

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2016/03115

In the matter between:

GERVASIUS ARNAT

1st PLAINTIFF

FRANCISKA ARNAT

2ND PLAINTIFF

and

LIFE CHANGING CHRISTIAN CHURCH

1ST DEFENDANT

SAUMA ONWORDI

2ND DEFENDANT

Neutral citation: *Arnat v Life Changing Church* (HC-MD-CIV-ACT-CON-2016/03115)
[2020] NAHCMD 51 (7 February 2020)

Coram: TOMMASI J

Heard: 7 February 2020

Delivered: 7 February 2020

Flynote: Sale – of land – First Plaintiff in reconvention in pleadings relied on a Memorandum of Understanding to the effect Defendant's in reconvention acted as a nominee when they applied for a Mortgage Loan and when they entered into an agreement to purchase immovable property. – Memorandum however was entered into after loan was applied for and the sale agreement entered into. Oral evidence suggests that a prior oral agreement was entered into and merely recorded in the Memorandum of Understanding.

Practice – original cause of action not pleaded – court would in exceptional cases deal with issues which arise during trial – although the evidence support a finding that an agreement was entered into in terms whereof the defendants in reconvention purchased the erf as nominees – the terms thereof is disputed and evidence of mortgage bond is secured over the property in favour of First National Bank. The relief sought is not valid.

Practice - absolution of the instance – at the end of the Plaintiffs in re convention case – the plaintiffs in re-convention occupies the property – The Defendants in reconvention are the registered owners of the property – In the circumstance the court may order absolution rather than dismissing the claim.

ORDER

Having heard the evidence and arguments from the respective counsel for the plaintiff and defendant –

IT IS ORDERED THAT:

1. The court grants absolution of the instance in respect of the Defendants' counterclaim (Plaintiffs in reconvention);
2. The Plaintiffs are to pay the Defendants' cost of suit in respect of the Plaintiff's claim in convention, to include cost of one instructed and one instructing counsel;

3. The Defendants are to pay the plaintiffs' cost in respect of the Defendants' counterclaim (claim in re-convention), to include the cost of one instructed and one instructing counsel.

JUDGMENT

TOMMASI J:

[1] In this matter the court already gave absolution of the instance of Plaintiff's case and the court is now called upon to consider the Defendants' counterclaim. For the sake of convenience I shall refer to the parties as in convention.

[2] The entire case centres on the rights and title to immovable property, Erf 148, Antilla Street, Dorado Park, Windhoek. A loan was granted to the plaintiffs against the security of first mortgage bond to be registered over the aforesaid property. The property is registered in the name of the plaintiffs. The Defendants are however occupying the premises. The Plaintiffs claim was premised on an oral lease agreement and the breach averred was that the Defendants effected substantial structural changes without the written consent of the plaintiff. No facts was adduced in evidence to sustain the material terms of the lease agreement nor was any evidence adduced of the substantial structural changes to the property. Mr Rukoro, counsel for Plaintiffs, conceded that the plaintiffs claim for cancellation and eviction from the premises could not be sustained. The court granted absolution of the instance. What remains to be considered is the Defendants' counterclaim.

[3] The defendants counter claim, in a nutshell, is premised on the following:

'The First Defendant is the owner of Erf 148, Antilla Street, Dorado Park, Windhoek, by virtue of the Memorandum of Understanding entered into on 12 October 2010, with the

Plaintiffs, who at all material times and for all intents and purpose acted as nominees for the first defendant to facilitate the procurement of the said property and generally do all such things as may be necessary or expedient in the premises in order to give effect to the Memorandum of understanding.'

[4] The Defendants claimed the following relief:

'(a) An order compelling the Deeds Registrar to side aside the transfer of the immovable property Erf 148, Antilla Street ,Dorado Park ,Windhoek in the names of the Plaintiffs

(b) An order declaring the Transfer of the immovable property Erf 148, Antilla Street, Dorado Park, Windhoek in the names of the Plaintiffs null and void or alternatively, setting aside same .

(c) An order directing the Plaintiffs to transfer the immovable property Erf 148, Antilla Street, Dorado Park, Windhoek back to the First Defendant and on failing to do so, authorize First National Bank – Karibib Branch, to sign all the necessary documents to effect the transfer back the immovable property Erf 148, Antilla Street, Dorado Park, Windhoek to the name of the First Defendant.

(d) Cost of Suit.'

[5] The Plaintiffs in their pleadings denied having entered into the Memorandum of Understanding and in particular that they entered into the agreement to assist the defendants or that they acted as agents for the defendants to acquire the property. The plaintiffs maintained in their defence to the counterclaim that the occupation of the Frist Defendant was grounded on lease agreement and that they are the lawful owners of the property.

[6] It is common cause that on 20 July 2010 the plaintiffs signed a loan agreement with First National Bank for the amount of N\$1 570 000 against security of a first Mortgage Bond to be registered over Erf 148, Antilla Street, Dorado Park , Windhoek. On 27 July 2010 the plaintiffs entered into a sale agreement to purchase the property. The purchase price for the property was N\$1 530 000.

[7] On 1 September 2010 an e-mail, ostensibly authored, by first plaintiff was addressed to 2nd defendant and her husband and attached thereto was the e-mail from the conveyancing attorney informing the plaintiffs that the transaction was lodged at the deeds office that morning. The email reads as follow: 'I received this today. Looks good meaning (sic) registration will thus be complete soon.' The property was registered in the name of the plaintiffs on 9 September 2010.

[8] On 13 September 2010 two emails seemingly were addressed by first plaintiff to 2nd Defendant and her husband who in essence indicated that that there was an overpayment on loan amount in the sum of N\$55665.04. The bank, according to first plaintiff, was insisting that N\$56 000 be paid back.

[9] On 30 September 2010 an application was made on behalf of first defendant to the City of Windhoek for the supply of electricity, water and refuse removal. Attached to this application was a written lease agreement between the plaintiffs and the first defendant dated 28 September 2010 in respect of the property. The defendants disputed the signature and the validity of this document.

[10] On 12 October 2010 the disputed written Memorandum of Understanding was entered into. The material parts of the agreement reads as follow:

'Mr(s) G & F Arnat entered into a Loan Agreement with FNB. The purpose of the loan was to assist LCCC to acquire immovable property.

It is understood Life Changing Christian Church shall arrange for the repayment of the principal and interest on the loan.

The property is currently registered in the names of MR(s) G & F Arnat. It is agreed that upon full repayment of the loan by LCCC, Mr(s) G & F Arnat shall arrange for the immediate release of the bond and transfer of ownership to Life Changing Christian Church. '

[11] The document appears to be signed by the plaintiffs and the 2nd defendant and her husband on behalf of the first defendant. The agreement, according to the daughter

of the plaintiffs was signed by her parents in her presence at the house of her parents. She confirmed her signature as a witness on this document.

[12] On 13 September it appears certain renovations were affected by the first defendant to the property. It was common cause that a fire destroyed a part of the property and the renovations were done by first defendant as the insurance company initially repudiated the claim. Approximately a year thereafter payment was made by the Insurance Company to the plaintiffs. The plaintiffs in turn paid the money claimed to first defendant ostensibly to compensate first defendant for the costs it incurred to repair the property after the fire.

[13] It was common cause that the defendants made monthly payments into the loan account of the plaintiffs at First National Bank. The documents handed into evidence by the defendants disclosed that payments were made in respect of insurance premiums as from June 2014. These payments follow e-mail correspondence which appear to be between first plaintiff and the 2nd defendant and her husband during October 2013.

[14] On 7 October 2015 the 2nd plaintiff addressed a letter to 2nd defendant. In this missive the first plaintiff refer to a discussion and an agreement which was entered into by herself and the 2nd defendant during August 2010. Second Plaintiff admitted being the author of this letter and 2nd defendant admitted receiving this letter. The wording suggest that it was an oral agreement. Second plaintiff averred that the 2nd defendant wanted the concerned property but did not have the amount of N\$1 570 000 or the deposit and neither did she qualify for a bank loan. 2nd defendant undertook to pay the full debt off within 3 years. She noted that the 3 year period has now lapsed and they waited patiently for another two years. She stated the following:

'We never had debts of this magnitude before and wish to clear our name. At the rate that you are paying this debt off, it will take additional (sic) 20 more years to settle, which to us is totally unconditional and unacceptable.... I was only being kind to you, so called clergy, by agreeing into this whole debt.' [my emphasis]

There was no response to this letter by the 2nd defendant.

[15] Mr Narib conceded that the evidence does not support a finding that the defendants are the owners of the property by virtue of the MOU. He furthermore conceded that the MOU is not original cause of action as pleaded but the prior agreement referred to by 2nd plaintiff in her missive to 2nd defendant dated 7 October 2015. He however invited this court to nevertheless determine that the real agreement was an oral agreement before the loan agreement was applied for and granted in terms of which the defendants were vested with nominal ownership. He submitted that the correspondence, the subsequent recording of the agreement in the form of the MOU and the conduct of the parties all point in this direction. He agreed that the relief prayed for would not be valid since the evidence which was adduce clearly show that a mortgage bond has been secured over the property in favour of First National Bank who is not a party to the proceedings. He suggested, in short, that the court should give a declaratory order that the first defendant is the nominal owner of the property, and that the plaintiffs, after full payment of the mortgage bond, when called upon, should sign the papers necessary to ensure registration. In answer to questions posed by the court he suggested that the court should order that the period for repayment of the mortgage bond should be accelerated.

[16] Mr Narib referred this court to *Collen v Rietfontein Engineering Works 1948 (1) SA 413, (A)* at page 433 where the Centlivres J. A stated as follow:

'I have already stated that in my view the ultimate contract between the parties was for the supply of a pump and a suitable engine. This was not the contract relied on by the defendant in his pleadings, and the position should have been regularised by an appropriate amendment. But in this case, where the contractual relationship between the parties arose partly through the interchange of letters and partly through their conduct, all the material letters (excepting one in respect of which secondary evidence, which was rightly accepted by the magistrate was led) were produced in evidence and the conduct of the parties was examined in viva voice evidence.'

[17] He referred this court further to *Tjihero v Kauari (SA 59-2017) [2019] NASC (25 June 2019)*. It was held in this case that, the court is entitled to deal with issues arising at a trial even if not pleaded, although this is an exception rather than the rule, it is preferred that an application to amend should be sought in this regard. It was further held that, a court should only exercise its discretion to go outside the pleading where it is clear there has been a full investigation of the matter and there is no reasonable ground for thinking any further examination of the facts might lead to a different conclusion. It is stating the obvious to mention that the resolution of the real issue must lead to a legally valid conclusion as the court cannot sanction conduct that would otherwise not be legally valid.

[18] Mr Rukoro simply argued that the prior agreement, as the original cause of action, was not the case they were called upon to answer. The defendant's entire case was premised on the written agreement. In terms of the pre-trial order the court was adjudicating the terms and conditions of the MOU. He referred this court to cases¹ of this court which deals with the effect of rule 26 (10) which provides that issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with leave of the managing judge or court granted on good cause shown.

[19] Evidence was in fact adduced that there was an agreement prior to the Memorandum of Understanding. This is clearly evident from the letter written by 2nd plaintiff. The wording of this letter would suggest that the 2nd plaintiff entered into the loan agreement in order to assist the 2nd defendant. The capacity in which the 2nd defendant was acting at the time is not clear. The 2nd defendant denied that there was such a discussion in August 2010 and was adamant that she only found the property in September. It is clear from the letter from FNB to the plaintiff's that the loan was granted against security of this specific property already on 20 July 2010. The plaintiff further aver that the term within which the debt had to be paid was 3 years and that the 2nd defendant defaulted on this part of the agreement. The relief claimed herein is not valid and the proposed suggestion for the declaratory order was never canvassed in the

¹ See *Lee's Investment (Pty) Ltd v Shikongo HC-MD-CIV-ACT-CON-2016/03394 [2018] NAHCMD 321 (12 October 2018)*

pleadings or during the parties' testimony. This court cannot under the circumstances of this case make the exception to the rule as requested by Mr Narib. As conceded by Mr Narib, the facts adduced in evidence do not support the cause of action as stated in the defendant's counterclaim.

[20] It would appear, from the correspondence, the Memorandum of Understanding and conduct of the parties that the plaintiffs were entrusted by the defendant's to purchase the property and to secure a loan on behalf of 2nd defendant and possibly the first defendant (See *Dadabhai v Dadabhai and another 1981(3) SA 1039*) The first defendant remains in occupation and has made substantial payments to reduce the mortgage bond. The plaintiff in terms of the real agreement, remains the owners of the property. The matter therefore remains unresolved. In the circumstances this court deemed it appropriate to order absolution from the instance of the defendants counterclaim. Both parties were ad idem that the cost should follow suit and that costs should include in support of the defendant's position.

[21] In the result, the following order is made:

1. The court grants absolution of the instance in respect of the Defendants' counterclaim (Plaintiffs in reconvention);
2. The Plaintiffs are to pay the Defendants' cost of suit in respect of the Plaintiff's claim in convention, to include cost of one instructed and one instructing counsel;
3. The Defendants are to pay the plaintiffs' cost in respect of the Defendants' counterclaim (claim in re-convention), to include the cost of one instructed and one instructing counsel.

M A TOMMASI
Judge

APPEARANCES

PLAINTIFF: Mr Mekumbu Tjitere

Of Weder Kauta and Hoveka Inc,
Windhoek.

DEFENDANT: Ms Astrid Feris

Of Sisa Namandje Inc.
Windhoek