

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA
(TO THE SUPREME COURT OF NAMIBIA)

Case Title: GERHARD TJAZIRAPI v CHRIS NGUAPIA	Case No: HC-MD-CIV-ACT-CON-2019/03765
	Division of Court: MAIN DIVISION
Heard before TOMMASI J	Date of hearing: 02 July 2020
	Delivered on: 24 July 2020
Neutral citation: <i>Tjazirapi v Nguapia</i> (HC-MD-CIV-ACT-CON-2019/03765) [2020] NAHCMD 315 (24 July 2020)	
Results on merits: .	
IT IS ORDERED THAT: <ol style="list-style-type: none">1. The plaintiff’s application for Summary Judgment is dismissed;2. The Defendant is granted leave to defend the main action;3. The plaintiff is ordered to pay the defendant’s cost of the application limited in terms of Rule 32 (11);4. The parties are ordered to file a joint case plan on or before 14 August 2020;5. The matter is postponed to 19 August 2020 for case planning hearing.	
Reasons for orders:	
TOMMASI J, [1] The plaintiff applied for summary judgment and the defendant filed an affidavit opposing the application.	

[2] Plaintiff claims ejectment of the defendant from his property. He avers that:

- he is the lawful owner of the property;
- and the defendant is in unlawful occupation of this property.

[3] The defendant admits that the property was registered in the name of the plaintiff but disputes that he is unlawful occupation. He avers that the defendant approached him during 2013 for financial assistance in order to purchase the property from the Municipality. The purchase price was N\$656 995. He advanced an amount of N\$200 000 to the plaintiff who signed an acknowledgment of debt on 05 November 2013 to repay the amount on or before 05 November 2014. Defendant claims that this forms of a further agreement between the parties.

[4] According to plaintiff they entered into a verbal agreement and the terms thereof were inter alia that:

- The defendant would pay the purchase price on behalf of the plaintiff;
- The defendant would take advance occupation pending the finalisation of the municipality transaction and transfer into the defendant's name.
- Once the purchase price has been paid then the property would be transferred from the City of Windhoek to the plaintiff;
- After two years the plaintiff would give transfer to the defendant.
- The defendant would take occupation and remain in possession of the property until the property has been transferred into his name.

[5] The defendant avers that he paid a total of N\$555 459 to the plaintiff and the City of Windhoek being a substantial payment toward the purchase price of N\$730 000. It is not entirely clear when this purchase price was agreed upon. He moved into the premises and paid the rates and taxes due to the Municipality.

[6] On 16 October 2017 the plaintiff's legal practitioners wrote a letter to him informing him that the defendant is no longer interested in selling the property to him. He therefore maintains that his occupation is not unlawful.

[7] In *Lofty-Eaton and Another v Noble 2014 (4) NR 952 (HC)*, Cheda J, at page, 995 para 5 stated the following:

'The general approach of the courts in applications of this nature is that cognisance is taken that a summary judgment is an independent, distinctive and a speedy debt collecting mechanism utilised by creditors. It is a tool for use by a plaintiff where a defendant raises some lame excuse or defence in order to defend a clear claim. The courts, have, therefore, been using this method to justly grant an order to a desperate plaintiff who, in its absence without it, would continue to endure the frustration mounted by an unscrupulous defendant(s) on the basis of some imagined defence'.

In para 9 of the same judgment the following is stated.

'For that reason, these courts will always seriously consider the granting of a summary judgment and will only do so where a proper case has been made out by applicants. The above principle has been applied in many cases. See also *Credé v Standard Bank of SA Ltd* where Kannemeyer J remarked:

'One must bear in mind that the granting of summary judgment is an extraordinary and drastic remedy based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law.'

[8] I agree that this is the approach to follow when considering whether Summary Judgment should be granted.

[9] Mr Ntinda referring to *Agricultural Bank Of Namibia v Witvlei Meat (Pty) Ltd* (A98/2012 [2013] NAHCMD 75 (20 March 2013) and *Standard bank v Somaeb* (I1912/2013 [2014] NACMD 98 (26 March 2014) argued that all the plaintiff must do is prove that:

- he is the owner of the property; and
- the defendant is in possession of it to succeed with his claim for ejection.

[10] He submitted that the defendant must show that he is lawful possession of the property to resist the applicant's application for summary Judgment. He further submits that it is a legal requirement that an agreement for sale of property must be in writing and

the verbal agreement between the parties is therefore invalid. In this regard he referred to *Tjihero & Another v Kauria & Another* 2019 (3) NR 879.

[11] Mr Coetzee, counsel for the defendant, submitted that the agreement as set out in the defendant's affidavit is a triable issue and a sustainable defence.

[12] The affidavit of the defendant sets out sufficient information for this court to determine what his defence is. It is the defendant's position that the parties agreed that the defendant would take occupation, pay the purchase price and municipal accounts and that the plaintiff in return would transfer the property into the defendant's name two years after it is transferred by the City of Windhoek into the plaintiff's name. After the property was transferred to the plaintiff he no longer wanted to sell the property. The defendant submits that he is in terms of the agreement lawfully occupying the property alternatively that he has a counter claim. The agreement herein differs from the verbal agreement referred to in *Tjihero & Another v Kauria & Another, supra*. (See *Shimhaudi v Shirungu* 1990 (3) SA 344 (SWA)).

[13] I am of the view that the defendant established a *bona fide* defence that his occupation of the property is lawful in light of the agreement he entered into with the plaintiff. There is sufficient detail of payments made to the plaintiff and to the City of Windhoek in terms of the said agreement.

[14] In the premises the following order is made:

1. The plaintiff's application for Summary Judgment is dismissed;
2. The Defendant is granted leave to defend;
3. The plaintiff is ordered to pay the cost of the application limited in terms of Rule 32 (11)
4. The parties are ordered to file a joint case plan on or before 14 August 2020;
5. The matter is postponed to 19 August 2020 for case planning hearing.

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondent
<p><i>M Ntinda</i> <i>Of</i> <i>Sisa Namandje & Co. Inc.</i></p>	<p><i>J Tjitemisa</i> <i>Of</i> <i>Tjitemisa & Associates</i></p>