

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2018/04242

In the matter between:

MEGAMENO BOAS NAANDA

PLAINTIFF

and

GERHARDUS CHRISTIAN FREDRIK

FIRST DEFENDANT

HILMA FREDRIK

SECOND DEFENDANT

Neutral citation: *Naanda v Fredrik* (HC-MD-CIV-ACT-CON-2018/04242) [2022]
NAHCMD 610 (8 November 2022)

Coram: USIKU J

Heard: 4 and 8 July 2022

Delivered: 8 November 2022

Flynote: Contract – Married Persons Equality Act 1 of 1996 – sections 7 and 8 thereof – Spouses married in community of property - Sale and registration of immovable property sold by one spouse without acknowledgement and consent of the other spouse – Purchaser has a duty to make reasonable enquiries as to the seller’s marital status and as to whether the other spouse’s written consent to the sale is needed – Purchaser failed to make the reasonable enquiries and therefore cannot rely on the deemed consent provided for under section of 8(1)(a) of the Married persons Equality Act 1 of 1996 – The sale transaction is void and

unenforceable with the consequence that the immovable property reverts to the joint estate.

Summary: A husband married in community of property sold and transferred a property (house), which formed part of the joint estate, to a purchaser in 2017. The sale and the transfer was without knowledge and consent of the wife. The property was registered in the joint names of the husband and the wife. The purchaser instituted action for the eviction of the husband and wife. The wife counterclaimed for an order declaring the sale agreement void and unenforceable and for the return of the property to her. The purchaser contended that the wife should be deemed, in terms of s 8(1)(a) of the Married Persons Equality Act, to have given the required consent as he did not know the marital status of the husband.

Held that the purchaser bears the onus to make enquiries as to whether the husband was married, if so, in terms of which marriage regime, whether consent of the wife was required and, if so, whether consent was given.

Held further that the purchaser did not make the enquiries that a reasonable person would make in the circumstances and therefore cannot be allowed to rely on the 'deemed consent' provision set out in section 8(1)(a) of the Married Persons Equality Act.

Held further that the sale transaction is void and unenforceable, with the consequence that the property reverts to the joint estate.

ORDER

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the costs of suit of the second defendant.
3. The second defendant's counterclaim succeeds.
4. The agreement of sale concluded between the plaintiff and the first defendant on 24 August 2017 in terms of which the first defendant sold to the plaintiff Erf No 3944 Katutura, Extension No. 2, in the Municipality of Windhoek, measuring 314 square meters, is declared null and void.
5. The transfer of the aforementioned erf to the plaintiff by virtue of Deed of transfer No. T 6463/2017 is hereby declared null and void.

6. The Registrar of Deeds is hereby directed to cancel Deed of Transfer No T 6463/2017, in terms of s 80(1) of the Deeds Registries Act 14 of 2015.
 7. The plaintiff is ordered to pay the costs of suit of the second defendant occasioned by the counterclaim.
 8. It is directed that the Registrar of the High Court brings this judgment to the attention of the Registrar of Deeds, so that the latter implements para 6 of this order.
 9. The matter is removed from the roll and is regarded finalised.
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JUDGMENT

USIKU J:

Introduction

[1] This is an action instituted by the plaintiff in which the plaintiff seeks to evict the second defendant from an immovable property described as:

Certain: Erf No 3944 Katutura, (Extension No. 2);

Situate: In the Municipality of Windhoek;

Registration Division "K" Khomas Region;

Measuring: 314 square meters;

Held by the plaintiff under Deed of Transfer No T 6463/2017; hereinafter referred to as 'the property'.

Background

[2] On or about 19 October 2018, the plaintiff instituted action against the first defendant and second defendant for eviction from the property.

[3] The second defendant entered appearance to defend. The first defendant did not enter appearance to defend.

[4] The matter was later referred to court connected mediation. Due to reasons that are not relevant to the present proceedings, mediation did not take place. On 16 October 2019 the plaintiff applied for summary judgment against both defendants. The court granted summary judgment for eviction, in favour of the plaintiff against both defendants on 12 November 2019.

[5] On 23 January 2020, the second defendant applied for rescission of the summary judgment. On 15 September 2020 the court rescinded the summary judgment granted against the second defendant only and the second defendant was granted leave to defend the action.

[6] The second defendant delivered a plea to the plaintiff's particulars of claim, and launched a counterclaim.

[7] In his action, the plaintiff claims that he owns the property by virtue of Deed of Transfer No. T 6463/2017 and that the second defendant is in unlawful occupation of the property.

[8] In her counterclaim, the second defendant denies that she is in unlawful occupation of the property and avers that the property was part of the joint estate of the first and second defendants, and that the first defendant sold and transferred the property to the plaintiff without her knowledge and consent. The second defendant contends that the transfer of the property to the plaintiff is contrary to the provisions of the Married Persons Equality Act and the Formalities in Respect of Contracts of the Sale of Land Act and should be set aside for that reason.

[9] At trial, the plaintiff gave evidence and called no further witnesses. The second defendant gave evidence and called one witness, namely Michael Morkel ("Mr Morkel").

Common cause facts

[10] The following facts are either facts admitted or facts not in dispute, namely that:

- (a) on 11 May 1991, the first and second defendants got married to each other at Windhoek, in community of property;¹
- (b) on 13 March 2001, the property in question was transferred from the Municipal Council of Windhoek and registered in the joint names of the first and second defendants².
- (c) on 24 August 2017, the first defendant and the plaintiff concluded a written sale agreement in terms of which the first defendant sold the property to the plaintiff for N\$535 000³;
- (d) the was transferred and registered at the Deeds Registry in the name of the plaintiff on 28 September 2017⁴;
- (e) the aforesaid written sale agreement was entered into by the plaintiff and the first defendant only⁵;
- (f) the second defendant had no knowledge and did not consent to the sale of the property⁶; and,
- (g) the second defendant did not sign the sale agreement and did not sign the power of attorney to pass the transfer of the property to the plaintiff⁷.

The plaintiff's case

[11] The plaintiff testified that, during August 2017, he was approached by a certain Mr Cosmos, an estate agent, informing him that he was selling the property, which is the subject matter of the present proceedings. The plaintiff, Mr Cosmos and the first defendant arranged to view the property. According to the plaintiff, the second defendant was present at the property when the viewing of the property took place. The plaintiff averred that he made various visits to the property for the purposes of drawing new construction plans and that during these visits the second defendant was present at the premises.

[12] The plaintiff and the first defendant agreed on a purchase price of N\$500 000 excluding transfer costs and the agent's commission. The first defendant informed

¹ Certificate of marriage, Exhibit "C¹".

² Deed of Transfer No. T 1162/2001, Exhibit "C⁴".

³ Deed of Sale dated 24 August 2017, Exhibit "A".

⁴ Deed of Transfer No. T 6463/2017, Exhibit "B".

⁵ Parties' joint pre-trial report dated 24 January 2022, para. 3.

⁶ Ibid.

⁷ Ibid.

the plaintiff that he had a death in the family and needed N\$200 000 as a deposit amount to cover funeral expenses. The plaintiff paid N\$200 000 to the first defendant and the parties agreed that the balance of the purchase price was to be paid to the first defendant on the date of the transfer of the property in the plaintiff's name.

[13] The transfer of the property was registered in the plaintiff's name on 28 September 2017. The plaintiff and the first defendant agreed that the first and second defendants shall occupy the property until the end of December 2017, because the defendants' children were still attending school during that period.

[14] In January 2018, the plaintiff approached the first and second defendants informing them that they should vacate the property by the end of January 2018. According to the plaintiff, the first defendant requested that he and the second defendant be allowed to remain in occupation of the property until the end of February 2018, subject to payment of rent in the amount of N\$4000 per month. The first defendant further indicated his intention to buy back the property from the plaintiff. At this stage, the plaintiff has become doubtful of the intentions of the first defendant.

[15] Some time later, the plaintiff tried to get in touch with the first defendant but without success. The plaintiff approached the second defendant and informed her that she must vacate the property. The second defendant refused to vacate. She informed the plaintiff that she was unaware that the property was sold to him and that she regarded herself as the owner of the property.

[16] The plaintiff asserts that he was not privy to the defendants' internal arrangements at home and was not involved in their daily discussions.

[17] The plaintiff further testified that, he had paid the following amounts pursuant to the aforesaid sale agreement:

- (a) N\$ 500 000 as the purchase price of the property;
- (b) N\$ 35 000 as agent's commission;
- (c) N\$ 8 465 as transfer costs;
- (d) N\$ 32 000 as rates and taxes;

(e) N\$ 8 900 as additional costs in respect of drawings and plans for the renovation of the property.

[18] The plaintiff testified further that:

(a) he and the first defendant signed the sale of the property, in the presence of Mr Cosmos and thereafter the agreement was handed over to first defendant for the second defendant to sign the agreement;

(b) the first defendant had told the plaintiff that he would have the second defendant sign the power of attorney to pass transfer as well as other transfer documents; and that,

(c) he did not ask the first defendant whether he was married, because he did not regard it his business to enquire about other people's marital statuses.

The second defendant's case

[19] The second defendant testified that she has been living on the property since she was born. The property belonged previously to her father who died in 1988. Upon the passing of her father she inherited the property.

[20] On or about 11 May 1991, the first and second defendants got married to each other in community of property. The property became the joint property upon their marriage.

[21] During 2013 the second and first defendants separated and subsequently reconciled in 2016. They separated again in 2018 which separation subsists up to now, even though they remain married to date.

[22] In October 2017, an employee from the City of Windhoek came to the property to disconnect the water usage. Not long thereafter, a person whom the second defendant later learned as Mr Cosmos also arrived at the property. The employee from City of Windhoek informed the second defendant that the property was sold. Mr Cosmos informed the second defendant, upon enquiry, that the first defendant has sold the house.

[23] According to the second defendant, she informed Mr Cosmos that she is the wife of the first defendant and that she was unaware that the property was sold.

[24] The second defendant related that she was in shock to find out that the property was sold and transferred without her knowledge and consent. At that time Mr Cosmos had shown the second defendant a copy of the sale agreement and a copy of the Deed of Transfer confirming the sale and transfer of the property.

[25] Later, that same evening, the second defendant called her sister Rosemary Morkel and her husband Michael Morkel and informed them about the incident. They advised her to set up a meeting with the first defendant and the children. At that time the first defendant was in South Africa. He arrived in Namibia about a week later and the second defendant set up the meeting. Present at the meeting were the second defendant, the first defendant, Mr Cosmos, Rosemary Morkel and Michael Morkel.

[26] According to the second defendant, the first defendant was not happy to see Mr Cosmos at the meeting. The first defendant wanted to know why Mr Cosmos was at the meeting, stating that he had not yet told his family about the fact that the house was sold. Furthermore, the first defendant did not want Mr Cosmos to reveal the events that transpired relating to the sale of the property. The first defendant indicated that he intended to tell the family after the sale went through. The meeting ended in chaos and Mr Cosmos left without giving more information.

[27] The second defendant further testified that she did not meet, see or know the plaintiff until May 2018, when she met the plaintiff at the office of Van Der Merwe-Greef-Andima Legal Practitioners.

[28] The second defendant states that she:

- (a) only became aware of the sale and transfer of the property in October 2017, when the employee of City of Windhoek came to the property to disconnect water usage;
- (b) had no knowledge of the arrangements made by the first defendant and Mr Cosmos regarding the sale and the viewing of the property;

- (c) did not receive any proceeds from the sale and transfer of the property;
- and,
- (d) did not consent to the sale and transfer of the property.

[29] The second defendant's witness, Mr Morkel, testified in relation to the events that transpired at the family meeting that took place in October 2017, which was attended by the second defendant, the first defendant, Mr Cosmos, Rosemary Morkel and Mr Morkel. Mr Morkel confirmed that at the meeting the first defendant was angry that Mr Cosmos was invited to attend the meeting. Furthermore, the first defendant did not allow Mr Cosmos to reveal what transpired concerning the sale of the property. Each time Mr Cosmos wanted to say something, the first defendant would interrupt him and stopped Mr Cosmos from talking. Nothing came out of the meeting as it turned to chaos and Mr Cosmos left without giving the meeting attendees proper information.

Closing submissions

[30] The plaintiff's legal practitioner, Mr Andima, submitted that the sale agreement concluded between the plaintiff and the first defendant met the requirements of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969. It was further submitted that the plaintiff did not know about the marital status of the first defendant. And that, since the plaintiff did not know about the marital status of the first defendant the sale agreement is deemed to have been entered into with the required consent.

[31] The legal practitioner for the second defendant, Adv Shifotoka, contended that the sale agreement in question did not comply with the Formalities in Respect of Contracts of Sale of Land Act in that the agreement was not signed by second defendant.

[32] Adv Shifotoka further submitted that the plaintiff has admitted in cross examination that he did not enquire about the marital status of the first defendant, therefore, the plaintiff cannot rely on the protection granted under section 8(1)(a) of the Married Persons Equality Act and that the second defendant is entitled to the relief she seeks in her counterclaim.

Analysis

[33] In my opinion, the principal issue for determination is whether the plaintiff has brought himself within the protection afforded to a third party purchaser, by s 8(1)(a) of the Married Persons Equality Act. As stated earlier on, the parties are agreed that the second defendant was not a party to the sale agreement in question and had no knowledge and did not consent to the sale and transfer of the property.

[34] Section 7 of the Married Person Equality Act deals with acts requiring other spouse's consent and provides as follows:

'7. (1) Except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse -

(a) alienate, ... or confer any other real right in any immovable property forming part of the joint estate;

(b) enter into any contract for the alienation, ... or conferring of any other real right in immovable property forming part of the joint estate;

(2) The consent required under subsection (1) for the performance of an act contemplated in that subsection may be given either orally or in writing, but the consent required for the performance of -

(a) any such act which entails the registration, execution, or attestation of a deed or other document in a deed registry; or

(b),

shall, in respect of each separate performance of such act, be given in writing only.

...'

[35] Section 8 of the Married Person Equality Act deals with consequences of an act performed without the required consent and provides as follows:

'8. (1) If a spouse married in community of property enters into a transaction with another person without the consent required by the provisions of section 7, ...and -

(a) that other person does not know and cannot reasonably know that the transaction is being entered into without such consent ... such transaction shall be deemed to have been entered into with the required consent...;

(b)'

[36] The provisions of ss 7 and 8 may be summarized as follows. First, as a general rule, a spouse married in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse. Secondly, there are exceptions to the general rule, especially those created by for s 7(1)(a) and (b) to the effect that a spouse shall not enter into any of the transactions listed in those subsections without the consent of the other spouse. Subject to the provisions of s 8(1)(a), if a spouse enters into such a transaction without the required consent, the transaction is unlawful, void and unenforceable.⁸ The rationale for the foregoing principle being that a thing done contrary to the direct prohibition of the law is void and of no effect.⁹

[37] A transaction performed without the consent of the non-contracting spouse, may be valid and enforceable if the third party did not know and would not reasonably have known that the transaction was being entered into without the required consent.¹⁰ It is stated that the consent requirement is necessary to provide protection to the non-contracting spouse against maladministration of the joint estate by the contracting spouse, and that, the 'deemed consent' is intended to protect the interests of a *bona fide* third party who contracts with that spouse.¹¹

[38] A party seeking to rely on the protection provided under s 8(1)(a) is required to establish that he:

- (a) did not know that the contracting spouse was married, and that he,
- (b) could not reasonably have known that the contracting spouse was married.

[39] Furthermore, a party seeking to rely on the protection provided under s 8(1)(a) is required to make enquiries as to:

⁸ *Standard Bank Ltd v Groenewald* 2021 NR 968 at 982 F-G.

⁹ *Ibid.*

¹⁰ *Marais v Maposa* 2020 (5) SA 111 SCA at 117 G.

¹¹ *Ibid.*

- (a) whether the contracting party is married, and if so,
- (b) in terms of which marriage regime,
- (c) whether the consent of the non-contracting spouse is required, and if so,
- (d) whether the consent of the non-contracting party has been given.¹²

[40] In the present matter, I accept for, for the present purposes, that the plaintiff did not know that the first defendant was married. However, that is not the end of the matter. The plaintiff is required to establish that he could not have reasonably known that the transaction was being entered into without the required consent. The phrase “cannot reasonably know” in s 8(1)(a), implies an objective standard of proof, to be satisfied with reference to the standard of conduct expected of a reasonable person, in the circumstances.

[41] It is common cause that the second defendant never consented to the sale or the transfer of the property. According to the second defendant, she first learnt of the sale and transfer of the property in October 2017 when the employee from City of Windhoek came to disconnect the water usage on the property. The plaintiff, on the other hand states that he has seen the second defendant on the property. The plaintiff never enquired with the first defendant about the nature of his relationship with the second defendant. On the plaintiff’s own version, he did not make enquiries expected of a reasonable person.

[42] The plaintiff, as a reasonable person, is under an obligation to enquire about the status of the person with whom he was contracting. According to the plaintiff, the first defendant had informed him that he would have the second defendant sign the power of attorney as well as other transfer documents. This information should have alerted the plaintiff, as a reasonable person, to ascertain whether the person he was dealing with was married and if so, whether he had obtained the relevant written consent for the particular transaction. This should have become more apparent bearing in mind that in this particular case the property was registered in the joint names of the first and the second defendants.

¹² Ibid at 119G.

[43] As the plaintiff made no enquiries, he did not establish that he, as a reasonable person, could not have known that the transaction was entered into without the second defendant's consent.

[44] It is clear, from the evidence, that the first defendant maladministered the joint estate by selling and transferring the property without the consent of the second defendant. Having made the foregoing finding, I am of the view that it is not necessary to deal with second defendant's contention that the provisions of the Formalities in Respect of Contacts of Sale of Land Act were violated.

[45] The result is that the plaintiff's claim falls to be dismissed and the second defendant's counterclaim stands to be upheld, with the consequence that the property reverts to the joint estate.

[46] In terms of para 3 of the relief sought by the second defendant in her counterclaim, directing the plaintiff to transfer the property back to the second defendant. In other words the second defendant seeks an order that ownership of the property reverts to its original owner.

[47] In terms of s 80 of the Deeds Registries Act No 14 of 2015 the court has power in appropriate cases to order a 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.¹³

[48] The procedure under s 80 can be applied without the intervention of the plaintiff and appears to me to be suitable in the circumstances and achieves the same object as the relief sought by the second defendant. I shall therefore make an order to that effect and shall direct that a copy of this judgment be brought to the attention of the Registrar of Deeds by the Registrar of the High Court, so that the former cancels Deed of Transfer No T6463/2017 in terms of s 80 (1) of the Deeds Registries Act.

¹³ Section 80(2) of the Deeds Registries Act 14 of 2015.

[49] Insofar as costs are concerned, I am of the view that the general rule that costs follow the event should find application.

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

1. The plaintiff's claim is dismissed.
2. The plaintiff is ordered to pay the costs of suit of the second defendant.
3. The second defendant's counterclaim succeeds.
4. The agreement of sale concluded between the plaintiff and the first defendant on 24 August 2017 in terms of which the first defendant sold to the plaintiff Erf No 3944 Katutura, Extension No. 2, in the Municipality of Windhoek, measuring 314 square meters, is declared null and void.
5. The transfer of the aforementioned erf to the plaintiff by virtue of Deed of Transfer No. T 6463/2017 is hereby declared null and void.
6. The Registrar of Deeds is hereby directed to cancel Deed of Transfer No T 6463/2017, in terms of s 80(1) of the Deeds Registries Act 14 of 2015.
7. The plaintiff is ordered to pay the costs of suit of the second defendant occasioned by the counterclaim.
8. It is directed that the Registrar of the High Court brings this judgment to the attention of the Registrar of Deeds, so that the latter implements para 6 of this order.
9. The matter is removed from the roll and is regarded finalised.

B USIKU
Judge

APPEARANCES

PLAINTIFF:

T Andima,

Of Van Der Merwe-Greeff Andima Inc., Windhoek

SECOND DEFENDANT:

E Shifotoka (with her F Gaes)

Of Uanivi Gaes Inc., Windhoek

Windhoek