REPORTABLE

CASE NO: SA 59/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

IMBERT NGAJOZIKWE TJIHERO	**First Appellant**
JACQUELINE GETRUD TJIHERO	**Second Appellant**

and

UAZUVA BEN KAUARI	**First Respondent**
LYDIA NINGIREE KAUARI	**Second Respondent**

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: **3 June 2019**

Delivered: **25 June 2019**

Summary: The appellants in this appeal instituted an action against the respondents in which they sought an order evicting the respondents from Farm Dankbaar No 444. In their plea, respondents raised the defence that a partnership agreement existed between them and the appellants. This agreement (and others) was made in a family context as Imbert Tjihero is the brother-in-law of Ben Kauari, the latter being married to Imbert Tjihero's sister. The agreements were not reduced

to writing as is required in terms of the Alienation of Land Act, No 68 of 1981 for any agreement relating to the alienation of a piece of land to be legally enforceable. The court *a quo* dismissed the eviction claim and the respondents' plea of a partnership agreement. The court *a quo* found based on the evidence (with reference to the principles contained in *Colien v Rieffontein Engineering Works),* that the respondents were co-owners of the farm and were entitled to occupy their portion of the farm. Respondents did not file a cross-appeal against the finding of the court a *quo* that their partnership agreement was invalid because the second appellant did not consent to the agreement. Second appellant's consent was necessary due to the appellants being married in community of property.

On the merits of the appeal, the issues the court is required to determine is (1) whether the court *a quo* was correct to go outside the pleadings and find that the respondents are co-owners of the farm in question, and (2) whether on the evidence, the respondents established some basis, other than a partnership agreement, to justify their occupation of a portion of the farm.

Preliminary issues dealt with on the day of the hearing involved the respondents' application to strike the appeal from the roll. Further, respondents did not file their heads of argument and sought a postponement of the appeal from the bar.

Appellants’ appeal had lapsed due to their failure to file their appeal record within the prescribed time period. They brought a detailed application for condonation and reinstatement of the appeal. This application was not opposed by the respondents.

Respondents’ application to strike the appeal from the roll is premised on a judgment Agribank obtained on 15 April 2019 against the appellants following their failure to pay instalments due in terms of a mortgage bond registered over the farm. In terms of the judgment, the farm was declared executable and can be sold on auction unless the appellants can reach an agreement with the bank. Respondents wished to join these proceedings to propose that they take over the bond on condition that the farm is registered in their name.

It is held that, this court accepts the finding of the court a *quo* regarding the invalidity of the partnership agreement plea in the absence of a cross-appeal against that order.

It is held that, the application to strike the appeal from the roll was an attempt by the respondents to present themselves as current co-owners of the farm as per the judgment of the court *a quo,* so as to have some leverage in pushing their proposal to Agribank and to use the order to share in any excess should the farm be sold on public auction. This is frivolous and amounts to an abuse of the court's process.

It is held that, this kind of utterly meritless application should not be tolerated and a special costs order is warranted to discourage such abuse.

It is further held that, respondents' application to have the appeal postponed is declined.

It is held that, the appellants showed good cause for their late filing of the record and that there was good prospects of success if the appeal is heard.

It is held that, the court is entitled to deal with issues arising at a trial even if not pleaded, although this is an exception rather than the rule, it is preferred that an application to amend should be sought in this regard.

It is further held that, a court should only exercise its discretion to go outside the pleading where it is clear there has been a full investigation of the matter and there is no reasonable ground for thinking any further examination of the facts might lead to a different conclusion. It is stating the obvious to mention that the resolution of the real issue must lead to a legally valid conclusion as the court cannot sanction conduct that would otherwise not be legally valid.

It is held that, the court a *quo's* conclusion that the respondents are co-owners of Farm Dankbaar No 444 was not correct and cannot stand.

It is further held that, as a result of the family context in which the matter of the occupation and intended subdivision of the farm was agreed upon to between the parties, the respondents failed to establish any legally enforceable right of possession to the portion of the farm.

It is held that, the appeal succeeds with costs.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and HOFF JA concurring):

Introduction

[1] The appellants as plaintiffs *a quo* instituted an action against the respondents (defendants *a quo)* seeking to evict them from agricultural land known as farm Dankbaar No 444 (the farm). The respondents in their plea to the action raised as their only defence a partnership agreement with the appellants, which they averred were still in place and which allowed them to occupy a part of the farm. The court *a quo* dismissed the defence based on the partnership agreement but held that on the evidence (as it was not pleaded) that it was clear that the defendants were co-owners of the farm and hence were entitled to occupy the portion of the farm they did and on this basis dismissed the claim for eviction.

[2] The appeal lies against the whole of the judgment and order of the High Court. No cross-appeal was noted against the finding of the High Court that the partnership agreement pleaded by the respondents was invalid as it was never consented to by the wife (second appellant) of Imbert Tjihero which consent

was necessary as the parties were married in community of property. The finding that the partnership relied upon in the plea of the respondent was invalid must thus be accepted for the purposes of this appeal as this court on appeal cannot alter a judgment *a quo* against the appellants in the absence of a cross-appeal.[1]

[3] Two preliminary issues had to be dealt with the day the appeal was set down for. Firstly, there was an application by the respondents that the appeal be struck from the roll, and secondly, as the appeal had lapsed there was an application for its reinstatement.

Application to strike appeal from the roll.

[4] Per letter dated 29 January 2019 the lawyers acting for the parties were informed that this matter was set down for hearing on 3 June 2019.

[5] On behalf of the respondents an application to strike the appeal from the roll was launched on 9 May 2019. The papers in respect of the application was finalised by a replying affidavit filed on 27 May 2019.

[6] No heads of argument were filed on behalf of the respondent in respect of this application or in the appeal. The application is premised on a judgment Agribank obtained against the appellants flowing from their failure to pay instalments due in terms of a mortgage bond registered over the farm by the said bank. In terms of this judgment the farm was declared executable and unless agreement can be reached with Agribank the property will be sold in due course at

[1] *Kriel v McDonald* 1930 SWA 53, *Holmdene Brickworks (Pty) Ltd v Robberts Construction Co Ltd* 1977(3) SA 670 (A) at 629B-D and *Van der Pleats v SA Mutual Fire and General Insurance Co Ltd* 1980(3) SA 105 (A).

a public auction. It is stated that the respondents attempted to join the fray in the case between Agribank and the appellants ‘to propose’ to Agribank that they ‘take over the bond . . . on condition that the farm be registered in their name’.

[7] Agribank obtained judgment against the appellants on 15 April 2019 whereas the application for joinder was heard on 18 April 2019. The court hearing the application for joinder held that as the case between Agribank and appellants had been finalised, the respondents could not be joined as parties to that case. The joinder application was accordingly dismissed.

[8] On what basis respondents could have thought they were entitled to join in the case between Agribank and the appellants escapes me. The bond was registered over the whole farm to secure the indebtedness of the appellants. Even on respondents version they agreed with appellants to have the farm registered in the appellant's names only and that the appellants would apply for a loan in their names. They were thus, on their own version, parties to a misrepresentation to Agribank as to the ownership and lender and cannot complain if Agribank acts on what was presented to it.

[9] The founding affidavit sets out certain background facts that needs to be commented on. According to Mrs Kauari (the second respondent) the respondents purchased the farm in partnership with the appellants. That was simply not their version at the trial. Their evidence was that the appellants bought the farm on their behalf, ie as their nominees and it was agreed that the farm would be registered on the appellants' names and upon their return from Russia the appellants would transfer the farm to them. It is further alleged that

the respondents' counterclaimed a partnership to the action to eject them from the farm. This is not correct. The partnership agreement was raised as a defence. It is alleged that (presumably after their return from Russia) the farm was divided 'into two halves after the partnership agreement' suggesting that there was a valid partnership in place and ignoring the fact that the court *a quo* found there was no valid partnership agreement and there is no cross-appeal against this order of the court *a quo.*

[10] The conclusion from the background facts and the fact that Agribank had foreclosed on the bond is the following submission:

> 'I submit it is clear that the appellants are no longer the registered owners of the farm Dankbaar and in order to protect their interest in the farm Dankbaar, the respondents' intent to apply directly to the Bank for assistance. This is however not possible as long as there is an appeal pending.'

[11] On what basis is it suggested that appellants are no longer the owners of farm is not stated. It is common cause that the farm was registered in their names and there is no suggestion the farm had in the meantime been transferred to someone else. This will only happen if the farm is sold and thereafter transferred to a new owner or owners. The whole purpose of the appeal is to finally determine the status of the parties in relation to the farm and this is also to the benefit of Agribank. The only and obvious reason for the striking order sought is for the respondents to present themselves as current co-owners of the farm as per the judgment of the court *a quo,* so as to have some leverage in pushing their proposal to Agribank and to use the order to share in any excess should the farm sold on a public auction.

[12] Counsel for the respondents submitted the appeal would be futile as the farm is going to be sold. This is speculation as it has not yet been sold and the appellants may at any time prior to such sale come to terms with Agribank which may avoid such sale. Even if the farm is sold this would not render the appeal moot as submitted by counsel for the respondents. The legal costs that the appellants will save if they are successful on appeal may make the appeal worthwhile from their perspective even if the court cannot prevent a sale of the farm. Further, as pointed out by counsel for appellants, how the excess or the remaining deficit after the sale is dealt with is also relevant. If the court *a quo's* decision is upheld this excess or deficit will be shared. If the court *a quo's* decision is set aside the excess or deficit will be attributed to appellants only.

[13] In short, this application to strike the appeal from the roll is probably brought for ulterior purposes, is frivolous and amounts to an abuse of the court's process. In my view, this kind of utterly meritless application should not be tolerated and a special costs order is warranted to discourage such abuse.

[14] As pointed out above, counsel for the respondents did not file any heads of argument in the appeal and from the bar sought a postponement of the appeal for this purpose. According to counsel he was so confident that the application to strike the appeal would succeed that he did not consider it necessary for such heads to be filed. As pointed out above the matter was enrolled on 27 January 2019. Appellants have filed heads of argument timeously. No formal application for a postponement was launched on behalf of respondents. This came in the form of an afterthought when the 'unassailable' application to strike the appeal from the roll was exposed as

nothing but a sham to attempt to block the appeal to allow respondents to rely on the judgment *a quo* to further their interest in negotiating with Agribank.

[15] In view of counsel for respondents' flagrant breach in not filing heads of argument the postponement of the appeal belatedly sought from the bar was declined and he was not heard in respect of the appeal.

Re-instatement application

[16] The record for the appeal was filed late. This meant that the appeal had lapsed. The appellants thus brought an application to condone the mentioned non-compliance and for the appeal to be reinstated. No intention to oppose this application was filed and hence also no answering affidavit.

[17] The appellants' failure to comply with the time period stipulated in the rules was mainly beyond their control. Firstly, a scarcity of finances meant that their lawyers representing them a quo withdrew from the case at the time the record was prepared. The same reason caused the transcribers who had to compile the record refused to give them the record prior to payment being made. This difficulty was further compounded by the fact that the traditional Christmas holidays intervened in their attempts to finalise the record as lawyers were not available to assist over this period.

[18] The appellants spelt out their personal efforts in detail and how the above considerations handicapped them in the filing of the record. Their version is not gainsaid and evidences a determination by lay persons to do what he could to ensure the appeal would proceed. In the result the appellants showed good cause

for the late filing of the record. I deal with the prospects of success under the heading ‘the appeal’.

The appeal

[19] It was common cause that the appellants were the registered owners of the farm and that the respondents were in possession of a portion of the farm. As indicated, the respondents' only defence pleaded was that they occupied the land in terms of a partnership agreement with the appellants. It goes without saying that, based on the pleadings, the failure to establish the partnership would be fatal to the case of the respondents. Counsel for the respondents *a quo* realised and conceded this as follows:

> ‘If his Lordship finds that there is no partnership agreement between the parties then that would the end of the case for the defendants . . . .

And

> ‘But should his Lordship finds that no valid partnership agreement has been concluded . . . then obviously no right would derive . . . in favour of the defendants . . . . Because they derive their rights from the partnership agreement.’

[20] The court *a quo* however with reference to the *Collen*[2] case and after a lengthy trial stated that ‘it would be idle not to consider the real issue which emerged during the trial, although it does not appear clearly in the pleadings’. On an analysis of the evidence the court *a quo* then concluded that ‘the farm is the property of the appellants and the defendants’.

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[2] *Collen v Rietfontein Engineering Works* 1948(1) SA 413 (A) at 433.

[21] The evidence led at the trial do indicate agreements between the parties and an intention to at some stage subdivide the farm so as to transfer about half thereof to the respondents. It is also clear that the respondents moved onto a portion of the farm in the expectation at that they would eventually become the owners of that portion of the farm they occupied. These agreements were made in a family context as Imbert Tjihero is the brother-in-law of Ben Kauari, the latter being married to Imbert Tjihero's sister. These agreements were long in trust but short in detail. And as often happens the devil was in the details. As commented by the judge a *quo* many aspects were hotly disputed during the trial which created more heat than light . . . and tended to befog the real issue at play; thus, prolonging unduly the trial.

[22] A court is entitled to deal with the real issues arising at a trial even if not pleaded. This is and should be an exception rather than a rule. Normally an appropriate amendment should be sought in this regard. This was obviously not done in the present matter as it was the court that decided to go outside the pleadings. Furthermore, a court should only do this where it is clear there has been a full investigation of the matter and there is no reasonable ground for thinking any further examination of the facts might lead to a different conclusion.[3] It is stating the obvious to mention that the resolution of the real issue must lead to a legally valid conclusion as the court cannot sanction conduct that would otherwise not be legally valid.

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[3] *Middleton v Carr* 1949(2) SA 374 (A) at 433.

[23] The problem with the finding of the court *a quo* that the respondents are co-owners of the farm is that it flies in the face of the law in various respects.

[24] Firstly, the only way one can become an owner of immovable property based on an agreement is for such property to be formally transferred in terms of the Deed's Registries Act.[4] Thus even if the basis of the transfer is a contract, the payment of the purchase price stipulated in the contract and being granted possession of the immovable property does not make such purchaser the owner thereof.[5] Whereas such contract may entitle one to possession and arm one with a right in personam to institute action compelling registration it does not bestow ownership. It seems the lawyers acting for the defendants realised this and hence the reliance on the partnership agreement to give them a right to occupy the farm.

[25] Secondly, the agreement between the parties falls foul of s 17 of the Agricultural (Commercial) Land Reform Act[6] which compels any owner who intends to alienate land to offer such land to the State and only if the State waives its right of pre-emption may such land be sold to anyone else. There is no basis that any court can condone non-compliance with this statutory provision and declare anyone an owner or co-owner of land in contravention of the said section.

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[4] Act 47 of 1937.
[5] *Willoughby's Cons.* Co. *Ltd v Capital Stores, Ltd* 1918 AD 16.
[6] Act 6 of 1995.

[26] Thirdly, no subdivision of Agricultural Land is possible without the permission of the Minister of Agriculture, Water and Forestry.[7] The parties knew about this provision as appellant at some stage applied for such subdivision which was approved. A dispute then arose as to the amount payable in respect of the portion envisaged for respondents. The consent, which was valid for 3 years, thus lapsed without effect been given to the subdivision. The court *a quo* was aware of this impediment but regarded it as 'immaterial' as there was agreement to the subdivision. Once again, such agreement may have been part of an agreement to allow the respondents' occupation of the part of the farm pending the approval of the Minister but it could not be ignored to conclude that the respondents were co-owners of the farm.

[27] Fourthly, the agreement between the parties that a portion of the farm would be alienated to the respondents was not in writing as required by law. This means the agreement relating to how they would divide the farm is legally invalid. In terms of s 2(1) of this Act[8] such oral agreement is not of 'any force or effect'. Once again no court of law can condone the non-adherence to this section and compel a person to give effect to such an oral agreement. It is only when such agreement is reduced to writing and signed by the parties or their agents acting on written authority that it has legal effect. The oral agreement in this regard was thus a mere gentleman's agreement unenforceable in law.

[28] It follows from the aforegoing that the court *a quo's* conclusion that the defendants were co-owners of the farm was not correct and cannot stand. The only

[7] Subdivision of Agricultural Land Act, No 70 of 1979.
[8] Section 2(1) of the Alienation of Land Act, No 68 of 1981.

further question is whether, on the evidence, the respondents established some basis, other than partnership, to justify their occupation of a portion of the farm.

[29] As the respondents conceded that appellants were the owners of the farm and that they were in possession of a portion thereof, the onus was on the respondents to allege and prove a right to possession.[9] The only right alleged was a partnership agreement. Accordingly the evidence presented was aimed at proving this partnership agreement. As mentioned this defence failed and as there was no cross-appeal in respect of this finding it is not necessary to consider this defence any further. Despite the evidence indicating that the respondents made improvements to the farm and even assisted in the purchase and also made payments on the bond registered over the farm no claim was made in this regard, assumedly because such money claims would not be a defence against the eviction claim but would simply amount to counterclaims. As far as their right to occupy is concerned and which was premised on an agreement that eventually their portion of the farm would be transferred to them against payment of half the amount owing on the bond, this agreement was an oral one involving agricultural land and thus created no binding legal obligations for the reasons set out in paragraphs [25] and [27] above. As pointed out above, the agreement to subdivide was initiated but not proceeded with as a dispute arose and as to the amount payable for the defendants' position of the farm as the bond payments were in arrears and over the amounts the defendants maintained they had already paid to acquire the farm and in respect of the bond instalments. It was the failure to resolve this dispute that eventually led to the institution of this action. Whereas the appellants' actions in this

[9] *Chetty v Naido* 1979(3) SA 13 (A).

regard is clear evidence of some agreement or understanding between the parties this cannot be legally given effect to for the reasons already mentioned.

[30] In short, probably as a result of the family context in which the matter of the occupation and intended subdivision of the farm was agreed to between the parties, the respondents could not establish any legally enforceable right of possession to the portion of the farm and hence any valid defence to the action for eviction against them.

[31] It follows that appellants not only established good prospects in relation to the application for re-instatement, but indeed that the appeal should succeed.

Cost orders

[32] The court *a quo* made no an order as to costs. The appellants were criticised for not confining their case to the essential elements of a *rei vindicatio.* The judge *a quo* stated the criticism as follows:

> 'I have already mentioned that if the case of the plaintiffs was namely their reliance on the fact that there was deed of transfer indicating clearly that the farm had been transferred to them, they should have pursued only that. They did not. The case went the full length of a trial.'

[33] This criticism is unfounded. The appellants' particulars of claim is based exclusively on the elements of the *rei vindicatio.* The defence to this was a right to occupy pursuant to a partnership agreement. Appellants' reply to this defence was that the partnership agreement was invalid, alternatively it was never implemented and if it was implemented it was lawfully terminated. The trial in essence proceeded

around these issues relating to the alleged partnership. The appellants did not raise the partnership, but had to deal with it as it was raised by the respondents as a defence. To criticise the appellants for responding to the issue raised by the respondents was not justified. To establish its case, the appellants had to address the defence put up by the respondents. The respondents, whom it must be borne in mind were the successful parties *a quo,* are similarly criticised for the fact that a great deal of evidence was adduced that was not material to the essence of the case which according to the judge *a quo* was not the partnership issue but the co-ownership one determined by him. He also criticised the respondents for persisting with their defence based on the partnership agreement in the following terms:

> '. . . some advice given to the parties before proceedings were instituted were bad in law, but the parties held on tenaciously to such bad advice and brought them into the proceedings, eg on the partnership agreement that it is valid when it clearly is not valid, and on whether the partnership agreement was terminated, an agreement which clearly did not exist.'

[34] In the context of the result in the court *a quo* one can appreciate the reasoning to not grant the successful party cost where its pleaded defence, which was dismissed, caused the trial to span intermittently over a period of 55 days from 23 March 2015 to 16 March 2017 culminating in a record of 18 volumes with a total of 2153 pages. And this in a case where the judge *a quo* had to discover the real issue in the evidence as it was not pleaded.

[35] However as is apparent from what is stated above, the issue distilled from the evidence of the court a quo did not constitute a defence in law and the costs

order thus must be considered on the basis that the appellants should have been successful in the court *a quo.*

[36] In my view, there is no reason not to follow the normal rule, namely that the costs should follow the result. The appellant instituted a straight forward *rei vindicatio.* Respondents raised a right of occupation arising from an alleged partnership agreement. The respondents had the onus to prove this partnership and the trial essentially revolved around this issue. This defence was rejected and as a result the claim for ejectment based on the *rei vindicatio* had to succeed. As appellants were successful they were entitled to their costs. It was not their fault that the trial became protracted. This was as a result of the defence raised. There is thus in my view no reason to not grant the normal costs order.

Conclusion

[37] In the result, I make the following order:

(a) The application to strike the appeal from the roll is dismissed with costs on an attorney and client scale.

(b) The appeal is reinstated.

(c) The appeal succeeds with costs.

(d) The order of the court *a quo* is set aside and substituted with the following order:

(i) The defendants are ejected from the farm Dankbaar No 444, Otjozondjupa Region, Namibia.

(ii) The defendants are to pay the costs jointly and severally, the one paying the other to be absolved, inclusive of the costs of one instructing and one instructed counsel.

(e) The respondents are given 1 month from the date this order is handed down to vacate farm Dankbaar No 444.

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FRANK AJA

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MAINGA JA

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HOFF JA

APPEARANCES

APPELLANT:	N Tjombe
	Of Tjombe-Elago Inc
RESPONDENTS:	Z J Grobler
	Of Grobler & Co