

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between:

Case no: HC-MD-CIV-ACT-OTH-2019/05032

JUSTUS NDERURA

PLAINTIFF

and

HELENA NDERURA

FIRST DEFENDANT

NATIONAL HOUSING ENTERPRISE

SECOND DEFENDANT

REGISTRAR OF DEEDS

THIRD DEFENDANT

Neutral citation: *Nderura v Nderura* (HC-MD-CIV-ACT-OTH-2019/05032) [2023]
NAHCMD 53 (15 February 2023)

Coram: MILLER AJ

Heard: 4, 6-7 & 12 July 2022; 15 August 2022; 27 September 2022; 6 & 10
October 2022

Delivered: 15 February 2023

Flynote: Verbal Donation of immovable property – Alienation of Land Act – Formalities in respect of contracts – Validity – Even if verbal donation made, it is of no force and effect – Party entitled to reimbursement for funds disbursed in terms of the verbal agreement.

Summary: The plaintiff instituted action against the first defendant for an order ejecting first defendant from plaintiff's property situated at Erf 1219, Omongo Street, Wanaheda, Windhoek and an order directing first defendant to pay all municipal bills plus the interest that accrued on the outstanding amount in respect of Erf 1219, Omongo Street, Wanaheda, Windhoek.

The plaintiff alleges in his particulars of claim that he is the lawful owner of the property and that first defendant is in illegal occupation of said property. The plaintiff's action against first defendant was met with a plea and a counterclaim in which first defendant pleaded that the property was donated to her by plaintiff during 1988 on condition that she repays the home loan to National Housing Enterprise in full and once the payments were effected in full, plaintiff would cause the property to be transferred into the name of first defendant. The first defendant has consequently been in occupation of the property since 1988.

The first Defendant further pleaded that any outstanding municipal bills have always been paid by her and for these reasons she is entitled to remain in occupation of the property.

In the alternative, the first defendant pleaded that the plaintiff's action amounted to unjustified enrichment as the plaintiff never made any contribution towards the home loan. Moreover, in the event that the first defendant is evicted, she would have no place to live. The first defendant contended that, the plaintiff would thus be liable to pay the amount of N\$800 000, being the average market value of residential property. The first defendant further pleaded that, should plaintiff take possession of the property in question, he would be unjustly enriched as first defendant has spent an amount of N\$249 290 on the property, which amount comprises of N\$184 290 paid towards the home loan by the first defendant and N\$65 000 being the amount the first defendant spent on reparations and additions on the property since 1988 to date.

The plaintiff denies donating the property to the plaintiff and alludes that the payments made to the National Housing Enterprise in respect of the home loan, were made using rent money from the property.

Held, that the Alienation of Land Act, Act 68 of 1987, makes it clear that no alienation of land shall be of any force or effect, unless it is contained in a deed of alienation, signed by the parties thereto or their agents so acting on written authority.

Held, that the condition indebiti as a species of enrichment actions available to a party to claim repayment of monies paid in terms of an invalid contract.

Held, that the payment made to NHE by the first defendant was made in the belief that there was an existence of a valid agreement between herself and the plaintiff in terms whereof she was obliged to make certain payments. That agreement was invalid and of no force and effect. In these circumstances she is entitled to reclaim the payments she had made.

ORDER

1. There shall be an order for the ejectment of the first defendant from the property described as Erf 1219, Omongo Street, Wanaheda, Windhoek.
2. The plaintiff shall pay to the first defendant the sum of N\$184 290.
3. Interest on the aforesaid amount at 20% per annum a tempore morae.
4. There shall be no order as to costs.
5. The matter is finalized and removed from the roll.

JUDGMENT

MILLER AJ:

Introduction

[1] It is common cause that the plaintiff is the owner of a certain residential property situate at Erf 1219, Wanaheda, Omongo Street in Windhoek. It is likewise common cause that the first defendant, who is the sister of the plaintiff is in occupation of the property and has been so in occupation for many years.

[2] The plaintiff now seeks the following relief by way of summons:

‘1.1 Ejectment of the first defendant from the property of the plaintiff situated at Erf no. 1219, Omongo Street, Wanaheda, Windhoek, Republic of Namibia (“the property”).

1.2 An order that the first defendant pays the municipal bills plus all interest accrued on the outstanding amount of Erf no. 1219, Omongo Street, Wanaheda, Windhoek.’

[3] The second and third defendant being the National Housing Enterprise (NHE) and the Registrar of Deeds, respectively were cited because of any interest they may have in the proceedings. No relief is being sought against either and none of them took part in this proceedings.

[4] The plaintiff’s claim against the first defendant was met by a plea as well as a counterclaim both in the main and the alternative.

[5] In her plea to the particulars of claim the first defendant alleges as follows:

‘5.1 The first defendant refuses to vacate the property as the property was donated to the defendant by the plaintiff in 1988. The first defendant, in terms of the said donation, resided in the property since 1988 and has paid for all the mortgage payments to National Housing Enterprise until the full amount was fully paid off.

5.2 Any outstanding municipal bills have always been paid by the first defendant.

5.3 In light of the donation, the lengthy occupancy (33 years) and the financial contributions made to the upkeep and settlement of the home loan of the property, the first defendant is entitled to refuse to vacate the property.

5.4 The first defendant is further entitled to reside on the property because the plaintiff and the first defendant entered into an oral settlement agreement at Windhoek on 6

September 2021. The first defendant pleads that the agreement is binding on the parties and enforces the terms of the agreement.'

[6] The counterclaim reads as follows:

'6.1 The aforesaid property was donated to the first defendant by the plaintiff, in the following terms: that the first defendant shall pay off the home loan with the second defendant in respect of the property in the amount of N\$184 290.00.

6.2 The plaintiff would transfer ownership of the property into the first defendant's name once the aforesaid loan has been paid off. The donation was offered and accepted, and the first defendant has lived on the property, with undisturbed possession, from 1988 to date. The donation has not been revoked.

6.3 The first defendant is further entitled to reside on the property because the plaintiff and the first defendant entered into an oral settlement agreement at Windhoek on 6 September 2021.

7. In the alternative claim, the first defendant pleaded that:

7.1 The plaintiff's actions amount to unjust enrichment as he has never made any home loan contribution to the property. Should the First Defendant vacate the property where she has resided for 33 years, she would have nowhere to live and as a result be forced to purchase another property.

7.2 As a result of the aforesaid undue enrichment, the first defendant would have to look for another property with the average market value of residential property in Windhoek being at N\$800 000.00, which amount plaintiff is liable to pay, in the alternative claim.

7.3 if the plaintiff was to take over the occupation of the property and remain with the ownership of the property, it would amount to unjust enrichment as the first defendant has spent an amount of N\$249 290.00 being the total balance after adding:

7.3.1 The amount of N\$184 290.00 paid towards the home loan with the second defendant by the first defendant.

7.3.2 the amount of N\$65 000.00 being the amount spent by the First Defendant on replacing, repairing and purchasing of the windows and doors on the property, the cost of building an outside room on the property, repairing the water pipes on the property, plumbing and electrical works conducted on the property and purchasing of the cement, bricks and Municipal dust bin for the property from 1988 to date.’

The issues arising from the pleadings

[7] The following issues fall for determination:

7.1 Did the plaintiff donate the property to the first defendant in 1988;

7.2 Does the alleged donation have any binding legal effect;

7.3 Did the plaintiff and the first defendant reach a settlement of the dispute on 6 September 2021;

7.4 Is the plaintiff obliged to pay to the first defendant any amounts claimed by her as set out in the counterclaim.

The Alleged Donation

[8] It is alleged by the first defendant that as long ago as 1988 there was a gathering around a fire in a village. Present at the gathering were the plaintiff, the first defendant as were Hilda Nautoro and Imgard Uahumbua. The latter two were called as witnesses by the first defendant. From their testimony it appears that at the gathering, broadly speaking, a verbal agreement was reached. In terms thereof and plaintiff stated that he donated the property to the first defendant, and that he would effect the transfer of the property into her name, once the outstanding bond debt with NHE was settled in full. In the interim the first defendant would reside in the dwelling. The first defendant would have to settle the outstanding debt with NHE.

[9] The plaintiff denies that any such agreement was reached. It may not be necessary for purposes of the case to make any specific finding on that issue, but I

conclude that the weight of the evidence, the objective facts and the probabilities favour the version of the first defendant.

The legal effect of the Donation

[10] It is common cause that the alleged donation was at no stage recorded to writing.

[11] The Alienation of Land Act, Act 68 of 1987, makes it clear that no alienation of land shall be of any force or effect, unless it is contained in a deed of alienation, signed by the parties thereto or their agents so acting on written authority.

[12] The Supreme Court in the matter of *Tjihero and Another v Kauari and Another* (SA 59/2017) dealt with the situation concerning verbal agreements concerning to the alienation of land. The Supreme Court expressed itself on the issue in the following terms:

[27] Fourthly, the agreement between the parties that a portion of the farm would be alienated to the respondents was not in writing as required by law. This means the agreement relating to how they would divide the farm is legally invalid. In terms of s 2(1) of this Act¹ such oral agreement is not of 'any force or effect'. Once again no court of law can condone the non-adherence to this section and compel a person to give effect to such an oral agreement. It is only when such agreement is reduced to writing and signed by the parties or their agents acting on written authority that it has legal effect. The oral agreement in this regard was thus a mere gentleman's agreement unenforceable in law.'

[13] It must follow that even if I were to accept that a donation was made, such donation has no legal force and effect. It follows further that the first defendant must fail in this score.

The Alleged Settlement in 2021

[14] During the course of the trial before me, and after some evidence had been led, I was requested by the legal practitioners who represented the parties to stand the matter down. I was advised that the parties and their respective legal

¹ Section 2(1) of the Alienation of Land Act, No 68 of 1981.

practitioners would negotiate a possible settlement of the dispute. I duly stood the matter down for a day and when the trial resumed I was advised that the plaintiff had refused to sign a prepared deed of settlement because he was unhappy with certain terms and conditions contained therein.

[15] The first defendant then amended her pleading to allege a verbal settlement. Mr Shimakeleni, a legal practitioner, who was involved in the process testified on behalf of the first defendant. From his evidence it is apparent that various terms and conditions of a proposed settlement were discussed. What ultimately transpired is that whereas some terms were agreed upon, others were not acceptable. In order to constitute an agreement there needs to be agreement in all the terms and conditions, failing which no agreement is reached.

[16] I conclude that no agreement was concluded.

Are any amounts payable to the first defendant

[17] As indicated earlier in this judgment it is common cause that the first defendant paid to NHE the full amount due to it. In the matter of *Van den Vries v the International University of Management*² it was held that the condition *indebiti* as a species of enrichment actions is available to a party to claim repayment of monies paid in terms of an invalid contract.

[18] The payment made to NHE by the first defendant was made in the belief that there was an existence of a valid agreement between herself and the plaintiff in terms whereof she was obliged to make certain payments. That agreement was invalid and of no force and effect. In these circumstances she is entitled to reclaim the payments she had made, being in total the sum of N\$184 290.

[19] As far as the further claims as contained in the counterclaim are concerned, I find that there was no acceptable reliable evidence in support of those claims and they must be dismissed.

[20] Since each party succeeded in part, there shall be no order as to costs.

² *Van den Vries v The International University of Management* I 602/2008 [2014] NAHCMD 159 (21 May 2014).

[21] I issue the following orders:

1. There shall be an order for the ejectment of the first defendant from the property described as Erf 1219, Omongo Street, Wanaheda, Windhoek.
2. The plaintiff shall pay to the first defendant the sum of N\$184 290.
3. Interest on the aforesaid amount at 20% per annum a tempore morae.
4. There shall be no order as to costs.
5. The matter is finalized and removed from the roll.

K MILLER
Acting Judge

APPEARANCES

PLAINTIFF:

M IKANGA

Ikanga Legal Practitioners, Windhoek

FIRST DEFENDANT:

H HAMUNYELA

Andreas-Hamunyela Legal Practitioners,
Windhoek