



**REPORTABLE**

CASE NO: SA 11/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between

**FRIEDA EINDE SSKO NELAGO NALUNO**

**APPELLANT**

and

**LAYAMBEKWA LINOVENE NANGHALA**

**RESPONDENT**

**CORAM:** SHIVUTE CJ, MAINGA JA and HOFF JA

**Heard:** 7 June 2023

**Delivered:** 10 October 2023

**Summary:** The respondent had instituted an action for the eviction of the appellant from a house she bought from the appellant's husband without the appellant's consent or knowledge. The appellant in turn instituted a counterclaim against the respondent for the return of the house to her, alleging that the transfer of the property into the respondent's name was done fraudulently through the falsification of the documents effecting transfer. The High Court initially granted

absolution from the instance at the end of the respondent's case, but changed that order without indicating the legal basis for doing so and substituted it for an order dismissing the application for absolution. At the end of the trial, the court granted an order evicting the appellant from the property and dismissing her counterclaim. The appeal lies against the order and judgment of the High Court.

*Held*, that the court a quo erred in rescinding the order granting absolution without a reason grounded in law.

*Held*, that it was common cause that the property in question was registered jointly in the names of the appellant and her husband.

*Held*, that it was also clear that the appellant had no intention to pass ownership of the property to the respondent. As such there was a defect in the real agreement, which defect precluded a valid transfer of ownership.

*Held*, that the appellant's counterclaim should have succeeded.

*Held*, that as the transfer of the property was not done lawfully, the deed of sale entered into between the appellant's husband and the respondent in terms of which the appellant's husband purported to sell the property to the respondent be declared null and void.

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## APPEAL JUDGMENT

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SHIVUTE CJ (MAINGA JA and HOFF JA concurring):

### Introduction

[1] This appeal originates from a trial in the High Court concerning the sale of a jointly-owned family home by the appellant's husband without the appellant's

knowledge and consent. The appellant, a resident of Ondangwa Town, was minding her business when a stranger arrived at her house clutching a set of her house keys. The stranger in turn was astonished to find someone in what she considered to be her newly acquired immovable property, the keys to which had moments previously been given to her by its seller. Unbeknown to the appellant, the family house had been secretly sold to the stranger by her husband. Also unbeknown to the stranger, the seller was the appellant's husband whose family was still living on the property. The couple was estranged at the time and the husband was not residing in the house. The stranger happened to be the respondent. The facts that the house was co-owned by the couple and that the seller's family occupied it at the time of its sale were not disclosed to the buyer. This real-life drama played itself out against the following background.

#### Background

[2] The respondent, a teacher and Head of Department at a school in the northern part of the country, wanted to buy a residential property of her own in Ondangwa. A friend of hers introduced the respondent to an estate agent who the respondent later approached with the instruction to find a house to purchase. The respondent was subsequently called to the estate agent's offices to sign a deed of sale for the immovable property which she subsequently submitted, together with a loan application to finance the purchase, to a commercial bank. The loan application was approved and a second continuing covering bond registered over the property in favour of the bank.

[3] On 25 February 2011, the respondent was called to the offices of a firm of legal practitioners appointed to attend to the transfer of the immovable property, where she was told to sign certain documents as a house had been found for her. The documents in question had already been signed by the seller and the conveyancer. Two months later, the respondent was called to the same lawyers' offices where she was given the deed of transfer of the property and was directed to the seller's workplace to collect the keys to the house, which she duly did.

[4] Obviously elated and keen to see her latest acquisition, the respondent proceeded to her newly-acquired property only to be confronted with the reality that the house was still occupied by the seller's family. Upon being told by the buyer to vacate the house, the appellant understandably refused, arguing that as an owner of the property, she had neither sold the house nor had she given anyone authority to sell it nor had she benefitted in any way from its sale. The respondent sought police intervention to evict the appellant, but was correctly advised to seek an eviction order from a court of law.

[5] To resolve the impasse, the respondent and the appellant's husband later entered into an agreement in terms of which the husband agreed to buy the house back from the respondent. Unfortunately, the husband could not secure funding for the purchase price and so the agreement fell through. The respondent then instituted eviction proceedings in the Northern Local Division of the High Court against the appellant and her husband, Mr Lamek Naluno. The appellant entered appearance to defend the action but Mr Naluno evidently ignored the summons and took no part in the ensuing trial.

[6] The appellant raised a defence that she and Mr Naluno were the registered owners, alternatively bona fide possessors of the property and that she did not in any manner authorise the registration of the property in the respondent's name. The appellant had remained in possession of the immovable property by the date of trial and paid all municipal bills. The bank was not cited as a party in the action in so far as it may have had an interest in the relief sought or the outcome of the proceedings.

#### Counterclaim

[7] The appellant in turn filed a counterclaim against the respondent, pleading that the transfer of the property into the respondent's name was done fraudulently and unlawfully through the falsification of the documents necessary to effect transfer. The appellant therefore sought the following orders: (a) a declaratory relief that the deed of sale entered into between the respondent and Mr Naluno was null and void; (b) a direction that the respondent signs all documents necessary to have the property registered in the appellant's name within seven days from the date of the order, failing which the Deputy Sheriff was to be authorised to sign the said documents on behalf of the respondent; and (c) costs of suit on an attorney and client scale. The Registrar of Deeds was cited and joined as a party to the proceedings in the counterclaim but did not oppose it.

[8] The respondent seemingly did not oppose the counterclaim as no plea thereto was filed. The appellant then applied for a default judgment on the counterclaim, but no ruling thereto was made. This is one of the many

unsatisfactory aspects of the conduct of the trial, which in some respects was conducted along the lines of a criminal trial. In a word, the trial was a comedy of errors. An application for leave to file the respondent's plea to the counterclaim was brought midstream, a year after the counterclaim was instituted. It was stated in the application that the respondent's legal practitioner found out late in the proceedings that the plea had not been filed. The application for leave to file the plea was refused, but inexplicably the respondent's legal practitioner was given a free reign to cross-examine the appellant on her evidence on the counterclaim and make submissions thereon at the end of the trial.

#### Trial proceedings

##### *Evidence*

[9] Much of the evidence on both sides was to a large extent common cause or at any rate could not be disputed. The respondent and the estate agent who facilitated the sale testified that they were under the impression that the property belonged to Mr Naluno alone. The reality was that the house was jointly registered in the names of the married couple whose marriage, according to the title deed, did not have the legal consequences of a marriage in community of property by virtue of the provisions of Proclamation 15 of 1928. Mr Naluno approached the estate agent offering the house for sale. The estate agent in turn found the buyer.

[10] The estate agent testified that she had known Mr Naluno before the sale of the property but did not know that he was married to the appellant. When they met to discuss the sale of the property, Mr Naluno showed the estate agent his home loan bank statement that showed that he alone paid the loan. From this bank

statement, the agent assumed that Mr Naluno was the sole owner of the property. She said she did not ask for the deed of transfer of the house Mr Naluno offered for sale as such document was ordinarily handled only by conveyancers and banks.

[11] The appellant, on the other hand, testified that the estate agent knew that the appellant was Mr Naluno's wife as the agent had secured a contractor who built the house in question for the couple in 2008. The agent had allegedly attended to the appellant's workplace and made her sign a document, collected copies of her identity document as well as her marriage certificate. That was when they had acquired the land in question and were looking for a contractor to build a house thereon. This aspect of the evidence was unfortunately not dealt with at all in the court a quo's judgment and therefore no credibility finding was made in relation to the contrasting evidence on that aspect. As previously noted, the appellant testified that she did not consent to the sale of the house nor was she aware that it had been sold prior to seeing the respondent at the house.

[12] The evidence further shows that on 8 April 2011, a Deed of Transfer T1511/2011, was executed before the Registrar of Deeds registering Erf No. 1085, Ondangwa (Extension No. 3) in the name of the respondent. This is the erf on which the house in question was built. On the face of it, the conveyancer who executed the deed was authorised by a power of attorney, dated 25 February 2011, allegedly granted to him by the appellant and her husband. The appellant, on the other hand, testified that she never signed any document in relation to the sale and transfer of the property. The respondent too initially confirmed that the

appellant did not sign any document relating thereto, only to change midstream and testify that the appellant in fact signed a document.

[13] However, she promptly corrected herself by stating that the document she referred to was a deed of sale the appellant signed when she and her husband tried to buy the property back from her. It was thus uncontested that the appellant never signed any document effecting the transfer of her property to the respondent. Therefore, a fairly strong inference can be made that the transfer of the property was Mr Naluno's unilateral decision, which appears to have been done fraudulently through the falsification of documentation necessary to effect transfer, at the very least on his part.

*Absolution from the instance*

[14] At the end of the respondent's case on 25 October 2019, the appellant brought an application from the Bar for absolution from the instance. The court reserved judgment and on 8 November 2019, absolution was granted and the matter postponed to 14 November 2019 for a status hearing to enable the appellant to prosecute her counterclaim. However, on 13 November 2019, the court issued a 'variation order notice' in terms of which the parties were directed 'to attend the variation order' to be held on 15 November 2019. On that date, however, the parties were presented with something entirely different: a reasoned ruling in which the order granting absolution was rescinded and substituted for an order dismissing the application. The parties were seemingly not heard before this decision was made. The text of the ruling did not state in terms of which rule of the High Court Rules the order granting absolution was rescinded. It was only in the



summary of the ruling that it was mentioned that the order was rescinded 'in terms of rule 103'.

[15] In its written ruling, the court recalled that it had granted the application for absolution on 8 November 2019. It stated that 'after a thorough look into this matter, the court convinced itself otherwise for the reasons [stated] below'. It then proceeded to state that the order was rescinded because of the existence of a deed of transfer of the property into the respondent's name.

[16] The court further found that the appellant did not dispute the transfer of the property to the respondent. What was disputed, so the court reasoned, was the process leading to the transfer. The court stated furthermore that the alleged illegality of the transfer was a matter to be dealt with in evidence. The matter was then postponed for the continuation of the hearing.

#### *Reasoning on the merits*

[17] After the trial, the court a quo found for the respondent. Its reasoning may be summarised as follows: The respondent did nothing wrong in the acquisition of the property. Although the appellant testified that she jointly owned the property with her husband, she did not produce any 'agreement to establish any such co-ownership' and the husband was not called to testify about the existence of any such agreement, what its terms were and whether such terms, if any, precluded the husband from alienating the property.

[18] The court reasoned furthermore, rather cryptically, that assuming that the husband sold the property through falsification of documents, such conduct concerned 'breach of co-ownership agreement' and did not concern the validity of the purchase agreement. By signing the deed of sale, 'presumably on behalf' of the appellant, the husband acted in his capacity as co-owner. There was no evidence of fraudulent conduct on the respondent's part. As the 'rightful owner' of the property, the respondent was entitled to the order of ejectment as prayed for. The order ejecting the appellant and her husband from the property was accordingly granted. The appellant was ordered to pay the respondent's costs despite the fact that she was legally aided. Her counterclaim was dismissed.

#### Non-participation of the respondent in proceedings in this Court

[19] The respondent did not oppose the appeal, but a few days prior to the date of hearing she addressed a letter to this Court's registrar, informing the registrar that she had applied for legal aid and that she was awaiting a response. She also turned up at court and requested for more time to obtain legal representation. The matter was then postponed to enable her to obtain legal representation. On the date of the postponement, the court advised the respondent that she should make alternative private arrangements for legal representation as the Director of Legal Aid may well take a view – in light of her employment status particularly her senior position in the education sector – that she may not qualify for legal aid. The respondent was also told to apprise the registrar of the outcome of her application for legal aid and her own position well before the date to which the matter was postponed for hearing, which she never did. Despite several reminders – in view of the importance of the appeal to her – to personally appear before court to explain

her position, the respondent never turned up. The appeal thus proceeded without the benefit of argument on her behalf.

### Determination

#### *Issues for determination*

[20] Two broad and interrelated issues are raised on appeal. The first is whether the court a quo erred in rescinding the absolution order it granted on 8 November 2019. The second is whether the court a quo was correct in granting the order ejecting the appellant from the property and dismissing her counterclaim. These issues are discussed and decided in turn.

#### *Rescission of the order*

[21] Rule 103 of the High Court Rules provides for a variation and rescission of a court order or judgment in the following terms:

#### **‘Variation and rescission of order or judgment generally**

103 (1) In addition to the powers it may have, the court may of its own initiative or on the application of any party affected brought within a reasonable time, rescind or vary any order or judgment –

- (a) erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) in respect of interest or costs granted without being argued;
- (c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or
- (d) an order granted as a result of a mistake common to the parties.

(2) . . .

(3) The court may not make an order rescinding or varying an order or judgment unless it is satisfied that all the parties whose interests may be affected have notice of the proposed order.'

[22] In this instance, the court gave the parties notice of a variation order. In court, the parties were presented with a rescission order. Additional to the parties being given a notice of an order different from the one ultimately given, even more fundamentally concerning an issue is that the order so given does not state in which sub-rule it was made. On the face of it, the order granting absolution in this case does not meet any of the criteria for rescission set out in rule 103(1): It was not erroneously sought or erroneously granted; it was not in respect of interest or costs granted without being argued; there was no ambiguity or patent error in it, and it certainly did not appear to have been granted by mistake either. The application was fully argued and the court a quo reserved its ruling and gave itself some 10 court days to reflect on it.

[23] The order initially granted appears to have met the three well-known attributes of a final or appealable order. As such, it was not open to the court a quo to rescind it in the absence of a valid basis. It will be recalled that the court a quo justified the rescission of the order on the basis that it 'thoroughly looked into the matter and convinced itself otherwise'. This is hardly a justification for rescinding an otherwise unassailable order. The court a quo's decision to grant absolution had the effect of dismissing the respondent's claim, leaving the appellant at large to prosecute her unopposed counterclaim and would have entitled her to move for

an order granting a default judgment. The court a quo therefore erred in rescinding its ruling without specifying a reason anchored in law. For all these reasons, the decision rescinding the order granting absolution has to be set aside.

*Order of ejectment and dismissal of the counterclaim*

[24] There is an additional basis upon which the appeal should succeed. It was common cause that the property in question was jointly registered in the names of the appellant and her husband, Mr Naluno. Section 1(1) of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 provides as follows:

‘(1) No contract for the sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties or by their agents acting on their written authority.’

[25] As earlier noted, the sale and transfer of the property was not authorised by the appellant as she neither signed any document effecting transfer of the property nor had she authorised any agent to do so on her behalf. There is thus no evidence, contrary to the finding by the court a quo, that Mr Naluno had authority to alienate the property without the consent of the appellant and that he had done so in terms of a ‘co-ownership agreement’, whatever that may mean.

[26] As discussed by Muller J in *Oshakati Tower*,<sup>1</sup> the requirements for passing ownership are two-fold. First, there must be an ‘underlying agreement’, which in

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<sup>1</sup> *Oshakati Tower (Pty) Ltd v Executive Properties CC & others* 2009 (1) NR 232 (HC).

the case of immovable property is perfected by the registration of the transfer in the Deeds Office. Secondly, there must be a 'real agreement', which connotes an intention on the part of the transferor to transfer ownership, coupled with the corresponding intention on the part of the transferee, to become the owner of the property. Whilst a defect in the underlying agreement does not prevent a valid transfer,<sup>2</sup> ownership will not pass if there is a defect in the real agreement. The owner must have the intention to pass ownership without which ownership would simply not pass.<sup>3</sup>

[27] It is clear from the Deed of Transfer T 5188/2007 that the property in question was registered in the joint names of the appellant and Mr Naluno. As earlier mentioned, the respondent and the estate agent were under the impression that the property was registered in Mr Naluno's name alone. That assumption was clearly wrong. The appellant testified that she had no intention to alienate the property, a claim borne out by her conduct when called upon to vacate the house. As the appellant had no intention to pass ownership of the immovable property to the respondent nor had she manifested any conduct evincing such intention, it is self-evident that Mr Naluno alone could not validly pass ownership. The power of attorney allegedly given to the conveyancer by the appellant in all probabilities was not signed by her.

[28] The court a quo erred in finding that Mr Naluno had authority, *qua* co-owner, to transfer the property to the respondent also on behalf of the appellant.

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<sup>2</sup> Para 26.

<sup>3</sup> *Ibid.*

No authority was cited for this startling proposition. The finding that the transfer by him was done in accordance with a 'co-ownership agreement' is also puzzling. It was not the appellant's case that there was such an agreement in existence. Co-ownership was not dependent on an agreement as the court a quo appears to have suggested. Co-ownership was apparent from Deed of Transfer T5188/2007 that was produced in evidence. It follows that the sale and transfer of the property by Mr Naluno to the respondent was not done lawfully and stands to be declared null and void. The appellant's unopposed counterclaim should therefore have succeeded.

Prayer for the transfer of the property into the name of the appellant

[29] In the pleadings relating to the counterclaim, the appellant prayed for an order transferring the property in her name alone. However, when testifying she stated that she wanted the property re-registered jointly in her name and that of her husband. This aspect of her evidence prompted her legal practitioner to inform the court that an application for amendment of the pleadings to reflect the appellant's wishes would be made. The respondent's legal practitioner indicated that the application would be opposed. Counsel for the appellant in her written heads of argument in this court argued that the application for amendment was made and that the court below committed an irregularity in not delivering a ruling on that application.

*Supplementary heads of argument*

[30] In light of the argument that the court a quo did not deliver a ruling on the application for amendment, this Court directed the parties<sup>4</sup> to file supplementary heads of argument addressing the questions of what the approach of this Court should be if it is so that the court a quo had failed to rule on the application for amendment and whether it would be equitable for the immovable property to be registered also in Mr Naluno's name as demanded by the appellant in her evidence as Mr Naluno appears to have been responsible for the unlawful sale and transfer of the property to the respondent. The parties were also directed to indicate whether the appellant and Mr Naluno were still married, and if the answer was in the affirmative, what the marital regime of their marriage was.

[31] On the question of what this Court's approach to the registration of the property should be, the legal practitioner for the appellant insisted in her supplementary heads of argument that the application for amendment was moved but not ruled on, which position had the effect that the application was refused. This, according to the legal practitioner, should result in Mr Naluno not benefiting from ownership of the immovable property.

[32] It was also stated in the supplementary heads of argument that the appellant and Mr Naluno were married out of community of property. It also emerged that they have since divorced on 6 June 2022. They concluded a settlement agreement containing a clause providing that neither of the parties 'shall have a claim against the other upon the agreement being made an order of court'.

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<sup>4</sup> The direction was also delivered to the respondent, to which she never reacted.



[33] On the issue of an alleged application for amendment, a careful re-reading of the record reveals that although lengthy submissions were made in support of and opposition to the intended application, ultimately the application was not brought. The matter was then postponed to the following day, in the words of the trial judge, 'for continuation of the hearing and *possible* application for amendment'. No such application had ever been brought. In fact, during the submissions in the court a quo after the close of the appellant's case, the appellant's legal practitioner – the same lawyer who also argued the appeal – made it clear that 'there was no application brought to amend our papers and as such our papers remained the same'. She then submitted that the court should therefore use its discretion to grant 'any further or alternative relief' as sought in the ultimate prayer in the counterclaim. This 'alternative relief' was obviously reference to the request in the appellant's evidence that the property be jointly registered in her name and that of her husband. However, as no substantive application for amendment was brought, the original prayer that the property be registered in the name of the appellant alone remained extant.

[34] A registered deed may be cancelled by the Registrar of Deeds but only upon an order of court. This is apparent from s 6 of the Deeds Registries Act 47 of 1937 which provides as follows:

'6. (1) Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no

cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.

(2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in sub-section (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.'

[35] If I understand s 6 above correctly, by virtue of these provisions, once the deed of transfer of the property to the respondent is cancelled by an order of court in this matter, ordinarily the legal status of the property revives to the former position, namely its registration in the joint names of the appellant and Mr Naluno. The registrar of deeds must then cancel the relevant endorsement evidencing the registration of the cancelled deed. The order this Court should make should be consistent with this provision. The order to be made would also coincide with the appellant's wishes, which position was advanced with vigour by her legal practitioner in this court, albeit on a mistaken understanding of the status of the aborted application for amendment in the court a quo. The principal dramatis personae in this saga will be at liberty to exercise their rights as advised or minded. It follows that the appeal succeeds. What remains is the making of the order.

#### Order

[36] In the result, the following order is made:

- (a) The appeal succeeds.
- (b) The decision by the court a quo rescinding the order granting absolution from the instance is set aside and the following order is substituted therefor:
- '(i) The first defendant's counterclaim succeeds.
  - (ii) The deed of sale entered into between Mr Lamek Naluno and Ms Layambekwa Linovene Nanghala in terms whereof Mr Naluno purported to sell to Ms Nanghala certain Erf No. 1085, Ondangwa (Extension No. 3), Registration Division "A", Oshana Region, measuring 525 (Five Two Five) square metres is declared invalid and of no force and effect.
  - (iii) The transfer of the aforementioned erf in Ms Layambekwa Linovene Nanghala's name by Deed of Transfer No. T1511/2011 is declared null and void.
  - (iv) The Registrar of Deeds is directed to cancel Deed of Transfer No. T1511/2011.'
- (c) The registrar of this Court is directed to bring this judgment to the attention of the Registrar of Deeds for the latter to comply with the directions given in sub-paragraph (iv) above.

(d) No order as to costs is made.

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**SHIVUTE CJ**

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**MAINGA JA**

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**HOFF JA**

APPEARANCES

APPELLANT:

G Mugaviri

Legal Aid

RESPONDENT:

No appearance