NAMIBIA / JUDGMENT

Billy v Mendonca [2020] NAHCMD 242 (18 June 2020)

[2020] NAHCMD 242

COURT
High Court Main Division

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REPUBLIC OF NAMIBIA
HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON ABSOLUTION FROM THE INSTANCE

In the matter between:	CASE NO: I 3954/2013 DENISE CARMEN BILLY PLAINTIFF and JULIO MENDONCA FIRST DEFENDANT ONGWEDIVA TOWN COUNCIL SECOND DEFENDANT REGISTRAR OF DEEDS THIRD DEFENDANT Neutral Citation: Billy v Mendonca (I 3954/2013) [2020] NAHCMD 242 (18 June 2020)
CORAM:	MASUKU J
Heard:	25 February 2020
Delivered:	18 June 2020
Flynote:	Civil Procedure – application for absolution from the instance – circumstances when granted – principles applicable to absolution – joinder of parties of necessity – whether failure to join a necessary party may be a basis for granting absolution from the instance – Pleadings – a party is, in a trial, confined to the issues raised in the pleadings and may not venture into issues not properly raised in the pleadings and the pre-trial order - Legislation – Communal Land Reform Act, 2000 – whether the defendant made out a case for rights under the said Act.
	Summary: The plaintiff instituted action for the ejectment of the defendant from certain property that had previously been communal land but had, over time, by proclamation, been declared to belong to the Ongwediva Town Council, ('the Council'). The Council granted an application by the plaintiff to allocated the property in question and on which the defendant had lived and carried on business. He claimed that he had a right to the land because he had paid for it from the plaintiff's grandparents, who had previously occupied same. The defendant lodged a counterclaim in which he sought on order

setting aside the transfer of the property by the Council to the plaintiff, and in the alternative, compensation in the amount of N$ 3 Million for the developments he had effected on the property.
The plaintiff led evidence and closed her case, followed by the defendant. At the close of the defendant's case, both the plaintiff and the Council, moved an application for absolution from the instance, contending that the defendant had failed to make out a case that would, in the instance, call for the Council, to open its case. The application, was contested by the defendant.
Held: that the application for absolution from the instance is granted when the plaintiff or claimant has failed to adduce evidence upon which a court, applying its mind reasonably to the evidence, could or might find for the plaintiff or claimant.
Held that: principles applicable to absolution are that the plaintiff or claimant must make a prima facie case on all the essential elements of the claim to be established; the court must not, at this stage, seek to decide the matter on the probabilities; the court must approach the case from the position that the evidence of the plaintiff or the claimant, is true; only in exceptional cases, where the plaintiff or the claimant's evidence is inherently unacceptable, should the court grant the application; and that the court should not lightly grant the application, as it should be frigid, shy or slow, in readily doing so.
Held further that: ordinarily, where a necessary party has not been joined to proceedings, the general approach of the court is to stay the proceedings, pending such joinder.
Held: that in the instant case, however, the defendant knew that some banks had registered bonds on the property he seeks to have transferred to him, but did not join those banks, yet they have a direct and substantial interest in the order he seeks. Because of the stage reached in the matter, it would be unworkable, unjust and unfair to the parties to stay the proceedings, pending the joinder of the banks. To do so, would amount to attempting to unscramble an egg, which is not easy feat as it would require the filing of further pleadings, reopening of closed cases and recalling of witnesses who have been excused.
Held that: the defendant failed to call any expert evidence regarding his claim for damages and that is a proper basis for granting absolution.
Held further: that the defendant had failed to make out a case against the plaintiff and the Council based on the provisions of the Communal Land Reform Act, namely that he had a right to occupy the land in question.
Held: that the defendant is not entitled to raise issues regarding the non-compliance with provisions of the Local Authorities Act considering that these issues had not been raised in the pleadings. For that reason, those issues did not properly fall for determination.
Considering the foregoing, the court granted the application for absolution from the instance with costs.
ORDER
1. The application for absolution from the instance moved by the Plaintiff and the Ongwediva Town Council in respect of the Defendant's counterclaim, is granted as prayed.
2. The First Defendant is ordered to pay the costs of the application.
3. The matter is postponed to 2 July 2020 at 08:30 for the issuance of directions for the further conduct and finalisation of the matter.

RULING

MASUKU J

Introduction

[1] Pending before court is an application for absolution from the instance. It is moved by both the plaintiff and second defendant. Predictably, the first defendant opposes the application, hence the present ruling. The parties [2] The plaintiff is Ms. Denise Billy, an adult Namibian female. She was described in the particulars of claim as being in the employ of the Development Bank of Namibia. The first defendant is Mr. Julio Mendonca, a major male resident of Ongwediva, resident on Erf 5679, Ongwediva, (Extension 13). The second defendant, is the Ongwediva Town Council. The third defendant is the Registrar of Deeds, which has not participated meaningfully or at all in these proceedings. [3] For ease of reference, I will refer to the parties in this judgment, as follows: the plaintiff will be referred to as such. The first defendant, Mr. Mendonca, will be referred to as ('the defendant'), whereas the second defendant, the Ongwediva Town Council will be referred to as merely as ('the Council').

Background

[4] This is a hotly contested matter, which has been interned in the belly of this court for a while. It has also served before the Supreme Court in respect of an application for an amendment at the defendant's behest, which application was refused by the Supreme Court. [5] At the heart of the dispute, is the property described above, namely, Erf 5679, which is presently occupied by the defendent. The plaintiff issued a combined summons from this court, seeking the ejectment of the defendant from the said property. The plaintiff alleges that she is the owner of this property and attaches thereto, a title deed issued in her name. It was issued by the Registrar of Deeds in favour of the plaintiff, following the sale of the property in question to the plaintiff, by the Council. This is common cause. [6] In her particulars of claim, the plaintiff avers that the defendant is in unlawful occupation of the said property, hence the application for ejectment. For his part, the defendant denies the plaintiff's right to the property in question and particularly denies that the plaintiff lawfully purchased the said property from the Council. The defendant alleges that he has occupied the said property and has conducted business thereon since 1980. [7] It is the defendant's further averral that the plaintiff and unbeknown to him, fraudulently misrepresented to the Council that she has the right to the property. It is further alleged by him that the Council, relying on the misrepresentations made by the plaintiff, transferred the property to the plaintiff. The registration and transfer of the property, claims the defendant, is invalid and must be set aside. Lastly, the defendant alleges that he is entitled to the property by virtue of having obtained ownership of same via prescription, as envisaged in s 1 of the Prescription Act, Act 28 of 1969. [8] In the alternative, the defendant alleges that he made improvements

on the property in the amount of N$ 700 000 and thus has a lien over the property. He thus applied for the dismissal of the claim with costs. This was not all. The defendant's counter-claim [9] The defendant further instituted a counter-claim against plaintiff and the Council respectively. In it, the defendant claims that the transfer of the property in question is invalid as it was induced by fraudulent misrepresentations by the plaintiff. In this regard, the defendant alleges that he occupied the property and conducted a business thereon known as 'Pelican' since 1980 and purchased the right to occupy the said property, as the said property was communal land from Mr. Martin Billy and Mrs. Caroline Billy, the plaintiff's grandparents. This, he alleges, was with the approval of the Traditional Authority. [10] The defendant avers further that in or about 1 December 2004, the village where the property is situate, was incorporated by proclamation to the Council's land and thus became susceptible to private ownership. The defendant claims that he, in this regard, has the right to procure the ownership of the property from the Council, if the latter is desirous of alienating the property. [11] The defendant further avers that his rights to the property, are protected by the Communal Land Reform Act, 2002, particularly by s 35 of the said Act. It is his averral that he was never alerted and granted the option to purchase the property in question by the Council. Furthermore, the defendant avers that the plaintiff never, at any time, occupied the said property or had any rights thereto. [12] In or about 2008, the defendant further alleges in the counter-claim, the plaintiff fraudulently misrepresented to the Council that she had the right to the property and is thus entitled to ownership thereof. The defendant annexes a document marked 'JM2' which the defendant alleges was created by the plaintiff to induce the sale of the property to her. It was on the basis of the said misrepresentations that the Council entered into the agreement of sale with the plaintiff and in terms of which she purchased the property for N$ 490 916.80. The deed of transfer in favour of the plaintiff is invalid and thus liable to being set aside, so contended the defendant. [13] The defendant, in the alternative to the aforegoing averrals, alleges that the Council in or about June 2010 unlawfully effected subdivisions of the property into five erven. These erven, continues the defendant, are registered in the plaintiff's name at the Deeds Registry. It is the defendant's prayer that the certificates of title in respect of the property referred to above, should be set aside and rectified by the Registrar of Deeds and should reflect the Council as the owner, subject to the defendant's right of pre-emption in respect of the said erven. [14] In a second alternative claim, the defendant alleges that in the event it is not possible to set aside the plaintiff's title to the property in question, that the defendant suffers damages alternatively, the plaintiff is enriched at the defendant's expense due to the plaintiff's unlawful action. A sum of N$ 3 Million is claimed in this regard as being the reasonable market value of the value of the property. [15] In the plea to the counterclaim, the Council denied knowledge of the defendant's alleged occupation of the property and further denied the defendant's allegation that the plaintiff purchased the right to occupy the property with the approval of the Traditional Authority as alleged by the defendant. [16] The Council denied the defendant's alleged primary right to procure ownership of the property, as claimed and put the defendant to the proof thereof. The Council further denied the applicability of the defendant's reliance on s 35 of the Communal

Land Reform Act, as the property in question is not subject to the provisions of the said Act. The Council further denied the allegation of fraudulent misrepresentation and put the defendant to the proof thereof, inasmuch as it also denied the allegation that annexure JM2 induced the sale of the property to the plaintiff as alleged by the defendant. [17] Finally, the Council denied the alleged unlawfulness of the subdivision and further denied that there was any unlawfulness and invalidity attaching to the registration of the property in the plaintiff's name. It was the Council's further case that the defendant had failed to set out the legal bases for his alleged entitlement to the right to first purchase the property and put the defendant to the proof thereof. [18] In response to the counter-claim, the plaintiff denied that the basis forming the transfer of the property in question to her was invalid and further denied that she made any fraudulent misrepresentations, which could lead to the deed of sale being invalidated. The plaintiff further averred that the defendant's claim is sterile insofar as the defendant lodged no attack on the transfer of the property, which is an independent causa and legal act on its own. The plaintiff further denied that the defendant set out any factual or legal bases for the setting aside or rectification of the certificates of title. Finally, the plaintiff denied the averment that there was any enrichment in her favour but to the defendant's prejudice, as alleged in the defendant's counter-claim. [19] It will be noted that the allegations and counter-allegations contained in the pleadings, particularly in the defendant's counter-claim, considered in tandem with the respective pleas thereto, have been recounted in some detail. The reason for doing so is that as will have been seen in the opening paragraph of this ruling, the attack by the plaintiff and the Council, in their application for absolution from the instance, is directed at the defendant's counter-claim. I will henceforth proceed to deal with the nature of the application, its basis and the argument advanced by the respective sets of parties. Absolution from the instance [20] It is unnecessary to deal in much detail with the law applicable to applications for absolution from the instance, for the reason that the position of the law in this regard is trite. To the extent necessary, the Supreme Court stated the following in Stier v Henke1 at para 4: 'At 92F-G Harms JA in Gordon Lloyd Page & Associates v Rivera and Another 2001(1) SA 88 referred to the formulation of the test to be applied by a trial court when absolution is applied for at the end of an appellant's case as appears in Claude Neon Lights (SA) v Daniel 1976 (4) SA 403(A) at 409G-H: "When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be established, but whether there is any evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.'"

[21] The learned judge of Appeal, Harms JA proceeded to state the following at para 92H-93A of the judgment: 'This implies that a plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff . . . As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one. The test has from time to time been

formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' . . . a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury . . . Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of the plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.' 1 2012 (1) NR 370 (SC). [22] There is not much controversy among the parties regarding the standard to be met at this stage of the proceedings. This is so because the law in this regard is very much settled. It is, however, in the application of the law to the facts that does raise some controversy, the defendant claiming that this is not a proper case in which to grant the application. The plaintiff and the Council, on the other hand, make common cause that there is no better case than the present, to grant the application. [23] It is, however, necessary for purposes of this judgment, to mention the following additional points regarding the application for absolution from the instance. First, the plaintiff must make out a prima facie case, in the sense that all the elements of the claim must be established. If such evidence is not marshalled, the court cannot find for the plaintiff – Factcrown Ltd v Namibia Broadcasting Corporation.2 [24] Additionally, if there is evidence upon which a reasonable man may find for the plaintiff, 'then absolution must be refused even if the court itself considers that the evidence produced by the plaintiff is open to question. At this stage it must not seek to resolve the matter on the probabilities'. 3 Additionally, the court must approach the plaintiff's evidence as true, save in exceptional circumstances, such as where the plaintiff's evidence is inherently unacceptable.4 It is for that reason that the court does not normally deal with credibility of the evidence led at the stage of absolution. [25] I will proceed to briefly consider the various positions taken by the parties in this regard. To the extent necessary, I shall have regard to the evidence led and then I shall apply the law to the facts and come to a conclusion as to whether the case commends itself as one in which absolution is appropriate to grant. I proceed in that direction. [26] Immediately below, a rendition of the argument advanced on behalf of each of the parties will be given. In this connection, I will not repeat each and 2 2012 (2) NR 447 (SC), para 72. 3 1978 (4) SA 204 (N) at 206C. 4 Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 525 (E) at 527C-D). every argument presented. I will give attention to what appears to be the main issues raised on behalf of each of the respective parties. This must not, however, be construed as trivialising the argument not recounted below. For the plaintiff

[27] Mr. Namandje, for the plaintiff submitted that there were insuperable difficulties in the defendant's way and that these should render the defendant on the receiving end of the application. First, he argued, there is no contention that the property in question is subject to at least two bonds from different financial institutions. One of the bonds, he further submitted, was prepared by the defendant's legal practitioner of record. He accordingly

argued that the defendant cannot succeed in its counterclaim in light of the failure to join the relevant banks in this matter. [28] Second, Mr. Namandje argued that the defendant's claim cannot succeed for the reason that the defendant claims that he was granted a right to conduct business on the said property, but tellingly, he has failed to attach any proof of title to the property that may have entitled him to a right to purchase the said property as he claims presently. [29] To add salt to injury, Mr. Namandje further argued, the defendant does not have any ministerial consent, which is required in terms of the provisions of the Local Authorities Act, 1992. It was his further argument that the defendant's claim for the right of pre-emption is done a telling blow by the fact that the Minister concerned actually gave his consent for the sale of the property in terms of the law, to the plaintiff. This decision by the Minister, proceeded Mr. Namandje, remains unchallenged and that the Minister is, in any event, functus officio regarding that decision. He has fully and finally exercised his jurisdiction in that regard. [30] Fourth, it was Mr. Namandje's spirited argument that when properly considered, the defendant failed to prove that there was any fraud on the part of the plaintiff in this matter. It was his argument that the argument on fraud was abandoned by the defendant's counsel, then Mr. Coleman, once he was made wise to the fact that the plaintiff did not use annexure JM2 referred to above. According to him, there is no case at all made out by the defendant premised on fraud and this should serve to non-suit the defendant in regard to his counterclaim at the stage of absolution.

[31] Mr. Namandje further argued that the theory of passing ownership in immovable property in Namibia is another stumbling block in the defendant's success. This is because, so he submitted, the law of transfer of property is based on the abstract theory, which recognises chiefly, the mutual intention to pass and receive ownership. As long as that intention is extant, he submitted, a valid transfer of property takes place in the eyes of the law. This renders the defendant's argument on invalidity of the transfer, simply out of order. [32] Last, but by no means least, Mr. Namandje argued that the defendant's second claim for damages based on improvements the defendant allegedly made on the property, was not proved. It was his case that there was no expert evidence adduced on the defendant's behalf, thus rendering absolution from the instance, the proper and only appropriate finding in the matter. The Council

[33] Ms. Kishi, for the Council, started at the beginning. This was in dealing with the pre-trial order. It was her contention that properly construed, the question whether the defendant had acquired, as he claimed, rights in terms of s 35 of the Communal Land Reform Act, never formed part of the issues for resolution by this court. It was her further argument that the question whether the defendant had a right to pre-emption in relation to the property also never arose for determination as it was not included in the pre-trial order. In essence, she drew the court's attention to what the case was not about.

[34] Ms. Kishi went into some detail on the evidence led in this and other related cases and she submitted that it would appear that there is a doubt whether the defendant is in possession of a document that serves to prove his alleged right to occupation or ownership of the

property in question. It was her submission that whatever the case, it was abundantly clear from the evidence that the defendant did not at any stage submit the said document to the Council and further that the defendant did not make any formal claim to the Council for determination or allocation of the property in question. [35] It was her contention that the defendant had not shown that he had made any case for acquiring the property whether by purchasing it or in pursuance of the provisions of s 35 of Act 35 of 2000 referred to above. It was accordingly submitted that in the circumstances, the defendant had not shown that he had made out a case that could lead the court to concluding that he had made a prima facie case sufficient to survive the application for absolution. The defendant

[36] Ms. Angula, for the defendant argued strenuously against the application for absolution. She relied on certain provisions of the Communal Land Reform Act and submitted that there is evidence that the defendant had some colour of right to the land in question and he was in occupation thereof as the land had been allocated to him. He could not on the land being acquired by the Council lose his rights therein without incident. Reliance in this regard was placed on Kashela v Katima Mulilo Town Council and Others.5

[37] Ms. Angula further argued that there is no evidence that the plaintiff had been allocated the property in question in line with the provisions of the Local Authorities Act, in particular, s 30(1) and s 63. Reference was also made to s 35 of the Communal Land Reform Act and the case of T Kamwi v Town Council of the Local Authority of Katima Mulilo and Others.6 [38] I should hasten to mention that the argument advanced in this regard by Ms. Angula, loses sight of the nature and place of the enquiry in the larger scheme of the trial. The question is not whether the plaintiff has made out a 5 (SA 15/2017) [2018] NASC 409 (16 November 2018). 6 2019 (2) NR 435 (HC). case at the close of her case, namely whether there is evidence on which the court may find for her. The plaintiff made her case and no application for absolution was moved by the defendant at the appropriate stage of the trial. At this stage, the question is whether the defendant has adduced evidence to satisfy the trier of fact that a court might find for him in respect of the counter- claim he launched. [39] The issues raised above may become relevant, if within the four corners of the pre-trial report, at the end of the trial, when all the evidence is in. This would be in order to determine whether the plaintiff has proved on a balance of probability that she is entitled to the relief that she seeks, namely, the ejectment of the defendant from the property in question. [40] To revert to the argument, Ms. Angula, relying on Ndevahoma v Shimwooshili7 submitted that because the defendant, in his evidence, testified that he was in occupation of the property prior to 1992, when the land devolved on the Council, the Council could only deal with the property in question subject to the defendant's rights of occupation. In this regard, it was her submission that the documents exhibited by the defendant in proof of his occupation of the property were not challenged. [41] It was also submitted on the defendant's behalf that there is evidence that the document JM2 was fraudulent and that in the circumstances, it appears that it was that very document that the Council relied on in allocating and alienating the property in question to the plaintiff. It was further submitted that because the Council denied reliance on JM2 for allocating the land to the plaintiff, it is meet that the Council

should be called upon to give evidence regarding the documents it relied upon in allocating and transferring the property to the plaintiff. If absolution is granted, so ran the argument, then the Council will be permitted to avoid being placed in the witness box to explain the allocation and transfer of the property to the plaintiff, a situation the court should regard as untenable. 7 2019 (2) NR 394 (HC).

Determination

[42] I intend to begin with the defendant's second alternative counter-claim. In that claim, he claims the market value of the property, alleging that the plaintiff was enriched at his expense in the amount of N$ 3 Million. This, it was alleged, was due to the he unlawful action pleaded and recounted earlier. The amount claimed is alleged to be the 'reasonable market value of the said Erf 7503.' [43] As indicated above, the court is entitled to grant absolution from the instance in cases where the claimant fails to prove all the elements or esselentia of the claim. It was argued, and quite correctly too that in the instant case, the defendant failed to lead any evidence regarding the alleged value of the property. [44] It is common cause that issues of the value of the property are not those within the ordinary knowledge and expertise of the court and must perforce be proved by admissible expert evidence. The defendant did not call any such expert witness. There is no evidence of what the alleged improvements were and what their value was. [45] In this regard, the court was referred to Smith v Mountain Oaks Winery (Pty) Ltd8 where the respondents failed to quantify the damages allegedly suffered as a result of an alleged misrepresentation by the appellant. The court reasoned that, 'The respondents alleged that they are not in a position to quantify the damages that will be suffered as such damages will only become apparent as their reputation and business relationships are affected. This therefore means that the respondents could not prove that they suffered damages as a result of the representation'. The appeal was accordingly upheld and the judgment of the lower court was set aside and replaced. 8 (1003/2018) [2019] ZASCA 123 (26 September 2019), para 18, per Mokgohloa JA. [46] It is good law that a party, which claims damages, based on some unlawful or negligent act of another, is bound to prove the damages incurred thereby. Failure to do so, amounts to that party having failed to prove all the essentials of the claim and this justifies the court in granting absolution from the instance because to ask rhetorically, how else can the court compute the damages as it cannot assess and declare the same from a mere thumb-suck? Absolution is, in my considered view, the defendant's proper and deserved lot in the instant case. [47] I now turn to the first counterclaim. The first salvo issued by Mr. Namandje is that there is a critical non-joinder of at least two banks that have registered bonds over the property in question and this was at the plaintiff's behest. It is, in this connection submitted that the failure to join the banks is fatal to the counterclaim. [48] This, so the plaintiff contends, is because the defendant seeks inter alia, an order setting aside the agreement of sale of property between the plaintiff and the Council and setting aside the deed of transfer passed in relation thereto and that the records at the Deeds Registry be rectified to reflect him as the owner of the property. I should hasten to mention that the issue of the bonds

over the property is common cause and is not denied by the defendant as will become apparent later. The documents bearing the endorsement of the mortgage bonds form part of the record. [49] In my view, the interests of the banks in question are manifest and the necessity of their joinder is clearly unmistakeable in the circumstances. In support of this proposition, the court was referred to Standard Bank of South Africa v Swartland Municipality.9 [50] The court, in that case, expressed itself on the issue thus: 9 Case No. 562/2019, delivered on 1 June 2011. '[9] It is trite that a mere financial interest in the outcome of litigation does not give a party the right to be joined in legal proceedings. But a mortgagee, as the holder of the real right in property, which includes buildings on the land, erected lawfully or otherwise, in my view clearly has more than a financial interest in the outcome of proceedings for the demolition of those buildings. In Home Sites (Pty) Ltd v Senekal Schreiner JA said that where a person claimed to have a servitude in land, and the validity of the servitude might become an issue in litigation between the parties, she had a clear right to be joined – to be given an opportunity to be heard and joined as a party. He cited in support of this the criterion stated in Collin v Toffie where a person has a "direct and substantial interest in the results of the decision" the matter cannot be "properly decided" without her being joined as a party. [10] In my view the bank had a clear and substantial interest in the outcome of the application in the magistrate's court. The value of the property in which it had real rights would no doubt be affected by the demolition of the structures erected on it. The bank's ability to sell the property for the amount owed to it was placed in jeopardy. It was accordingly necessary for the municipality to join the bank as a respondent in the application.' [51] I endorse the above remarks as good law and they resonate with principle, justice and fairness. They apply to the instant case and thus fit hand in glove as there can be no doubt that the banks in question, have an interest in this case as the relief sought by the defendant, has a direct and detrimental bearing on their ability to recover the amounts loaned to the plaintiff if the order sought be the defendant is granted. [52] The only question to determine, is what is the proper course in the light of the non-joinder in the peculiar circumstances of this case. Ordinarily, the court, in such situations, stays the proceedings and orders the joinder of the party that should have been joined because of their direct and substantial interest in the order sought.10 In this regard, the court would ordinarily make an appropriate order as to costs. Is that the proper course in the instant case? What do interests of justice require – a stay of the proceedings and an order for the joinder of the banks? 10 Herbstein & Van Winsen, The Superior Practice of South Africa, 4th ed, 1997, p 187.

[53] Mr. Namandje argued and with all the powers of persuasion at his command that this is not a proper case to stay the proceedings but one where the granting of absolution would suffice. He did not cite any authority for this proposed course of action. I have myself not found any light in this regard despite research. I will, in the circumstances, deal with the matter, based on its peculiarities and what I consider to be the demands of justice, coupled with the overriding principles of judicial case management, to the extent that they are relevant. [54] It must be recalled that this is a trial. Furthermore, the trial is not at what may

be described as an infancy or nascent stage, where one or two witnesses have adduced their testimony. The case is nearing completion, with only one party, namely, the Council needing to adduce its evidence, depending on how the application for absolution is decided. In this regard, both the plaintiff and the defendant have closed their respective cases. The question that should be asked and which will probably be decisive is this – what will staying the proceedings pending the joinder of the banks entail? [55] The answer to this question is very plain. To do so will require a gargantuan attempt to unscramble an egg. I say this because if the matter were to be stayed pending the joinder of the banks, then the banks may have to file their own pleadings, which may entail the filing of supplementary pleadings by the other parties, depending on how the pleadings filed by the banks affect their respective cases. Furthermore, there may be a need to revisit the pre-trial order and for the banks to file their witness' statements, but that is not all. [56] As indicated above, evidence has been led by the parties. A need may arise for the reopening of the already closed cases or the recalling of all the witnesses who have testified in order for the banks to cross-examine and to put their respective cases to them before the banks are at par and are able to adduce their own evidence. This would obviously be subject to the banks' witnesses being cross-examined by the other parties' legal practitioners. This would be very unworkable and amount to nothing less than trying, as stated earlier, to unscramble many scrambled eggs laid by different hens. This is a formidable proposition indeed. [57] Sight should also not be lost of the fact that this matter comes from 2013 and has been interned in the court's belly, including that of the Supreme Court, for some time. To stay the proceedings would be very detrimental to the finalisation of the case, insofar as the absolution is concerned and this would do the overriding objectives of judicial case management a decisively telling blow.

[58] What should not be allowed to sink into oblivion as this issue is being discussed, is that the defendant's legal practitioners knew about the mortgage bonds as they, it appears, registered at least one of the bonds on behalf of the one of the banks. At that time, it is common cause that this matter had already been launched. They had a duty as soon as the developments took place, to bring those to the attention of the defendant so that a timeous, workable, less costly decision is made as to the proper approach to the matter at the relevant time. [59] It is also a fact that the plaintiff stated in her witness' statement dated 16 June 2016, that she obtained a loan from Nedbank for the purchase of the land only. In the circumstances, it is accordingly clear that the defendant knew or ought to have known that Nedbank, at least would have had an interest in the order he sought. [60] The defendant cannot himself be said to have been in the dark about the mortgage bonds because their endorsement is on the plaintiff's deed of transfer, which the defendant attached to his counterclaim and is marked as 'JM4'. The deed of transfer ex facie bears the dates 3 June 2010 (cancelled on 14 December 2011) and 14 December 2011, respectively. [61] As demonstrated above, it would be oppressive and unworkable both to the court and the other parties to order the joinder of the banks so late in the day at this particular juncture. At the same time, the court cannot, in good conscience, decide this matter in deliberate oblivion of the rights and interests of the banks, recognising that the relief sought by the defendant directly affects their rights and

interests. [62] In this regard, it appears to me that the only decision which protects the banks' interests and those of the defendant in the peculiar circumstances, as well, and which causes less dislocation both to the court and the parties, is that of granting absolution from the instance. It must be mentioned that this decision has not been taken lightly but with a heavy heart on the one hand, but with a full heart, on the other. [63] This is so because the defendant is to blame for the non- joinder of what are clearly necessary parties to the proceedings. Although he inevitably has to bear the burden of the costs, he would still retain the right, if so advised, to institute his claim afresh, ensuring in the process, that all the affected parties are before court. This would hopefully ensure that the matter proceeds to finality without glitches of the kind presently afflicting the instant case. [64] It must be stressed that a party who institutes proceedings, has an abiding duty to ensure that all parties foreseeably affected by the relief he or she seeks, are properly and timeously served with the relevant process. Where developments render the joinder of a new party to be effected, the party instituting the proceedings or otherwise legally obliged to ensure that all parties affected are before court, must take the appropriate steps as soon as the need to join the parties becomes apparent. If that is not done, then the court may have no option but to issue an order that is appropriate to protect the interests of the party not before court as well. [65] I therefor do not agree with Ms. Angula's argument that the duty to join the banks fell on the plaintiff. Proper regard being had to the relief sought in plaintiff's claim, shows indubitably, that it had no bearing or effect on the rights and interests of the banks. It was geared at one person and one person alone – the defendant. As discussed elsewhere in this ruling, it was instead the relief sought by the defendant in his counterclaim that stands to prejudicially affect the rights and interests of the banks, hence the need for the defendant to join the banks. [66] I am of the considered view in this connection that the interests of justice, that should guide a decision on whether or not to grant an application for absolution from the instance, as recorded in para 20 above, stand on the mountain top and proclaim in unison that absolution from the instance is the only and appropriate order in the instant case. [67] This finding, I must necessarily state, affects the entire counterclaim filed by the defendant in this matter, namely both claims 1 and 2.

[68] Mr. Namandje further argued that the defendant's case, in any event, does not find resonance in the Communal Land Reform Act in any event. In this regard, he referred the court to the provisions of s 21, which have the following rendering: 'The following customary land rights may be allocated in respect of communal land –

(a) a right to a farming unit;

(b) a right to a residential unit;

(c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the Gazette for the purposes of this Act.'

[69] When proper regard is had to the defendant's claim, to the extent that it appears or is contended on his behalf to be based on the aforesaid Act, it does not appear that the rights that the defendant seeks to enforce, fall within the rubric of the above section, in my considered view. In any event, when one has regard to the provisions of s 16 (2) of the Act, and that is if the defendant has made a case for a right under the Act, it appears that the compensation payable for land that may have been withdrawn from a person, is payable by the Minister and not a private individual or the town council concerned. [70] To buttress the latter point made above, the Supreme Court in Tuhafeni Jonas v Ongwediva Town Council stated the following:11 'Once the boundaries of Ongwediva Town Council were extended by proclamation to engulf Omatando area within its boundaries, the State acquired all the rights of the residents of that area as provided for by s 16(2). Section 16(3) further provides that the compensation payable to a person in terms of subsection (2) must be determined –

(a) by agreement between the Minister and the person concerned; or

(b) failing such agreement, by arbitration in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965).' [71] There appears to be no doubt that the land, which is the subject of this dispute, became appropriated to the State and thus formed part of land allotted to the Council in this case. It would appear that the Council had power and was authorised to alienate the land in terms of the law. Its case, as put, is that it alienated the property to the plaintiff herein. [72] Another issue that appears to place the defendant's case, as argued by both Ms. Kishi and Mr. Namandje, relates to the provisions of s 28(1) of the Act. It provides that a person who immediately before the commencement of the Act held a right in respect of occupation of communal land referred to in s 21, such person 'shall continue to hold such right unless –

(c) such land reverts to the State by virtue of the provisions of subsection (13)'. [73] There is no doubt that the land in question reverted, so to speak, to the State as envisaged above and this places the defendant's case within the realms of absolution. He has produced no evidence that his right was registered and recognised in terms of the Act. I may add as well that the defendant's case, namely, that he purchased the land from the plaintiff's grandparents, finds no support in law, as communal land is in terms of the 11 Case No: SA 16/2018 (Delivered on 27 January 2020), p 16, para 30. applicable law, not available for purchase. It was not his case that he bought the business only, as argued by Ms. Angula and this evident from the plaintiff's witness' statement.12 He states that he bought both the business and the land. [74] In point of fact, s 17(2) appears, as argued by Ms. Kishi, to prohibit the sale of communal land. The said provision reads as follows: 'No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.' This provision should be viewed in the context of s 17(1), which states that all communal land areas vest in the State and are held in trust for the traditional communities residing in those areas for the purpose of promoting economic and social development. [75] Another basis raised by the defendant for his title or right to the land is s 35 of the Act. A proper reading of that provision suggests that a person who, before the coming into force of the Act

held a right to land, not being one under customary law, to occupy communal land, may continue to occupy such communal land subject to the same terms and conditions on which he occupied the said land before the coming into force of the Act. This right maintains until - (a) such right is recognised and a right of leasehold is granted to such person; (b) such person's claim to the right is rejected upon an application provided in subsection 7; (c) the person declines or fails to accept an offer of leasehold in terms of ss (7) and such land reverts to the State by virtue of the provisions of ss (13). The defendant failed to bring his case within any of the above sub-paragraphs (a) to (d) above. [76] As a general observation, both Ms. Kishi and Mr. Namandje make the valid point that the matter must be confined to the boundaries set by the pleadings. In this regard, the major complaint made by both of them is that the defendant seeks relief based on provisions of statutes that were never pleaded and never formed the substratum of his case. Testimony to this is 12 Page 17, para 72.2. that there is not a single statutory enactment cited or referred to in the defendant's counterclaim. [77] A party must properly and fully plead the case that the opponent is required to meet. It is unfair and improper to panel-beat one's case as the proceedings advance, fitting it to the inevitabilities of the case. This approach serves to rob both the other party and the court of the opportunity to properly deal with that matter. A case in point in this regard is the reference to the Minister for Urban and Rural Development not having authorised the transaction allocating and transferring the property to the plaintiff. [78] This is an issue that was never raised in the pleadings by the defendant but it found its way into the mix when the application for absolution from the instance was argued. In this regard, it must be clear that the case at absolution relates to the success or otherwise of the defendant's counterclaim at this stage. If this had been an issue and had been properly raised, the defendant would have made it an issue and grounded an application for absolution from the instance on the said ground. No such application was moved by the defendant.

Conclusion

[79] Having due regard to what has been discussed above, the court is fortified in the conclusion that for the reasons advanced above, the plaintiff and the Council, have successfully argued a case for the granting of the application for absolution from the instance. It accordingly is appropriate for the court, in the circumstances, to grant the application for absolution from the instance, as prayed by the plaintiff and the Council. Order [80] In view of the conclusion arrived at above, the order that commends itself as condign to issue in the circumstances, is the following:

1. The application for absolution from the instance, moved by the Plaintiff and the Council regarding the Defendant's counterclaim, is hereby granted as prayed.

2. The Defendant is ordered to pay the costs of the application.

3. The matter is postponed to 2 July 2020 at 08:30 for the issuance of directions for the further conduct and finalisation of the matter.

T. S Masuku Judge APPEARANCES: PLAINTIFF: S. Namandje Of Sisa Namandje Inc, Windhoek. FIRST DEFENDANT: E. Angula Of. AngulaCo Inc., Windhoek. SECOND DEFENDANT: F. Kishi Of Dr. Weder, Kauta & Hoveka Inc., Windhoek. .

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