

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: HC-NLD-CIV-MOT-GEN-

2022/00017

In the matter between:

**MARIANA JOHANNES**  
**SIMON WATSON SHITYENI**

**1<sup>ST</sup> APPLICANT**  
**2<sup>ND</sup> APPLICANT**

and

**PETRINA JOHANNES**

**RESPONDENT**

**Neutral citation:** *Johannes v Johannes* (HC-NLD-CIV-MOT-GEN-2022/00017)  
[2024] NAHCNLD 44 (22 April 2024)

**Coram:** MUNSU J  
**Heard:** 15 November 2023  
**Delivered:** 19 April 2024  
**Reasons:** 22 April 2024

**Flynote:** Applications and motions – Application to stop the respondent from building on the first applicant's unit.

**Summary:** The second applicant and the respondent entered into an agreement to construct two joint units on a family property. Halfway through the construction project, disagreements ensued. The second applicant decided to give his unit to his mother, the first applicant. The respondent terminated the agreement because she did not want to build with the first applicant. In spite of the first applicant's attempts to stop her, the respondent took over the first applicant's unit and continued with the construction of both units. The first applicant brought this application to stop the respondent from continuing with the construction works she was carrying out on her unit.

*Held*, that the respondent failed to plea a crucial aspect of her case, being the circumstances she claimed entitled her to terminate the agreement.

*Held*, that the applicants' version on the reason for the cancellation of the agreement by the respondent was more plausible than that of the respondent. The respondent's version could simply be rejected for lacking sufficient particulars.

*Held*, that the court could not find that the respondent was entitled to terminate the agreement.

*Held*, that the respondent did not challenge the first applicant's standing to bring the application. Similarly, the respondent did not allege that the second applicant could not in law pass his entitlement in the unit to the first applicant.

*Held*, that there was no basis for the respondent's claim over the entire structure (both units).

*Held*, that, at best, the respondent would have been expected to complete her unit without taking over the first applicant's unit.

*Held*, that the respondent's occupation of the first applicant's unit was not justified, accordingly, the relief sought must succeed.

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### ORDER

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1. The Respondent is ordered to cease all construction works being carried out on the First Applicant's Unit as more fully described in the building plan.
2. The Respondent and any other person(s) occupying the First Applicant's Unit are ordered to vacate and remove all movable items from the said Unit.
3. The Respondent and any other person(s) occupying the First Applicant's Unit are ordered to refrain from hindering the First Applicant's access to the said Unit.
4. The First Applicant is granted unhindered access to the Unit.
5. There is no order as to costs.
6. The matter is removed from the roll and is regarded as finalised.

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### JUDGMENT

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MUNSU J

#### Introduction

[1] This is an opposed motion involving siblings who are at odds over a dwelling under construction at their late father's residence. The late Mr Johannes Namundjembo (Mr Namundjembo) is the father of the first applicant and the respondent. In the papers filed, the first applicant refers to the respondent as her 'half-sister'. The second applicant is a biological son of the first applicant.

[2] Mr Namundjembo was the owner of an immovable property (the property) situated at Oshakati. Sadly, he passed away on 03 June 2019 and was survived by his wife and nine children.

#### The application

[3] In her founding affidavit, the first applicant states that during January 2019, while Mr Namundjembo was still alive, her son, the second applicant informed her that he intended to build a flat on the property. She advised him to approach Mr Namundjembo for permission and he obliged.

[4] The first applicant avers that the respondent also had plans to build a flat on the property, however, there was not sufficient space for the construction of two structures located separately within the property. As a result, the second applicant and the respondent had no choice but to build on one location of the property.

[5] The first applicant goes on to say that the second applicant and the respondent came up with a building plan that consists of a structure with two sides, one meant for the second applicant and the other for the respondent. She continues by saying that the two agreed to equally share the costs for the construction.

[6] She further states that the two commenced with the construction, however, soon after the passing of Mr Namundjembo in June 2019, disagreements started between her and the respondent.

[7] The first applicant adds that during July 2020, a family meeting took place in Ongwediva after the respondent had indicated that she was no longer interested in carrying out the agreement. She continues by saying that, during the meeting, the respondent stated that she was no longer going to build with the second applicant. The first applicant further states that the respondent was advised during the meeting not to allow misunderstandings separate them because they were family, and that she would eventually agree to continue with the building.

[8] In addition, the first applicant asserts that, subsequent thereto, the second applicant offered her 'his side of the building' as he had by then secured a plot in the area of Ondangwa. She claims that the second applicant stated that he would continue with the building and once it was completed, that the first applicant would then occupy his side of the building as her own.

[9] Furthermore, the first applicant avers that one Sunday morning, she was called to a family meeting where the respondent stated that she wanted to reimburse the second applicant the amount of N\$ 10 800 which he spent on the construction of the flat, but that she did not know how to go about it because the second applicant had warned her not to phone him during a previous altercation. The first applicant goes on to say that, although it was proposed during the meeting that she receive the money, she indicated that she did not want the money as she intended to give the room to her sister Saima Johannes, who by then was sleeping in a shack. According to the first applicant, the meeting could not reach consensus and turned into chaos.

[10] Additionally, the first applicant states that while still in the meeting, it was decided that the second applicant be called for his input. She claims that the second applicant indicated that he had given his side of the building to her (first applicant).

[11] The first applicant claims that one day as she came from work, she noticed that the workers were building on her side of the building. She claims that she told them not to build on her side of the building and to only build on the respondent's side. She continues, saying that they declined and informed her that the respondent had given them the instruction. She further states that she went to the police station where she was advised to engage the services of a legal practitioner.

[12] The first applicant further states that on her instructions, her legal practitioner wrote a letter of demand to the respondent demanding that all construction works on her side of the building cease. She avers that the respondent replied through a legal practitioner who pointed out that the agreement between the second applicant and the respondent had been terminated on account of the second applicant's support of the

first applicant's claim over the property. Additionally, it was pointed out that, while the respondent had accepted the second applicant to 'join' in the construction of the building, they had not agreed to share the costs thereof. The first applicant states further that the respondent was of the view that the second applicant should be refunded the amount he spent on the building.

[13] The first applicant states that her legal practitioner responded to the aforesaid letter and pointed out that the agreement could not be cancelled. However, in response, the respondent stated that the construction would not be halted. Consequently, the first applicant claims that she has been dispossessed of her unit by the respondent and asks for the relief interdicting the respondent from going ahead with the construction on her side of the building.

[14] The second applicant filed a confirmatory affidavit, wherein he reiterates the averments by the first applicant.

#### The opposition

[15] The respondent states in her answering affidavit that, she was approached by the second applicant who requested that they build a joint structure on the property. She avers that she then approached Mr Namundjembo, informing him about the second applicant's request, to which Mr Namundjembo replied that the second applicant had already been allocated his own space within the property for purposes of constructing his structure next to that of the first applicant. She adds that upon the persistency of the second applicant, she eventually agreed and convinced Mr Namundjembo to allow the second applicant to build with her.

[16] Furthermore, the respondent states that she agreed with the second applicant that the latter could contribute whatever he could towards the completion of the building as most of the materials were already bought. She claims that there was no agreement to share the costs of the construction. According to the respondent, the second applicant contributed a total amount of N\$ 10 800 towards the building.

[17] In addition, the respondent acknowledges that she informed family members at a meeting held in Ongwediva that she did not want to continue with the agreement because of the second applicant's support of the first applicant's claims to the property. The respondent further states that she however, reluctantly followed the advice to carry with the agreement.

[18] The respondent asserts that, subsequent to the meeting in Ongwediva, the second applicant informed her that he had acquired a plot of his own at Ondangwa and that he was giving his unit to the first applicant. She claims that she informed the second applicant that she was not willing to share the building with the first applicant, who already had a structure on the property, and that she informed him that she would proceed to finalise the entire structure on her own.

[19] The respondent acknowledges that a meeting took place where she offered to refund the second applicant the amount of N\$ 10 800 that he contributed towards the building. She further attests that during the meeting, it was decided by the family that the best course of action was for her to proceed with the building on her own as she was not amenable to sharing the building with the first applicant. She claims that the first applicant also indicated that she wasn't interested in sharing the structure with her and wished to give the unit to their sister Saima Johannes.

[20] The respondent acknowledges that when the second applicant was called about the refund, he indicated that same should be addressed with the first applicant as he had given his part of the structure to her and did not wish to get involved any further.

[21] The respondent asserts that the cancellation of the agreement with the second applicant took place when the second applicant initially informed her that he acquired a plot in Ondangwa and wished to donate his part of the building to the first applicant.

[22] Furthermore, she claims that the second applicant was informed telephonically of the decision for her to proceed with building on her own. She denied the assertion by

the first applicant that there was no space on the premises for her and the second applicant to construct separate structures.

### The issues

[23] The issues for determination are:

- (a) Whether the respondent had a right to terminate the agreement between the parties.
- (b) Whether the applicants have any entitlement to any of the units, and
- (c) Whether the respondent is in unlawful occupation of the unit belonging to the first and or second applicant.

### Submissions by the parties

[24] Mr Aingura for the applicants submitted that the respondent's conduct in the matter amounts to a repudiation because the reason provided as the basis for cancelling the agreement is not valid in law. Counsel argued that the second applicant did not commit any breach neither was a cancellation clause agreed upon by the parties entitling the respondent to cancel the agreement. He went on to say that it is clear that at no stage did the second applicant elect to accept the repudiation.

[25] Mr Aingura further contended that the applicants are entitled to an order for specific performance. He argued that the object of the agreement was to enable the parties to finalise the construction of the structure so that each could occupy their side of the structure. However, the first applicant, so it was submitted, does not currently have access to her unit because of the respondent's conduct.

[26] Ms Ogundiran for the respondent submitted that, from the prayers sought by the applicants, it is evident that they seek an eviction order as well as an interdict. She argued that in order to eject a respondent from immovable property, an applicant needs to allege that he or she is the owner of the immovable property and that the respondent is in occupation of the immovable property. Counsel further contended that the



applicants failed to establish a cause of action nor make the necessary allegations to sustain the relief sought.

[27] It was counsel's submission that it was not alleged that the respondent agreed to jointly occupy the structure with the first applicant, as such, the respondent cannot be expected to accept the personal arrangement between the applicants as binding on her. It was further argued that the first applicant cannot on the one hand claim that the respondent is not entitled to unilaterally cancel the agreement with the second applicant whilst in the same vein, wishing to hold the respondent bound by an agreement that she was not privy to. Additionally, Ms Ogundiran contended that a party cannot be forced to keep to the terms of an agreement that no longer reflects his or her intention. Counsel contended that the respondent was entitled to cancel the agreement, and it is for the second applicant to claim specific performance or damages.

### Discussion

[28] It is trite that in motion proceedings, the affidavits are both the pleadings and the evidence, and that the parties must make out their respective cases on affidavit. I am equally mindful of the approach to resolving factual disputes in application proceedings<sup>1</sup>.

[29] It is common cause that the two joint units were being built on the property that belong to the late Mr Namundjembo, whose estate is yet to be finalised. None of the parties before court was able to demonstrate a better title to the property than the other. In fact, their presence on the property is on the basis of family ties with the late Mr Namundjembo.

[30] The parties agree that the second applicant and the respondent entered into an agreement to construct two joint units each consisting of a sleeping room and a bathroom. They began constructing the units, however, disagreements ensued shortly after the passing of Mr Namundjembo. It is common cause that the respondent terminated the agreement. In deciding the issues, it is essential to have regard to the agreement and the evidence presented.

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<sup>1</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *Bahlsen v Nederlof and Another* 2006 (2) NR 416 at 424E-G, para 31.

[31] According to the applicants, the respondent cancelled the agreement because the second applicant backed the first applicant's claim that the late Mr Namundjembo had donated the property to her. As mentioned earlier, the respondent acknowledged that she informed the meeting at Ongwediva that she did not want to continue with the agreement because of the second applicant's support of the first applicant. She went on to say that on advice, she reluctantly agreed to continue with the agreement. She claims that after the Ongwediva meeting, the second applicant informed her that he had acquired a plot of his own at Ondangwa and that he was giving his unit to the first applicant. She further claims that she informed the second applicant that she would proceed to finalise the entire structure on her own as she was not willing to share the building with the first applicant.

[32] The respondent did not plead how the second applicant informed her about the plot in Ondangwa and where it happened. She also does not say how she related her change of position. This is crucial because it is the basis on which she claims to have unilaterally cancelled the agreement. It is further important because her sequence of events on this score differs from that of the applicants.

[33] The applicants' version was that the second applicant travelled to Oshakati during the month of July 2020. According to the second applicant, he telephoned the respondent requesting for the constructor's number in order to proceed with the construction. But, the respondent informed him that there was a need for a meeting as there were changes. He states that the respondent was in Outapi at the time, and he had to send her money for transport. Upon her arrival in Oshakati, the family proceeded to Adolofi in Ongwediva where the meeting was held. It was at that meeting where respondent indicated her change of mind.

[34] The second applicant went on to state that one Mr Shikwaya was the one to encouraged unity in the family, which yielded temporary reconciliation. The second applicant further stated that when he returned back to Walvis Bay, he received a phone call from the respondent who informed him that she no longer want to continue building with him and that she would refund him his contribution to the construction. According to

the second applicant, he informed her that he was tired of 'her drama' and requested that she addresses a letter to him to that effect. The second applicant further stated that he informed the respondent that he had given his unit to the first applicant and that the latter would henceforth finalise the building. Similarly, the respondent insisted that she would not build with the first applicant. The second applicant went on to say that:

'...it appears from the applicant that she held the view that she is the owner of the building and/or the entire Erf, with the power to conclude agreements and cancel them at her leisure.'

[35] Lastly, the second applicant stated that one Sunday, he received a phone call from the man who chaired the last family meeting, informing him about the refund. The second applicant attached to his confirmatory affidavit the text messages between him and the said man from Uukwambi Traditional Authority. The above is corroborated by the first applicant.

[36] In her answering affidavit, the respondent states that the family resolved that it was best for her to finish the building on her own. She stated that:

'...Mr Leo Shinime informed me to continue building my structure, the decision was made unanimously by all in attendance after the applicants had distanced themselves from the building and had refused to accept the refund for 2<sup>nd</sup> applicant's contribution.'

[37] There is no confirmation of the above. Mr Shinime, whom she claims to have authorised her to continue with the building appears to distance himself from the issue when he was confronted by the second applicant (through the text messages presented). It is also not clear whether the decision to terminate the agreement was her own or based on the alleged family resolution.

[38] The applicants' refusal to accept a refund is an indication of the non-acceptance of the respondent's termination of the agreement. It means that they never gave up the unit to the respondent. The applicants' version on the reason for the cancellation of the agreement by the respondent is more plausible than that of the respondent. As stated, the respondent failed to plea a crucial aspect of her case, being the circumstances she

claimed entitled her to terminate the agreement. There were no particulars regarding where and how the second applicant informed her about his newly acquired piece of land. To the extent that her version is at variance with that of the applicants, it can simply be rejected for lacking sufficient particulars. Consequently, I am unable to find that the respondent had a right to terminate the agreement.

[39] The respondent did not challenge the first applicant's standing to bring this application. Similarly, the respondent did not allege that the second applicant could not in law pass his entitlement in the unit to the first applicant. The only reason advanced by the respondent for her objection is that she was unaware of the said arrangement between the first and the second applicant and secondly, she did not prefer to build with the first applicant.

[40] As argued by counsel for the applicants, the agreement was merely to construct the joint units and not conditional to the second applicant being the occupant of the one unit. I attach considerable weight to this argument especially when the property is at present for the family. It seems to me that none of the children of the late Mr Namundjembo can claim exclusive occupation of the property, otherwise they may as well find their own piece of land. Allowing the respondent to take over the applicant's unit would mean that she would occupy both units, thereby exercising unjustified dominance over the family property. The first applicant made it clear that her intention was to give the unit to their sister Saima who did not have decent accommodation. The respondent acknowledges this fact in her papers but says nothing further.

[41] There is no basis for the respondent's claim over the entire structure. This is in spite of her assertion that she had earlier intended to build with her brother, who unfortunately passed away. Because of that she attempted to create an impression that the second applicant was not an equal contracting party to their agreement as he only joined her. It matters not whether she was the initiator of the idea to construct the units. Similarly, it is neither here nor there whether she communicated her intention to build, earlier than the second applicant did. It was not part of their agreement that such would bequeath her with exclusive rights over the structure.

[42] The respondent denies that the reason the second applicant had to build a joint structure with her was because of limited space within the premises. She however, fails to disclose the reason. While the respondent could be heard to argue that she did not want to continue with the agreement after the second respondent withdrew, she would only be expected to complete her unit and not take over the other unit given to the first applicant. The relief sought is to stop her from doing that, and it is my considered view that she failed to justify her actions. Consequently, her occupation of the unit given to the first applicant is not justified and the relief sought must succeed.

### Costs

[43] The first applicant did not ask for costs in the event of being successful. She did not do so even when this issue was raised by the respondent. Although there is authority to the effect that a successful party can still be awarded costs even if a prayer for costs is not included, particularly where the matter was opposed and the other party appeared and contested the suit.<sup>2</sup> However, I find the circumstances of this matter different as the first applicant was so silent on the issue, such that to grant an order for costs would be to go against her wishes. As such, there shall be no order as to costs.

### The order:

[44] For these reasons, I make the following order:

1. The Respondent is ordered to cease all construction works being carried out on the First Applicant's Unit as more fully described in the building plan.
2. The Respondent and any other person(s) occupying the First Applicant's Unit are ordered to vacate and remove all movable items from the said Unit.
3. The Respondent and any other person(s) occupying the First Applicant's Unit are ordered to refrain from hindering the First Applicant's access to the said Unit.
4. The First Applicant is granted unhindered access to the Unit.
5. There is no order as to costs.

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<sup>2</sup> See *Indongo Auto (Pty) Ltd Trading as Indongo Toyota v Ipinge* (HC-MD-CIV-ACT-OTH-2023/05317) [2024] NAHCMD 163 (10 April 2024).

6. The matter is removed from the roll and is regarded as finalised.

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D C MUNSU  
JUDGE

APPEARANCES

APPLICANTS:

S Aingura  
Of Aingura Attorneys  
Oshakati

RESPONDENT:

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