

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2020/04833

In the matter between:

PIET MURANDI

PLAINTIFF

and

DAPHNEY KAMUZERI

DEFENDANT

Neutral citation: *Murandi v Kamuzeri* (HC-MD-CIV-ACT-OTH-2020/04833) [2021]
NAHCMD 467 (7 October 2021)

Coram: OOSTHUIZEN J

Heard: 28 – 30 September 2021

Delivered: 7 October 2021

Flynote: Civil Procedure – claim for eviction instituted by the plaintiff – on the basis that he was defrauded and/or misrepresented into selling his house – on the part of his brother – plaintiff did not prove the elements that he was defrauded or misrepresented – defendant opposed the action – and raised as her defence that she bought the house from the plaintiff – considered on a balance of probabilities – defendant's version is much more probable – the plaintiff's claim is dismissed – and the defendant's counterclaim succeeds.

Summary: The matter before this court pertained to the claim against the defendant by the plaintiff for the eviction of the defendant and her family from the property of the

plaintiff, on the grounds that the plaintiff was defrauded and/or misrepresented by his brother to sell the property. The defendant opposed the action stating that she purchased the property from the plaintiff during 2015.

The court held that the plaintiff was an unreliable witness.

Held that plaintiff had the onus to prove fraud and/or misrepresentation, and failed.

Held that the agreement of sale between plaintiff and defendant dated 8 May 2015, is a valid agreement.

Held further that on a balance of probabilities, the defendant's version is more probable and the court dismisses the plaintiff's claim and finds in favour of the defendant.

ORDER

Having heard evidence in this matter:

IT IS HEREBY ORDERED THAT:

[1] The Plaintiff's claims for eviction and payment of a municipal bill are dismissed.

[2] The property, Erf 750, A. Kavita Street, Epako, Gobabis, Republic of Namibia, shall be registered in the name of the Defendant.

[3] The Plaintiff shall attend to signing any and all further documentation as may be required for purposes of registering the Erf 750, A. Kavita Street, Epako, Gobabis, Republic of Namibia in the name of the Defendant.

[4] In the event the Plaintiff refuses to sign or is unable to sign any documentation as may be required to effect registration of Erf 750, A. Kavita Street, Epako, Gobabis, Republic of Namibia, that the Deputy Sheriff of Gobabis is authorized to attend to the signing thereof.

[5] Each party shall pay its own costs.

[6] The matter is finalized and removed from the roll.

JUDGMENT

OOSTHUIZEN J:

Introduction

[1] The plaintiff instituted action proceedings, on the allegations that he was defrauded and/or misrepresented into selling his house, a certain Erf No. 750, Epako Township, Gobabis and now claims the eviction of the defendant and part of the municipality bill.

[2] The defendant opposed the action proceedings, raising as her defence that her parents purchased the property from the plaintiff's brother, a certain Mr. Erwin Hans Murandi and subsequently thereto, the plaintiff and the defendant entered into an agreement of sale for the said property in question and claims transfer of the property based on this latter sale agreement.

Parties

[3] The plaintiff is Piet Murandi, a major male with full legal capacity and residing at Epukiro Post 3, Gobabis District, Gobabis, Republic of Namibia.

[4] The defendant is Daphney Kamuzeri, a major female with full legal capacity and residing at Erf No. 750, Epako Township, Gobabis, Republic of Namibia.

Analysis of the Evidence

[5] The matter before the court is defined when one looks at the onus the plaintiff had. Plaintiff had to prove that he was the lawful owner of the property and that he was defrauded and/or misled into selling the property. The plaintiff proved ownership of the

property by way of a title deed that the property was still registered in his name. The plaintiff went on to allege that his brother Hans Murandi sold his house without his consent in 2003/2004. And when the plaintiff was cross-examined on what he did when Hans Murandi stated that the house was his to sell, the plaintiff was silent and had no comment.

[6] Further to the plaintiff's testimony he specifically stated that the fraudulent actions of his brother, Hans Murandi lead him to sign the sale agreement between himself and the defendant in 2015. Mr Tjituri in closing argument tried to proffer the notion that according to the plaintiff, plaintiff cannot remember that he attended the lawyer's office, where he signed the transfer documents, as he was allegedly told that he needed to attend to the municipality to sign documents for the new tenant account, in 2015.

[7] Plaintiff failed to plea and prove that his faculties was impaired when signing the sale agreement with Defendant in 2015. Nor did he allege fraud by the defendant, which is a crucial allegation to make and prove. Plaintiff during his testimony confirmed that fraud and/or misrepresentation was made by his own brother Hans Murandi. Hans Murandi was not called as witness for plaintiff, nor was he a party to the proceedings.

[8] Plaintiff testified that he could only thumb sign, but during his testimony it came to light that he could actually initial. Plaintiff did not thumb sign the transfer documents, he initialled same. Plaintiff also confirmed that he signed the transfer documents, that it was his initials in his writing but that he does not remember signing same.

[9] The plaintiff made the allegation during his testimony that the Kamuzeri family invited him to the Gobabis Municipality to sign a utility bill to authorise a new utility account as tenants, which was disavowed by defendant.

[10] Plaintiff however, did not tell the court that he signed various other documents at Kempen & Maske legal practitioners. He stated that he cannot remember he was at Kempen & Maske legal practitioner. But he confirmed that he signed the Power of Attorney, the transfer and various other documents shown to him during cross-examination, namely the 'Power of Attorney to give transfer', 'Declaration by Seller',

FIA documents, Insolvency documents, Application in terms of Regulations 53(1) of Deeds Registries Act.

[11] Plaintiff did not try to explain how a copy of his Passport found its way to be part of the bundle of transfer documents discovered by defendant.

Findings and/or Determination on the evidence

[12] In cases as these the court is bound by the pleadings and the issues that are defined by the pleadings. The parties' pre-trial order set out the issues for determination.

[13] Apart from the fact that plaintiff did not prove fraud or misrepresentation, the court is faced with the fact that after hearing the evidence from both plaintiff and defendant their versions are mutually destructive. *Govan v Skidmore*¹ provides guidance in the following terms:

'In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed., para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable, even though that conclusion be not the only reasonable one.'

[14] The test in civil matters is on a balance of probabilities. The court asks itself which of the competing versions viewed against the totality of evidence is more probable. This means that if the court finds that the plaintiff's claim is more probable, the plaintiff's claim will succeed and if the court finds the defendant's defence/claim more probable then the plaintiff did not discharge his onus. He/she who alleges must prove. In *casu*, the defendant pleaded the sale agreement of May 2015 as justification for her possession and had to prove same.

[15] The following dictum by Eksteen AJP in *National Employers General Insurance Co. Ltd v Jagers*² represents the law in Namibia:

¹ *Govan v Skidmore* 1952 (1) SA 732 (N) at 734. See also, *Ocean Accident and Guarantee Corp. Ltd v Koch* 1963 (4) SA AD at 159.

² *National Employers General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G. It was cited with approval by the Supreme Court in *Burgers Equipment and Spares Okahandja CC v Aloisius Nepolo*

'Where the onus rests on the plaintiff . . . and where there are mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

Where the onus rests on defendant, the same test will apply *mutatis mutandis*.

[16] The court finds that the plaintiff was an unreliable and untrustworthy witness and that the agreement of sale entered into by the parties on 8 May 2015, is a valid agreement.

[17] It is more probable to find on the versions of events as set out by the Defendant, that she and the plaintiff had entered into a subsequent agreement and that the plaintiff had attended to the offices of Kempen & Maske legal practitioners to sign the documents to effect transfer of the property to the defendant. The plaintiff neither alleged nor proved that the defendant defrauded alternatively misrepresented him into signing all these documents and he confirmed that he signed all the above mentioned documents as listed in paragraph 10.

[18] In conclusion, and in light of the aforementioned, I make the following order:

[18.1] The Plaintiff's claims for eviction and payment of a municipal bill are dismissed.

[18.2] The property, Erf 750, A. Kavita Street, Epako, Gobabis, Republic of Namibia, shall be registered in the name of the Defendant.

[18.3] The Plaintiff shall attend to signing any and all further documentation as may be required for purposes of registering the Erf 750, A. Kavita Street, Epako, Gobabis, Republic of Namibia in the name of the Defendant.

[18.4] In the event the Plaintiff refuses to sign or is unable to sign any documentation as may be required to effect registration of Erf 750, A. Kavita Street, Epako, Gobabis, Republic of Namibia, that the Deputy Sheriff of Gobabis is authorized to attend to the signing thereof.

[18.5] Each party shall pay its own costs.

[18.6] The matter is finalized and removed from the roll.

GH Oosthuizen
Judge

APPEARANCES

FOR THE PLAINTIFF(S):

Mr. M. Tjituri

Of Tjituri Law Chambers, Windhoek

FOR THE DEFENDANT(S):

Ms. H. Ntelamo-Matswetu

Of Ntelamo-Matswetu & Associates, Windhoek