



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

**RULING**

Case no: HC-MD-CIV-ACT-OTH-2022/03166

In the matter between:

**ALFRED HERMAN TIETZ**

**PLAINTIFF**

and

**ERWIN SIEGFRIED TIETZ**

**FIRST DEFENDANT**

**TIETZ FARMING ENTERPRISES CC (CC/95/00515)**

**SECOND DEFENDANT**

**FM OEHL TRUSTS CC (CC/97/0173)**

**THIRD DEFENDANT**

**MASTER OF THE HIGH COURT**

**FOURTH DEFENDANT**

**BRIGITTE HONSBEIN**

**FIFTH DEFENDANT**

**OTTO JOACHIM TIETZ**

**SIXTH DEFENDANT**

**OSKAR TIETZ**

**SEVENTH DEFENDANT**

**JOHANNA CONWAY TIETZ**

**EIGHTH DEFENDANT**

**Neutral citation:** *Tietz v Tietz* (HC-MD-CIV-ACT-OTH-2022/03166) [2024]  
NAHCMD 53 (14 February 2024)

**Coram:** NDAUENDAPO J

**Heard:** 01 November 2023

**Delivered:** 14 February 2024

**Flynote:** Civil Practice – Special Pleas – Lack of *locus standi* and Prescription – Raised against amended particulars of claims – Validity of donation of immovable properties challenged – Plaintiff not party to donation – Abstract system of property ownership applicable – Plaintiff lacks legal standing to challenge the validity of donation

**Summary:** The plaintiff instituted action against the defendants seeking, *inter alia*, an order that the donation of immovable properties by the late father of the plaintiff and first defendant, donated to the second defendant, (a close corporation) be declared *null* and *void*, alternatively, lapsed and of no force and effect. The plaintiff avers that the donation is *null* and *void* because he, as one of the sons, of the donor was entitled to inherit one of the of the farms. Ownership of the properties was subsequently transferred to the second defendant by registration in the Deeds Office on 21 August 1995. The plaintiff was not party to the donation nor was he the executor in the estate of his deceased father.

*Held that;* Namibia applies the abstract system of property ownership. The real agreement to pass ownership is treated in *abstracto*, that is, totally independently from the contractual agreement which provides the *causa* for the transfer.

*Held:* further that plaintiff was not party to the donation nor the executor and therefore has no *locus standi* to bring the action to declare the donation *null* and *void*.

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### ORDER

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1. The special plea of *locus standi* is upheld.
2. The plaintiff does not have *locus standi* in respect of prayers 1; 3 and 4 and of the amended particulars of claim.
3. The Plaintiff is ordered to pay the costs of the defendants, such costs to include the costs of one instructing and one instructed counsel and such costs to be capped in terms of r 32(11).

4. The matter is postponed to 27 March 2024 at 15h30 for status hearing.

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## RULING

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NDAUENDAPO J:

### Introduction

[1] Before me are two special pleas, lack of *locus standi* and prescription, which have been raised by the first and second defendants against the plaintiff's amended particulars of claim.

[2] The pleas are couched in the following terms:

(a) Lack of *locus standi*:

'5. The plaintiff claim is based upon an alleged (and disputed) invalid donation of immovable property that was donated on 20 April 1995 and subsequently registered in the Deeds Office on 21 August 1995.

6. In the event of it being held that the donation was indeed invalid (which is still denied), then, as a matter of law and in terms of the abstract theory transfer applicable in this jurisdiction, the only right of recourse that would have arisen as a result for the donor, as transferor of the Immovable Property, is a personal right of delivery that accrued only to the donor vis-a vis the second defendant.

7. In the premises, only the donor has *locus standi* in *iudicio* in respect of any cause of action arising from the alleged (and disputed) invalid donation of the Immovable Property (which cause of action, if any, has, in any event, already become prescribed).

8. The plaintiff was not the donor, nor was he a part to the donation of the Immovable Property. The plaintiff accordingly does not have any right of recourse in respect of the donation of the Immovable Property and the alleged (and disputed) invalidity thereof.

9. In the premises the plaintiff lacks locus standi in *iudicio* in respect of any relief relating to the donation of the Immovable Property. Wherefore the first and second defendant pray that the plaintiff's claim in relation to the donation of the Immovable Property (as set out in prayer 1 of the amended particulars of claim, and thereof) be dismissed with costs, such costs to include the costs occasioned by the appointment of one instructing and one instructed counsel.

(b) Prescription

10. Without derogating from the first pleas raised above and in the event of it being held that the plaintiff does have locus standi in respect of the issue of the donation of the Immovable Property, the defendants raise this second special plea as set out hereinafter.

11. The plaintiff's claim is based upon an alleged (and disputed) invalid donation of immovable property that was donated on 20 April 1995 and subsequently registered in the Deeds Office on 21 August 1995.

12. In the event of it being held that the donation was indeed invalid (which is still denied), then, as a matter of law and in terms of the abstract theory of transfer applicable in this jurisdiction, any resultant right of recourse for delivery that may have arisen as a result constitute the cause of action.

13. That cause of action, constituting a debt as defined within the Prescription Act, 68 of 1969, ("the Act"), arose on 20 April 1995, alternatively on 21 August 1995.

14. In terms of section 11 (read with section 12) of the Prescription Act, 68 of 1969, debts such as those claimed by the plaintiff prescribe after a period of three (3) years after having arose.

15. Summons herein was served on the defendants on 16 August 2022, which is twenty-six years (i.e. more than 3 years) from the date on which the cause of action herein arose.

16. In the premises it follows that the claim in respect of the donation of the Immovable Property herein has become prescribed in terms of section 11 (read with section 12) of the Prescription Act 68 of 1969.

Wherefore the first and second defendants pray that the plaintiff's claim in relation to the donation of the Immovable Property (as set out in prayer 1 of the amended particulars of claim, and which, by necessary implication, would impact prayers 3 and 4 thereof) be dismissed with costs, such costs to include the costs occasioned by the appointment of one instructing and one instructing counsel.'

#### Plaintiff's evidence

[3] Mr Alfred Hermann Tietz, testified that he is the fifth child of Otto Friedrich Tietz and Hanni Brigitte Tietz, who were married to each other in community of property, until Hanni Brigitte passed away on 1 December 2008.

[4] He testified that, when Hanni Brigitte passed away on 1 December 2008, the family learned that Otto Friedrich and Hanni Brigitte Tietz had made a joint will, in terms of which, the surviving spouse would inherit the other's share in the joint estate.

[5] The joint will, in the relevant parts, further provided that in the event of the last surviving's passing, the estate in respect of the farms would devolve as follows per clause 6 of the joint will, to wit: 'Farm Hiebis, No 339 District Tsumeb and portion 2 of Dinaib No 852 District Tsumeb, to our son Erwin Siegfried Tietz; Plot Mannheim 100 Portion 3 and 5 to our son Alfred Hermann Tietz; Reminders of Farm Dinaib 852, District Tsumeb, to Otto Joachim Tietz, Farm Dinaib Portion 5 to Oskar Friedrich Tietz'.

[6] He testified that, from the Liquidation and Distribution account lodged with the Master of the High Court in respect of the late Hanni Brigitte's estate, it is clear that Otto Friedrich accepted and inherited in terms of the joint will. There is no note contained in the L&D, which explains what happened to the other farms mentioned in the joint will. At the time, Mr Alfred Tietz did not see the L&D and there were no discussions in the family, because it was clear that their father would inherit everything.

[7] He testified that his father, Otto Friedrich Tietz passed away on 3 October 2019 and the Master of the High Court accepted a will that he purportedly made on 22 October 2009. This second will does not make mention of the aforementioned farms.

[8] He testified further that he became aware of the second defendant on or about 17 October 2019, when Erwin read their father's will. He asked him what happened to farms Mannheim, Portion 3 and Dinaib No 582, portions 2 and 5. Erwin replied that the farms were donated to him, but he did not believe Erwin and he decided to enquire with the Master of the High Court.

[9] He testified that given the fact that the second will does not mention the farms Dinaib No 852 portions 2 and 5 and plot Mannheim No 100, portion 3, he addressed a letter to the Master of the High Court dated 9 December 2019, in which, at paragraph 7 thereof, he points out the following:

'Point 3A a) of the testament states that Farm Hiebis No 339 is bequeathed to Erwin Siegfried Tietz, however I wish to know what becomes of Farm Dinaib No 582 portions 2 and 5 as well as Plot Mannheim No 100 portion 3 as these were not mentioned in the testament. I know that in my parent's joint testament I, Alfred Hermann Tietz should inherit Plot Mannheim 100 portion 3 (as I played a major part together with my parents to build up plot Mannheim No 100 portion 3 and I also invested a substantial amount of money into the said Plot) and my brother Oskar Friedrich Tietz a biological son of my parents (not mentioned in my father's will) should inherit farm Dinaib No 852 portion 5 and my brother Joachim Otto Tietz should inherit farm Dinaib No 852 portion 2. I wish to have more clarity on this matter.'

He delivered this letter dated 9 December 2019, (attached marked “AT 4”) in person to the Master on 12 December 2019.

[10] He testified that the Master did not respond to his letter, in fact she did not even acknowledge receipt thereof. He addressed another letter, but did not receive a response from the Master.

[11] He testified that on or about 20 October 2021, when his sister Brigitte Honsbein. contemplated taking legal action against the first defendant for evicting her from Portion 3 of farm Mannheim No 100, it confirmed that the farms were “donated” to the second defendant in 1995. Specifically, he learned about this from the deeds search conducted by his legal practitioner, which resulted in the Power of Attorney to Give Transfer, which is marked “B” to the Plaintiff’s amended particulars of claim.

[12] He testified that the “donations” were never discussed with him at the time that they were supposedly being made, and his father never mentioned anything about it, to the day he passed. When his legal practitioner confirmed the “donation”, he further learned that it did not comply with the legal requirements and consequently lapsed as a result.

[13] He testified that the donation had lapsed as it did not comply with the legal requirements and because of the lapse; the farms in question reverted to the joint estate of his parents, Hanni Brigitte and Otto Friedrich, and in accordance with the joint will, it would have passed to himself and his brothers; Oskar, Joachim Otto, respectively.

[14] The defendants closed their case without leading evidence.

Submissions on behalf of the plaintiff

*Locus standi*

[15] Ms Katjipuka-Sibolile, counsel for the plaintiff, submitted that for purposes of determining the question of *locus standi*, the court has to accept what is pleaded by the plaintiff because *locus standi* must be established on the pleadings. She directed this court to the case of *Antonio v Joseph*<sup>1</sup>, which states:

'The starting point is that a party that institutes a suit bears the onus to establish locus standi and that the standing must be apparent from the pleadings.'

[16] She contended that, what the court has to look at is the entirety of what has been pleaded by the plaintiff to make this assessment. She submitted that the following in this regard is important: "a declaration of invalidity of the 2009 will and a declaration of invalidity of the donation will have the effect of reverting the farms in question back to the joint estate and in terms of the joint will, one of the farms will devolve to the plaintiff." Ms Katjipuka-Sibolile stated that this constitutes direct and substantial interest in the subject matter, which is not too remote, hypothetical or abstract. The case of *Mungendje v Kavari*<sup>2</sup> was cited and it was held that:

'Under common law, the question of standing (in the sense of an actionable interest) has always been regarded as an incidence of procedural law. The assessment of the concept as an aspect of procedural (rather than substantive) law allows the court a greater measure of flexibility in determining whether, given the facts of the particular matter, the substance of the right or interest involved, and the relief being sought, locus standi has been established ...

... Whether a litigant's interest on the subject matter of the litigation justifies engagement of the court's judicial powers must be assessed with regard to the peculiar facts and circumstances of each case. What will generally not suffice is ... an interest, which is abstract, academic, hypothetical or simply too remote. Considerations such as that the interest is "current", "actual" and "adequate" are vital in assessing whether a litigant has standing in the circumstances of a case.'

[17] Ms Katjipuka-Sibolile submitted that similar observations were made in *Antonio v Joseph*, "the expression interested person judicially means someone

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<sup>1</sup> *Antonio v Joseph* (HC-MD-CIV-ACT-DEL-2018/04279) (2019) NAHCMD 378 (30 August 2019) at para 14.

<sup>2</sup> *Mungendje v Kavari* (HC-MD-CIV-MOT-GEN-2017/00399 (2018) NAHCMD 153 (22 November 2017) at para 12.



who has a direct and substantial interest in the subject matter and the outcome of the litigation. The interest must be a real interest, not merely an abstract or academic interest. A mere financial or commercial interest will not suffice”.<sup>3</sup>

[18] She submitted further that, the defendants insist on separating the incidents underlying the plaintiff's claim into two separate claims, it is not for the defendants to dictate how the plaintiff is to present his claim. The case brought by the plaintiff raises two incidents which are inextricably linked in the plaintiff's claim. They are cumulative in effect and create a domino effect, in a sense. This means that the court has to accept the cumulative effect and consequences, as pleaded by the plaintiff when it determines whether the plaintiff has demonstrated a direct and substantial interest in the subject matter.

[19] She submitted that to argue as the defendants do, that only the donor could have challenged the donation back in 1995, is inaccurate. Yes, the donor could have challenged the donation, but that does not mean that the plaintiff on the present facts and circumstances underlying this claim, is excluded from challenging the donation (in conjunction with the challenge of the 2009 will) or that in doing so, he lacks a direct and substantial interest in the subject matter of the litigation. Whether or not he will succeed with this claim, is a matter of evidence on the substantive merits of the case, which is currently not before the court.

#### Submissions on behalf of the defendants

[20] Ms Van der Westhuizen, counsel for the defendants, submitted that the plaintiff's claim herein involves two aspects. The first aspect of the plaintiff's claim herein, is an attack on the validity of a donation of immovable properties made by the plaintiff's late father to the second defendant (a close corporation) during 1995 (prior to the death of both of the plaintiff's parents). The second aspect relates to the validity of a will executed by the plaintiff's late father in 2009.

[21] She submitted that these two issues are distinct and independent from each other. The one aspect does not inform or determine the other and *vice versa*. In fact,

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<sup>3</sup> *Antonio v Joseph* (HC-MD-CIV-ACT-DEL-2018/04279) (2019) NAHCMD 378 (30 August 2019).

the first and second defendants, in their plea on the merits, record that, on this aspect (i.e. the validity of the will) they abide the ultimate decision of this honourable court on the merits. The validity, or otherwise of this will, is not up for determination at this stage and the special pleas do not include this aspect of the validity of the will.

[22] She submitted that the first special plea is that, the plaintiff lacks *locus standi* to seek recourse in respect of the donation of the immovable properties herein (irrespective of the validity or otherwise of such donations). The second special plea is one of prescription. Both these special pleas are raised only in respect of the donation of the relevant immovable properties. Thus, the special pleas only involves prayers 1, 3 and 4 of the amended particulars of claim (with, of course, resultant costs).

[23] She submitted that the validity of the donation is not an issue for determination in the special pleas. This issue will only arise should both special pleas be dismissed.

[24] She further submitted that, in the event of the first special plea of lack of *locus standi* succeeding, the second special plea of prescription requires no further determination.

[25] She submitted that the immovable property relevant to this matter is the following (which properties are hereinafter jointly referred to as “the Properties”):

- i) Portion 2 of the Farm Dinaib No 852;
- ii) Portion 5 of the Farm Dinaib No 852;
- iii) Portion 3 of Farm Mannheim No 100; and
- iv) Portion 15 of Farm Mannheim No 100.

She submitted that it is common cause that the properties were initially owned by the plaintiff’s late parents.

[26] She submitted that on 20 April 1995, the plaintiff’s late father donated the

properties to the second defendant. Ownership of the Properties was subsequently transferred to the second defendant by registration in the Deeds Office on 21 August 1995. The plaintiff was neither the donor, nor a party to the donation in question. The late Hanni Brigitte Tietz (the plaintiff and first defendant's mother) passed away on 1 December 2008, 13 years after the donation of the farms to the second defendant.

[27] She submitted that at the time that the late Hanni Brigitte Tietz passed away, the properties no longer formed part of the joint estate of the said deceased and her husband (the plaintiff and first defendant's parents) and were not included in and administered as part of the estate of the late Hanni Brigitte Tietz. The estate of the late Hanni Brigitte Tietz was finalised and finally administered and a final L&D account in respect thereof was duly published.

[28] The plaintiff does not challenge the final administration of the estate of the late Hanni Brigitte Tietz. The benefits of the joint will of the plaintiff's parents that were accepted by the late Otto Friedrich Tietz (plaintiff and first defendant's father) did not include the properties. The late Otto Friedrich Tietz (plaintiff and first defendant's father) passed away on 3 October 2019. The plaintiff is not the executor of the estate of his late father. Summons herein was served on the defendants on 16 August 2022, twenty-six years after the date on which the donation and its subsequent registration in the Deeds Office took place.

[29] The plaintiff approaches this honourable court in this action in his capacity as heir in the estate of his late father.

#### *Locus Standi*

[30] She submitted that the plaintiff's claim relating to the donation of the properties is based upon an alleged (and disputed) invalid donation of immovable property executed by the then owner of the properties and dating back to 20 April 1995. This donation was perfected by registration in the Deeds Office on 21 August 1995.

[31] She submitted that Namibia has an abstract theory of transfer. The abstract theory does not make transfer of a real right (i.e. the actual transfer of the properties

in casu to a bona fide third party some 28 years ago) dependent upon the validity of an underlying contract.

“Under an abstract system of passing of ownership the mere intention of the parties to pass ownership is sufficient without reference to the underlying causa for the transfer. This principle originated in Roman law and was developed further by natural lawyers of the seventeenth century and pandectists and accepted in **Oshakati Tower (Pty) Ltd v Executive Properties CC and Others 2009 (1) NR 232 HC**

“Modern law- The abstract principle guarantees certainty in that it disallows the invalidity of an underlying causa to affect the existence or validity of a transfer. The real agreement to pass ownership is treated in abstracto, that is, totally independently from the contractual agreement which provides the causa for the transfer. Although the abstract system simplifies matters for the transferee it does not leave the transferor who has transferred an object by virtue of an invalid causa without a remedy. Since ownership passes to the transferee, the transferor is deprived of his rei vindicatio. However, he may still claim by way of *condictio* on the ground of unjust enrichment.”<sup>4</sup>

[32] She submitted that, assuming the plaintiff is able to prove that the donation of 28 years ago was invalid, (which is of course denied by the first and second defendants), then, as a matter of law and in terms of the abstract theory of transfer applicable in this jurisdiction, the only right of recourse that would have arisen as a result of an invalid donation and subsequent transfer of property is a personal right of recourse that accrued for the donor, as transferor of the immovable property. Put plainly, only the plaintiff's late father would have had a right of recourse in the event that the donation was invalid. That right of recourse (if any) arose in 1995 already and would long since have become prescribed.

[33] Only the donor has *locus standi in iudicio*, in respect of any cause of action arising from the alleged (and disputed) invalid donation of the Immovable Property (which cause of action, if any, has, in any event, already become prescribed).

[34] She submitted that the plaintiff was not the donor. The plaintiff was not a party to the transaction at all. In fact, during 1995 the plaintiff was not even an heir in any

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<sup>4</sup> Joubert, *The Law of South Africa*, 2nd edition, vol 27 at 110 paragraph 203.

estate (which is, by the plaintiff's own version under cross-examination, the capacity in which he approaches court herein).

[35] She argued that a future heir, who comes into the picture some 24 years later (in 2019, 24 years after the donation in question) simply has no recourse to start litigating over properties that the deceased alienated decades earlier.

[36] She submitted that, it is for the executor to decide whether the estate had any claim against a third party and if so, the advisability of instituting action to recover. It is not open to the beneficiary to *vindicate* the assets of the estate since it is only the executor who can legitimately do so.

[37] She submitted that it has been held by the Supreme Court, in the matter of *Brink NO and Another v Erongo All Sure Insurance CC and Others*<sup>5</sup> that "where a sole legatee acts with the consent of the executor to vindicate a specific asset of the estate because his/her right in the asset in question is infringed or threatened, the rule may be relaxed to allow the heir or legatee to institute proceedings jointly with the executor." Such a situation, however, does not arise in casu. Instead, in this matter, the plaintiff acts entirely on a frolic of his own to *vindicate* properties left right and center, so to speak, even on behalf of other heirs. This, she submitted, is with respect, entirely impermissible and intolerable in law.

[38] She argued that the plaintiff accordingly, does not have any right of recourse in respect of the donation of the immovable property and the alleged (and disputed) invalidity thereof and has no legal standing in this matter.

[39] She submitted that the onus of proving *locus standi* falls squarely on the plaintiff. She argued that on this basis alone the plaintiff's claim, as set out in prayers 1, 3 and 4 of the amended particulars of claim ought, with respect, to be dismissed and this, would be dispositive of the matter of the donation of the properties entirely.

## Discussion

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<sup>5</sup> *Brink NO and Another v Erongo All Sure Insurance CC and Others* 2018 (3) NR 641 (SC).

[40] Does the plaintiff have *locus standi* to challenge the donation of the immovable properties, donated by his late father to the second defendant? It is common cause that, the abstract system of property ownership applies in Namibia.

[41] In *Oshakati tower (Pty) Ltd v Executive properties CC and Others*<sup>6</sup> the court held that “in terms of the abstract system of ownership of land applicable in Namibia, two separate agreements were recognized ,namely, the underlying agreement and the real agreement: a defect in the first agreement did not prevent valid transfer; in respect of the real agreement it was a requirement that it should not only be voidable, but it should be *void ab initio* because of a mistake or fraudulent misrepresentation.” The court further held that, “for transfer, the owner must have the intention to pass ownership: if there was no such clear intention to transfer ownership, ownership did not pass”.

[42] The learned author Joubert<sup>7</sup> opines that: “The abstract principle guarantees certainty in that it disallows the invalidity of an underlying causa to affect the existence or validity of a transfer. The real agreement to pass ownership is treated in *abstracto*, that is, totally independently from the contractual agreement which provides the *causa* for the transfer. Although the abstract system simplifies matters for the transferee it does not leave the transferor who has transferred an object by virtue of an invalid *causa* without a remedy. Since ownership passes to the transferee, the transferor is deprived of his *rei vindicatio*. However, he may still claim by way of *condictio* on the ground of unjust enrichment.”[Emphasis added]

[43] From the above authorities, it appears that even if the *causa* for the transfer was invalid, that will not affect the validity of the transfer. The properties were donated by the plaintiff’s late father to the second defendant and transferred in the name of the second defendant. The plaintiff in this matter was not party to the donation. Put differently, he was neither the transferor nor the transferee. Where ownership had passed under an invalid *causa* the transferor may have a claim for

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<sup>6</sup> *Oshakati tower (Pty) Ltd v Executive Properties CC and Others* (2009) (1)NR 232.

<sup>7</sup> Joubert (The Law of South Africa, 2<sup>nd</sup> edition, vol 27 at 110 paragraph 203).

unjustified enrichment. In this particular case what claim does the plaintiff have, if he was not party to the donation nor the executor? Only the transferor has *locus standi* to bring an action for unjustified enrichment if the transfer was for an invalid *causa*.

[44] In light of the conclusion reached, it is not necessary to consider the special plea of prescription.

Order

1. The special plea of *locus standi* is upheld.
2. The plaintiff does not have *locus standi* in respect of prayers 1; 3 and 4 of the amended particulars of claim.
3. The Plaintiff is ordered to pay the costs of the defendants, such costs to include the costs of one instructing and one instructed counsel and such costs to be capped in terms of r 32(11).
4. The matter is postponed to 27 March 2024 at 15h30 for status hearing.

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N NDAUENDAPO

Judge

APPEARANCES:

PLAINTIFF:

MS KATJIPUKA-SIBOLILE  
INSTRUCTED BY NIXON  
MARCUS PUBLIC,  
WINDHOEK

1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS:

MS VAN DER WESTHUIZEN  
INSTRUCTED BY ETZOLD-  
DUVENHAGE, WINDHOEK