDRIKA HIANGORO**

**DEFENDANT**

**Neutral citation:** *Muvangua v Hiangoro* (HC-MD-CIV-ACT-OTH-2019/00768)  
[2020] NAHCMD 292 (16 July 2020)

**Coram:** PARKER AJ

**Heard:** 1-2 & 10 June 2020

**Delivered:** 16 July 2020

**Flynote:** Contract – Proof of – Court held, onus of proving existence of contract is discharged by adducing evidence to prove either consensus or reasonable reliance on the appearance of consensus – The onus rests on the person alleging existence of the contract – Document signed by parties placed before the court by the bearer of onus is objective evidence of the parties' agreement – If one party denies existence of the contract despite his or her signature on the document, the evidentiary burden shifts to that party to show that despite the objective appearance of agreement, no consensus was reached – In instant case plaintiff bears such evidentiary burden – Court having considered the circumstances surrounding the making of the agreement, came to the conclusion that plaintiff discharged the onus cast on him – Court finding that the agreement between plaintiff and first defendant was a deed of donation despite the objective appearance of being a deed of sale relied on by first defendant – Consequently, court set aside the deed of sale and declared plaintiff to be the owner of the property.

**Summary:** Contract – Proof of – Onus of proving existence of contract is discharged by adducing evidence to prove either consensus or reasonable reliance on the appearance of consensus – Onus rests on the person alleging existence of the contract – Document signed by both parties is objective evidence of the parties' agreement – If a signatory denies existence of the contract the onus shifts to him or her to show that despite the objective appearance of agreement no consensus was reached – Plaintiff was to show that despite the objective appearance of a deed of sale no consensus was reached between him and first defendant and that the agreement reached by consensus is a deed of donation – Having considered the surrounding circumstances of the making of the agreement court came to the conclusion that plaintiff had discharged the onus placed on him – Accordingly, court finding that the agreement reached was a deed of donation as contended by plaintiff - Consequently, court set aside the deed of sale – Court declared plaintiff to be owner of the property.

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## ORDER

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1. Judgment is for the plaintiff.

2. The Deed of Sale done on 21 November 2008 a copy of which is annexed to the particulars of claim is declared null and void ab initio, and is set aside.
3. The Deed of Transfer No.T 7002/2008 is hereby cancelled.
4. It is declared that plaintiff is the registered owner of the property, viz. Erf No.3427 Katutura (Extension No. 4), situated in the Municipality of Windhoek, Registration Division "K", Khomas Region, in extent 494 (Four Nine Four) square meters, held by Certificate of Consolidated Title No. T1986/1996.
5. The plaintiff and defendant must at their joint cost appoint a property valuer registered as such in terms of any applicable law to estimate the value of the improvements done by defendant, and plaintiff shall, not later than 30 days after the estimated value is communicated to him, pay to defendant, through her legal practitioners of record, the amount arrived at by the valuer.
6. Defendant shall pay plaintiff's costs of suit, and such costs include costs of one instructing counsel and one instructed counsel.
7. The matter is considered finalized and is removed from the roll.

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### **JUDGMENT**

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[1] In this matter, the citation on the page of the summons indicated Godfried Muvangua as plaintiff and Fredrika Hiangoro as defendant. However, the particulars of claim refers to plaintiff, first defendant (Fredrika Hiangoro) and second defendant (Registrar of Deeds), and describes them. Indeed, the summons indicated that the process was addressed to Fredrika Hiangoro (first defendant), to the Registrar of Deeds (second defendant) and to the Registrar of the High Court. I do not find a return of service establishing that process was indeed served on the Registrar of Deeds. I also do not find that such an item was in issue between the plaintiff and first defendant who are legally represented. I take it that the Registrar of Deeds is a party to these proceedings, and he has not participated in the proceedings. Accordingly, I

shall for the sake of convenience, refer to Fredrika Hiangoro simply as the defendant, as suggested by Mr Narib, counsel for plaintiff.

[2] In order to throw light on the burden of the court in this matter, it is important to set out at the outset *verbatim et literatim* the relief plaintiff seeks. The relief is this:

(a) An order that the Deed of Sale, a copy of which is attached to the plaintiff's particulars of claim, marked "A", be declared null and void ab initio and (is) set aside.

(b) That the Deed of Transfer No. T 7002/2008 be cancelled.

(c) It is declared that plaintiff is the registered owner of the property, certain Erf No. 3427, Katutura (extension 4) situated in the Municipality of Windhoek, Registration Division "K", Khomas Region, measuring 494 m<sup>2</sup> (Four Nine Four square meters), and held by Certificate of Consolidated Title No. T 1986/1996 ('the property').

(d) That plaintiff pay to the defendant an amount which is equal to the cost of improvements which the first defendant effected on the property, alternatively an amount of N\$81 000 (Eighty One Thousand Namibian Dollars).

(e) The first defendant pays the plaintiff the costs of suit in the event of defending this action.

(f) Further and/or alternative relief.

[3] The primary plea of first defendant is this. There was a valid Deed of Sale entered into between the parties (ie plaintiff and defendant) on 12 December 2008, and the Deed meets all the requirements of a valid Deed of Sale, making the Deed valid; and further, that plaintiff refused to accept the purchase price of the property, being the consideration.

[4] It seems to me clear that the dispute turns on what is the true nature of the transaction between plaintiff and his sister, the defendant. The familial relationship of brother-and-sister is relevant when considering the circumstances of the transaction

between them. I shall, therefore, revert to it in due course. It is to the true nature of the transaction between plaintiff and defendant that I now direct the enquiry. For the first part of the enquiry, we must go to the basics: basics of contract in our law and proof of its existence.

[5] In South Africa, in *Saambou–Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) the Appellate Division stated that ‘the true basis of contractual liability in our law ....is not the objective approach of English law, but is – save in cases where the reliance theory is applied – the real consensus of the parties. This accepted approach was affirmed in *Steyn v LSA Motor Ltd* 1994 (I) SA 49(A). There, an amateur golfer, participated in a golf tournament that was open to both amateurs and professionals. Next to the 17<sup>th</sup> hole, there was on display a new car and alongside it a board proclaiming: ‘Hole-in-one prize sponsored by LSA Motors’. Steyn duly scored a hole-in-one, but the sponsor refused to give him the car on the grounds that the prize had only been intended for professional golfers. In the litigation that followed, it became plain that Smal, the representative of the defendant, had never intended to make any offer to an amateur such as Steyn, and that there was accordingly no consensus between the parties.

[6] Steyn’s attempt to urge the court to disregard the fact put forth by the defendant’s representative (Smal) was rejected by the court for the following reasons (at 61C-E):

‘The argument is fundamentally fallacious inasmuch as it treats Smal’s subjective intention as irrelevant and postulates the outward manifestation of his intention as the sole and conclusive touchstone of the respondent’s contractual liability. That is contrary to legal principle. Where it is shown that the offeror’s true intention differed from his expressed intention, the outward appearance of agreement flowing from the offeree’s acceptance of the offer as it stands does not in itself or necessarily result in contractual liability. Nor is it in itself decisive that the offeree accepted the offer in reliance upon the offeror’s implicit representation that the offer correctly reflected his intention. Remaining for consideration is the further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in the belief that it represented the true intention of the offeror, in accordance with objective criterion formulated long ago in the classic dictum of

Blackburn J in *Smith v Hughes*... only if this test is satisfied can the offeror be held contractually liable.'

[7] It follows that there are two grounds on which one may establish contract in South Africa, namely consensus and reasonable reliance on consensus. (Dale Hutchison (Ed) et Chris-James Pretorius, *The Law of Contract in South Africa*, 2<sup>nd</sup> ed (2012) at 19). That, in my opinion, should be the law in Namibia, too. Of course, the primary basis is consensus. Therefore, when determining whether a contract has been formed, one must ascertain first whether the minds of the parties have actually met; and the approach in the determination is essentially subjective. If consensus is found to exist, that is the end of the enquiry. (Dale Hutchison (Ed) et Chris-James Pretorius (Ed) *The Law of Contract in South Africa*, loc cit)

[8] Doubtless, it is trite that the onus of proving the existence of a contract rests on the person who alleges that the contract exists. In that regard, as Mr Narib submitted – correctly – a dispute about the existence of a contract, as is in the instant matter, should not be confused with a dispute about terms of a contract where the parol evidence rule is applicable. Consequently, I find that the submission by Mr Coetzee, counsel for defendant, that plaintiff has not sought rectification of the Deed of Sale carries no weight. The purpose of rectification is to reform a written document in a specific fashion and the applicant prays the court that some proposed words be inserted at a suitable place in the writing. (*Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 11478) That is not what plaintiff pleads in this matter.

[9] The onus of proving the existence of a contract is discharged by adducing evidence to prove either consensus or reasonable reliance on the appearance of consensus. Where the dispute, as is in the instant proceeding, is that one party (X) relies on the existence of the contract and the other party (Y) denies the existence of the contract, X should adduce objective evidence of the agreement, in the form of, usually, statements made by Y. Most invariably, X places before the court as evidence a document signed by both parties.

[10] Indeed, in our rule of practice, if the contract relied on is a written contract, X must, in terms of r 46(7) of the rules of court, annex the written contract to the

pleadings. In that regard, Y's signature operates as prima facie proof of the existence of the contract. The evidentiary burden shifts to Y, for Y to show that, despite the objective appearance of agreement, no consensus was reached. (See Dale Hutchison (Ed) et Chris-James Pretorius (Ed) *Law of Contract in South Africa*, ibid at 20; and RH Christie, *The Law of Contract in South Africa*, 3<sup>rd</sup> ed (1996) at 383, and the cases there cited.)

[11] It is important to note that these basic principles of contract on the onus of proving the existence of a contract and the manner of discharging the onus apply to all contracts. It is immaterial that the subject of a contract is an immovable property, as is in the present proceedings, as Mr Narib submitted. They apply to the 'so-called "real agreements" which involve the transfer of immovable property' (see *Lema Enterprises CC v Orban Investments Three Seven Five (Pty)Ltd* (I 1085/2012) [2014] NAHCMD 324 (19 September 2014) para 31).

[12] In the instant proceedings, it should be understood that plaintiff is Y and defendant is X in our symbolic representation in paras 9 and 10 above.

[13] I now apply the enquiry in paras 5-10 to the symbolic representation in order to apportion the burden of each one, that is, plaintiff (Y) and defendant (X). What follows is, accordingly, this. Defendant (X) relies on the existence of the Deed of Sale, and defendant has placed before the court the Deed of Sale which has been signed by the parties as objective evidence of the agreement. The signature of plaintiff operates as prima facie proof of the existence of the contract. Accordingly, the evidentiary burden shifts to plaintiff (Y) to show that, despite the objective appearance of agreement, no consensus was reached. Thus, the next level of the enquiry should, therefore, be a consideration of whether plaintiff has discharged the onus cast on him. (See paras 7-10 above; and the authorities there cited). Has plaintiff discharged the onus of establishing that no consensus was reached as regards a sale of the property?

[14] As a general rule, the parties to a contract express themselves in terms to embody the agreement at which they have arrived. The parties intend the contract to be exactly what it purports; and the shape which the contract assumes, ie the tenor

of the contract, is what they meant the contract to have. But the tenor of the contract simpliciter may not always be the end of the matter. In that regard, Innes J stated in *Zandberg v Van Zyl* 1910 AD 302 at 309:

‘Not frequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies *plus valeat quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention’.

[15] In *Zandberg v Van Zyl* evidence was admitted to establish the true nature of the contract. There, although the contract was drawn up as a sale, it was in reality a pledge. Such evidence is always admissible. The reason is as was articulated succinctly by Wessels ACJ in *Kilburn v Estate Kilburn* 1931 AD 501 at 507:

‘It is a well known principle of our law that Courts of law will not be deceived by the form of a transaction. They will rend aside the veil in which the transaction is wrapped and examine its true nature and substance. *Plus valeat quod agitur quam quod simulate concipitur*.

[16] As Innes J remarked about the *Plus valeat quod agitur quam quod simulate concipitur* principle, in applying the principle, ‘the court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention’. (*Zandberg v Van Zyl* at 309) What this entails in practice is that prima facie, the nature of the transaction is what it purports to be, and the party who asserts that it is something different bears the onus to prove that fact (*S v Coin Operated Systems (Pty) Ltd* 1980 ([1] SA 448 (T) at 454D), as mentioned in para 10 above.

[17] The authorities show these approaches about simulated transactions. The authorities show that simulations may be detected by considering the facts leading up to the contract (see *Zandelberg v Van Zyl*, relying on *Perezius* (Ad. Cod., 4.22.2),



that is, by the court considering the surrounding circumstances (see *Zandelberg v Van Zyl*, relying on Voet (*Ad Pand.*, 13,7,1). In *Beckett v Tower Assets Co.* (1891) 1QB, at 25, after reviewing all the decisions, Cave J held, 'the real question ...is, what is the intention of the parties?' *Beckett* was also relied by Innes J in *Zandelberg v Van Zyl* at 311. 'And to answer the question', said Cave J (in *Beckett v Tower Assets Co.*), 'we must have regard to the form of the transaction, but more particularly to the substance, the position of the parties, and the whole of the circumstances under which the transactions came about'.

[18] The next thing to do is, therefore, to consider the intention of plaintiff and defendant, the form of the transaction, but more particularly the substance, and the whole of the circumstances under which the transaction came about (see *Beckett v Tower Assets Co.*, referred to in para 17 above). That is necessary to do for this reason. It is to determine whether plaintiff, who asserts that the nature of the transaction between him and defendant is something different from that which defendant contends (that is, a donation not a sale) has proved that fact (see *S v Coin Operated Systems (Pty) Ltd*, referred to in para 16 above).

[19] I have followed the *Beckett v Tower Assets Co.* approach. I have also taken into account the well known approaches to resolving factual disputes and irreconcilable differences; see *Sakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524 (HC), namely, that the court should make findings on (a) credibility of factual witnesses, (b) their reliability and (c) the probabilities, and (d) where the probabilities are equipoised, probabilities should prevail (*U v Minister of Education, Sports and Culture and Another* 2006 (I) NR 168 (HC)). Having done all that, I make the following factual findings.

[20] Somewhere in 2006, defendant (who, as I have said previously, is plaintiff's sister) asked plaintiff to permit her to build a backyard flat on the property to accommodate her daughter and plaintiff's niece Vindeline Hiangoro (a plaintiff witness), who at the material time, was unemployed and had difficulty in finding accommodation for herself and her children, one of whom has special needs. Plaintiff acceded to defendant's entreaty. A year or two later plaintiff, who has no children of his own, told Vindeline that he wished to give the property to her as a

donation. Vindeline did not take up the offer because as she was unemployed she could not afford the transfer costs involved. She suggested that plaintiff should rather give the property to her mother and plaintiff's sister, ie the defendant, who, because she was a farmer, could afford to pay such costs. All this evidence was corroborated in material respects by Vindeline. I find that Vindeline's suggestion would have made sense to plaintiff. Having no children of his own, his wish was to give the property to his niece Vindeline, as he testified, so that Vindeline would not become a destitute.

[21] Vindeline's further evidence is that when her mother came to Windhoek she, Vindeline, informed her mother about plaintiff's wish; and her mother, the defendant, agreed to accept the donation. Plaintiff's conditions in donating the property to defendant was that (a) plaintiff would occupy two rooms of the property for the rest of his life; (b) plaintiff's and defendant's family members will occupy and use part of the property; and (c) the property shall not be leased to third parties.

[22] Defendant denies that plaintiff offered to donate the property to her on conditions (a), (b) and (c) in para 21 above. Her evidence is that in November 2008 she informed plaintiff that she was *busy* looking for property to buy in Windhoek; and plaintiff advised her to buy the property; and plaintiff agreed to sell the property to her for 'N\$60 000 and he would occupy two rooms in the house and that he would not need to pay rent'. (Italicized for emphasis)

[23] I find that defendant's version cannot on the probabilities be correct on the following grounds:

(1) Defendant testified that she was 'busy looking for property to buy in Windhoek'. But not one iota of evidence was placed before the court tending to show how many property owners she approached and their identities in her 'busy' hunt for property to buy in Windhoek. Was plaintiff the first and last property owner she contacted? She does not say.

(2) Defendant's evidence is that plaintiff agreed to sell the property to her for N\$60 000, and plaintiff would occupy two rooms of the property for the rest of his life and he would not pay any rent. Not one grain of evidence was placed before the court to explain satisfactorily why, if the seller intended to sell the property to

defendant and defendant intended to purchase the property for the full consideration of N\$60 000, that plaintiff would dictate terms that would materially encumber defendant's rights in her own property.

(3) We know that it is common cause between the parties that to date the alleged purchase price has not been paid to plaintiff. When this fact was put to defendant in her cross-examination-evidence, her answer was that plaintiff said he would not accept the purchase price because he was not paying rent. But that was not part of her examination-in-chief-evidence. I note that this afterthought answer weighs heavily against the credibility of defendant.

(4) Added to this fact is, Why would the Deed of Sale provide in express terms that the purchase price of the property is N\$60 000 and that that amount had been paid? I find that as defendant was signing the instrument she knew that the N\$60 000 had not been paid because it was not plaintiff's intention to sell the property to her, and it was not her intention to purchase the property. To answer the real question, I hold that the intention of the parties was that plaintiff would give the property to defendant as a donation, and he would occupy two rooms for the rest of his life and his niece Vindeline and other family members will also occupy and use the property. (See *Beckett v Tower Assets Co*, referred to in para 17 of this judgment.)

(5) Defendant testified further that before plaintiff and defendant approached legal practitioners that were to assist them in the transfer of the property, she informed the plaintiff that since she would be the owner of the property she would like to erect flats at the back yard on the property. According to her, plaintiff had no objection to that and she started erecting the outside flat. If the intention of plaintiff was to sell the property to defendant, and defendant's intention was to purchase the property as the new owner, and there was *consensus ad idem* as to a sale, why would she need the permission of plaintiff to erect the outside flat on her own property? The conclusion is inevitable that there was no *consensus animorum* about sale of the property.

[24] Apart from the factual findings in para 23 above, there is this. In the particulars of claim, plaintiff claims that he and defendant were advised by the legal practitioners (who were to assist them in the transfer of the property) that to give effect to the donation and for the transaction to be expedited, plaintiff and defendant must sign a Deed of Sale, which had been prepared in proforma, in respect of the property. No wonder the Deed of Sale provides that the purchase price of the property is N\$60 000 and the amount had already been paid.

[25] In our rule of practice in terms of r 46 (2), the defendant must in his or her plea admit, deny or confess and avoid all material facts alleged in the combined summons and the particulars of claim, or state which of those facts are not admitted and to what extent, and must also clearly and concisely state all material facts on which the defendant relies in defence or answer to plaintiff's claim. Subrule (3) of r 46 provides that every allegation of fact in the particulars of claim which is not stated in the plea as denied or admitted is regarded as having been admitted (see *EPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 542B-D).

[26] The defendant does not state in the plea that she denies or admits this crucial allegation of fact. The result is that that fact is regarded as having been admitted. This leads to the irrefragable conclusion that the transaction between plaintiff and defendant is simulated, as Mr Narib submitted. (See *Zandberg Van Zyl*, referred to in para 17 of this judgment.)

[27] Based on all these reasons, I come to the following conclusion. Plaintiff has discharged on the balance of probability the onus cast on him to prove that the nature of the transaction between him and defendant is that of a donation, and not a sale as contended by defendant (see para 18 above). The occasion has therefore arisen for the court not to be deceived by the form of the transaction, and for the court to 'rend the veil in which the transaction is wrapped and examine its true nature and substance' on the principle *plus valeat quod agitur quam quod simulate concipitur* (see para 15 above). The true nature of the transaction in the present matter between plaintiff and defendant is a transaction of donation; I so hold.

[28] On the pleadings and evidence, the long and short of it is that plaintiff wants his property back; not least because defendant evicted him and his niece Vindeline from his property somewhere in 2013 in breach of the terms of the donation. Defendant denies she evicted him. All this matters tuppence now. Of the view I have taken of the matter, plaintiff is, in any event, entitled to have his property back.

[29] One last aspect; on the evidence, defendant has effected improvements on the property, and it is fair and just that she be compensated accordingly. Mr Erick Kandorozi (a plaintiff witness), a disinterested party, in his official capacity of community activist officer at the Office of the Katutura Constituency, got a property valuer to value the improvements in March 2018. Kandorozi did that in his official attempt to resolve the dispute between plaintiff and defendant amicably outside the surrounds of the court. The valuer's estimation of the value of the improvements to be N\$81 000 was not confirmed before the court as evidence. I therefore agree with Mr Narib that the valuer's estimation cannot, therefore, be accepted by the court. Plaintiff and defendant may now find a valuer to do that work for them, if defendant is not happy with the estimation of N\$81 000.

[30] In the result, I order as follows:

1. Judgment is for the plaintiff.
2. The Deed of Sale done on 21 November 2008 a copy of which is annexed to the particulars of claim is declared null and void ab initio, and is set aside.
3. The Deed of Transfer No.T 7002/2008 is hereby cancelled.
4. It is declared that plaintiff is the registered owner of the property, viz. Erf No.3427 Katutura (Extension No. 4), situated in the Municipality of Windhoek, Registration Division "K", Khomas Region, in extent 494 (Four Nine Four) square meters, held by Certificate of Consolidated Title No. T1986/1996.
5. The plaintiff and defendant must at their joint cost appoint a property valuer registered as such in terms of any applicable law to estimate the value of the

improvements done by defendant, and plaintiff shall, not later than 30 days after the estimated value is communicated to him, pay to defendant, through her legal practitioners of record, the amount arrived at by the valuer.

6. Defendant shall pay plaintiff's costs of suit, and such costs include costs of one instructing counsel and one instructed counsel.

7. The matter is considered finalized and is removed from the roll.

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C PARKER  
Acting Judge

APPEARANCES:

PLAINTIFF:

G Narib

Instructed by Dr Weder, Kauta & Hoveka Inc.

Windhoek

DEFENDANT:

E Coetzee

Of Tjitemisa & Associates.

Windhoek