

UNREPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2921/2014

In the matter between:

HILDA LAURA NEETHLING

PLAINTIFF

and

ELIZABETH JOHANNA BRINK N.O.

DEFENDANT

Neutral citation: *Neethling v Brink N.O.* (Reasons) (I 2921/2014) [2016] NAHCMD 154 (27 May 2016)

Coram: OOSTHUIZEN J
Heard: 9, 10 and 12 February 2016
Order Delivered: 31 MARCH 2016
Judgment released: 30 May 2016

Flynote: Usufruct registered in the title deed when farmland was transferred and registered in the name of the donee.

Summary: Usufruct in favour of donor of farmland registered in title deed. Stipulated that usufruct is to be ceded to donor's wife at the death of the donor. Plaintiff (wife of donor) was married out of community of property with the donor.

ORDER

Having read through the pleadings, the managing orders and joint reports by the parties and after having heard evidence, and arguments by Mr Frank SC, counsel for the plaintiff and Mr Heathcote SC with Ms Van der Westhuizen, counsel for the defendant-

THE FOLLOWING ORDER IS MADE:

1. Plaintiff's claims are dismissed.
2. Plaintiff is to pay the defendant's costs, to include the costs of one instructing and two instructed counsel.

JUDGMENT

OOSTHUIZEN J:

[1] Plaintiff is the widow of the late Tielman Johannes Neethling who passed away on 16 December 1998 and to whom she was married out of community of property.

[2] During March 1990 the late husband of the plaintiff donated a farm, Farm Remini No. 308 in the Otjozondjupa Region to his son, the late Gabriël Stephanus

Neethling. The said farm was held by the late son under deed of transfer No. T 1031/1990.

[3] The donation was subject to an usufruct in favour of the donor and father of Gabriël Stephanus Neethling with a further stipulation that the said usufruct must be ceded to the plaintiff upon the donor's death.

[4] Plaintiff now claims a declaration that she has a lifelong usufruct over the said farm and registration thereof.

[5] When the case commenced on 9 February 2016, plaintiff's particulars of claim from paragraph 4 onwards reads as follows:

4.

During his life and on or about March 1990 Tielman Johannes Neethling donated a farm, namely Farm Rimini No 308, of which he was the owner, to the deceased. The full particulars of the farm is as follows:

CERTAIN:	Farm Rimini No. 308 In Registration Division "J" Otjozondjupa Region
MEASURING:	10782,4062 hectares
HELD:	under Deed of Transfer No T 1031/1990

5.

The donation was subject to the following condition which is reflected on Deed of Transfer, T 1031/1990:

"Subject to a usufruct in favour of Tielman Johannes Neethling, ..., which usufruct must be ceded at his death to Hilda Laura Neethling..., who are married out of community to one another".

6.

Tielman Johannes Neethling died on 16 December 1998. Plaintiff and the deceased were advised that it was necessary to register a lifelong usufruct in plaintiff's favour to make her rights effective against parties other than the deceased and as to the costs involved in such registration.

7.

Plaintiff and the deceased during or about the end of 2005 and at Windhoek orally agreed as follows:

7.1 That two mortgage bonds in favour of plaintiff be registered over the said farm for a total capital amount of N\$ 2 950 000,00 in favour of the plaintiff in respect of monies owed to her by the deceased;

7.2 That the plaintiff's usufruct not be registered but that the deceased would bequeath the farm to the plaintiff in his last will and testament and as long as this was done the deceased would not be obliged to register the said condition of the donation upon which he acquired the farm, i.e. the usufruct in favour of the deceased.

8.

The deceased acknowledged the aforesaid agreement by allowing the registration of the said two bonds and by nominating the deceased in his last wills and testaments subsequent to the said agreement (and hence was released from the obligation to register the said usufruct as far as the plaintiff and deceased was concerned) up to his penultimate last will and testament. The deceased also orally confirmed the said agreement as late as October or November 2013 at Swakopmund, Namibia.

9.

Unbeknown to plaintiff the deceased in his ultimate last will and testament dated December 2013 bequeathed the farm to his spouse and not to plaintiff.

10.

The defendant refuses to recognize the aforesaid usufruct of the plaintiff.

11.

In the premises –

11.1 The usufruct already registered as part of the Deed of Transfer and mentioned above on a proper interpretation thereof constitutes two successive usufructs and plaintiff is currently the usufructuary in respect of the said farm. The advice plaintiff received to the contrary was wrong in law.

Alternatively

11.2 Plaintiff is entitled to claim that a lifelong usufruct in her favour be registered over the said farm by virtue of the acknowledgments of the deceased that the donation of the said farm to him was subject to such condition and as a consequence of him not adhering to the agreement aforesaid.

In the alternative to paragraph 11 above

12

The agreement referred to above in terms whereof plaintiff foregoes her right to the registration of the usufruct in return for the undertaking by the deceased to bequeath the farm to her, was an invalid agreement and same constituted a *pacta successoria*.

13

Neither the plaintiff nor the deceased was aware, at the time of entering into the agreement that it was contrary to law and invalid.

14

Plaintiff in the bona fide and reasonable belief that the said agreement was valid and enforceable did not insist on the registration of her lifelong usufruct.

15

In the premises the deceased was enriched at the expense of plaintiff in that his estate has as an asset the full dominium of the said Farm Rimini instead of only the bare dominium of the said Farm Rimini.

16

The aforesaid enrichment amounts to N\$ 13 million which amount the estate owes plaintiff.

WHEREFORE PLAINTIFF PRAYS FOR AN ORDER IN THE FOLLOWING TERMS:

1. A declarator that the existing usufruct reflected on the Title Deed of the Farm Rimini No 308, Registration Division "J", 10782,4062 hectares on Deed of Transfer T 1031/1990 constitutes a lifelong usufruct in favour of plaintiff.

Alternatively

That the defendant is ordered to procure that a lifelong usufruct is registered in favour of the plaintiff over the Farm Rimini as described above at the cost of the estate of the late Gabriël Stephanus Neethling.

2. In the alternative to prayer 1

- 2.1 Payment of the amount of N\$ 13 million;

- 2.2 Interest a *tempore morae* on the aforesaid amount at the rate of 20% per annum from date of judgment until payment thereof.

3. Costs of suit.

4. Further and/or alternative relief.’

[6] During the hearing the plaintiff abandoned the sections and parts in her particulars of claim which are highlighted in grey.

[7] During argument the relief which have remained subsequent to the abandonment, was adapted and changed to the following:

- ‘1. Declaring that plaintiff has a lifelong usufruct over the farm Rimini.
2. That defendant is ordered to sign all the necessary documents to enable the plaintiff to register the aforesaid usufruct in the Deeds Office at plaintiff’s costs and should she refuse to do so within 14 days of having been presented with such documentation, the Registrar is empowered to sign the said documentation on behalf of the defendant.
3. Cost of suit.’

[8] The relevant law concerning an usufruct is common cause between the parties.

[9] The effective and applicable law in the circumstances of this case is the following:

- a. The Deeds Registries Act, Act 47 of 1937, section 66, 67 and 68 as follows:

‘66. Restriction on registration of personal servitudes

No personal servitude of *usufruct*, *usus* or *habitatio* purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered, nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered.

67. Reservation of personal servitudes

A personal servitude may be reserved by condition in a deed of transfer of land, if the reservation is in favour of the transferor, or in favour of the transferor and his spouse or the survivor of them, if they are married in community of property, or in favour of the surviving spouse if transfer is passed from the joint estate of spouses who were married in community of property.

68. Registration of lapse of personal servitude

(1) If for any reason a personal servitude has lapsed, the registrar shall, on written application by or on behalf of the owner of the land encumbered thereby, accompanied by proof of the lapse of the servitude, the title deed of the land and, if available, the title deed, if any, of the servitude (which title deed the holder of the servitude shall on demand hand over to the owner of such land) note on the title deed of the land and of the servitude, if the title deed of the servitude has been produced, that the servitude has lapsed.¹

- b. 'Usufruct is a highly personal limited real right which entitles a person to have the use and enjoyment of another's property and to take its fruits without impairing the substance. The holder of this right is termed the usufructuary and the property affected is referred to as usufructuary property. Usufruct is commonly employed where a testator wishes to provide an income after his death to one person (for example his spouse), but desires the property itself to devolve upon another person (for example his son).'¹
- c. Vivier, JA in *Durban City Council v Woodhaven Ltd and others*²:

'What is quite clear from the Roman and Roman-Dutch authorities to which I have referred is that they regarded a personal servitude as inalienable. This was also the effect of the decision of this Court in *Willoughby's Consolidated*

¹ LAWSA Vol 25 para 64.

² 1987(3) SA 555 AD at 561 G-H.

Co Ltd v Copthall Stores Ltd (supra) which was followed in *Hotel De Aar v Jornordon Investment (Edms) Bpk* 1972 (2) SA 400 (A). I have already referred to what Solomon JA said in Willoughby's case about the nature of the rights under a personal servitude. In the course of his judgment in that case Innes JA said very much the same at 282:

"From the very nature of a personal servitude, the right which it confers is inseparably attached to the beneficiary. *Res servit personae*. He cannot transmit it to his heirs, nor can he alienate it; when he dies it perishes with him."

d. On 562 B-D³:

'In an earlier case *Van der Merwe v Van Wyk* NO 1921 EDL 298 (a decision of the Full Bench of that Court) it was held that a usufruct is such a personal right that it cannot be ceded to anyone but the owner of the property over which the usufruct exists and that, consequently, it does not fall into the community of property between husband and wife. Finally, in this regard I should refer to s 66 of the Deeds Registries Act 47 of 1937 which gives full effect to our common law by providing that no personal servitude of usufruct, *usus* or *habitio*, purporting to extend beyond the lifetime of the person in whose favour it is created, shall be registered. Nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby be registered.'

[10] The view this court entertain on the subject matter is that the usufruct created as evidenced by Deed of Transfer No. T 1031/1990, was that a lifelong usufruct in favour of plaintiff's deceased husband existed. It lapsed on his death. The usufruct was clearly not successive nor joint and did not vest in plaintiff after the donor's demise. The said usufruct could also not be ceded. It lapsed.

³ Durban City Council, op cit.

[11] It seems that the estate of the plaintiff's late husband was finalised in accordance with the common law and section 66 of the Deeds Registries Act, Act 47 of 1937.

[12] It was never the case of the plaintiff that a fresh, independent or new usufruct over Farm Rimini was granted to her by her late son.

[13] In replying argument counsel for plaintiff indicated that the last word in paragraph 7.2 of the particulars of claim (see para 5 above), namely "deceased" was an inadvertent error, and should be replaced with "plaintiff". The condition of the donation upon which her late son acquired the farm has remained an obstacle for plaintiff. The cession part thereof was simply inoperative and contrary to law.

[14] The usufruct in Deed of Transfer No. T 1031/1990 was in favour of plaintiff's late husband, it was not successive, neither was it joint.

[15] In the premises it would be superfluous to discuss the evidence of the plaintiff in detail. Through the pleadings and the evidence plaintiff clearly latched to and build her case on the condition of donation.

[16] Mr Swanepoel's evidence that he effected the registration of the endorsement of the cancellation of the usufruct in Title Deed No. T 1031/1990 in terms of section 68(1) of the Deeds Registries Act, Act 47 of 1937, during 2006 on the instructions (and after advise) of the late Gabriël Stephanus Neethling, is noted.

[17] Defendant clearly pleaded that the usufruct in favour of the late Tielman Johannes Neethling lapsed⁴ and that the previously existing usufruct did not constitute two successive usufructs.⁵

[18] Plaintiff's late son could at any time have given the plaintiff an usufruct after he acquired full dominium, but did not. If he had, it should have been embodied in a

⁴ Pleadings Bundle, pp 12 and 13.

⁵ Pleadings Bundle, p 16.

notarial deed and registered against the title deed of the farm subsequent to formal requirements which had to be met.

[19] The necessity to consider the remaining issues of law relating to cession, prescription and enrichment do not arise.

[20] Consequently, this Court ordered on 31 March 2016 that having read through the pleadings, the managing orders and joint reports by the parties and after having heard evidence, and arguments by Mr Frank SC, counsel for the plaintiff and Mr Heathcote SC with Ms Van Der Westhuizen, counsel for the defendant-

THE FOLLOWING ORDER IS MADE:

1. Plaintiff's claims are dismissed.
2. Plaintiff is to pay the defendant's costs, to include the costs of one instructing and two instructed counsel.


GH OOSTHUIZEN
Judge

APPEARANCES

PLAINTIFF: T Frank SC (instructed counsel)
By Dr Weder, Kauta & Hoveka Inc., Windhoek

DEFENDANT: R Heathcote SC & C Van der Westhuizen (instructed
counsel)
By Van Der Merwe-Greef Andima Inc., Windhoek