

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2021/03821

In the matter between:

REBECCA BEUKES

PLAINTIFF

and

FLORITHA BEUKES

FIRST DEFENDANT

RICHARD GOAGOSEB

SECOND DEFENDANT

REGISTRAR OF DEEDS

THIRD DEFENDANT

Neutral citation: *Beukes v Beukes* (HC-MD-CIV-ACT-OTH-2021/03821) [2023]
NAHCMD 169 (5 April 2023)

Coram: PARKER AJ

Heard: 31 October 2022; 1, 3, 4 November 2022; 7, 12 December 2022; 18,
26 January 2023; 17 February 2023

Delivered: 5 April 2023

Flynote: Land – Alienation of land *donatio mera* – Alleged plaintiff donor denying voluntary donation of property to donee – Donor alleging fraud in the transaction of donation – Court finding that donor failed to prove pleaded fraud which was in issue – Consequently, court concluding that plaintiff not entitled to succeed – Action accordingly dismissed – Court finding that the property was sold by the first defendant donee as seller to second defendant as purchaser for N\$360 000 –

Second defendant's counterclaim to evict the occupants of the property from the property failed because similar eviction order by the Windhoek Magistrates Court, existed involving the selfsame second defendant and the occupants and the property.

Summary: The plaintiff was the owner of the property. The plaintiff's daughter having claimed that the plaintiff had donated the property to her in turn sold the property to the second defendant. The plaintiff brought action against the first defendant to cancel the deed of donation and against the second defendant to cancel the sale agreement entered into between the first defendant and the second defendant on the ground that the deed of donation was tainted with fraud. The court found that the plaintiff relied on the allegation that the deed of donation was tainted with fraud and yet no deed was placed before the court for the court to determine the allegation of fraud. Consequently, court dismissed the action. In his counterclaim, the second defendant, as the lawful owner of the property, prayed the court to order eviction of the present occupants of the property from the property and to be granted possession of the property. In the alternative, the second defendant claimed a return of the purchase price of the property by both the plaintiff and the first defendant. The court refused to grant an eviction order because an eviction order to the same effect had been granted in favour of the second defendant and against the occupants of the property by the Windhoek Magistrates Court, as long ago as May 2021 and that order existed unexecuted. Court upheld the second defendant's alternative claim but against the first defendant only as she was the seller of the property.

Held, where a party relies on the fact that a document is tainted with fraud, the fraud relied on must be in the document and not in the underlying transaction.

Held further, in our law, an order of court does not just evaporate into thin air: It exists until set aside by a competent court or vacated or executed by the party in whose favour the order was made.

ORDER

1. The plaintiff's action is dismissed.
2. The second defendant's principal counterclaim to evict the occupants of the property (Erf 1407, Katutura (Extension 3), Windhoek) from the property is dismissed.
3. The second defendant succeeds in his counterclaim in the alternative against the first defendant only in the amount of N\$360 000, plus interest thereon at the rate of 20 per cent per annum calculated from the date of this judgment to the date of full and final payment.
4. There is no order as to costs.
5. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

Introduction: Claim 1 and Claim 2

[1] In this matter, the plaintiff is Rebecca Beukes; the first defendant, who is the daughter of the plaintiff, is Floritha Beukes; the second defendant is Richard Goagoseb; and the third defendant is the Registrar of Deeds. The first defendant and the third defendant have not taken part in these proceedings. Unlike the first and second defendants, the third defendant is an administrative official and he is cited in such capacity. Thus, as respects the first and the second defendants, it was in their interest to defend the action. The second defendant has done so. The first defendant did not, and yet she is the sole target of Claim 1.

[2] The plaintiff was the owner of Erf 1407 Katutura (Extension 3), Windhoek ('the property'). She lost the property in August 2013, allegedly through a donation, she denied, whereby she had donated the property to her daughter, the first defendant.

The first defendant in turn sold the property to the second defendant for N\$360 000. On 4 December 2019 the ownership of the property was accordingly transferred to the second defendant by the third defendant.

Claim 1

[3] In Claim 1, the allegation is that as a result of 'a fraudulent deed of donation' the first defendant became the owner of the property, and the 'plaintiff suffered damages and/or loss to the value of N\$360 000'. As a matter of law, any allegation about a so-called fraudulent donation of the property does not concern the second defendant and third defendant, an administrative official. I conclude that they cannot be expected to defend that allegation. This conclusion leads me to the next level of the enquiry.

[4] In that event, the court is entitled to deal with the first defendant's default to deliver a notice of intention to defend in terms of subrule (3) of rule 15 of the rules of court. Rule 15 provides: 'If a defendant fails to deliver a notice of intention to defend as contemplated in rule 14, the registrar may not allocate the case to a managing judge'. In that event, in terms of subrule (2), 'the plaintiff may set the action down for a default judgment as provided for in subrule (4)'. This option was open to the plaintiff in the instant matter, but plaintiff decided not to pursue that option.

[5] Of course, the plaintiff may, if he or she wishes, disregard his or her right under subrule (2), read with subrule (4), of rule 15, and proceed to trial, as the plaintiff in these proceedings has done. But, unless there is some relief obtainable at the trial which he or she could not have had at the earlier stage, he or she will be penalised in costs. However, where there are several defendants (as is the case in the instant matter) not all of whom are in default of defence, the plaintiff's course of action in terms of the aforementioned provisions of rule 15 will be determined by whether the plaintiff's claim against the defendant in default is severable from the plaintiff's claim against the other defendants.¹ In the instant matter, I find that Claim 1 is severable from Claim 2.

¹ P St J Langan and D G Lawrence *Civil Procedure* 2 ed (1976) at 76.

[6] As I have said previously, the first defendant is in default of defence. The claim against her in Claim 1 is a liquidated demand; and so, without hearing evidence, I grant judgment in favour of the plaintiff against the first defendant in the amount of N\$360 000, plus interest thereon at the rate of 20 per cent per annum calculated from the date of this judgment to the date of full and final payment. I proceed to consider Claim 2.

Claim 2

[7] For a good reason that will become apparent in due course, I append here holus bolus the plaintiff's Claim 2 as it appears in the particulars of claim:

'Ad claim 2

14. As a result of the fraudulent donation and consequential transfer of the property pleaded above, during October 2019, the first defendant sold and/or caused to be sold the property to the second defendant in the amount of N\$360 000.00.
15. In entering the sale agreement, second defendant:
 - 15.1 The first defendant knew that it acquired the property by virtue of fraudulent deed of donation.
 - 15.2 The first defendant intended second defendant to act thereon and authorise the sale and/or transfer of the plaintiff's property into the second defendant's name.
16. As a result of this fraud, the plaintiff is unable to recover the property from the second defendant and suffered damages in respect of loss of property.'

[8] Despite the fact that a great deal of evidence was adduced by and on behalf of the plaintiff, consisting of the evidence of the plaintiff herself, Lydia Beukes and Desiree Beukes, and by the second defendant (who called no defence witnesses), the determination of Claim 2 turns on an extremely short and narrow compass. This calls for a recourse to the basics about pleadings in action proceedings and about the law of evidence.

[9] 'The function of pleadings may be said to be threefold. The first function is that they must ensure that both parties know what are the points of issue between them, so that each party knows what case he has to meet. He can thus prepare for trial knowing what evidence he requires to support his own case and to meet that of his opponent. The object of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial, attempt to canvass another. The second function is that pleadings are to assist the court by defining the limits of the action. In general, these cannot be extended without the leave of the court which may, however, allow amendments. The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within these limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. The third function of pleadings is to place the issues raised in the action on record so that when a judgment is given such judgment may be a bar to the parties litigating again on the same issues.'²

[10] Thus, 'once pleadings are filed the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case might be) would fail'³ The foregoing are the basics on pleadings.

[11] In the instant matter, it is as clear as day that the issues raised on the pleadings are these. As a result of the fraudulent donation and the consequential transfer of the property into the name of the first defendant, the first defendant sold the property to the second defendant for N\$360 000. The second defendant knew, the plaintiff alleged, that the first defendant acquired the property 'by virtue of a fraudulent deed of donation'. In sum, the issues are that the first defendant acquired the property through fraud and so the alienation of the property to the second defendant was tainted with fraud, and so the second defendant could not have taken ownership of the property lawfully.

[12] The second defendant's defence is simply this, in a few words: He bought the property from the first defendant in market overt and for value. A search at the

² | Isaacs *Beck's Theory and Principles of Pleading in Civil Actions* 5ed (1982) para 17.

³ Ibid para 19.

Deeds Registry revealed that the title deed to the property is in the name of the first defendant.

[13] The aforementioned basics on the law of evidence is the general principle that he or she who asserts must prove.⁴ Seminal to this general principle is that in order to succeed, the party must prove the facts in issue (*facta probanda*), that is, he or she bears the onus of satisfying the court that he or she is entitled to succeed on his or her claim or defence, as the case may be.⁵ Thus, in the instant matter, the plaintiff must prove the allegation of fraud, as referred to above, and that the second defendant knew about it or ought to have reasonably known about it.

[14] The Supreme Court stated: 'Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.'⁶ The Supreme Court had held in an earlier case that 'the fraud relied upon must be in the document rather than in the underlying transaction'.⁷

[15] In the instant matter, the document which the plaintiff relied on and in which the fraud must, according to the Supreme Court,⁸ be is the so-called 'deed of donation'. But the plaintiff, who is legally represented, has placed no 'deed of donation' before the court. The irrefragable result is that the court is unable to determine the allegation of fraud: There is no document to go on.

[16] Consequently, I hold that the plaintiff has failed to prove that which she asserts on the pleadings.⁹ The plaintiff has failed to prove the fact in issue (*factum probandum*). The plaintiff has, therefore, not satisfied the court that she is entitled to succeed on her claim under Claim 2 as pleaded.¹⁰

[17] I should say this. A great deal of evidence was adduced by the plaintiff and the plaintiff witnesses. I have not overlooked their testimonies. I have considered them. Having considered them, I come to the inexorable conclusion that the

⁴ *Pillay v Krishna* 1946 AD 946 at 951-953.

⁵ *Pillay v Krishna* footnote 3 at 952.

⁶ *State v Dias* [2021] NASC (13 April 2021) para 107.

⁷ *Standard Bank Namibia Ltd v Karibib Construction Services CC and Others* 2019 (4) NR 1061 (SC) para 21.

⁸ See para 14 above.

⁹ See *Pillay v Krishna* footnote 1 loc cit; and paras 9 and 10 above (on pleadings).

¹⁰ See para 13 above.

testimonies cannot supply the document the plaintiff relied on to establish the fraud she has alleged on the pleadings. They cannot prove that which the plaintiff must prove to succeed.¹¹

[18] Based on these reasons, I find that the plaintiff cannot succeed on her claim. I proceed to consider the second defendant's counterclaim. Here, also, I go by the pleadings and the evidence and, of course, the applicable law.

Second defendant's counterclaim

[19] In his counterclaim, the second defendant claims in his principal counterclaim that the first defendant and/or plaintiff deliver possession of the immovable property to the second defendant. I am not inclined to grant such order against the plaintiff. On the pleadings, the second defendant has pleaded that he bought the property from the first defendant. He must look to the first defendant for delivery of the property to him. By a parity of reasoning, the court cannot grant the order sought in the alternative against the plaintiff.

[20] The court is prepared to grant judgment with regard to the counterclaim in respect of the alternative claim against the first defendant in terms of rule 15 of the rules of court.

[21] In the counterclaim, the second defendant has prayed the court to make a further order to evict the occupants of the property from the property and to grant possession of the property to the second defendant. This court refuses to grant such orders.

[22] On the evidence before the court and as Mr Engelbrecht reminded the court, an eviction order was made by the Windhoek Magistrates Court, against the occupants of the property and in favour of the second defendant as long ago as 5 May 2021. A rescission application against that order was dismissed on 20 July 2021.

¹¹ See paras 13 and 14 above.

[23] In our law, an order of court does not just evaporate into thin air: It exists until it is set aside by a competent court or vacated or executed by the party in whose favour the order was made. The court cannot cause the execution of orders of inferior courts or tribunals in the absence of statutory powers granted to the court to do so.

[24] It remains the matter of costs. In the nature of the proceedings and the determination I have made as to the result, I think it is fair and reasonable to decline to grant costs orders against or in favour of any party.

[25] In the result, I order as follows:

1. The plaintiff's action is dismissed.
2. The second defendant's principal counterclaim to evict the occupants of the property (Erf 1407, Katutura (Extension 3), Windhoek) from the property is dismissed.
3. The second defendant succeeds in his counterclaim in the alternative against the first defendant only in the amount of N\$360 000, plus interest thereon at the rate of 20 per cent per annum calculated from the date of this judgment to the date of full and final payment.
4. There is no order as to costs.
5. The matter is finalized and removed from the roll.

C Parker
Acting Judge

APPEARANCES:

PLAINTIFF:

I VELIKOSHI

Of Ileni Velikoshi Inc., Windhoek

DEFENDANT:

M ENGELBRECHT

Of Engelbrecht Attorneys, Windhoek