REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-OTH-2022/01190

In the matter between:

BALFRIEDA COETZEE	**PLAINTIFF**
and	
ALBERTUS STEPHANUS KLAZEN	**FIRST DEFENDANT**
REGISTRAR OF DEEDS REHOBOTH	**SECOND DEFENDANT**
MASTER OF THE HIGH COURT	**THIRD DEFENDANT**
ESTATE LATE CORNELIA KATRINA KLAZEN	**FOURTH DEFENDANT**
MARILYN MITA KLAZEN	**FIFTH DEFENDANT**

Neutral citation:	*Coetzee v Klazen (*HC-MD-CIV-ACT-OTH-2022/01190) [2023] NAHCMD 400 (14 July 2023)
Coram:	SIBEYA J
Heard:	**4-5, 24-25 April and 15 June 2023**
Delivery:	**14 July 2023**

Flynote: Law of Succession **–** Estates – Donations and the requirements thereof – Land registration systems in Namibia – The intention of the owner to transfer property to another person.

Summary: This matter is about the validity of a deed of donation of a property. In this instance the property in question is a farm. The plaintiff alleged that the farm was initially the property of Magrietha Klazen who then donated the farm to her son, Willem Klazen. Her son further donated the farm to his daughter, Ms M M Klazen.
The contention between the parties is whether the farm was in actual fact donated to Willem Klazen, while Magrietha Klazen had other heirs who were duly able to benefit from the farm.

During the trial the parties led evidence and the plaintiff provided the court with a deed of donation that was signed by Ms Magrietha Klazen, wherein she donated the said farm to Willem Klazen, who is now late. The first defendant (Mr Klazen) vehemently denied that the deed of donation was valid and provided several reasons for his doubt of the validity of the donation.

Held: that it is clear from the Transfer Duty, an official document of the Ministry of Finance that the farm was to be acquired by Willem Klazen through donation. This document was not disputed by Mr Klazen or Ms Claasen who testified against the plaintiff's claim. The court therefore, took the document for what it is.

Held that: the qualm that was raised that the deed of donation had no witnesses and therefore casts doubt on its validity, in the court's view, lacks merit as the fact that no one signed as a witness to the deed of donation does not diminish its validity.

Held further that: the complaint that the late Willem Klazen appears to have transferred the farm after barely 110 days from the date of the receipt of the donation thus raising doubts of the validity of the first donation also lacks merit as there is no duration that must pass before a donated property can be further donated.

Held: that the plaintiff established that the late Magrietha Klazen donated the farm to the late Willem Klazen. There was no dispute to the claim made by Ms M M Klazen that the late Willem Klazen, when still alive donated the farm to her. As a result, the

court found that the late Willem Klazen who received the donation of the farm from his mother further donated the said farm to his daughter Ms M M Klazen.

The plaintiff's claim is upheld.

ORDER

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1. The first defendant is directed to sign all necessary documents to give effect to the transfer of 319,9997ha of Portion 1 from land title 431 into the estate of the late Willem Klazen, within 30 days from date of this order, failing which the Deputy Sheriff of Rehoboth is authorised to sign such transfer documents.

2. The first defendant must pay the plaintiff's costs of suit.

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

JUDGMENT

SIBEYA J:

Introduction

[1] This matter revolves around the validity of a deed of donation by the deceased and the consequences thereof, regarding the donated property where ordinarily other heirs would have benefited.

[2] The subject of the alleged donation is a farm. The plaintiff, claims transfer of the farm on the basis of the donation. The plaintiff further claims in the alternative to the alleged donation, the improvements made on the farm, amounting to N$2 million. The claim is defended.

The parties and their representation

[3] The plaintiff is Ms Balfrieda Coetzee, an adult female person residing in Windhoek and the duly appointed executrix for the estate of the late Willem Klazen effective 25 July 2016. The plaintiff shall be referred to as such.

[4] The first defendant is Mr Albertus Stephanus Klazen N.O, an adult male residing at Farm Vrede, No. 433, Rehoboth, duly appointed as the executor of the estate late Magrietha Klazen. The first defendant shall be referred to as 'Mr Klazen'.

[5] The second defendant is the Registrar of deeds (Rehoboth), a functionary cited in an official capacity for the interest in the matter, with the business address situated in Rehoboth. The second defendant shall be referred to as 'the Registrar'.

[6] The third defendant is the Master of the High Court, cited in official capacity for her interest in the matter, with the business address situated in Windhoek.

[7] The fourth defendant is cited as the Estate late Cornelia Katrina Klazen, c/o the fifth defendant.

[8] The fifth defendant is Ms Marilyn Mita Klazen, an adult female residing at Erf No. 199, Block D Rehoboth. The fifth defendant is the biological child of the late Willem Klazen and the late Cornelia Katrina Klazen. The fifth defendant shall be referred to as 'Ms M M Klazen'.

[9] The action is defended by Mr Klazen only. The plaintiff is represented by Ms Katjaerua while Mr Klazen (first defendant) is represented by Mr Kapalu.

Pleadings

[10] The plaintiff alleges, in the particulars of claim, that on 29 April 1998, the late Magrietha Klazen, was the then registered owner of 319,9997ha of Portion 1 of Farm Jacobsdal, Rehoboth Gebiet No. 431 ('the farm). Magrietha Klazen then donated the entire farm to her son, the late Willem Klazen and she (Magrietha Klazen) passed away on 14 September 2008.

[11] The plaintiff claims that, for reasons unknown to her, the farm was never transferred to the late Willem Klazen, at the office of the Registrar.

[12] The plaintiff alleges further that Mr Klazen refuses to transfer the farm into the estate of the late Willem Klazen, resultantly the farm remains registered in the name of the late Magrietha Klazen.

[13] The plaintiff further claims that the late Willem Klazen, occupied and farmed on the farm since 1972 and made improvements on the farm to the value of N$2 million. It is further claimed that the estate of the late Magrietha Klazen is, therefore, enriched to the impoverishment of the estate of the late Willem Klazen in the amount of N$2 million.

[14] The plaintiff claims further that during his lifetime and on 17 August 1998, the late Willem Klazen donated the farm to Ms M M Klazen. Ms M M Klazen is the sole heir to the estate of her parents. The plaintiff claims that the first defendant is liable to transfer the farm to Ms M M Klazen, alternatively, and only if the transfer is not ordered then the first defendant must pay the plaintiff N$2 million for the improvements made to the farm.

[15] In his plea to the claim, Mr Klazen denied being liable to transfer the farm to Ms M M Klazen or to pay N$2 million for alleged improvements. Mr Klazen further stated that the farm lawfully belongs to the estate of the late Magrietha Klazen and therefore he has no authority to cause its transfer to Ms M M Klazen.

The pre-trial order

[16] The parties filed a joint pre-trial report dated 1 December 2022 which was made an order of court on 5 December 2022. The pre-trial order lists the following agreed facts and issues to be resolved during the trial:

Agreed facts

(a) That the late Willem Klazen occupied and farmed on the farm since approximately 1972;
(b) That 319,9997ha of Portion 1 of the farm is currently registered in the name and estate of late Magrietha Klazen;
(c) That the late Willem Klazen was the biological son of late Magrietha Klazen.

Issues of fact to be resolved during the trial

(a) Whether during her lifetime the late Magrietha Klazen, then registered owner of 319,9997ha of Portion 1 of farm Jacobsdal, Rehoboth Gebiet No. 431 donated the entire farm to her son Willem Klazen;

(b) Whether or not the estate of the late Magrietha Klazen was unjustifiably enriched at the impoverishment of the estate of the late Willem Klazen by the improvements made to the farm for approximately N$2 million.

(c) Whether or not the late Willem Klazen donated the said farm to Ms M M Klazen;

(d) Whether or not Mr Klazen is liable to transfer the farm into the name of the estate late Willem Klazen and whether in his capacity as the executor of the estate of the late Magrietha Klazen has the power to cause the transfer of the farm into the name of Willem Klazen and by extension to Ms M M Klazen;

(e) Whether or not Mr Klazen and two other surviving siblings have knowledge of the alleged donation of the farm to the late Willem Klazen.

(f) Whether or not annexure ‘B1’ to the particulars of claim is a deed of donation, donating the farm to Willem Klazen.

Plaintiff’s evidence

[17] The plaintiff led the evidence of Ms Marilyn Mita Klazen (Ms M M Klazen), born on 6 December 1976. She testified, *inter alia*, that the farm which was registered in the names of the late Johannes Klazen was, upon his death, transferred to the names of his surviving spouse, the late Magrietha Klazen in September 1988. She testified further that during her lifetime and on 29 April 1998, the late Magrietha Klazen donated the entire farm to her son Willem Klazen. She

referred to the deed of donation dated 29 April 1998 and Transfer duty bearing the same date, and both documents were received into evidence as exhibits.

[18] She states further that the late Willem Klazen had peaceful and undisturbed possession of and farmed on the farm since 1972 when he got married. The farm was, however, not registered in the name of the late Willem Klazen at the office of the Registrar.

[19] Ms M M Klazen testified that the late Willem Klazen was the only one among the children of the late Magrietha Klazen who had a keen interest in farming hence she felt the need to donate the farm to him. She testified further that on 17 August 1998, the late Willem Klazen donated 386,6685ha of the farm valued at N$38 666,85 to her. She further stated that the other portion of the farm was divided as follows: Willem Johannes Claasen (16,6667ha); Willem Fryer and Katrina Fryer (16,6667ha); Albertus David Klazen and Kathrina Klazen (16,6667ha) and Johannes Albertus Claasen (16,6667ha); all of which were donated to the late Willem Klazen on 29 April 1998 but never registered and transferred accordingly.

[20] Ms M M Klazen testified further that on 14 September 2008, Ms Magrietha Klazen passed away. At the time that Mr Klazen, a biological brother to the late Willem Klazen, was appointed as the executor of the estate of the late Magrietha Klazen, the value of the estate was N$98 000. In 2011, Mr Klazen filed an inventory of the estate and deliberately excluded the farm.

[21] Ms M M Klazen testified further that the fact that the farm was donated to the late Willem Klazen is a known fact within the family. She states further that the said farm should be transferred to the estate of Willem Klazen. From 1998 to 2023, the Land Tax Assessments over the farm have been registered in her names and she has been solely responsible for the related payments. She further testified that despite donating the farm to her in 1998, the late Willem Klazen was still responsible for the maintenance and the upkeep of the farm until around January 2016 when she took over. She said further that from January 2016, she controlled the farm under the belief that she was the owner. When Willem Klazen died in January 2016, when she discovered that the farm (386,6685ha of the farm) was never registered in the names of Willem Klazen. She further stated that Mr Klazen requested her in March 2016 to

inquire at the Registrar's office to determine as to whose name was the farm registered and she was shocked to learn that it was still registered in the name of the late Magrietha Klazen.

[22] Ms M M Klazen further testified that the late Willem Klazen developed the farm and planted about 1000 orange trees at the orchard situated on the farm. He also farmed in cattle.

[23] In cross-examination, Ms M M Klazen confirmed that by 1972, she was not yet born. She testified that the late Magrietha Klazen had eight children consisting of three males and five females. When she was questioned by Mr Kapalu that the siblings of the late Willem Klazen lived on the farm, she said that most of them lived on the farm when they were young. The late Willem Klazen was the second eldest child while the eldest child Dawid Klazen lived on the farm and built a house which he later demolished in 2002. It was her further testimony that Mr Klazen lived on the farm until the time that he left school for work and only returned to the farm about five years ago, around 2018.

[24] Ms M M Klazen confirmed that by 1998 all the siblings for the late Willem Klazen were alive. When questioned whether the said siblings were aware of the donation to Willem Klazen, she responded that she was not aware. She, however, later testified that the surviving siblings, except for Mr Klazen, were aware of the donation of the farm to Mr Willem Klazen. She further alleged that the late Magrietha Klazen asked her children if they wanted to take over the farm and they declined except Willem Klazen who had the interest in the farm hence the farm was donated to him.

[25] When questioned whether Willem Klazen's surviving siblings were aware of the subsequent donation of the farm to Ms M M Klazen, she responded that she did not know if they were aware. When further questioned as how it came for the land taxes to be registered in her names when the farm was still registered in the name of the late Magrietha Klazen's, she said that she does not know.

[26] Ms M M Klazen further testified that she is in control of the farm as she attends to the fences, she is responsible for the workers at the farm, she takes care

of the about 600 orange trees and the machines on the farm, and she works on the farm. In her words the farm is her life.

[27] It was the further testimony of Ms M M Klazen that the surviving siblings of the late Willem Klazen can have access to the farm if they ask for the key from her as the gate to the farm is always locked. According to her the said siblings have shown no interest in the farm and they were last on the farm in the year 2013 or 2014.

[28] The plaintiff further led the evidence of Mr Wayne Clifford Beukes who testified, *inter alia*, that he is a Property Valuator, employed at Property Valuations Namibia in Windhoek since July 2016. He stated that he obtained a National Diploma in Real Estate from Cape Peninsula University of Technology in South Africa in 2016. He has, however, been valuating properties including farmlands and improvements made to the properties since 2002.

[29] Mr Beukes testified further that in 2016 and 2021, he was approached by Ms M M Klazen to conduct a valuation of the farm. He assessed the farm by considering its size, the valuation of land if vacant and the improvements to the land. After the assessment he concluded that the value of the improvements to the farm amounts to N$1 821 650.

[30] Mr Beukes assessed the farm covering 319.9997ha. He further stated that in terms of the Valuation Roll of 2008/2009, the land value is indicated as N$26 600. He further testified that minor improvements to the farm include water installations, reservoirs, tanks, cattle kraals, loading pen, mangas, neck scissor, IBR structure, green house structures. In this matter he said that amongst several valuation methods the comparable sales method was the most appropriate one used. He concluded that the valuation of the farm including improvements is N$2 500 to N$3 500 per hector resulting in 319.9997ha x N$3 500 amounting to a marketing value of N$1 119 998,95 and rounded it up to N$1 120 000. He further valuated the citrus trees at N$2 200 each for 580 trees totalling to the market value of N$1 276 000. He arrived at the value of the trees by inquiring from other persons and agencies like Ferreira Gardens. He did not assess the income generated by the trees. He stated that the combined market value of the farm is N$2 400 000.

[31] In severe cross-examination by Mr Kapalu, Mr Beukes, in attempt to justify the stated improvements amounting to N$1 821 650, said that the amount included the house of Ms M M Klazen valued at N$183 750 and the orchard valued at N$1 276 000.

Defendant's case

[32] Mr Klazen, a 64 years' old executor of the estate of the late Magrietha Klazen testified, *inter alia*, that the farm Jacobsdal No. 431, Rehoboth consists of 766,6708ha of which 319,9997ha (the farm) belongs to the estate of the late Magrietha Klazen. He testified that the late Magrietha Klazen had eight children three of whom are still alive. He was born and raised on the farm. He lived on the farm until he attained the age of 18 years that is when he left to seek employment but kept returning to the farm monthly to support his mother until 1998. His father passed on in 1982 while his mother passed on in 1998. He said further that the children knew that the farm belonged to their parents and they were never informed that the farm was donated to the late Willem Klazen. When questioned in cross-examination if the late Willem Klazen informed him that he (Willem Klazen) was the owner of the farm, Mr Klazen responded with emphasis that he did not inform him as they both knew that the farm belonged to their mother.

[33] He said that they have all worked on the farm and have, at different times, contributed to the maintenance of the farm. He stated further that he contributed machinery and PVC pipes which are still at the farm. The machine, which he bought for N$3 000 a long time ago is used to pull out pipes from the borehole. He further said that he also contributed money to assist with the maintenance of the farm. He further said that he also assisted in putting up the orchard as he bought two 100 meter water pipes to water the trees despite not purchasing the said trees. He said further that the farm had a dam with trough for drinking water for animals, a reservoir, a windmill, was totally fenced and there were three houses on the farm which were built or brought by his father. There is further a greenhouse structure on the farm which belongs to him. He further said that he contributed N$300 000 towards the citrus orchard. The alleged contribution of N$300 00 was disputed.

[34] Mr Klazen testified further that it is only after the death of Willem Klazen in 2016 that claims that the farm was donated surfaced. He said further that he sent his sister to the Registrar's office to determine if the farm was registered in his late mother's name. It is around that time that he saw the said deed of donation and the transfer duty. When asked whether he will deny the assertion that his late mother signed the said deed of donation, he responded that he will not deny as he was not present and did not know about the deed of donation.

[35] Mr Klazen confirmed that his exclusion of the farm from the inventory drawn in 2010 from the assets belonging to the estate of the late Magrietha Klazen and only included same in 2016. He said that the reason why he did not include the farm in the first inventory of 2010 is that he did not see nor have the title deed for the farm as they were in possession of his elder brother Dawid Klazen.

[36] When questioned further, Mr Klazen testified that after the documents were obtained from Dawid Klazen, he did not include the farm on the inventory because he had no original title deed of the farm. He, however, conceded to a question that even in May 2015, when he included the farm on the inventory he had not seen the original title deed.

[37] Mr Klazen further testified that Willem Klazen said that the farm belonged to him and after his death, and the finding that the farm is registered in the names of the late Magrietha Klazen, he did a second inventory.

[38] Mr Klazen further testified that the surviving children of the late Magrietha Klazen have no access to the farm as such is denied by Ms M M Klazen.

[39] The next witness was Ms Katrina Regina Claasen, born in 1964 who testified, *inter alia*, that she is a biological child of the late Magrietha Klazen. She testified further that the farm Jacobsdal 431 initially belonged to her grandfather, upon his death, the farm was apportioned and her father, Johannes Klazen received the farm measuring 319,9997ha. She further testified that together with all her siblings they grew up on the farm. Upon her father's death, the farm was registered in her mother's name.

[40] Ms Claasen further testified that together with her siblings they knew that the farm belonged to their parents. She said that her parents did not inform them that the farm was donated to the late Willem Klazen. She further said that the late Willem Klazen lived and worked on the farm and, therefore, had to put up reasonable structures to survive. She testified further that although the family contributed to the water pipes on the farm, dams and maintenance of the fences, she was not part of the contributors. She also said that together with her surviving siblings, they intend to use the farm for the benefit of the children and grandchildren of the late Magrietha Klazen.

[41] When asked whether she had seen the deed of donation to Willem Klazen before, Ms Claasen said she first saw the deed of donation with Mr Klazen. When questioned why the farm was excluded from the inventory of 2010, Ms Claasen said that Mr Klazen was first unsure whether the farm was registered in the names of the late Magrietha Klazen but he later confirmed. She had no idea as to how he confirmed that the farm was still registered in the late Magrietha Klazen's name. When asked whether it was possible for her mother to donate the farm, she responded that she does not know.

[42] Ms Claasen further testified that her father built the big house, the dam, the trough, the borehole, and one camp.

The arguments

[43] Ms Katjaerua submitted that the evidence proved that the late Magrietha Klazen donated the farm to the late Willem Klazen and the paid transfer duties which were submitted to the Registrar. The fact that Ms M M Klazen paid the land taxes for the farm further strengthens the claim that the farm was donated to the late Willem Klazen and subsequently donated to Ms M M Klazen.

[44] Ms Katjaerua submitted that the conflicting evidence tendered by Mr Klazen on whether or not the late Willem Klazen informed him that the farm belonged to him demonstrates that Mr Klazen was informed that Willem Klazen is the owner of the farm. She further submitted that Mr Klazen testified that he did not include the farm in the inventory of 2010 because he had not seen the original title deed of the farm

but nevertheless proceeded to include the said farm in the inventory of 2015 while he still had no sight of the original title deed. This, according to her, supports the version that the only reason that the farm was excluded from the 2010 inventory was the knowledge that the farm belonged to the late Willem Klazen. She relied on *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others*[1] for the authority that the parties to the donation intended to transfer the farm to the late Willem Klazen and, therefore, the transfer should be effected.

[45] In respect of the improvements, Ms Katjaerua maintained that Mr Beukes clearly testified that the improvements to the farm amounted to N$1 821 650 and that should be awarded to the plaintiff.

[46] Mr Kapalu submitted the contrary. He submitted that there was no factual evidence led to support the deed of donation. The evidence by Ms M M Klazen that everybody knew of the donation is unreliable. He submitted further that the donation of the farm to the late Willem Klazen was never mentioned to the children of Magrietha Klazen including Mr Klazen and Ms Claasen.

[47] Mr Kapalu argued that Ms M M Klazen was not a party to the deed of donation of the farm from Magrietha Klazen to Willem Klazen dated 29 April 1998 and she, therefore, bears no personal knowledge of the donation. Ms M M Klazen could also not explain how the land tax assessments were registered in her names which casts doubt whether indeed the farm was donated to Willem Klazen. Mr Kapalu further submitted that what causes more doubt on the donation is the fact that Magrietha Klazen is said to have donated the farm to Willem Klazen on 29 April 1998, and Willem Klazen in turn donated the farm to Ms M M Klazen on 17 August 1998, just after 110 days of receiving the donation. The donation to Willem Klazen, he argued, cannot be said to strictly-speaking constitute a donation.

[48] Mr Kapalu further argued forcefully that the plaintiff failed to prove that the estate of the late Magrietha Klazen was unjustifiably enriched while the estate of the late Willem Klazen was unjustifiably impoverished by the improvements made to the farm by the late Willem Klazen. He further argued that the estate of the late Magrietha Klazen was not enriched at the expense of the estate of the late Willem

[1] *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others* (2) 2009 (1) NR 232 (HC).

Klazen. He argued that all the improvements made to the farm by Willem Klazen were necessary for his own benefit and survival and he utilised them for the purpose of the said improvements, therefore, it cannot be claimed that his estate was unjustifiably enriched.

[49] Mr Kapalu submitted further that the evidence of Mr Beukes was full of contradictions and conclusions without any foundation. He submitted that Mr Beukes testified that he consulted property brokers and accredited valuators for the market rates of the farmland within the vicinity of the farm but no such evidence from the property brokers or valuators was presented in court. The prices of the citrus fruits was according to Mr Beukes obtained by telephonically contacting citrus farms and Ferreira Gardens but no admissible evidence was presented from the said contacted persons other than hearsay evidence led. He concluded that the calculations made by Mr Beukes to arrive at the amount for the improvements of N$1 821 650 is full of contradictions in numbers and has no supporting foundation. He called for the plaintiff's claim to be dismissed with costs.

The law

[50] It is a well-established principle in our law that the plaintiff bears the burden to prove his claim on a balance of probabilities. It follows that the plaintiff who alleges the existence of a donation bears the burden to prove the existence of such donation. It is further settled law that a donation is never presumed but must be proven.[2]

[51] It was stated in a South African matter of *Commissioner, South African Revenue Services v Marx No*[3] that:

'The donor's intention to make the donation (*animus donandi*) must arise from generosity (*liberalitas*) or liberality (*munificentia*) and be expressed as a promise (offer) to donate, which promise (offer) must be accepted by the donee before a binding contract of donation comes into existence. Once this happens the donation is perfected and it may be revoked only under certain circumstances. The resultant contract is not sufficient, however, for purposes of transferring the donated asset into the ownership (*dominium*) of the donee.

[2] *Taapopi v Ndafediva* 2012 (2) NR 599 (HC) 49.
[3] *Commissioner, South African Revenue Services v Marx NO* 2006 (4) SA 195 (C).

Performance of the obligation arising from the donation, in the form of delivery (*traditio*) of the asset donated, first has to take place.'

[52] If, on the basis of an agreement between the parties including a valid donation, the parties have serious intention to transfer ownership of the property, then such ownership passes over to the transferee.

[53] In *Satar v Clayton*[4] this court per Ueitele J remarked as follows in paras 18 and 19:

'[18] In *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others*[5] this Court held that the land registration system in Namibia is an abstract system. Professor van der Merwe[6] argues that:

"Under an abstract system of passing of ownership the mere intention of the parties to pass ownership is sufficient without reference to the underlying causa for the transfer. This principle originated in Roman law and was developed further by natural lawyers of the seventeenth century and *pandeactists* and accepted in modern law. The abstract principle guarantees certainty in that it disallows the invalidity of an underlying causa to affect the existence or validity of a transfer. The real agreement to pass ownership is treated in *abstracto*, that is, totally independently from the contractual agreement which provides the causa for the transfer. Although the abstract system simplifies matters for the transferee it does not leave the transferor who has transferred an object by virtue of an invalid causa without a remedy. Since ownership passes to the transferee, the transferor is deprived of his *rei vindicatio*. However, he may still claim by way of *condictio* on the ground of unjust enrichment.

The abstract principle is by no means absolute and several exceptions exist: first, certain forms of invalidity of the contractual agreement are considered so material that they affect the real agreement also as, for example, where recognition of the validity of the transfer will conflict with an absolute statutory prohibition. Second, it seems possible for parties to the contractual agreement to provide that the transfer of ownership will only be valid if the causa for the transfer is valid. Such a term can also be implied from the circumstances of the case."

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[4] *Satar v Clayton* (HC-MD-CIV-ACT-DEL-2018/03453) [2023] NAHCMD 263 (12 May 2023).
[5] *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others* (2) 2009 (1) NR 232 (HC).
[6] Joubert (ed) *The Law of South Africa* (2 ed) vol 27 at 110 para 203.

[19] The learned professor further discusses the effect of the abstract system on land registration and what the requirements are and states the following:[7]

"In terms of an abstract system of the transfer, the passing of ownership is wholly abstracted from the agreement giving rise to the transfer and is not made dependent on such an agreement. It is immaterial whether such an agreement is void, voidable, putative or fictional. The puristically minded do not even talk in terms of a causa giving rise to the obligation to transfer but only require a serious intention on the part of the parties to transfer ownership. In terms of the abstract system a clear distinction is thus drawn between the agreement giving rise to the transfer *(verbintenisskeppende ooreenkoms*) and the real agreement (*saaklike ooreenkoms*) in which the parties agree to pass ownership. Emphasis is placed on the real agreement which exists independently of the agreement giving rise to the transfer. The invalidity of the latter agreement has no influence on the validity of the real agreement. If there is a serious intention to transfer ownership, ownership passes to the transferee, who can in turn validly pass transfer to a third party. The original owner in such a case loses ownership of his thing and he has in appropriate circumstances only a personal action, namely the *condictio* based on unjust enrichment on the ground of the loss suffered by him."'

[54] The above authorities lay bare the legal position regarding donation and transfer of ownership. Guided by the said authorities, I proceed to determine whether or not the plaintiff succeeded to prove her claim.

Analysis

[55] In *casu*, it is agreed between the parties that the late Willem Klazen lived and farmed on the farm from about 1972. A deed of donation dated 29 April 1998 was produced revealing that the late Magrietha Klazen donated the farm to the late Willem Klazen. This deed of donation is not signed by witnesses, but it appears that it was signed by both the donor, Magrietha Klazen and the donee, Willem Klazen. I find that neither Mr Klazen nor Ms Claasen who testified against the plaintiff's claim could dispute the assertion by Ms M M Klazen that Magrietha Klazen signed the deed of donation as the donor to Willem Klazen, the donee. Willem Klazen signed the deed of donation as the done, thus accepted by the donee.[8]

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[7] *Ibid* para 363 at 296.

[8] *Commissioner, South African Revenue Services v Marx NO (supra)* para 23: 'It must be borne in mind that a donation made during the lifetime of the donor (*donatio inter vivos*) becomes contractually

[56] The qualm that Mr Kapalu raised that the deed of donation had no witnesses who signed it and therefore casts doubt on the validity of the deed of donation, in my view, lacks merit. The donation in this matter is an executory donation, and this is an agreement to give something in future. The farm is to be delivered in future upon transfer. For an executory contract of donation to be valid, it must be reduced to a written document and signed by the donor or his or her agent, authorised in writing, and in the presence of two witnesses.[9]

[57] An executory donation is required by law to be in writing and signed by the donor. If it is, however, signed by a person acting on behalf of the donor's written authority, then it must be signed in the presence of two witnesses. Gamble J in the South African matter of *D.E and Another v C.E and Others*[10] remarked as follows on the formalities of an executory donation (where I quote extensively):

'[37] Prior to the promulgation of the GLAA, the common law provided that any donation, whether executed or not, was revocable to the extent that it exceeded GBP 500 unless it was registered in the deeds office or embodied in a notarial deed[11]. With the passing of the GLAA (General Law Amendment Act) in June 1956 the position changed when limited formality was stipulated in regard to executory contracts of donation only.

"***5. Formalities in respect of donations.***

No donation concluded after the commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarially executed: Provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses."

The formality for an executory donation is therefore limited only to a written document signed by the donor – no witnesses being required in that event – or a person authorized by the

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and legally binding from the moment the donees accept the donation. It creates rights and obligations just like any other consensual contract'

[9] General Law Amendment Act 50 of 1956, as amended by section 43 of the General Law Amendment Act of 70 of 1968.

[10] *D.E and Another v C.E and Others* [2020] 1 All SA (WCC) 10 October 2019 para 37 – 38.

[11] *Coronel's Curator v Estate Coronel* 1941 AD 323; *Estate Phillips v Commissioner for Inland Revenue* 1942 AD 35 at 47.

donor in writing, in which event the authority granted by the donor is to be witnessed by two people.

[38] What then is meant by an executory contract of donation? The issue was dealt with in detail by Van Zyl J in the Full Bench decision in this Division in *Marx*[12] and I shall therefore quote extensively from the judgment.

"*[23] It must be borne in mind that a donation made during the lifetime of the donor (donatio mortis causa) becomes contractually and legally binding from the moment the donees accept the donation. It creates rights and obligations just like any other consensual contract as appears from the following definition and elucidation in Joubert (ed) The Law of South Africa [second edition (2005) vol 8 para 301]:*

'A donation is 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.'

…

[25] An executory donation is so-called because it still requires to be effected or perfected, in the sense that something is required to be done before it can be regarded as completely performed. [Nezar v Die Meester en Andere 1982 (2) SA 430 (T) at 436E; Savvides v Savvides and Others 1986 (2) SA 325 (T); Stander v Commissioner for Inland Revenue 1997 (3) SA 617 (C) at 622D-E]. In the present case [the Court a quo] held the donation was executory because delivery thereof would take place at some future time, namely when the donor died. As such, it was valid and enforceable in terms of s5 of [the GLAA]'

[58] The General Law Amendment Act 50 of 1956, as amended by section 43 of the General Law Amendment Act of 70 of 1968, therefore, requires that where a person acting on the written authority of the donor signs the deed of donation, such person must sign in the presence of two witnesses. The formality of signing in the presence of two witnesses finds no application where the written deed of donation is signed by the donor.

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[12] *Commissioner, South African Revenue Services v Marx NO* 2006 (4) SA 195 (C).

[59] I, therefore, find that the fact that no one signed as a witness to the deed of donation in the present matter does not diminish the position of a deed of donation, because it was duly signed by the donor, not another person acting on her behalf.

[60] I further find that the complaint that the late Willem Klazen appears to have transferred the farm after barely 110 days from the date of the receipt of the donation thus raising doubts regarding the validity of the first donation also lacks merit. This is due to the fact that there is no duration that must pass before a donated property can be further duly donated.

[61] It was established in evidence that the late Willem Klazen was raised on the farm and he stayed with the late Magrietha Klazen on the farm where he carried out farming activities and made an orchard amongst other installations. It comes as no surprise in my view that the late Magrietha Klazen could donate the farm to her son Willem Klazen whom she stayed with at the farm and who brought improvements on the farm.

[62] It is the evidence of Ms M M Klazen that, over and above the said deed of donation, the Transfer Duty also dated 29 April 1998 proves that the farm was to be transferred to Willem Klazen. It clear from the said Transfer Duty, an official document of the Ministry of Finance that the farm was to be acquired by Willem Klazen through donation. This document was not disputed by Mr Klazen or Ms Claasen. I, therefore, take the document for what it is.

[63] I further find that on the evidence presented, it is apparent that Mr Klazen was aware that the late Willem Klazen used to say that the farm belonged to him and he never challenged him. This, in my view, supports the existence of the donation of the farm to Willem Klazen.

[64] Mr Klazen contradicted himself in evidence as to the reason why he did not include the farm in the inventory of 2010 of the estate of the late Magrietha Klazen. At first he testified that the reason for such exclusion was because he did not know that the farm was registered in the name of the late Magrietha Klazen, later he said that the exclusion was due to the fact that he thought that the farm belonged to the late Willem Klazen. Mr Klazen was not done with self-contradictions as he later

changed his version and testified that the said exclusion was because he did not see the original title deed for the farm. As if the above-mentioned contradictions were not enough, Mr Klazen further testified that by May 2015 he included the farm in the inventory while he had still not had sight of the original title deed of the farm. On this aspect I find the evidence of Mr Klazen unreliable and, in my view, supports the version of Ms M M Klazen that Mr Klazen knew or ought to have known that the farm belonged to the late Willem Klazen and that it was only after finding out that the farm was still registered in the names of the late Magrietha Klazen that Mr Klazen included the farm in the inventory.

[65] Mr Klazen in evidence testified that he sent his sister, Ms Claasen to the Registrar's office to inquire about the name under which the farm was registered and he was informed that it is registered in the name of the late Magrietha Klazen. Ms Claasen testified to the contrary, she stated that it was Mr Klazen who informed her that the farm was still registered in the name of the late Magrietha Klazen.

[66] It is further evidence that, although Ms M M Klazen could not clearly explain as to how it came about that the land tax assessments were registered in her name, the land tax payments were initially paid by her father Willem Klazen and after his passing, she took over the said payments and has been paying the land tax assessments ever since.

[67] In view of the above findings, I am of the considered opinion that the late Magrietha Klazen donated the farm to the late Willem Klazen. There was no dispute to the claim made by Ms M M Klazen that the late Willem Klazen, when still alive donated the farm to her. As a result I find that the late Willem Klazen who received the donation of the farm from his mother further donated the said farm to his daughter Ms M M Klazen.

[68] Mr Kapalu poked holes in the evidence of Mr Beukes leaving the reliability of the said evidence into question. He further went at length to dismantle the plaintiff's claim for the improvements under the principle of unjustified enrichment, but given the conclusion that I have reached above that there was a donation of the farm to the late Willem Klazen, I find it unnecessary to consider the inviting arguments raised by Mr Kapalu as they relate to the alternative claim of unjustified enrichment.

Conclusion

[69] In the premises of the evidence led in totality, the particulars of this case, the findings and conclusions made above, I hold the view that the plaintiff succeeded in her main claim that Magrietha Klazen donated the farm to Willem Klazen who in turn donated the farm to Ms M M Klazen.

Costs

[70] It is a well-established principle that costs follow the result. This matter is no different as the parties did not provide the court with any reasons why the said principle should be deviated from.

Order

[71] In the result, it is ordered that:

1. The first defendant is directed to sign all necessary documents to give effect to the transfer of 319,9997ha of Portion 1 from land title 431 into the estate of the late Willem Klazen, within 30 days from date of this order, failing which the Deputy Sheriff of Rehoboth is authorised to sign such transfer documents.

2. The first defendant must pay the plaintiff's costs of suit.

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

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O S Sibeya

Judge

APPEARANCE:

PLAINTIFF:	E M Katjaerua Of Katjaerua Legal Practitioners, Windhoek.
DEFENDANTS:	H Kapalu Of Henry Kapalu & Co Inc, Windhoek