

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

HC-MD-CIV-APP-AMC-2022/00009

In the matter between:

**JULIANA SHIPANGA**

**APPELLANT**

and

**MONICA MUTOTA**

**RESPONDENT**

**Neutral citation:** *Shipanga v Mutota* (HC-MD-CIV-APP-AMC-2022/00009) [2024]  
NAHCMD 202 (30 April 2024)

**Coram:** MASUKU J et USIKU J

**Heard:** 10 November 2023

**Delivered:** 30 April 2024

**Flynote:** Appeal from Magistrates' court – Eviction – Vindictory claim – Appellant failed to produce title deeds to confirm ownership of immovable property – Magistrate dismissed claim on the basis that ownership of the immovable property was not proved – Appellant contends that ownership of the immovable property was not disputed – On appeal court finding that ownership of immovable property needs to be alleged and proved by production of title deed – Magistrate's decision upheld – Appeal dismissed.

**Summary:** The appellant instituted action in the magistrate's court for the eviction of the respondent from certain premises allegedly owned by the appellant's deceased's stepfather. The magistrate found that neither the appellant nor the respondent were in possession of proof of ownership of the premises and accordingly dismissed the action. Aggrieved by the magistrate's decision, the appellant lodged an appeal against the decision.

*Held* that an owner who institutes a *rei vindicatio* claim to recover his or her property is required to allege and prove that he or she is the owner of the thing; that the thing was in the possession of the defendant at the commencement of the action; and that the thing which is vindicated is still in existence and clearly identifiable.

*Held* that in order to eject a defendant from immovable property, plaintiff needs to allege ownership and such ownership is confirmed by the production of title deeds.

*Held* further that the decision reached by the magistrate cannot be faulted and the appeal stands to be dismissed.

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### ORDER

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1. The appeal is dismissed.
  2. I make no order as to costs.
  3. The matter is removed from the roll and is regarded finalised.
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### JUDGMENT

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USIKU J (MASUKU J concurring):

#### Introduction

[1] This is an appeal by the appellant against a decision made by the Gobabis Magistrate's Court. The appellant, in her capacity as the estate representative, appeals against a decision by the magistrate refusing to eject the respondent from Erf 1170, Epako, F Goeieman Street ('the premises'). The respondent opposes the appeal.

### Background

[2] The appellant instituted proceedings in the Gobabis Magistrate's Court seeking the following relief:

- '1. An order ejecting/evicting the Defendant from the property, that is, Erf 1170, F GOEIMAN STREET GOBABIS, OMAHEKE REGION, REPUBLIC OF NAMIBIA.
2. An order that defendant settles the municipal bill/arrears in the amount of N\$4 206.70 with interest at 20% from date of court order.
3. Each party pays own costs;
4. Further and/or alternative relief.'

[3] During the trial, the appellant testified that the premises belonged to her stepfather, Mr Hendrick Gariseb and her mother, Mrs Justine Garises, who were married in community of property. She testified further that the premises were occupied by the respondent, however, the appellant was in possession of a document which entitled her to be the 'lawful occupier' of the premises. The document relied upon is a letter of authority appointing the appellant as the duly authorised estate representative. During cross examination, it was put to the appellant that the respondent is the biological daughter of the late Hendrick Gariseb and that she has been staying at the premises since 1992. The appellant refuted that version and insisted that the respondent was not the late Gariseb's daughter and that she had been staying at a road camp.

[4] During her evidence, the respondent testified that, as per her full birth certificate handed up as evidence, her biological parents were Mr Hendrik Gariseb and Mrs Sylvia

Eises. She went to stay at the premises with her father and stepmother in 1992 when they were sickly. She took care of them until her father was transferred to Windhoek, where he eventually passed on. She then remained taking care of her stepmother who was confined to bed for two years with prostate cancer. The respondent testified that her stepmother on a certain occasion called all four of her children, including the appellant, to inform them that she was leaving the house with the respondent as she was the only one taking care of her in her condition. The four children did not contest her decision and on that basis, the respondent continued to reside at the premises. During cross examination, the respondent confirmed that the appellant's mother was married to Mr Hendrick Gariseb and the premises belonged to the late Hendrick Gariseb.

#### Magistrate's finding

[5] Upon considering the approach that must be followed where an owner institutes a *rei vindicatio* to recover his or her property, the magistrate held as follows in her judgment:

'When the court considers this matter and the issue of ejectment there are a number of factors the court considered in coming to its conclusion. Firstly, the court would like to deal with the issue of ownership of this house. This court was not provided with any documentation or any evidence which in fact proved that this specific property belonged to the said deceased. There were municipal bills handed up however this does not prove ownership. There was no title deed or at least any valuation of this property which suggested that this property belonged to the deceased. If ownership of his property is in question and until that aspect is resolved neither the plaintiff nor the defendant can claim anything on this property...'<sup>1</sup>

[6] It was the magistrate's further finding that where the deceased is the owner of certain property, same should be proven and in the absence thereof, the court is unable to make a determination regarding whether the defendant is to be ejected, thus, the

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<sup>1</sup> Page 76 of record.

cause of action cannot stand. Consequently, the application for ejectment failed and the matter was removed from the roll with no order as to costs.

[7] Dissatisfied with the findings, the appellant lodged the current appeal.

Grounds of appeal

[8] The appellant's grounds of appeal are as follows:

'1. The learned Magistrate misdirected herself, alternatively erred in law and in fact by dwelling into issues that was (sic) not part of the pleadings or placed in dispute by the parties, to wit;

1.1 The court a quo misdirected and erred by finding that the Court was not provided with any documentation or any evidence which in fact proved that the property belonged to the deceased, while ownership of the property was not in dispute or placed in dispute by Respondent in the pleadings to allow the plaintiff to discharge the onus thereof.

1.2 The court a quo misdirected herself by dwelling into findings that ownership of the property is in question and that neither the plaintiff nor the defendant can claim anything in the property while none of the parties claimed ownership in the pleadings and or during trial.

2. The learned Magistrate misdirected herself, alternatively erred in law or in fact by finding that the letter of authority tends to be null and void while the learned magistrate is vested with no powers in law to make such a finding or powers and functions of reviewing the administrative action of the Magistrate who granted the letter of authority.

3. The learned Magistrate misdirected himself, alternatively erred in law and in fact by considering and making findings on issues of whether the defendant is an heir or biological daughter of the deceased in an action proceeding brought by Appellant for eviction while failing to grant the relief of placing plaintiff in control of the property in question which is listed among the deceased's assets on the letter of authority.

4. The learned Magistrate misdirected himself, alternatively erred in law and in fact by finding that the cause of action to eject defendant cannot stand, while defendant raised no valid claim in the pleadings and subsequently led no evidence in support of a right in law entitling her to occupy the property against Appellant's authority (as estate representative) vested in her by the letter of authority to take control of the property in question.'

### Analysis

[9] The question that this court is seized with is whether the magistrate's findings were so irregular that interference from this court is warranted.

[10] In *Nanghama v Traugott N.O and Three Others* (I 1845/2014) [2021] 433 (28 September 2021), the court quoted the following excerpt from *Badenhorst et al*<sup>2</sup>:

'An owner who institutes a *rei vindicatio* to recover his or her property is required to allege and prove:

- (a) that he or she is the owner of the thing;
- (b) that the thing was in the possession of the defendant at the commencement of the action; and
- (c) that the thing which is vindicated is still in existence and clearly identifiable.'

[11] The *rei vindicatio* is a remedy available to an owner for reclaiming property from whomever is in possession thereof. In vindicatory proceedings it is trite that the owner need merely to allege and prove that he or she is the owner and that the other party is in possession of the property. The onus is then shifted to the possessor to allege and establish an enforceable right (such as a right of retention or a contractual right) to continue to hold the property against the owner.<sup>3</sup>

[12] From the above authority, it is evident that for a successful application or action for ejectment, the plaintiffs need to allege and prove ownership. The ownership in regard to immovable property is proved by producing a title deed in favour of the

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<sup>2</sup> Badenhorst, Pienaar & Mostert in *Silberberg and Schoeman's Law of Property* Lexis Nexis 5ed at 93.

<sup>3</sup> *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-D.

plaintiff. The fact that the defendant did not dispute ownership does not necessarily mean that ownership has been proved. The court needs to satisfy itself that the person instituting a *rei vindicatio* claim is indeed the owner. Absence of a dispute about ownership does not relieve the plaintiff of the onus to prove ownership in the circumstances. In so far as the first ground of appeal is concerned, this court is not convinced that the magistrate erred or misdirected herself when she found that the court a quo was not provided with any documentation or evidence which proved that the premises belonged to the deceased. For that reason, this ground of appeal cannot succeed.

[13] As far as the second ground of appeal is concerned, this court is in agreement with the appellant that the magistrate erred in law in finding that the letter of authority is null and void and accordingly, this ground must be upheld. In the proceedings before the magistrates court, the court was not called upon to review the appointment of the estate representative. In any event, in terms of the provisions of section 29 of the Magistrates Courts Act (No. 32 of 1944), the court does not have powers to review an administrative action. However, this finding does not affect the fact that the decision which the magistrate made in regard to the issue of eviction is correct.

### Conclusion

[14] I am of the view that the decision reached by the magistrate cannot be faulted. Consequently, the appeal stands to be dismissed.

[15] In regard to the issue of costs, the general rule is that the successful party is entitled to costs. However, seeing that both parties are being legally assisted by the Directorate of Legal Aid, I make no order as to costs.

[16] In the result, I make the following order:

1. The appeal is dismissed.

2. I make no order as to costs.
3. The matter is removed from the roll and is regarded finalised.

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B Usiku  
Judge

I agree

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T Masuku  
Judge



## APPEARANCES

APPELLANT:

Mr E Shiikwa  
Of Ministry of Justice: Legal Aid  
Windhoek

RESPONDENT:

Mr E Mwakondange  
Of Mwakondange & Associates Incorporated  
Windhoek