

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
OSHAKATI



NORTHERN LOCAL DIVISION

CASE NO: HC-NLD-CIV-ACT-

CON-2018/00208

In the matter between:

HISKIEL MATHEUS

PLAINTIFF

and

ANGULA MATHEUS

1ST DEFENDANT

EPAFRANS IIPINGE

2ND DEFENDANT

REGISTRAR OF DEEDS

3RD DEFENDANT

Neutral Citation: *Matheus v Matheus* (HC-NLD-CIV-ACT-CON-2018/00208) [2021]
NAHCNLD 19 (09 March 2021)

CORAM: SIBEYA J

Heard: 21 and 22 October 2020

Order: 27 October 2020

Reasons: 09 March 2021

Flynote: Contract Law – Misrepresentation – Plaintiff alleges that misrepresentation induced him to enter into an agreement with first defendant which resulted in the transfer of an immovable property to first defendant – Plaintiff seeks cancellation of the agreement due to misrepresentation – Court not satisfied that plaintiff proved misrepresentation.

Summary: The plaintiff transferred an immovable property to first defendant, his son, without reservation or condition. First defendant alienated the property to second defendant. Plaintiff claims cancellation of the agreement which resulted in the transfer

of the property on account of alleged misrepresentation made by first defendant and plaintiff further seek restitution of the property. Plaintiff claims that first defendant misrepresented to him that plaintiff should transfer the property to first defendant for purposes of securing a loan to be used to build flats on the property. This misrepresentation induced the plaintiff to effect transfer. Plaintiff is the only witness who testified but his evidence still had to be assessed to determine if it sustains the claim.

Held that, he who alleges must prove the allegation on a balance of probabilities. A party who raises misrepresentation bears the burden to prove its existence.

Held further that, self-contradictions on material aspects of a witness' evidence renders the evidence unreliable and affects the credibility of the witness.

Held further that, the evidence considered in totality established that the plaintiff transferred the property to the first defendant without reservations or conditions. The evidence further establishes that the plaintiff failed to prove on a balance of probabilities that the property was transferred as a result of misrepresentation by the first defendant.

Held further that, the plaintiff failed to prove that he was entitled to the relief sought.

Held further that, although costs should follow the result, the court in the exercise of its discretion may order otherwise where a cost order has the capacity to paralyse a party resulting in unfairness.

ORDER

1. The plaintiff's claim is dismissed.
 2. There is no order as to costs.
 3. The matter is removed from the roll and regarded as finalised.
-

JUDGMENT

SIBEYA J:

Introduction

[1] Alienation of property is a daily occurrence and can have devastating effects to the owner. Notwithstanding, departing with one's property, willingly or not, can be tormenting to the owner to the extent that warrants an inquiry to determine the legality of such alienation where the owner raises qualms of however significance.

[2] The plaintiff seeks the following relief:

(a) An order canceling the agreement between the parties and restitution of the plaintiff's position prior to the conclusion of the contract;

(b) an order directing that the sale of Erf No. 331, Ondangwa by the first defendant to the second defendant is null and void;

(c) An order directing that the second defendant takes all necessary steps within ten (10) days from date of this order to pass transfer of Erf 331 Ondangwa to the plaintiff with the first defendant being liable for all transfer costs, stamp duty costs and conveyancer's costs, and failing compliance therewith, that the deputy-sheriff be authorised to take such steps as may be necessary and sign such documents as may be necessary to give effect to this order;

(d) Cost of suit against the first defendant;

(e) Cost of suit against the second and third defendants (only in the event of defending this action).’

[3] Only the 1st and 2nd defendant disputed the claim. The 3rd defendant opted not to participate in the proceedings.

[4] The plaintiff is Hiskiel Matheus, an adult male pensioner residing at Onakahama village in Onankali.

[5] The 1st defendant is Angula Matheus, an adult male businessman trading as Tangeni OM Trading Enterprises, residing at Oikango No. 4 village in Ohakweenyanga, Ondangwa. First defendant is the plaintiff’s son.

[6] The 3rd defendant is the Registrar of Deeds in the Ministry of Lands and Resettlement with offices situated in Windhoek.

[7] The plaintiff is represented by Ms. Amupolo, while the 1st and 2nd defendants are represented by Mr. Aingura and Ms. Tjihero respectively.

[8] The 1st defendant disputed the claim and actively participated in the hearing. The 2nd defendant on the other hand filed a plea disputing the claim and implored on this court to dismiss such claim with costs. 2nd defendant through Ms. Tjihero participated in the pre-trial proceedings, filed a witness statement and attended to the trial. During the trial, the 2nd defendant acted passively by not partaking in the proceedings as he did not lead evidence or cross examine any witness, neither did he make submissions of any nature to assist the court in the determination of the issues in dispute. I will return to the 2nd defendant when I draw curtains of this judgment to a close.

Background

[9] During 2014, the plaintiff transferred ownership of Erf 331 Ondangwa, hereinafter referred to as the property, to the first defendant. According to the

particulars of claim the property was transferred based on the representations made by the first defendant to the plaintiff, which included:

9.1 That the plaintiff and the first defendant will form a business venture where they will obtain a loan from a financial institution in order to construct a block of flats;

9.2 That the property will be used as security for the loan;

9.3 That considering the young age of the first defendant, the property will be transferred to his names to enable him to obtain a loan from a financial institution;

9.4 That both the plaintiff and the first defendant will be responsible to repay the loan, after which the property will be transferred back to the names of the plaintiff.

[10] The plaintiff further stated that the aforesaid representations which led to the transfer of the property to the names of the first defendant were false. Plaintiff stated further that first defendant did not comply with any of the representations made. The first defendant subsequently sold the property to the second defendant. The plaintiff seek reunification with the property and to be restored in the position in which he was prior to the conclusion of the agreement with the first defendant.

[11] The plaintiff's claim is disputed. The first defendant pleaded that the plaintiff donated the property to him by virtue of being his son without conditions or reservations. First defendant was therefore authorized to deal with the property as he pleased including alienating it, on the premise of the said donation so the plea provided.

[12] The second defendant did no better than merely state in his plea that the property belongs to him.

Issues to be resolved

[13] The issues due for determination were set out in the pre-trial order dated 08 July 2019 as follows:

- 13.1 Whether the first defendant misrepresented to the plaintiff and if so, whether such misrepresentations induced the conclusion of the agreement;
- 13.2 Whether there was a valid donation by the plaintiff to the first defendant and if so whether this was subject to any reservations;
- 13.3 Whether or not the first defendant misrepresented facts to the plaintiff thereby inducing him to transfer the property into the name of the first defendant.

Evidence led and analysis

[14] In an endeavour to answer the above questions, it is now opportune to consider the relevant evidence led. It should be mentioned that none of the defendants led evidence therefore the matter has to be decided squarely on the evidence led by the plaintiff.

[15] The plaintiff was the sole witness for his case in attempt to prove his claim.

[16] He testified, *inter alia*, that: he was the registered owner of the property and in September 2014, the first defendant, represented to him that:

16.1 The plaintiff and the first defendant should form a business venture to build a block of flats on the property;

16.2 A loan will be obtained from a financial institution for the purpose of building flats and considering that the plaintiff was a pensioner the first defendant will apply for the loan and use the property as security for such loan;

16.3 The property had to be transferred to the names of the first defendant for the sole purpose of enabling him to secure the loan;

16.4 The first defendant will not alienate the property.

[17] The plaintiff testified further that the said representations induced him to conclude the agreement as he was of the view that the flats to be constructed will benefit his entire family.

[18] Astonishingly, so he claimed, in December 2016 he was served with court documents revealing that action was instituted against him for ejectment from the property. It was at this revelation that he found out that the first defendant sold the property to the second defendant for an amount of N\$390 000. He wrapped up his evidence with a statement that but for the misrepresentation made by the first defendant he would not have transferred the property to the first defendant. He therefore seeks restitution to his position prior to the said agreement.

[19] In cross examination by Mr Aingura the plaintiff conceded that there was no guarantee that upon transferring his property to the first defendant same would be transferred back to him as, per his own version, he was mindful that in the event of default in payment of the loan the financial institution could sell and dispose of the property. When probed further the plaintiff adjusted the goal posts of the agreement and stated that his agreement with the first defendant was further that upon obtaining a loan, first defendant would renovate the property, electrify and install running water on the said property. He further stated that the first defendant would then transfer the property back to the plaintiff while first defendant repays the loan. When the plaintiff was reminded that the statement that the first defendant will transfer the property back to the plaintiff while repaying the loan was not part of his witness statement nor his evidence in chief, the plaintiff appeared to be dumbfounded and stated that such statement should have formed part of his evidence in chief.

[20] During cross examination the plaintiff was extensively asked to state the benefits which he would have derived from his agreement with the first defendant. The plaintiff testified that they agreed to obtain a loan from a financial institution whereafter the first defendant will build flats where the plaintiff will not benefit. The first defendant will however renovate the property, electrify it and install running water on the property and this was the only benefit for the plaintiff so he said. The plaintiff drove this point home by emphasising that he had no other benefit for the transfer as the flats were to be constructed elsewhere and not on the property.

[21] In evidence in chief the plaintiff did not testify that it was part of the terms of the agreement that the first defendant will, upon obtaining a loan, renovate the property, electrify it and install running water. This matter was only brought to the fore in cross examination and when pressed for reasons why this was not part of the witness statement and evidence in chief, the plaintiff proffered no explanation.

[22] When further cross examined by Mr Aingura, the plaintiff conceded that the property was transferred to the first defendant on plaintiff's instructions without reservation or condition for the first defendant not to alienate the property.

[23] It was put to the plaintiff that he received money from the sale of the property by the first defendant to the second defendant and the plaintiff agreed and explained that he received about N\$30 000 from the first defendant through his bank account. Although it was a substantive amount, he came to learn about the exact amount after being told so by the first defendant. The Plaintiff testified that he questioned the first defendant about the sale of the property, whereby first defendant stated that he sold the property and deposited money in plaintiff's bank account. Plaintiff stated that the first defendant's explanation that he deposited money in the plaintiff's account came later after the said deposit.

[24] The plaintiff was further questioned as why he never returned back the money which was paid into his account, where he responded that he used the money and never returned it as he thought that it was part of his money.

[25] In her quest to convince the court that the evidence led sustained the plaintiff's claim, Ms Amupolo submitted that the evidence of the plaintiff that first defendant misrepresented to the plaintiff which misrepresentation induced the transfer of the property was not disputed. This submission cannot be correct. The first defendant disputed the allegations of misrepresentation in his plea and in cross examination of the plaintiff. To suggest that the misrepresentation was not disputed is misplaced to say the least.

[26] It is established law that he who allege bears the burden of proof of such allegation on a balance of probabilities in order to sustain his claim. It is therefore the duty of the claimant to satisfy the court that he should succeed in his claim.

[27] Notwithstanding the fact that the only evidence led is that of the plaintiff this court is still duty bound to make an assessment of the evidence in its totality in order to determine whether or not the plaintiff has discharged his duty and has become entitled to the relief sought so to speak. Although not on all fours, this court finds comfort in the aforesaid assessment exercise in the following passage quoted in *Ndabeni v Nandu*¹ and *Life Office of Namibia v Amakali*,² from *SFW v Martell Et Cie and Others*³, where it was stated:

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his with his own extra-curial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .'

[28] It follows from the above approach that in assessing the evidence the court should consider the merits and demerits of such evidence as well as the credibility and reliability of the witness. I now consider the evidence to determine if the plaintiff proved his claim and whether he is consequentially entitled to the relief claimed.

[29] It is important to record that it is common cause between the parties that the plaintiff transferred the property to the first defendant without any condition or

¹ *Ndabeni v Nandu* (I 343/2013) [2015] NAHCMD 110 (11 May 2015).

² *Life Office of Namibia v Amakali* (LCA78/2013) [2014] NALCMD 17 (17 April 2014).

³

reservation. There is a dispute on the reason for the transfer of the property. First defendant pleaded that the transfer resulted from a donation of the property by the plaintiff. Contrariwise the plaintiff testified that the transfer was only to enable the first defendant to obtain a loan from a financial institution to be used to build flats.

[30] There being no evidence led by the first defendant in support of his plea that the transfer resulted from a donation as aforesaid, this court has nothing before it to consider whether or not there was a donation. This is however not dispositive of the matter.

[31] The court must further consider the relief sought which is to cancel the agreement between the plaintiff and the first defendant and to restore the plaintiff in a position which he was prior to the agreement. The basis on which the plaintiff seeks cancellation of the agreement and restitution is that the first defendant misrepresented facts which induced the plaintiff to enter into the agreement and transferred the property to the first defendant as alluded to above.

[32] Corbett JA in *Trust Bank of Africa Ltd v Frysch*⁴ discussed the approach to be adopted by a court when it considers a claim by a party who challenges the validity of a contract on the basis of misrepresentation and stated the following:

‘A party who seeks to establish the defence that the contract which he entered into is voidable on the ground of misrepresentation must prove (the onus being upon him) (i) that a representation was made by the other party in order to induce him to enter into the contract; (ii) that the representation was material; (iii) that it was false in fact; and (iv) that he was induced to enter into the contract on the faith of the representation (see *Karoo and Eastern Board of Executors and Trust Co. v Farr and Others*, 1921 AD 413 at p. 415).’

[33] It is apparent from the above authority that the plaintiff bears the onus to prove on a balance of probabilities that the transfer of the property to the first defendant was induced by misrepresentation. Simply put the question is whether it can be said that the plaintiff proved that but for the misrepresentation made by the first defendant he would not have transferred the property to the first defendant. This matter therefore

⁴ 1977 (3) SA 562 (A).

stands or falls on the determination whether the first defendant misrepresented to the plaintiff and whether such misrepresentation induced the plaintiff to transfer the property.

[34] It is crucial to understand the facts that led to the transfer of the property. The plaintiff stated in his particulars of claim that the purpose of the transfer of the property to the first defendant was to enable the first defendant to obtain a loan which will be utilised to build flats on the property. In evidence in chief the plaintiff went further to state that the flats to be built on the property would benefit his family. Out of nowhere the plaintiff changed his version in cross examination and stated that his only benefit expected from the transfer of the property was for first defendant to renovate the property, electrify and install running water on the property. He also stated that the flats were to be at a different place and not on the property. This is a material self contradiction in the evidence of the plaintiff which goes to the purpose of the transfer.

[35] The plaintiff stated that the transfer of the property was for purposes of securing a loan and further that he knew that in the event of default of payment of the loan the financial institution could sell the property to recover its money. Nonetheless the plaintiff stated that he agreed with first defendant that upon securing a loan, first defendant will renovate the property, electrify it, install running and transfer the property back to the plaintiff while first defendant pays back the loan. This is contrary to his evidence in chief and his witness statement where he mentioned that they would both be responsible for the loan repayment.

[36] It should be mentioned further that it defeats logic why there would be an agreement to transfer the property back to the plaintiff while the loan is still being serviced and not fully paid. I find such averment improbable.

[37] During cross examination and only after it was put to him by Mr Aingura that he received part of the payment for the sale of the property by the first defendant did the plaintiff mention receiving the money for the first time. He conceded and stated that he only received N\$30 000 which he never paid back. The plaintiff claimed not to have been aware that this amount which was deposited in his bank account emanated from the sale of the property as he thought that it was just part of his funds in the bank

account. There was no dispute that the amount paid into the plaintiff's account was about N\$30 000 although the plaintiff said this figure was mentioned by the first defendant. I accept that the amount paid into the plaintiff's account was about N\$30 000. N\$30 000 is a substantial amount of money which the receiver thereof would reasonably ascertain its source.

[38] What is surprising with the plaintiff is that one searches the particulars of claim in order to locate where the N\$30 000 is mentioned in vain. The witness statement and the evidence in chief of the plaintiff is equally mute on any amount that the plaintiff received from the first defendant.

[39] When confronted that the version that the only benefit which the plaintiff was due to receive from the transfer of the property to the first defendant was to have the property renovated, electrified and installed with running water is not part of his witness statement, the plaintiff expressed surprise as such version should have been in statement according to him. The said version was not even part of his evidence in chief. Before he was questioned his evidence was that he would benefit from the flats to be built on the property. These changes in his version demonstrates further self contradiction in the evidence of the plaintiff.

[40] In any event the plaintiff testified that he transferred the property to the first defendant without reservations or conditions. It follows as a matter of consequence that there were no restrictions on how or what the first defendant could do with the property.

Conclusion

[41] In the foregoing I hold the view that the version of the plaintiff is highly improbable, unreliable and is marred by self contradictions. The said improbabilities and self contradictions pokes material holes in the evidence of the plaintiff. In view of the conclusions set out hereinabove, I find that the plaintiff failed to establish on a balance of probabilities that the first defendant misrepresented facts to him which induced the conclusion of the agreement. The plaintiff further failed to prove that the

transfer of the property to the first defendant was subject to any condition or reservation to the extent that the first defendant was precluded from alienating the property.

Costs

[42] Ordinarily, costs should follow the result. In *casu*, I am of the respective view that the strict application of this principle would severely paralyze the plaintiff with costs. I state, however without fear of contradiction that the 1st defendant never prayed for the dismissal of the plaintiff's claim with costs. In the exercise of my discretion, I have formed a considered view not to grant *manu* to the 1st defendant in absentia of his prayer for same. Notwithstanding, I hold the view that taking into account the circumstances of this matter in totality the plaintiff should not be crippled as a result of an adverse costs order.

[43] The second defendant on the other hand prayed for the dismissal of the plaintiff's claim with costs. The 2nd defendant however remained inactive particularly during trial to the extent that it could be said that he was non-existent during the hearing.

[44] In the foregoing, I have in the exercise of my discretion decided not to award costs to the defendants.

[45] Wherefore it is ordered that:

1. The plaintiff's claim is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalised.

APPEARANCES:

PLAINTIFF: M Amupolo
Of JacobsAmupolo Lawyers, Ongwediva

1ST DEFENDANT: S Aingura
Of Aingura Attorneys, Oshakati

2ND DEFENDANT: C Tjihero
Of Dr Weder Kauta & Hoveka Inc., Ongwediva

3RD DEFENDANT: No appearance