REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: I 1845/2014

In the matter between:

ESTEL NANGHAMA	**PLAINTIFF**

and

HILMA TRAUGOTT IN HER CAPACITY AS ESTATE REPRESENTED IN THE ESTATE OF THE LATE HELENA SHIYUKA	**1ST DEFENDANT**
THE MASTER OF THE HIGH COURT	**2ND DEFENDANT**
THE REGISTRAR OF DEEDS	**3RD DEFENDANT**
ELIA MATHEUS	**4TH DEFENDANT**
NICKEY LACHEY	**5TH DEFENDANT**

Neutral citation: *Nanghama v Traugott N.O and Three Others* (I 1845/2014) [2021] 433 (28 September 2021)

Coram:	UEITELE J
Heard:	**30 November 2020 – 03 December 2020; 21 and 22 January 2021**
Delivered:	**28 September 2021**

Flynote: *Rei vindicatio* — requirements restated — plaintiff must allege and prove that he or she is the owner and that the defendant is holding the *res* — defendant must allege and prove some right to hold possession — court held that plaintiff had proved ownership

of the immovable property by producing the registered title deed indicating that she is the registered owner of the property — defendant had failed to place admissible evidence before the court to disturb the presumption of ownership created by the registered title deed.

Evidence — admissibility of court orders — section 15 of the High Court Act, 1990 — in any civil proceedings a copy of a court order which is duly certified by the Registrar of the High Court under the seal of the High Court is admissible as evidence of what is contained in that order.

Summary: The plaintiff in this case alleged that she was the owner of the immovable property situate at Erf 6101, Katutura Extension 1, Windhoek ("the property") and sought an order of eviction from the property against the first defendant and all other persons occupying the property against the plaintiff's will. The plaintiff further alleged that she became the lawful, registered owner of the property when the fourth defendant, who had previously inherited the property from the deceased estate of one Josiah Shoongoleni in 2010, subsequently donated the property to her in 2014.

The first defendant disputed the validity of the plaintiff's ownership on the basis that an Order of this Court dated 04 February 2011 set aside two decisions made by the Master of the High Court, namely that the fourth defendant was the closest living relative of the late Josiah Shoongoleni, and the appointment of the plaintiff as the executrix of the deceased estate of the late Josiah Shoongoleni. In addition to defending the action, the first defendant instituted a counterclaim wherein she sought, inter alia, an order setting aside the transfer of the property from the deceased estate to the fourth defendant and a declarator that she (the first defendant) is entitled to take ownership of the property.

The Court was tasked with determining whether the plaintiff had lawfully acquired ownership of the property and as such was entitled to the eviction order sought.

The Court confirmed the approach to be followed in a *rei vindicatio* action to be that the owner, in instituting the action need do no more than allege and prove that he is the owner, and the defendant must allege and prove some right to hold possession.

The Court found that the plaintiff, having produced the registered title deed indicating that she is the registered owner of the property, had discharged the onus of proof in respect of her ownership of the property and the occupation of the property by the first defendant and members of her family.

In considering the admissibility of the High Court order of 04 February 2011, the Court referred to section 15 of the High Court Act, 1990 and held that in any civil proceedings a copy of a court order which is duly certified by the Registrar of the High Court under the seal of the High Court is admissible as evidence of what is contained in that order. The first defendant's failure to fulfil the condition prescribed by the High Court Act rendered the evidence inadmissible. It was found that the first defendant had failed to place admissible evidence before the court to disturb the presumption created by the Deed of Transfer that the property was lawfully and validly transferred from the estate of the late Josiah Shoongeleni to the fourth defendant, and thereafter from the fourth defendant to the plaintiff.
The plaintiff accordingly succeeded with her claim for the eviction order and was absolved from the instance in respect of the first defendant's counterclaim.

ORDER

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1. The first defendant and all persons occupying the property described as:

CERTAIN: Erf 6101, Katutura (Extension No. 1)

SITUATE: In the Municipality of Windhoek
Registration Division "k"

Khomas Region

MEASURING 259 (Two Five Nine) square meters

HELD BY Deed of Transfer No T 2527/2014.

must, by not later than 31 October 2021, vacate that property.

2. The plaintiff is in respect of the first defendant's counterclaim absolved from the instance.

3. The first defendant must pay the plaintiff's costs of suit.

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

JUDGMENT

UEITELE J

Introduction

[1] This case involves the continued occupation of a family home located at Erf 6101, Katutura Extension 1, Windhoek ("the property") by family members of the late Helen Shiyuka. (I will, in this judgement, refer to the late Helen Shiyuka as the late Shiyuka). The fourth defendant (who at the time of this trial was also deceased) is a relative of the original owner of the property, the late Mr Josiah Shoongeleni (who died on 23 October 1996), who acquired that property during 1991. (I will, in this judgement, refer to the late Josiah Shoongeleni as the late Shoongeleni).

[2] The plaintiff, Estel Nanghama (I will, for ease of reference refer to the plaintiff as Estel in this judgement) was, on 13 March 2009 and in terms of section 18(3) of the

Administration of Estate Act, 1965[1], appointed as the estate representative (the executrix) in the estate of the late Shoongeleni. During November 2010 the executrix in the Estate of the late Shoongeleni (that is Estel) transferred the property to the fourth defendant (the late Elia Matheus) who in turn during May 2014 donated the property to Estel and registered it in the latter's name on 19 May 2014. Estel does not reside in the property but is desirous of doing so.

[3] From the pleadings and other documents filed of record it appears that as at November 2010 when the property was transferred into the name of the late Elia Matheus, the late Shiyuka and other family members were in occupation of the property. During July 2014 Estel, claiming that she is the registered owner of the property, commenced proceedings out of the High Court for the eviction of the late Shiyuka and all persons occupying the property from the property. The late Shiyuka entered a notice to defend Estel's claim and also instituted a counterclaim in terms of which she, amongst other orders, sought an Order setting aside the transfer of the property to the late Elia Matheus and an Order declaring that she (the late Shiyuka) is entitled to take ownership of the property.

[4] Whilst this matter was still pending in Court, Helena Shiyuka died on 17 June 2018 and her only child Hilma Traugott (I will, for ease of reference refer to Hilma Traugott as Hilma in this judgement) was, appointed as executrix in her estate. After Hilma was appointed as executrix in the estate of the late Shiyuka she elected to substitute her late mother as first defendant and was so substituted in terms of Rule 43 of the Rules of Court.

The Pleadings

[5] In her particulars of claim Estel alleges that on 02 March 2014 she acquired the property through a donation and that she is the registered owner of the property. She further alleges that at the date the property was registered in her name the late Shiyuka was already in occupation of the property and that despite demand to vacate the property she refuses to do so.

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[1] Administration of Estate Act, 1965 (Act No 66 of 1965).

[6] In her plea the late Shiyuka denies that Estel is the lawfully registered owner of the property. She pleaded that Estel unlawfully acquired the property contrary to the directions of the Master of the High Court. The late Shiyuka further pleaded that Estel was, by an Order of the High Court dated 04 February 2011, removed as executrix in the estate of the late Shoongeleni and that the transfer of the property was *ex lege* set aside.

[7] In her counterclaim the late Shiyuka repeated the allegations that on 4 February 2011 the High Court set aside the Master of the High Court's ("the Master") decisions and findings dated 29 June 2010 and 28 July 2010 respectively that the late Elia Matheus was the closest living relative of the late Shoongeleni, and also set aside the appointment of Estel as the executrix in the estate of the late Shoongeleni. She further alleged that Estel, the Registrar of Deeds and the late Elia Matheus acted fraudulently, unlawfully and in an illegal manner when the late Elia Matheus donated and transferred the property to Estel. She concluded by alleging that Estel obtained the property illegally and her ownership of the property is thus *void ab initio.*

[8] In her plea to the late Shiyuka's counterclaim Estel denied that she obtained or acquired the property through fraud or other unlawful means. She pleaded further that the late Elia Matheus was the half-brother of the late Shoongeleni and the only living blood relative of the late Shoongeleni who was the lawful owner of the property. She further pleaded that the late Elia Matheus was the sole heir to the estate of the late Shoongeleni.

[9] The case was subjected to case management and the parties held a pre-trial conference. During the pre-trial conference the parties agreed upon a number of factual disputes that had to be resolved by this Court. Amongst the factual issues that had to be resolved by the Court were the following:

(a) Whether the High Court, on 04 February 2011 set aside the Master's decisions which declared the late Elia Matheus as the closest living relative of the late Shoongeleni and the appointment of Estel as estate representative in the estate the late Shoongeleni.

(b) Whether the late Elia Matheus was in fact the closest living relative of the late Shoongeleni and therefore entitled to inherit the property.

(c) Whether Estel acquired the property as a result of an illegal donation.

(d) Whether the late Elia Matheus had the capacity and authority to donate the impugned property to Estel.

(e) Whether the late Shiyuka was the niece of the late Shoongeleni and therefore the closest living blood relative (at the time) and thus entitled to inherit the property.

(f) Whether the Master of the High Court made a conclusive determination in its investigation to determine the closest living blood relative of the late Shoongeleni (at the time).

(g) If the answers to questions (a) and (c) are in the affirmative, the effect of the court order setting aside the transfer of the property to Estel.

Issues for determination.

[10] In the light of the pleadings, I am of the view that the question that I am required to resolve is simply whether Estel lawfully acquired the property and is thus entitled to evict the persons occupying the property against her will.

[11] Before I deal with the issue which I am called upon to decide, I will briefly summarise the evidence presented to me. I will thereafter restate the applicable legal principles and then finally apply those principles to the facts of this case.

The plaintiff's evidence.

[12] Estel was a single witness and testified in support of her claim. Her evidence was essentially that she was the owner of the property and that it was duly transferred to her

name on the 09 May 2014 after it had been donated to her by the late Elia Matheus. She also confirmed that at the time of the transfer, Helena Shiyuka was already resident at the property and that she refused to vacate the property despite her demands.

[13] In cross examination she was questioned about her family relationship to the late Shoongeleni. Her testimony with respect to how she was related to the late Shoongeleni was not supported by any documentary evidence and I therefore regard that evidence as inadmissible hearsay evidence. I say so because both the late Shoongeleni and the late Elia Matheus were born several decades before Estel was born (the late Shoongoleni was born in 1903 and the late Elia Matheus was born in 1931, that is some sixty-three and thirty-five years, respectively, before Estel was born). It thus follows that in the absence of any documentary evidence Estel cannot positively testify as to who the late Shoongeleni or the late Elia Matheus' brothers, sister or parents are or were. I therefore reject Estel's evidence as regards her relationship to the late Shoongeleni.

The evidence on behalf of the 1st defendant's (Hilma Traugott).

[14] Ms Traugott called a certain Mr Leonard Nevonga as the first witness in support of her defence and counterclaim. He testified that he knew the late Shoongeleni as they both hail from Omashekediva Village in Northern Namibia and he knew him when he resided in Windhoek. He further testified that he knows that the late Shoongeleni was not survived by a spouse or offspring. He furthermore testified that the late Shoongeleni had a half-brother by the name of Nikodemus Nekuta Shiyuka, with whom they shared a mother. It was also his testimony that the late Elia Matheus was not a biological brother to the late Shoongeleni.

[15] Mr Nevonga further testified that Nicodemus Nekuta Shiyuka is the biological father of the late Shiyuka. He further testified that he was the one who took Helena Shiyuka from Ohakweenyanga village and took her to reside with her uncle, the late Shoongeleni, during 1978 or 1979. He furthermore testified that Helena Shiyuka is the biological mother of Hilma Traugott, and that Hilma Traugott is therefore the closest living blood relative of the late Shoongeleni.

[16] Hilma Traugott was the second witness for the first defendant. She testified that she is the biological daughter of the late Shiyuka. She further testified that her late mother was the niece of the late Shoongeleni. She further testified that the late Shoongeleni and Nicodemus Nekuta Shiyuka were biological brothers who were born of the same mother. She testified that she has resided at the property with her late mother since birth. For that reason she is the closest living blood relative of the late Shoongeleni and that now after the demise of her mother, she should be the one to inherit the property.

[17] She further testified that she came to know about the Order of the High Court of 04 February 2011 in terms of which the decisions of the Master dated 29 June 2010 and 28 July 2010 whereby she found that the late Elia Matheus was the closest living relative of the late Shoongeleni, and appointed Estel as executrix in the estate of the late Shoongeleni respectively were set aside.

[18] Having briefly set out the evidence that was adduced by the parties I now proceed to briefly outline the applicable legal principles.

The applicable legal principles.

[19] The approach that must be followed in an action of this nature (i.e. for the recovery of possession of a *res* or for ejectment from immovable property) is set out in *Chetty v Naidoo*[2] where Jansen, JA said the following:

'It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the *onus* being on the defendant to allege and establish any right to continue to hold against the owner (cf *Jeena v Minister of Lands* 1955 (2) SA 380 (A) at 382E, 383).'

[20] Badenhorst et al[3] argue that:

[2] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 B – D.
[3] Badenhorst, Pienaar & Mostert in *Silberberg and Schoeman's Law of Property* Lexis Nexis 5ed at 93.

'An owner who institutes a *rei vindicatio* to recover his or her property is required to allege and prove:

(a) that he or she is the owner of the thing;

(b) that the thing was in the possession of the defendant at the commencement of the action; and

(c) that the thing which is vindicated is still in existence and clearly identifiable.'

[21] In the South African case of *Akbar v Patel*[4] Trengove J said the following:

'According to our law, where a plaintiff's claim for the recovery of possession or for ejectment is based on his ownership of the property involved, his cause of action is simply the fact of his ownership coupled with the fact that possession is held by the defendant. (*Graham v Ridley* 1931 TPD 476; *Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T) at 336 and the authorities there cited.)'

[22] In *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd*[5] Van der Westhuizen, AJ said:

'The plaintiff's claim is — in the first place — based upon the *rei vindicatio,* which is the applicable action available to an owner, who has been deprived of his or her property against his or her will and who wishes to recover the property from any person who retain possession of it without the owner's consent…The plaintiff in order to succeed is required to allege and prove:

(a) that he is the owner of the thing or items in issue; and

(b) that the items were in the possession of the defendant at the commencement of the action…'

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4 *Akbar v Patel* 1974 (4) SA 104 (T) at 109.

5 *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 996.

[23] For the defendant to successfully resist a *rei vindicatio* action, he must allege and prove some right to hold possession[6]. In the matter of *Shimuadi v Shirungu*[7] Levy, J held that:

'It is trite that in order to eject a defendant from immovable property, a plaintiff need only allege that he is the owner and that the defendant is in occupation thereof. Should the defendant deny any one of these elements, namely that the plaintiff is the owner or that the defendant is in occupation, the *onus* is on the plaintiff to prove the truth of the element which is denied. The plaintiff would succeed in discharging the *onus* of proof in respect of ownership by providing registered tittle deeds in his favour. An inference that plaintiff is the owner would then justifiably be drawn. Should the defendant dispute the validity of the title deeds or that ownership, despite the deeds, is of a 'nominal character' ('*nominale aard'*), as in the present case, the *onus* is on the defendant to prove this.'

[24] Having set out the applicable legal principles I now proceed to considered the factual dispute set out by the parties in the pre-trial order.

Did the High Court, on 04 February 2011, set aside the Master's decisions?

[25] It is common cause between the parties that Estel is the registered owner of the property (she produced a copy of the Deed of Transfer that indicates that she is the registered owner of the property) and that Hilma and some members of her family are in possession or occupation of the property. It thus follows that Estel has discharged the *onus* of proof in respect of her ownership of the property and the occupation of the property by Hilma and members of her family.

[26] Hilma disputes the validity of Estel's ownership of the property despite the existence of a title deed (the Deed of Transfer) indicating that Estel is the registered owner of the property. On the authority of *Shimuadi v Shirungu*, the *onus* is thus on Hilma to

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6 See *Chetty v Naidoo* supra footnote 1 at 20B.

7 *Shimuadi v Shirungu* 1990 (3) SA 347 (SWA), also see the case of *Shukifeni v Tow-in-Specialist CC* 2012 (1) NR 219 (HC); *Angula v Mavulu* (I 2690/2010) [2014] NAHCMD 250 an unreported judgment of this Court delivered on 22 August 2014.

prove the ownership of the property by Estel is invalid and therefor of a 'nominal character'.

[27] Hilma anchors her denial of the validity of Estel's ownership in an Order of the High Court dated 04 February 2011. Mr Enkali, who appeared on behalf of Hilma, argued that in terms of the Court Order dated 04 February 2011 the High Court set aside the Master's decisions and findings dated 29 June 2010 and 28 July 2010 that the late Elia Matheus was the closest living relative of the late Shoongeleni and to appoint Estel as executrix in the estate of the late Shoongeleni.

[28] Mr Enkali furthermore relied on the matter of *Bezuidenhout v Patensie Sitrus Beherend Bpk* where it was held that a court order stands and must be strictly obeyed until set aside by a higher court, and the same court which granted the original order does not have the right to nullify its effect or interfere with that order except in very limited circumstances in the context of variation[8]. He thus argued that:

> 'It is on the strength of the court order of 4 February 2011 that the 1st Defendant seeks that the transfer of the property from the estate of the late Josia Shoongeleni to the 4th Defendant (the late Elia Matheus) be set aside. Once the 4th defendant was stripped of the status that he is the closest living (at the time) relative of the late Josia Shoongeleni, the retrospective effect of that order is that he was no longer the closest living relative and therefore was not entitled to inherit the property.'

[29] On the other hand, Mr Beukes who appeared on behalf of Estel, objected to the admission of the Court Order dated 4 February 2011 on the basis that that Order does not comply with s 34 of the Civil Proceedings Evidence Act, 1965.

[30] I pause here to remark that discovery is a pre-trial mechanism to facilitate a fair hearing. It prevents trial by-ambush. It ensures that before trial both parties are aware of all the relevant documents. The issues to be taken to the trial are thereby delineated and disputes are narrowed so that only the controversial aspects of the trial need to be

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8 *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229.

adjudicated upon. In the English case of *Air Canada*[9] the purpose of discovery was described as follows:

'Discovery is one of the few exceptions to the adversarial character of our legal process. It assists parties and the court to discover the truth. By so doing, it not only helps towards a just determination; it also saves costs. A party who discovers timeously a document fatal to his case is assisted as effectively, although less to his liking, as one who discovers the winning card; for he can save himself and others the heavy costs of litigation.'

[31] The evidence tendered by means of discovered documents is not admissible. Even if a party admits the authenticity of a document it does not automatically become admissible. There is a difference between the admissibility of a document and the authenticity thereof. It is not enough to aver that a document has been discovered by the opposition and that therefore the correctness of its contents need not be proved. This is made very clear in rule 28(7) of the High Court Rules. Rule 28(7) reads as follows:

'(7) When the parties prepare a case management report referred to in rule 24 for the purpose of the case management conference-

(a) the discovery affidavit referred to in subrule (4) must form part of such report;

(b) unless a document, analogue or digital recording listed under subrule (4)(a) is specifically disputed for whatever reason, it must be regarded as admissible without further proof, *but not that the contents thereof are true;*.' (Italicised and underlined for emphasis)

[32] For the above stated reason, I, at the trial of this matter ruled that I will accept the Court Order date 04 February 2011. But it is clear that Rule 28(7)(b) does not relieve a party from proving the truth or correctness of a document which is admitted in evidence. It thus follows that Hilma still bears the *onus* to prove the correctness of the High Court Order dated 04 February 2011.

[33] Generally speaking, a document has no testimonial value and is not evidence of its contents. According to the matter of *Weintraub v Oxford Brick Works (Pty.) Ltd*[10], a

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[9] *Air Canada v Secretary of State for Trade* {1983) 2 AC 394, as quoted in *Santam v Segal* 2010 (2) SA 160 (NPD) at para 6.

[10] *Weintraub v Oxford Brick Works (Pty.) Ltd*, 1948 (1) SA 1090 (T) at p. 1093

document is only evidence of the fact that it came into existence. It is not evidence that what is contained in the document is true. As I indicated earlier this is the general rule. This position is somewhat changed in respect of documents which fall within the provisions of s 34 of the Civil Proceedings Evidence Act, 1965 or s 15 of the High Court Act, 1990[11]. Section 15 of the High Court Act, 1990 reads as follows:

> '15 **Certified copies of court records admissible as evidence**
>
> Whenever any judgement, decree, order or other record of the High Court is required to be proved or inspected or referred to in any manner, a copy of such judgment, decree, order or other record duly certified as such by the registrar under the seal of the High Court shall be *prima facie evidence* thereof without proof of the authenticity of the registrar's signature.'

[34] It therefore follows that in any civil proceedings a copy of a Court Order which is duly certified by the Registrar of the High Court under the seal of the High Court is admissible as evidence of what is contained in that order. The non-fulfilment of the condition prescribed by the High Court Act, 1990 means that the evidence relating to the correctness of what is contained in the Court Order is inadmissible.

[35] It thus follows that Hilma has not placed admissible evidence before me to prove that the Master's decision dated 29 June 2010 in terms of which she declared that the late Elia Matheus was the closest living relative of the late Shoongeleni was set aside by the High Court. It thus follows that the decision (in terms of which the Master declared that the late Elia Matheus was the closest living relative of the late Shoongeleni) remains valid and so also the Master's decision to appoint Estel as executrix in the estate of the late Shoongeleni. It furthermore follows that Hilma has not placed admissible evidence before me to disturb the presumption created by the Deeds of Transfer that the property was lawfully and validly transferred from the estate of the late Shoongeleni to the late Elia Matheus, and from the late Elia Matheus to Estel.

[36] My finding that the there is no admissible evidence before me indicating that the decisions by the Master which declared the late Elia Matheus as the closest living relative of the late Shoongeleni and the appointment of Estel as estate representative in the estate the

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[11] The High Court Act, 1990 (Act 16 of 1990).

late Shoongeleni have been set aside obviates the need to deal with all the other matters raised by the parties in their pre-trial report which was made an order of Court.

[37] There exist no factors as to why the ordinary principle applicable to costs must not apply. Thus costs must follow the event, in which case the first defendant must bear the costs of this suit. For the reasons set out in this judgment I make the following order:

1. The first defendant and all persons occupying the property described as:

CERTAIN: Erf 6101, Katutura (Extension No. 1)

SITUATE: In the Municipality of Windhoek
Registration Division “k”
Khomas Region

MEASURING 259 (Two Five Nine) square meters

HELD BY Deed of Transfer No T 2527/2014.

must, by not later than 31 October 2021, vacate that property.

2. The plaintiff is in respect of the first defendant’s counterclaim absolved from the instance.

3. The first defendant must pay the plaintiff’s costs of suit.

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

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UEITELE S F I

Judge

APPEARANCES

PLAINTIFF:	RIGUARD BEUKES Of Henry Shimutwikeni & Co Inc. Windhoek
FIRST DEFENDANT	SAMSON ENKALI Of Kadhila Amoomo Legal Practitioners Windhoek.
SECOND TO FOURTH DEFENDANTS	No Appearance