REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2020/01046

In the matter between:

MORNAY JARMAN **PLAINTIFF**

and

MATHEUS ALBERTUS MORKEL **1ST DEFENDANT**

WILHEMINA MOUTON **2ND DEFENDANT**

Neutral citation: *Jarman v Morkel* (HC-CIV-ACT-DEL-2020/01046) [2022] NAHCMD 327 (1 July 2022)

Coram: PRINSLOO J

Heard: **5 -7 April 2022 and 29 April 2022**

Delivered: **1 July 2022**

Flynote: Practice - application for absolution from the instance - claim for rental arrears - damage to property - ejectment from property - counterclaim - special plea of *locus standi* and prescription raised by plaintiff - special plea of prescription on first counterclaim upheld - first defendant has no right, title or interest in this matter- special

pleas on prescription and *locus standi* in respect of first defendant upheld - second defendant's second counterclaim prescribed - absolution from the instance on the defendant's second counterclaim is granted.

Summary: The plaintiff instituted a claim on 21 February 2021 for arrears rental, alleged damage to property that amounted to N$ 42 000 as well ejectment of the first defendant from the premises of the plaintiff with immediate effect. In September 2019, the first defendant entered into an oral agreement with the plaintiff to lease the house at Erf 424 at a monthly rental amount of N$ 6 500 per month. Accordingly, the first defendant took occupation of the house on 13 September 2019 and has occupied the house ever since.

The first defendant defended the action and in his plea the first defendant does not deny the plaintiff's claim but denies that he caused any damage to the property. The first defendant pleads that he acts on behalf of his mother, Ms Mouton, in terms of a special power of attorney. The first defendant instituted a counterclaim for set-off, whereby he claims an amount of N$ 140 000 as interest and the amount of N$ 420 000 for the outbuilding and land that was illegally fenced off. He states that his mother, the second defendant should not have sold the property as it is contrary to his late father's will, and he would therefore wish to buy the property from the plaintiff. The first defendant further pleaded that that portion of land in question was not included as part of the immovable property sold to the plaintiff. The plaintiff, raised a special plea of *locus standi* on the grounds that the mother of the first defendant is not a party to the proceedings and as a result, the first defendant has no *locus standi* in respect of the counterclaims instituted by him. The plaintiff raised a second special plea of prescription in respect of both counterclaims.

On the special pleas raised by the plaintiff, the first defendant approached the court for an order to join his mother, the second defendant, as a party to the proceedings, which was granted by Oosthuizen J on 10 May 2021. The second defendant filed a plea and counterclaim that is similar to that filed by the first defendant. The plaintiff's plea of

prescription in respect of the first counterclaim was upheld by Oosthuizen J on 20 September 2021 and the special plea of prescription in respect of the second counterclaim to be decided after hearing evidence during the trial. The parties filed a pre-trial report and the matter proceeded to trial. At the close of the defendants' case (plaintiffs in reconvention), the plaintiff's legal representative indicated that the plaintiff wanted to bring an application for absolution from the instance, which the court had to make a determination on.

Held that: the first defendant has no right, title or interest in this matter and cannot set off the plaintiff's claim against the counterclaim.

Held that: there is no evidence that the sales agreement did not include a specific portion of the Erf 424. The court cannot find that there was encroachment by the plaintiff onto the land that belonged to either the second defendant or the owner of the adjacent business.

Held that: no expert evidence was presented to prove quantum regarding the second counterclaim.

Held further that: Considering the evidence presented to this court, the special pleas on prescription and *locus standi* in respect of the first defendant must be upheld.

Held further that: the special plea on the second defendant's second counterclaim has also prescribed and special plea must be upheld.

The application for absolution from the instance on the defendant's second counterclaim is granted with cost.

ORDER

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1. The application for absolution from the instance on the defendant's second counterclaim is granted with cost.
2. The matter is postponed to 18 July 2022 at 10h00 to set a date for continuation.

JUDGMENT

PRINSLOO J:

Introduction

[1] The plaintiff is Mornay Jarman, an adult male now residing in Ocean View, Swakopmund. Mr Theron represents Mr Jarman during these proceedings.

[2] The defendants are Matheus Albertus Morkel and Wilhelmina Mouton. Mr Morkel is Ms Mouton's son and resides at Erf 424, Block A, Rehoboth. The defendants are unrepresented self-actors.

Background

[3] The plaintiff and his wife purchased the immovable property situated at Erf 424, Block A, Rehoboth from Ms Mouton, the second defendant, in 2006 for an amount of N$ 300 000.

[4] In September 2019, the first defendant entered into an oral agreement with the plaintiff to lease the house at Erf 424 at a monthly rental amount of N$ 6 500 per month. Accordingly, the first defendant took occupation of the house on 13 September 2019 and has occupied the house ever since.

Pleadings

[5] The plaintiff instituted a claim for arrears rental against the first defendant, and at the date of issuing the summons (21 February 2021), the arrears rental, as well as some alleged damage to the property, amounted to N$ 42 000.

[6] It is common cause that the first defendant failed to pay any rent from occupation to date.

[7] The plaintiff claims payment in the amount of N$ 42 000 from the first defendant and prays further that the first defendant is ejected from the premises with immediate effect.

[8] The first defendant defended the action.

[9] In his plea, the first defendant does not deny the plaintiff's claim, except for pleading that he did not cause any damage to the property and further instituted a counterclaim for set-off.

[10] The first defendant's plea and counterclaim can be summarized as follows:

a) The first defendant admitted that he did not pay any rent to the plaintiff and pleaded that he did not pay any rent as the plaintiff owes the family rent in respect of the portion of land that is adjacent to the house, which was part of Erf 424, but did not form part of the sales agreement between his mother, Wilhelmina Mouton, and the plaintiff.
b) The first defendant further pleads that in terms of the agreement between the plaintiff and Ms Mouton, the immovable property at Erf 424 would be sold for N$ 350 000. However, the plaintiff only paid N$ 300 000, and as the amount of N$ 50 000 remains outstanding since 2006, it causes the plaintiff to be in breach of the agreement.

c) The first defendant pleads that he is looking after the property that was standing vacant for several months and that he does so because he has an interest in the house, as this is his childhood home, and he offered to purchase the property from the plaintiff.
d) The first defendant pleaded that he refused to vacate the property because of the safety risk to the house and the damage that might be caused if the property stands vacant. The first defendant further pleads that there are rumours that the house is haunted, and before he occupied the property, the house was broken into on several occasions, and he would not like to see any further damage come to the house.

[11] The first defendant claims the following in terms of his counterclaim:

a) Claim 1: Payment in the amount of N$ 140 000. This represents the interest that the amount would attract if invested at Nampost from 2006 to date of counterclaim.
b) Claim 2: Payment in the amount of N$ 420 000 for the outbuilding and land that was illegally fenced off. The first defendant pleads that the house's boundary wall was evident when the plaintiff bought the property. The plaintiff illegally moved the boundary wall of the house to include the portion of land between the adjacent shop and the house. The first defendant pleads that that portion of land in question was not included as part of the immovable property sold to the plaintiff. Using that portion of land attracts rental calculated at N$ 2500 per month over the preceding 14 years (N$ 2500x 12 months x 14 years).The first defendant further claims for the discovery of the following documents:

i. Original sales agreement in respect of Erf 424, Block A, Rehoboth.
ii. Valuation certificate of the property at the time of sale.

[12] The first defendant pleads that his mother should not have sold the property as it is contrary to his late father's will, and he would therefore wish to buy the property from the plaintiff.

[13] The first defendant also prayed that the court issues a declaratory preventing the plaintiff from selling the property to any third person until the dispute is resolved between him and the plaintiff.

[14] The first defendant pleads that he acts on behalf of his mother, Ms Mouton, in terms of a special power of attorney.

Plea to counterclaim and special plea raised

[15] The plaintiff raised a special plea of *locus standi* regarding the first defendant as the mother of the first defendant is not a party to the proceedings before the court. The plaintiff, as a result, pleads that the first defendant has no *locus standi* in respect of the counterclaims.

[16] In addition, the plaintiff raised a second special plea of prescription in respect of both counterclaims. The plaintiff pleads that prescription was not stayed and, therefore the first defendant's claim prescribed. The plaintiff further pleaded that the immovable property, Erf 424. Block A, Rehoboth, was legally purchased by the plaintiff and the property was duly transferred to him and his wife.

[17] In respect of the first defendant's averment that the property's sale price was N$ 350 000, instead of N$ N$ 300 000, the plaintiff maintains that the purchase price was indeed N$ 300 000, a fact which is borne out by the sales agreement.

[18] The plaintiff vehemently denied that the first defendant had any legal interest in the property as he was not a party to the sales agreement.

[19] Following on the special pleas raised by the plaintiff, the first defendant approached the court for an order to join his mother, the second defendant, as a party to the proceedings, which was granted by Oosthuizen J on 10 May 2021.

Second defendant's plea in respect of the first defendant

[20] In her plea, the second defendant pleads that she does not have any knowledge of the claims made by the plaintiff in his particulars of claim but confirms that she drew the first defendant's attention to the house as he was looking for a house to rent and the house was standing vacant for months. The second defendant further confirms that the first defendant informed her of his difficulties in complying with his obligations regarding the rental payment, and she informed the first defendant to remain in occupation of the house as the plaintiff still owed her the amount of N$ 50 000 dating back to 2006, which amount remains due and owing.

[21] The second defendant further pleads that the plaintiff is in breach of contract as he fenced off a portion of the property in respect of which the subdivision was not completed as yet.

[22] In her counterclaim the second defendant sets out the same claim as the first defendant, as set out herein above.

Special plea in respect of the second defendant

[23] The plaintiff raised a special plea of prescription in respect of the second defendant's counterclaims as well and further denies that the immovable property was sold at the purchase price of N$ 350 000 and further denies the allegation that he occupies a portion of the property that was a part of any subdivision.

[24] The plaintiff further pleads that the property's fence is as per the town planning scheme for the Rehoboth Town Council on Erf 424, Block A, Rehoboth.

[25] The plaintiff denies fencing off any property which does not belong to him. The plaintiff further denies that any portion of the property currently registered in his name was excluded from the sales agreement between the plaintiff and the second defendant.

[26] In replication to the plaintiff's plea to the counterclaim, the first defendant pleads as follows :

a) He is the beneficiary of the property in question, and his mother, who was the executrix of his father's late estate, was not adequately advised when she sold the property to the plaintiff.
b) That he has *locus standi* as he has an interest in the matter. His interest in the matter is that he lived on the property and wanted to purchase it back from the plaintiff.
c) That the boundaries were clearly outlined by the wall separating the house and the adjacent business complex, the buildings between the house and the business complex were part of the daily operations of the supermarket and not part of the immovable property bought by the plaintiff.
d) The agreement with the second defendant was that the plaintiff would purchase only the house with its existing boundary walls, but the plaintiff unlawfully moved the boundary walls.

[27] My Brother Oosthuizen J heard the parties on the issue of prescription on 24 August 2021 and ruled on 20 September 2021 that the plaintiff's plea of prescription in respect of the first counterclaim was upheld and in terms of the special plea of prescription in respect of the second counterclaim to be decided after hearing evidence during the trial[1].

[28] In his discussion, Oosthuizen J found that:

[1] *Jarman v Morkel* (HC-CIV-ACT-DEL-2020/01046) [2021] NAHCMD 430 (24 September 2021).

‘ [16] The defendants are unrepresented self-actors. Their second counterclaim and the relief claimed is framed as a personal right that might have become prescribed. However, the pleading imply that they possibly have a claim to the alleged illegally fenced of surplus land, which may constitute a real right which may only prescribe after 30 years. Defendants may elect to amend their pleas in respect of the alleged surplus land fenced off.’

[29] The court further gave the defendants the opportunity to amend their pleadings should they elect to do so.

Pre-trial order

[30] For purposes of this judgment I will not deal with all the issues raised in respect of the plaintiff’s claim but intend to deal with those issue that relates to only the counterclaims. As indicated earlier the claim of the plaintiff stands unchallenged.

[31] The parties agreed on the following issues to be determined during the trial:

a) Whether the first defendant has a valid counterclaim against the plaintiff and whether either the first or the second defendants have the *locus standi* to raise the counterclaim of encroachment against the plaintiff.
b) In respect of the portion of Erf 424, Block A, Rehoboth, that is allegedly illegally fenced off:

i. If that portion of Erf 424 was not subject to the sales agreement between the second defendant and the plaintiff.
ii. Was there a discussion between the second defendant and the plaintiff of what would happen to the operations of the adjacent business, which was done next to the house bought by the plaintiff.
iii. Whether or not the boundary wall erected by the plaintiff during 2007 encroaches onto any property other than Erf 424, Block A, Rehoboth, as determined in the Rehoboth Town Planning Scheme.

iv. What size the land is that the defendants are claiming the plaintiff illegally fenced off.

v. Whether or not the operations of the supermarket adjacent to the house were affected by erecting a new fence (in 2007), and what were the repercussions of the alleged encroachment by the plaintiff.

vi. What is the fair and reasonable value regarding the portion of the property allegedly fenced off by the plaintiff.

vii. Whether the plaintiff got a special price for the property from the second defendant since the plaintiff allegedly only bought the house, and whether the house was correctly fenced off.

viii. Whether the defendants' claim in respect of the alleged encroachment prescribed in terms of the Prescription Act, 68 of 1969.

ix. Whether or not the plaintiff and the second defendant entered into a written deed of sale for Erf 424, Block A, Rehoboth, measuring 1080 m^2 for an amount of N$ 300 000 on 16 March 2006.

c) Was there subdivision pending at the time of the sales agreement; whether the Erf was supposed to be sub-divided, and whether such an application was ever lodged with the Registrar of Deeds in terms of the Registration of Deeds in Rehoboth Act, 93 of 1976.

[32] On the issues of law to be determined during the trial, the parties agreed on the following issues:

a) Whether the first and second defendants have a counterclaim of encroachment against the plaintiff.
b) Prescription of the counterclaims, either in whole or in part.
c) Whether the defendants have proven that the plaintiff and his wife encroached upon the immovable property not legally registered in their names.
d) Whether Erf 424 was correctly fenced off and, if so, whether there were discussions about the open land which formed part of the business operations of

the adjacent business operation and held the toilet facilities for the supermarket, causing some grey areas for the plaintiff of what the extent of the transaction was.

The evidence

[33] At the commencement of the trial, the parties agreed that the defendants have the onus to start as plaintiffs in reconvention as the plaintiff's claim in convention is uncontested.

The Defendants' case

[34] The first and second defendants testified in support of their case.

Matheus Albertus Morkel

[35] Mr Morkel, the first defendant, testified that his deceased father, Jacobus Morkel, started a supermarket in 1973 called Jaco Supermarket, which was situated at Erf 423, Block A, Rehoboth. His parents also owned the property next door to the supermarket on which their house was located. The house was built on Erf 424.

[36] Over the years, his parents extended the business on Erf 423 by adding a dry cleaning business. The late Mr Morkel was allowed to expand their business on the condition that there was provision made for delivery trucks to have an off-loading area. So the late Mr Morkel built the house at the furthest end of Erf 424, which created an open site between the home and the business, providing the necessary space for delivery vehicles. In addition, he erected a storage area between the house and the business, which would serve as the storage area for flammable products and also housed the toilets used by the supermarket staff.

[37] In 2006 his mother, the second defendant, sold the immovable property known and registered as Erf 424 to the plaintiff. At the time, Mr Morkel was residing in South Africa and was not involved in selling the immovable property. He laboured under the impression that his youngest sister, Jacqueline Feris, would purchase the house to keep the house in the family. That, however, did not happen.

[38] According to Mr Morkel his mother only sold the portion of land on which the house was situated to the plaintiff, and that would not include the outbuilding of Erf 424. Mr Morkel was, however, not present at the time of the sale negotiations between the plaintiff and the second defendant.

[39] In 2007 Mr Morkel was contacted by his sister, Ms Feris. She informed him that the plaintiff erected a new boundary wall between the business erf and the Erf 424, which resulted in the business premises losing its loading area, storage space and staff toilet facilities. At the time, Mr Morkel told Ms Feris that this matter needed to be handled between her, their mother and his step-brother Mr Van Wyk and to get legal assistance.

[40] At the time, Ms Feris was the owner of the dry-cleaning business and Mr van Wyk was the supermarket owner. It would appear that before his death, the late Mr Morkel and the second defendant approached the relevant authorities for the subdivision of Erf 423, Bock A, Rehoboth into the remainder of Erf 423 and Erf 889, Block A, Rehoboth, and it was, therefore, possible for the siblings to own the respective businesses adjacent to Erf 424.

[41] Mr Morkel testified that their father gifted him and Mr van Wyk the supermarket, but he renounced his rights to the supermarket in favour of Mr van Wyk.

[42] Mr Morkel visited Rehoboth a few months later, and he established that the matter regarding the new boundary fence was not resolved. Ms Feris apparently attempted to resolve the matter but made no headway. As for Mr van Wyk, he got into

cash flow difficulties and had to close down the business. Mr van Wyk rented the building out to a tenant.

[43] Mr Morkel testified that Ms Feris approached several legal practitioners seeking advice on how to resolve the issue and was advised to sue the second defendant for not completing the sub-division of Erf 424. Mr Morkel pleaded with his sister not to take that specific cause of action.

[44] In the meantime, the second defendant remarried, and she and her new husband decided not to engage in legal action in respect of either the N$ 50 000 still due on the sale of the property or in respect of the encroachment.

[45] After the passing of the first defendant's wife, he relocated back to Namibia, and in 2019 he was looking for premises to rent and was informed by the second defendant that the house at Erf 424 was vacant. Mr Morkel contacted Mr Jarman, the plaintiff, and agreed that he could move into the house. The plaintiff forwarded a lease contract to Mr Morkel to sign, and he requested that a further clause be added to the lease agreement giving him the option to purchase the property. This, according to Mr Morkel, led to the breakdown in the agreement between him and the plaintiff.

[46] Mr Morkel contacted his mother, the second defendant regarding the difficulty between him and the plaintiff. The second defendant then informed him that the plaintiff still owes her N$ 50 000 since the date of sale, which he failed to pay to date, but that she did not pursue it on the advice of her husband, Mr Mouton. She further informed Mr Morkel that the plaintiff took the adjacent piece of land, which did not form part of their agreement, and he never spoke to her again after the transaction to explain his actions.

[47] Mr Morkel then decided to take it upon himself to challenge the plaintiff on his actions via legal proceedings. He investigated the matter and found that the property was sold to the plaintiff at 60 percent of its value. This price was apparently agreed to

between the plaintiff and the second defendant on the understanding that the plaintiff would not interfere with the business set-up at the time.

[48] During cross-examination, the first defendant made the following concessions:

a) The second defendant inherited the properties (Erf 423 and 424) after the death of the late Mr Morkel Sr. in 2003 and was within her right to sell it, should she choose to do so.
b) When the second defendant sold the immovable property at Erf 424 to the plaintiff, she was of sound mind. However, Mr Morkel clarified this statement by saying his mother did not have the support of the family to assist her in making the decision.
c) The second defendant sold the immovable property measuring the 1080 m² as per the deed of sale, and the property was accordingly transferred into the names of the plaintiff and his wife. The size of the erf is 1080 m² as registered at the Deeds Registry. The first defendant does not dispute that the erf was measured by a land surveyor on the instructions of the plaintiff but states that he was not present when the measurements were made.
d) He was not present when the second defendant showed the house to the plaintiff and is not privy to their conversation regarding the property measurements.
e) The agreement between the plaintiff and the second defendant was reached based on the willing buyer/seller principle, and the second defendant was entitled to accept any offer she chose.
f) The actual size of the disputed portion of land (the 400 m² of Erf 424) and the rental amount claimed in respect thereof are estimations.
g) Erf 424 was never subdivided, and no records show the contrary.
h) The 400 m² in question was not registered in anybody else's name as it was his late father's property, who could use the said piece of land as he wished. However, Mr Morkel expressed the view that the specific piece of land became a servitude as the shop was the dominant occupant.

i) He has been aware of the issue regarding the boundary wall since 2007 and that no action was taken to resolve the issue with the plaintiff until the first defendant filed his counterclaim.

[49] On the issue of his *locus standi* regarding the counterclaim, Mr Morkel responded that his right is vested in the fact that he would be a beneficiary of his mother's estate.

Wilhelmina Mouton

[50] Ms Mouton testified that Erf 424 belonged to her and her late husband, Jakobus Morkel, and was part of a business set-up consisting of a supermarket and dry cleaner. After his passing, the second defendant inherited his assets. However, prior to Mr Morkel's death, the dry cleaners were gifted to their youngest daughter. Therefore the second defendant inherited the supermarket and the property at Erf 424.

[51] At the time of Mr Morkel's death, Erf 423, where the dry-cleaning business and supermarket were situated, was already subdivided as the remainder of Erf 423 and Erf 889. The dry-cleaning business was transferred into the name of their daughter.

[52] In February 2006, Ms Morkel remarried Mr Mouton and moved to Swakopmund. During the period that Ms Mouton and her husband visited Rehoboth, she was approached by the plaintiff regarding her house at Erf 424, Block A, Rehoboth. She initially thought he was interested in renting the property.

[53] Ms Mouton testified that when she showed the property to the plaintiff and his wife, she showed them the house, the yard and the outbuildings to the right of the house. The outbuildings consisted of a double garage and a store room. The buildings to the left side of the house consisted of a garage, a store room containing her late husband's tools and staff toilets. It appears that the second defendant showed these

outbuildings to the plaintiff as well but stated that the sale of the property did not include these outbuildings.

[54] After showing the house to the plaintiff and his wife, the plaintiff inquired if she would not like to sell the house. After some deliberations with her husband, Mr Mouton (who also passed away in 2019), she decided to sell the property. Ms Mouton informed the plaintiff that she wanted N$ 400 000 for the property. The plaintiff indicated that he needed to secure a loan from the bank and would revert to her.

[55] The plaintiff returned to the second defendant later and informed her that he only qualifies for a home loan to the value of N$ 300 000 but that he pays the remaining N$ 50 000 in cash from his savings. Upon signing the sales agreement, the second defendant noticed that the N$ 50 000 was not included in the sales amount but states that the plaintiff assured her that he would pay it once his insurance paid out. However, according to the second defendant, the plaintiff never did.

[56] Ms Mouton testified that sometime later, she was called by her daughter, Jaqueline Feris (who passed away in 2019), informing her that the plaintiff was busy constructing a new fence. When she confronted the plaintiff in 2007 regarding the construction of the new wall, she told him that he had only purchased the house and could not construct the boundary wall. The plaintiff disagreed with Ms Mouton and informed her that if that was the case, she defrauded him.

[57] Ms Mouton testified that her husband advised against taking action against the plaintiff. In addition, she had nobody to assist her as she was not on good terms with her daughter, Ms Feris and her son, Mr van Wyk, did not know how to help her.

[58] Ms Mouton testified that she made a mistake in selling the property to a third party as it was the will of the late Mr Morkel that their children should get preference if she sells the property. She further testified that she made a mistake in selling the

property to the plaintiff as she knew that the property in question was part of the business operation at the Jaco Supermarket.

[59] Ms Mouton stated that she did not mislead the plaintiff when she showed the property to him, and he never questioned the boundaries of the house, which was and still is separated by its boundary wall, separating it from the business.

[60] During cross-examination the second defendant made the following averments:

a) She was unaware that her late husband started the process to subdivide Erf 424, and if he did, she could not say if he completed the process through the official channels.
b) What she could say is that her late husband himself did a ‘subdivision’ of Erf 424 before his passing away. No land surveyor was involved in this process. To her recollection, her late husband paced out the piece of land.
c) Erf 424 was not 1080 m² despite official records reflecting 1080 m² as the size of the property. However, the second defendant does not hold any documentation supporting her contention.
d) That portions of immovable property could be sold in Rehoboth without subdividing the property. However, Ms Mouton could not explain why her late husband deemed it necessary to subdivide Erf 423 if it was a practice in Rehoboth to sell off pieces of land without subdivision.
e) No actions were taken regarding the boundary wall erected by the plaintiff on the portion of land that he apparently did not own. Ms Mouton confirms that she has known of the boundary wall since 2007, and her children, i.e. Ms Feris and Mr van Wyk had to sort out the problem, which they did not, and she just accepted the position as it was.

[61] At the close of the defendants’ case (plaintiffs in reconvention), Mr Theron indicated that the plaintiff wanted to bring an application for absolution from the instance.

Absolution application

Arguments on behalf of the plaintiff

[62] Mr Theron raised a few crisp issues in support of the plaintiff's application for absolution from the instance, which can be summarized as follows:

In respect of the first defendant

a) The first defendant conceded that he had no right or interest to either the plaintiff's property or that of the second defendant and that he was only assisting his mother.
b) The first defendant admitted that Erf 424 was legally sold by his mother to the plaintiff, and the full extent of the erf (1080 m²) was transferred into the names of the plaintiff and his wife in 2006.
c) The first defendant knew of the issue of the alleged illegally constructed boundary wall since 2007 already.
d) The first defendant conceded that the amount claimed as per the second counterclaim is based on an estimation and not on expert facts.
e) The first defendant failed to prove quantum and *locus standi* (right, title and interest) in Erf 424, and his counterclaim stands to be dismissed.

In respect of the second defendant

a) The second defendant admitted to entering into a deed of sale with the plaintiff and his wife to sell Erf 424, measuring 1080 m² on 13 March 2006.
b) The second defendant admitted that the full extent of Erf 424 was lawfully transferred into the plaintiff's and his wife's names.
c) The second defendant admitted that no subdivision was done in respect of Erf 424 or even initiated by her late husband, Jakobus Morkel.

d) The second defendant admitted that the boundary wall erected by the plaintiff in 2007 was done within the bounds of Erf 424, which the plaintiff lawfully purchased.
e) The second defendant admitted that she did not do anything about the subdivision of Erf 424 like they did with Erf 423. The adjacent business used the portion of Erf 424 as both erven was the property of the second defendant and her husband.
f) The second defendant admitted that the portion of Erf 424, upon which the house is situated, is much smaller than the 1080 m² she sold to the plaintiff and his wife.
g) The second defendant could not provide any evidence on the quantum of the second counterclaim.
h) The second defendant failed to proof that the plaintiff was encroaching on any property belonging to her.
i) It is a real right that the second defendant failed to prove, and there is no basis for her claim.
j) He claim based on a personal right, in terms of her pleadings, has prescribed in terms of s 11 (d) of the Prescription Act.
k) The second defendant took no procedural steps to enforce her alleged rights from 2006/7 until the first defendant joined her in the current action.
l) The second counterclaim stands to be dismissed.

Argument on behalf of the defendants

[63] The defendants argue that their counterclaim is credible. This contention is based on the plaintiff's failure to prove with a valuation certificate that he paid for the property at a market-related price.

[64] The defendants deny that the plaintiff had the right to build the boundary wall in question and submit that this was against the agreement between the plaintiff and the second defendant.

[65] The defendants do not dispute that the plaintiff bought the property from the second defendant however submits that the business erf, Erf 423, had a commercial easement on the property he purchased. The defendants submit that the plaintiff did not consider the consequences for the adjacent supermarket when he erected the boundary wall, and the plaintiff's actions resulted in a loss of income for the supermarket.

[66] The first defendant insists that he has *locus standi* to prosecute the counterclaim as he is an ‘heir’ to the estate of his mother, the second defendant and his mother asked him for his assistance.

[67] The first defendant concedes that he has known of the boundary wall since 2007 but that it does not mean that he condoned the plaintiff's actions by constructing the wall. Instead, the first defendant argued that the plaintiff pretended he was only interested in the house to convince the second defendant to sell the property to him.

[68] The first defendant conceded further that he did not quantify his claim through an expert. Still, the plaintiff rented a portion of Erf 424 out for a carwash operation at N$ 4500 per month. Therefore, he believes that the defendants’ counterclaim calculated at N$ 2500 per month is fair as the supermarket lost 10 to 15 percent of its business due to a lack of storage facilities for its flammable products.

[69] The second defendant admitted that she sold the house to the plaintiff but maintained that she did not sell the portion of the erf that formed part of the supermarket’s business operations. The second defendant further asserts that the plaintiff did not question the ongoing business operation on the open piece of land adjacent to the house.

[70] The second defendant further conceded that no subdivision was done in respect of the Erf 424 but submitted that she did not sell the relevant piece of the erf to the plaintiff in terms of their accord reached between the parties.

[71] The second defendant contended that she believed an easement existed, created over the years and that the plaintiff was aware of the fact.

Law applicable on absolution from the Instance

[72] In *Stier and Another v Henke*[2], the Supreme Court outlined the test applied when applications for absolution from the instance is sought in the following terms:

'… (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307 (T)." (My underlining.)

Harms JA went on to explain at 92H- 93A:

"This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne (loc cit))* – a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.'

[2] *Stier and Another v Henke* (SA 53/2008) [2012] NASC 2 (3 April 2012) para 4 which cites Harms, JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA), at page 92 para F – G.

[73] In *Dannecker v Leopard Tours Car & Camping Hire CC*[3] Damaseb JP stated the considerations relevant to absolution at closing of the plaintiff's case, which in my view will be relevant and applicable to the current application. Damaseb JP stated as follows:

'Absolution at the end of plaintiff's case ought only to be granted in a very clear case where the plaintiff has not made out any case at all, in fact and law:

a) The plaintiff is not to be lightly shut out where the defence relied on by the defendant is peculiarly within the latter's knowledge while the plaintiff has made out a case calling for an answer (or rebuttal) on oath;
b) The trier of fact should be on the guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable facts having a bearing on both credibility and the weight of probabilities in the case;[4]
c) Where the plaintiff's evidence gives rise to more than one plausible inference, anyone of which is in his or her favour in the sense of supporting his or her cause of action and destructive of the version of the defence, absolution is an inappropriate remedy;[5]
d) Perhaps most importantly, in adjudicating an application of absolution at the end of plaintiff's case, the trier of fact is bound to accept as true the evidence led by and on behalf of the plaintiff, unless the plaintiff's evidence is incurably and inherently so improbable and unsatisfactory as to be rejected out of hand.[6]'(my underlining)

Discussion

Evaluation of the evidence

[74] What is required to succeed with the application for absolution from the instance is to show that the plaintiffs in reconvention did not make out a prima facie case, that is, that there is no evidence relating to all the elements in their second counterclaim.

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[3] *Dannecker v Leopard Tours Car & Camping Hire CC* (I 2909/2006) [2015] NAHCMD 30 (20 February 2015).
[4] *Compare, Supreme Service Station (1969) (Pty) Ltd v Fox & Goodridge (Pty)* 1971 (4) SA 90 (RA) at 92.
[5] *Mazibuko v Santam Insurance Co Ltd & Another* 1982 (3) SA 125 (A) at 127C-D.
[6] *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 335 (A) at 527.

[75] The defendants are self-actors, which is evident from their pleadings and arguments advanced. Mr Morkel drafted all the pleadings and witness statements, and it was apparent during the trial that Mr Morkel inserted portions into Ms Mouton's witness statement that she did not state (and she said as much). Ms Mouton is 80 years of age and was quite traumatized to be joined to this current proceedings and to testify in court. Being mindful of Ms Mouton's age, I accept that she would not be able to remember the finer details of the transactions between her and the plaintiff. Unfortunately, I got the distinct impression that on several issues, the second defendant does not have independent memory of the facts and relies on suggestions by the first defendant and related it as facts to the court.

[76] The defendants tried to revive the first counterclaim by virtue of their evidence. However, that proverbial train left the station on that score when Oosthuizen upheld the special plea of prescription on the first counterclaim. Therefore, I do not intend to dwell on it, even during the evaluation of the evidence.

[77] It is clear from the evidence and the concessions made by the first defendant that he has no *locus standi* in respect of the counterclaims. The fact that he believes that he will be an heir or beneficiary to the estate of the second defendant when she passes away is, in my opinion, neither here nor there.

[78] The first defendant has no right, title or interest in this matter and cannot by any stretch of the imagination set off the plaintiff's claim against the counterclaim. Even if there was a possibility of success, which there is not for reasons I will discuss hereunder, it would go in favour of the second defendant and not in favour of the first defendant.

[79] The first defendant attempted to make out a case in favour of the owner of the supermarket, Mr van Wyk. However, on the first defendant's own version, he relinquished all right he might have had in the supermarket to his brother, Mr van Wyk.

Mr van Wyk showed no interest in pursuing a claim against the plaintiff despite the first defendant's efforts to get him on board.

[80] The first defendant commented on the losses suffered by the supermarket, but that would be hearsay. In any event, it is my understanding that Mr van Wyk is leasing the business property to a third person, and it is unclear where the first defendant obtained his facts.

[81] The first defendant has no personal knowledge of the deal between the plaintiff and the second defendant, yet he is pretty vocal regarding the injustice done to his mother. However, this, in my view, is the last-ditch attempt to salvage the second defendant's decision way back in 2006, without the input of any of her children. Therefore, the first defendant became quite emotional regarding the sale of the property, and unfortunately, his emotions drove the counterclaims.

[82] The first defendant's evidence was utterly unhelpful and took the second counterclaim no further.

[83] As already indicated, the second defendant is elderly. She is vague on specific facts and contradicted herself on certain issues, specifically which outbuildings and garages were pointed out to the plaintiff.

[84] On the one hand, the second defendant testifies that she told the plaintiff that the outbuildings to the left of the house were not included in the sale, yet in the same breath, states that the plaintiff failed to ask about the business operations conducted on that specific piece of land and further states he would have done his research and would have known that the particular piece land is used by the business next door. The second defendant also expressed her regret for selling the property as she knew that the property in question was part of the business operation at the Jaco Supermarket.

[85] The second defendant, therefore, blows hot and cold on what happened during the sale negotiations. It seems to me that the second defendant did not inform the plaintiff that a portion of Erf 424 was excluded from the deal. Even when the second defendant confronted the plaintiff regarding the boundary wall, he told her that if what she said was true, she made a misrepresentation to him as to what he would buy, and that was the end of the discussion. The second defendant took it no further.

[86] I am satisfied that there is no evidence that the sales agreement did not include a specific portion of the Erf 424. On the evidence presented to this court, I cannot find that there was encroachment by the plaintiff onto the land that belonged to either the second defendant or the owner of the adjacent business.

[87] If it is so that the portion of land was excluded from the sale, then I find it strange that once the boundary wall was erected, nobody objected to the infringement of their rights or followed a legal process to eject the plaintiff of the said piece of land.

[88] The first time anybody took any legal steps in respect of this piece of land was when the first defendant instituted a counterclaim against the plaintiff. It was not on the second defendant's insistence. In fact, the first defendant had to join the second defendant in proceedings. The parties (the second defendant and the supermarket owner) who might have had a right to enforce against the plaintiff did not do so. The status quo remained unchanged from 2007 up to 2021, when the second defendant was reluctantly drawn into this action.

Quantum

[89] It is common cause that the full extent of Erf 424 was transferred into the names of the plaintiff and his wife. It is further common cause that there was no subdivision of Erf 424, either by the second defendant or her late husband.

[90] The 400 m² referred to in the second counterclaim is a mere estimation. A land surveyor never measured the area, nor was it registered in anyone else's name but that of the plaintiff and his wife.

[91] The second defendant is no longer recorded as the owner of any portion of Erf 424 and would therefore not be entitled to any rent in respect of the piece of land in question. Even if she was, it is clear that the quantum of the claim is not adequately proven.

[92] *Abner v KL Construction and Another*[7] wherein Van Niekerk J found as follows:

'It is so that the opinion of the owner of a thing may be accepted as an estimation of its value, but where the estimate is challenged only an expert's testimony carries weight.'

[93] No expert evidence was presented to prove quantum regarding the second counterclaim.

Servitude or easement

[94] During the trial, the first defendant testified that there was a servitude on the portion of land previously used by the adjacent business. In opposition to the absolution application, the defendants argued that there was a commercial easement on the property in favour of the said business premises.

[95] The defendants did not plead these averments, and in my view, they raised it as an afterthought.

[96] If I may oversimplify, a servitude can be defined in our current context as a right that one person has over the immovable property of another person. This right entails the use and/ or enjoyment of that property by the holder of the right. Given the fact that

[7] *Abner v KL Construction and another* (I 1676-2011) [2013] NAHCMD 139 (27 May 2013) at paragraph 7.

the late Mr Morkel owned both properties and could extend a portion of his business to Erf 424 does not mean that it creates a servitude.

[97] In my considered view, the portion used for Jaco Supermarket did not constitute a servitude. In any event, if there was a servitude, it had to be registered against the title of the property.

[98] According to Silberg and Schoeman in The Law of Property[8], a servitude originates normally from an agreement. The learned authors further state:

> 'A servitude as a real right comes into existence only when the agreement has been registered, either be means of a reservations in a deed of transfer in the circumstances envisaged in s 76 of the Deeds Registries Act (47 of 1937) or by registration of a notarial deed, accompanied by an appropriate endorsement against the title deed of the dominant and servient tenements, respectively.'

[99] It is unclear when, where and how the easement and between whom the right to easement was created or came into existence, and I do not intend to dwell on it.

[100] In my view, the allegation of an easement has no bearing on the current matter.

Prescription

[101] During his judgment, Oosthuizen J pointed out that from the pleadings, it appears that the defendants want to rely on a real right but instead framed their counterclaim as a personal right and held that the pleadings imply that defendants might have a claim to the alleged illegal fenced off surplus land, which may constitute a real right, which may only prescribe after 30 years and it was suggested that the defendants might elect to amend their pleas in respect of the alleged surplus land fenced off[9].

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[8] *Silberberg and Schoeman's, The law of Property*, Butterworths.1983, 2nd ed at p 388.
[9] Supra footnote at para 16.

[102] The defendants elected not to amend their pleadings, and the counterclaim remained framed as a personal right. As a result, s 11(d) of the Prescription Act, 68 of 1969 is applicable, which means that the three-year period will apply to the debt alleged to be payable to the second defendant specifically.

[103] A mortgage bond does not secure the alleged debt, nor does it fall within the ambit of any of the other provisions of s 11(a) of the Act, wherein the period of prescription would be 30 years.

[104] The second defendant had been aware of the fence since 2007 already. If there were any debt due to the second defendant, it prescribed.

Conclusion

[105] Considering the evidence presented to this court, I do not doubt that the special pleas on prescription and *locus standi* in respect of the first defendant must be upheld.

[106] Further, it is evident from the evidence advanced on the second defendant's second counterclaim that the claim has also prescribed.

[107] Having made the findings regarding the special pleas, it is clear that it leaves the defendants without a case for the plaintiff to answer. Therefore, absolution from the instance must be granted in respect of the defendants' second counterclaim.

Cost

[108] The final issue to consider is the issue of costs. Given that the defendants are self-actors, I cannot concede to the plaintiff's request to grant cost on a punitive scale; therefore, the cost will be the cost in the ordinary cause.

Order

1. The application for absolution from the instance on the defendant's second counterclaim is granted with cost.
2. The matter is postponed to 18 July 2022 at 10h00 to set a date for continuation.

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JS Prinsloo

Judge

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:	PD THERON PD THERON AND ASSOCIATES WINDHOEK
ON BEHALF OF THE DEFENDANTS:	IN PERSON