CASE NO. A 350/2008

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NORTHGATE PROPERTIES (PTY) LTD
APPLICANT

and

THE TOWN COUNCIL OF THE MUNICIPALITY OF HELAO NAFIDI **1ST RESPONDENT**

MARTHA NAMUNDJEBO-TILAHUN N.O. **2ND RESPONDENT**

THE REGISTRAR OF DEEDS **3RD RESPONDENT**

THE MINISTER OF REGIONAL AND LOCAL GOVERNMENT & HOUSING & RURAL DEVELOPMENT **4TH RESPONDENT**

HADDIS TILAHUN **5TH RESPONDENT**

CORAM: MILLER, AJ

Heard on: 01 April 2011

Delivered on: 05 May 2011

JUDGMENT

MILLER, AJ : [1]

In Namibia certain areas of land are known as communal land. Their distinguishing feature is that the ownership thereof vests in the State who currently deals with the land according to the provisions of the Communal Land Reform Act, Act No. 5 of 2002. The statutory regime pre-dates the independence of Namibia at a time when Namibia was still administered by the Republic of South Africa. Although the State is the owner of the land, it holds the land in trust on behalf of traditional communities and their members who live there. The Communal Land Reform Act is administered on behalf of the State by the Ministry of Lands, Resettlement and Rehabilitation. As part of its functions the Ministry grants rights to occupy specific areas within the communal land to specific individuals who reside at or wish to conduct business from the specific areas. In common parlance this authority is referred to as a "Permission To Occupy" or in its abbreviated form as a "PTO". I will, when I refer to this, likewise, use the abbreviated form "PTO".

When circumstances require it, the Local Authorities Act, Act 23 of 1992 entitles the Minister of Local Government and Housing to establish by notice in the Gazette any area as a local authority and to declare that area to be a municipality, town or village under the name specified in that notice.

If the area of a local authority thus established is in an area of communal land the ownership of the immovable property vests henceforth in the local authority so established. The rights of ownership insofar as they concern amongst others the alienation of such immovable property is not unlimited but curtailed by several provisions contained in the Local Authorities Act. I will refer to some of those, relevant to this case at the appropriate time.

[2] Thus it came about that on 1 September 2002 the Helao Nafidi Town Council was established and its establishment was published in Government Gazette No.

3054 of 2003. Prior to the establishment of the council the area upon which it was established formed part of communal land and was occupied by virtue of PTO's issued to those who resided there. A specific piece of land now known and described as Erf 13, Oshikango was likewise occupied in terms of a PTO, which was renewed from time to time, the latest renewal being issued on 24 October 2006.

It is common cause that the PTO was issued to Namundjepo Northgate Properties (Pty) Ltd. That name was changed to Northgate Properties (Pty) Ltd on 28 May 2008. It is this entity which features as the Applicant on these proceedings. Clause 10 of the PTO forms the cornerstone upon which the Applicant bases its claim for relief and it reads as follows:

> "10. Options
> Should title to the allotment become possible, the Government of Namibia shall give the said holder the first option of purchase thereof, the price being equivalent to the average of two sworn valuators, one to be appointed by the Government of Namibia and the other by the holder."

[3] It is common cause that Erf 13, as I will continue to refer to it was sold by Deed of Sale dated 13 June 2007, to Martha Namundjepo-Tilahun acting in her capacity as the nominee trustee for the Namundjepo Family Trust to be formed. On 3 July the Erf 13 was transferred to the Trustees for the time being of the Namundjepo Family Trust. This entity was cited in these proceedings through the second respondent who was cited in her capacity as a trustee. The fifth respondent who is likewise a trustee was joined to the proceedings at a later stage.

It is this transaction comprising the sale of Erf 13 and it subsequent transfer which precipitated the present proceedings which the Applicant launched.

Relief claimed

[4] The relief claimed by the Applicant, in its amended form is the following. The respondents were called upon to show cause why -

"1.1 The decision of the first respondent taken on or about 13 June 2007 to enter into an agreement of sale with the second respondent for the purchase of immovable property belonging to the first respondent such property described as

Erf 13, Oshikango
In the town of Helao Nafidi
Registration Division "A"
Oshikango Region
(hereinafter referred to as "the property")

should not be declared *ultra vires* the powers of the first respondent and accordingly null and void, alternatively be reviewed and set aside in terms of Rule 53 (1).

1.2 declaring the agreement concluded between the first and second respondents pursuant to the decision aforesaid – Annexure **"HH13"** to the founding affidavit – in terms whereof the second respondent purchased the property from the first respondent to be null and void.

1.3 directing and ordering the third respondent to cancel the entry in the Deeds Registry indicating that the property belongs to the second respondent.

1.4 directing that the matter be referred back to the first respondent and that the first respondent consider applicant's exercise of its right of pre-emption in respect of the property.

Alternatively

2.1 declaring the agreement concluded between the first and second respondent aforesaid – Annexure "HH13" to the founding affidavit – in terms whereof the second respondent purchased the property from the first respondent to be null and void.

2.2 directing and ordering the third respondent to cancel the entry in the Deeds Registry indicating that the property belongs to the second respondent.

2.3 directing that the matter be referred back to the first respondent and that the first respondent consider applicant's exercise of its right of pre-emption."

In addition the applicant seeks a cost order against those of the respondents who oppose the application.

The applicant was represented at the hearing by the Mr van der Nest SC who was assisted by Mr Corbett.

The response of the respondents

[5] The third and fourth respondents did not oppose the application. Although the first respondent indicated that it would not oppose the application and would abide the decision of this Court, it nonetheless filed an affidavit by its Chief Executive Officer, Mr Michael Pandeni Sheelongo, "….. to set out the facts which are within the Councils knowledge and which may be relevant in assisting the Court to come to its decision". The facts disclosed were indeed relevant and helpful and assisted me to come to a decision.

[6] The second and fifth respondents opposed the application. It took issue with the applicant on the following:

1) It was contended that the Trust was not properly before the Court, because the fifth respondent had not been cited. As I had indicated the fifth respondent was subsequently joined at the behest of the second respondent. Nothing more was made of the issue at the hearing and the point was not pursued.

2) The decision to sell the property does not constitute administrative action. It remains a purely commercial transaction to which the principles articulated in *Open Learning Group v Secretary Ministry of Finance and Others 2006 (1) NR 275* find no application.

3) Even though the impugned decision may be administrative action and thus capable of review there was inordinate delay in instituting these proceedings with the result that I should decline to exercise this court's power of review.

4) The agreement of sale was indeed a valid and binding transaction. During argument before me this point was transformed somewhat to the effect that whether valid or not, the first respondent is estopped from denying the validity of the sale.

5) As a fall back position it was contended that even though the sale might have been invalid ab initio, that fact became one of academic interest because the property had subsequently been transferred in the Deeds Registry. Thus, so the argument went, by virtue of the abstract theory of transfer, recognized in our law, the validity of the transfer of the property did not depend on the validity or otherwise of the agreement that preceded the transfer.

6) Lastly, it was contended that absent a prayer to set aside the transfer as invalid, the applicant was not entitled to the relief claimed in prayer 1.3 of the notice of motion or the alternative.

Mr Bokaba SC, assisted by Mr Namandje appeared for the second and fifth respondents.

The Review Application

[7] A convenient and indeed decisive starting point is to be found in the affidavit deposed to by Mr Sheelongo on behalf of the first respondent, and more particularly the facts surrounding the conclusion of the agreement of sale. These facts were not placed in issue by the applicant nor by the second and fifth respondents and I accept the facts as correct.

[8] According to Mr Sheelongo the first respondent established a Land Allocation Committee towards the end of 2005. Its function was to consider applications for the purchase and sale of immovable property and to make recommendations about these to the Town Council. Once the first respondent resolved the sell a portion of land by way of private treaty, the permission of the Minister of Regional and Local Government and Housing is required before the transaction proceeds. This latter requirement is in accordance with section 31 (t) of the Local Authorities Act I pause to mention, which requires that a local authority council, which by definition includes a municipality, a township and a village may not, subject to the provisions of Part XIII of that Act sell, hypothecate or otherwise dispose of or encumber any immovable property, without the prior approval of the Minister and then subject to such conditions, if any, as may be determined by the Minister. The provisions of Part XIII of the Act do not apply to the first respondent. Those provisions exempt a municipality, which the first respondent is not, from obtaining the prior permission of the relevant Minister.

[9] Mr Sheelongo states that the former Chief Executive Officer of the first respondent, Mr Shivolo, entered into the deed of sale with the second respondent

without the consent and knowledge of the first respondent. The first respondent had in any event resolved at that time not to sell the property until certain claims to the land by the Namundjepo family had been resolved.

[10] I conclude on these undisputed facts that the first respondent did not take a decision to sell Erf 13 to the second respondent. Accordingly there is no decision subject to review and the relief claimed in this regard must fail. To the credit of the applicant, the fact that the first respondent did not take a decision to sell Erf 13 was probably not known to the applicant when the proceedings were launched.

The validity of the Agreement

[11] My finding that Mr Shivolo did not have the authority of the first respondent to sell and the consent of the relevant Minister, leads to the inevitable finding that the sale was null and void ab initio. To that I must add that in terms of section 31 A of the Local Authorities Act, any contract entered into shall be signed by the Chief Executive Officer of the Local Authority Council and shall be co-signed in the case of a municipality or a town council by the chairman of the management committee or any staff member of that council generally or specifically authorized thereto. This provision is plainly cast in peremptory terms and the failure in the instant case to comply with the provision provides a further basis upon which the agreement is null and void.

[12] Mr Bokaba, in argument contended that the agreement can not be declared invalid as the first respondent is estopped from denying the validity of the agreement. I do not agree with this argument.

[13] In *Union Government v Viannin Ferro-concrete (Pty) Ltd 1941 AD 43* the court accepted the definition of estoppel stated in Spencer Bowes; The Law Relating to Estoppel as being part of South-African Law and now part of our law.

[14] The definition reads as follows:

> "Where one [person (i.e. representor) has made a representation to another person (i.e. representee) in words or by acts or conduct (being under a duty to the representee to act or speak) by silence or inaction, with the intention (actual or presumptive) and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may take place afterwards between him and representee, is estopped as against the representee from making or attempting to establish by evidence, any averment substantially at variance with the former representation, if the representee, at the proper time, objects thereto."
>
> (Emphasis added).

[15] The issue of estoppel plainly does not arise within the framework of this case. There is no litigation between the second and fifth respondent on the one hand and the first respondent on the other. The issues that arose in this matter are issues between the applicant and the second and fifth respondents. Whatever representation the first representation may have made can not be raised as a defence against the applicant.

[16] The second and fifth respondents have further difficulties in this regard. They did not raise the issue of estoppel on the papers, as they should have done. The matter of estoppel was raised for the first time during argument before me. This is not permissible (J C Sonnekus; The Law of Estoppel in South Africa; Second Edition, p. 17).

[17] Moreover the second and fifth respondents bear the onus of proving the defence. There are simply no facts sufficient to discharge that burden of proof.

The validity of the transfer

[18] Mr Bokaba relies on two pieces of evidence in support of his argument that the first respondent validly caused Erf 13 to be transferred in the Deeds Registry.

[19] Firstly, he points to the fact that on 3rd of July 2008, Mr Shivolo executed a power of attorney authorizing the conveyancer to effect the transfer of the property. There is however not a shred of evidence that Mr Shivolo when he executed the power of attorney, did so with the knowledge and consent of the first respondent. The probabilities are that he had no such authority.

[20] Secondly, Mr Bokaba refers to a series events which took place at the time when the applicant became aware that Erf 13 had been sold and the transfer of the property was about to take place. Initially the first respondent on 24 March 2005 addressed a letter to the applicant. The text of the letter reads as follows:

> "Re: Offer to purchase
>
> 1. Helao Nafidi Town Council was established in terms of the Local Authorities Act, Act 23 of 1992 as amended and it administers the civic administration for Oshikango, Engela/Emafo, Ohangwena and Oshona. All land within the town of Helao Nafidi belongs to the Town Council.
>
> 2. Currently you are the PTO holder of PLOT/ERF No. 13 measuring 20,435 m^2. We would like to take this opportunity to offer you the first opportunity to purchase off such PLOT/ERF (details available at the office).
>
> You are humbly requested to purchase off your PLORT/ERF within a reasonable period of 21 days from the date of this notice.

We count on your usual support and co-operation."

The letter was signed by Mr Shivolo.

[21] Thereafter followed an exchange of correspondence between the applicant and the first respondent and on 5 June 2007 the applicant submitted an offer to purchase the property and to enquire what the purchase price was, which it offered to deposit to the first respondent's bank account. Unbeknown to the applicant Mr Shivolo entered into the deed of sale with the second respondent some days later. The applicant continued to make enquiries regarding progress to no avail. Remarkably Mr Shivolo did not advise the applicant that Erf 13 had in fact been sold.

[22] It is apparent from the affidavit filed by Mr Shivolo that on or about the 24th of July 2008 the legal representatives of the applicant telephoned both himself and the conveyancer, Mrs Greyvenstein, and threatened to bring an urgent application to prevent the transfer of the property. By then the necessary documents had been lodged in the Deeds Registry and the transfer was imminent. Mr Sheelongo adopted the stance that the Council would only consider stopping the transfer once such application was launched. As matters turned out the transfer took place the next day.

[23] Mr Bokaba points to the stance adopted by Mr Sheelongo when the applicant threatened to institute legal proceedings. This, he argues, is sufficient evidence that the first respondent had resolved to transfer the property. I do not agree. On the facts in their totality it is clear that no such decision was taken. I would have expected Mr Sheelongo to disclose the resolution by the first respondent to authorize the transfer, had such a resolution been taken. Mr Sheelongo attached to his affidavit all the documents in possession of the first respondent relevant to Erf 13. There is no resolution to transfer Erf 13 amongst those documents

[24] Even if my findings on the facts are wrong, on this issue, the point taken must fail as a matter of law.

[25] As a general proposition it is correct that in the abstract system of passing of ownership, the transfer is independent from the underlying contract, provided that the parties to the transaction have the mutual intention that ownership should pass.

[26] I refer in this regard to the discussion of the topic by Prof. C G van der Merwe in *LAWSA Vol. 27, para. 203 at 110*. The learned authors of Silberberg and Schoeman; The Law of Property, Third Edition, state the following at p. 84.

> "In terms of the abstract theory the underlying contract and the act of transfer (consisting of the real agreement plus delivery of registration) legally form two independent acts, and a defect attaching to the underlying contract will consequently not necessarily also attach to the real agreement."

[27] There are, however, certain recognized exceptions to the general rule in our law. One of those exemptions is that non-compliance with a statutory requirement, may render invalid not only the underlying agreement but also the real agreement. Whether that is so or not in any given case depends on the intention of the legislature.

(*Oshakati Towers (Pty) Ltd v Executive Properties CC and Others (2) 2009 (1) NR 232 at 245 G – H)*.

[28] In this matter the conclusion of the underlying agreement did not comply with the requirement of the Local Authorities Act, 1992. It required the prior consent of the relevant Minister as a peremptory requirement. The State has a vested interest

in the manner in which local authority councils go about their business and how they dispose of and treat the land within their areas of jurisdiction.

[29] It is for this reason that the Minister is granted regulatory powers when a town council like the first respondent wishes to sell land to a third party, inasmuch as the Minster's prior consent is a requirement. Plainly it is the intention of the Legislature that town councils should not be permitted to alienate its land without the consent of the Minister. This intention and object of the legislature will be defeated if the real agreement is allowed to stand, despite the defects in the underlying agreement.
In this case the defect in the underlying agreement affects the real agreement rendering it likewise invalid.

[30] I turn to the last point raised by Mr Bokaba which is to the effect that there ought to have been a prayer declaring the transfer invalid. My finding that the act of transferring the property is invalid is not dependent on a prayer seeking such relief in specific terms. It is sufficient that I in that event grant the applicant the relief claimed in paragraph 1.3 of the Notice of Motion.

[31] It follows that the applicant is entitled to relief which I will grant in the order issued at the conclusion of this judgment.

[32] It is for that reason that I must decide upon the Conditional Counter Application filed by the second and fifth respondents. In essence they claim that the records of the fourth respondent should be rectified to reflect the holder of the PTO in respect of Erf 13 to be George Namundjepo in his capacity as joint executor in the estate of the late Eliakim David Namundjepo, alternatively the Namundjepo Family Trust.

[33] The application is premised on the fact that the transfer of the PTO to the applicant was done in error inasmuch as the PTO issued to Mr George Namundjepo on 1 October 1996 and issued to him in his personal capacity, should have been issued to him in his capacity as the executor in the estate of the late Eliakim David Namundjepo.

[34] It is apparent, however, that this is a belated attempt on the part of the Trust to acquire rights in and to Erf 13. The fact that Mr George Namundjepo acquired the PTO in his own name and that it was subsequently transferred to the applicant was known by the second respondent and the Namundjepo family for many years prior to the counter claim application being launched. So was the fact that the applicant was conducting business on Erf 13. On the evidence as a whole and the probabilities the second and fifth respondents fail to make out their case. It follows that the counter application must be dismissed.

[35] In the result I make the following orders:

1. The agreement of sale concluded between the first and second respondents signed on 13 June 2007 in terms whereof Erf 13, Oshikango was sold to the second respondent is declared null and void and of no force and effect.

2. The third respondent is directed to cancel the entry in the Deeds Registry indicating that the property belongs to the second respondent.

3. The matter is referred back to the first respondent to consider the applicant's exercise of its right of pre-emption in respect of the property.

4. The conditional counter application is dismissed.

5. The second and fifth respondents are ordered to pay the costs of this application and the conditional counter application, jointly and severally, the one paying the other to be absolved such costs to include the costs of one instructing and two instructed counsel.

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MILLER, AJ

ON BEHALF OF THE APPLICANT ADV. VAN DER NEST, SC,

ASSISTED BY ADV.

CORBETT

Instructed by: ENGLING, STRITTER &

PARTNERS

ON BEHALF OF THE 2ND & 5TH RESPONDENTS: ADV. BOKABA,

SC ASSISTED BY MR

NAMANDJE

Instructed by: SISA NAMANDJE &

CO.