REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 3994/2015

In the matter between:

LINDA DIANNE HUBBARD	**1ST PLAINTIFF**
ANDREW WILLIAM CORBERT	**2ND PLAINTIFF**

and

TATJANA CLAUDIA BATZ	**1ST DEFENDANT**
MARKUS ARNO BATZ	**2ND DEFENDANT**
JESKO WOERMANN	**3RD DEFENDANT**
LINDA ERASMUS	**4TH DEFENDANT**
REGISTRAR OF DEEDS	**5TH DEFENDANT**

Neutral citation: *Hubbard v Batz & Others* (I 3994/2015) [2021] NAHCMD 420 (20 August 2021)

Coram: USIKU, J
Heard: **08, 11-12 June 2020; 26, 29-30 October 2020; 23 March 2021 and 20 April 2021**
Delivered: **20 August 2021**
Reasons: **17 September 2021**

Flynote: Contract – Simulation – Test – Whether transaction is simulated is a question of its genuineness, which depends on consideration of all facts and circumstances surrounding it.

Contract- Right of pre-emption – Sale to purchaser with knowledge of right of pre-emption – Holder of pre-emption right entitled to an order declaring the contract of sale null and void.

Summary: The plaintiffs are holders of a pre-emptive right over certain immovable property. The first defendant, without knowledge or consent of the plaintiffs purported to 'donate' her entire interest (undivided share) in the immovable property to the third defendant. At the time of the transaction the third defendant was fully aware of the plaintiffs' rights. The plaintiffs instituted action stating that the transaction between the first and third defendants was not a 'donation' but a sale dressed up as a donation. The court agreed with the plaintiffs and granted relief setting aside the transaction.

ORDER

---

1. The purported contract of 'donation' entered into between the first defendant and the third defendant does not constitute a donation, but a transaction, the intended and actual entering into of which entitled and entitles the plaintiffs to exercise the right of pre-emption created in terms of the agreement entered into between the plaintiffs and the first and second defendants on or about 23 July 2007.

2. The plaintiffs are entitled to exercise the right of pre-emption in respect of the transaction entered into between the first and third defendants relating to the half-shares of the properties as more fully described in para 3 hereunder.

3. The fifth defendant is hereby ordered to cancel, in terms of s 80(1) of the Deeds Registries Act (Act No. 14 of 2015), the registration of Deed of Transfer No. T 3347/2015 registered in the name of the third defendant, in respect of:

   ½ share in and to:

   1. Certain: Portion 48 (Portion of Portion 12) of the Farm Nubuamis No 37

Situate: In the Municipality of Windhoek
Registration Division “K”
Khomas Region
Measuring: 29, 9987 hectares and
½ share in and to:

2. Certain: Portion 64 (Portion of Portion 53) of the Farm Nubuamis No 37
Situate: In the Municipality of Windhoek
Registration Division “K”
Khomas Region
Measuring: 25, 0539 hectares
and to cancel all the rights accorded to the third defendant by virtue of the said deed.

4. The third defendant is ordered to pay the costs of the plaintiffs and such costs include costs of one instructing and two instructed legal practitioners.

5. The matter is removed from the roll and regarded as finalised.

JUDGMENT

USIKU, J

Introduction

[1] This court made an order on 20 August 2021 in the terms as set out above and undertook to provide its reasons on 17 September 2021. The reasons follow herein.

[2] The first plaintiff is Linda Dianne Hubbard. The second plaintiff is Andrew William Corbett. The first and second plaintiffs are wife and husband.

[3] The first defendant is Tatjana Claudia Batz. She is a national of German and was an employee of Woermann Brock & Co. (Windhoek) Pty Ltd, (“the business”). According to the evidence, the first defendant was deported from Namibia to Germany in 2016, when it was discovered that she was not lawfully in the country.

The second defendant is Markus Arno Batz. The first and second defendants are sister and brother. The third defendant is Jesko Woermann. The third defendant is the managing director of the business. The fourth defendant is Linda Erasmus. She is the conveyancer who attended to the registration of the transfer of the immovable property, the subject matter of the present litigation. The fifth defendant is the Registrar of Deed.

[4] The plaintiffs seek to enforce a right of pre-emption granted in their favour by the first and second defendants on or about 23 July 2007. The pre-emptive right is contained in a written agreement entered into by and between the parties and couched in the following terms:

'AGREEMENT CONCERNING SALE OF PLOTS 64 AND / OR 48 NUBUAMIS

Entered into by and between

AW Corbett/LD Hubbard

(co-owners of Plots 45, 47, 51 & 52 Nubuamis)

And M & T Batz (co-owners of Plots 64 & 48 Nubuamis)

("the Parties")

WHEREAS the parties have signed an agreement in respect of the WINDHOEK NATURE CONVERSATION PARTNERSHIP;

AND WHEREAS AW Corbett and LD Hubbard have paid the costs of erecting the game fence which encloses the aforementioned plots in the nature conservation area established under the agreement aforesaid;

AND WHEREAS at all times it was intended that the said fence would remain the property of AW Corbett and LD Hubbard, subject to what is agreed hereunder;

AND WHEREAS M & T Batz have the free benefit of such game fence and have not been required by AW Corbett and LD Hubbard to contribute to the costs of erection or maintenance thereof;

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

1. Should M & T Batz, sell either of the aforesaid plots to anyone other than a member of the immediate family of M & T Batz, M & T Batz would give AW Corbett and LD Hubbard,

or their successors in title, a right of pre-emption to purchase one or both of the aforesaid plots (or any portions thereof) at a price and upon conditions no less favourable than those offered to any other potential purchaser;

2. If AW Corbett and LD Hubbard, or their successors in title, should decline to exercise this right of pre-emption, M & T Batz would at the time of sale of one or both of the aforesaid plots to another party (other than a member of the immediate family of M & T Batz), pay to AW Corbett and LD Hubbard, or their successors in title, the value of the game-proof fence on that property at the time of sale, thereupon the portion of the game fence which has been so paid for shall become the property of the owner of Plot 64 and / or 48, as the case may be;

3. Should the parties, or their successors in title, be unable to agree on the value of the said game fence at the time of sale, the value will be determined by an independent valuator chosen by the parties or their successors in title, with the costs of the service of the valuator to be shared equally between the parties or their successors in title. If the parties or their successors in title are unable to agree on the person to be chosen as valuator such person shall be appointed by the professional body regulating sworn valuators in Namibia.

4. Clauses 1, 2 and 3 above shall apply with the necessary modification in the event of the death of M and/or T Batz, or the sequestration of their estates.'

[5] It is common cause that the third defendant was, at all material times, aware of the aforementioned pre-emption agreement.

[6] At the time of the conclusion of the aforesaid pre-emption agreement, the first and the second defendants were joint owners of the properties described as:

1. Certain: Portion 48 (Portion of Portion 12) of the Farm Nubuamis No 37
   Situate: In the Municipality of Windhoek
   Registration Division "K"
   Khomas Region
   Measuring: 29, 9987 hectares and
2. Certain: Portion 64 (Portion of Portion 53) of the Farm Nubuamis No 37
   Situate: In the Municipality of Windhoek
   Registration Division "K"
   Khomas Region
   Measuring: 25, 0539 hectares

hereinafter referred to as “the pre-emption property”.

[7] On 6 May 2015, the first defendant and the third defendant entered into a written agreement in terms of which the first defendant “donated” her half shares in the pre-emption property to the third defendant. The transfer of the first defendant’s undivided shares in favour of the third defendant was registered at the Deeds Office on 18 June 2015 under Deed of Transfer No. T 3347/2015.

[8] The plaintiffs complain that the transaction underpinning the transfer of the first defendant’s half shares in the pre-emption property to the third defendant and the resultant transfer, in truth did not constitute a “donation” (as the first defendant received consideration from the third defendant) but a transaction the intended and the actual entering into of which, to the knowledge of the first and third defendants entitled and entitles the plaintiffs to exercise their right of pre-emption.

[9] The plaintiffs assert that, should the court find that the pre-emption agreement does not include a sale of an undivided share in the pre-emption property, then in such event, the agreement be rectified to read as follows:

‘Should M and/or T Batz sell either of the aforesaid plots or any portion(s) thereof (including any shares therein), to anyone other than a member of the immediate family of M and T Batz, M and/or T Batz (as the case may be) gives A W Corbett and L D Hubbard, or their successors-in-title, a right of pre-emption to purchase the subject matter of such intended transactions at a price and upon conditions no less favourable than those offered to any other potential purchaser’.

[10] The plaintiffs therefore seek relief in the following terms:

‘(a) In as far as it may be necessary, an order rectifying clause 1 of annexure 2 to reflect what is pleaded in paragraph 11.4 of the particulars of claim.

(b) An order declaring that the purported contract of “donation” between the first defendant and the third defendant does not constitute a donation but a transaction, the intended and actual entering into of which entitled and entitles the plaintiff to exercise the right of pre-emption created in terms of the agreement entered into between the plaintiffs and the first and second defendants on or about 23 July 2007.

(c) An order declaring that the plaintiffs are entitled to exercise the right of pre-emption in respect of the transaction entered into between the first and third defendants relating to the half shares of the properties more fully described in paragraph 9 of the particulars of claim.
(d) An order directing the third defendant to re-transfer to the first defendant the half shares which were transferred to the third defendant under Deed of Transfer T3347/2015.
(e) Costs of suit, including costs of instructing and instructed counsel as against such defendants who may elect to defend this action. In the event of more than one defendant electing to defendant this action, costs are sought against such defendants, jointly and severally, the one paying the others to be absolved, and such costs to include the costs of instructing and instructed counsel.
(f) Further or alternative relief.'

[11] The third defendant maintains that the property was donated to him and, therefore, the pre-emptive right does not apply to the transaction. The third defendant submits that the plaintiffs have not established that a sale was concluded between the first and the third defendant, and even if a sale had been concluded, the written pre-emption agreement would not find application as the first defendant transferred her undivided shares in the property (as opposed to the entire pre-emption property or portion thereof).

[12] At the trial of the matter, three persons gave evidence as witnesses, namely the two plaintiffs and the third defendant.

The evidence

[13] The first plaintiff testified that, in or about 2003, a neighbour on the western side of the plaintiffs' properties erected a game-proof fence around his plot and created a private nature reserve in order to trade in game. The plaintiffs approached him and he agreed that the plaintiffs could include their properties within the game area. The plaintiffs approached the mother of the first and second defendants, who was at that stage the sole owner of plots 48 and 64 and she agreed that her properties be fenced in with a game-proof fence. So did a further two neighbours.

[14] According to the first plaintiff, being fenced in a game-proof fence is an advantage to the parties, because they enjoy game and being inside a nature conservancy significantly enhanced the value of their properties. The arrangements

for the properties to be part of the game area were concluded in or about September 2004, and agreements to this effect were signed by the affected plot-owners.

[15] None of the abovementioned three neighbours could afford to finance the portion of the game-fence that would enclose their properties, so the plaintiffs agreed to finance it on their behalf. The parties then reached an agreement that should these neighbours sell their properties, they would refund the plaintiffs the portion of the costs of the game-fence which enclosed the property along their respective borders. In addition, the plaintiffs requested and the parties agreed and entered into a right of pre-emption agreement in favour of the plaintiffs, should they decide to sell their properties.

[16] After the death of the mother of the first and second defendants, the first and second defendants inherited plots 48 and 64. Because of the changes in ownership, on 23 July 2007, the plaintiffs and the first and second defendants entered into a right of pre-emption agreement in favour of the plaintiffs as more fully set out para 4 hereof.

[17] On or about 15 April 2014, after some exchange of e-mails between the first defendant and the first plaintiff, the first defendant sent an e-mail to the first plaintiff indicating that she has decided to put her plot up for sale and would like to offer it to the plaintiffs for N$7.2 million. On 24 April 2014, the first plaintiff wrote to the first defendant explaining to her how the right of pre-emption operates. On the same day, the first defendant responded by e-mail, stating that the third defendant ‘did not accept a first-buy right’.

[18] In or about mid-2015, the second defendant informed the plaintiffs that he has recently learned that the first defendant has transferred her half-share in the pre-emption property, in favour of the third defendant. The second defendant also informed the plaintiffs that the conveyancer who attended to the registration of the transfer in respect of that transaction was the fourth defendant.

[19] On 3 August 2015, the plaintiffs and the fourth defendant had a meeting at the fourth defendant’s office. The fourth defendant indicated that she was unaware of the pre-emption agreement entered into between the first defendant and the plaintiffs. At

this meeting the fourth defendant provided the plaintiffs with a copy of a deed of transfer wherein the first defendant transferred her half-share in the pre-emption property to the third defendant purportedly as a ‘donation’. Upon enquiry by the plaintiffs, the fourth defendant indicated that the transfer could have been motivated by the fact that the first defendant owed money to the third defendant. The fourth defendant further indicated that it was contemplated that the second defendant and the third defendant would do a swap of the shares so that the second defendant would own the undeveloped plot 48 in undivided shares and the third defendant would own plot 64 as the sole owner.

[20] After referring to various exhibits submitted in court, the first plaintiff submits that the transaction between the first defendant and the third defendant in terms of which the first defendant transferred her half-share in the pre-emption property was not a donation in a true sense, but was in effect a sale of her half-share in the pre-emption property for consideration. The first plaintiff contends that the transaction was structured as a ‘donation’ to bypass and frustrate the right of pre-emption held by the plaintiffs. The first plaintiff maintains that the plaintiffs were denied their right in terms of the agreement, by the collusion between the first and the third defendants. She submits therefore, that the transaction between the first and the third defendants entitled and entitles the plaintiffs to exercise their right of pre-emption and the plaintiffs are entitled to the relief they seek in this action.

[21] The evidence of the second plaintiff largely corroborates the evidence given by the first plaintiff. In particular, the second plaintiff confirmed the events testified to by the first plaintiff that led up to the signing of the pre-emption agreement, as well as the events that occurred after the conclusion of the agreement, leading up to the transfer of the half-share by the first defendant in favour of the third defendant.

[22] Having referred to various exhibits tendered in court, the second plaintiff submits that the transaction that occurred between the first and the third defendants entitled the plaintiffs to exercise their right of pre-emption and asks the court to grant the plaintiffs the relief they seek.

[23] The third defendant testified that the first defendant came to Namibia approximately in 1990. She worked on and off at Woermann Brock & Co Windhoek

(Pty) Ltd, ("the business"). The third defendant is the managing director of the business.

[24] According to the third defendant, the first defendant was very valuable for the business. The third defendant repeatedly helped the first defendant by arranging that she be re-employed and also arranged on various occasions for her to obtain working visas. Although the first defendant was a most difficult person, it was clear to the third defendant that first defendant was extremely grateful to the third defendant. The third defendant maintains that this was the major motivation for the donation of the first defendant's half-share in the properties to him.

[25] The third defendant further testified that there was an agreement concluded between the first and second defendants and the plaintiffs, affording the plaintiffs a right of pre-emption. The agreement limited the first and second defendants' right to sell either of the plots or both plots. The third defendant saw a copy of that agreement.

[26] The first defendant borrowed various amounts from the business between 2010 and 2016. These loans were granted to her in terms of oral agreements and were repayable as and when the first defendant would have sufficient money to repay. As managing director of the business, the third defendant indicated to the first defendant that she would have to provide some form of security to the business for the repayment of the loans.

[27] On 10 February 2011, the first defendant signed a promissory note and offered security in the form of title deeds of the properties in question, as security for the repayment of the first four, in the series of loans advanced to her. In the promissory note, the first defendant undertook to repay the amounts lent to her latest in August 2014 including 12% interest and that in September 2014 the business shall have the right to register a bond over the property.

[28] The first four loans involved:

(a) N$5 000, granted on 29 July 2011;

(b) N$8 000, granted on 18 August 2010;

(c) N$12 000, granted on 16 December 2010;

(d) N$24 000, granted on 8 February 2011.

[29] Further loans were advanced to the first defendant by the business, as follows:

(a) N$14 375, granted on 10 May 2012;
(b) N$6 000, granted on 8 August 2012;
(c) N$27 000, granted on 8 January 2014;
(d) N$220 000, granted on 3 October 2014.
(e) N$180 000, granted on 4 October 2014;
(f) N$10 000, granted on 15 April 2015;
(g) N$10 000, granted on 30 April 2015;
(h) N$50 000, granted on 7 May 2015.
(i) N$30 000, granted on 28 May 2015;
(j) N$30 000, granted on 22 June 2015;
(k) N$270 000, granted on 15 August 2015;

[30] The third defendant testified that when in August/September 2014 the first defendant had not repaid all the money loaned plus interest, the business became entitled in terms of the promissory note, to register a bond over the first defendant's property. Later on, the third defendant was advised that the first defendant could not give a bond as security without the consent of the second defendant.

[31] On or about 2 May 2015, the first defendant sent an email to the third defendant. She was distraught and needed N$400 000. She begged the third defendant to accept a donation of her interest in the pre-emption property, or that the third defendant purchases it. The third defendant relented and accepted the proposal and undertook to persuade other directors of the business to make a further loan to her. No specific amount was specified.

[32] According to the third defendant, he consulted a certain Mr Pfeifer, his previous legal practitioner, on the impact of the pre-emption agreement. He was advised that the pre-emption agreement was of limited effect and that it only applied to a sale of the properties by both the first and second defendants.

[33] On 6 May 2015, the third defendant accepted the donation and signed the donation agreement. Thereafter, the first defendant gave instructions to the fourth defendant to register the transfer of the first defendant's half-share in the property. The transfer was registered on 18 June 2015 under Deed of Transfer No. T.3347/2015.

[34] In 2016, the third defendant learned that the first defendant was deported back to Germany.

[35] The third defendant further states that, despite the fact that the first defendant is no longer in Namibia, the loans extended to her are still on record and remain payable to the business.

Legal principles

[36] A donation is defined as follows:

'an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something… to another person, called "the donee", with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage'.[1].

[37] If a donor gives any consideration at all for the donation, it is not a donation.[2]

[38] In regard to agreements being dressed up in a particular form, where the underlying intention of the parties is inconsistent with the form, it was stated in *Roshcon v Anchor Auto Body Builders*[3] that whether a particular transaction is a simulated transaction is a question of its genuineness. If it is genuine, the court will give effect to it and, if not, the court will give effect to the underlying transaction that it conceals. And whether it is genuine will depend on a consideration of all facts and circumstances surrounding the transaction.[4]

---

[1] *The 3 Tenners Properties CC v The Trustees for The Time Being of the Atlantic Seaboard Trust* (9478/2008) [2011] ZAWCHC 51(22 March 2011) para 14.
[2] *Ovenstone v Secretary for Inland Revenue* 1980 (2) SA 721 at 736H-737A.
[3] 2014 (4) SA 319 at 330 E-G.
[4] Ibid.

[39] Insofar as a pre-emptive right is concerned, it is a rule of our law that, where a purchaser knowingly acts in violation of the pre-emptive right of another, the latter is entitled to claim a cancellation of the delivery or transfer to that purchaser, upon the ground that the seller and purchaser with notice are considered to have acted in fraud of the rights of the possessor of the pre-emptive right.[5]

[40] The person who possesses a pre-emptive right has a personal right of action or claim, when his right has been infringed. The law protects that right against a defendant, who has knowingly purchased, in spite of such prior right of pre-emption.[6] The object is to prevent the purchaser with notice, taking an unfair or improper advantage of his own wrongful act. The policy of the rule is to discourage and disallow covert and fraudulent dealings in violation of others' rights.[7]

Analysis

[41] On the evidence presented before court, I am of the view that there is a link between the loans advanced to the first defendant and the transfer of the property from the first defendant to the third defendant. The link is established, among other things, by the following pieces of evidence:

(a) on 31 May 2014, the first defendant signed a statement confirming that she was indebted to the third defendant in the total amount of N$400 000 and that as security for the aforesaid indebtedness she offers her half share in the property;[8]

(b) on 24 April 2015 the first defendant confirms to the third defendant that she does not have a will and stated the implication of her not having a will.[9] On 20 May 2015 the first defendant executes a last will and testament bequeathing, among other things, her half share in the property, to the third defendant; [10]

(c) on 29 April 2015 the third defendant texted the fourth defendant saying*: 'Hi Linda, she wants the money. Please let me know if everything is signed and lodged*';[11]

(d) on 2 May 2015 the first defendant addressed an email to the third defendant proposing to donate or sell the property to the third defendant and stating that she

[5] *McGregor v Jordaan and another* 1921 CPD 301 at 308-309.
[6] Ibid.
[7] Ibid.
[8] Exhibit 'MMM' at 171 of the Trial Bundle.
[9] Exhibit 'PP' at 243 of Trial Bundle.
[10] Exhibit 'QQ' at 268 of Trial Bundle.
[11] Exhibit 'PP' at 242 of Trial Bundle.

needs N$400 000 and promising to repay all the costs incurred by the third defendant, 'up to the resale' by the third defendant;[12]

(e) on 6 May 2015 the first defendant and the third defendant executed the deed of donation, [13] and on 7 May 2015 the third defendant's business advanced payment to the first defendant in the amount of N$50 000.[14]

[42] It is common cause that transfer of the property from the first defendant into the name of the third defendant was registered at the Deeds Office on 18 June 2015 and that the third defendant's business paid the costs of the transfer in the amount of N$284 291.61.

[43] Evidence shows that after the text of 29 April 2015 (Exhibit 'PP'), a total amount of N$390 000 was paid by the third defendant's business to the first defendant spanning from 30 April 2015 to 15 August 2015.

[44] From the evidence, it appears apparent that after the 'donation agreement' and the final will and testament were executed, the third defendant did not require any further security in respect of third defendant's indebtedness to the business.

[45] Having considered all the evidence, I am of the opinion that the transaction between the first defendant and the third defendant, in respect of which the first defendant transferred her half share in the property to the third defendant, was not a genuine donation. The transaction was in reality, a sale in that the first defendant transferred her property in exchange of the money already advanced to her as loans, plus a promise of money that was advanced to her up to 15 August 2015. According to the evidence, the total amount of the money advanced to the first defendant is N$896 387.53.

[46] On the evidence presented before court I therefore find that consideration in the amount of N$896 387.53 was paid by (or on behalf of) the third defendant to the first defendant in exchange of the transfer of the property. The fact that payment connected to the transaction was made by the third defendant's business is immaterial for the present purposes. The fact remains that consideration was made

[12] Exhibit 'JJ' at 234 of Trial Bundle.
[13] Exhibit 'X' at 255 of Trial Bundle. Exhibit 'FF' page 254 of Trial Bundle.
[14] Exhibit 'FF' at 254 of Trial Bundle.

and that such consideration related to the transfer, regardless of who made the payment, and that, in my opinion constitutes a '*sale*'.

[47] I now turn to consider whether the pre-emption agreement entered into between the plaintiffs on the one hand, and the first and second defendants, on the other hand exclude sale of undivided shares by either the first or second defendant.

[48] In *McGregor v Jordaan* (supra), the parties entered into a written right of pre-emption in respect of a whole property. The defendant sold only a portion of the pre-emption property to a third party who knew about the right of pre-emption. The holder of the pre-emption right sought and was granted an order declaring the agreement with the third party null and void, on the ground that the sale of the portion to the third party infringed the rights of the holder of the pre-emptive right.

[49] It appears to me that, on the authority of *McGregor v Jordaan*, the holder of a pre-emption right has a right to purchase partial interest in the pre-emptive property on the terms agreed with or offered to a third party.

[50] Having read and considered the pre-emptive right entered into by the plaintiffs on the one hand and the first and second defendants, on the other, I am of the opinion that it includes a sale of undivided shares by either of the defendants in question. It should be borne in mind that, in the present case, the first defendant sold her entire interest in the pre-emption property. She was a party to the pre-emption agreement by virtue of the interest she had in the property. It therefore does not make sense to argue, as the third defendant does, that the pre-emptive right only applies when the entire property or a portion thereof is sold by the first and second defendants together. Such argument, if entertained, would allow the first and second defendants, as grantors of the pre-emptive right to unfairly defeat the plaintiffs' right of pre-emption by piecemeal alienation. Such a result was certainly not intended by the parties nor does it appear from the meaning of the agreement in question. I am, therefore, of the opinion that the agreement of pre-emption includes a sale of undivided shares by either the first or the second defendant. Having so found, it is not necessary for me to deal with the issue of rectification.

[51] I now turn to deal with whether the plaintiffs are entitled to the relief they seek. On the basis of the evidence adduced at trial, I am of the view that the plaintiffs are entitled, as holders of the pre-emptive right, to the relief they seek.

[52] In terms of para (d) of the relief sought by the plaintiffs, the plaintiffs seek an order directing the third defendant to re-transfer to the first defendant the half-shares which were transferred to the third defendant under Deed of Transfer No. T 3347/2015. In other words, the plaintiffs seek in that paragraph an order that ownership of the property, reverts to its original owner, namely the first defendant.

[53] During trial, evidence was led that the first defendant was deported back to Germany and possibly resides there. From the evidence, it appears that it is unknown whether the first defendant is still alive.

[54] In terms of s 80 of the *Deeds Registries Act No. 14 of 2015* the court has power, in appropriate cases, to order cancellation of a deed of transfer. Once so cancelled the deed under which the property was held immediately prior to the registration of the deed which is cancelled, shall be revived, to the extent of the cancellation.[15]

[55] The procedure under s 80 can be followed without the intervention of the third defendant or the first defendant and appears to me to be suitable in the circumstances and achieves the same object as the relief sought by the plaintiffs. I shall therefore make an order to that effect.

[56] In so far as costs are concerned, I am of the view that the general rule that costs follow the event should find application.

[57] In the result, I make the following order:

1. The purported contract of ‘donation’ entered into between the first defendant and the third defendant does not constitute a donation, but a transaction, the intended and actual entering into of which entitled and entitles the plaintiffs to exercise the right of pre-emption created in terms of the agreement entered

[15] Section 80(2) of the Deeds Registries Act 14 of 2015.

into between the plaintiffs and the first and second defendants on or about 23 July 2007.

2. The plaintiffs are entitled to exercise the right of pre-emption in respect of the transaction entered into between the first and third defendants relating to the half-shares of the properties as more fully described in para 3 hereunder.

3. The fifth defendant is hereby ordered to cancel, in terms of s 80(1) of the Deeds Registries Act (Act No. 14 of 2015), the registration of Deed of Transfer No. T 3347/2015 registered in the name of the third defendant, in respect of:

½ share in and to:

1. Certain: Portion 48 (Portion of Portion 12) of the Farm Nubuamis No 37
Situate: In the Municipality of Windhoek
Registration Division “K”
Khomas Region
Measuring: 29, 9987 hectares and

½ share in and to:

2. Certain: Portion 64 (Portion of Portion 53) of the Farm Nubuamis No 37
Situate: In the Municipality of Windhoek
Registration Division “K”
Khomas Region
Measuring: 25, 0539 hectares

and to cancel all the rights accorded to the third defendant by virtue of the said deed.

4. The third defendant is ordered to pay the costs of the plaintiffs and such costs include costs of one instructing and two instructed legal practitioners.

5. The matter is removed from the roll and regarded as finalised.

B USIKU

Judge

APPEARANCES:

PLAINTIFF:	Adv Totemeyer (with Mr D Obbes) Of Lorentzangula Inc (Ensafrica Namibia) Windhoek
3RD DEFENDANT:	Adv. Barnard (with Mr Du Pisani) Of Du Pisani Legal Practitioners Windhoek