

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2019/00337

In the matter between:

**ADRIANA JACOBA VAN DER MERWE**

**1<sup>ST</sup> PLAINTIFF**

**CATHERINE BEUKES (PREVIOUSLY MÖGLE)**

**2<sup>ND</sup> PLAINTIFF**

And

**JAKOBUS SCHNEIDERS**

**1<sup>ST</sup> DEFENDANT**

**ELGELBERTHA SCHNEIDERS**

**2<sup>ND</sup> DEFENDANT**

**Neutral citation:** *Van der Merwe v Schneiders* (HC-MD-CIV-ACT-CON-2019/00337) [2021] NAHCMD 427 (22 June 2021)

**CORAM:** Ndauendapo, J

**Heard:** 19 February 2021

**Delivered:** 3 September 2021

**Reasons:** 29 September 2021

**Flynote:** Property law-Plaintiffs - Owners of property-Sued defendants for ejectment from property unlawfully occupied - Defendants raised defense of oral

agreement to retransfer property to them - such oral agreement to retransfer property to defendants unenforceable.

**Summary:** Property law. The plaintiffs issued summons against the defendants seeking an ejectment of the defendants from Erf 724, Rehoboth (the property) on the basis that the plaintiffs are the registered owners of the property and the defendants are unlawfully occupying the property. The defendants defended the action and alleged that, when they sold the property to the plaintiffs, they entered into an oral agreement with the plaintiffs that the property would be retransferred back to them once the bond (which they assisted to repay) has been fully paid to Standard Bank. Unfortunately, the oral agreement to retransfer the property to the defendants, was not reduced to writing and the husband of the second plaintiff who was party to the oral agreement had passed away and the wife, the second plaintiff, the sole heir of the estate and co- registered owner of the property is seeking the ejectment of the defendants from the property. The defendants counterclaimed and demanded payment for improvements they effected to the property, payments they made towards rates and taxes and contribution towards the bond payments they assisted to pay.

Held, that the oral agreement to retransfer the property to the defendants was of no force and effect as it was not reduced to writing as required by section 1 of the Formalities in respect of Contracts of Sale of Land Act, 71 of 1969.

*Held* further that the improvements effected were permanent fixtures and they became the property of the owners of the property.

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### ORDER

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1. The first and the second defendants are evicted from Erf 724, Block B, Rehoboth in the Republic of Namibia.

2. The first and the second defendants must vacate Erf 724, Block B, and Rehoboth in the Republic of Namibia on or before 30 September 2021.
3. Prayers 1, 4, 5 and 6 of the first and the second defendants' counterclaim are dismissed.
4. The first and the second defendants are directed to ascertain and account for the municipal rates and taxes paid by the first and the second defendants from 17 June 2011 to 04 June 2019.
5. The first and the second plaintiffs are liable to pay the first and the second defendants the amount ascertained in paragraph 4 hereof.
6. The first and the second defendants are advised to lodge a claim in respect of prayer 2 of their counter-claim against Estate Late Mögle (the second plaintiff) in terms of section 31 of the Administration of Estates Act, No. 66 of 1965.
7. The first and the second defendants are ordered to pay the costs occasioned by the claim in convention and the claim in reconvention, such costs being the costs of one instructing and one instructed legal practitioner on the scale as between attorney and client.

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## JUDGMENT

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### Introduction

[1] In this matter the plaintiffs seek an ejectment order against the defendants, claiming that Erf 724, Block B, Rehoboth ('the property') is lawfully owned by the second plaintiff and her late husband, Lloyd Mögle. In their defense, the defendants claimed that after they sold the property to the plaintiffs, it was orally agreed that the property will be resold back to them. The crux of the matter is whether such an oral agreement is valid and enforceable when it comes to the sale of land.

### The parties

[2] The First plaintiff is Adriana Jacoba Van Der Merwe N.O., a major female legal practitioner, practicing as such in partnership at Fisher, Quarmby & Pfeifer Attorneys, with her main place of business situated at c/o Robert Mugabe Avenue and Thorer Street, Windhoek, Republic of Namibia.

[3] The first Plaintiff is acting herein in her nominal capacity as a nominee of Fisher, Quarmby & Pfeifer Attorneys and as such the duly appointed and authorized agent of the executrix of the deceased estate of the late Lloyd Ettienne Mögle. A copy of the letter of executorship issued by the Master of the High Court in respect of the aforesaid deceased estate is attached hereto as annexure "POC1". A copy of the power of attorney of which the authority of the Plaintiff is apparent is attached hereto as annexure "POC2".

[4] The second Plaintiff is Catherine Beukes (Previously Mögle), an adult female who resides at unit 114 Equistra, Stellenberg Road, Republic of South Africa.

[5] The second Plaintiff and the late Lloyd Ettienne Mögle were married to each other in community of property at the time of his passing. The Second Defendant is also the executrix in the estate of the late Lloyd Ettienne Mögle.

[6] The first Defendant is Jakobus Schneiders, an adult male, who resides at Erf 724, Block B, Rehoboth, Republic of Namibia and whose full and further details are unknown.

[7] The Second defendant is Engelbertha Schnieders, an adult female, who resides at Erf 724, Block B, Rehoboth, Republic of Namibia and whose full and further details are unknown.

### The pleadings

[8] 'The plaintiffs aver that the first and second Defendants are married to each other in community of property.

[9] The entire cause of action arose in the jurisdiction of the above Honorable Court.

[10] On 17 June 2011, the late Lloyd Etienne Mögle (the deceased and the Second Plaintiff became the lawful owners of Erf 724, Block B, Rehoboth, Republic of Namibia by way of Deed of Transfer Registration No: 404/2011. A copy of the Deed of Transfer is attached hereto as annexure "POC3".

[11] The First and Second Defendants are currently in unlawful occupation and possession of the aforesaid immovable property.

[12] The Plaintiff has demanded that the Defendants, being the present occupiers of Erf 724, Block B, Rehoboth, Republic of Namibia vacate the property in question. A copy of the letter of demand dated 22 August 2018 is attached hereto as annexure "POC4".

[13] Despite demand, alternatively summons constituting demand, the defendants however, remain in illegal occupation of the said property and refuse to relinquish possession of or vacate the said property.

WHEREFORE Plaintiffs claims for:

- [14] 1. An order for ejectment of the First and Second Defendants and all other illegal occupants from the aforesaid property, namely Erf 724, Block B, Rehoboth, Republic of Namibia.
2. Cost of suit'.

#### Plea

[15] The defendants pleaded that the plaintiffs became the owners of Erf 724, Block B Rehoboth without value. They further denied that they are in unlawful occupation and possession of the property. They also filed a counterclaim.

## Counterclaim

[16] The defendants filed a counterclaim in the following terms:

'3. During April 2011 the deceased and the second plaintiff, both acting in person, entered into a partly written and partly oral agreement with the defendants, both acting in person, at Windhoek alternatively Rehoboth. Confirmation of the terms of the agreement is attached hereto as Annexure "A".

4. The material express, alternatively implied in the further alternative tacit terms of the agreement were *inter alia* as follows:

4.1. A mortgage bond in the amount of N\$ 360,000.00 will be registered over the defendants' immovable property at Erf 724, Block B, and Rehoboth in favor of Standard Bank Namibia in the name of the deceased and second plaintiff;

4.2. Once the bond is registered over the immovable property, the deceased and the second plaintiff will jointly receive the amount of N\$96,000.00 (of the bond amount) and the defendants will receive the remainder;

4.3. The parties will repay the monthly bond repayment instalments to Standard Bank Namibia Ltd on the basis that the deceased and the second plaintiff will repay 25% of the total bond amount whereas the defendants will repay 75% thereof,

4.4 The parties agreed that the immovable property will be transferred into the names of the deceased and the second plaintiff and once the full bond amount is repaid, the said property will be retransferred into the names of the first and second defendants. A copy of the deed of sale is in possession of Standard Bank Namibia who is refusing to hand it to the defendants.

4.5 The defendants will remain in occupation of the immovable property.

5. As a result of the agreement a bond in favor of Standard Bank was registered over the property on 17 June 2011 in the amount of N\$367,000.00.

6. On 17 June 2011 the said property was transferred into the names of the deceased and the second plaintiff by ways of deed of transfer registration number 404/2011.

7. On 17 June 2011 Standard Bank dispatched the loan amount and the deceased and the second plaintiff received the amount of N\$90,000.00 from the defendants on 17 June 2011 of which proof is attached hereto as Annexure "B". A further amount of N\$6,000.00 was paid over to the second defendant and deceased towards the end of 2011 and proof is attached hereto as Annexure "C".

8. The defendants fully complied with the agreement entered into between the parties.

9. The deceased and the second plaintiff breached the agreement in that:

9.1. They failed to repay 25% of the monthly bond repayment. As a result of their breach the defendants paid the amount of N\$158, 349.37 being 100% of the bond repayments.

9.2. Despite repayment of the full bond amount, the deceased and the second plaintiff failed and/or refused to retransfer the immovable property into the names of the defendants;

9.3. Despite being obligated to pay the rates and taxes in respect of the said property the deceased and the second plaintiff failed and/or refused to pay the rates and taxes to the Municipality of Rehoboth. The defendants paid the amount of N\$37,440 towards the rates and taxes of the said property from 17 June 2011 until date hereof.

10. Defendants agreed to the transfer of the said immovable property to the deceased and the second plaintiff under the *bona fide* but mistaken belief that the plaintiffs will agree to the retransfer thereof to the defendants upon payment of the bond.

11. The deceased and second plaintiff became owners of the said property without giving any value therefore. Due to the plaintiffs' refusal to agree to the retransfer of the said immovable property to the defendants, the plaintiffs were unjustly enriched with the market value of the said property, being N\$ 800,000.00, whereas the defendants were impoverished with the said amount.

12. Neither of the amounts as per paragraphs 9.1, 9.3 above was due and payable by the defendants as a result whereof the plaintiffs were unjustly enriched, whereas the defendants were impoverished with the said amounts.

13. During the period of occupation of the said immovable property and between July 2013 until December 2017, the defendants effected reasonable and necessary improvements to the said immovable property. All these improvements were necessary and are useful to the sites improvement and has increased the value of the premises which has the result that the second plaintiff will be unjustly enriched whereas the defendants' will be impoverished.

14. The following improvements and/or renovations were effected:

PAINTWORK:

- |    |  |              |
|----|--|--------------|
| 1. | Paint and Repairs inside and outside Ceiling | N\$46 800.00 |
|    | Ceiling                                      | N\$7720.00   |

Celling:

- |    |  |             |
|----|--|-------------|
| 2. | Replaced, repair ceiling in the house and stoep,<br>And front door<br>Ceiling strips | N\$5 700.00 |
|----|--|-------------|

PAINT.

- |    |  |             |
|----|--|-------------|
| 3. | Inside doors, windows and replaced glasses | N\$2 560.00 |
|----|--|-------------|

BARBEQUE:

- |    |  |             |
|----|--|-------------|
| 4. | Repair, complete cement work and paint | N\$3 500.00 |
|----|--|-------------|

CEMENT WORKS:

- |    |                         |             |
|----|-------------------------|-------------|
| 5. | Repair cracks and stoep | N\$2 400.00 |
|----|-------------------------|-------------|

BROKEN PIPE:



6. Replaced broken sewerage pipe, outside building N\$450.00

GEYSER:

7. Replaced 400 kpa valve and safety valve N\$2 800.00

PIPES:

8. Replaced galvanized pipes with copper pipes in roof N\$4 450.00

FLOOR TILES:

9.	Replaced carpet with ceramic floor tiles	N\$5 280.00
	Replaced ceramic system in the main bedroom	N\$ 650.00
	Repair sewerage pipes	N\$850.00

ROOF:

10.	Mounting of gutters on the stoep and washroom	N\$4 180.00
	IBR roof sheets 10 square meters	N\$1 500.00

INTERLOCKS:

11.	Replaced old interlocks with new ones	N\$5 950.00
	TOTAL	N\$96,870.00

15. Despite demand alternatively this counterclaim constitutes demand; the plaintiffs have failed to retransfer the immovable property to the defendants and or to pay the amounts as set out above or any other amount to the defendants, which amounts are due and payable.

Wherefore the defendants pray against the plaintiffs jointly and severally, the one paying the other to be absolved for:

1. Transfer of the immovable property at Erf 724, Block B, Rehoboth Namibia to the defendants;
2. Payment of the amount of N\$ 39,587.34, being 25% of the bond payments;
3. Payment of the amount of N\$ 37,440.00, being the rates and taxes paid in respect of the said immovable property;
4. Payment of the amount of N\$96,870.00, being improvements effected; alternatively;
5. Payment of the amount of N\$973,897.34;
6. Costs of suit
7. Further and or alternative relief.

In respect of claims 2-5

8. Payment of interest a tempora morae'.

#### Plea to the counterclaim

[17] '1. Ad Paragraph 1 to 2 thereof:

1.1 The allegations are not disputed.

2. Ad Paragraph 3 and 4 thereof:

2.1 Save to admit that during 2011, the deceased, second plaintiff and the defendants entered into an agreement. Each and every other contained therein are denied as if herein set out and denied.

2.2 In amplification, and without derogating from the generality of the aforesaid denial, the second plaintiff pleads that:

2.2.1. The second plaintiff was not a party to the alleged agreement (Annexure A to the defendants counterclaim) and bears no knowledge of same.

2.2.2. During 2011, the first defendant approached the deceased and the second plaintiff to purchase the immovable property in question, namely Erf 724, Block B, Rehoboth, Republic of Namibia (the immovable property), because the first defendant had encountered financial difficulties and he was worried that Agricultural Bank of Namibia would foreclose on the immovable property.

2.2.3. The deceased and the second plaintiff agreed to assist the defendants; as a result thereof the parties concluded a written agreement of sale, whereby the deceased and the second plaintiff purchased the immovable property from the defendants. The deceased and the second plaintiff complied with the terms and conditions of the agreement of sale; as a result thereof the immovable property was transferred into their names. The deceased and second plaintiff obtained a loan from Standard Bank to purchase the immovable property and a mortgage bond was registered against the immovable property in favor of Standard Bank as security for the loan. The Second plaintiff is not in possession of the formal agreement of sale concluded between the parties, as it was given to conveyancers who dealt with the registration of transfer of the immovable property.

2.2.4. In addition to the formal agreement of sale concluded between the parties, the parties had verbally agreed as follows:

2.2.4.1. The defendants would buy the immovable property back from the deceased and the second plaintiff within one year after the immovable property had been registered into the names of the deceased and the second plaintiff;

2.2.4.2. The defendants would continue to reside in the immovable property, on condition that the defendants would pay occupational rent in the amount of N\$4500.00 (which amount constitutes the monthly mortgage bond repayment instalment); and such rental amount would be paid directly by the defendants into the home loan account of the deceased and the second plaintiff;

2.2.4.3 The defendants would be responsible to pay all necessary expenses related to the immovable property, such as the municipal account.

3. Ad Paragraph 5 thereof:

3.1 Save to admit that a mortgage bond was registered against the immovable property in favor of Standard Bank. This was done as security for the loan obtained by the deceased and the second plaintiff to purchase the immovable property from the defendants. Each and every other allegation contained therein is denied as if so traversed and the defendants are put to the proof thereof.

4. Ad Paragraph 6 thereof:

4.1 The allegations are not disputed.

5. Ad Paragraph 7 thereof:

5.1 The plaintiffs deny each and every allegation contained therein as if herein set out and denied and the defendants are put to the proof thereof.

6. Ad Paragraph 8 thereof:

6.1 The allegations are denied and the defendants are put to the proof thereof.

6.2 In implication of the aforesaid denial and without derogating from the generality of the aforesaid denial, the second plaintiff pleads that the defendants did not comply with the terms of the verbal agreement concluded between the parties, in that the defendants failed and/or refused to buy the immovable property back from the deceased and the second plaintiff. After the one year anniversary of the transaction, the second plaintiff approached the second defendant to enquire when they (the defendants) intent to buy the immovable property back from them (the deceased and the second plaintiff). The second defendant at that stage made it categorically clear to the second plaintiff that they do not have any particular plans at that stage to buy the immovable property back. The second plaintiff then approached attorneys, to get a formal lease agreement in place, because the deceased already fell ill at that stage and became unfit for work. The defendants had

at that stage already made payments as they please and not punctual as agreed between the parties. The defendants refused to sign a formal lease agreement.

7. Ad Paragraph 9 thereof:

7.1 Each and every allegation contained therein is denied and the defendants are put to the proof thereof.

7.2 An implication of the aforesaid denial and without derogating from the generality of the aforesaid denial and without derogating from the generality of the aforesaid denial, the second plaintiff pleads as follows:

7.2.1. The deceased and the second plaintiff complied with their obligations in terms of both the formal agreement of the sale and the verbal agreement concluded between the parties in that they have purchased the immovable property of the defendants and payment was made to the defendants;

7.2.2. The deceased and the second plaintiff gave the defendants undisturbed occupation of the immovable property;

7.2.3. After the passing of the deceased during 2014, the outstanding balance of the mortgage bond was settled in full by the insurance policy of the deceased. The defendants has thus been staying in the immovable property for free since 2014 and not at one stage did the defendants refund the estate of the deceased and/or the second plaintiff. In addition, the defendants do not see the need to pay occupational rent. The plaintiffs reserve their right to institute further action against the defendants for the recovery of the monies due and payable to them by the defendants.

8. Ad Paragraph 10 thereof:

8.1. The plaintiffs deny each and every allegation contained therein as if herein set out and denied and refer to what is pleaded in paragraph 6.2 above.

9. Ad Paragraph 11 to 12 thereof:

9.1 The plaintiffs deny each and every allegation contained herein as if herein set out and denied.

9.2 In amplification of the aforesaid denial, the plaintiffs plead that value has been given for the immovable property. If this was not the case registration of transfer of the immovable property into the names of the deceased and second plaintiff would not have taken effect.

10. Ad Paragraph 13 to 14 thereof:

10.1 Each and every allegation contained therein is denied and the defendants are put to the proof thereof.

11. Ad Paragraph 15 thereof:

11.1. The plaintiffs deny that they are liable to pay to the defendants for the amount as claimed or any other amount'.

The duty to begin

[18] At the commencement of the hearing, Mr. Muhongo, counsel for the plaintiffs, submitted that in terms of rule 99(3) of the rules of the High Court the duty to begin was on the defendants. He argued that the defendants admitted that the plaintiffs are the owners of the property and they seek the ejectment of the defendants from the property. He referred this court to the case of *Mobil Oil Southern Africa (Pty) Ltd v Mechin*<sup>1</sup>.

Where the court held that: '*He who seeks a remedy must prove the grounds therefor*'. On that basis he argued, that the onus to begin to adduce evidence was on the defendants.

[19] In reply, Ms. Williams for the defendants, argued that the duty to begin was on the plaintiffs as they sought the eviction of the defendants. She submitted that transfer and registration of the property in the names of the plaintiffs did take place, but there was a further agreement of retransferring the property to the defendants, although, orally.

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<sup>1</sup> *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA at 711.

[20] The court having considered the submissions, ruled that the duty to begin was on the defendants. In *Mobil Oil*, supra, the court at 952 held that:

*'In other words he who seeks a remedy must prove the grounds therefor. There is ,however also another rule,...That is to say the party who alleges or , as it is sometimes stated, the party who makes the positive allegation must prove, with these two principles must be read the following principle namely: it was stated as follows in Pillay v Krishna and another,where the person against whom a claim is made is not content with a with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence,as being the claimant; for his defence to be upheld he must satisfy the court that he is entitled to succeed on it'.*

In this case, there is a special defence raised to the effect that there was an oral agreement between the defendants and the second plaintiff and her late husband that the property will be retransferred back to the defendants and on that basis, the court ruled that the duty to begin was on the defendants.

#### First Defendant's evidence

[21] Mr. Schneider testified that he is a farmer and married in community of property to the second defendant, Engel bertha Schneiders. He testified that they had the immovable property at Erf 724, Block B, Rehoboth constructed during 1982 and have been living in the said property since 1982 until date hereof and have improved and renovated same.

[22] He denied that they were ever in unlawful and or illegal occupation of Erf 724, Block B, Rehoboth. He testified that he knew the late Lloyd Ettienne Mögle (who passed away on 14<sup>th</sup> of May 2013) since 1996. He was a school friend of his son and whilst he was at school, regularly visited them. He was like a son to them. Once he matriculated he was admitted to Unam, but due to the fact that his father had passed away, he was unable to afford his Unam registration fees.

[23] He testified that during April 2011, he experienced financial pressure. At that point in time he lost all his work in the North as a result of a flood (he was a property developer) which resulted in the fact that he was unable to repay his Agribank loan in the amount of ± N\$200 000.00. He phoned Lloyd Ettienne Mögle ("the deceased") and informed him of his financial predicament. It was clear from their discussion that

he was also experiencing financial pressure. He testified that the deceased, the second plaintiff, the second defendant and he met during or about April 2011. During their meeting it became clear that he urgently needed the amount of N\$200,000.00 and the deceased and second plaintiff needed N\$90,000.00 – N\$65,000.00 for a Volkswagen Jetta that they wanted to purchase, as well as cash to pay an outstanding medical bill of the second plaintiff. They agreed that a bond will be registered over their property at Erf 724, Block B, Rehoboth, and that they will share the bond amount when it is paid out for him to cover the Agribank debt and for the deceased and second defendant to purchase the Volkswagen Jetta and to repay their outstanding medical bill. They further agreed to repay the monthly bond instalment to Standard Bank pro rata, they (the deceased and second plaintiff) 25% and he and second defendant 75% thereof.

[24] The property was evaluated for the amount of ±N\$600,000.00, however, the deceased and the second plaintiff could only qualify for a bond in the amount of ±N\$360,000.00. He testified that during April 2011, the deceased, second plaintiff and second defendant and himself signed a deed of sale in respect of their immovable property. They also agreed that the property will be retransferred into his name and his wife (second defendant) once the bond is fully paid. Unfortunately, he did not keep a copy of the said deed of sale. As a result of their agreement a bond was registered over the said property on the 17<sup>th</sup> of June 2011 in favor of Standard Bank Namibia in the amount of N\$367,000.00. On 17 June 2011 the said property was transferred into the names of the deceased and the second plaintiff by way of Deed of Transfer Registration No. 404/2011. He and the second defendant continued to occupy the property. There was never an agreement for them to vacate the property or pay rental in respect of their occupation.

[25] He testified that Standard Bank dispatched the loan amount and on the 17<sup>th</sup> of June 2011, the deceased received the amount of N\$90,000.00 from him. Upon the deceased's request, he advanced a further amount of N\$6,000.00 to him towards the end of 2011. Shortly after the loan amount was dispatched, the deceased resigned from his employment. This had the result that he was unable to repay 25% of the bond repayment and as a result he was compelled to pay 100% of the monthly bond



repayment instalments to Standard Bank. He testified that he had paid the amount of N\$158,349.37 in respect of the bond repayments from 2012 until 2014.

[26] He testified that on 13 February 2013, the deceased, the second defendant and he met at the deceased's home in Windhoek. The second plaintiff was still at work. The purpose of this meeting was to set out the agreement regarding the retransfer of the immovable property into their names, once the entire bond was repaid. Upon the second plaintiff's return from work, she refused to sign the agreement. The deceased was shocked and disappointed about her refusal to sign the agreement.

[27] He testified that on the 14<sup>th</sup> of February 2013 and upon the request of the deceased, he took him to the police station. He got into the car with an envelope. At the police station, he made an affidavit which he later on handed to him together with the envelope. The affidavit confirmed the agreement the deceased, the second plaintiff, himself and the second defendant made. He later opened the envelope and discovered that it was a handwritten last will and testament of the deceased (in his own handwriting) which also confirmed the agreement between them as set out above.

[28] The deceased unfortunately passed away on the 14<sup>th</sup> of March 2014. After the appointment of the executrix he made arrangements for a meeting to be held between the second defendant, himself and the appointed agent of the executrix. The purpose of the meeting was to *inter alia* discuss the issue of the return of the immovable property to himself and the second defendant and to ascertain what the outstanding balance on the bond repayments were at that point in time as the bond was registered in the name of the second plaintiff and the deceased. They received the bond statements from Standard Bank. He testified that he had not only paid 100% of the bond repayments, but his monthly payment also covered the monthly instalments of a life insurance policy over the deceased's life. This policy paid out after the passing of the deceased which extinguished the entire Standard Bank loan.

[29] He testified that he and the second defendant had since 2013, effected reasonable and necessary improvements to the said immovable property. All these

improvements were necessary and are useful to the site's improvement. It has increased the value of the premises, which has the result that the plaintiff will be unjustly enriched and they will be impoverished.

[30] He testified that they effected the following improvements and/or renovations:

Paintwork:

- |    |                                      |          |
|----|--------------------------------------|----------|
| 1. | Paint and repairs inside and outside | N\$46800 |
|    | Ceiling                              | N\$4720  |

Ceiling:

- |    |  |         |
|----|--|---------|
| 2. | Replaced, repair ceiling in the house and stoop and front door | N\$5700 |
|    | Ceiling strips   |         |

Paint:

- |    |  |         |
|----|--|---------|
| 3. | Inside doors, windows and replaced glasses | N\$2560 |
|----|--|---------|

Barbeque:

- |    |  |         |
|----|--|---------|
| 4. | Repair, complete cement work and paint | N\$3500 |
|----|--|---------|

Cement works:

- |    |                         |          |
|----|-------------------------|----------|
| 5. | Repair cracks and stoep | N\$2 400 |
|----|-------------------------|----------|

Broken pipe:

- |    |   |         |
|----|---|---------|
| 6. | Replaced broken sewerage pipe, outside building | N\$ 450 |
|----|---|---------|

Geyser:

- |    |   |          |
|----|---|----------|
| 7. | Replaced 400 kpa valve and safety valve | N\$2 800 |
|----|---|----------|

Pipes:

- |    |   |          |
|----|---|----------|
| 8. | Replaced galvanized pipes with copper pipes in roof | N\$4 450 |
|----|---|----------|

Floor tiles:

- |    |  |          |
|----|--|----------|
| 9. | Replaced carpet with ceramic floor tiles | N\$5 280 |
|----|--|----------|

Replaced ceramic system in the main bedroom	N\$650
Repair sewerage pipes	N\$850

Roof:

10. Mounting of gutters on the stoep and washroom	N\$4 180
IBR roof sheets 10 square meters	N\$1500

Interlocks

11. Replaced old interlocks with new ones	<u>N\$5 950</u>
Total	<u>N\$96 870</u>

[31] He testified that they were never in unlawful occupation and possession of the said immovable property. He denied that there was ever a rental agreement between them and for them to pay rent. The only agreement in place between them was as set out above.

[32] He testified that he and the second defendant effected payment of all municipal accounts including all rates and taxes in respect of the said property before they have entered into the agreement with the deceased and second plaintiff and also thereafter. The Municipal bills are still in their names. He estimated that they have paid the amount of N\$37,440 towards rates and taxes, which will also forms part of their counterclaim, should this matter proceed.

The second defendant did not testify due to ill health.

The plaintiffs closed their case without calling any witness.

Submissions by the defendants (written heads)

[33] Counsel conceded that in respect of prayer 4, the improvements to the property, a case has not been made out. Counsel also conceded that the oral agreement pertaining to the retransfer of the property to the defendants was not reduced to writing as required by the formalities pertaining to the Sale of Land Act and therefore such an oral agreement is invalid and unenforceable.

[34] Counsel further submitted that the defendants paid N\$96 000 to plaintiff in terms of the oral agreement, they are out of pocket. Plaintiff denies that N\$96 000 was paid. Defendants also paid an amount of N\$158 349.00 towards the bond and those amounts should be reimbursed should the court find that ownership vests in the plaintiffs, then the defendant are entitled to the full bond repayment they made.

#### Submissions by Plaintiffs

[35] Counsel argued that there was noncompliance with the formalities in respect of Contracts of sale of Land Act in that the oral agreement relating to the retransfer of property was not reduced to writing.

Counsel further argued that Mr. Schneider conceded that he knew that the agreement should have been in writing, but was negligent in not reducing the oral agreement to writing. Counsel argued that the estate of late Mögel is interstate as no valid Will was executed by him.

Counsel submitted that prayer 1 of the counterclaim be dismissed and that prayer 2 of the counterclaim in the amount of (N\$39 587.34 bond amount) is correct and defendants are entitled to that amount.

[36] Counsel argued that the relief sought in prayer 2, the grant will not follow automatically, because Mr. Schneider conceded that if this court were to find that his occupation was unlawful from 29 February 2016 he acknowledged under oath that they are liable for occupational rent and that this amount must be set off.

[37] Counsel submitted that as far as prayer 3 is concerned, plaintiffs tender to pay the municipal rates and taxes. Counsel argued that as far as prayer 4 is concerned, it must be dismissed because the defendant conceded that, in the event the court finds that the second plaintiff is the owner, the defendant concedes that it did not prove the claim.

#### Analysis of the evidence

[38] The crisp issue for determination is whether the oral agreement entered into between the second plaintiff, her late husband, Mr. Mögel and the defendants to retransfer the property to them (defendants) after it was sold to the second plaintiff and her late husband Mögel was valid and enforceable.

In terms of the formalities in respect of Contracts of sale of Land Act, 1969(Act 71 of 1969), such a contract shall be of no force or effect. Section 1 reads:

*'1. Formalities in respect of contracts of sale of land and certain interests in land  
(1)No contract of sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.'* (My emphasis).

[39] The first defendant testified that he was involved in property development for many years and knew that any agreement relating to the sale of land must be in writing. He testified that he was negligent in not reducing that oral agreement to writing. The only conclusion this court can come to is that, the oral agreement to retransfer the property to the defendants is of no force or effect. The lawful owners of property are the second plaintiff and her late husband.

[40] The counterclaim of the defendants for improvements effected to the property is without foundation. That is so, because having regard to the nature of the improvements and the intention of the defendants when they effected those improvements, it was clear that they became permanent attachments and the property of the owner of the property<sup>2</sup>.

[41] The municipal rates and taxes that the defendants paid whilst residing in the property, the plaintiffs have agreed to pay that and to be offset against the bond payment that the defendants paid in the amount of N\$158 349.37.

One matter remains. Counsel for the plaintiffs sought costs on the higher scale on the basis that the defendants were on various occasions informed that the oral

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<sup>2</sup> (*Macdonald Ltd v Radin NO & the Pochtchefstroom Diaries & Industries Co Ltd* 1915 AD 454 467).

agreement to retransfer the property to them was invalid because it did not comply with Act 71 of 1969 and they should not oppose the matter and settle. They persisted with their unmeritorious defence and for those reasons counsel sought costs on the higher scale. I agree.

For all those reasons, the following order is made:

#### The Order

1. The first and the second defendants are evicted from Erf 724, Block B, Rehoboth in the Republic of Namibia.
2. The first and the second defendants must vacate Erf 724, Block B, Rehoboth in the Republic of Namibia on or before 30 September 2021.
3. Prayers 1, 4, 5 and 6 of the first and the second defendants' counterclaim are dismissed.
4. The first and the second defendants are directed to ascertain and account for the municipal rates and taxes paid by the first and the second defendants from 17 June 2011 to 04 June 2019.
5. The first and the second plaintiffs are liable to pay the first and the second defendants the amount ascertained in paragraph 4 hereof.
6. The first and the second defendants are advised to lodge a claim in respect of prayer 2 of their counter-claim against Estate Late Mögle (the second plaintiff) in terms of section 31 of the Administration of Estates Act, No. 66 of 1965.
7. The first and the second defendants are ordered to pay the costs occasioned by the claim in convention and the claim in reconvention, such costs being the costs of one instructing and one instructed legal practitioner on the scale as between attorney and client.

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G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE PLAINTIFF

Adv. T Muhongo  
Instructed by Fisher, Quarmby & Pfeifer  
Windhoek

FOR THE DEFENDANTS

C. Williams  
of Williams Legal Practitioners  
Windhoek