

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: HC-MD-CIV-ACT-CON-2021/00798

In the matter between:

**EAGLE ROCK LODGE CC**

**PLAINTIFF**

and

**AFRICAN KIDS CLUB CC**

**FIRST DEFENDANT**

**ARIANE WENDT**

**SECOND DEFENDANT**

**Neutral citation:** *Eagle Rock Lodge CC v African Kids Club CC* (HC-MD-CIV-ACT-CON-2021/00798) [2023] NAHCMD 727 (10 November 2023)

**Coram:** MILLER AJ

**Heard:** 25 – 27 & 29 September 2023

**Delivered:** 10 November 2023

**Flynote:** Action proceedings – Contract law – Non-compliance with the Agricultural Commercial Land Reform Act, No 6 of 1995 – Agreement not concluded in terms of the Act – The Court finds the agreement void *ab initio* and unenforceable. Further, that the plaintiff has no locus standi, the Court therefore refuses the claim of eviction.

**Summary:** The plaintiff and the first defendant entered into a written agreement, whereby the first defendant would lease a portion of land, which portion of land constitutes a part of the farm Baumgartsbrunn Wes No.333. This property is utilized as a lodge. It was agreed between the parties that the first defendant will make certain improvements to the property.

The plaintiff represented itself as the owner of the property and the defendants took occupation of the property. It is common cause that the plaintiff is not the owner. The property constituted agricultural land, thus, the Agricultural Communal Land Reform Act 6 of 1995 governed the terms and conditions of the lease agreement.

During the hearing, it became clear that the agreement did not comply with the provisions of the Act and was void *ab initio*.

The plaintiff sought an order that the defendants and any person employed or residing on the property should be evicted and should vacate the property within one month. The defendants pleaded that the plaintiff has no *locus standi*, the lease agreement is illegal and that the plaintiff is not the registered owner of the property.

The plaintiff claims that it was donated the property and that it has a right of possession over the property.

*Held that*, the plaintiff was at the time of the donation a foreign national for purposes of the Act.

*Held that*, the donation to the plaintiff was subject to the condition that ministerial approval be obtained in terms of the Act. Such approval was not granted at any stage. The plaintiff seeks to overcome this condition by submitting that the donation was made during the process of the administration of the estate of the late Mr Bleks. The submission seeks to rely on s 17(3)(b) of the Act. In effect s 17(3)(b) provides that the alienation of agricultural land in the administration of an estate needs not be first offered to the state and a certificate of waiver obtained to acquire the property.

*Held further that*, the fatal flaw in the submission is that the reliance on s 17(3)(b) is misplaced. The relevant part of the Act is Part VI thereof which, specifically

regulates the acquisition of land by foreign nationals. Section 62(6)(c) of the Act provides that the provisions of part VI shall not apply to an acquisition by virtue of any succession *ab intestitio* or testamentary disposition. The plaintiff did not inherit *ab intestitio* nor was the donation itself a testamentary disposition.

*Held that*, the donation was unlawful *ab initio* and could not in law confer upon the plaintiff any right to either own or possess the property.

*Held that*, donation in itself, whether lawful or otherwise lapsed in any event due to the non-fulfilment of the contract of conditions.

*Held that*, the plaintiff failed to establish that it has *locus standi* to seek an order for the eviction of the defendant. The Court therefore, refuses such an order sought.

*Held that*, the lease agreement entered between the parties is contrary to the Agricultural Act and void *ab initio*.

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## ORDER

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1. The lease agreement between the plaintiff and the first defendant was concluded contrary to the provisions of s 58(1)(b)(i) and (ii) of the Agricultural Commercial Land Reform Act, No 6 of 1995 (as amended) in *freudem legis* illegal void *ab initio* and unenforceable.
2. The relief claimed in paragraph 3 of the amended Particulars of Claim is refused.
3. There shall be no order as to costs.
4. The matter is finalised and removed from the roll.

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## JUDGMENT

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MILLER AJ:

[1] On 18 October 2010, the plaintiff and the first defendant entered into a written agreement. The plaintiff was represented by Mr Michael Bleks, whereas the first defendant was represented by the second defendant.

[2] In terms of the agreement, the first defendant leased a portion of land approximately 17-hectare in extent, which portion of land although demarcated and fenced off constitutes a part of the farm Baumgartsbrunn Wes No. 333.

[3] I will refer to the portion of land simply as 'the property'.

[4] The property together with the buildings and structures erected upon it is utilized as a lodge.

[5] The agreement of lease provided inter alia, that the first defendant will make certain improvements to the property ostensibly to further 'the business of the lodge'.

[6] A smaller portion of the property, referred to as the 'Klippenhaus' did not form part of the agreement of lease.

[7] When the agreement was concluded, the plaintiff represented to the second defendant that it was the owner of the property.

[8] The defendants took occupation of the leased property and remain in occupation thereof.

[9] All the time the lease agreement was concluded the property constituted 'agricultural land' as defined in the Agricultural Communal Land Reform Act, Act 6 of 1995 ('the Act').

[10] It is to state the obvious that the provisions of the Act governed the terms and conditions of the Agreement of Lease.

[11] By the time the hearing of the matter commenced, it had become common cause that the agreement of lease did not comply with the relevant provisions of the Act and was for that reason *void ab initio*.

[12] A part of the prayers being sought by the plaintiff is an order declaring the agreement of lease as one that is *void ab initio*. There is no opposition to that specific prayer and I will make an appropriate order to that effect.

[13] The only prayer which requires determination in the trial is prayer 3 of the amended particulars of claim, which reads as follows:

'3. In either event, an order that the first and second defendants and all persons related to and/or employed by them and/or residing on the Property are evicted and ordered to vacate the Property within one month of this order.'

[14] The defendants' response to the part of the plaintiff's claim is contained in paragraph 10 of the defendants' plea, which reads as follows:

'10. Ad paragraph 19:

10.1 The Defendants deny that the Plaintiff is entitled (has the locus standi) to an order evicting the first and second Defendant from the property and put the Plaintiff to the proof thereof.

10.2 Without derogating from the generality of the aforesaid denial, and in amplification, the Defendants plead that:

10.2.1 Plaintiff is barred from relying on the illegal lease agreement for Defendants' eviction;

10.2.2 Plaintiff is barred from relying on the rei vindication for its eviction claim as Plaintiff is not the registered owner of the Property; and

10.2.3 Plaintiff is barred from relying on a possessory claim for its eviction

claim as Plaintiff is in illegal possession of the Property.

10.3 The Plaintiff has no locus standi to pray for an order for eviction for reasons pleaded herein before.'

[15] In the pre-trial order issued by the managing judge, it is common cause that the plaintiff is not the owner of the property. It is recorded that the owner is an entity named Baumgartsbrunn (Pty) Ltd, which entity for some reason or another, is not a party to these proceedings.

[16] Having conceded, so to speak, that the plaintiff is not the owner of the property, the plaintiff seeks to make out a case that is in bona fide possession of the property. It claims that its right to be in bona fide possession of the property stems from a donation made to it in a written document dated 23 June 2009, which I shall refer to in due course.

[17] The reliance by the plaintiff on the Deed of Donation sparked a lengthy debate as to whether or not the fact of the alleged donation should have been included as part of its pleadings and the pre-trial order. I do not deem it necessary for the purpose of the judgment to resolve that debate. I mean no disrespect to either of the parties in not resolving the issue. The issues which arise from the alleged donation must be resolved in the following manner:

17.1 Is the donation in itself enforceable in law or is it in itself an illegal transaction?

17.2 If the donation was legally enforceable at the time the donation was made, was it still in force and effect at the time the action was instituted.

17.3 If the donation in itself was unlawful for any reason, is the plaintiff nonetheless entitled to seek an order that the defendants be evicted. To put it differently, did the plaintiff establish its *locus standi* to evict the defendants.

[18] As a starting point in the enquiry, I note that the plaintiff was at the time of the donation a foreign national for purposes of the Act.

[19] The donation to the plaintiff was subject to the condition that ministerial approval be obtained in terms of the Act. Such approval was not granted at any stage. The plaintiff seeks to overcome this condition by submitting that the donation was made during the process of the administration of the estate of the late Mr Bleks. The submission seeks to rely on s 17(3)(b) of the Act. In effect s 17(3)(b) provides that the alienation of agricultural land in the administration of an estate need not be first offered to the state and a certificate of waiver obtained to acquire the property.

[20] The fatal flaw in the submission is that the reliance on s 17(3)(b) is misplaced. The relevant part of the Act is Part VI thereof which, specifically regulates the acquisition of land by foreign nationals. Section 62(6)(c) of the Act provides that the provisions of part VI shall not apply to an acquisition by virtue of any succession *ab intestitio* or testamentary disposition. The plaintiff did not inherit *ab intestitio* that nor was the donation itself a testamentary disposition.

[21] I conclude that the donation was unlawful *ab initio* and could not in law confer upon the plaintiff any right to either own or possess the property.

[22] The donation in itself, whether lawful or otherwise lapsed in any event due to the non-fulfilment of the conditions of the contract.

[23] It follows that the plaintiff did not establish that it was at any stage in lawful possession of the property. It is not in any better position than the defendant.

[24] The plaintiff thus, failed to establish that it has locus standi to seek an order for the eviction of the defendant.

[25] It was further submitted that in the circumstances this court should relax the *in par delictum* rule. That rule may be relaxed to prevent injustice or to promote public policy. I see no reason on the facts of this case to relax the rule. No basis for the relaxation of the rule was laid either in the pleadings or the pre-trial order. Furthermore, a refusal to relax the rule will not necessarily lead to an injustice or be against public policy. Any perceived injustice may be cured by following the ordinary remedies available in law to seek the eviction of unlawful occupants. Clearly such a

remedy is available to the owner of the property should it be inclined to follow that course. Public policy considerations can be met in the same way.

[26] As far as costs are concerned, neither the plaintiff nor the defendant is in my view entitled to an order in their favour. The facts of this case establish that the parties from the outset engaged in transactions which are contrary to the law. In such circumstances, I see no need to award costs.

[27] I make the following orders:

1. The lease agreement between the plaintiff and the first defendant was concluded contrary to the provisions of s 58(1)(b)(i) and (ii) of the Agricultural Commercial Land Reform Act, No 6 of 1995 (as amended) in *freudem legis* illegal void *ab initio* and unenforceable.
2. The relief claimed in paragraph 3 of the amended Particulars of Claim is refused.
3. There shall be no order as to costs.
4. The matter is finalised and removed from the roll.

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PJ MILLER  
Acting Judge



## APPEARANCES

PLAINTIFF:

E M ANGULA

Of AngulaCo Inc, Windhoek

DEFENDANTS:

B DE JAGER

Instructed by Dr Weder, Kauta & Hoveka Inc,  
Windhoek