



REPORTABLE

CASE NO: SA 104/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELIZABETH NEIS

Appellant

and

KENNETH KASUME

First Respondent

JOSEPHINA AMUTSE

Second Respondent

REGISTRAR OF DEEDS

Third Respondent

Coram: SHIVUTE CJ, FRANK AJA and MAKARAU AJA

Heard: 9 November 2023

Delivered: 15 December 2023

Summary: The appellant, (Ms Neis), instituted action proceedings in the High Court for an order against the first respondent (Mr Kasume) compelling him to transfer back to her a house he is living in with the second respondent (Ms Amutse). This house was sold for N\$200 000 and transferred in terms of a written agreement from Ms Neis to Ms Amutse and thereafter to Mr Kasume.

The facts of this matter are briefly that Ms Neis, before her retirement was a registered nurse. Her troubles started when she lent N\$100 000 (her life's savings) to a certain Du Preez, a patient she met in the hospital who promised to repay her upon his release from the hospital. After his release he simply disappeared and she was never repaid the N\$100 000. She shared this situation with her sister who advised her to consult Mr Kasume (an alleged traditional healer or witch doctor) about her problem. This she did and Mr Kasume informed her that he would be able to help.

Not long after the visit to Mr Kasume, the son of Ms Neis found a 'voodoo doll' with a calabash inside the yard of their home (Ms Neis lived with her daughter and son in this house). The first thought that came in her's and her son's mind was that someone was trying to cast an evil spell over their property and that witchcraft may be involved. She made a phone call to someone and Mr Kasume arrived at the scene. He soon after informed Ms Neis that her house was cursed by an evil spirit or spirits and that he would get some people to assist him to cleanse the house of this scourge. He also informed her that she and her children would have to move out of the house while the cleansing took place and that he will arrange accommodation for them in the suburb of Wanaheda.

During the cleansing exercise, Mr Kasume informed Ms Neis that the evil spirits inhabiting her house were very powerful and whereas he could withstand their spells, she would not be able to do so and if she and her children moved back to the house one of them would die. Mr Kasume's solution to this dilemma was that he would buy (through his girlfriend Ms Amutse) the house from her for N\$200 000 and also buy her a substitute house of a similar size (worth N\$2 million). A contract was drawn-up for the sale of Ms Neis's house to Ms Amutse. An appointment with a lawyer was arranged and Mr Kasume accompanied Ms Neis to the lawyers where the formalities for the transfer of the property to Ms Amutse were completed. Suffices to say that after the transfer of the property, the rent on the Wanahenda accommodation ceased and Mr Kasume always had excuses with regards to properties she showed interest in.

Family intervention followed thereafter when Ms Neis' daughter started asking questions about why they moved out of their home and why their mother seemed to not show any interest in the renovation work that she informed them were the reason why they had to move out. When Ms Neis finally came clean about her financial problems, and the problems with her daughter which caused her to consult Mr Kasume, who took advantage of her, she and her brother-in-law approached the police station to lay criminal charges against Mr Kasume. They were however advised that her case was a civil matter and that they should approach a lawyer.

The basis of Ms Neis' action is that she is entitled to *restitutio in integrum* as she entered into the agreement of sale of her house as a result of the undue influence on her by Mr Kasume in his role as witchdoctor or prophet whom she consulted in respect of her personal problems and in particular her dire financial position.

During the lengthy trial in the court *a quo*, a postponement was sought on behalf of Ms Neis as a witness that was subpoenaed on her behalf had not presented himself at court to testify. When the legal representative for Ms Neis indicated that she could continue with the trial as her expert witnesses were available, there was an objection to this course of action on behalf of Mr Kasume and Ms Amutse legal representative. The court *a quo* granted the postponement, but ordered that she pay the wasted costs from 3 – 5 March 2020 (the dates set for the continuation of the trial). Reasons for the order were handed down on 24 March 2020.

At the end of Ms Neis' case, counsel for Mr Kasume and Ms Amutse indicated that he would move for absolution from the instance. Before the application for absolution, counsel for Ms Neis moved for an amendment of her particulars of claim. The basis of this amendment was that the legal representative of Mr Kasume and Ms Amutse in argument, raised a further defence to the claim of Ms Neis, namely that a compromise was reached between Ms Neis and Mr Kasume subsequent to the sale in respect of their dispute with regard to the circumstances in which the sale was concluded – which means that Ms Neis was not entitled to a

re-transfer of the property, except only to the amount of money which was agreed to in the compromise.

This application to amend the particulars of claim was refused and the court *a quo* granted the absolution from the instance in respect of the 'undue influence' claim. The court *a quo* further refused absolution from the instance with regard to the claim that Mr Kasume 'was to pay the purchase price of (Ms Neis' house) and to give N\$2 million to the plaintiff for her to buy a house in Windhoek'. The court *a quo* made these decisions on 4 November 2020. The appellant appeals against the court orders of 24 March 2020 and 4 November 2020 respectively.

On appeal, in addition to the appeals against the costs order in respect of the postponement, the refusal of the amendment and the granting of absolution in respect of the 'undue influence' claim; there are two further issues that the court addressed, namely: the condonation applications in respect of the late filing of the notice of appeal and the record of appeal as well as the late filing of appellant's heads of argument. Ms Neis had legal aid representation during the proceedings in both the court *a quo* and before this Court.

Condonation applications

Held that, the late filing of the record of appeal was caused mainly by the fact that the Directorate of Legal Aid was involved in the matter. They appointed legal representation for Ms Neis and after she lost her case in the High Court, the directorate had to consider anew whether they would support her in the appeal. Despite attempts on behalf of Ms Neis to expedite this process (even amidst the Covid-19 pandemic), the decision process by the directorate proceeded slowly along its predetermined bureaucratic route and the approval to assist Ms Neis in the appeal was only taken on 16 July 2022.

Held that, the court is satisfied with the explanation Ms Neis provided for the delays caused in the filing of the notice of appeal and the record of appeal. There was no prejudice to the respondents as the record was the most important documentation for the intended appeal without which the notice of appeal could not be seen in its proper context and of very limited use to the respondents save to

indicate a desire to appeal the decisions mentioned in it. Ms Neis has also shown good prospects of success on appeal under the appeal against the granting of absolution from the instance that this Court grants condonation and reinstatement of the appeal for the late filing of the appeal record.

Held that, the appellant's heads of argument were filed timeously for the hearing and there is thus no need for condonation in this regard.

Costs order of 24 March 2020

In terms of s 18 of the High Court Act 16 of 1990, no appeal lies, as of right, against a costs order only save with the leave of the High Court. No such leave was sought and none of the parties to the appeal raised the issue of appealability of this order.

Held that, the appeal against the costs order of 24 March 2020 cannot be entertained as leave was not obtained for this purpose from the court *a quo*. The appeal against the costs order of 24 March 2020 by the High Court is struck from the roll with no order of costs as leave to appeal this order was not obtained.

Refusal of the amendment

In *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC), this Court held that the refusal of an amendment was an interlocutory order for which leave to appeal was necessary if a party intended to appeal such an order. Leave to appeal was also not sought in this appeal.

Held that, the appeal against the refusal to grant leave to Ms Neis to amend her particulars of claim by the High Court as per the court order of 4 November 2020 is struck from the roll with no costs order as leave to appeal this order was not obtained from the court *a quo*.

Application for absolution from the instance

A claim for *restitutio in integrum* has been accepted in our law via the decision in *Preller & others v Jordaan* 1956 (1) SA 483 (A). The requirements for a claim of *restitutio in integrum* based on undue influence must be established to find for the

appellant in this matter. The question that arises from the evidence in this matter is whether Ms Neis established a *prima facie* case of undue influence with reference to the conduct of Mr Kasume.

Held that, the relationship between Mr Kasume as a prophet/witch doctor to Ms Neis (as beholden to his powers) is similar to that of a religious advisor and disciple. The use of the stratagem of the 'voodoo doll' and the reference to evil spirits was clearly designed to establish a special relationship of trust and dependence between Mr Kasume and Ms Neis so as to render Ms Neis incapable of having an independent opinion and to make her will pliant to the influence of Mr Kasume.

Held that, Mr Kasume did have an undue influence over Ms Neis based on the assessment of the evidence.

Held that, Mr Kasume's influence weakened the resistance of Ms Neis and made her will pliable by the invocation of 'witchcraft' to bring her under the expression that she and her family members' lives were under threat and that she had to sell her house. This approach also solved her 'lack of money' problems so as to address her immediate need with the purchase price of N\$200 000 and her long term need by the assurance that a replacement house would follow shortly. In this sense, Mr Kasume was the 'saviour' of Ms Neis and she only had to follow his advice or instructions in her mind to resolve her problems. Her psychological state must also be kept in mind as it indicates that her mental condition was such that she was more easily influenced than otherwise would have been the case.

Held that, Mr Kasume used his influence unscrupulously or unconscionably to prevail upon Ms Neis to agree to the sale transaction. He knew she was in a financial dilemma, he knew she had a house, he tested her mental state with the 'witchcraft' stratagem and when he saw that she became beholden and trusted him unconditionally he moved forward to influence her which in her mind would solve her problems. He further knew that the purchase price agreed upon was unrealistically low and he was snatching the house at a bargain. Furthermore, he

clearly envisaged that he would not perform his undertaking to purchase a substitute house.

Held that, that transaction was prejudicial to Ms Neis. This court is satisfied that, Ms Neis did establish, on a *prima facie*, basis that she was unduly influenced to enter into the sale agreement in respect of her house for N\$200 000. The appeal must thus succeed.

Consequently, the matter is to continue before the trial judge on dates to be determined by him at a case management meeting.

APPEAL JUDGMENT

FRANK AJA (SHIVUTE CJ and MAKARAU AJA concurring):

Introduction

[1] Appellant (Ms Neis) instituted action proceedings in the High Court for an order against the first respondent (Mr Kasume) compelling him to transfer a house he is living in with the second respondent (Ms Amutse) back to her.

[2] The house belonging to Ms Neis was transferred to Ms Amutse in terms of a written agreement of sale for N\$200 000 and thereafter from Ms Amutse to Mr Kasume. It is common cause that it was the intention when the written agreement of sale was entered into that the house would eventually be transferred from Ms Amutse (Mr Kasume's girlfriend) to Mr Kasume.

[3] The basis of Ms Neis' action is that she is entitled to *restitutio in integrum* as she entered into the agreement for the sale of her house as a result of the undue influence on her in this regard by Mr Kasume in his role as witch doctor or prophet

whom she consulted in respect of her personal problems and in particular her dire financial position.

[4] During the trial, which was quite a lengthy one, a postponement was sought on behalf of Ms Neis as a witness that was subpoenaed on her behalf did not present himself at court and was thus not available to testify. When the legal representative for Ms Neis indicated that she could continue with the trial as her expert witnesses were available there was a technical objection to this course of action on behalf of Mr Kasume and Ms Amutse and the court *a quo* then granted Ms Neis a postponement but ordered that she pay the wasted costs from 3 – 5 March 2020 which were the dates set for the continuation of the trial. The reasons for the costs order were handed down on 24 March 2020. In the notice of appeal this costs order is challenged and is referred to as the ‘ruling and order made on 24 March 2020’.

[5] At the end of the case for Ms Neis counsel for Mr Kasume and Ms Amutse indicated that he would move for an order of absolution from the instance. This was on 4 November 2020. At that stage the legal representative of Ms Neis moved for an amendment of her particulars of claim to be dealt with prior to the application for absolution. This amendment was sought on the basis that the legal representative of Mr Kasume and Ms Amutse in argument, raised a further defence to the claim of Ms Neis, namely that a compromise was reached between Ms Neis and Mr Kasume subsequent to the sale in respect of their dispute with regard to the circumstances in which the sale was concluded. In terms of the compromise, Ms Neis was not entitled to the re-transfer of the property to her but

only to an amount of money which was agreed to in the compromise. The judge *a quo* refused this late amendment and in the notice of appeal this ruling and order by the judge *a quo* is appealed against and is referred to as the 'judgment and order made on 4 November 2020'.

[6] The court *a quo* granted absolution from the instance in respect of the 'undue influence' claim but refused it with regard to a claim that Mr Kasume 'was to pay the purchase price of (Ms Neis' house) and also give N\$2 000 000 to the plaintiff (Ms Neis) for her to buy a house in Windhoek . . .'. The matter thus continued on the basis of this further claim which was also eventually dismissed in the judgment of 4 November 2020 and in terms of which Mr Kasume was ordered to pay Ms Neis N\$15 000 that was found to be outstanding on the original agreement of sale which Ms Neis attacked on the basis of undue influence.

[7] Because there is no dispute about the fact that the initial purchase of the house of Ms Neis was intended to end up with Mr Kasume even though his girlfriend (Ms Amutse) would be used as an intermediary in this process, it is not necessary to deal with the role of Ms Amutse in any detail in this appeal. It was common cause that if Ms Neis could establish her claim based on undue influence that she would be entitled to the re-transfer of the house from the current owner, Mr Kasume. The background facts for this claim which I deal with below will make this position clear. Where I thus refer to the legal representative of Mr Kasume below it must be borne in mind that the lawyer represented both Mr Kasume and Ms Amutse. I should also mention that third respondent, the Registrar of Deeds, did not enter into the fray as a party in the High Court nor did he do so on appeal.

Unless I refer to the Registrar of Deeds specifically any reference to 'respondents' in this judgment refers to the first and second respondents (Mr Kasume and Ms Amutse) only.

[8] In addition to the costs order in respect of the postponement, the refusal of the amendment and the granting of absolution in respect of the 'undue influence' claim, there are three further issues that need to be addressed in this judgment. The first is the continuance of the matter after the granting of the absolution application on the mentioned N\$2 million claim and the other two are condonation applications in respect of the late filing of the appeal and the record as well as the late filing of appellant's heads of argument. I now turn to deal with all these aspects *seriatim*.

Condonation applications

[9] As far as the late filing of the notice of appeal and the record of appeal is concerned, it should be mentioned that the applications for condonation are not opposed by the respondents. As mentioned above, there are three judgments or orders appealed against and these three judgments were all delivered on two dates. The notice of appeal was filed timeously if regard is had only to the last of these judgments (ie the one of 4 November 2020). The appeal record was filed about six months out of time.

[10] The late filing of the record was caused mainly by the fact that the Directorate of Legal Aid was involved in the matter. As Ms Neis could not afford to approach a lawyer to assist her, she approached the said directorate to assist her

and to institute action against the respondents. The directorate agreed to assist her but as she lost the case in the High Court, the directorate had to consider anew whether they would support Ms Neis in the appeal. An approval to assist Ms Neis on appeal meant that the directorate would have to finance the costs of the preparation of the record and appoint a lawyer to represent Ms Neis at the hearing of the appeal.

[11] The process involved to make a decision whether to assist Ms Neis or not took time. Despite attempts on behalf of Ms Neis to expedite this process the matter proceeded slowly along its predetermined bureaucratic route and the approval to assist Ms Neis in the appeal was taken on 16 July 2022. Subsequent to this, the Covid-19 restrictions and the personal circumstances of Ms Neis and her erstwhile lawyer caused further delays before everything was in place for the appeal to proceed. As the delay was substantially caused by reason of the fact that Ms Neis had to rely on legal aid to prosecute the appeal as she was impecunious, I am of the view that a reasonable excuse was provided for the late filing of the record. The fact that the notice of appeal was filed late did not prejudice the respondents as the record was the most important documentation for the intended appeal without which the notice of appeal could not be seen in its proper context and of very limited use to the respondents save to indicate a desire to appeal the decisions mentioned in it.

[12] In conclusion, this is not a matter where the reinstatement application should be dismissed without regard to the prospects of success on appeal. I shall deal with the prospects below when dealing with the application for absolution.

Good prospects on appeal will lead to the granting of the condonation application whereas no prospects or poor prospects will lead to its dismissal.

[13] An application was also brought seeking condonation for the late filing of the appellant's heads of argument. The matter was originally set down for 31 March 2023. By that date, the lawyer who represented Ms Neis *a quo* had already withdrawn and Legal Aid had appointed her current legal representative of record on 2 March 2023 which date was also the last day for the filing of heads of argument for the hearing of 31 March 2023. Because of the fact that the appointment of Ms Neis' current legal representative was so late, the matter was postponed at the hearing of 31 March 2023 to a date to be arranged with the registrar which turned out to be 9 November 2023. The appellant's heads of argument were filed timeously for the hearing on this latter date and there is thus no need for condonation in this regard and I do not deal with this aspect any further.

Costs order of 24 March 2020

[14] In terms of s 18 of the High Court Act 16 of 1990 no appeal lies, as of right, against a costs order only save with the leave of the High Court. In this matter the postponement sought was granted but it was coupled with an adverse costs order and the appeal is directed at that costs order only.

[15] Counsel for Ms Neis submitted that such an appeal was competent because it was not brought immediately but only after the merits of the litigation

between Ms Neis and the respondents were finally decided with the handing down of the judgment granting absolution from the instance in favour of the respondents.

[16] For this submission, reliance was placed on a passage from the judgment in *Namibia Media Holdings (Pty) Ltd & another v Johan Lombaard & another*.¹ In *Namibia Media Holdings*, the appellants as defendants *a quo* sought leave to call a further two witnesses after discovering that, despite a return of non-service in respect of a subpoena, the relevant witness was available to testify in respect of two reports she had authored relevant to the issue at hand and that a further person also produced a report in the matter. The trial court refused permission to call the two witnesses and granted an adverse costs order against the appellants. On appeal, a reversal of the costs order was sought with a referral back to the court *a quo* to hear the testimony of these witnesses prior to determining the matter afresh.

[17] In *Namibia Media Holdings* counsel for the respondents submitted that the appeal against the finding that two witnesses could not be called (with a concomitant adverse costs order) was an interlocutory one that could not be appealed without leave of the trial court. Smuts JA writing for this Court dealt with the issue as follows:

‘[77] As was made clear in *Unitrans*, that rulings in respect of admissibility of evidence and on procedural matters such as permitting or excluding additional witness statements or portions of evidence would not necessarily amount to appealable interlocutory orders and would not be separately appealable even with

¹ *Namibia Media Holdings (Pty) Ltd & another v Johan Lombaard & another* (SA 23/2020) [2022] NASC (8 June 2022).

leave but may be raised as grounds of appeal against the final judgment. The policy reason for restricting appeals in interlocutory matters – reflected in s 18(3) by requiring leave of the High Court – is the avoidance of piecemeal appellate disposal of issues with unnecessary expense and delays involved, as was spelt out by this court in *Government of the Republic of Namibia v Phillipus*. Given the nature of the ruling and the subsequent finalisation of the matter in the High Court, leave to appeal was not required to raise it on appeal as has been done in this matter.’

[18] The submission made by counsel for Ms Neis that *Namibia Media Holdings* is authority for the proposition that interlocutory decisions or orders become appealable as of right once the main issue between the parties has been determined is misplaced and based on an incorrect reading of the judgment. As it will become clear if regard is had to *Unitrans* as referred to by Smuts JA, rulings on the admissibility of evidence cannot be appealed (until a matter has been finalised).² Then the attacks against such decisions are dealt with as attacks on the merits of the final judgment, ie if successful in that admissible evidence that could have been material in respect of the outcome of the case was wrongly not admitted, the result would be to set aside the decision and to remit the matter back to the court *a quo* to hear such evidence. If inadmissible evidence was allowed and had a material bearing on the outcome the appeal will be considered without such evidence. It is in this context that those rulings or decisions form part of the appeal on the merits. In the present matter the granting of a postponement has and cannot have any bearing on the outcome on the merits of the appeal. In fact one cannot appeal the granting of a postponement as it is a procedural ruling. One

² *Arangies v Unitrans Namibia (Pty) Ltd* 2018 (3) NR 869 (SC) para 5, the relevant position reads as follows: ‘Rulings with regard to the admissibility of evidence during the course of a hearing are regarded as orders and are hence not separately appealable even though such rulings may be raised as grounds of appeal against the final judgment. If a party is aggrieved by such rulings the proper relief is by way of a review . . .’.

can appeal against the refusal of a postponement only. So, firstly, the order granting the postponement was not on appeal and secondly, the appeal was against the costs order only which required leave pursuant to s 18 of the High Court Act. In *Namibia Media Holdings*, the appeal was against the order refusing leave to present further evidence of two witnesses which could only be appealed once a final judgment had been given and an appropriate costs order would follow in the wake of the decision on the merits and would not necessarily be determined on its own.

[19] It follows that the appeal against the costs order of 24 March 2020 cannot be entertained as leave was not obtained for this purpose from the court *a quo*. The appeal will be struck from the roll. As none of the parties to the appeal raised this issue of appealability of this order I shall make no order as to costs.

Refusal of the amendment

[20] In the order of 4 November 2020, the court *a quo* refused an amendment but made no order as to costs. In *Di Savino v Nedbank Namibia Ltd*³ this Court held that the refusal of an amendment was an interlocutory order for which leave to appeal was necessary if a party intended to appeal such an order.

[21] Counsel for Ms Neis also sought to rely on *Namibia Media Holdings* for his submission that once a matter has been finalised the need for leave to appeal in respect of interlocutory matters fall by the wayside. I have demonstrated above that this is not the effect of *Namibia Media Holdings* which dealt with the issue of

³ *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).

rulings or decisions on evidence only where it has always been the practice that such rulings or decisions are not to be dealt with piecemeal but only when the matter has been finalised and as an attack against the merits of the final ruling or decision in the matter between the parties.⁴

[22] The intended appeal must thus suffer the same fate as the appeal against the costs order in the postponement application, ie it will be removed from the roll with no order as to costs. Once again the failure to issue a costs order is as a result of the fact that none of the parties raised the point that the order to refuse the amendments sought could not be appealed against without leave from the court *a quo*.

Events subsequent to the absolution application

[23] As indicated above, subsequent to the absolution application being granted the court *a quo* heard evidence to determine whether Mr Kasume agreed to, in addition to the purchase of the house from Ms Neis, provide her with N\$2 million to purchase an alternative home.

[24] After hearing the testimony of Mr Kasume, the claim was rejected and Ms Neis was award an amount of N\$15 000 still outstanding on the original purchase price of N\$200 000.

[25] Counsel representing the parties in this Court were perplexed by the further proceedings as, according to them, it was contemplated that if the absolution

⁴ *Arangies* para 5 and the case there referred to.

application succeeded it would be the end of the matter. However, as the court *a quo* insisted to continue with the trial on the basis that it would determine the matter based on the issue that arose in the evidence pertaining to the promise to provide N\$2 million in respect of an alternative house for Ms Neis, they proceeded with the matter on this aspect. It should be noted that counsel who appeared for Ms Neis in this Court did not appear in the court *a quo*. In the court *a quo*, Ms Neis was represented by Ms Rachel Mondo. Her current instructing counsel is Mr Afrika Jantjies.

[26] The reason why the legal representatives were surprised by the turn of events was the fact that, in her final particulars of claim, Ms Neis asserted no money claim at all. She sought restitution of the property to her and in turn tendered back to Mr Kasume the money she received in respect of its sale. The final abortive attempt to seek an amendment would not have instituted a money claim but attempted to address a defence of compromise which respondents indicated in argument that they would raise. This issue of N\$2 million as a potential claim was simply never raised by Ms Neis.

[27] Obviously an application for absolution from the instance cannot be used to determine one of the credibility issues in a trial so as to determine whether a defendant did not have to answer averments made by some witnesses but only those of others where they all testify in connection with a single claim and not stipulated alternatives on the pleadings as was the case in this matter.

[28] Counsel for the parties agreed that if the absolution judgment is upheld in this Court there is no need to set aside the subsequent judgment which in essence dismissed the claim of Ms Neis as no real prejudice would be caused in respect of this claim which was never asserted in the court *a quo*. It was agreed that should the appeal be upheld and the judgment of absolution is set aside so that the respondents would have to decide whether to call witnesses or close their case, the proceedings relating to the issue in respect of the N\$2 million that the judge *a quo* wanted to decide should be set aside. In this way the matter would start-off where the parties and the pleadings were aligned at that stage, ie prior to the hearing of the absolution application.

Application for absolution from the instance

[29] The test to apply where an application for absolution from the instance is made at the close of a plaintiff's case can be summarised as follows:

- (i) whether the evidence presented on behalf of the plaintiff is such upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff.⁵
- (ii) whether the plaintiff made out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim.⁶ Without such evidence no court would be able to find for the plaintiff.⁷
- (iii) at this stage it is not for a court to seek to resolve the matter on the probabilities.⁸

⁵ *Stier & another v Henke* 2012 (1) NR 370 (C) para 4.

⁶ *Stier & another* para 4.

⁷ *Factcrown Ltd v Namibia Broadcasting Corporation* 2014 (2) NR 447 (SC).

⁸ *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015) and *Fish Orange Mining Consortium (Pty) Ltd v Goaseb* 2018 (3) NR 632 (HC).

- (iv) if an inference is a reasonable one and not the only reasonable one and it is in favour of the plaintiff it must be accepted as such.⁹
- (v) the evidence of and on behalf of plaintiff should be accepted as true save in exceptional circumstances where it is obviously of such a nature as to be rejected out of hand.¹⁰

[30] What the evidence on behalf of the plaintiff had to establish can be found in the requirements for a claim of *restitutio* based on undue influence. A claim for *restitutio in integrum* was accepted in our law via the decision in *Preller & others v Jordaan*¹¹ and is summarised in *Maasdorp's Institutes of South African Law* as follows:¹²

'*Restitutio in integrum* may likewise be granted where a person obtains such influence over another that it weakens the latter's power of resistance and by doing so makes his will pliable, and the former thereafter brings his influence to bear in an unprincipled manner with the object of prevailing upon the other person to agree to a prejudicial transaction into which he would not normally have entered of his own free will.'

[31] If one breaks down the elements of undue influence as they appear in the definition quoted above the following had to be established, *prima facie*, in the evidence presented on behalf of the appellant, namely:¹³

⁹ See *Dannecker and Fish Orange Mining*.

¹⁰ *Ibid* fn 7.

¹¹ *Preller & others v Jordaan* 1956 (1) SA 483 (A).

¹² C G Hall *Maasdorp's Institutes of South African Law*, Volume II: Law of Contract, (1960) 8 ed at 15.

¹³ *Fourie v Fourie* (HC-MD-CIV-ACT-OTH-2019-03172) [2020] NAHCMD 261 (29 June 2020).

- (i) that the other party (Mr Kasume) had an influence over the plaintiff (Ms Neis);
- (ii) that Mr Kasume's influence weakened Ms Neis's resistance and made her will pliable;
- (iii) that Mr Kasume used his influence unscrupulously or unconscionably to prevail upon Ms Neis to agree to the transaction;
- (iv) that the transaction is prejudicial to Ms Neis;
- (v) that in exercise of her normal free will Ms Neis would not have concluded the transaction.

[32] The judge *a quo* was clearly very sceptical of the case of the appellant which was described as having all the hallmarks of 'hocus pocus and witchcraft'. His interventions in the evidence were clearly directed to establish that persons sometimes make decisions out of sheer foolishness and not necessarily because they were acting under undue influence. Maybe he was aware of the word of caution in *Preller* that a court must be wary not to regard the persuasive capacity of a cunning salesperson, a spirited collector or an eloquent minister of religion as undue influence or 'set aside gifts on the grounds of the folly, imprudence or want of foresight on the part of donors'.¹⁴

[33] According to the court *a quo*, on Ms Neis's evidence, the 'root cause' of her problems came about because she could not recover a loan of N\$100 000 from a certain Du Preez. As no documentary proof could be produced to establish this loan and to pave the payment of the money to Du Preez coupled with the lack of

¹⁴ *Preller* at 493F–G (my translation).

attempts (according to the judge *a quo*) to recover the loan, she did not, *prima facie*, establish her claim. Thus all the other evidence became irrelevant including those of expert witnesses as their evidence could have no bearing on her state of mind when the relevant transaction for the sale of the house was entered into with Ms Amutse.

[34] The evidence was basically as follows: Ms Neis who was a qualified nurse on the verge of retirement lived in a three bedroom, 2 bathrooms, kitchen, lounge and dining room house in a western suburb of Windhoek with her two children. Her daughter was in her late twenties and worked at a local bank. Her son was still studying at the time. She had financial problems and also problems with the lifestyle of her daughter. Her financial problems stemmed from an amount of N\$100 000 (her life savings) which she lent to a patient she met in the hospital who promised to repay her upon his release from the hospital. After his release he simply disappeared and she was never repaid the N\$100 000. She informed her sister about her dilemma and the sister recommended that she should consult Mr Kasume (a prophet) about her problem. This she did and Mr Kasume informed her that he would be able to help. It should be noted that from what was put to Ms Neis in cross-examination it is common cause that she was introduced to Mr Kasume by her sister as she had 'money problems'. Her daughter testified that she knew that Ms Neis lost money and her brother also testified that she had financial problems.

[35] Not long after the visit to Mr Kasume, the son of Ms Neis found a voodoo doll with a calabash inside the yard of their home when he returned home during

the evening. He called Ms Neis, who was in the house, to come and have a look. Ms Neis went to have a look but her daughter who was also in the house refused to do so as she thought this was not worthy of attention. It seems that the first thoughts that came to Ms Neis and her son was that someone was trying to cast an evil spell over their property and that witchcraft may be involved. Ms Neis, after viewing the doll and calabash made a phone call to someone and a little while later Mr Kasume arrived on the scene (at that stage he was unknown to the children but they came to know him later as Mr Kasume). Mr Kasume took the doll and calabash and put salt in the area of the yard. Ms Neis told her daughter that Mr Kasume was a prophet. Shortly after this event Mr Kasume came to the house walked through it and told Ms Neis that it was cursed by an evil spirit or spirits and that he would get some persons to assist him to cleanse the house of this scourge.

[36] He also informed her that she and the children would have to move out of the house while the cleansing took place. It was arranged that Ms Neis and the children move to accommodation arranged for them by Mr Kasume in the suburb of Wanaheda. Mr Kasume during the cleansing exercise informed Ms Neis that the evil spirits inhabiting her house were very powerful and whereas he could withstand their spells, she would not be able to do so and if she and her children moved back to the house one of them would die. Mr Kasume's solution to this dilemma was that he would buy (through his girlfriend Ms Amutse) the house from her for N\$200 000 and also buy her a substitute house of a similar size. It follows that in this manner her immediate financial problems would be resolved and she would in due course have a house of a similar size as her old haunted one. Mr Kasume arranged for a contract to be drawn-up for the sale of Ms Neis's house to

Ms Amutse for N\$200 000. An appointment with a lawyer was arranged and he accompanied Ms Neis to the lawyers where the formalities for the transfer of the properties to Ms Amutse were completed.

[37] According to Ms Neis she informed the person that dealt with her at the lawyers offices the purchase price of N\$200 000 had already been paid in full on the instructions of Mr Kasume which was not the case. Be that as it may, the transfer was done and subsequently also a transfer from Ms Amutse to Mr Kasume by the time the trial *a quo* commenced.

[38] Subsequent to the transfer of the property to Ms Amutse, the rental in respect of the property at Wanaheda ceased to be paid by Mr Kasume and they were evicted. By this time the daughter of Ms Neis, fed-up with the fact that they had to leave their home which the mother indicated was due for renovations that were done there, had already moved in with other persons and the son moved in with a family member. Ms Neis viewed properties so as to find a suitable replacement of her house as agreed with Mr Kasume. Her son accompanied her to view properties. These properties were in the N\$600 000 to N\$800 000 range. Initially, Mr Kasume always had some excuse as to why the property she was interested in would not be a suitable purchase. She even made an offer on a property, after getting the approval of Mr Kasume according to her, but this deal came to nought when the money for the purchase price was not forthcoming from Mr Kasume.

[39] The daughter of Ms Neis who did not believe the assertion that their home was bewitched was suspicious of the relationship between Ms Neis and Mr Kasume and the suspicion grew as the situation of Ms Neis increasingly worsened. She uncovered that her mother had sold her house for N\$200 000. She knew this was way below its value. Because her mother was reluctant to discuss the issue with her and also did not want to talk about it at the time when the agreement with Mr Kasume was entered into, she approached two of her uncles to investigate the matter further, namely the brother-in-law of Ms Neis who was married to the sister who recommended Mr Kasume to her and the brother of Ms Neis who was retired and was at the time in Uis where he, as part of his retirement, also acted as a pastor at a local church.

[40] The daughter of Ms Neis testified that when she confronted Ms Neis about the reasons for moving out of the family home and why she never went to their house to look at the renovations being done there and why she was not interested in the renovations which was the reason she gave for the family to move, she was not forthcoming with answers. At a later stage Ms Neis informed her that the family would not move back to the house as Mr Kasume is going to buy her another house up to N\$2 million. This is what prompted her to investigate the matter only to find out that the house had been transferred to Ms Amutse. When she told Ms Neis that she had arranged a meeting with her brother and brother-in-law with regard to the transaction, Ms Neis had a meeting with Mr Kasume. She stated that in her view the house was sold because Mr Kasume knew that she had financial problems and he influenced Ms Neis who was an easy target at the time.

According to her, the house was sold for N\$200 000 but the real value was between N\$1 300 000 and N\$1 500 000.

[41] The brother of Ms Neis became aware of the fact that she was having problems with accommodation in Windhoek. This surprised him as he knew she owned a house. On a visit to Windhoek, he found her living in Wanaheda and not in her house. She told him that Mr Kasume was paying for the accommodation in Wanaheda. That Mr Kasume who is a prophet, informed her that her house was bewitched and that he would cleanse it and also do some renovations. She did not inform him that she sold the house. Ms Neis only confessed to the sale after the children discovered this fact. Thus at a second meeting, Ms Neis told him that she sold the house for N\$200 000 or N\$250 000 and that Mr Kasume would provide her with N\$2 million to purchase another house. When Ms Neis was asked for documentation relating to the sale, she could not provide anything. The brother also went with Ms Neis to view houses.

[42] Eventually, a meeting was arranged with Councillor Kandjii and the matter was taken up via the Councillor with Mr Kasume and Ms Amutse. Mr Kasume agreed that he paid the rental for the property used by Ms Neis in Wanaheda and stated that he also on occasion gave her money to buy food. Mr Kasume however denied that he undertook to buy her another house. However, through the mediation of Mr Kandji he agreed to pay Ms Neis a further N\$230 000 in three instalments of just over N\$76 666 per month from the date following the meeting. This agreement was reduced in writing. Mr Kasume paid N\$50 000 to the brother

(as nominated by Ms Neis) on the day this agreement was reached and thereafter made no further payments. The brother of Ms Neis said the following of her:

'I believe Elizabeth (Ms Neis) was not in the right frame of mind when she gave up her house. When I spoke to her during my visits to Windhoek, she did not seem to understand the magnitude of what she had done. She was losing her house and she did not seem to mind. She was very protective over Kenneth (Mr Kasume). I recall even asking her at some point whether he was her boyfriend and she said no.'

[43] The brother-in-law of Ms Neis also became aware of the issue with regard to her house when she asked him to assist her to move to the premises in Wanaheda that Mr Kasume rented for her. At the time Ms Neis told him it was a temporary move while renovations would be done at her house. At a later stage she called on him again to assist with a move somewhere else as she could not pay the rental in Wanaheda. He asked her why she did not move back to her own house. Whereas Ms Neis was initially reluctant to respond, she later told him that she could not return because the house had evil spirits and that Mr Kasume would purchase her another house and it was he who rented the Wanaheda property but stopped paying and hence the eviction from the property.

[44] She refused to give any further information. The brother-in-law was also at the meeting with Mr Kandjii and confirmed the evidence of the brother as to the further agreement concluded at that meeting. After the meeting he asked Ms Neis to accompany him to a bail application at the Katutura Magistrate's Court which involved a case where a woman was allegedly swindled out of her house in similar circumstances as Ms Neis. After attending this application, Ms Neis, who was

according to him reluctant to inform the family of her transaction with Mr Kasume, opened up and informed him about her financial problems, and the problems with her daughter which caused her to consult Mr Kasume, who took advantage of her. The two of them proceeded from the Magistrate's Court to the police station to lay criminal charges against Mr Kasume. They were however advised that it was a civil matter and that they should approach a lawyer.

[45] The brother-in-law summarises the position of Ms Neis as follows:

'Kenneth took advantage of Elizabeth because she was vulnerable and she was an easy target. I say this because he gave her money on several occasions, he promised to buy her a home and he rented a house for her to gain her trust. His actions gave her the impression that he cared for her, he was going to help solve her troubles. Kenneth also created the impression that he had a lot of money because she really believed that she was getting a house from him. Kenneth was like a saviour to Elizabeth and he used his influence over her to get her to give up the house to him under the pretext that her house had evil spirits.'

And

'The time that she sold that house . . . she was depressed . . . she could not take the right decisions at that time because we know that . . . her mind was not, she did not have the right mind . . . the problem we have is that she did not take the decision with a sound mind to sell her house, that is the problem that we have . . . because you could observe her doing things, getting angry with people you know and fighting with her children and if we ask her she will just keep quiet she cannot answer our questions so we know something was wrong with her.'

[46] Appellant called two expert witnesses in support of her case. The court *quo* made short thrift of this evidence. Although the evidence of Ms Sinkala is

briefly referred to it is not expressly dismissed but was clearly not regarded as of any assistance, even to come to a *prima facie* view. Dr Mudzanapapbwe's evidence is dismissed in a contemptuous manner as not applicable to the facts and is not 'founded on logical reasoning' (the same criticism apparently also applied to the evidence of Ms Sinkala). It is further stated that as Dr Mudzanapapbwe did a 'purely academic exercise' and 'not a health service' exercise his evidence had no 'probative value'. As I endeavour to point out below, the court *a quo* misdirected itself in this regard. Both experts' testimonies are important and relevant and should have been considered in the process of deciding whether to grant or refuse absolution from the instance.

[47] Ms Sinkala is a clinical psychologist whose expertise in this regard was not questioned at all. Ms Neis consulted her and after five consultations she wrote the report which was used as the basis of her expert testimony. She consulted with Ms Neis and thus had a background to the events. It goes without saying if Ms Neis did not furnish her with information that turns out to be relevant, that she would not have known about it and factored into her determination. Insofar as her information tallies with the evidence, it is clearly relevant to her conclusion or findings. Ms Sinkala stated that Ms Neis was experiencing 'emotional difficulty and struggling to cope due to stress related to a difficult living environment and financial burden brought about by the loss of her residence in 2014'. As a result Ms Neis was diagnosed with '296.54 major depressive disorder with mood incongruent psychotic features with anxious distress'. According to Ms Sinkala the judgment of Ms Neis was impaired as it is possible she could have done something that she did not really understand why she did it. Often people who are extremely

depressed end up isolating themselves and keep separate and do not engage with other people. They do not do the things that they would normally do. So, they lose contact with people that normally advise them or would help them with their decision making. This is the state Ms Sinkala found Ms Neis was in at the time.

[48] As Ms Sinkala saw Ms Neis about two years after the event the question arose as to how one could relate what she saw to an event that happened in 2014 (the sale of her house). Her response to this question was: 'I can make an informed deduction based on the history that she gave me and symptoms that she is experiencing at the time' and in more detail 'once again, based on the history and the stress that she had been in and the financial stress and the loss and I can make an educated assumption about her judgment and state of mind at the time. But I was not there to make the exact diagnosis'. Pressed by the court to state how far back she could give an opinion or diagnosis she stated: 'As far back as I have a history of when symptoms started and when they were exacerbated. So based on the history and what she told me, I can deduce when the stress started and when it became progressively worse and worse and up to the day when she arrived at my office'.

[49] The judge *a quo* in his questioning took up the issue of the financial position of Ms Neis. He was highly critical of the fact that Ms Sinkala stated that she did not delve into the details of this cause for the stress as according to the judge *a quo* this would depend on the amount of money involved. Ms Sinkala, despite what can only be referred to as a badgering by the judge *a quo*, stuck to her guns maintaining that the symptoms she recognised indicated that Ms Neis' financial

position caused her stress. As already pointed out above it was common cause that Ms Neis approached Mr Kasume because of 'money problems' as put to her on behalf of Mr Kasume. That she had money problems is also the undisputed evidence of Ms Neis and her children as well as her brother. The badgering of Ms Sinkala in this regard by the judge *a quo* was thus out of place and unwarranted.

[50] The report of Ms Sinkala was thus relevant to decide whether absolution should be granted or not. It simply indicated a possibility that Ms Neis with her symptoms which included mood incongruent features and being distressed, could have acted in a manner that a rational person (to use the judge *a quo*'s words) would not have. Whether the factual basis for this finding, which is based on the interviews with Ms Neis, and which must be compared to the evidence at the trial is such as to seriously disturb Ms Sinkala's conclusion was not called for in the application for absolution at the end of the appellant's case.

[51] The evidence of Dr Mudzanapapbwe was even more important and critical. It was not of no probative value as was found by the court *a quo*. On the contrary, it was very valuable and relevant evidence. Whereas Dr Mudzanapapbwe stated he gave a merely academic report and not a health services report, that does not redound against him adversely as suggested by the judge *a quo*. His expertise in this field was never questioned and he gave an impressive overview of the academic literature and consensus on the aspect of undue influencing from a psychological perspective. Whereas he did not interview any witnesses, he did read the witness statements from which he gained an insight into the facts of the matter. What he then did was to determine whether the facts in the witness statements fit into the academic parameters or criteria spelt out by him and he

concludes that 'there are sufficient grounds to conclude that Ms Neis was unduly influenced to sell her house to the defendant'. It should be pointed out that as the respondents denied the allegations of undue influence it is really the evidence of the appellant's witnesses (which largely followed their witness statements) that needed to be considered here. Because credibility is not an issue at this stage, his conclusion that the evidence does pass muster in satisfying all the academic criteria for undue influence cannot simply be disregarded in total and was in fact highly relevant for a decision in this matter.

[52] The value of the house of Ms Neis when it was sold was not established. The indications however are that the sale's price of N\$200 000 was ridiculously low. The value indicated in a valuation certificate that accompanied the transfer documents indicate the value to be N\$1 100 000. As indicated above, her daughter placed the value between N\$1 300 000 and N\$1 500 000. Ms Neis in her evidence testified that with N\$200 000 one would not be able to buy 'even the houses in Katutura with the outside toilets'. She clearly knew that N\$200 000 was very far below par for a house her size is in that neighbourhood. Lastly, the ease with which Mr Kandjii got Mr Kasume to agree to pay a further N\$230 000 to Ms Neis at the meeting where he mediated between the parties is indicative of the fact that Mr Kasume also knew that the initial purchase price was ridiculously low.

[53] Counsel for respondents made much of the agreement that Mr Kandjii mediated and which was recorded in writing and in terms whereof it was agreed that Mr Kasume would pay a further N\$230 000 to Ms Neis. It will be recalled that he paid only N\$50 000 of this amount. Counsel for the respondents submitted this

was a compromise where Ms Neis was assisted by her brother and brother-in-law and thus the undue influence action fell by the wayside and if Ms Neis had a claim, it had to be based on the compromise, ie the amount outstanding in terms of the compromise. The problem with this stance is that it was not raised as a defence in the alternative to the denial of undue influence. Appellant was thus not called on to address this defence on the pleadings and in the case management reports. Ms Neis had to establish that she was moved to enter into the sale agreement as a result of the undue influence of Mr Kasume. Furthermore, it is no doubt correct that compromise normally disposes of the original cause of action and has the effect of *res judicata*.¹⁵ Nothing however prevents parties to agree that upon a breach of the compromise agreement, the original claim will be revived. Such agreement can be express or implied.¹⁶ On the evidence one cannot exclude the possibility that this is how the parties saw it. From Mr Kasume's point of view, he decided not to proceed with payments based on the compromise because of the criminal charges laid against him by Ms Neis. From Ms Neis' perspective, as testified by her brother, Mr Kasume did not honour the compromise agreement and it was decided that she then wanted her house back. It can be inferred from the conduct of the parties that they intended to fall back on their original stances where the compromise agreement would not be honoured. Be that as it may, for the purpose of the present matter, the compromise was not raised as a defence and nor can it be said that the legal point if raised on behalf of the respondents, could not have been met had it been properly raised in the pleadings and this aspect thus simply formed part of the narrative leading up to the institution of the

¹⁵ *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co. (Pty) Ltd & others* 1978 (1) SA 914 (A).

¹⁶ *Crause en andere v Ocean Bentonite Co (Edms) Bpk* 1979 (1) SA 1076 (O).

action. In fact the evidence surrounding the manner in which the compromise agreement came about is indicative of the fact that the original purchase was such to amount to a snatching of a bargain by Mr Kasume.

[54] The question that arises from the evidence as discussed is whether Ms Neis established a *prima facie* case of undue influence with reference to the conduct of Mr Kasume. I deal with this aspect below with reference to the criteria in this regards set out in para [31] above.

[55] Did Mr Kasume have influence over Ms Neis. Gibson in *South African Mercantile and Company Law*;¹⁷ states that:

‘The law recognises that such influence is more likely to exist where there is a “special relationship” between the parties. Such special relationships are: attorney and client; doctor and patient; trustee and *cestui que* trust; guardian and minor; religious advisor and disciple.’

It is further pointed out that unlike the position in English law where in a special relationship rebuttable presumption of undue influences arises, this is not the case in our law. This presumption is obviously based on a common sense approach and experience when it comes to certain relationships and it is, perhaps, time to bring our own law in this regard in line with the English law. In my opinion, the relationship between Mr Kasume as prophet/witch doctor with Ms Neis (as beholden to his powers) is similar to that of a religious advisor and disciple. The use of the stratagem of the ‘voodoo doll’ and the reference to evil spirits was

¹⁷ J T R Gibson, R G Comrie, Coenraad Visser, J T Pretorius, Robert Sharrock and Carl Mischke *South African Mercantile & Company Law* 7 ed (1997) at 76.

clearly designed to establish a special relationship of trust and dependence between Mr Kasume and Ms Neis so as to render Ms Neis incapable of having an independent opinion and to make her will pliant to the influence of Mr Kasume. As stated in *Amstrong v Magid & another*¹⁸ with reference to an English case:

‘Whenever two persons stand in such relationship that while it continues confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeded if no such confidential relationship had existed.’

[56] In my view, Mr Kasume did have an undue influence over Ms Neis based on my assessment of the evidence on behalf of the appellant which at this stage needs only be done on a *prima facie* basis.

[57] Did Mr Kasume’s influence weaken the resistance of Ms Neis and make her will pliable? Once again, and on a *prima facie* basis this did occur. This was done by the invocation of ‘witchcraft’ to bring her under the expression that she and her family members’ lives were under threat and that she had to sell her house. This approach also solved her ‘lack of money’ problem so as to address her immediate need with the purchase price of N\$200 000 and her long term need by the assurance that a replacement house would follow shortly. In this sense Mr Kasume was the ‘saviour’ of Ms Neis and she only had to follow his advice or instructions in her mind to resolve her problems. Here her psychological state

¹⁸ *Amstrong v Magid & another* 1937 AD 260 at 276.

must also be kept in mind as it indicates that her mental condition was such that she was more easily influenced than otherwise would have been the case.

[58] Did Mr Kasume use his influence unscrupulously or unconscionably to prevail upon Ms Neis to agree to the transaction? The facts presented in evidence clearly established this requirement. He knew she was in a financial dilemma, he knew she had a house, he tested her mental state with the 'witchcraft' stratagem and when he saw that she became beholden and trusted him unconditionally he moved forward as mentioned above in a manner, which in her mind would solve her problems. He further knew that the purchase price agreed upon was totally unrealistically low and he was snatching the house at a bargain. Furthermore, he clearly envisaged that he would not perform an undertaking to purchase a substitute house.

[59] That the transaction was prejudicial to Ms Neis goes without saying. This is evident from the purchase price which is probably between a fifth and a half of the real value of the house. It is also clear that Ms Neis would not have entered into an agreement had she been in a normal frame of mind and not influenced by Mr Kasume. She might not have known the exact value of the house but she knew with N\$200 000 she would not even buy a house in Katutura with an outside toilet. It is obviously that no rational person freely exercising his/her mind would sell the house for N\$200 000.

[60] It follows that, Ms Neis did establish, on a *prima facie*, basis that she was unduly influenced to enter into the sale agreement in respect of her house for N\$200 000. The appeal must thus succeed and I shall make such an order.

[61] There is one evidential matter that received a lot of attention at the trial and which was raised in this Court to substantiate an allegation that counsel for Ms Neis was unfairly treated by the judge *a quo*. This issue arose when Mr Kasume was called as a witness in regard to the one issue the court *a quo* itself created despite the fact that Ms Neis pressed no money claim, ie whether Mr Kasume agreed to give Ms Neis N\$2 million to purchase a substitute property. Counsel for Ms Neis asked Mr Kasume whether apart from buying and selling cars and owning some shops which he testified about, he was a traditional doctor and he answered 'not now'. In response counsel sought to confront him with a witness statement filed on behalf of the respondents in which a Mr Kutondokwa apparently stated the opposite. The court *a quo* immediately pointed out that the evidence of Mr Kutondokwa was not led and placed before court. Mr Kasume then also stated that he would not respond to the question as the witness was not called. After attempting to refer to the filed witness statement the judge *a quo* interrupted as follows:

'This is cross-examination. A categorical question, categorical answer is final. You have asked a categorical question. Are you a healer or are you a traditional doctor? He says no. That is final. You cannot answer, ask him any other question. If you ask a categorical question, that is the law of evidence, and he has given a categorical answer you cannot ask any more questions . . . you ought to lead him in another way . . .'

[62] The first aspect to note is that in the discussions between the judge *a quo* and counsel for Ms Neis, the evidence of Mr Kasume that he was 'not now' a traditional doctor morphed into that he was not a traditional doctor or healer and

this issue was not persisted with on the basis of when did he stop being a traditional doctor at all once the court ruled that answer was final.

[63] The second aspect relates to a principle referred to by the judge *a quo* that an answer to a categorical question is final. I must confess I know of no such rule nor could I find a reference to 'categorical questions' in the standard books on the South African law of evidence. From the nature of the questions and the stance as expanded upon by the judge *a quo*, I suspect he intended to refer to the general rule that answers to questions which are relevant solely to a witness' credit are final.¹⁹ This does not mean that the answer must be accepted without more. It means that no evidence to contradict the answer may be presented. The rule is 'based upon practical common sense because . . . the range of matters which may be relevant to credit is extremely wide and if every collateral issue had to be investigated the trial may be indefinitely prolonged'.²⁰ There seems to be a similar rule in the English law. In *Cross on Evidence*²¹ the following is stated:

'There is a sound general rule, based on the desirability of avoiding a multiplicity of issues, that the answers given by a witness to questions put to him in cross-examination concerning collateral facts was to be treated as final. This may or may not be accepted by the jury, but the cross-examiner must take them for better or for worse, and cannot contest them by other evidence.'

[64] To sum up: In respect of matters which are relevant to the issue, the answers of witnesses under cross-examination may be contradicted by other witnesses. In respect of matters which are relevant to credit only of a witness such

¹⁹ *S v Ffrench-Beytagh* (3) 1971 (4) SA 571 (T) at 572, *S v Cooper & others* 1976 (1) SA 932 (T) at 937 and *S v Sinkankaka & another* 1963 (2) SA 531 (A) at 539.

²⁰ L H Hoffmann and D T Zeffert *The South African Law of Evidence* 3 ed (1983) at 359.

²¹ Sir Rupert Cross and Colin Tapper *Cross on Evidence* 6 ed (1985) at 282–283.

answers are final. This does not mean that one cannot probe such answers or put to the witness facts that would tend to suggest he/she is not truthful in the answer (its not necessary for the purpose of this judgment to state what can be put to such witness and in what circumstances).²² The point is that the answer can be probed provided the basis for what is put to the witness is laid, eg statements in discovered documents casting doubt on the truth of the witness's answer.²³

Conclusion

[65] It follows from what is stated above that the appeal against the granting of absolution from the instance should succeed and that, as a consequence thereof the judgment of the N\$15 000 plus costs and interest against Mr Kasume must also be set aside as agreed between counsel for the parties. In addition, the appeal against the costs order consequent to the granting of a postponement and the refusal of an amendment after appellant closed her case are to be struck from the roll as leave has not been obtained for these appeals.

[66] As far as costs are concerned, I am of the view that, in respect of the absolution application an order that the costs be in the cause will be equitable. The application cannot be said to have been so without merit that it should not have been brought. It was clearly an arguable application and it is only at the end of the trial that one will know which party will be the successful party. With regard to the order relating to the liability or otherwise of Mr Kasume to pay Ms Neis N\$2 million for a substitute house; this was not claimed by Ms Neis nor suggested as an alternative relief and constituted an irregular folly embarked upon by the court a

²² *R v Ntsangela en andere* 1961 (4) SA 592 (A) at 598 and *S v Cele* 1965 (1) SA 82 (A) at 93B–C.

²³ *Carroll v Carroll* 1947 (4) SA 37 (D) at 40–41.

quo and I cannot see any way that either party should pay the costs thereof. The only fair result is to make no order as to costs in this regard.

[67] In the result, I make the following order:

1. The late filing of the record of appeal is condoned and the appeal is reinstated.
2. The appeal against the costs order of 24 March 2020 by the High Court is struck from the roll with no order of costs as leave to appeal for this order was not obtained from the court *a quo*.
3. The appeal against the refusal to grant leave to Ms Neis to amend her particulars of claim by the High Court as per the court order of 4 November 2020 is struck from the roll with no costs order as leave to appeal this order was not obtained from the court *a quo*.
4. The court order of the High Court of 30 July 2020 granting absolution from the instance in respect of the claim based on undue influence is set aside and substituted with the following orders:
 - '(a) The application for absolution from the instance in respect of the claim based on undue influence is declined. The costs occasioned by this application for absolution from the instance shall be costs in the cause.'

5. The matter is to continue before the trial judge on dates to be determined by him at a case management meeting.
6. The court orders of the High Court of 4 November 2020 relating to the adjudication by the judge *a quo* in respect of a dispute identified by him involving an alleged undertaking by Mr Kasume to give Ms Neis N\$2 million to purchase a substitute house are set aside (paras 1, 2 and 3 of the order of 4 November 2020).
7. The costs on appeal shall be borne by the respondents (the one paying the other to be absolved) on the basis of one instructing and one instructed counsel (where an instructed counsel was used).

FRANK AJA

SHIVUTE CJ

MAKARAU AJA

APPEARANCES

APPELLANT:

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