

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI  
JUDGMENT**

Case No: A 3/2016

In the matter between:

**LIINA SHANGHETA N.O**

**APPLICANT**

and

**ELIZABETH SHIMANYA**

**FIRST RESPONDENT**

**SESTINUS SHIMANYA**

**SECOND RESPONDENT**

**COUNCIL FOR THE MUNICIPALITY OF OSHAKATI**

**THIRD RESPONDENT**

**THE MASTER OF THE HIGH COURT**

**FOURTH RESPONDENT**

**REGISTRAR OF DEEDS**

**FIFTH RESPONDENT**

**SIMEON NANDJEBO**

**SIXTH DEFENDANT**

**Neutral citation:** *Shangheta N.O v Shimanya (A 3/2016)* [2020] 133 NAHCNLD (17 September 2020)

**Coram:** DIERGAARDT, AJ

**Heard on:** 4 August 2020

**Delivered:** 17 September 2020

**Flynote:** Civil Practice - Applications and Actions- Disputes of facts- Oral evidence must be brought on formal applications- Glaring disputes of fact-Court cannot adjudicate judicially on the papers alone-the application for the referral of certain issues to oral evidence not entertained- Application dismissed with costs.

**Summary:** The Applicant by way of motion proceedings brought an application to declare the transfer and registration of the property, Erf 0099 to the first and second respondent by the third respondent and fourth respondent respectively as unlawful, invalid and of no legal effect.

The court *held* that there are material disputes of facts and that a notice of motion alone does not constitute an application in terms of rule 67(1).

The court dismissed the application with costs.

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### ORDER

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1. The application is dismissed with costs.
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### JUDGMENT

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DIERGAARDT, AJ:

#### Introduction

[1] The Applicant brought an application on behalf of the Estate of the Late Tobias Amakali. The Applicant in this matter is Ms Liina Shangheta appointed as executrix in the estate of the late Tobias Amakali, the first respondent is Elizabeth Shimanya who is the alleged adopted daughter of the Late Tobias Amakali, the second defendant is Mr

Sestinus Shimanya who is married to the first respondent. The third respondent is the Council for the Municipality of Oshakati, the fourth respondent is the Master of the High Court, the fifth respondent is the Registrar of Deeds and the sixth respondent is Mr Simeon Nanjembo who is the brother of the Late Tobias Amakali.

[2] In April 2016, the Applicant brought an application seeking the court to direct the transfer and registration of the immovable property described as a certain Erf 0099, situated in Oshakati, Republic of Namibia held by certificate of registered title no. T2538/1995 in the name of the first respondent and second respondent be set aside and directing the fifth respondent to deregister Erf 0099, Oshakati in the name of the first respondent and be registered in the name of the sixth respondent.

### Background

[3] The late Tobias Amakali was married to the late Elizabeth Amakali, the couple did not have any biological children, they however raised a couple of children as their own. Ms Amakali predeceased Mr Amakali. The late Tobias Amakali passed on 28 March 1988. The late Amakali was allocated a leasehold on an immovable property situated at Erf 0099, Oshakati by the third respondent.

[4] The first respondent resided in this house with the Late Amakali and some other members of the family. After the Late passed, it was allegedly decided by the family that even if the children are not biological children of the late, they could still reside in the house until they all got married, to which they would move out and live with their respective spouses. The late passed intestate and with no biological children.

[5] There is a point in limine raised with regards to the late filing of the replying affidavit by the applicants. This point will be put in abeyance for now, the court will first deal with the pressing issue of whether or not this matter ought to be brought by way of motion or action.

### Application for referral

[6] Referral of application for evidence or to trial in terms of Rule 67:

'67 (1) Where an application cannot properly be decided on the affidavits the court may dismiss the application or make any order the court considers suitable or proper with the view to ensuring a just and expeditious decision and in particular, but without affecting the generality of the foregoing, it may -

(a) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness; or

(b) refer the matter to trial with appropriate directions as to pleadings, definition of issues or any other relevant matter.

(2) After hearing an application the court may make no order, except an order for costs, if any, but may grant leave to the applicant to renew the application on the same papers, supplemented by such further affidavits as the case may require or allow'.

[7] Geier J in the case of *Kambazembi Royal Traditional Authority v Minister of Urban and Rural Development*<sup>1</sup> that:

'Mr Narib emphasised that the disputes which the parties wish to have referred, was not foreseeable and that a referral would be the most expeditious way of deciding, of dealing with this matter. He also submitted that the question whether or not the dispute was foreseeable would be decisive in the question whether a court would refer a matter to the hearing of oral evidence. With referenced to the leading case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (TPD)*, he reminded the court that the dispute in question must be a genuine and bona fide one and he submitted further that the court should have regard to the prospects of such evidence tipping the balance in favour of the applicant and if the probabilities favour the applicant the court may refer.' (own emphasis)

[8] The significance of the above quote is that, the parties made a formal application to court( Notice of motion supported by affidavit in terms of rule 67(1)), they motivated and qualified why certain issues need to be referred for oral evidence. The parties in the

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<sup>1</sup> (HC-MD-CIV-MOT-REV-2017/00219) [2018] NAHCMD 413 (19 October 2018) at para 5, page 4.

present case before failed miserably to bring a formal application before court, what is before this court was a notice of motion only with prayers and with no substantive application. Namweya AJ was correct in his order to state that there was no application before the court to enable the court to make its decision to refer the matter.

[9] It is quite clear to see that rule 67 (1) would have proven usefull in this matter before court as this application is crowed with numerous issues of fact that colour this entire application as bright as the colour red. There is not a single fact that is not in dispute between the parties before court, apart from the fact that the Late Tobias Amakali passed away on 1988 and he fathered no children of his own.

#### Issue of fact in motion proceedings

[10] The test for applied in determining disputes of fact is trite. It is the test set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*<sup>2</sup>

[11] The Plascon-Evans Rule postulates that in deciding disputes of fact in application proceedings, those disputes should be adjudicated on the basis of the facts averred in the founding affidavits which have been admitted by the respondent together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant unless a denial by the respondent is not such as to raise a real genuine *bona fide* dispute of fact or a statement in the respondent's affidavit is so far-fetched or clearly untenable that the court is justified in rejecting it merely on the papers. This approach remains the same irrespective of the question which party bears the onus of proof in any particular case.

[11] Furthermore the plascon evans rule was applied in *Kgori Capital (Pty) Ltd v The Director of Public Prosecutions and Another*<sup>3</sup> The learned Judge of Appeal commented on the applicable test as follows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities.'

<sup>2</sup> 1984 (3) SA 623.

<sup>3</sup> CA Crim App No. CLCGB-033-19 (delivered on 26 July 2019), para 16.

Where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be difficult if the respondent's version consists of bald or creditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[12] In the present matter before court the parties have made bald statements and denials. The applicants state that the first defendant was not legally adopted, whereas the first defendant is adamant that she at some point carried the surname of her Late father Amakali until she got married , to her the late has adopted her and has made a birth certificate for her.

[13] The birth certificate is yet again coloured with material discrepancies that can only be cleared up at a trial and not on the papers.

[14] There is no dispute that the Erf in dispute belongs to the third respondent and at the time of death of the Late Amakali it was not fully paid, however the how and why of the transfer of same are a material dispute of fact.

[15] This court re-iterates the position in the Kgori case in that motion proceedings are about the resolution of legal issues based on common cause facts, they cannot be used to resolve factual issues because they are not designed to determine probabilities. Where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

[16] This court is alive to the fact that this matter has been on the roll since 2016, however it feels that should I proceed to adjudicate this matter on the papers before court, it would render a grave injustice to both the parties affected.

[17] The Legal Practitioner for the Applicant ought to have foreseen that material disputes of fact would arise in this matter already at the drafting of its papers and would have rather brought the matter as one of action rather than as motion proceedings.

Conclusion

[18] The court finds itself between a rock and a hard place. There are simply too many glaring facts in dispute between the parties for the court to be able to determine any of the issue in dispute judicially.

[19] In the result I make the following order:

1. The application is dismissed with costs.

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A Diergaardt  
Acting Judge

APPEARANCES:

APPLICANT:

Ms A Samuel,  
Of Samuel Legal Practitioners, Ongwediva

RESPONDENTS:

Mr J Kandara,  
Of AngulaCo Incorporated, Ongwediva

