

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**  
**JUDGMENT**

**Consolidated Case No: HC-MD-CIV-ACT-OTH-2017/02389**

In the matter between:

**FADI FADEL AYOUB**

**FIRST PLAINTIFF**

**CHARLES JACOBUS CLOETE**

**SECOND PLAINTIFF**

**ALGENE MICHELLE MOUTON**

**THIRD PLAINTIFF**

and

**ANTONY JANUARIE**

**FIRST DEFENDANT**

**JOSEPHA JANUARIE**

**SECOND DEFENDANT**

**CECILIA BEAUKES**

**THIRD DEFENDANT**

**HEINRICH VAN WYK**

**FOURTH DEFENDANT**

**Case no.: HC-MD-CIV-ACT-OTH-2020/03781**

In the matter between:

**GERHARDT ALFONS BEZUIDENHOUDT**

**FIRST PLAINTIFF**

**FRANS HUBERT BEZUIDENHOUDT**

**SECOND PLAINTIFF**

**CECELIA BEUKES**

**THIRD PLAINTIFF**

**ANTHONY JANUARIE**

**FOURTH PLAINTIFF**

and

<b>ALGENE MICHELLE MOUTON</b>	<b>FIRST DEFENDANT</b>
<b>CHARLES JACOBUS CLOETE</b>	<b>SECOND DEFENDANT</b>
<b>FADI FADEL AYOUB</b>	<b>THIRD DEFENDANT</b>
<b>REGISTRAR OF DEEDS</b>	<b>FOURTH DEFENDANT</b>
<b>DAVID JOHN BRUNI NO</b>	<b>FIFTH DEFENDANT</b>
<b>MASTER OF THE HIGH COURT</b>	<b>SIXTH DEFENDANT</b>
<b>ALBERTUS BEUKES NO</b>	<b>SEVENTH DEFENDANT</b>
<b>FREDERICK JACOBUS COETZEE NO</b>	<b>EIGHTH DEFENDANT</b>
<b>PERUNZIA CHRISTINE MOUTON VAN WYK</b>	<b>NINTH DEFENDANT</b>
<b>MAURENCEL BEUKES</b>	<b>TENTH DEFENDANT</b>
<b>MARIANA COETZEE</b>	<b>ELEVENTH DEFENDANT</b>
<b>DOROTHY BARANICE CLOETE</b>	<b>TWELFTH DEFENDANT</b>
<b>GHADAFI NARIB</b>	<b>THIRTEENTH DEFENDANT</b>
<b>RACHEL ELAINE VAN WYK NO</b>	<b>FOURTEENTH DEFENDANT</b>

Neutral citation: *Bezuidenhout v Mouton* (HC-MD-CIV-ACT-OTH-2017/02389)  
[2023] NAHCMD NC 589 (22 September 2023)

**Coram:** UEITELE J  
**Heard:** 15 – 19 August 2022, 24 October 2022, 1, 28 and 30  
November 2022; 10 & 13 February 2023  
**Delivered:** 22 September 2023

**Flynote:** *Administration of Estates* - Redistribution of the immovable property of the estate of a deceased person' - What amounts to –

*Estates – Intestate succession* – Testatrix died intestate – The farm left by the testatrix was to be bequeathed to the seven heirs of the testatrix in terms of the intestate succession laws – Section 3 of the Subdivision of Agricultural Land Act 70 of 1970 precludes a farm being registered in more than one person's name – The seven heirs concluded a redistribution agreement to register the farm in one of the

heirs' name ('the guardian') in terms of s 13 of the Registration of Deeds Act 93 of 1976 – The guardian died intestate and the farm was awarded to his son – The guardian's son sold the farm and registered the farm in the name of the third plaintiff – The court held that the redistribution agreement may not be contrary to the common law rule – The court further held that the redistribution agreement, in the present matter, does not amount to an equitable variation or reshuffle of the estate assets in terms of the intestate succession laws – The redistribution agreement is void ab initio and the transfer of the farm to the third party and then to the third party's son and then to the third plaintiff is set aside.

**Summary:** On 7 July 2017, the plaintiffs instituted eviction proceedings against the defendants from Portion 2 of Farm Platsand No 451, measuring 657,0976 hectares Registration Division 'M', Hardap Region ('the farm').

The defendants resisted the eviction proceedings by defending the action and filed a counterclaim against the plaintiffs wherefore the defendants sought an order *inter alia* directing that the Registrar of Deeds at Rehoboth cancels the transfer of the farm to the third plaintiff and also an order to retransfer the farm into the names of the defendants. This counterclaim was withdrawn on 30 April 2018 by the defendants. On 15 September 2020, two of the defendants (in the 2017 action) and two other persons who were not parties to the 2017 brought a claim, under a separate case number, against the plaintiffs (in the 2017 action) with the addition of 11 other defendants. The two cases were consolidated on 27 April 2021 by the court.

The facts are largely undisputed and not complex and are as follows: The farm was the property of the late grandparents of the defendants in the 2017 action (two of who are the plaintiffs in the 2020 action). Upon the death of the defendants' (in the 2017 action) grandmother, after she inherited the farm from her husband (the late grandfather of the defendants in the 2017 action), the farm was bequeathed to her seven children (some of whom are the defendants' in the 2017 action, parents) in terms of the intestate succession laws.

The defendants' (in the 2017 action) grandmother's executor (the seventh defendant in the 2020 action) faced the legal challenge and limitations of s 3 of the Subdivision

of Agricultural Land Act, 70 of 1970 ('Subdivision of Agricultural Land Act') whereby the law precludes the registration of the farm into the names of more than one person. Given this limitation, the seven children of the defendants' in the 2017 action grandmother concluded a redistribution agreement on 4 January 1986 whereby the farm would be registered in the name of a certain Clemens Bezuidenhout ('Clemens') and as such the seven children acted in accordance with the said redistribution agreement until Clemens' death on 7 March 2009.

Following the death of Clemens the farm was then awarded to a certain Charles Jakobus Cloete ('Charles') – the son of Clemens. Despite the defendants' legal practitioners addressing correspondence to the Registrar of Deeds at Rehoboth not to register the farm in the name of Charles, an endorsement was registered on 7 February 2014 in terms of s 13 of the Registration of Deeds in Rehoboth Act 93 of 1976 ('Rehoboth Deeds Act') effectively transferring the farm to Charles. After such transfer, Charles sold the farm to the third plaintiff (the first defendant in the 2020 action) on 27 March 2017 and the endorsement in terms of s 13 of the Rehoboth Deeds Act was registered.

The court is tasked to determine whether the sale of the farm to the third plaintiff (the first defendant in the 2020 action) by Charles is valid given that the defendants argued that Charles (who sold the farm to the third plaintiff) had the knowledge that he was not the owner of the farm and that it was simply transferred to Clemens (Charles' father) as the guardian of the farm as a result of the legal limitations imposed by the Subdivision of Agricultural Land Act. If found that the sale is invalid, the court must further determine the consequences flowing from such invalidation.

*Held that* a redistribution agreement, subject to testate or intestate succession, provides a channel whereby beneficiaries or heirs can restructure or reshuffle the allocation of assets amongst themselves, if desired.

*Held further that*, a redistribution agreement may not be contrary to the common law rule, in that the explicit provisions of a will may not be departed from, even though there was an agreement between the interested parties.

*Held further that*, in the present matter, the redistribution agreement does not amount to an equitable variation or reshuffle of the estate assets in terms of intestate succession laws nor does each beneficiary who is a party to the redistribution agreement contribute something and receive something. The redistribution agreement amounts to a covert donation and nothing more.

*Held further that*, the redistribution agreement concluded by the executor and the intestate heirs of the defendants' grandmother is invalid and void ab initio.

Held further that, the executor in the estate of the defendants' grandmother thus had no power to transfer the farm to Clemens, ownership of the farm therefore never passed from the estate of the defendants' grandmother to Clemens and all subsequent transfers are therefore void.

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## ORDER

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1 The redistribution agreement concluded, on 4 January 1986, between the executor in the estate of the late Christina Martina Bezuidenhout and the intestate heirs to that Estate, is *void ab initio*.

2. The transfer of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares from the estate of the late Christina Martina Bezuidenhout to Clemens Bezuidenhout is set aside.

3 The transfer of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares from the estate of the late Clemens Bezuidenhout to Charles Jacobus Cloete is set aside.

4 The Deed of Sale concluded on 27 March 2017 between Charles Jacobus Cloete and Algene Michelle Mouton married to Fadi Ayoub which marriage is governed by the laws of South Africa, in respect of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657, 0976 is declared void.

5. The transfer of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares from Charles Jacobus Cloete to Algene Michelle Mouton married to Fadi Ayoub which marriage is governed by the laws of South Africa is set aside.

6. Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares must revert to the estate of the late Christina Martina Bezuidenhout. The Master of the High Court of Namibia must appoint an estate representative to administer the estate of the late Christina Martina Bezuidenthout.

7. The Registrar of Deeds must cancel the following transfer endorsement in respect of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares:

7.1 Endorsement Transfer No 799/89 dated 20 September 1989 made in favour of Clemence Bezuidenhout, with Identity Number 440112 0200432; and

7.2 Endorsement Transfer No 66/2014 dated 07 February 2014 made in favour of Charles Jacobus Cloete, with Identity Number 70110300505; and

7.3 Endorsement Transfer No 305/2017 dated 31 March 2017 made in favour of Algene Michelle Mouton, with Identity Number 71071500244, married to Fadi Ayoub which marriage is governed by the laws of South Africa.

8 Algene Michelle Mouton, with Identity Number 71071500244, married to Fadi Ayoub which marriage is governed by the laws of South Africa, must surrender the Title Deed in respect of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares to the Registrar of Deeds for cancellation.

9. The first, second and third defendants in the 2020 action must, jointly and severally the one paying the other to be absolved, pay the plaintiffs costs of suit.
10. The matter is regarded as finalised and is removed from the roll.

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## JUDGMENT

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### **UEITELE J:**

#### Introduction

[1] On 7 July 2017, three persons, namely, Fadi Fadel Ayoub (acting as the first plaintiff), Charles Jacobus Cloete (acting as the second plaintiff), and Algene Michelle Mouton (acting as the third plaintiff) commenced action by issuing summons out of this court seeking the eviction of Antony Januarie (as the first defendant) Josepha Januarie (as the second defendant), Cecilia Beukes (as the third defendant) and Heinrich Van Wyk (as the fourth defendant) from Portion 2 of Farm Platsand No. 451, Measuring 657,0976 Hectares Registration Division M, Hardap Region (I will in this judgment refer to the property as 'the Farm'). This case is registered under case number HC-MD-CIV-ACT-OTH-2017/02389.

[2] The four defendants entered a notice to defend and resisted their eviction from the Farm. In addition to filling a notice to defend the eviction the four defendants also instituted a counterclaim in terms of which they sought an order declaring the sale of the Farm by the second plaintiff, Charles Jacobus Cloete, to Algene Michelle Mouton (the third plaintiff) as void. They furthermore sought an order directing the Registrar of Deeds at Rehoboth to cancel the transfer of the Farm to Ms Algene Michelle Mouton and an order to retransfer the Farm into the names of Antony Januarie, Josepha Januarie, Cecilia Beukes and Heinrich Van Wyk or any other legitimate heir to the estate of the late Christina Martina Bezuidenhout.

[3] On 30 April 2018, the four defendants withdrew their counterclaim against the three plaintiffs, and approximately 28 months later, that is on 15 September 2020, two of the defendants in the 2017 and to other persons who were not parties to the 2017 action issued summons (as plaintiffs now) against the initial three plaintiffs, who were now cited as defendants and added another 11 defendants. This case was registered under case number HC-MD-CIV-ACT-OTH-2020/03781. In this action, the four plaintiffs essentially seek the same relief that was sought in the counterclaim which was withdrawn on 30 April 2018 (as referred to in paragraph 2 of this judgment). Of the 14 defendants who were cited in this action only two, namely, Ms Algene Michelle Mouton and Fadi Fadel Ayoub defended the action. I will, for the sake of convenience, in this judgment, refer to them as 'the defendants in the 2020 action'.

[4] On 27 April 2021, this court issued an order consolidating the two matters. This judgment is therefore in respect of the two consolidated matters. At the commencement of the trial, the parties agreed that the Farm is currently registered in the name of Ms Algene Michelle Mouton and that the resolution of the dispute relating to the cancellation of the sale of the Farm to Ms Algene Michelle Mouton will also resolve the dispute as to whether Antony Januarie, Josepha Januarie, Cecilia Beukes and Heinrich Van Wyk (I will, for the sake of convenience in this judgment, refer to them as the plaintiffs in the 2020 action) may or may not be evicted from the Farm. Because of that agreement the parties agreed, as contemplated under rule 99, that the plaintiffs in the 2020 matter must commence with their case.

[5] The plaintiffs in the 2020 action commenced with leading evidence in respect of their case, and lead evidence of six witnesses. At the close of the plaintiffs' case, the defendants in the 2020 action applied to be absolved from the instance. I refused the application for absolution from the instance and indicated that the reasons for my refusal will be stated in the judgment on the merits. After I refused the defendants in the 2020 action's application for absolution from the instance, they (the defendants in the 2020 action) elected not to testify and closed their case.

[6] The parties filed their respective heads of arguments, and both waived their rights to make oral submissions. The matter was, as a result, postponed for



judgment. I find it appropriate to, for best understanding of the issues that are involved in this matter, give a brief factual background of what transpired between the parties, giving rise to the two actions before this court.

### Factual Background

[7] The background facts are to a large extent undisputed and not particularly complex. They relate to the Farm. The Farm was the property of the late Jacobus Bezuidenhout (the late Jacobus) and the late Christina Martina Bezuidenhout (the late Christina), who were married to each other in community of property. Both Jacobus and Christina have long passed away. Jacobus died on 19 December 1977 and he bequeathed his portion of the Farm to his surviving spouse, the late Christina. The late Christina in turn died on 24 September 1984 and was at the time of her death the owner of the Farm.

[8] From the marriage between the late Jacobus and the late Christina seven children were born namely; Josepha Januarie (born Bezuidenhout), Waltraud Sophia Beukes (born Bezuidenhout), Andrew Joseph Bezuidenhout, Clemens Bezuidenhout, Frans Hubert Bezuidenhout, Gerhardt Alfons Bezuidenhout and Willem Bezuidenhout. Of the seven children only two children, namely, Gerhardt Alfons Bezuidenhout and Frans Hubert Bezuidenhout were still alive at the time of the trial of this matter. Cecelia Beukes the third plaintiff in the 2020 action, is the grandchild of the late Jacobus and the late Christina. Her mother is the late Waltraud Sophia Beukes. Similarly, Anthony Januarie is the grandchild of the late Jacobus and the late Christina. His mother is the late Josepha Januarie.

[9] The late Christina, who died on 24 September 1984, died intestate. As a result, her estate was distributed in accordance with the intestate succession laws. The seventh defendant in the 2020 action, Mr Albertus Beukes, was appointed as the executor in the estate of the late Christina. The seven children of the late Christina inherited the Farm in equal undivided shares. Faced with challenges and legal limitations in the winding up of the late Christina's estate, one such legal limitation being the fact that s 3 of the Subdivision of Agricultural Land Act, 70 of 1970 prohibits the registration of agricultural land in the names of more than one

person, the executor caused the seven heirs (that is the seven biological children of the late Christina) to conclude a redistribution agreement on 4 January 1986.

[10] Because of the central role that the redistribution agreement has in this dispute, I find it appropriate to, in full reproduce the version of that agreement as it was translated from the Afrikaans language to the English language and admitted into evidence as 'Exhibit B1'. It reads as follows:

**'REDISTRIBUTION AGREEMENT** entered into and between:

Albertus Beukes in his capacity as executor in the estate of the late Christina Martina Bezuidenhout (WIDOW) issued by the magistrate of Rehoboth in terms of article 4 of the Estate Proclamation of 1941 at Rehoboth on 18 February 1985.

AND

1. JOSEPHA JANUARIE (BORN BEZUIDENHOUT),
2. WALTRAUD BEUKES (BORN BEZUIDENHOUT),
3. ANDREW JOSEPH BEZUIDENHOUT,
4. CLEMENS BEZUIDENHORST,
5. FRANS BEZUIDENHOUT,
6. GERHARD BEZUIDENHOUT and
7. WILLEM BEZUIDENHOUT.

(hereinafter called the INTERSTATE HEIRS)

**WHEREAS** the said CHRISTINA MARTINA BEZUIDENHOUT died interstate at REHOBOTH;

**AND WHEREAS**, in terms of the interstate law of succession the hereinafter mentioned property must devolve upon the said intestate heirs in equal shares;

**AND WHEREAS**, in terms of the Consolidation Act of the Government of Rehoboth the property may not be registered in the name of more than one person;

**NOW THEREFORE THE PARTIES AGREE AS FOLLOW;**

1. The property namely:

**CERTAIN** Portion of Portion 2 of the Farm PLATSAND NO. 451

**MEASURING** 657,0976 (Six Hundred and Fifty Seven comma Nil Nine Seven Six) hectares

**HELD** under Land Title No. 451

Shall be transferred into the name of **CLEMENS BEZUIDENHOUT**

2. The said **CLEMENS BEZUIDENHOUT** shall further not be entitled to sell the property or alienate it in any in any other manner without the written consent of the other interstate heirs, which consent shall not be withheld unreasonably.
3. The other interstate heirs shall further be entitled to, notwithstanding any directions contrary hereto, keep on the above-mentioned property such number of cattle as each of them presently possesses and let them graze thereon without paying any compensation.
4. The said **CLEMENS BEZUIDENHOUT** shall not be required to pay any consideration for the said property.
5. The parties hereby acknowledge that they shall have no claims whatsoever against each other and hereby commit their heirs, executors, administrators and/or procurators irrevocably and in rem suam.
6. This agreement represents the whole agreement between the parties and no amendment shall be valid unless it is in writing and signed by all parties hereto.
7. The parties here by agree to the jurisdiction of the Magistrate Court in any action which may arise in terms hereof.
8. The costs hereof shall be paid by the executor of the Estate of the late Christina Martina Bezuidenhout.

Signed at PLATSAND on this 4th day of January 1986 in the presence of the undersigned witnesses.'

[11] The above quoted redistribution agreement was signed by all the seven heirs and the executor, and two witnesses for each signatory. As a result of the redistribution agreement, the Farm was subsequently registered in the name of Clemens Bezuidenhout ('Clemens'), but it appears that the conditions contained in the redistribution agreement were not registered against the title deed of the Farm. As of 1986, the heirs acted in accordance (in that all the heirs conducted their farming activities on the Farm and all also resided on the Farm) with the redistribution agreement until the death of Clemens, who died on 7 March 2009. Clemens also died intestate.

[12] David John Bruni, the fifth defendant in the 2020 action, was appointed as the executor in the estate of the late Clemens. At the time of his death, Clemens was unmarried but was survived by two children, namely, Eloisius Ricardo Okhuizen and Charles Jakobus Cloete (I will, in this judgment, refer to him as Charles, not out of disrespect but simply for convenience sake). According to the liquidation and distribution account in the estate of the late CLEMENS BEZUIDENHOUDT (which was advertised during April 2012 and laid open for inspection between 5 April 2012 and 27 April 2012 the Farm was awarded to Charles.

[13] During 2011, 2012, 2013 and 2014, several letters were written by different legal practitioners who represented some of the plaintiffs in the 2020 action, addressed to the Office of the Registrar of Deeds (the fourth defendant), urging the Registrar of Deeds not to register the Farm in the name of Charles. On 7 February 2014, an endorsement in terms of s 13 of the Registration of Deeds in Rehoboth Act 93 of 1976 was made on the title of the Farm at the Registrar of Deeds in Rehoboth. The effect of that endorsement is that the Farm was transferred to Charles.

[14] On 27 March 2017, Charles concluded a deed of sale with Algene M Mouton (Ms Mouton), the first defendant in the 2020 action. In terms of that deed of sale, Charles sold the Farm to Ms Mouton for an amount of N\$1 million. On 31 March 2017, that is four days, after Charles and Ms Mouton signed the deed of sale, the Registrar of Deeds at Rehoboth endorsed the title deed of the property in terms of s 13 of the Registration of Deeds in Rehoboth Act 93 of 1976. The effect of that endorsement is to transfer ownership of the Farm to Ms Mouton, who is married to

the third defendant in the 2020 action, Mr Fadi Fadel Ayoub. Three months after the Farm was transferred to Ms Mouton, she, Charles and her husband commenced proceedings to evict some of the plaintiffs in the 2020 action from the Farm. It is the deed of sale between Charles Ms Mouton and the endorsement transfer into the name of Ms Mouton that the plaintiffs in the 2020 action are impugning.

#### The issues for determination

[15] The plaintiffs in the 2020 action are seeking to set aside the deed of sale concluded between Charles and Ms Mouton on the basis that Charles knew very well that he had no claim to ownership in the Farm, because the Farm was simply transferred to his father, as the guardian of the property because of legal limitations that the Farm could not be transferred into the names of the seven heirs. The plaintiffs further contend that despite that knowledge Charles through fraudulent means sold the Farm to Ms Mouton. The plaintiffs in the 2020 action on that basis are seeking the voiding of the deed of sale between Charles and Ms Mouton and the cancellation of the transfer of the Farm to Ms Mouton.

[16] The issue that this court is thus required to determine in this matter is whether the sale of the Farm to Ms Mouton is valid and what the consequences are, if the sale is invalid. In considering the issue that the court is required to determine, I will start of by briefly summarising the evidence that I regard as relevant.

#### The plaintiffs in the 2020 action's evidence.

[17] As I indicated earlier the plaintiff called six witnesses. The first witness was Mr Frans Hurbert Bezuidenhout (Frans), who is the second plaintiff in the 2020 action. He testified that he was 75 years old, at the time of the trial. He testified that he grew up on the Farm. He is the son of the late Jacobus and Christina. He confirmed being a signatory to the redistribution agreement, and further confirmed its content. He testified that a few years ago, Charles went to see him at his house. Charles indicated to him that he needed to obtain a loan to repair existing fences of the Farm and to pay for land tax for the Farm. After the discussion, the two drove to Charles' flat, where Frans signed the document he believed would help Charles to secure a

loan. He did not read the document that he signed as he had eye problems and could not see properly.

[18] He further stated that after some time, the Farm was still not renovated and he thus suspected that Charles had lied to him. His other nephew Anthony Januarie (the fourth plaintiff in the 2020 action) later told him that the Farm was sold. He further testified that Charles deceived him into thinking that the document he was signing was to help him (Charles) obtain a loan to renovate the Farm and pay land tax. He did not give consent to the Charles to sell the Farm.

[19] The second witness was Mrs Sanna Van Der Byl (Sanna) and is the daughter of Frans. Charles is her cousin. She testified that on 31 January 2016 she went to Rehoboth to visit her parents. While in Rehoboth, her father called her, and informed her that there is a document that he needed to sign which was at Charles' place of residence. Her father wanted them to go together so that Charles can explain the document to her. She continued and testified that she and her father went to Charles' residence and Charles informed them that he wanted to apply for a loan from the Agricultural Bank of Namibia in order to enable him to renovate the Farm and pay land tax in respect of the Farm.

[20] She continued and testified that Charles told her that the document that her father signed and which she just needed to sign as a witness was to strengthen his application for the loan from the Agricultural Bank of Namibia. He also indicated that he had already acquired the consent of her other uncle, Gerald Alfons Bezuidenhout, and he showed it to her. She continued and testified that Charles further conveyed to her that all that was required, again, was consent from their aunt, Josepha Januarie, to strengthen his application. Charles, after all this exchange, asked her to sign as her father's witness. She had no problem to sign the document as a witness for her father as she was of the view that the renovation would be good for the Farm.

[21] She continued and testified that she trusted Charles and they had a good relationship and she did not think that Charles would lie to her. She accordingly did not read the document when she signed as a witness. It is only later when she heard

that the Farm was sold that she read the document that she signed as a witness that she came to the realisation that Charles had actually misled her and her father.

[22] The third witness to testify on behalf the plaintiffs in the 2020 action was Gerhard Alfons Bezuidenhout (Gerhard), the first plaintiff, an adult male 70 year old at the time of the trial. He testified that he is a biological son of late Jacobus and Christina. He testified that he and his siblings were born and raised on the Farm. He further testified that his mother died interstate, and Mr. Albertus Beukes was appointed as the executor of her estate. He testified that his mother's wish and intention was that the Farm should be divided into equal shares amongst her seven children, but they, as siblings, were advised by Mr. Beukes that, in accordance with the prevailing laws, the Farm could not be subdivided and could not be registered in the name of more than one person.

[23] He continued and testified that they were then advised to enter into a redistribution agreement so that the Farm could be registered in one person's name. He continued and testified that the seven of them accepted the advice and agreed that the Farm be registered in the late Clemens' name who would act as guardian for the Farm on behalf of the other siblings and that the other siblings would have the right of use of the Farm in accordance with what is agreed and recorded in the redistribution agreement.

[24] He further testified that Clemens passed away on 7 March 2009 and that during February 2014, he learned that the Farm was transferred and registered into his nephew, Charles' name. Charles is the son of his brother Clemens. He testified that he did not consent to the Farm being registered into Charles' name, he thus contended that the registration of the Farm into Charles' name was in contravention of the redistribution agreement. He continued and testified that somewhere during the year 2017; he discovered that the Farm was sold to Ms Mouton. He vehemently denied that he gave his consent for the Farm to be sold. He further testified that Charles forged his signature on the document that purported to be a consent from him for the sale of the Farm.

[25] Gerhard further testified as to the steps he took when he discovered that the Farm was sold. He testified that the steps that he took included him laying criminal charges under case number CR 341/06/2018 against Charles for the fraudulent sale of the Farm and him engaging the third defendant, Mr Fadi Ayoub, to see how they will resolve the fraudulent sale.

[26] The fourth witness is Michael Max Saco (Saco), an adult male self-employed as a paralegal consultant and estate agent. He testified that during August 2018 he received a visit from Gerhard who informed him that he had a problem with his mother's estate, and he needed his assistance. Gerhard identified himself as an heir to the property. Gerhard informed him of the estate of the late Christina, the redistribution agreement, and the status of the estate. After he analysed the documents presented to him, he concluded that the property was sold. Gerhard informed him that he was not aware of the sale, and he did not consent to the sale. Saco showed Gerhard the document that showed that he had consented, and that Gerhard's signature was on the document, but Gerhard denied that he ever signed such a document.

[27] Saco continued and testified that a few days after his meeting with Gerhard he reported the matter to the Master of the High Court by way of a letter, informing the Master of the High Court that he had discovered some irregularities in the estate of the late Christina. He did not receive a response on his letter from the Master. He continued and testified that during May of 2019 Gerhard came to his house together with a man who identified himself as 'Charles Jacobus Cloete'. Charles appeared nervous and Charles requested that the discussion be done the following day, they both agreed.

[28] Saco continued his testimony that the following day Charles came back with Gerhard and Saco took a statement from Charles, in which statement Charles confessed to having forged Gerhard's signature and fraudulently selling the Farm. Saco further testified that Charles agreed to attend to the Rehoboth Police Station the following day for the purposes of commissioning the statement so that it would be under oath. Charles, however, never turned up at the police station.

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[29] The next witness to testify on behalf of the plaintiffs in the 2020 action was Cecilia Paulina Beukes (Cecilia), an adult female and the third plaintiff in the 2020 action. She is seeking an order declaring the sale of the Farm by Charles to Ms Mouton null and void. She testified that the Farm belonged to her grandparents (as indicated earlier her mother is the late Waltraud Sophia Beukes). She testified that she moved onto the Farm during 2003 just before her mother's death and commenced with gardening and livestock farming. She testified that after the death of her uncle, Clemens, she has been enquiring about the ownership of the Farm.

[30] Cecilia continued and testified that during the year 2011, she started writing to the family regarding the Farm. She also acquired cattle and this caused a dispute with her family, and they wanted her to leave the Farm. The dispute continued into 2012 and she approached a lawyer to obtain advice on what her rights were on the Farm. Her lawyer confirmed that the property was in the process of being transferred to her cousin Charles. Cecilia was not happy with this as Charles was not the only heir. As a result, she instructed her lawyer to write a letter to the Registrar of Deeds requesting that the property must not be registered in the name of Charles. A second letter was written to the Registrar of Deeds requesting the property not to be transferred in the name of Charles, pending an application she intends to bring in the High Court. However, she did not have sufficient funds to bring this application at the time.

[31] Cecilia continued and testified that the Farm was subsequently transferred into Charles' name, and she continued living on the Farm doing gardening and farming until April 2017, when Ms Mouton, Charles and Mr Ayoub instituted eviction proceedings against her. She testified that on a date that she cannot remember Mr Ayoub came with a certain warrant Officer Eiseb, a police officer, who informed her that she needed to leave the Farm as the Farm was sold to Ms Mouton, and she was shown a title deed. Thereafter, Ms Mouton gave her an amount of N\$109 000 and seeing that the property was already sold, she accepted the money. She later engaged lawyers to assist her with reversing the sale. Cecilia stated further that Charles has forged her signature purporting to give her consent for the sale of the Farm. She further testified that Charles acted in collusion with Mr Ayoub in forging her signature.

[32] The last witness was Anthony Januarie (Anthony), an adult male who is the fourth plaintiff in the 2020 action. He testified that he is the son of Josepha Januarie and that he moved onto the Farm during the year 2011, with the permission of his mother, and started farming on the Farm. He also testified that he later learned that the Farm was sold to Ms Mouton. He further testified on the interactions between him and Mr Ayoub, who had tried to evict him with the help of the police, and that Mr Ayoub had cut the fences and chained gates to prevent him and his mother from entering the Farm. He later approached lawyers with some of the other plaintiffs who brought this action, to stop eviction proceedings, which were brought by Mr Ayoub, Charles and Ms Mouton.

[33] As indicated earlier, after these six witnesses testified, the two defendants who defended the 2020 action applied to be absolved from the instance. As I further indicated, I refused to grant the application for absolution from the instance. My reasons for so refusing will become clear in the paragraphs that will follow.

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#### Discussion

[34] Central to the plaintiffs' in the 2020 action (the plaintiffs), on which their cause of action is rooted is the redistribution agreement concluded on 4 January 1986 between the executor and the heirs to the estate of the late Christina. The plaintiffs contend that when the siblings signed the redistribution agreement they never intended ownership of the Farm to pass to Clemens. They contend that Clemens was simply supposed to be the 'guardian' of the Farm. In view of this contention I asked both counsel for the plaintiffs and defendants in the 2020 action to address me on the legality and validity of the redistribution agreement.

[35] Deceased estates in Namibia are administered in accordance with several statutory instruments. Such instruments include the Administration of Estates Act 66 of 1965, Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941 and the Native Administration Proclamation 15 of 1928 (as amended). When a person dies; his beneficiaries or heirs may inherit movable or immovable assets or both movable and immovable assets in terms of a valid will (testate succession) or intestate succession (in terms of the Intestate Succession Laws). However, not all

the beneficiaries or heirs concerned may be thrilled with what they have inherited or they may face legal limitations, particularly where movable or immovable property is left to more than one beneficiaries or heir for instance.

[36] The common law's response to prevent co-ownership of either movable or immovable property was to permit beneficiaries or heirs to conclude what has become known as redistribution agreements<sup>1</sup>. The common law also subsequently developed and extended the *causa* for redistribution agreements to carry out the wishes of testators or to comply with certain legal limitations imposed by law such as for example the Agricultural Land Act 70 of 1970 and enable an individual heir to take sole ownership of certain assets in terms of such redistribution agreement.

[37] In essence, a redistribution agreement, subject to testate or intestate succession, provides a channel whereby beneficiaries or heirs can restructure or reshuffle the allocation of assets amongst themselves, if desired. D Meyerowitz<sup>2</sup>, states the following with regard to a redistribution agreement:

'Although not strictly speaking a method of realisation, a redistribution agreement among the heirs can contain elements of realisation. For example, property may be left in undivided shares to A and B. They may agree that A should be awarded the property and B something else, or that A will take over a bigger share of the property and pay estate debts.

The basis of a redistribution agreement is that the heirs or legatees who have vested rights are able to deal with these rights and can therefore agree to a redistribution of their inheritances among themselves. A redistribution therefore could avoid a sale which might otherwise have had to take place in order to pay the estate's liabilities, or because the practical exigencies did not permit a transfer or delivery of the assets to the heirs jointly.'

[38] *Abrie et al*<sup>3</sup>, argue that a distinctive characteristic of a redistribution agreement is that each beneficiary or heir who is a party to the agreement must contribute something and receive something. The parties need not contribute or receive in the same ratio as to their original inheritance. It is also possible that an heir may bring

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<sup>1</sup> See *Testate Estate of John McDonald* 1897 NLR 15 (6).

<sup>2</sup> In *Meyerowitz on Administration of Estates and Estate Duty* 2004 ed para 12.31.

<sup>3</sup> W Abrie, CR Graham, M C Schoeman-Malan and P de E van der Spuy, *Deceased Estates* 5<sup>th</sup> Ed at 132-133.

movables (such as cash) into the estate from outside to facilitate a more equal distribution. The learned authors, however, emphasise that the main objective of a redistribution agreement, must be a redistribution of the estate assets.

[39] A redistribution agreement may not be contrary to the common law rule, in that the explicit provisions of a will may not be departed from, even though there was an agreement between the interested parties. According to our common law, it is thus clear that it will only be admissible to enter into a redistribution agreement to redistribute assets acquired by heirs or legatees by virtue of a will or *ab intestatio*, and thus they cannot agree to alter the provisions of the will or law relating to intestate succession. However, s 14(1)(b)(iii) of the Deeds Registries Act 47 of 1937 has altered the common law position, but this section is not applicable to the present matter.

[40] There exists no prescribed form for a redistribution agreement, however, from the wording contained in regulation 5(1)(e) of the Administration of Estates Act 66 of 1965, it is evident that a redistribution agreement must be in writing. Furthermore, s 2(1) of the Alienation of Land Act 68 of 1981 also provides that if immovable property is involved in such redistribution, then the redistribution agreement must be in writing. Even though no form is prescribed for a redistribution agreement, a redistribution agreement may not, as mentioned earlier, be contrary to the common law. In *De Wet v De Wet and Others*<sup>4</sup> the court held that:

'... a legatee's interest under a will is limited to what has been given to him thereunder, and the second is that an executor must administer and distribute the estate of a deceased person in strict accord with the terms and directions contained in such person's will, if any. It is also, I think, implicit from the numerous cases which have been decided in our Courts upon applications for relief, whether by beneficiaries under a will or by executors, that acts and agreements by and between them which vary or modify the terms of a will are invalid and unenforceable unless sanctioned by the Court, which sanction is given only in certain excepted cases.

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<sup>4</sup> *De Wet v De Wet and Others* 1951 (4) SA 212 (C) at 216.

[41] In *Bydawell v Chapman NO and Others*<sup>5</sup> the court held that beneficiaries of full capacity may freely renounce, waive or dispose of their rights under a will, and if the executor or administrator acts in terms of the agreement, every party who so waived or disposed of his rights cannot complain. But said, the court:

‘... it must be plain that any rights acquired under the agreement are contractual and cannot affect the devolution of the testator's estate; in other words they may contract to render to each other the fruits of the devolution, if and when they mature or accrue, but cannot alter the devolution by contract.’

[42] In *Klerck, NO v Registrar of Deeds*<sup>6</sup> the court stated that:

‘... that in every redistribution there must be involved sale, exchange, or donation between one heir and another, or between the heir and surviving spouse. But the mere fact that a sale between two heirs or between an heir and the surviving spouse is entered into does not necessarily mean that a redistribution is brought about by that sale.’

[43] In the *Klerck matter*, the court indicated that a redistribution agreement must be scrutinised so that a covert sale or donation must be distinguished from a redistribution agreement because the former is not a redistribution agreement. The court stated that the transaction in that case (in *the Klerck case*) was a sale and nothing more. It was not the vehicle of redistribution, the transaction was therefore declared void. How must one determine whether the redistribution agreement does not constitute a covert donation or sale? The test that has been frequently used is that developed in *Lubbe v Commissioner for Inland Revenue*<sup>7</sup> and the objective question is;

‘If the redistribution agreement is ignored, will there, irrespective of the movable assets which are possibly introduced, be an allocation of the relevant assets being distributed in the agreement to the contracting parties’

If the question is answered in the affirmative, a valid and binding redistribution agreement is forthcoming and can include a sale, donation or exchange.

<sup>5</sup> *Bydawell v Chapman NO and Others* 1953 (3) SA 514 (A) at 523.

<sup>6</sup> *Klerck, NO v Registrar of Deeds* 1950 (1) SA 626 at p 629.

<sup>7</sup> *Lubbe v Commissioner for Inland Revenue* 1962 (2) SA 503(O).

[44] In the present matter, the redistribution agreement signed between the heirs of the late Christina, does not amount to an equitable variation or reshuffle of the estate assets in terms of intestate succession laws nor does each beneficiary who is a party to the redistribution agreement contribute something and receive something. The redistribution agreement amounts to a covert donation and nothing more. The redistribution agreement concluded between the executor and their heirs to the late Christina's estate furthermore fails the test postulated in the *Lubbe v Commissioner for Inland Revenue* matter because in the present case, if the redistribution agreement is ignored, the Farm would never devolve to Clemens or his estate alone. The Farm will devolve back into the estate of the late Christina and may either be sold and the heirs each receive their fair share, or a legally compliant redistribution agreement is concluded. For this reasons, I find that the redistribution agreement concluded by the executor and the interstate heirs of the late Christina is invalid and void ab initio.

[45] The conclusion I have arrived at is fortified by Article 16(1) of the Namibian Constitution which holds that 'all persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.' To disinherit legitimate heirs by way of redistribution agreement, as the redistribution agreement in this matter does, is just untenable.

[46] This is not the end of the matter. The finding that the redistribution agreement is void gives rise to another question namely whether it follows, as contended by the plaintiffs, that the transfer of the Farm to Clemens and subsequently to other third parties must be regarded as a nullity. Put in another way, did the registration of the transfer of the Farm to Clemens effectively transfer dominium in the Farm to him?

[47] What was, in principle then necessary in order that *dominium* in the Farm must pass? Badenhorst *et al*<sup>8</sup> discuss and deal with this matter. They argue that one

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<sup>8</sup> PJ Badenhorst, MJ Pienaar and H Mostert *Silberberg and Schoeman's The law of Property* 5 ed.

of the requirements is that the parties to an agreement to pass ownership in a thing must be in a position to pass and acquire ownership, which means normally that the transferor must be the owner or authorised by the owner. Another requirement listed by the learned authors is that the parties must be legally competent to give and receive ownership. And the third requirement is that the parties must intend the passing of ownership<sup>9</sup>. In this regard, the learned authors deal with the difference between the 'abstract' and 'causal' approach to the transfer of *dominium*<sup>10</sup>.

[48] I start off to consider whether the first requirement for the valid passing of ownership has been met (that is whether the executor in the state of the late Christina had authority to transfer the Farm to Clemens). In *Mngadi NO v Ntuli and Others*<sup>11</sup> the relevant facts and findings of the court are set out in the headnote as follows:

'A deceased black man had been twice married. He had executed a will, in which his first wife, plaintiff, had been appointed executrix of his estate, and which he had not revoked on his second marriage. After his death this will had been accepted and registered by the Master. Subsequently, however, the second wife had been appointed by an additional Bantu Affairs Commissioner as representative of the deceased's estate in terms of reg 4(1) of the regulations for the Administration and Distribution of the Estates of Deceased Bantu published under Government Notice R34 of 7 January 1966, both the Commissioner and the second wife, first defendant, being unaware of the existence of the will. She had then sold and transferred certain immovable property in the estate to second defendant who had in turn sold and transferred it to third defendant. Plaintiff now brought a vindicatory action against the defendants, citing the Registrar of Deeds as fourth defendant.

*Held*, since the power of appointment conferred upon the Commissioner by reg 4(1) existed only in relation to cases where the deceased bantu had died leaving no valid will, that, if the Commissioner purported to exercise that power in respect of an estate of a deceased person who had left a valid will he was not mistakenly exercising a power which he had but was purporting to exercise a power which he did not have at all in terms of the relevant statute. *Brand NO v Volkskas Bpk and Another* 1959 (1) SA 494 (T) distinguished.

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<sup>9</sup> *Ibid* at 72-73.

<sup>10</sup> Also see *Satar v Clayton* (HC-MD-CIV-ACT-DEL-2018/03453) [2023] NAHCMD 263 (12 May 2023).

<sup>11</sup> *Mngadi NO v Ntuli and Others* 1981 (3) SA 478 (D).

Held, therefore, that the appointment of first defendant was *void ab initio* and that she accordingly had no power to transfer the ownership of the properties to the second defendant: the ownership of the properties accordingly remained vested in the estate of the deceased of which plaintiff was the duly appointed representative.'

The Court accordingly found for the plaintiff and granted the order sought, cancelling the transfer of the relevant properties.'

[49] By parity of reasoning, the executor in the estate of the late Christina, when transferring the Farm to Clemens, purported to exercise that power in terms of the redistribution agreement he was not mistakenly exercising a power which he had but was purporting to exercise a power which he did not have at all in terms of the Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941. Not only was the redistribution agreement void but that agreement also made it clear that Clemens was holding the Farm in trust for the other interstate heirs and dominium could thus not pass to him. The executor in the estate of the late Christina thus had no power to transfer the Farm to Clemens. Ownership of the Farm therefore never passed from the estate of the late Christina to Clemens and all subsequent transfers are therefore void.

[50] The conclusion that I have arrived at, namely, that the executor in the estate of the late Christina did not have the power to pass ownership in the Farm to Clemens makes it unnecessary for me to consider whether on the basis of the 'abstract' or 'causal' theories, *dominium* in the property was transferred.

[51] What is left is the question of costs. The basic rule with regard to costs is that all costs, unless expressly otherwise enacted, are in the discretion of the judge, and the discretion must be exercised judicially, that is, not arbitrarily. An award of costs ought to be fair and just between the parties. It has also been held that another general rule is that the successful party must be awarded his or her costs, and the rule ought not to be departed from without good grounds. But the rule is subject to the abovementioned overriding principle that the award of costs is in the discretion of the judge (it depends upon the circumstances of the particular case).



[52] In my view, the plaintiffs (in the 2020 action) were successful, the first and third defendants (in the 2020 action) must pay their costs.

### Order

[53] In light of the reasons that I have set out, the findings that I have made and conclusions that I have reached in the preceding paragraphs, I make the following order:

1 The redistribution agreement concluded, on 4 January 1986, between the executor in the estate of the late Christina Martina Bezuidenhout and the intestate heirs to that Estate, is *void ab initio*.

2. The transfer of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares from the estate of the late Christina Martina Bezuidenhout to Clemens Bezuidenhout is set aside.

3 The transfer of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares from the estate of the late Clemens Bezuidenhout to Charles Jacobus Cloete is set aside.

4 The Deed of Sale concluded on 27 March 2017 between Charles Jacobus Cloete and Algene Michelle Mouton married to Fadi Ayoub which marriage is governed by the laws of South Africa, in respect of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657, 0976 is declared void.

5. The transfer of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares from Charles Jacobus Cloete to Algene Michelle Mouton married to Fadi Ayoub which marriage is governed by the laws of South Africa is set aside.

6. Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares must revert to the estate of the late Christina Martina

Bezuidenhout. The Master of the High Court of Namibia must appoint an estate representative to administer the estate of the late Christina Martina Bezuidenhout.

7. The Registrar of Deeds must cancel the following transfer endorsement in respect of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares:

7.1 Endorsement Transfer No 799/89 dated 20 September 1989 made in favour of Clemence Bezuidenhout, with Identity Number 440112 0200432; and

7.2 Endorsement Transfer No 66/2014 dated 07 February 2014 made in favour of Charles Jacobus Cloete, with Identity Number 70110300505; and

7.3 Endorsement Transfer No 305/2017 dated 31 March 2017 made in favour of Algene Michelle Mouton, with Identity Number 71071500244, married to Fadi Ayoub which marriage is governed by the laws of South Africa.

8 Algene Michelle Mouton, with Identity Number 71071500244, married to Fadi Ayoub which marriage is governed by the laws of South Africa, must surrender the Title Deed in respect of Portion 2 of Farm Platsand No. 451, Registration Division M, Hardap Region, Measuring 657,0976 Hectares to the Registrar of Deeds for cancellation.

9. The first, second and third defendants in the 2020 action must, jointly and severally the one paying the other to be absolved, pay the plaintiffs costs of suit.

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

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S FI UEITELE



**APPEARANCES**

## PLAINTIFFS

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## DEFENDANTS

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