REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2022/00661

In the matter between:

MALAKIA EKANDJO NGHIPANDULWA **PLAINTIFF**

and

MEKONDJO NGHIPANDULWA **FIRST DEFENDANT**
KOEP & PARTNERS **SECOND DEFENDANT**

Neutral citation: Nghipandulwa *v* Nghipandulwa (HC-MD-CIV-ACT-CON-2022/00661) [2023] NAHCMD 503 (16 August 2023)

Coram: PARKER AJ
Heard: **3-6 April 2023**; **17 May 2023**; **29 June 2023**
Delivered: **16 August 2023**

Flynote: Enrichment – *Condictio indebiti* – Plaintiff paying the first defendant's monthly contribution in satisfaction of mortgage bond held by a mortgage bank against property co-owned by the plaintiff and first defendant – Plaintiff failing to prove payments were made to the first defendant in error of law – Plaintiff's claim of unjust enrichment rejected by the court.

Summary: Enrichment. *Condictio indebiti*. The plaintiff and the first defendant were living together on the property in question as boyfriend and girlfriend. The two

purchased the property in question by entering into two separate deeds of sale with the seller. The two were, therefore, co-owners of the property and it was subject to a single mortgage bond. Somewhere in May 2020, the first defendant abandoned occupation of the property due to the souring of their relationship. She failed to contribute her part of the bond repayments for some 17 months. To avoid the bond being foreclosed, the plaintiff made payments on behalf of the first defendant for those 17 months without the knowledge and consent of the latter. The two sold their property and the proceeds from the sale of the property are held in trust in their favour by the second defendant pending the decision of the court as to how the net proceeds should be shared between the two parties.

Held, a party is not entitled to invoke *condictio indebiti* where the sum claimed was not paid in error of law to the receiver.

ORDER

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1. From any moneys held in trust by the second defendant in favour of the plaintiff and the first defendant, plus any accrued interest thereon, the second defendant must make payments to the plaintiff and the first defendant in the following manner:

   (a) To the plaintiff, 50 per cent share of the net proceeds, less N$70 000, and the N$70 000 must be added to the first defendant's 50 per cent share of the net proceeds.

   (b) To the first defendant, 50 per cent of the net proceeds, less N$46 325, and the N$46 325 must be added to the plaintiff's 50 per cent share of the net proceeds.

2. There is no order as to costs.

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

JUDGMENT

PARKER AJ:

[1] This matter comes with its own idiosyncrasy. The plaintiff and first defendant were once upon a time husband and wife. By an order of the court of 24 January 2017, the bonds of marriage that subsisted between the plaintiff and first defendant were dissolved.

[2] The following happened more than two years after the dissolution of the marriage: 'During February 2019, the plaintiff and the 1st Defendant rekindled their romance and agreed to live together as boyfriend and girlfriend. In order to fulfil their living together arrangement, the Plaintiff and the 1st Defendant agreed to acquire a common property. As a result, the Plaintiff and 1st Defendant purchased an immovable property, to wit Erf No. 911, Klein Kuppe (Extension No.1) ("the Property"). The Plaintiff and 1st Defendant during July 2019 moved together into the property, and continued to live together until about or during April 2020 when the 1st Defendant moved out of the property, when their relationship soured…. The plaintiff remained in occupation of the property.'

[3] The following crucial legal reality emerges from the pleadings and the evidence: The post-divorce relationship was nothing more or less than what the plaintiff aptly described it to be in his pleading, namely, a 'boyfriend'-and-'girlfriend' relationship. It, therefore, beggars belief why the legal practitioners who drafted the so-called Settlement Agreement gave the relationship the legal appellation 'universal partnership.'

[4] Buying the property together did not *ipso facto* lead to the existence of a universal partnership. Their relationship was, as the plaintiff avers, 'a living together arrangement'. Universal partnership of all property which extends beyond commercial undertakings is part of Roman-Dutch Law and still forms part of our law. A party who relies on the existence of a partnership agreement bears the onus of

establishing that the terms of the agreement satisfy the requirements of a partnership agreement which are:

(a) an undertaking by each party to bring into the partnership money, labour or skill;

(b) the object must be to carry on a business for the joint benefit of all the parties; and

(c) the common object must be to make profit.[1]

[5] Significantly, in the instant matter, none of the parties has alleged and proved the existence of a universal partnership agreement. Therefore, the arrangement of 'living together' and buying the property as common property between them was a mere commercial transaction.[2]

[6] Furthermore, the so-called settlement agreement cannot stand the test of a valid contract. The arrangement of 'living together' and buying the property together as common property did not bring into existence a valid universal partnership of the property, as I have held previously. The plaintiff and the first defendant did not enter into a partnership agreement. Therefore, the first recital of the so-called settlement agreement is patently wrong; and most crucial, there is a lack of *animus contrahendi* on the part of the first defendant. Her intention for signing the so-called settlement agreement was 'to amicably dissolve' the boyfriend-and-girlfriend 'living together' arrangement. I accept her evidence on the issue. I have held that no valid universal partnership agreement existed between the plaintiff and the first defendant. As a matter of common sense and logic, one cannot dissolve that which does not exist. Furthermore, *pace* the plaintiff, the so-called settlement agreement could not dissolve the property. It would be doing damage to the English language to say that one can dissolve an immovable property. Therefore, what was to be dissolved by the so-called settlement agreement was indubitably the boyfriend-and-girlfriend 'living together' arrangement.

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1 *Mbaisa v Mbaisa* [2015] NAHCMD 181 (5 August 2015) para 10.
2 Ibid para 9.

[7] Based on these reasons, I find that the plaintiff and the first defendant were never *ad idem* respecting the so-called settlement agreement;[3] and *a fortiori*, the property is not a partnership property;[4] and so the property cannot be dealt with as if it was. The ineluctable conclusion is that if their living together arrangement has come to an end, then the general principles of reasonableness and fairness should perforce inform the distribution of the net proceeds realised from the sale of the property. That would answer to the justice of the case. In that regard, I find it to be irrelevant the evidence that was adduced from both sides of the suit as to whether the first defendant left the common property voluntarily. It has no probative value. It is labour lost.

[8] The second defendant was served with process but has not taken part in these proceedings. The second defendant is bound by the order of the court.

[9] In his amended particulars of claim, the plaintiff makes three main claims in the following terms:

(a) Claim 1: unjust enrichment in the amount N$317 488,60;

(b) Claim 2: unjust enrichment in the amount N$200 000; and

(c) Claim 3: refund for the contributions made in respect of improvements on the property in the amount of N$46 325.

[10] In the interest of justice, the claim in convention and the claim in reconvention must be considered against the backdrop of the discussion on the law of partnership agreement and valid contract and the conclusions thereanent in the preceding paragraphs. That is to say, the claims are considered on the basis that there is no partnership agreement concluded between the plaintiff and the first defendant. Similarly, the settlement agreement is not a valid contract and, therefore, it is not enforceable. Any reliance on partnership agreement and the settlement agreement is misplaced. Accordingly, I take no note of those instruments. I pass to consider the plaintiff's claims.

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[3] RH Christie *Law of Contract of South Africa* 3rd (1996) at 21-23 *passim*.
[4] See *MB v DB* [2018] NAHCMD 266 (31 August 2018).

Claim 1

[11] A claim of unjust enrichment is predicated upon *condictio indebiti*. The cause of action in such a claim is that the claiming party made a payment to another (the receiver) due to an excusable error in law in the belief that the payment was owing, whereas it was not, and the claiming party claims repayment to the extent that the receiver was enriched at her or his expense.[5]

[12] On the evidence, I make the following factual findings. The plaintiff paid the amount involved to Standard Bank, the mortgagee of the bond on the property. He did not make payment to the first defendant. What is more, the plaintiff made the said payment without the first defendant's knowledge or consent. *Condictio indebiti* applies in a proceeding for the return of a sum of money not owing but paid. On the facts of the instant matter, the plaintiff is not entitled to invoke *condictio indebiti*. The sum claimed was not paid in error of law to the first defendant.

[13] Based on these reasons, I hold that the plaintiff has failed to prove claim 1. I now proceed to consider claim 3 before considering claim 2, for a good reason that will become apparent shortly.

Claim 3

[14] This claim concerns the first defendant's portion of the cost incurred in fixing the swimming pool at the property and renovation there. I make the following factual findings. The Windhoek Municipal Council refused to issue a clearance certificate to enable the property to be sold and transferred to a new owner. The reason was that the swimming pool was not constructed according to the Municipality's town planning regulations. It was, therefore, found necessary and required to fix the swimming pool.

[15] In his examination-in-chief-evidence, the plaintiff testified that he paid the contractor N$127 650 to fix the swimming pool. But in his cross-examination-

[5] LTC Harms *Amler's Precedents of Pleadings* 4ed (1993) at 68-69; *Seaflower Whitefish Corporation v Namibia Ports Authority* 1998 NR 316 (HC).

evidence, he admitted that he had not paid N$50 000 of that amount, as appears on the document placed before the court. It means the plaintiff paid only N$77 650.

[16] I accept the evidence that the pool was fixed to enable the property to be sold. Without that they could not have succeeded in selling the property, as explained previously. If the first defendant did not want to be part of the fixing of the property, she should have declined to give her consent to the sale of the property. But she did consent and she now seeks to enjoy the fruits of the sale of the property. With respect, I find it cynical on the part of the first defendant to contend now that there was no need to have fixed the swimming pool.

[17] From the evidence it would seem the first defendant was more concerned with the cost of fixing the swimming pool. She testified that the cost was 'inflated'. If that was her position, she would have assisted the court greatly if she had commissioned a quantity-surveyor to evaluate professionally the works done. In the absence of such professional evaluation, I am prepared on the evidence to accept on the balance of probability the amount mentioned in the papers and as testified to by the plaintiff; except that the amount ought to be N$77 650, as explained above.

[18] I find that the plaintiff paid in addition to that amount of N$15 000 towards renovation of the property. No doubt the renovation enhanced the market value of the property. As respects the fixing of the swimming pool and the renovation, the first defendant's portion of the cost involved should be N$46 325. Consequently, the plaintiff's claim under claim 3 succeeds to the extent of N$46 325. I pass to consider claim 2.

Claim 2

[19] This claim is predicated upon the so-called settlement agreement, which I have found to be an invalid and an unenforceable contract. That being the case, the maxim *ex nihilo nihil fit* applies. The result is that no contractual rights or obligations can accrue from that invalid contract. Consequently, claim 2 is rejected.

Claim in reconvention

[20] I now proceed to consider the defendant's claim in reconvention. I do not accept that the claim in reconvention has been abandoned by the first defendant. The abandonment of a claim – in convention or in reconvention – may be abandoned by only express terms.

[21] I find on the evidence that the amount of N$140 000 was received from the contractor who was commissioned to carry out renovations at the property. The amount came from the loan granted by the financing bank; ie Standard Bank, for the benefit of the joint-owners of the property, that is, the plaintiff and the first defendant. The oral evidence and documentary evidence that the plaintiff put forth in his attempt to prove how the amount was expended are insufficient and unsatisfactory. Consequently, I reject them. The maker of the document that was placed before the court was made by a third party, a Mr Djuulume Daniel. Daniel was not called to testify to the correctness and truthfulness of the entries in the document. And no explanation was vouchsafed why Daniel could not appear to give evidence. What the plaintiff avers is not established: It becomes a mere irrelevance.[6] The result is that the first defendant's claim in reconvention succeeds in the amount of N$70 000, being a half of the N$140 000.

Conclusion

[22] I have held previously that an order of forfeiture of benefits arising from community of property, as is known to the law, is not applicable in these proceedings.

[23] The real and substantial justice of the matter dictates that the plaintiff and the first defendant should share equally the moneys held in trust in their favour, including interest thereon. The only qualification is that the plaintiff's share shall be reduced by N$70 000, which amount shall be paid over to the first defendant. Similarly the first defendant's 50 per cent share shall be reduced by N$46 325, which amount shall be paid to the plaintiff.

[6] *Klein v Caramel Pharmaceuticals (Pty) Ltd* 2015 (4) NR 1016 (HC) para 13.

[24] Based on these reasons, the plaintiff's claim succeeds to the extent appearing in the order below. The first defendant's claim in reconvention succeeds. In the nature of the matter and the outcome of the proceedings, I think this is a case where it is fair and reasonable that each party pays his or her own costs.

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

1. From any moneys held in trust by the second defendant in favour of the plaintiff and the first defendant, plus any accrued interest thereon, the second defendant must make payments to the plaintiff and the first defendant in the following manner:

   (a) To the plaintiff, 50 per cent of the net proceeds, less N$70 000, and the N$70 000 must be added to the first defendant's 50 per cent share of the net proceeds.

   (b) To the first defendant, 50 per cent of the net proceeds, less N$46 325, and the N$46 325 must be added to the plaintiff's 50 per cent share of the net proceeds.

2. There is no order as to costs.

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

C PARKER

Acting Judge

APPEARANCES

PLAINTIFF:	P Muluti Of Muluti & Partners, Windhoek
DEFENDANT:	F Bangamwabo Of FB Law Chambers, Windhoek