

**REPUBLIC OF NAMIBIA**



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

CASE NO. I 3099/2015

**PAULUS ENKALI**

**PLAINTIFF**

and

**THIMON KAHUURE**

**FIRST DEFENDANT**

**KAPENA ZAOMBO**

**SECOND DEFENDANT**

**TJIVI MUEZE**

**THIRD DEFENDANT**

**KUVERI TJIHERO**

**FOURTH DEFENDANT**

**COUNCIL FOR THE MUNICIPALITY OF WINDHOEK**

**FIFTH DEFENDANT**

**Neutral Citation** *Enkali v Kahuure* (I 3099/2015) [2019] NAHCMD 264 (31 July 2019)

**CORAM: MASUKU J**

**Heard:** 25, 26, 27, 28, 29 September 2017; 29, 30 January 2018; 23 March 2018; 31 July 2018.

**Delivered:** 31 July 2019

**Flynote:** Law of evidence – disparate versions – credibility of witness – on a balance of probabilities – burden of proof on party that alleges – reliance on *viva voce* evidence – where evidence is emphatic and independent – not sufficient to merely deny liability – Law of Property – whether provisions of Stamp Duties Act apply to agreements in respect of sale or purchase of immovable property. Rules of the High Court – Pre-trial report – all issues to be dealt with to be agreed at the pre-trial stage – new legal issues cannot, without leave of court, be raised during closing submissions.

**Summary:** The plaintiff, in his capacity as executor of his late father's estate, instituted an action for eviction of the 1<sup>st</sup> – 4<sup>th</sup> defendants from the immovable property which is registered in the name of the deceased.

According to the plaintiff, the defendants erected or authorised the erection of informal structures on the property. The plaintiff alleges that as a result, the 5<sup>th</sup> defendant is refusing to issue a compliance certificate in respect of the said property, which has rendered it impossible for the plaintiff to cause the property to be transferred to the deceased's heirs. It is on this account that the plaintiff prays for the eviction of the defendants and those holding under them from the said property.

The 1<sup>st</sup> defendant defended the action. Whilst not contesting that the property in question is registered and held in the deceased's name, he alleges that he purchased the said property from the deceased on 9 July 2002 for an amount of N\$ 32 000. He accordingly denies that he is in unlawful occupation of the property, as alleged by the plaintiff.

The 1<sup>st</sup> defendant launched proceedings of his own in the form of a counter-claim wherein he avers that he, acting in person, and the deceased, who also acted in person, entered into a written agreement in terms whereof the deceased sold and the defendant purchased from him the landed property.

According to the 1<sup>st</sup> defendant, on the date of the conclusion of the agreement, he took occupation of the property in question and duly complied with his obligations in terms of

the agreement by paying the purchase price agreed by the parties in 2002 whereas the deceased, during his lifetime, breached the terms of the agreement between the parties in that although he received payment of the purchase price, he did not, however, effect transfer of the property into the defendant's name. The 1<sup>st</sup> defendant thus prays for an order declaring him the owner of the property in question, coupled with an order compelling the plaintiff to sign the documents effecting transfer of the property to the defendant. Both parties called witnesses who tendered different versions in evidence to testify in support of their case.

Held: That where there are serious disputes in the versions presented by both parties, it becomes imperative for the court, in order to arrive at a decision as to where the probabilities lie, to make credibility findings and to state which of the parties has been able to prove his case on a balance of probabilities.

Held that: The evidence led by the plaintiff is of very poor quality and is also afflicted by self-interest and that the plaintiff and his witness performed very poorly in the witness' stand and scored very lowly in so far as their credit is concerned.

Held further that: The evidence of the defendant was adduced as a matter-of-factly and was not only consistent and rational, it was, more importantly, corroborated by the evidence of an independent witness, who had nothing to gain from the issues in dispute.

Held: The evidence adduced by the defendant was consistent with the sheer probabilities of the case.

Held further that: An unstamped document may be stamped retrospectively, and even after judgment or on appeal.

Held: That an agreement relating to the purchase or sale of immovable property, is exempt from the provisions of the Stamp Duties Act.

Held that: The parties at pre-trial stage need to soberly and fully consider all the matters, both factual and legal that arise from the case and have same reduced into the pre-trial report.

Held further that: the plaintiff has failed to adduce evidence which shows that he is entitled to the order for eviction on a balance of probabilities.

Held that: The defendant's version is creditworthy and supported by independent evidence and neutral circumstances.

Court accordingly dismissing plaintiff's claim and upholding the defendant's counterclaim with costs.

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### **ORDER**

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1. The Plaintiff's claim for eviction of the Defendants is dismissed.
2. The First Defendant is declared to be the owner of the Erf. 7051, Rafidim Street, Katutura, Windhoek.
3. The Plaintiff is directed to take steps necessary to ensure that the property in question, is transferred into the name of the First Defendant, within 30 days of the issue of this order.
4. In the event the Plaintiff does not take steps to comply with paragraph 3 above, the Deputy Sheriff for the District of Windhoek, is directed and authorised to take the steps necessary to effect transfer of the property mentioned in paragraph 2 above into the name of the First Defendant.
5. The Plaintiff is ordered to pay the costs of the action.
6. The matter is removed from the roll and is regarded as finalised.

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### **JUDGMENT**

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## MASUKU J:

### Introduction

[1] This is an action in which the plaintiff has sued the defendant seeking the following relief:

- (a) The eviction of the First to Fourth Defendant from Erf. 7051, Rafidim Street, Katutura, together with any other person or persons in possession or occupation thereof through or under the First to Fourth Defendants.
- (b) An order empowering, authorizing and directing the Deputy Sheriff to remove (with the assistance of the Namibian Police, if necessary) all the structures on the property required by the Fifth Defendant to be removed therefrom for the issue of a building compliance certificate in respect thereof.
- (c) An order ordering the First to Fourth Defendants to pay the costs of the action.
- (d) Should the Fifth Defendant defend the action, an order ordering the Fifth Defendant to pay the costs thereof jointly and severally with the First to Fourth Defendants, the one paying the other to be absolved.
- (e) An order ordering the First to Fourth Defendants to pay the costs of executing the orders mentioned in prayers 1 and 2 above.

[2] The action was accordingly defended by the 1<sup>st</sup> to 4<sup>th</sup> defendants. The 5<sup>th</sup> defendant did not defend the action. As a result, it would appear that the prayers that relate to it, mentioned above, namely, prayers 4 and 5 have fallen by the wayside. The matter, accordingly remains defended by the first four defendants and it is the discordant positions taken by the parties that shall form the basis of this judgment.

### The pleadings

[3] The plaintiff avers, in his particulars of claim that he is a male adult employed as a packer at Namibia Breweries and has instituted the action in his capacity as the executor in the estate of his late father, Mr. Petrus Timotheus, ('the deceased'). He, the plaintiff is resident at Erf 205, Havana, Katutura, Windhoek.

[4] It is the plaintiff's further averral that the property in question, recorded in para 1 above, registered in the name of the deceased, via Deed of Transfer No. T2258/1983, is occupied by the 1<sup>st</sup> to 4<sup>th</sup> defendants, who shall henceforth, be referred to collectively, as 'the defendants'.

[5] It is further averred by the plaintiff that the defendants erected or authorised the erection of informal structures on the property, which are illegal and in contravention of Regulation 25(a)(i) and/or (ii) of the Building Regulations of the 5<sup>th</sup> defendant, the Municipality Council of the City of Windhoek, published in Government Gazette No. 2992 of 28 April 1968. It is alleged that the said structures were erected without the requisite approval contained in the Regulation.

[6] The plaintiff alleges that as a result, the 5<sup>th</sup> defendant is refusing to issue a compliance certificate in respect of the said property, which has rendered it impossible for the plaintiff to cause the property to be transferred to the deceased's heirs. It is on this account that the plaintiff prays for the eviction of the defendants and those holding under them from the said property.

[7] The 1<sup>st</sup> defendant defended the action. Whilst not contesting that the property in question is registered and held in the deceased's name, and who has transcended to the celestial jurisdiction, as alleged, in the particulars of claim, he however, avers that he purchased the said property from the deceased on 9 July 2002 for an amount of N\$ 32 000. He accordingly denies that he is in unlawful occupation of the property, as alleged by the plaintiff. To the contrary, he contends that he is in lawful occupation of the property in question.

[8] Finally, the defendant avers that the plaintiff is not entitled at law, to transfer the property to any other person than himself, as he alone, is the one who purchased the property from the deceased during his lifetime.

[9] The defendant did not end there. He launched proceedings of his own, in the form of a counter-claim. In the said counter-claim, he avers that he, acting in person, and the deceased, who also acted in person, entered into a written agreement in terms whereof the deceased sold and the defendant purchased from him the landed property described earlier in the judgment. The defendant attached a copy of the agreement to his pleadings, namely, a handwritten agreement written in Afrikaans and a loose interpretation thereof.

[10] It is the defendant's averral that the express, alternatively implied and further alternatively, tacit terms of the agreement of sale were the following:

- (a) The defendant would purchase the property from the deceased for an amount of N\$ 32 000;
- (b) The property would be transferred into the defendant's name upon payment of the purchase price; and
- (c) The defendant would be entitled to the use and occupation of the said property from the date of the conclusion of the agreement.

[11] It is the defendant's averral that on the date of the conclusion of the agreement, he took occupation of the property in question and duly complied with his obligations in terms of the agreement by paying the purchase price agreed by the parties in 2002. He further avers that he tendered payment of all the costs necessary and incidental to effecting the transfer of the property into his name.

[12] The defendant, in the alternative, avers that the deceased, during his lifetime, breached the terms of the agreement between the parties in that although he received

payment of the purchase price, he did not, however, effect transfer of the property into the defendant's name.

[13] In the alternative, the defendant avers that in the event the court finds that no agreement existed between the parties, as alleged above, alternatively, if the court finds that the said agreement was cancelled, or is invalid and/or unenforceable for any reason, he, during July 2002, in the bona fide and reasonable belief that a valid and enforceable agreement had been entered into *inter partes*, paid an amount of N\$ 32 000 to the plaintiff as the purchase price of the property and considering that the plaintiff, despite demand, refuses to register the property in the defendant's name, the plaintiff has been unduly enriched in the amount of N\$ 32 000, and that the defendant has contemporaneously been impoverished in the said amount, rendering the plaintiff liable to make good the said amount to the defendant.

[14] In the premises, the defendant, in his counterclaim, prays for an order declaring him the owner of the property in question, coupled with an order compelling the plaintiff to sign the documents effecting transfer of the property to the defendant, alternatively, ordering the deputy sheriff to sign such transfer, if within a period of 30 days the plaintiff refuses or neglects to sign the said documents of transfer. In the alternative, with the court disinclined to order transfer of the property to the defendant, that it orders the plaintiff to pay to the defendant the amount of N\$ 32 000 at the rate of 20% per annum from the date of judgment, to the date of full payment. Finally, the defendant prays for costs of suit, consequent upon the employment of one instructing and one instructed counsel.

#### Points of law *in limine*

[15] The plaintiff, in his written oral submissions, raised two points of law that need to be disposed of before the merits of the dispute are dealt with. First, the plaintiff raises the inadmissibility of the exhibits that were handed in by the defendant in support of his case, namely, Exhibit E '1' and E '2'. These are the written agreement of sale of the



property between the plaintiff and the defendant, written in Afrikaans and the loose translation, thereof, as it was referred to.

[16] The plaintiff, in applying for the court to render these documents inadmissible, relies on the provisions of s. 12 of the Stamp Duties Act<sup>1</sup>. In this regard, the plaintiff's contention is that the 'deed of sale' signed *inter partes*, was not stamped as required by the Act in question.

[17] The provision relied on for the invalidity reads as follows:

'Save as is otherwise provided in any law, no instrument which is required to be stamped under this Act shall be made available for any purpose whatsoever, unless it is duly stamped, and in particular shall not be produced or given in evidence or be made available in any court of law, except –

(a) In criminal proceedings; or

(b) In any proceedings by or behalf of the State for the recovery of any duty on the instrument or of any penalty alleged to have been incurred under this Act in respect of such instrument:

Provided that the court before which any such instrument is so produced or given or made available may permit or direct that subject to the payment of any penalty incurred in respect of such instrument under section 9(1), the instrument be stamped in accordance with the provisions of this Act and upon the instrument being stamped may admit it or be produced or given in evidence or made available.'

[18] There is no doubt, it would seem, that the said document does not comply with the provision quoted above. From all accounts, it is clear that the document, in its present form, and in the absence of the invocation of the procedure mentioned in the proviso above, may not be produced or tendered in evidence. What is the defendant's take on this argument?

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<sup>1</sup> Act No. 15 of 1993.

[19] In his defence, the defendant submits that the plaintiff has shot himself in the foot, as it were and this is so for the reason that it is the plaintiff, and not the defendant, who introduced these documents in evidence. The plaintiff cannot, so to speak, hunt with the hounds and run with the hares at the same time. It lies foul in the mouth of the plaintiff, so the argument ran, for him to introduce documents in evidence and then turn around and seek to have the same documents relied on in his case, to be declared inadmissible.

[20] The defendant, in its argument, sought to rely on *Denker v Ameib Rhino Ltd and Others*<sup>2</sup>, where the Supreme Court expounded the law applicable to stamp duty as follows:

[48] The High Court's approach as regards the effect of the non-compliance with the Stamp Duties Act accords with the modern trend in interpreting a provision which places an obligation on a legal actor to do something. That approach is to consider if the legislative intent was to visit non-compliance with a nullity. The learned judge approached the matter on correct principle. He held (para 41:

"I am of the view that the existence of section 12 and 13 (of the Stamp Duties Act) is an indication that the legislature did not intend that if a document is not stamped such failure would lead to a nullity of the document. I am of the further view that the court when faced with a document which is not stamped may order that the document be stamped in accordance with the Stamp Duties Act, 1993."

[21] It was the defendant's contention that viewed through the prism of the statement in *Denker* above, the plaintiff's argument has no 'resemblance of merit' and must be thrown out therefor. Mr. Rukoro further referred the court to authority for the proposition that an unstamped document in this regard, may be stamped retrospectively, and even after judgment or on appeal.<sup>3</sup> I accept this statement of the law as sound and worth adopting in this context. This finding, is subject to what follows in the succeeding paragraphs of this judgment.

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<sup>2</sup> 2017 (4) NR 1173 (SC).

<sup>3</sup> *De Meyer v Bam* 1959 (4) SA 69 (N) 72D; *Mullan v Vladislavic* 1961 (1) 364 (T) 369 and *Lee v Tobias* (HC-MD-CIV-ACT-CON-2016/04131) [2017] 204 (31 July 2017).

[22] After going through the Stamp Duties Act, it would appear from reading Schedule 1 of the said Act, that there are certain agreements in respect of which the law grants an exemption from paying stamp duty. Under 1 (d) of the said Schedule, an agreement for the disposal or acquisition of property is one of those agreements that is so exempted. In terms of this provision, property, assumes the definition given in the Transfer Duty Act<sup>4</sup>, which defines property as follows:

'Property means land and any fixtures thereon, and includes –

- (a) Any real right in land, but not any right under a mortgage bond or a lease of property other than a lease referred to in paragraph (b);
- (b) any right to mine for minerals and a lease or sub-lease of such a right.'

[23] There is no question, in my mind, that the agreement in question in these proceedings, relates to the disposal and acquisition of property as defined in the Transfer Duty Act. For that reason, it would further appear, that the said agreement is exempt from attracting stamp duty. This, in my view, makes sense for the reason that in land transactions, transfer duty is payable and it would be unfair to expose a party in the shoes of the defendant, to paying both transfer and stamp duty, possibly in relation to the same agreement.

[24] In view of the foregoing, it would appear to me that the plaintiff's argument, in this connection, is totally misplaced and should be dismissed for this very reason, quite apart from the question whether it is an argument that is properly before court, which I deal with below.

[25] Mr. Rukoro had another ace up his sleeve. He also argued and quite forcefully too, that the court should not have regard to this point of law raised by the plaintiff for the reason that it was never included in the pre-trial order and has been an ambush, privily sprung on the defendant in written submissions for the very first time at the tail

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<sup>4</sup> Act No. 14 of 1993.

end of the case. Reliance was placed on the case of *The Board of Incorporators of the African Episcopal Church v Kooper*<sup>5</sup> and *Conrard v Dohrmann*<sup>6</sup>.

[26] In both *Kooper* and *Conrard*, the court quoted generously from the words of Smuts J in *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC*<sup>7</sup>, where the learned Judge reasoned the proper approach as follows at para 26 of the judgment:

‘This approach has now been trenchantly reinforced by rule 37(14) when a matter is the subject of case management and for good reason. The parties have after all agreed upon the issues of fact and law to be resolved during the trial and which facts are not to be disputed. That agreement, as occurred, in this matter, is then made an order of court. Plainly, litigants are bound by the elections they make when agreeing upon which issues of fact and law are to be resolved during the trial and which issues are not in dispute when preparing the pre-trial order. It is, after all an agreement to confine the issues which is binding upon them and from which they cannot resile unless good cause is shown. It is for this reason that the rule-giver included rule 37(14). To permit parties without a compelling and persuasive explanation to undo their concurrence to confine issues would fundamentally undermine the objectives of case management. It would cause delays and the unnecessary expense of an application and compromise the efficient use of available judicial resources and unduly lengthen proceedings with the consequent cost implications for the parties and the administration of justice.’

[27] In the circumstances, it is abundantly clear that the plaintiff never raised this legal issue at pre-trial and when it emerged, the plaintiff did not take steps to try and undo the pre-trial order. It must be mentioned that in such cases, the parties are not at large to arrogate upon themselves the right to deal with issue that arise at any time. If the matters for argument come as an afterthought, they should still be sanctioned by the court at the stage that they become apparent.

[28] There is another legal argument that was introduced by the plaintiff for the very first time at the stage preparing oral submissions. The plaintiff claims that the

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<sup>5</sup> (I 3244/2014) [2018] NAHCMD 5 (24 January 2018).

<sup>6</sup> 2018 (2) NR 535.

<sup>7</sup> (I 3499/2011) [2014] NAHCMD 57 (19 February 2014).

agreement entered into by the parties, namely the plaintiff and the defendant does not meet the legal requirements for a sale of land. This argument, it would seem to me, must be faced by the same difficulty as the previous one. This points to the need for the parties, at pre-trial stage, to soberly and fully consider all the matters, both factual and legal that arise from the case and have same reduced into the pre-trial report. This is because it is clear that amending the pre-trial order does not appear to be an easy exercise as it has the potential to disrupt the natural flow of the case, and hence impinge on its finalisation as well.

[29] It is improper, in my considered view, for the court to allow a case to develop incrementally at the stage of making closing submissions, to the extent that it no longer bears any similarity with the case pleaded and subsequently endorsed in the pre-trial order. To do so smacks of unfairness and deprive the party at the receiving end no proper time to deal with the issue. Such a practice, is in any event, not in keeping with the overriding objectives of judicial case management.<sup>8</sup> I accordingly dismiss the points of law raised by the plaintiff.

### The evidence

[30] The plaintiff, in support of his case, gave his own testimony and further called his brother Mr. Jesaja Timoteus as a further witness. For his part, the defendant adduced his own testimony and also called Mr. Erasmus Ndeshipanda Hamweya as his witness. I will, in this regard, chronicle the evidence led on each of the parties' behalf. I will thereafter, consider the probabilities of the case, with a view to determining whether the plaintiff, in so far as the onus was upon him, has discharged same in respect of the main claim. I will also engage in a similar exercise, in so far as the onus lies on the defendant to prove his entitlement to order sought in respect of the counterclaim on a balance of probability.

*Paulus Enkali*

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<sup>8</sup> Rule 1(3) as read with Rule 19.

[31] The plaintiff (PW1), testified that he is a major adult male residing at Erf. 205, Havana, Katutura, Windhoek. It was his further evidence that he was duly appointed as an executor in the estate of his late father, Mr. Petrus Timotheus. It was his evidence that the present proceedings were instituted by him in that aforesaid capacity.

[32] PW1 testified that his father died intestate on 3 September 2010 and was, at the time of his death, the registered owner of Plot No. 7051, which is the subject of the current proceedings. It was his evidence that after his father passed on, he, PW1 was appointed as the executor dative. In exercise of his powers as such, he compiled a list of properties for distribution to the heirs and this included the property in question in this matter.

[33] He testified further that the defendants are in occupation of the property and that his attempts to evict them from the property proved futile. It was his further evidence that during his attempts to evict the defendants, they produced a hand-written sales agreement in terms of which they claimed that his late father had sold the property in question to the 1<sup>st</sup> defendant. He testified further that upon a close examination of the said document, he noticed that his name appears as a witness thereon. He emphatically denied having ever served as a witness to the said document and further denied that any sale transaction ever took place between the 1<sup>st</sup> defendant and his late father.

[34] It was PW1's further evidence that he also spoke to his brother Mr. Jesaya Timoteus, who also appears as a witness in the said document, and he also denied having served as a witness when the property in question was allegedly sold to the 1<sup>st</sup> defendant. It was his evidence that his brother had told him that his signature was forged. He accordingly contends that the alleged sale is a fraud and prays for an order ejecting the defendants.

*Mr. Jesaya Timoteus*

[35] Mr. Jesaya Timotues ('PW2'), in his evidence, confirmed that PW1 had been appointed as an executor dative to his late father's estate. It was his evidence that efforts to evict the defendants from the property in question in this matter proved futile as the defendants refused to vacate. It was his further evidence that PW1 had shown him a written agreement purporting to have been a sales agreement which was signed by him. He denied having done so, stating that the signature attributed to him is not his. He further denied serving as a witness during the transaction that allegedly took place between the parties to the agreement.

*Mr. Thimon Kahuure*

[36] The defendant, (DW1) testified that he is resident at Erf. 7051, Rafidim Street, Maroela, Katututra, in Windhoek. It was his evidence that on 9 July 2002, the deceased came to him and informed him that he was selling his house for N\$ 32 000. The house, it is common cause, is the one where the defendant presently lives. It was DW1's evidence that he proceeded to view the house with the deceased. At the time of inspecting the house, there was a tenant known as Ms. Tjivikua, who lived there.

[37] DW1 informed the deceased that he was interested in acquiring the property. He further asked the deceased to inform his children who worked at Namibia Breweries, where both the deceased and the defendant also worked at the time of his interest in acquiring the property. It was his evidence that he asked the deceased to prepare an agreement of sale stating the terms of the sale.

[38] The deceased returned with a letter setting out the details of the sale and it had been prepared by Mr. Erasmus Hamweya. The deceased presented it to the defendant and asked him to sign it if he was in agreement with it. He accordingly did so. It was his evidence that he caused to be inserted next to the seller's name the words 'Einenaar/Verkooper' loosely interpreted to mean 'Owner/Seller'. He further caused to be added the word 'Koooper', meaning buyer and also the word 'Datum', meaning date.

[39] DW1 testified further that the agreement was concluded on 9 July 2002 in the presence of Mr. Hamweya and it was duly witnessed by PW1 and PW2. He thereafter made payment of the purchase price on the same day, to the deceased in the presence of his then girlfriend Ms. Agnes Tjiveze. It was DW1's further evidence that the deceased further told him that he owed some money to the National Housing Enterprise from whom he purchased the property. He undertook to settle the indebtedness and thereafter, transfer the property into the defendant's name.

[40] DW1 also testified that the deceased was also indebted to the City of Windhoek, in relation to utilities in the amount of N\$16 000. It is the defendant's further case that after some time, he enquired from the deceased as to when the property would be transferred into his name. The deceased informed him that he had run out of money and would be unable to settle the account with the City of Windhoek. As a result, testified the defendant, water and electricity supplies to the house were suspended. This forced the defendant, to make arrangements for payment of the amounts owing as he had already taken occupation of the property by then.

[41] DW1 further testified that the amount owed to the Council was substantial. As a result, he took some time to settle the debt and by the time he finished settling same, the deceased was taken ill and subsequently passed on. Upon the demise of the deceased, he testified that he approached the plaintiff to transfer the property into the defendant's name who agreed to do so, but later changed his mind. It was lastly his evidence that the plaintiff attempted on numerous occasions to evict him from the premises without success, hence the present proceedings. That was the extent of his testimony.

*Mr. Erasmus Ndeshipanda Hamweya*

[42] This witness, DW2, was the second to testify for the defendant. He described himself as a business man, resident at Erf 1755, Claudius Kandovazu Street,



Wanaheda, Windhoek. It was his evidence that in 2001, he was employed by Namibia Breweries in the Human Resources Department.

[43] It was his further evidence that in 2016, he was approached by the defendant who asked if the witness remembered writing a letter regarding the sale of the property in question in 2001. He told the defendant that he could not remember the details as the incident had taken place a long time ago. Upon the defendant bringing a copy of the said document, DW2 testified that he then read the document and recognized his own handwriting thereon.

[44] It was his evidence that he recalled writing the said document on the instructions of the deceased on 9 July 2001. It was his evidence that he was in his office when he was approached by the deceased and that he wrote the letter in Afrikaans and the deceased signed the said document after he explained it to the latter. It was also his evidence that the deceased's sons, who served as witnesses were known to him as they were also employees at the Breweries at the time. He proceeded to confirm the signatures appearing on the document as having been appended by the said sons to the deceased in his presence.

[45] It was his further evidence that as an employee in the Human Resources Department, he was familiar with the signatures of the deceased and his sons and had regular interaction with all the parties to the said document, being a person who dealt with their personal files. Lastly, it was his evidence that at the time he prepared the document and it was signed in his office, the defendant was not present and this is because the latter no longer worked for Namibia Breweries at the time and was not allowed into the offices as his employment had been terminated in 2001. This was the extent of the evidence led by the parties.

#### Analysis of the evidence

[46] It is plain, from a reading of the evidence presented by the parties that there are serious disputes in the versions presented by both parties. In the circumstances, it becomes imperative for the court, in order to arrive at a decision as to where the probabilities lie, to make credibility findings and to state which of the parties has been able to prove his case on a balance of probabilities.

[47] The proper approach, in this regard, was stated in *National Employers' General Insurance Co. Ltd v Jagger's*<sup>9</sup>, cited with approval in the court by Parker A.J. in *Jin CV Joint Fitment Centre CC v Hambabi*<sup>10</sup>. The court in the *Jagger's* case expressed itself as follows:

'I must follow the approach that has been beaten by the authorities in dealing with such an eventuality ; that is to say, the proper approach is for the court to apply its mind not only to the merits and demerits of two mutually destructive versions but also their probabilities and it is only after so applying its mind that the court would be justified in reaching the conclusion as to which opinion accept and which to reject . . . Where the onus rests on the plaintiff and there are two mutually destructive stories he (the plaintiff) can only succeed if he satisfied the court on a preponderance of probabilities that his version is accurate and therefore acceptable, and that the version advanced by the defendant is false or mistaken and falls to be rejected.'

[48] I have carefully analysed the evidence adduced by each of the protagonists and I have found that the evidence led by the plaintiff is of very poor quality and is also afflicted by self-interest as shall be demonstrated in the judgment. I also find that the plaintiff and his witness were performed very poorly in the witness' stand and scored very lowly is so far as their credit is concerned. The evidence of the defendant, on the other hand, was adduced matter-of-factly and was not only consistent and rational, it was, more importantly, corroborated by the evidence of an independent witness, who had nothing to gain from the dispute or the issues in dispute. Furthermore, the evidence adduced by the defendant was consistent with the sheer probabilities of the case.

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<sup>9</sup> 1984 (4) SA 437 (E) at 440E.

<sup>10</sup> (I 1522/2008) [2014] NAHCMD 73 (6 March 2014), para 11.

[49] I will start with the plaintiff. It is clear that he adduced the evidence in his capacity as the executor and also an heir to the deceased estate. He was very forthright in cross-examination that he is an heir and stands to benefit from the estate. He confirmed that as an heir, he would do all in his power to ensure that he gets something to inherit from the estate. When asked if he would push the agenda of him inheriting to the extent of denying other claimants to the estate, he became unclear. Later he admitted that he could not give the property in question to a third party, even if that party has a legitimate claim against the estate and this nailed his true colours to the mast as a witness of credit.

[50] It became clear in cross-examination that the plaintiff could not deny that the agreement between the deceased and the defendant was entered into. He said as much. He also admitted that the date of the agreement was during the deceased's lifetime. It bore the deceased's identity number. The plaintiff could not deny that the agreement bore the deceased's signature.

[51] It is clear from the evidence that the defendant lived in the house for some time during the deceased's lifetime and this leads inexorably to the conclusion that there was some agreement that the two had come to and this is, in my view, is explained by the evidence of the defendant's witness, who it must be said, is independent and has nothing to gain from the entire dispute. He adduced his evidence in a forthright and clear manner and could not be unhinged in cross-examination. He was as constant as the Northern Star, and remained totally unshaken in adducing his evidence, when viewed as a whole.

[52] Another issue to consider, is that the plaintiff and his witness denied that they signed the agreement as witnesses. I will come to this issue later. What they could not deny, was that the deceased did sign the document as stated by Mr. Hamweya, who testified that he prepared the written agreement. To that extent, it seems to me that the agreement that the defendant submitted to court is valid and it is clear that it was in respect of the sale of the property in question to the defendant by the deceased during

his lifetime. Furthermore, it recorded a purchase price agreed by the parties for the property in question.

[53] The evidence of Mr. Hamweya, which as stated, is independent and struck me as credible, could not be shaken even once in cross-examination. He testified that he was approached by the deceased to draft the agreement for him and he did so. The deceased, he further testified, signed the agreement in his presence. It was also his evidence that the plaintiff and his brother also served as witnesses, which they deny. He remained unruffled like a Bishop presiding over a tea party, regarding this aspect of his evidence.

[54] I am of the considered view that Mr. Hamweya had no basis or motive to lie against the plaintiff and his brother that they signed as witnesses to the agreement. There is no question that he knew them and their signatures as according to his evidence, which is not contested, they were also employed at Namibia Breweries at the material time. It was his evidence that he knew their signatures as he maintained the records of the company employees.

[55] The plaintiff and his witness, on the other hand, have an interest in adducing the evidence they did. They admitted that the property in question is the single and most valuable asset that was owned by the estate and which they eyed to inherit from. Their evidence, in this regard, standing in contrast to that of Mr. Hamweya, independent as he is, is not worthy of credit in the circumstances. He had no reason to lie that the plaintiff and his brother signed as witnesses, which is in any event not necessary to bolstering the validity of the agreement. The plaintiff, it must be mentioned, agreed that Mr. Hamweya knew their signatures. As to why he would lie that they signed the document when they did not, remains a mystery that did not unravel.

[56] It must also be mentioned that the onus to prove that the signatures appended on the agreement by the witnesses were a fraud, lay on the plaintiff and his brother Jesaya. They adduced not an iota or a tittle of that evidence. It is not enough, when a

person testifies under oath that you signed a document in his presence for you to make a bare denial and not go the extra mile, to prove by admissible expert evidence that the signature attributed to you is false. It does not merely lie in the mouth of a person like the plaintiff and his brother, faced with such emphatic evidence, which is independent, to rely merely on *viva voce* evidence, to deny liability that could only be proved by expert evidence being harnessed.

[57] Another issue worth mentioning, and on which there was no explanation is why the plaintiff and his brother did not go to the police to report a case of fraud once they learned that their signatures had been ‘forged’ as they claimed. When asked why he did not report the alleged fraud to the police, the plaintiff informed the court that the police could not solve such an issue, which explanation must be jettisoned as plainly devoid of credit.

[58] There is no rational explanation proffered by the plaintiff and his witness as to the basis upon which the defendant occupied the property in question during the deceased’s lifetime. It was not just an explanation that the defendant proffered, it was in fact corroborated by an independent witness, as stated earlier. In this regard, it must be mentioned that the defendant, for his part, has consistently proffered one story – namely that the property was sold to him by the deceased, who unfortunately died before he could sign the documents to transfer the said property into his name. This version is seen, for instance, when he was sought to be evicted by the plaintiff, who had enlisted the service of the police. His refrain has been the same throughout, with no variableness or shadow of turning in this regard.

[59] It must also be mentioned that the plaintiff, according to his evidence in cross-examination, saw the agreement in 2010, after the internment of his father. In his witness statement, however, he testified that he only saw the document for the first time, when he instituted proceedings to evict the defendant from the premises in question.<sup>11</sup> It is accordingly clear that he contradicted himself on this issue and this

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<sup>11</sup> Para 13 of Plaintiff’s witness statement.

constitutes one other reason why his evidence, besides the interest that riddles it, should be accepted, where appropriate, with a pinch of salt as it were. He in fact admitted under cross-examination that the contents of his witness' statement regarding the issue in question were untrue.

[60] I will not delve much in the evidence of the plaintiff's brother as it did not advance the case one inch. A lot of what he testified about was hearsay. He was a very poor witness who also contradicted himself on critical issues and failed to properly answer pertinent questions. He, after the first day in the witness box, particularly in cross-examination, failed to handle the pressure. When he presented himself the following day for the cross-examination to proceed, he presented himself in avowed inebriated state, resulting in the court adjourning the proceedings that day, to enable him to regain his sobriety. Such was his performance as a witness.

### Conclusion

[61] In the circumstances, I am of the considered view that the plaintiff has failed to adduce evidence which shows that he is entitled to the order for eviction on a balance of probabilities. For reasons advanced above, I am of the view that his claim stands to be dismissed.

[62] On the other hand, when one has regard to what has been stated above, it becomes clear that the case for the defendant is supportable when one has regard to the probabilities of the case and particularly the evidence of Mr. Hamweya, which remains uncontradicted, as much as it is independent. In this regard, it must be mentioned, when one refers to probabilities, that they favour the defendant in the sense that the plaintiff fails to explain the basis for the defendant living in the premises during his father's lifetime, if it was not for the reasons that he, the defendant advanced, as corroborated in material respects by Mr. Hamweya's uncontradicted evidence.

[63] In the premises, the evidence of the defendant finds corroboration in the evidence of Mr. Hamweya regarding how he came to live in the house that the plaintiff seeks to have him evicted from. On a balance of probabilities, I am of the view that the defendant's version is creditworthy and as stated, is supported by independent evidence and neutral circumstances as discussed above.

### Order

[64] Having regard to the foregoing, I am of the considered opinion that the following order is condign:

1. The Plaintiff's claim for eviction of the Defendants is dismissed.
2. The Defendant is declared to be the owner of the Erf. 7051, Rafidim Street, Katutura, Windhoek.
3. The Plaintiff is directed to take steps necessary to ensure that the property in question, is transferred into the name of the First Defendant, within 30 days of the issue of this order.
4. In the event the Plaintiff does not take steps to comply with paragraph 3 above, the Deputy Sheriff for the District of Windhoek, is directed and authorised to take the steps necessary to effect transfer of the property mentioned in paragraph 2 above into the name of the First Defendant.
5. The Plaintiff is ordered to pay the costs of the action.
6. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku  
Judge

## APPEARANCES:

PLAINTIFF: R. Strauss  
Of Dr. Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANTS: R. Rukoro  
Of ENSAfrica|Namibia Legal Practitioners, Windhoek