

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV- ACT-CON-2018/02140

In the matter between:

**PUMA ENERGY NAMIBIA TWO (PTY) LTD**

**PLAINTIFF**

and

**NAMIBIA BUS AND TAXI ASSOCIATION**

**FIRST DEFENDANT**

**RUSA HANDUNGE**

**SECOND DEFENANT**

**Neutral citation:** *Puma Energy Namibia Two (Pty) Ltd v Namibia Bus and Taxi Association* (HC-MD-CIV-ACT-CON-2018/02140) [2023]  
NAHCMD 1 (18 January 2023)

**Coram:** TOMMASI J

**Heard:** 16, 17, 18 & 19 February 2021, 6 June 2022

**Submissions** 15 July 2022

**Delivered:** 18 January 2023

**Flynote:** Ejectment – Action for ejectment – Necessary averments – Plaintiff need only allege ownership of property and occupation thereof by defendants – Onus on defendants to prove lawful occupation – Onus not discharged by defendants as consent to occupy has been withdrawn.

**Summary:** The plaintiff instituted action for the ejectment of the first and second defendants from the immovable property. The plaintiff adduced evidence that the property is registered in the name of Caltex Oil Namibia (Pty) Ltd and that the company had subsequently changed its name to Chevron Namibia (Pty) Ltd. The name was once again changed from Chevron to Puma Energy Namibia Two (Pty) Ltd, the plaintiff. The plaintiff therefore discharged the onus to prove ownership. The occupation by the first defendant has not been disputed. The onus was thus on the first defendant to prove just cause for its occupancy. The first defendant claims that its right to occupy is contained in a joint venture agreement between the first defendant and Caltex Oil Namibia (Pty) Ltd. The parties agreed to pursue negotiations with the Windhoek Municipality or any other party in acquiring land for the setting up of a Secretariat and Service Station for the first defendant. The property was indeed acquired from the Municipality of Windhoek and a Secretariat set up for first defendant. The defendant claims that the right to occupy the property was for an indefinite period. The first defendant claims that it was supposed to have been a co-owner having the right to perpetual occupation. The single issue for determination is whether the first defendant established that it was in lawful possession of the property.

*Held that:* the plaintiff's predecessor gave consent to first defendant to take occupation such consent was withdrawn by giving first defendant notice to vacate the property on 20 November 2013.

*Held further that:* The first defendant's claim of an agreement between Caltex and the first defendant that for co-ownership is not compliant with section 1 of the Formalities in Respect of Contracts of Sale of Land Act, 1969 (Act 71 of 1969).

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## ORDER

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1. The court grants an order ejecting the first and second defendants from the immovable property of the plaintiff situated at Erf 7035 (a portion of Erf 7044), Windhoek (Extension 2).

2. First defendant is to pay the costs of suit to the plaintiff which costs include the costs of one instructing and one instructed counsel. Each party is to bear their own costs in respect of the costs occasioned by the request for a postponement on 24 May 2022.

3. The matter is removed from the roll and regarded as finalized.

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## JUDGMENT

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TOMMASI J:

### Introduction

[1] The plaintiff in this matter instituted action against the first and second defendants for ejectment. The first defendant entered an appearance to defend. The second defendant entered an appearance to defend but filed no plea.

[2] The plaintiff's cause of action is that of vindication as it claims to be the owner of the property. The cause of action is related to a cancelled contract of a franchise agreement entered into on 9 March 1995, and terminated on 31 October 1997. A copy of the "agreement", an internal approval of Caltex Dealer Proposition, was attached to the particulars of claim.

[3] The defendant claims that its continued occupation of the property is on the basis of a joint venture agreement attached to the particulars of claim marked annexure "D" and in fulfillment of Annexure "D", the parties resolved to set up a 'Secretariat and Service Station for the defendant on the property'.

[4] Mr Dicks, counsel for plaintiff argued that this is really a simple matter. The legal position is clear i.e that in an action for ejectment the plaintiff need only allege ownership of property and occupation thereof by first defendant and that the onus is on first defendant to prove lawful occupation.<sup>1</sup> On the surface it may seem simple,

<sup>1</sup> *Viviers v Ireland and Another* 2016 (3) NR 644 (HC).

but this matter is far from simple as can be seen from the facts below much of which is common cause between the parties.

### Ownership

[5] The plaintiff avers that it is the current registered owner of Erf 7305, (a portion of Erf 7044). The property was transferred on 27 February 1995, from Southern Realty International (Pty) Ltd to Caltex Oil Namibia (Pty) Ltd (Caltex). The name of Caltex changed to Chevron Namibia (Pty) Ltd (Chevron) on 6 April 2006. The Name of Chevron Namibia (Pty) Ltd was changed to Puma Energy Two (Pty) Ltd, the plaintiff, on 9 February 2012.

[6] In support of the claim to ownership, the plaintiff handed into evidence the title deed reflecting that the property is registered in the name of Caltex Oil (Namibia) (Proprietary) Limited (Company Number 78/000193/07). The second document handed in support of plaintiff's claim is a copy of a certificate of change of name of Company. Plaintiff's witness, Ms Samuelson, testified that they were unable to trace the original document. The certificate reflects that there has been a name change from Caltex to Chevron on 6 April 2006. The company registration number is the same as that of Caltex as it appears on the trust deed.

[7] The plaintiff handed into evidence a certified copy of another certificate of change of name. This document reflects that the company's name was changed from Chevron to Puma Energy Namibia Two (Pty) Ltd, the plaintiff, on 9 February 2012. This certificate reflects the same registration number of Caltex as it appears on the deed of transfer.

[8] The defendant, although, it disputed the veracity of the Change of Name certificate from Caltex to Chevron failed to dislodge both primary and secondary evidence adduced, that plaintiff is the lawful owner of the property. No argument in closing was presented by the defendant and correctly so as the plaintiff successfully discharged the onus upon it to prove that it is the registered owner of the property.

### Occupation

### *The franchise agreement*

[9] The plaintiff pleads that the defendant was given occupation in terms of a franchise agreement which was terminated on 31 October 1997. The actual franchise agreement was not handed into evidence by either the plaintiff or the defendant. The plaintiff handed into evidence an internal approval of Caltex Dealer Proposition. This document indicates that Caltex approved the franchise which was entered into between Erastus David, trading as NABTA Service Station and Caltex. The commencement date is 1 November 1994 and the agreement was to endure for 3 years until 31 October 1997. The approval was granted only on 9 March 1995.

[10] The approval was amended to read that the franchise agreement would commence on 1 January 1994 and expire on 31 December 1997. In terms of this amended approval document, Caltex would enter into the lease portion of the franchise agreement with T Mlunga, D Hatuikulipi and E D Groeneveldt acting in their personal capacities and in their capacities as trustees for a co-operative to be formed. The co-operative in turn will sublet the premises to Erastus David who will be pay the rental. It appears *ex facie* the document that it was approved by Caltex on 26 April 1995.

[11] On 24 July 1997, Caltex addressed a letter to Mr E David which missive was also handed into evidence. Caltex drew his attention to the fact that the franchise agreement which was entered into on 26 April 1995 would expire on 31 August 1997 and that Caltex would re-occupy the premises upon expiry. Mr David was reminded to vacate the premises on that date. The letter further confirmed that Mr David did not request to be reconsidered for a further franchise and Caltex accordingly confirmed its right contained in clause 28.3 of the agreement.

[12] A further letter dated 30 September 2013 was handed into evidence. This letter is addressed to Mr G Van Wyk, and authored by Mr Rukoro, a witness and representative of the plaintiff. The contents of this letter reveals that there was a meeting held on 29 January 2013 and that certain incidents had occurred. The plaintiff's position was that, in the absence of any agreement, formal or informal,

between the first defendant and the plaintiff and due to the occurrence of incidents between him and members of first defendant that Mr Van Wyk was to vacate the property within 14 days. This was followed up with another letter dated 20 November 2013 addressed to the first defendant giving it a final opportunity to voluntarily vacate the property and warned that if it fails to do so legal action would be instituted.

[13] The plaintiff's position in short is that no agreement exists between the plaintiff or its predecessors and the first defendant justifying the defendant's current occupation.

[14] The first defendant denied that their occupation was in terms of the contract of franchise but claims that it derived its right to occupation in terms of Annexure "D". Mr Mlunga testified that the first defendant never entered into a franchise agreement with Caltex.

[15] The document tendered into evidence to support a franchise agreement is merely an internal approval document. The franchise agreement itself was not tendered into evidence. The particulars of claim do not stipulate who acted on behalf of Caltex and who acted on behalf of first defendant. There was no causal link between the termination of the franchise agreement and the occupancy of first defendant. First defendant remained in occupation long after notice was given to Mr Erastus David in 1997. The evidence adduced does not support the plaintiff's case that the franchise agreement is the basis for first defendant's occupation.

[16] The plaintiff however, discharged the onus that first defendant is in occupation of the property. The single remaining issue for decision is whether the defendant is entitled to occupy the property in terms of Annexure "D". The onus that the first defendant has just cause for occupation rests with the first defendant.

Defendant's claim to continue to hold against the owner

*Annexure D*

[17] First defendant avers that it had entered into a joint venture agreement with Caltex on 3 February 1993 and this agreement forms the basis for NAPTA's (first defendant) continued occupation of the property. This agreement is not in dispute and is in fact attached to the plaintiff's particulars of claim. It reads as follows:

'AGREEMENT

JOINT VENTURE: NAPTA (NAMIBIA BUS AND TAXI ASSOCIATION) AND CALTES OIL NAMIBIA (PTY) LTD

We refer to discussions held at the offices of Southern Estates on the 3<sup>rd</sup> February 1993 regarding the abovementioned and wish to confirm the following:

The parties have agreed to pursue negotiations with the Municipality or any other party in acquiring land for the setting up of a Secretariat and Service Station for NAPTA provided that studies executed by Caltex is economically justified.

The parties further agree that no negotiations will take place outside this agreement and that Mr C van Niekerk of Southern Estates will act as facilitator and spokesman on behalf of the parties'.

[18] During cross examination of the plaintiff's witness it became apparent that Southern Estates on 2 March 1993 submitted a letter to the Town Clerk of the Municipality of Windhoek regarding the purchase and subdivision of erf 7044 Windhoek West. The material parts concerning the involvement of first defendant reads as follows:

'The developer has been working for some 3 years with the Namibia Bus and Taxi Association (NAPTA) to find and develop a suitable sit in Windhoek to establish a minibus-taxi terminus and secretariat which is located in a convenient location between the suburb of greater Katutura (the main origin of trips) and the CBD (the main destination of trips). The terminus is needed to serve as a transit point between taxis which serve individual addresses in greater Katutura, and the mini busses will also use the terminus as a collection point for long distance commuters, especially those north bound to Otjiwarongo, Tsumeb, Oshakati and Rundu.'

In its quests to assist NABTA, the developer has had discussion with Caltex Namibia who are (sic) prepared to become involved in the project with substantial financial support to develop the terminus in conjunction with a service station and petrol filling station. The proposal provides for ultimate ownership and management of the secretariat, terminus and garage by NABTA. [My underlining] .....

At this point it seems relevant to point out that the search for a site for the NABTA operation is in line with the national drive to improve and enhance road safety. The developer will therefore aggressively oppose any attempts by other developers to retard or hijack this important development. [my emphasis]

[19] This letter also contained proposals for the development of business and residential erven but as stated in the proposal: 'The centerpiece of the development is clearly the NAPTA terminus, secretariat and garage which will occupy a sit of some 4000m<sup>2</sup>.'

[20] The proposal recommended that the property be sold to the developer. The sale of the site erf 7044 measuring 68700 m<sup>2</sup> was approved. It is clear that the City of Windhoek considered the sale on the strength that it is suitable for the establishment of a minibus and taxi terminus and secretariat as it is located in a convenient location between the suburbs of greater Katutura and the CBD. It is common cause that the Developer, Southern Realty International (Pty) Ltd purchased the land and in turn sold a portion thereof (erf 7305 measuring 4001m<sup>2</sup>) to Caltex. The minutes of the Municipal Council Agenda was also handed into evidence and it reflects that the Council recommended inter alia that consent be granted to use Portion 2 for a service station and a minibus/taxi terminus. It is noted that this refers to Municipal consent.

[21] It was the testimony of Mr Mlunga, the only witness for the first defendant, that he, as former president of the first defendant, had a vision to acquire land to establish a secretariat for first defendant. He met with Mr Christoph Van Niekerk who was a representative of Southern Estates and who agreed to facilitate discussions with Caltex. The idea was that Caltex would build a service station for first defendant and first defendant would benefit N\$.02 for every liter of fuel sold. It was agreed that first defendant would be liable for payment of the municipal services. Caltex would build two service stations and a secretariat consisting of an office, conference hall and a kitchen. Before entering into an agreement he discussed the issue with the then mayor of Windhoek and it was resolved between the two of them that the property would be allocated to Southern Estates, Caltex and first Defendant.



[22] It was further his testimony that once the building was completed the first defendant moved into the property and he started to lobby amongst the taxi drivers to recognize the property as the headquarters for first defendant and to fuel up at the service station for benefit of Caltex and first defendant. Caltex trained the staff of first defendant on how to manage an office and how to run the service station. Caltex, according to Mr Mlunga, never paid the N\$.02 and first defendant never paid the municipal services. The premises was inaugurated by the then Prime Minister. It was, according to Mr Mlunga, the intention of all the parties that the property would belong to Caltex and first defendant jointly.

[23] Mr Mlunga boldly testified that Mr Cristoph Van Niekerk in a clandestine manner, effected transfer to Southern Estates and from Southern Estates to Caltex instead of registering the property into the names of both Caltex and first defendant as per the joint venture agreement. The first defendant never picked this up. He personally only became aware of this fact during September 2019 when the first defendant's legal representative did a deed search. He submitted that the registration of the property in the name of Southern Realty International (Pty) Ltd is unlawful. He maintained that first defendant was crooked and betrayed by Mr Christoph van Niekerk. He testified that after independence the aim was to correct past wrongs and the Municipality was to assist the first defendant to fulfil this objective.

[24] Mr Mlunga during cross examination, was unsure whether a document existed which gave the first defendant consent to occupy the property. He ventured a guess that there probably would be a document but that he is unaware of it. He maintained that annexure "D" gave the first defendant the right to remain indefinitely 'until Jesus comes' on the premises. He maintained that the first defendant did not pay any electricity or rental nor entered into a franchise agreement. He was unable to explain why the first respondent failed to bring a counter application for rectification. He testified that he believed that the title deed was held in the offices of the first defendant or with the Municipality but testified that he never asked to see a copy of the title deed.

[25] The documents handed into evidence and the testimony of Mr Mlunga indeed tell a story of how two financial giants, the predecessor of the plaintiff being one of them, obtained land in Windhoek by riding on the back of the first defendant. The proposal was driven by public road safety considerations and the interest of commuters of public transport but the real agenda was to secure private property. The sad reality is that all promises made to the defendant to become the ultimate owner of the property came to naught as it was never reduced to writing as is required in terms of section 1 of the Formalities in Respect of Contracts of Sale of Land Act, 1969 (Act 71 of 1969) which provides that:

‘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.’

[26] The defendant argues that the joint venture agreement which was entered into between the parties has not been cancelled and still remains valid and enforceable. The plaintiff submits in argument that the agreement is invalid as it is an agreement to agree. The plaintiff took no issue in replication to the first defendant’s plea in respect of this validity of this agreement and as such I would not consider this argument.

[27] The court is satisfied that the evidence proves that the first defendant agreed with Caltex to jointly negotiate with the Municipality of Windhoek or any other party for the sale of land for the construction of a service station and a secretariat for the first defendant. This agreement was intended to mutually benefit Caltex and the first defendant in that Caltex would pay the first defendant N\$.02 for every liter of fuel and that first defendant would pay the municipal services. No payment was made to the first defendant, most likely because the required quota of sales was not met and no payment was made by the first defendant for municipal services. This is only important insofar as it speaks to an agreement by Caltex to accommodate the first defendant on the property. Caltex therefore gave its consent to first defendant to occupy the premises. The first defendant claims that such consent was premised on an agreement of co-ownership. As already stated above, the first defendant was

unable to prove co-ownership. The joint venture agreement tendered as the basis for its claim does not constitute an agreement for co-ownership.

[28] The owner in the exercise of its rights may give consent to occupy but may also revoke such consent as he/she/it is entitled to the full use of the property. The first defendant may have labored under the impression that it was the co-owner but plaintiff made it abundantly clear that it required the first defendant to vacate the property in the exercise of its rights as the registered owner of the property on 20 November 2013 when it addressed a letter to this effect to first defendant. The consent previously granted was clearly revoked.

[29] There is nothing before this court which indicates that the transfer of the property in the name of Caltex is invalid and neither is the transfer in the name of Caltex challenged by the first defendant on the basis of fraud at this stage. As things stand the first defendant is not a registered co-owner of the property and has no entitlement to ownership rights such as perpetual occupancy.

[30] Mr Amoomo, counsel for the first defendant further argues that it would not only be contrary to the intentions of all parties but also contrary to the concepts of good faith, ubuntu and reasonableness for the court to evict the first defendant after more than 25 years of undisturbed use and occupation. He invites the court to invoke concepts of good faith, fairness and reasonableness in respect of cases involving evictions in light of the current constitutional dispensation.

[31] This issue cropped up in argument for the first time and was not raised in the pleadings. The breach of trust/agreement and the alleged unlawful transfer of the property to the predecessor of the plaintiff are not issues raised in this matter for determination.

[32] In light of the conclusions reached on the evidence, the court is not satisfied that the first defendant discharged the onus to prove that there is just cause for its occupancy. The plaintiff is accordingly entitled to the relief it claims i.e an order of ejectment of first defendant. The second defendant did not file a plea and the plaintiff is therefore entitled, by default, to an order for her ejectment.

Costs

[33] There is no reason why the cost should not follow the event which costs is to include the cost of one instructing and one instructed counsel. The cost occasioned by the postponement of the matter on 24 May 2022 stands on a different footing. The indulgence was granted by the court for compassionate reasons advanced by Mr Amoomo. The first defendant had very little control over this situation and should not have to bear the costs of this postponement. In this regard each party should bear its own costs.

[34] In the result the following order is made:

1. The court grants an order ejecting the first and second defendant from the immovable property of the plaintiff situated at Erf 7035 (a portion of Erf 7044), Windhoek (Extension 2).
2. First defendant is to pay the cost of suit to the plaintiff which cost is to include the cost of one instructing and one instructed counsel. Each party is to bear their own costs in respect of the costs occasioned by the request for a postponement on 24 May 2022.
3. The matter is removed from the roll and regarded as finalized.

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M Tommasi  
Judge

APPEARANCES:

PLAINTIFF:

G Dicks

Instructed by Engling, Stritter & Partners, Windhoek

DEFENDANTS:

K Amoomo

Of Kadhila Amoomo Legal Practitioners, Windhoek