

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**RULING ON SPECIAL PLEA OF PRESCRIPTION**

Case no: HC-NLD-CIV-ACT-CON-2021/00032

In the matter between:

**JASON NAHUM**

**1<sup>ST</sup> PLAINTIFF**

**KATRINA IIMENE**

**2<sup>ND</sup> PLAINTIFF**

**and**

**PENDUKENI AMBOLE**

**1<sup>ST</sup> DEFENDANT**

**COUNCIL FOR THE TOWN COUNCIL OF OSHAKATI**

**2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF DEEDS**

**3<sup>RD</sup> DEFENDANT**

**Neutral Citation:** *Nahum v Ambole* (HC-NLD-CIV-ACT-CON-2021/00032) [2022]  
NAHCNLD 37 (05 April 2022).

**Coram:** MUNSU, AJ

**Heard on:** 21 February 2022

**Delivered:** 05 April 2022

**Flynote:** Practice – Special plea - Evidence to be led to establish facts – Special plea not a bearer of facts – Insufficient for a party to plea legal basis without supporting facts.

**Summary:** In this matter the plaintiffs sue the defendants for the return of immovable property which is alleged to have been fraudulently transferred into the 1<sup>st</sup> defendant's name. The 1<sup>st</sup> defendant maintained that the property was donated to him by the plaintiffs. He also alleged that he entered into a sale agreement with the plaintiffs to purchase the property. The plaintiffs contend that at all material times relevant and at the time of signing the documents, they had no intention to donate, sell, alienate, dispose or transfer the property to the 1<sup>st</sup> defendant or any third party. It is alleged that there was no consensus to sign the donation documents and that the transfer documents were obtained through fraudulent misrepresentations made by the 1<sup>st</sup> defendant to the plaintiffs. The court is seized with special pleas raised by both the 1<sup>st</sup> defendant to the plaintiffs' particulars of claim and likewise by the plaintiffs to the 1<sup>st</sup> defendant's counter claim. The 1<sup>st</sup> defendant subsequently abandoned his special plea on account of authority released after the hearing date. It appears that the plaintiffs' special plea hinges on the fact that at the time of the alleged donation, the plaintiffs had no title to the property competent to pass ownership as ownership of the property was at all material times vested in the 2<sup>nd</sup> defendant. The court found as follows:

*Held:* The plaintiffs rely on certain facts as forming the basis of the special plea raised, facts of which are not common cause. The plaintiffs elected not to lead evidence in support thereof.

*Held that:* with reliance on the matter of *Swanu of Namibia v Katjivirue* (HC-MD-CIV-ACT-OTH-2021/03315) [2022] NAHCMD 98 (09 March 2022) a special plea was not designed to be a bearer of facts but rather to convey the nature and ambit of the special plea.

*Held further that:* it is not sufficient for a party to allege a legal basis for the relief claimed, a party must accordingly prove the primary facts for such application of the law.

In the result, the court found that in the absence of evidence the court is unable to make a determination of the special plea. The special plea was in turn dismissed.

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### ORDER

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1. The special plea of prescription raised by the 1<sup>st</sup> defendant is dismissed.
2. The special plea raised by the plaintiffs is dismissed.
3. Each party is to bear its own costs in respect of the special pleas raised.
4. The matter is postponed to 09 May 2022 at 10h00 for a case management conference.
5. The parties are directed to file a joint case management report on or before 04 May 2022.

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### RULING

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MUNSU, AJ:

#### Introduction

[1] The sole issue for determination in this ruling relates to the special pleas raised by both the 1<sup>st</sup> defendant and the plaintiffs. The plaintiffs issued summons against the defendants claiming the return of immovable property, namely Erf 129, Oshakati West, Oshakati, hereinafter called the property. The property was alleged to have been fraudulently transferred into the 1<sup>st</sup> defendant's name.

### The parties

[2] The 1<sup>st</sup> plaintiff is Mr. Jason Nahum, an adult male pensioner residing at the property.

[3] The 2<sup>nd</sup> plaintiff is Ms. Katrina limene, an adult female pensioner, residing at the property, and is the spouse to the 1<sup>st</sup> plaintiff.

[4] The 1<sup>st</sup> defendant is Pendukeni Ambole, an adult male, residing at Erf No 1256, Tigris Street, Wanaheda, Windhoek.

[5] The 2<sup>nd</sup> defendant is the Council for the Town Council of Oshakati, a local authority constituted in terms of section 6 of the Local Authorities Act, 23 of 1992, with its main principal place of business at 906 Sam Nujoma Road, Oshakati. It is cited due to the interest it may have in the matter.

[6] The 3<sup>rd</sup> defendant is the Registrar of Deeds, presently Mr. Dana Beukes, duly appointed as such in terms of section 2 of the Deeds Registries Act, 47 of 1937, with his principal place of business at No. 55, Dr. Robert Mugabe Avenue, Windhoek. He is cited in his official capacity as the person responsible for the registration and cancellation of Deeds.

[7] Where reference is made to both the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff, they shall be referred to as 'the plaintiffs'.

[8] Only the 1<sup>st</sup> defendant entered appearance to defend the action.

[9] The plaintiffs are represented by Mr. Matheus while the 1<sup>st</sup> defendant is represented by Mr. P. Greyling.

## Background

[10] According to the particulars of claim, the plaintiffs have been residing at the property as their primary home since March 1990. By way of donation from the 2<sup>nd</sup> defendant, the plaintiffs became lawful owners of the property in November 2007.

[11] It is alleged that the property had an outstanding water bill in the amount of N\$ 18 577, 54 due and payable to the 2<sup>nd</sup> defendant. It is further alleged that towards the end of 2006, the plaintiffs requested the 1<sup>st</sup> defendant, a family member, to assist in settling the water bill, and would be reimbursed therefor on a future date. It appears to be common cause that the 1<sup>st</sup> defendant accordingly settled the bill.

[12] The plaintiffs further allege that on 11 January 2007, and at the office of Greyling & Associates Legal Practitioners at Oshakati, the 1<sup>st</sup> defendant presented documents written in English to the plaintiffs and made oral representations to the plaintiffs to the effect that they were required to append their signatures on the documents for the acknowledgement and make an undertaking to repay the debt in respect of the water bill settled by the 1<sup>st</sup> defendant.

[13] It is alleged that the plaintiffs are illiterate and relied on the representation made to them by the 1<sup>st</sup> defendant. They signed the documents.

[14] It is further alleged that around 15 October 2019, the plaintiffs discovered that the documents they signed were donation and transfer documents and that the 1<sup>st</sup> defendant had through Deed of transfer Number T 6903/2007 caused the property to be transferred into his name on 30 November 2007. It is alleged that at all material times relevant and at the time of signing the documents, the plaintiffs had no intention to donate, sell, alienate, dispose or transfer the property to the 1<sup>st</sup> defendant or any third party. Furthermore, it is alleged that there was no consensus to sign the donation documents and that the transfer documents were obtained through fraudulent misrepresentations made by the 1<sup>st</sup> defendant to the plaintiffs.

[15] In the premises, the plaintiffs allege that they are prejudiced and thus elected to cancel the Deed of Transfer Number T 6903/2007 and have the ownership of the property returned to them. They are seeking two types of relief, firstly, an interdict prohibiting the 1<sup>st</sup> and 3<sup>rd</sup> defendants from acting/dealing with the Deed of transfer Number. T 69032007 until such time as the court has finalised the matter and secondly, an order directing the 3<sup>rd</sup> defendant to re-transfer and rectify the Deeds registry to reflect the plaintiffs as the owners of the property.

#### Special plea by 1<sup>st</sup> defendant

[16] The 1<sup>st</sup> defendant raised a special plea of prescription in respect of which he contended that the plaintiffs' claim constitutes a 'debt' as envisaged by the Prescription Act 68 of 1969 (the Prescription Act) and that the claim has become prescribed as it was not instituted within 3 years.

[17] The plaintiffs on the other hand maintained that their claim does not constitute a 'debt' in terms of the Prescription Act. However, in the event that the court is to find that their claim is a debt, they contend that same would not prescribe after 3 years.

[18] The parties presented oral arguments to court on 21 February 2022. On 24 February 2022, Sibeya J delivered reasons for judgment in *Empire Fishing Company (Pty) Ltd v Dumeni*<sup>1</sup> a decision of this court that has a direct bearing on the special plea of prescription raised by the 1<sup>st</sup> defendant.

[19] I accordingly afforded the parties an opportunity to file additional head of arguments in view of the above recent judgment.

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<sup>1</sup> *Empire Fishing Company (Pty) Ltd v Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022).

[20] In his supplementary heads of argument, the 1<sup>st</sup> defendant indicates that he no longer pursues his special plea of prescription. The only issue to be determined relates to costs.

#### Plaintiffs' special plea

[21] In addition to the special plea of prescription, the 1<sup>st</sup> defendant proceeded to plead over on the merits, filed a counterclaim and a conditional counterclaim. In the counterclaim, the 1<sup>st</sup> defendant claims that the plaintiffs donated the property to him. In his conditional counterclaim, the 1<sup>st</sup> defendant avers that he entered into a sale agreement with the plaintiffs to purchase the property.

[22] In their plea to the 1<sup>st</sup> defendant's counterclaim, the plaintiffs raised a special plea in which they claim that at the time of donating the property to the 1<sup>st</sup> defendant, the plaintiffs had no title to the property competent to pass ownership as ownership of the property was at all material times prior to 30 November 2007 vested in the 2<sup>nd</sup> defendant. Further, the plaintiffs aver that the deed of donation entered into by the plaintiffs and the 1<sup>st</sup> defendant is null and void for non-compliance with the legal requirements provided in section 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969.

[23] In response, the 1<sup>st</sup> defendant contended that the plaintiffs' special plea does not constitute a special plea. He argued that same should have been raised by way of an exception.

[24] According to the 1<sup>st</sup> defendant, a donation or deed of donation does not fall within the ambit of the Formalities in respect of Contracts of Sale of Land Act. He contends that a deed of donation must however comply with section 5 the General Law Amendment Act<sup>2</sup> which provides that a donation shall not be invalid merely by reason of the fact that it is not registered or notarially executed: provided however, that the terms

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<sup>2</sup> General Law Amendment Act 50 of 1956 (commencement date: 22 June 1956) as amended by section 43 of the General Law Amendment Act of 70 of 1968 (commencement date 21 June 1968).

thereof are embodied in a written document signed by the donor or a person acting on his written authority in the presence of two witnesses.

[25] The 1<sup>st</sup> defendant emphasized that the transfer of the property was effected by way of a 'double transaction'. This entails that in one application, the property was transferred with a deed of donation from the 2<sup>nd</sup> defendant to the plaintiffs and then from the plaintiffs to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant contended that what happened in this matter is consistent with the practice adopted by the Deeds Office as well as legal practitioners. It was further submitted that the practice is also consistent with the common law.

[26] Moreover, the 1<sup>st</sup> defendant stressed that clause 2 of the deed of donation between the 2<sup>nd</sup> defendant and the 1<sup>st</sup> plaintiff<sup>3</sup> stipulates that all rights in the property were transferred on the date of donation. It is contended that on 18 October 2007, the plaintiffs accepted the donation by signing a power of attorney to have the property transferred into their name. Furthermore, on 19 October 2007 the plaintiffs transferred the property into 1<sup>st</sup> defendant's name.

### Determination

[27] The plaintiffs rely on certain facts as forming the basis of the special plea raised. However, such facts are not common cause. The plaintiffs elected not to lead evidence in support of the special plea.

[28] It is apposite to quote two instructive passages from the decision of *Swanu of Namibia v Katjivirue*.<sup>4</sup> The court expressed itself as follows:

'[25] It would appear to me that special pleas can be divided into two categories. There are those that are capable of being decided on the pleadings as they stand, without a need to

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<sup>3</sup> At that stage, only the 1<sup>st</sup> plaintiff was involved.

<sup>4</sup> *Swanu of Namibia v Katjivirue* (HC-MD-CIV-ACT-OTH-2021/03315) [2022] NAHCMD 98 (09 March 2022).



adduce evidence in support. On the other hand, there are those that require the adduction of evidence. In this regard, a defendant must carefully consider the special pleas intended to be raised and make an election as to whether evidence is necessary or not. Where evidence is necessary but is not led, that might be the end of the road regarding that special plea. Each case must, having said this, turn on its own peculiar facts.'

[29] Earlier on, the court had expressed itself in the following manner:

'[23] My reading of the special pleas raised, suggests that there are facts placed before court on the basis of which the determination can be made. These facts have been incorporated in the special plea. A special plea was not designed to be the bearer of facts. Its purpose is to convey the nature and ambit of the special plea and no more.'

[30] The learned judge highlighted that in trial proceedings, the most usual way to elicit or establish facts is by adducing oral evidence. This is where witnesses are called and they state on oath or affirmation the facts that are relevant to the issues for determination. The learned judge went on to say the following:

'Another manner for establishing facts, which is, however, very convenient, is where the facts giving rise to the *lis*, are largely common cause. In that event, the parties invoke the provisions of rule 63 in which case the parties make a written statement of agreed facts. The issues for determination are placed in the form of a special case for adjudication by the managing judge.'

[31] It is not sufficient for a party to only allege the legal basis for the relief claimed (or opposed) but it must also prove the primary facts for such application of the law. The onus of establishing a special plea rests on the defendant.<sup>5</sup> In the absence of evidence, the court is not in a position to make a proper determination of the special plea on the papers. The special plea has to be dismissed as I hereby do.

### Costs

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<sup>5</sup> *Mahamo v Lesotho National General Insurance Company* (C of A (CIV) 51/2017) [2021] LSCA 27 (14 May 2021).

[32] Both parties were unsuccessful in respect of the special pleas raised. In the exercise of my discretion, I find that it will meet the interests of justice for each party to pay its own costs regarding the preparation and hearing of the special pleas raised.

[33] In the result, it is ordered as follows:

1. The special plea of prescription raised by the 1<sup>st</sup> defendant is dismissed.
2. The special plea raised by the plaintiffs is dismissed.
3. Each party is to bear its own costs in respect of the special pleas raised.
4. The matter is postponed to 09 May 2022 at 10h00 for a case management conference.
5. The parties are directed to file a joint case management report on or before 04 May 2022.

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D C MUNSU  
ACTING JUDGE

## APPEARANCES

FOR THE PLAINTIFFS: J. L. Matheus  
Slogan Matheus & Associates, Ongwediva.

FOR THE 1<sup>ST</sup> DEFENDANT: P. Greyling.  
Greyling & Associates, Oshakati.

FOR THE 2<sup>ND</sup> DEFENDANT: No appearance.

FOR THE 3<sup>RD</sup> DEFENDANT: No appearance.