

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case no: I 93/2015

In the matter between:

ESTATE LATE MAATI THOMAS
HILDE THOMAS

1ST PLAINTIFF

2ND PLAINTIFF

and

SACKEUS THOMAS

DEFENDANT

Neutral citation: *Thomas v Thomas* (I 93/2015) [2018] NAHCNLD 75 (30 July 2018)

Coram: CHEDA J

Heard: 29 March 2017; 30 March 2017; 29 June 2017; 13 November 2017;
23 March 2018; 04 June 2018

Delivered: 30 July 2018

Flynote: A surviving spouse married in community of property is entitled to her husband's estate – members of the husband's family have no right to deprive her of the same – a party who embarks and insists on litigation in the face of official advise from the Master of the High Court and his opponent's legal practitioner that he has no legal right to his claim should be ordered to pay costs as between legal practitioner and client scale.

Summary: First plaintiff during his lifetime, was married to second plaintiff in community of property. First plaintiff bought plots upon which he developed for commercial purposes. This he did using his own financial resources being helped by second plaintiff. He, however, died. Defendant who was his brother together with other members of his family decided to deprive second plaintiff of their plot leaving it to be taken over and run as a going concern by defendant.

Defendant continues to run it to date to the total exclusion of second plaintiff and her children. Both plaintiffs issued out summons against him to which he defended and he filed a counter-claim for the eviction of second plaintiff. Second plaintiff proved her right to the plot and was supported by various witnesses including the Master of the High Court and Oshakati Town Council who both confirmed that the plot in question belonged to first plaintiff.

It was held that second plaintiff was entitled to inherit the said plot as the widow, as determined by the Master of the High Court. Plaintiffs succeeded in their claim.

ORDER

1. Judgment is granted in favour of plaintiffs.
2. Defendant's counter-claim is dismissed.
3. Defendant shall pay plaintiffs' costs as between legal practitioner and client scale.
4. Such costs should be taxed.

JUDGMENT

CHEDA J:

[1] In this matter, the first plaintiff is the Estate of the Late Maati Thomas, a deceased estate duly registered at the Master of the High Court, while second plaintiff a lady who was married to first plaintiff. Defendant is a businessman who is a brother to first plaintiff.

[2] First and second plaintiffs are lawful holders of all rights in respect of Erf 8162, Uupindi North, Oshakati which property is in the possession of defendant. Plaintiff issued summons and claimed the following as per their particulars of claim:

- a) Eviction of defendant from Erf 8162 Uupindi North Oshakati;
- b) Cost of suit; or
- c) Alternative relief, if any.

[3] Defendant entered an appearance to defend. It was his plea that he is the lawful holder of the plot in dispute. It is his further plea that it was agreed that plaintiff should operate the business on the said plot for the benefit of the family and there was agreement that the plot should be registered under the deceased's name. It is for that reason that his possession of the property cannot be said to have been unlawful. Defendant filed a counter-claim seeking the eviction of second plaintiff. However second plaintiff has averred that she cannot be evicted from a place she is not in occupation of.

Plaintiffs' case

[4] Plaintiffs' case was presented by second plaintiff who stated that she was married to the late Maati Thomas in December 1998 although they had been living together as husband and wife since 1991. Her husband purchased a stand which is now referred to as Erf 8162 Uupindi. He built a bar and later a small residential dwelling comprising of flats which they subsequently moved into. The plot was purchased through funds realised from the bar and their personal savings.

[5] He also acquired additional land upon which he built some flats. The said land was donated to him by his friend Ipuleni Sheya. In addition to those properties, he further acquired another plot from a Mrs Beata Ekandjo. They derived income from the said properties until her husband's death. She then registered her husband's estate and she was appointed as the administrator of her late husband's estate. She is in possession of a certificate from the Oshakati Town Council which proves that her late husband was the owner of the improved property.

[6] Defendant lodged a counter-claim with the Master of the High Court for N\$294 000 as being money owed by the estate to various creditors. She denied any indebtedness to defendant as she stated that all creditors were paid up by the estate at the relevant period. Defendant refuses to vacate their property.

[7] Under cross-examination, she denied that the property belonged to defendant. She stated that defendant had never claimed it during her husband's lifetime. She did not know who the original owner of the plot was, but, all she knew was that her husband bought the plot from a Mr Vilho. Under cross-examination she disputed that defendant bought the plot from the alleged seller as the document which he was seeking to rely on was not signed and does not say where the plot was in other words it is not identifiable.

[8] She also disputed the authority of a letter produced by headman Andreas Namene as it was not signed. She further stated that, the plot is theirs and it was not possible for the same plot to have been sold to defendant when it had already been bought by Vilho. It was further her evidence that after the death of her husband, his family convened a post-death ritual meeting called *Omwaale*. It is at this meeting that members of the deceased's family suggested that she should be assisted by three relatives in the administration of the estate. She, however, refused. She also turned down the suggestion that the house be given to the children, which meant that she should vacate.

[9] It is from that day that defendant took over the plot to her total exclusion. Plaintiff left the plot and has never gone back again. It is therefore surprising that defendant sought her eviction from a plot she was not in occupation of. After her

authorisation by the Master of the High Court and demand of entitlement to administer the estate by the defendant, the Master of the High Court advised defendant by letter of the 10th of May 2013 that he had no right to the property. Despite this letter defendant refused to vacate the plot. Second plaintiff denied defendant's allegation that he purchased Erf 8162 Uupindi from Festus Shikoto as the plot was only allocated Erf 8162 after the 3 plots had been merged. This was only after 1992. It was, therefore, impossible for defendant to have purchased Erf 8162 Uupindi from Festus Shikoto Nambala in 1987 as same was not in existence.

[10] The next witness was Pius Shikongo whose evidence was that he is an employee of Oshakati Town Council in the Department of Property and Planning and he has access to the records of plot holders in Oshakati and that he caused a certificate to be issued to second plaintiff indicating that first plaintiff was the registered occupier and owner of plot 8162 Uupindi.

[11] It was his testimony that the plot in question was registered under first plaintiff and he was involved in that exercise. This was in 1995. He went further and stated that the right of occupation was registered and it is currently registered under first plaintiff who has a right of abode and is consequently entitled to make improvements on it.

[12] He also testified that defendant approached them in 2013 claiming that the plot did not belong to first plaintiff, but, to himself. They told him in no uncertain terms that this was not correct and this was further communicated to him by a letter of the 11 February 2013.

[13] Beata Ekandjo also testified that she is self-employed and that she sold a portion of her land which is adjacent to plot 8162 Uupindi to the late Maati Thomas for N\$4000. It was further her evidence that, first plaintiff then constructed a bottle store/bar and flats and more flats were constructed at a later stage. It was also her evidence that first plaintiff acquired two more plots, one from Vilho Nuumbala and another from Ipuleni Sheya. This was the evidence of plaintiff's case.

Defendant's case

[14] Defendant opened his case by giving evidence. His evidence was that in 1987 he bought Erf 8162 Uupindi from Festus Shikole Nuumbala for N\$200. He, together with Festus and one Andreas Alugodhi went to see the Village Headman Andreas Namene whereat he paid N\$200 to which the headman confirmed the said payment by a note. In 1992, first plaintiff asked for permission to develop one of his plots as he wanted to use it to sustain the family.

[15] They then went to inform their father. In 1992, first plaintiff requested for his identity in order to use it to apply for water connection. He however did not give it to him as he was in Rundu. In 2012 he discovered that first plaintiff had now registered his plot under his name and he asked him to reverse what he had done, but, he did not do so until he met his demise.

[16] After his death, an *Omwaale* meeting was held whereat second plaintiff was advised that the plots belonged to defendant and Pius Shigwedha. He disputed that first plaintiff bought them from Mr Vilho Nuumbala as he had left Oshakati West before 1994.

[17] He admitted that he did not develop any of the plots, but, that he took charge and control of these businesses from the death of first plaintiff in 2013 to date. His reason for this, is that the plot was his. He, however, was not able to say how the other plots were acquired. He admitted that he was informed by the Master of the High Court and the Oshakati Town Council of the correct legal position being that the plots belonged to first plaintiff. Defendant made a counter-claim of eviction against second plaintiff. He however admitted that ever since the *Omwaale* meeting was held he had never seen second plaintiff in that property.

[18] The next witness was Thomas Shoongo. He is an old man, pensioner and the father of both first plaintiff and defendant. His evidence was that Erf 8162 was bought by and belongs to defendant. He further stated that after the death of first plaintiff a meeting was held wherein second plaintiff was advised that the disputed property belonged to defendant.

[19] He also stated that he had no personal knowledge of defendant having bought the plot, but, admitted that defendant did not make any improvements on it

although he is using it for his own benefit. Under cross-examination he admitted that the proceeds from this property benefited defendant alone.

[20] Pius Shigwedha was the next to give evidence. His evidence was that sometime in 1988, he bought a piece of land in Ongwediva from defendant. Further that he attended the *Omwaale* meeting where second plaintiff was told that Erf 8162 together with its improvements belong to defendant. Other than that, he knew nothing about the plot in dispute.

[21] The next witness was lidhongela Blasius. His evidence was that on the 12th of November 1987 defendant bought plot Erf 8162 from Festus Shikolo Nuumbala and that he proceeded to inform the Headman, the Late Andreas Namene. He stated that he was present when defendant purchased this property. He disputed that the plot belonged to first plaintiff. He had previously stated that the plot bought by defendant was Erf 8162, but, however under cross-examination he changed his evidence and stated that he was not sure if the erf number was mentioned when the sale transaction took place.

[22] He went further to state that even the improvements belong to defendant although he changed his evidence under cross-examination thereby acknowledging that the improvements were carried out by the first plaintiff. He, however, could not say for certain that the developed plot as it stands today is the same that was shown to him by the defendant some years ago.

Proved facts

[23] It admits of no doubt that second plaintiff was married to the Late Maati Thomas, now first plaintiff. They had children together and he later died. The following is what was proved by plaintiff during the trial that:

- a) first plaintiff purchased all these stands which now from plot number Erf 8162 Uupindi;
- b) that he used his personal funds for the said purchase;

- c) first plaintiff made improvements on the plot which presently consist of a bar and two blocks of flats;
- d) the Master of High Court recognised second plaintiff as the widow by virtue of her marriage to first plaintiff which was in community of property and gave her a letter of authority to administer the estate;
- e) The Master of the High Court advised defendant that the plot belonged to first plaintiff and not him. Oshakati Town Council also advised defendant that the plot did not belong to him, but, to first plaintiff;
- f) second plaintiff was dispossessed of this plot by first plaintiff's relatives resulting in defendant taking over to the total exclusion of second plaintiff and her children; and
- g) that defendant has been in occupation of this plot and using it as a business concern of which he was collecting all the proceeds from these businesses to the total exclusion of first plaintiff's family.

[24] Second plaintiff and her witnesses gave their evidence very well and convincingly. The court has no reason to fault this testimony as it was corroborated to the courts' satisfaction and is therefore acceptable as a true reflection of the events in this matter.

[25] Ms Shilongo for plaintiff in her submissions referred me to the case of *Agricultural Bank of Namibia v Witvlei Meat (Pty) Ltd* (A 98/2012) [2013] NAHCMD 75 delivered on 20/3/2013 where the court adopted the position adopted in *De Villiers v Potgieters & Others* NO 2007 (2) SA 31 (SCA) where it was stated:

'That when the applicant's owner being admitted as well the respondent's continued occupation, it would then be for the respondent to establish its right to be in occupation of the premises. If the respondent is unable to establish a right to be on the premises, then an eviction order should follow.' (my emphasis)

[26] This stands to reason that defendant has the onus of proving his lawful entitlement to the occupation of this plot. This he has failed to do. Further, the right to occupation was expletively dealt with in *Chetty v Naidoo* 1994 (3) SA 13 (A) which point was followed in *Shukifeni v Tow-In-Specialist* CC 2012 (1) NR 219 (HC) at 225-226 where Ueitele AJ (as he then was) clearly stated:

‘[19] there is a principle in our law that an owner cannot be deprived of their property against their will, this means that ‘an owner is entitled to recover property from any person who retains possession of it without the owner’s consent...’

[27] The court was not privileged to have sight of defendant’s heads of argument as these were not filed despite the court of the 04/06/2018 that they should be filed by the 19/07/2018.

[28] With regards to the defendant, I find the following factors as unconvincing and as such there are holes in his case.

- a) defendant’s evidence that he purchased Erf 8162 in 1987 cannot be true as according to Oshakati Town Council the stands had no numbers;
- b) defendant admitted under cross-examination that the portion of land from Lipuleni Sheya was not given to him, but, to first plaintiff;
- c) it is improbable that John would accompany defendant to the headman to register the transfer of his right and then fail to take part in the discussion. The correct position is that defendant did not acquire any right regarding this plot;
- d) defendant contradicted himself in that in his evidence-in-chief, he testified that by the time the right of occupation was sold to him by Festus Nuumbala, John had passed away. However under cross-examination he changed his version and said that John was there and he accompanied him to the headman; and

- e) The letter purportedly from the headman is not signed and is therefore not authentic.

[29] Second plaintiff left this plot as ordered by first plaintiff's family members and has not returned to date. It was, therefore, baseless for defendant to file a counter-claim for eviction when she was not in occupation of the plot.

[30] This, having been said, it is clear that defendant's evidence is littered with holes which cannot be plugged and is therefore rejected in its entirety. Most importantly, defendant finally admitted that despite the fact that second plaintiff made it clear that he had no right on the property in dispute as he did not spend any money towards its purchase or improvements, he, nonetheless continued to occupy the said property to his benefit excluding second plaintiff and her children. In fact, he continued to do so even when the Master of the High Court and Oshakati Town Council clearly advised him that he had no right to this property. It is clear that he was stubborn.

[31] Second plaintiff was married to first plaintiff in community of property, a marriage which gives her a right over her husband's property hence the issuance of a letter of authority by the Master of the High Court. The facts obtaining in this matter favour her in terms of the laws of Namibia. She is therefore entitled to take over from first plaintiff's estate and to run it to the total exclusion of first plaintiff's members of the family defendant not excepted.

[32] She spent money, time and effort in building up their empire while defendant failed to produce evidence of his contribution to the estate. It is clear that, defendant's hold to this estate is based on the authority bestowed on him by first plaintiff's family which in turn is based on a long standing tradition, customary practise and norms. The practices and norms good as they maybe unfortunately they are in direct conflict with the established modern legal principles of the land. Therefore, he cannot succeed.

[33] Second plaintiff is found to be the rightful owner of this estate. With regards to defendant's counter-claim it was not a *bona fide* claim as second plaintiff was not in occupation after the death of first plaintiff. This, to me was an abuse of court

process. The counter-claim is accordingly dismissed with costs which costs I deal with below.

Costs

[34] Second plaintiff has argued through her legal practitioner that defendant's conduct, not in so many words was tantamount to an abuse of court process and he should therefore be visited with punitive costs.

[35] The general rule regarding costs is that costs follow the cause. However, in this instance, the court is being called upon to levy defendant with costs at a higher scale. The general approach by these courts is that they lean against granting attorney and client costs and will grant such costs only on rare occasions, see *Ebrahim v Excelsion Shopfitters and Furniture (Pty) Ltd* (2) 1946 TPD 226 and *Mallinson v Tanner* 1947 (4) SA 681 (T) 686. In addition, the court will not grant such costs unless they have been specifically prayed for although the absence of such a prayer or notice is not necessarily fatal to the granting of such costs.

[36] In my view, defendant's conduct was an abuse of a court process. The appearance to defend and counter-claim was dilatory and therefore lacked *bona fides*. This to me is the proper case which the court should show its displeasure by levying defendant with punitive costs in order to discourage him and others of like mind of unnecessarily putting a genuine litigant into financial expenses which leaves his/her purse dented. The courts have a duty to place plaintiffs in the financial position, they were before commencing the litigation process.

[37] In the result, this is the order of the court;

1. Judgment is granted in favour of plaintiffs.
2. Defendant's counter-claim is dismissed.
3. Defendant shall pay plaintiffs' costs as between legal practitioner and client scale.

4. Such costs should be taxed.

M Cheda
Judge

APPEARANCES

PLAINTIFFS: S Aingura
of Aingura Attorneys, Oshakati

DEFENDANT: W Horn
of W Horn Attorneys, Oshakati