

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61(9)

Case Title: Job Januarie and Others and Paulus Benjamin Januarie and Others	Plaintiffs Defendants	Case No: INT-HC-AMDPLEA-2024/00221 in HC-MD-CIV-ACT-OTH-2021/03840
		Division of Court: Main Division
		Heard on: 27 May 2024
		Delivered on: 17 June 2024
Heard before: Honourable Lady Justice De Jager, AJ		
Neutral citation: <i>Januarie v Januarie</i> (HC-MD-CIV-ACT-OTH-2021/03840) [2024] NAHCMD 325 (17 June 2024)		
The order: 1. The plaintiffs' late filing of the replying affidavit is condoned. 2. The plaintiffs' application for leave to amend is dismissed. 3. The plaintiffs must pay the first and second defendants' costs including the costs of one instructing and one instructed legal practitioner, jointly and severally, the one paying the other to be absolved, capped by High Court Rule 32(11). 4. The application under INT-HC-AMDPLEA-2024/00221 is finalised and removed from the roll. 5. The action under HC-MD-CIV-ACT-OTH-2021/03840 is postponed to 24 July 2024 at 08:30 for a status hearing.		

6. The parties must file a joint status report on or before 18 July 2024.

Reasons for order:

DE JAGER, AJ:

Introduction

[1] While the second plaintiff was under cross-examination, the plaintiffs sought a postponement of the trial to apply for leave to amend their particulars of claim. After the parties could not resolve the anticipated application amicably, and by agreement, the trial was postponed and the plaintiffs were ordered to pay the first and second defendants' wasted costs. Directions were furthermore given for the papers to be filed in the application for leave to amend and for its hearing. The plaintiffs' replying affidavit was filed late. They applied for condonation. That application is unopposed. The court is satisfied that a case is made for condonation to be granted. The first and second defendants oppose the application for leave to amend on the grounds that prayer one introduces a new claim on a new cause of action for a debt that prescribed, the intended amendment is in material contradiction to the plaintiff's evidence so far and the intended amended particulars of claim would be excipiable to the defendants' prejudice.

The parties

[2] The first (Job Januarie), second (Karl Marthinus Januarie) and third plaintiff (Henry Hermanus Januarie) and the first defendant (Paulus Benjamin Januarie) are brothers. Henry was substituted with Adv Lotta Ambunda under a court order dated 14 September 2022 after having been appointed as his curator *ad litem* on 22 July 2022. Henry allegedly suffers from a cognitive developmental deficiency. The third defendant (Lloyd Januarie) is the executor of the estate of their late brother (Louis Albertus Januarie). The fourth and fifth plaintiffs are Job and Karl, respectively, in their capacities as executors of the estate of their late father (Nicolaas Januarie). The second defendant (Deidre Arnrud Januarie) is married to Paulus in community of property. The fourth defendant is the Registrar of Deeds of the Rehoboth Gebiet (the Registrar), and the fifth defendant is the Master of the High Court (the Master). Paulus and Deidre are collectively referred to as the defendants.

The plaintiff's claim

[3] The plaintiffs' claim in their current particulars of claim is as follows.

[4] Under the late Nicolaas's will, Job, Karl, Henry, Paulus and the late Louis inherited undivided portions of a farm measuring 1564,0710 hectares (the farm). An undivided portion measures 312,8142 hectares. By implication, the will indicates the undivided portions would be shared amongst the five sons, which means each would be entitled to 312,8142 hectares. The will further indicates which portions of the farm are to be allocated to which heir. Job is allocated 'mountain', Louis is allocated 'die vlak', Karl is allocated the portion neighbouring 'Nauzerus and Kabiras', and the remainder of the farm including the ordonans may be allocated according to Henry's and Paul's preferences. By implication, Henry and Paulus would each receive 312,8142 hectares out of the remainder of the farm comprising 625,628 hectares. It was a condition of the will that the brothers may sell their undivided portions to each other but not to third parties.

[5] All the brothers except Henry, who, due to his limited and poor cognitive capacity, needed one of the executors' assistance to attend to the Registrar's office and sign the form RA2, signed forms RA2, being certificates under s 13(2) of the Registration of Deeds in Rehoboth Act 33 of 1976 (the Act), required to transfer the undivided portions to the heirs. Consequently, the transfers of the undivided portions were effected to all the heirs but not to Henry.

[6] Around 27 June 2007, the defendants unlawfully caused the undivided portion that was bequeathed to Henry to be transferred to themselves. That transfer was unlawful, unenforceable and invalid because:

(a) It was done contrary to the will (also the new paragraph 31.1 of the particulars of claim).

(b) It was done without Henry's knowledge and consent, who, because of his limited and poor cognitive capacity, could not have consented to a valid agreement of transfer (also the new paragraph 31.2 of the particulars of claim).

(c) It was done without the executors' knowledge or consent (also the new paragraph 31.3 of the particulars of claim).

(d) It was done without the Government's written consent as required by the condition registered against the title deed (also the new paragraph 31.4 of the particulars of claim).

(e) It was not done in compliance with s 13(2) of the Act in that there was no certificate in

the prescribed form under s 13(2)(a) and such certificate is not accompanied by a document issued by the magistrate under s 13(2)(b)(ii) (also the new paragraph 31.5 of the particulars of claim).

[7] Therefore, no valid *causa* exists for the transfer to the defendants and any purported agreement to effect such transfer is void (also the new paragraph 32 of the particulars of claim).

[8] Furthermore, no agreement could be concluded between Henry and Paulus whereby the ordonans was beaconed, measured, divided and surveyed. As a result, the boundary lines of each portion within it are yet to be defined (also the new paragraph 33 of the particulars of claim).

[9] Henry is the lawful owner of the undivided portion measuring 312,8142 hectares, alternatively, he is an owner of an area of land measuring 312,8142 hectares of the ordonans.

[10] Around 27 June 2007, Paulus unlawfully took occupation and transfer of the ordonans, leaving Henry without any title or right over any portion of it. Paulus is solely in possession of and currently occupies the ordonans. Alternatively, if found that he no longer possesses it, the defendants disposed of it without Henry's knowledge and contrary to the will's conditions. The market value of the undivided portion measuring 312,8142 hectares is N\$710 000.

[11] Apart from their prayers for damages and costs, the plaintiffs pray that:

(a) The transfer of the undivided portion measuring 312,8142 hectares forming part of the ordonans done on 27 June 2007 to the defendants be cancelled.

(b) The Master oversees the transfer of an undivided portion measuring 312,8142 hectares of the farm from the defendants to Henry.

(c) Lloyd (the plaintiffs probably meant the Registrar) effects transfer of the undivided portion measuring 312,8142 hectares from the defendants to Henry and provides Henry with a copy of the title deed reflecting the transfer to his name.

(d) The defendants restore possession and occupation within seven days from the date of the order over an area measuring 312,8142 hectares of the ordonans to Henry, failing which the Deputy Sheriff is directed to evict the defendants or anyone else occupying it through them.

(e) Alternatively, if Paulus is no longer in possession of the property, payment by the defendants to Henry of N\$710 000 together with interest.

[12] Henry also claims from the defendants N\$1300 per month from 1 November 2018 to the date on which his possession is restored for loss of income damages suffered from his loss of use and enjoyment of his property.

The intended amendment

[13] The plaintiffs wish to add the following allegations before the allegations pertaining to the alleged unlawful transfer. Insofar as the defendants allege that Henry entered into any agreements with them, whether written or oral or both, whereby Henry sold, donated or otherwise alienated either his hope or expectation to inherit (*spes*), or his right to inherit, or his undivided portion measuring 312,8142 hectares of the farm forming part of the ordonans, the plaintiffs hold that at the time of entering into such alleged agreements and at all other times, Henry was (and remains) of unsound mind and was (and is), as a result thereof, wholly incapable of understanding and appreciating the nature and contents of such alleged agreements due to his severe cognitive impairment.

[14] Instead of the allegation that Henry is the lawful owner of the undivided portion measuring 312,8142 hectares and the alternative allegation thereto, the plaintiffs wish to allege that Henry was supposed to be the lawful owner thereof. The plaintiffs claim that ownership of the undivided portion measuring 312,8142 hectares on any part of the ordonans be restored in that the Registrar be ordered to effect transfer thereof from the defendants to the estate.

[15] The plaintiffs intend to delete the alternative *rei vindicatio* claim as well as the damages claim.

[16] Save for the prayer for costs, the plaintiffs wish to substitute their prayers with the following two prayers. Firstly, that any agreements between Henry and the defendants, whether written or oral or both, whereby Henry sold, donated, or otherwise alienated either his hope or expectation to inherit (*spes*), or his right to inherit, or his undivided portion measuring 312,8142 hectares of the farm forming part of the ordonans be declared void *ab initio* and unenforceable since Henry was and is wholly incapable of understanding and appreciating the nature and contents of such alleged agreements due to his severe cognitive impairment and accordingly Henry was mentally incapable of entering into such agreements. Secondly, that

the transfer of the undivided portion measuring 312,8142 hectares of the farm forming part of the ordonans to the defendants be cancelled and ownership be restored in favour of the estate or Henry as the court may find, whether consequent to the underlying agreement being declared void *ab initio* or on any other basis as the court may find that the transfer was unlawful.

[17] The plaintiffs' explanation for the belated amendment is as follows.

[18] When the action was instituted, it appeared that the undivided portion that was supposed to be transferred to Henry, was transferred from the estate to Henry and then to Paulus. Consequently, the averment was made that Henry is the rightful owner and that the unlawfully transferred portion must be returned to him. Upon counsel's advice in January 2022, Henry was assessed by a clinical psychologist in May 2022, and she made the following findings. Henry has limited capacity to consider and understand complex, abstract concepts like legal agreements and the probable future implications thereof. He is likely to consent to contracts or arrangements as he is agreeable and unassertive in nature and would be motivated to receive other's approval by agreeing. It is highly unlikely that he comprehends the full extent of such agreement/s even if explained to him. He is vulnerable to exploitation. The evaluation indicated limited cognitive capacity regarding long-term binding, complex contracts. It was recommended that a curator guide and assist him in his financial affairs. Subsequently, a curator *ad litem* and a curator *bonis* were appointed for him.

[19] Around January 2023, the defendants disclosed three written documents purportedly signed by Henry. Those were an alleged 'koopbewys', 'deed of alienation' (not discovered) and 'second koopbewys'. The defendants also aver Henry entered into a verbal agreement with them. The defendants' defence had always been that they are the owners to Henry's exclusion. It was never their case that Henry was not entitled to the relief since the estate was the owner or that the transfer was effected directly from the estate to them. As such, the necessity to amend did not reveal itself at the time.

[20] At all times up until Karl's cross-examination, the plaintiffs believed the question of ownership was not an issue (in relation to the estate or in relation to Henry) since the defendants only pleaded they are the owners. It was only during cross-examination that their counsel said that he intended to argue that the relief sought is incompetent since the estate was the owner and not Henry, the undivided portion having been transferred directly from the estate to the defendants. The plaintiffs say it was never the defendants' case that Henry sold his expectation or right to inherit and that argument was only revealed after the trial

commenced.

[21] The *rei vindicatio* is only available to the owner of a thing. If found that the transfer was effected directly from the estate, the defendants' counsel's submission is correct and the facts pleaded do not support the relief sought and for that reason the amendment became necessary.

The objection

[22] The first objection is as follows. The new prayer one introduces a new claim for a debt as contemplated in the Prescription Act 68 of 1969, being the rights, entitlement and benefit arising from the declaration that the agreements are void *ab initio*. It is common cause that Henry's psychological evaluation and the appointment of his curator only took place about 17 years later. Furthermore, the positive allegation is made that around 27 June 2007, the defendants unlawfully caused the transfer, but during Karl's examination in chief, he admitted and presented evidence on the form RA2 signed by the executors transferring Henry's portion to the defendants. At all material times, the plaintiffs acting reasonably had constructive knowledge of the facts currently relied on and the identity of the debtor (the defendants) from at least 11 July 2005 (the date of the form RA2). Thus, prescription began to run on 11 July 2005. The amendment was only brought on 23 April 2024. A period longer than three years elapsed from 11 July 2005 to 23 April 2024. Thus, the relief in prayer one prescribed and is extinct. The plaintiffs say prescription cannot operate against a mentally incapacitated person.

[23] The second objection is as follows. Prayer two seeks the retransfer of the remaining ordonans portion and that ownership be restored to either the estate or to Henry. That relief is premised on either the underlying agreement being declared void *ab initio* or on any other basis the court may find the transfer is unlawful. The allegations in support of that relief are those in paragraphs 31.1 to 33 of the intended amended particulars of claim. The underlying agreement is the form RA2 handed up as exhibit P. The allegations that the transfer was done contrary to the will or without Henry's knowledge and consent do not invalidate the underlying agreement. The proposed paragraphs 31.3, 31.4 and 31.5 are in direct conflict with the plaintiff's own evidence led so far. It would be prejudicial to allow an amendment in material contradiction to the evidence led by the plaintiffs. In the absence of exhibit P being declared void *ab initio*, the underlying agreement remains and so does the real agreement.

[24] The third objection is as follows. The undivided portion is registered in the names of the defendants and the real agreement is intact. To achieve the retransfer, which ultimately

remains a *rei vindicatio*, and by virtue of the applicable abstract system, the plaintiffs would need to set aside not only the underlying agreement but also the real agreement. *Ex lege*, the underlying agreement is the form RA2 and the certificate under s 13(2)(b)(iii) of the Act handed up as exhibit P. Any agreement entered between Henry and the defendants is irrelevant and at most an agreement by Henry to sell his *spes*, which is not the underlying agreement. Even if the sale of the *spes* is set aside, it is not the underlying agreement and it will not cause the real agreement to be set aside. In the absence of an attack on the underlying agreement and it successfully validating and causing the underlying agreement to be void *ab initio*, the real agreement remains intact (which must be set aside to achieve the retransfer), and the ultimate relief sought would be incompetent. There are no allegations made to declare the underlying agreement (exhibit P) void *ab initio*, rendering the intended amended particulars of claim excipiable as it fails to disclose a cause of action and the defendants are prejudiced thereby.

[25] According to the defendants:

(a) There is no evidence before the court, nor any indication that the plaintiffs can present any evidence demonstrating that Henry had a severe cognitive impairment when he contracted. The material time stems from 2003 to 2007 when no investigation was conducted. Even if a curator was appointed, such a patient would still be able to contract validly during lucid intervals.

(b) All that was sold was Henry's right to inherit, a personal right. The executors were aware of the sale. The defendants rely on two 'koopbewyse' dated 28 July 2005 and 6 July 2007. They say Job had full knowledge of the arrangement and assisted Henry, and that it is evidenced by his signature on the 28 July 2005 'koopbewys'.

(c) The relief in prayer two is independent of that in prayer one. It is irrelevant whether the relief in prayer one is granted because the underlying agreement for the transfer is not the sale of the *spes*. Any agreement between the defendants and Henry has no bearing on the transfer because Henry never owned any portion of the property that was transferred. The property vested in the estate controlled by the executors. The form RA2 is the underlying agreement. During Karl's examination in chief, he tendered it as an exhibit and confirmed the correctness thereof as well as the signatures thereon, but in cross-examination he tried to distance himself from it but would not say it constituted a fraud. Thus, without setting aside the form RA2, the retransfer is impossible in law. Under the abstract system, it is only when the real agreement is unenforceable that it can be said ownership did not pass from the estate to

the defendants. It is not alleged that the form RA2 and the real agreement are void *ab initio*. If the real agreement is not attacked, prayer two is incompetent.

Determination

[26] The parties are *ad idem* on the legal principles applicable to applications for leave to amend, and it is unnecessary to deal with them in the ruling.

[27] The court will first deal with the third objection.

[28] The court, exercising a discretion, will normally lean in favour of granting an amendment to ensure justice is done between the parties by deciding the real issue between them. If an amendment would result in the pleading being excipiable, it cannot lead to a decision on the real issues, and therefore, unless it may be more sensible to grant the amendment and let the other party file an exception, such an amendment should be refused. An amendment would normally be refused if there would be prejudice to the other party incurable by a cost order or a postponement. That prejudice relates to a party's rights regarding the subject matter of the litigation.¹

[29] Under the intended amended particulars of claim, Henry is not an owner, he is supposed to be an owner. The *rei vindicatio* is no longer the plaintiffs' cause of action. The court disagrees with the defendants' contention that the retransfer claim ultimately remains a *rei vindicatio*.

[30] Land registration in Namibia is based on an abstract system. The transfer of a real right is not dependent on a valid underlying agreement. A real right will, in general, pass if the agreement to transfer the real right (the real agreement) is valid notwithstanding that the cause for the transfer (the underlying contract) is defective. The abstract system provides certainty by disallowing an invalid underlying *causa* to affect the existence or validity of the transfer. In cases of fraud, the underlying agreement to the transfer may affect the real agreement and, thus, the transfer.² The requirements for passing ownership are delivery (effected by registration of transfer in the deeds office) and a real agreement the essential elements of which are an intention by the transferor to transfer ownership and an intention by the transferee to become the owner.³ What the abstract system means for the case before the court is that, to achieve cancellation of the transfer to the defendants, the real agreement

¹ *South Bakels (Pty) Ltd and Another v Quality Products and Another* 2008 (2) NR 419 (HC) para 10.

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

³ *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) para 22.

between the executors and the defendants for the transfer to them will have to be invalidated and, since the plaintiffs do not rely on fraud, the invalidity of any underlying agreement to the transfer will not affect the real agreement and the transfer.

[31] The plaintiffs attack the transfer by invalidating any agreements between Henry and the defendants whereby Henry sold, donated or otherwise alienated his hope or expectation to inherit (*spes*), his right to inherit or his undivided portion. They do not attack the real agreement between the executors and the defendants for the transfer to the defendants. Even if the plaintiffs succeed with prayer one, that could not result in success with prayer two because the real agreement between the executors and the defendants for the transfer to them would remain intact. The absence of the agreement between Henry and the defendants could not result in cancellation of the transfer to the defendants or ownership to be restored to the estate or to go to Henry. The transfer to the defendants necessitated a real agreement between the executors and the defendants that ownership be transferred from the estate to the defendants as reflected on the form RA2 and the subsequent registration of the transfer as reflected on the land title. To cancel that would require, amongst others, the invalidation of that real agreement. As long as that real agreement remains intact, the transfer cannot be cancelled. Seeing that the plaintiffs are not attacking that real agreement, there is no cause of action for their prayer that the transfer to the defendants be cancelled and ownership be restored to the estate or to Henry on 'any other basis as the [court] may find that the transfer was unlawful'.

[32] Although not perfectly formulated, the court upholds the second objection and refuses the amendment as the amended particulars of claim, in its current form, would be excipiable for its failure to disclose a cause of action for prayer two. Allowing it would prejudice the defendants' rights in the subject matter of the litigation. Allowing it would not assist the plaintiffs. The defendants say they will except thereto. The result would be the same. If they do not except thereto the ultimate result for the plaintiffs would be fatal. In the circumstances, it is unnecessary to consider the other objections or the explanation for belatedly seeking an amendment.

[33] Under High Court Rule 52(8), unless the court otherwise orders, the plaintiffs are liable to pay the costs occasioned by the notice of amendment. By seeking leave to amend, the plaintiffs sought an indulgence. The general rule on costs provides that costs follow the event. The plaintiffs should pay the defendants' costs. In the court's view the facts and circumstances of the application do not justify an order uncapped by rule 32(11).

[34] In conclusion, the order is as set out above.

<p align="center">Judge’s signature:</p> <p align="center">_____</p> <p align="center">DE JAGER AJ</p>	<p align="center">Note to the parties:</p> <p align="center">Not applicable.</p>
<p align="center">Counsel:</p>	
<p align="center">PLAINTIFFS:</p> <p>R Lewies Instructed by Veiko Alexander & Company Incorporated, Windhoek</p>	<p align="center">FIRST AND SECOND DEFENDANTS:</p> <p>J P Ravenscroft-Jones Instructed by Leezhel Mouton & Associates Incorporated, Windhoek</p>