

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-OTH-2018-00081

In the matter between

HERERO ROYAL RED FLAG ASSOCIATION

PLAINTIFF

and

HERERO RED FLAG ASSOCIATION

1ST DEFENDANT

THE COUNCIL OF THE MUNICIPALITY OF WINDHOEK

2ND DEFENDANT

THE REGISTRAR OF DEEDS

3RD DEFENDANT

DR WEDER, KAUTA & HOVEKA INCORPORATED

4TH DEFENDANT

Neutral citation: *Herero Royal Red Flag Association v Herero Red Flag Association*
(HC-MD-CIV-ACT-OTH-2018/00081) [2020] NAHCMD 674 (24
October 2023)

Coram: CLAASEN, J

Heard: 1 November 2022, 24 January 2023, 16 February 2023, 2 March 2023, 19
April 2023, 12 July 2023, 11 October 2023.

Delivered: 24 October 2023

Flynote: Sale immovable land – Abstract system of transfer of ownership – Essence of abstract theory that ownership passes if real agreement is valid – Real agreement – Intention on part of the transferor and the transferee to transfer and to acquire ownership of the land – Consensus between the seller and the purchaser in all respects and a valid and real agreement was concluded – Ownership should have passed to the plaintiff instead – Absent any real agreement, the first defendant, as a matter of law, never became the owner, that is despite the entry of it being the owner in the Deeds Registry.

Summary: The plaintiff instituted action for rectification of a certain title deed and eviction of the first defendant from the premises. The plaintiff claims to have concluded a deed of sale and paid the purchase price for the property. The plaintiff claims that the Erf was registered in the name of first defendant because of an error. First defendant denies that the plaintiff paid the purchase price. The first defendant furthermore denies that an error occurred and pleaded that the said Erf was transferred in accordance with the power of attorney. First defendant filed a conditional counterclaim for undue enrichment, but did not persist with it.

Held that – Ownership never passed to the first defendant as there was no real agreement between the first defendant and the second defendant. The real agreement was between the plaintiff and the second defendant and the plaintiff is thus the true owner.

Held further that – Where a deed of transfer of immovable property does not reflect the real agreement between the seller and the purchaser of the property, there is no difference between rectification of a contract, on the one hand, and rectification of the deed of transfer. Rectification of the deed of transfer does not alter the rights and obligations of the parties to the deed of transfer: it merely serves to correct the deed of

transfer and is a declaration of what the parties to the deed of transfer to be rectified had agreed to in the real agreement giving rise to the deed of transfer.

ORDER

1. The title deed T6147/2009 for Erf no 6297 (a portion of Erf 6296, Katutura extension no 11 must be rectified to reflect the name of the owner as 'Herero Royal Red Flag Association (non-profit association incorporated under section 21) registration no 21/2016/0780'.
2. The first defendant must vacate the Erf forthwith.
3. In respect of the main claim, the first defendant is ordered to pay the plaintiff's cost of suit, and such costs include one instructing and one instructed counsel.
4. The first defendant is ordered to pay the plaintiff's costs in respect of its abandoned counterclaim, and such costs are limited to the costs incurred in regard to the taking of instructions and the drawing up of pleadings: such costs include costs of one instructing and one instructed counsel.
5. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

CLAASEN J:

Introduction

SITUATE: In the Municipality of WINDHOEK
Registration Division "K"
Khomas Region

MEASURING: 2391 (TWO THREE NINE ONE) square metres

[6] The plaintiff also claims that on 26 May 2006 the second defendant instructed the fourth defendant, to effect transfer of the property to the plaintiff. However, due to an error in the registration of transfer of ownership, the Erf was registered in the name of first defendant, instead of the name of the plaintiff.

[7] The first defendant in its plea denies that the plaintiff paid the purchase price and that the second defendant's instruction was to effect transfer of the Erf to the plaintiff. The first defendant also disagrees with the contention that an error occurred and pleaded that the property was transferred in accordance with a power of attorney by the second defendant. The first defendant filed a conditional counterclaim for undue enrichment of N\$2 million, but did not persist with it in the end. In any event, no evidence was lead thereon and it was bound to be dismissed.

Summary of the evidence

[8] The plaintiff called 2 witnesses, whereas the first defendant elected to close its case without calling any witnesses. The first witness for the plaintiff was the late Mr Katuutire Kaura. He testified that he is a member of the Regiment with the rank of General Field Marshall at the time that he testified.

[9] He explained that in 1979 the Regiment occupied three municipal properties in Windhoek and that the one at the centre of this case was used for commando buildings. These buildings were financed with collections from members of the Regiment. During 1993 the second defendant put pressure on the Regiment to purchase the said Erf, and after having pondered over that, by 1994 the Regiment decided that it will do that.

Subsequently the Regiment decided that an association should be created for that specific purpose. Hence, the Herero Royal Red Flag Association was born, which constitution¹ bears a date of 28 August 1996. He also deposed that the members of Herero Royal Red Flag Association were also members of the Regiment.

[10] Collections continued from amongst the members of the Regiment and a deed of sale² was concluded on 16 May 2000 between the plaintiff and the second defendant for the commando's Erf at a price of N\$57 838. General Field Marshall Kamburona was the secretary of the Regiment and the Herero Royal Red Flag Association and he signed the deed on behalf of the Herero Royal Red Flag Association. The witness deposed that as far as he was concerned, the property was purchased by the Herero Royal Red Flag Association and the transaction was finalised.

[11] According to the witness, a split occurred amongst the party lines of the Democratic Turnhalle Alliance (DTA) and the National Unity Organisation (NUDO) around 2003. That caused fragmentation amongst the Regiment members.

[12] During a meeting in 2015, the witness saw documents that the said Erf was in fact registered in the name of the first defendant, as the new faction had registered it as a section 21 company. That led to a debate between the plaintiff and the second defendant, but the matter was not resolved.

[13] The second witness, Mr Mike Venaani, also a member of the Regiment, stated that by 1996 he held the rank of General Obetz. His evidence aligned to that of the first witness for the plaintiff in all material respects relating to the transaction concluded between the plaintiff and the second defendant. He too eventually learnt that the Erf was registered in the name of the first defendant, instead of the plaintiff.

[14] Elaborate cross-examination was spent on the history, the decision making structures within the Regiment, whether the first witness had in fact in depth knowledge of

¹ Exhibit 'B'.

² Exhibit 'E.'

the Regiment's affairs given that he only returned from exile in 1979 and the second defendant's power of attorney wherein the word 'Royal' was scratched out', resulting in the transfer being made to the first defendant. I will return to that later in the judgment.

The law and application thereof

[15] The parties were *ad idem* that the Namibian law subscribes to the abstract theory of transfer of property. The abstract theory and not the causal system, is applicable when it comes to the transfer of both movable and immovable property.³ The law on that has been settled.

[16] According to the abstract theory, the validity of the transfer of ownership is not dependent on a valid underlying agreement. It means that ownership of immovable property passes on registration of transfer, notwithstanding that the underlying contract is defective. Registration gives effect to a so-called real agreement, that is, a meeting of minds to transfer and receive ownership. The general principles applicable to agreements, apply to real agreements. Thus, a real agreement may itself be defective or may not have come into existence. In such a case registration of transfer does not result in the passing of ownership and has no effect.⁴

[17] That was all that the parties agreed on in their submissions respectively. Evidently it appears that the first defendant is of the belief that the transaction was concluded between the first defendant and the second defendant.

[18] Mr Tjiteere, counsel for the first defendant, contended that the claim for rectification is legally untenable in the absence of any evidence to establish that the second defendant did not intend to transfer the property to the first defendant. In addition, he

³ *The DTA of Namibia v River View Estate CC* (2003/2015) [2019] NAHCMD 491(15 November 2019) para 41.

⁴ See *Cape Explosive Works Ltd & another v Denel (Pty) Ltd & others* 2001 (3) SA 560 (SCA) para 10; *Legator Mckenna Inc & another v Shea & others* [2008] ZASCA 144; 2010 (1) SA 35 (SCA) paras 20-22; *Absa Ltd v Moore & another* [2015] ZASCA 171; 2016 (3) SA 97 (SCA) paras 36-37 and P J Badenhorst et al *Silberberg and Schoeman's The Law of Property* 5 ed at 79-80.

referred to the general rule that land can only be transferred from one person to another by means of a deed of transfer, unless another law provides otherwise and that s 4(1)(b)⁵ does not permit rectification if it will cause transfer from one entity to another. He argued that the court is not competent to grant the relief prayed for.

[19] On the other hand, Mr Barnard, counsel for the plaintiff, reiterated the principles and case law of the abstract theory as the basis for the relief prayed for. He accentuated that there was no evidence that the first defendant originated as a result of the provisions of clause 23 of the deed of sale, as pleaded. In particular he emphasized that there was a real agreement between the plaintiff and the second defendant and cited *Weinerlein v Goch Buildings*⁶ wherein it was stated that:

'The policy of our registration laws with regard to fixed property requires the true contract under which the land is held to be reflected on the register... the Court will not allow it to be used as an engine of fraud to extort from an adversary what the claimant knows that he was never entitled to, and in order to prevent this the written contract and the register to be rectified...'

[20] In support of his argument that rectification can be granted he relied on the *dicta* expressed in *Bester NNO v Schmidt Bou Ontwikkelings CC*⁷ which also involved a mistaken transfer and rectification of the deed of transfer in order to reflect the true owner. In that matter the owner (Schmidt Bou) sold a portion of the mother Erf to Innova Holding (Pty) Ltd (Innova). The deed of sale had a suspensive condition that the Erf be subdivided and that the sold portion be transferred to Innova. However, on the strength of a power of attorney signed by a representative of Schmidt Bou, the whole Erf was transferred to Innova, and the title deed thus, contained the mistaken transfer of the whole Erf to Innova. Subsequently Innova was liquidated. When Schmidt Bou learned of the mistake it unsuccessfully engaged the liquidator (Bester NNO) to rectify the error, and ended up going to court over the rectification. The High Court granted the rectification as the parties' intention was not to transfer the whole Erf and thus ownership did not pass to

⁵ Deeds Registries Act 47 of 1937.

⁶ *Weinerlein v Goch Buildings* 1925 AD 828 at p 293.

⁷ *Bester NNO v Schmidt Bou Ontwikkelings CC* (2013) (1) SA 125 (SCA).

Innova. Bester NNO appealed the finding, but it was dismissed by the Supreme Court of Appeal.

[21] With that in mind it is sensible to highlight the decisive dealings relating to the said Erf and what manifested. It was common cause that historically the Erf had been occupied and used by the commando of the Regiment. Furthermore in 1996, a common law association, the Herero Royal Red Flag Association, was created specifically to purchase the said Erf.

[22] Apart from the oral evidence, pertinent documents were tendered in evidence. Nothing material turns on the criticism against the late Mr Kaura's evidence, namely that he testified, not from memory, but from papers. Both of the plaintiff's witnesses were members and in leadership positions in the Regiment, and I am satisfied that they became privy to the Regiment's affairs and had access to the documents. Considering their very senior age, at the time of their oral evidence, their evidence was clear and reliable. In this instance I find nothing unbecoming about the witness wanting to have regard to the exhibits.

[23] Above all, the documentary evidence is telling, especially if one has regard to the following:

- (a) A resolution⁸ (no. 40/02/2000) passed by the second defendant that Erf 6297, Katutura, in extent 2391 square metres be sold to Herero Royal Red Flag Association at a subsidized price of N\$ 57 838;
- (b) A deed of sale⁹ concluded between the second defendant and Herero Royal Red Flag Association on 16 May 2000;
- (c) An instruction¹⁰ from the second defendant's office, the Acting Chief of Housing and Properties, instructing the fourth defendant to transfer the said Erf wherein the purchaser is indicated as Herero Royal Red Flag Association.

⁸ Exhibit F.

⁹ Exhibit E

¹⁰ Exhibit G.

(d) A power of attorney¹¹ by the second defendant's Chief: Planner, Urban Policy, Strategy, Facilitation and Implementation Services to certain legal practitioners at the fourth defendant to pass transfer, wherein a line was drawn through the word 'Royal' in the name of the purchaser with the signatures of the said Chief and his witnesses.

(e) A deed of transfer,¹² executed on 02 December 2009, wherein the said Erf is transferred to the Herero Red Flag Association.

[24] The Registrar of Deeds in its report indicated that there is no objection to the order sought. That being said, it has to be remembered that there was no evidence tendered by any of the defendants especially the second and fourth defendants to explain the basis for the amendment in the power of attorney. They did not defend the matter, nor did the first defendant, during its cross-examination, postulate the root cause for the peculiar amendment or come up with a cogent explanation for it. The first defendant's cross-examination did not manage to discredit the plaintiff's evidence or the paper trail that documents the transaction. If I follow the argument of counsel for the first defendant, there was a clamour that the plaintiff should have given the reason for the mistake, be it fraud or otherwise.

[25] The bottom line of the oral evidence by the plaintiff was that at all material times there was no agreement between the first defendant and the second defendant. That is borne out by the documentary evidence too. Thus, there was no agreement, no resolution or any sound basis as to why the title to the property was to be transferred to anyone, other than the plaintiff. That is why the expression by the late Mr Kaura that the first defendant essentially 'hijacked' the transfer of the Erf was spot on.

[26] It is evident which of the parties has the answer for the amended power of attorney. Clearly it is information that the plaintiff will not be privy to. Incidentally, in answer to the protest that plaintiff should have pleaded the reason for the error, counsel

¹¹ Exhibit H.

¹² Exhibit I.

for the plaintiff postulated that in rectification claims, it is not necessary to plead the cause of the mistake.¹³ That is the position as set out in Amlers Precedents of Pleadings.¹⁴

[27] In this situation wherein the parties who have the information have not come forth to put their cards on the table, the court is constrained to agree with the plaintiff that it calls for a negative inference against the defendants.¹⁵

[28] In *Satar v Clayton*¹⁶ Ueitele J referred to a description by Professor van der Merwe for a real agreement as follows ¹⁷

'Under the abstract system a real agreement, namely an agreement to transfer and accept ownership, is required for transfer of ownership. In every instance it must consequently be determined factually whether a real agreement had indeed been reached. If the real agreement is merely voidable, for example as a result of undue influence, ownership will pass if the agreement had not been vitiated before transfer. If, however, the real agreement is void, having been induced by the fraudulent misrepresentations or by mistake ownership will not pass.' My emphasis.

[29] I thus return to the facts to assess whether it points to any real agreement and if so, who was the purchaser at the relevant time. There is no doubt as to which entity purchased the said Erf. I disagree that the first defendant was the purchaser. There was no evidence by the first defendant that it existed as a common law association prior to its incorporation on 29 April 2009. The only common law association in existence at the time, was the one created for the acquisition of the land, who subsequently purchased the Erf.

[30] A sale is defined as contract whereby one party (seller) undertakes to transfer a thing or the possession thereof to the other (the buyer) in return for a price by the latter.¹⁸ Having considered the evidence, there was clearly an intention from the second

¹³ *Offit Enterprises (Pty) Ltd v Knysna Development Co (Pty) Ltd* 1987 (4) SA 24 (C).

¹⁴ Amlers Precedents of Pleadings 3rd edition at page 277.

¹⁵ *Akuake v Jansen van Rensburg* 2009 (1) NR 403 (HC).

¹⁶ *Satar v Clayton* (HC-MD-CIV-ACT-DEL-2018/03453) [2023] NAHCMD 263 (12 May 2023)

¹⁷ Supra para 365 at 300.

¹⁸ Sharrock R *Business Transactions Law* 2007 7th ed JUTA and Company Ltd p 232.

defendant to sell and transfer the land. Likewise, there was an intention from the Herero Royal Red Flag to purchase the Erf. Similarly, the price was agreed upon. There was consensus between the seller and the purchaser in all respects and a valid and real agreement was concluded. Thus, ownership never passed to first defendant as there was no real agreement between first defendant and the second defendant. Absent any real agreement, the first defendant, as a matter of law, never became the owner. That is despite the entry of it being the owner in the Deeds Registry.

[31] As regards rectification, the headnote of the *Bester* case¹⁹ explained that where a deed of transfer of immovable property (registered in a deeds registry) does not reflect the real agreement between the seller and the purchaser of the property, there is no difference between rectification of a contract, on the one hand, and rectification of the deed of transfer. Rectification of the deed of transfer does not alter the rights and obligations of the parties to the deed of transfer: it merely serves to correct the deed of transfer and is a declaration of what the parties to the deed of transfer to be rectified had agreed to in the real agreement giving rise to the deed of transfer.

[32] In light of that, I do not regard this as constituting a transfer of one entity to the other, as contended by counsel for the first defendant, which would contravene s 4(1)(b) of the Deeds Registries Act. In any event, the High Court also has inherent jurisdiction. In addition I concur that the plaintiff is not a different legal person from the common law association and that the section 21 company has all the rights, obligation, assets and liabilities that the common law association had. Should that not be the case it would mean that the all the assets and rights that the common law association had would be *bona vacantia*, which would be a legal absurdity.

[33] Finally, the first defendant also pointed to the failure of the plaintiff to have indicated a pre-incorporation contract in its memorandum on registration. This was not pleaded, nor in pre-trial agreement and thus not available to first defendant.

¹⁹ *Bester NNO v Schmidt Bou Ontwikkelings CC* (2013) (1) SA 125 (SCA).

[34] Therefore, the plaintiff's claim succeeds and there is no reason to deviate from the general rule that cost follows the event. Hence, I grant the relief as prayed for in the following terms:

1. The title deed T6147/2009 for Erf no 6297 (a portion of Erf 6296, Katutura extension no 11) must be rectified to reflect the name of the owner as 'Herero Royal Red Flag Association (non-profit association incorporated under section 21) registration no 21/2016/0780.
2. The first defendant must vacate the Erf forthwith.
3. The first defendant must pay the plaintiff's cost, which includes one instructing and one instructed counsel.
4. The first defendant's counterclaim is dismissed with costs limited to the taking of instructions and drawing up of pleadings.
5. The matter is regarded as finalised and is removed from the roll.

C Claasen
Judge

APPEARANCES:

FOR THE PLAINTIFF:

P BARNARD
Instructed by: Palyeenime Inc.
Windhoek

FOR THE FIRST DEFENDANT:

M TJITEERE
Of Dr Weder, Kauta & Hoveka,
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