



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3511/2009

In the matter between:

BRIGITTE GEINGOS

PLAINTIFF

and

MARTHA NAMUNDJEBO

DEFENDANT

Neutral citation: *Geingos v Namundjebo* (I 3511/2009) [2012] NAHCMD 12 (18 September 2012)

Coram: MILLER AJ

Heard: 04 April 2012; 30 July 2012

Delivered: 18 September 2012

ORDER

The defendant is ejected from the deceased's estate property at Erf 159, Tsumeb, Republic of Namibia. The defendant's counterclaim is dismissed. The defendant will pay the costs in respect of both claim and the counterclaim, such costs will include the costs of one instructing counsel and one instructed counsel.

JUDGMENT

MILLER AJ:

[1] In this matter, plaintiff in her capacity as the Executrix in the Estate of the late Frans Gawanab, seeks an order in terms whereof the defendant is evicted from certain premises, namely Erf 159, Tsumeb in the Republic of Namibia.

[2] It is common cause that the late Frans Gawanab was the registered owner of the said erf and it is reflected as such in the Title Deed pertaining to this property.

[3] That contention has not been disputed by the defendant. It is also common cause that the defendant is in occupation of the property and has been in occupation thereof for a number of years.

[4] It is incumbent upon the defendant, once it is established that the plaintiff is the owner of the property and she is in occupation thereof, to establish a right to occupation.

[5] Both in the plea and a counter-claim filed by the defendant it is alleged that the late Frans Gawanab had sold the property to the late Elias Namundjebo and that the purchase price in respect of that property had been paid.

[6] It is not disputed by the plaintiff that an Agreement of Sale was contemplated between the parties and that in anticipation of the conclusion of the Deed of Sale the sum of two hundred and fifty thousand Namibian Dollars (N\$250 000-00), being the purchase price, had been paid.

[7] Although various claims were pursued in the counter-claim during the course of the hearing, Van Der Westhuizen who appeared for the defendant abandoned then all but one. The only order she is asking for in the counter-claim is an order directing the plaintiff to transfer the ownership of Erf 159 to the defendant.

[8] It is evident from the evidence of Mr Pretorius, a legal practitioner practising at Tsumeb, that he at one stage acted for both Mr Gawanab and the late Mr Namundjebo and that he was instructed to draft a Deed of Sale in respect whereof Erf 159 was to be sold to the late Mr Namundjebo.

[9] He testifies further and it common cause that the parties never signed the Agreement. The Agreement concluded between the parties, therefore, at all times was and remains a verbal agreement.

[10] Ms Van Der Westhuizen argued before me that it is inequitable that the defendant, having paid the purchase price, is now not in a position to take transfer of the property and if I understood her correctly, she sought to argue that the equities of the matter should dictate that I should order the plaintiff to transfer the property to the defendant despite the absence of a written Agreement of Sale.

[11] I do not need to dwell on this particular argument, I can do no better than quote from the work of Christie, *The Law of Contract in South Africa* and the passage I have in mind appears at page 122 of the First Edition of that work. It reads as follows:

“The effect of non-compliance with the requirements of Section 2(1) is that the contract shall be of no force or effect, that is what Section 2(1) plainly says since *Wilken vs Kohler*, 1930 AD 135 at 143, it has been trite that a transaction which has no force or effect is necessarily void ab initio and can under no circumstances confer any right to action. So neither party can enforce the informal contract against the other even if he has fully performed his part of the contract.”

[12] Ms Van Der Westhuizen was not able to refer me to any authority which runs counter to the passage I have quoted and I have not been able to find any.

[13] It follows in my judgment that the occupation of the property by the defendant is unlawful.

[14] In the result I grant an order ejecting the defendant from the deceased estate's property at Erf 159, Tsumeb, Republic of Namibia. The defendant's counter-claim is dismissed and the defendant is ordered to pay the costs in respect of both claim and counter-claim. Such costs will include the cost of one Instructed and one Instructing counsel.

P J Miller
Acting Judge

APPEARANCES

APPELLANT:

C J MOUTON

Instructed by Dr. Weder, Kauta & Hoveka Inc.,
Windhoek.

RESPONDENT:

C VAN DER WESTHUIZEN

Instructed by Sisa Namandje & Co. Inc.,
Windhoek