

IN THE HIGH COURT OF NAMIBIA

CASE NO. I 1690/2010

In the matter between:

JEREMIA LUKAS MUADINOHAMBA
and

PLAINTIFF/RESPONDENT

KATIMA MULILO TOWN COUNCIL

1st DEFENDANT/EXCIPIENT

**THE CHIEF EXECUTIVE OFFICER OF
THE KATIMA MULILO TOWN COUNCIL**

2nd DEFENDANT/EXCIPIENT

**THE MINISTER OF REGIONAL AND LOCAL
GOVERNMENT, HOUSING AND RURAL
DEVELOPMENT**

3rd DEFENDANT /EXCIPIENT

CORAM: **GEIER, AJ**

HEARD ON: 2011.02.14

DELIVERED ON: 2011.02.15

JUDGMENT

GEIER, J: [1] The Plaintiff in this matter has instituted an action against the Katima Mulilo Town Council, its Chief Executive Officer and the Minister of Regional and Local Government and Housing, for an order :

1. *"That the first alternatively the second, alternatively the third defendants sign the deed of sale in respect of the sale of the immovable properties situated at Erven 440, 441, 442, 443, 444 and 335 Katima Mulilo to the Plaintiff within 7 days from date of this order,*

failing which

the deputy sheriff for the district of Katima Mulilo is authorised to sign such deed of sale on the defendant's behalf.

2. *An Order that the defendant take all necessary steps to pass transfer of Erf 440, 441, 442, 443, 444 and 335 Katima Mulilo to the plaintiff within 30 days from this order,*

failing which

the deputy sheriff for the district Katima Mulilo be authorised to take such steps and to sign the necessary documents on the defendant S behalf;

together with ancillary relief.

[2] In support of such relief the Plaintiff alleges that :

(a) "During or by January 2009 the Plaintiff applied to the 1st and 2nd Defendants ,who fall under the jurisdiction of the 3rd Defendant, to purchase certain immovable property situated at Katima Mulilo and belonging to the 1st Defendant to wit erven 440 to 444 and Erf 335.

(b) On or about 16th April 2010 the 1st and 2nd Defendants duly passed a resolution in terms of which the Plaintiff's offer to purchase the aforesaid immovable property was accepted and it was more specifically resolved that the said immovable property will be sold to the Plaintiff at the following purchase consideration:

*(i) Erven 440, 442, 443, and 444 at the price of fifty Namibian Dollars
(N\$50) per square metre.*

(ii) Erf 440 would be transferred to the Plaintiff for free in lieu of payment already made by Plaintiff to the 1st Defendant in the amount of N\$8 160 00.00 and

(iii) Erf 335 at the price of N\$70.00 per square metre.

A copy of the resolution is annexed hereto and marked A.

(c) Subsequent to the aforesaid the 1st Defendant duly adopted the said resolution and the Plaintiff was duly informed thereof.

(d) The Plaintiff has duly tendered payment of the immovable property to the Defendants and have in turn demanded that the relevant Deeds of Sale be signed as is required for the sale of a movable property and that ownership of the immovable property be transferred to the Plaintiff and herewith once again tender such payment.

(e) *Despite demand as aforesaid Defendants fail and to refuse and to neglect to*

i) sign the Deed of Sale of the said immovable property to Plaintiff

ii) transfer ownership of the said immovable property to Plaintiff.

Wherefore.... "

[3] The Defendants have now excepted to the Plaintiff's Particulars of Claim alleging that such particulars lack averments necessary to sustain a cause of action.

[4] More particularly they allege that :

a) "In terms of Section 1(1) of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969 no contract of sale of land or any interest in land, (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.

b. The contract sued upon purports to be a contract of sale in respect of immovable property situated in Katima Mulilo to wit Erven 440 to 444 and Erf 335.

c. The contract is void ab initio and that it has not been reduced to writing nor been signed by the parties thereto.

Wherefore the Defendants/Excipients pray for the following orders

i) that the exception be upheld with costs and

ii) that the Plaintiff's action be dismissed with costs."

[5] A replication was filed thereto. In such replication the Plaintiff alleges that : *"It is not*

Plaintiff/Respondent's claim that land was sold.

a. The Plaintiff/Respondent aver that he applied for land from the 1st and

2nd Defendants/Excipients. Plaintiff/Respondent refer to Paragraph 5 of his Particulars of Claim as if specifically incorporated herein.

b. Plaintiff/Respondent further avers that 1st and 2nd Defendants/Excipients, duly resolved that erven 440 to 444 and 335 be sold to the Plaintiff as stipulated in paragraph 6 of the Plaintiff/Respondent Particulars of claim as if specifically incorporated herein.

c. The Plaintiff/Respondent seeks, inter alia, an order that the 1st Defendant /Excipient alternatively the 2nd Defendant /Excipient sign the Deed of Sale in respect of Erven 440 to 444 and 335 as said out in prayer 1 of the Particulars of Claim, which is specifically incorporated herein.

Wherefore the Plaintiff prays for the exception to be dismissed with costs."

[6] An exception falls to be assessed in line with the approach formulated in the decision of Namibia Breweries Limited v Seelenbinder, Henning and Partners 2002 NLR 155 (HC) by his Lordship Mr Justice Maritz (as he then was) at pages 158H - 159A, as approved in the Gem Farm Investments (Pty) Ltd v Trans Hex Group Limited & Another case, reported in 2009 (2) NLR at page 477 (HC), (and to which decisions counsel unfortunately did not refer the Court), but which authority seems to be in line with the referred to unreported judgement of Kuiri v Bulk Trade, case I 103/05, which was delivered on 31st March 2006 and which remained unreported as well as a more recent unreported judgment delivered in the case of Tazwald Theo July vs the Motor Vehicle Accident Fund Case No. I 3417/2007 delivered on 25th November 2009.

[7] It appears from the Gem Farm Investments (Pty) Ltd v Trans Hex Ltd & Ano¹ case that, that judgment specifically also approves what was stated by the court in Namibia Breweries Limited v Seelenbinder, Henning and Partners at p158H-159A, namely that an exception is to be decided against the following principles:

"It is with this interpretation in mind that the second exception falls to be assessed. The approach to be adopted on an exception was restated by this Court in Namibia Breweries Ltd v Seelenbinder, Henning and Partners 2002 NR 155 HC at 158H-159A in the following terms.

"(The excipient) must satisfy the Court that, on all reasonable constructions of the Plaintiff's Particulars of Claim, as amplified and amended, and on all possible evidence that may be led on the pleadings, ... (that) no cause of action

¹ at page 502 paragraph [49]

is or can be disclosed."

[8] I shall now turn to consider the merits of this exception in line with this approach.

[9] Counsel in this matter were agreed that in order to be of any force and effect all contracts of sale of land have to be reduced to writing and signed by the parties in terms of Section 1(1) of *the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969*.

[10] It is also common cause that no such deeds of sale in respect of Erven 440 to 444 and Erf 335 Katima Mulilo have been reduced to writing, thus the Plaintiff's claim for an order directing the Defendants to sign the respective deeds of sale.

[11] This claim is based on the allegations already quoted above.

[12] Counsel were also in agreement that the relief sought in paragraph 2 of the Particulars of Claim would also not be competent unless the Court would first grant an order in terms of prayer 1.

[13] It is also clear that this exception has to be decided solely with reference to the allegations contained in the Particulars of Claim which must show that such claim particulars are self-contained subject to the principles set out in the *Seelenbinder* and *Gem Farm* cases.

[14] From such claim particulars it appears that the Plaintiff applied to purchase the erven in question during January 2009.

[15] The 1st and 2nd Defendants thereupon passed a resolution in terms of which the plaintiff's offer to purchase, in principle, was accepted and that such erven would be sold to Plaintiff for the specified prices.

[16] It would appear therefore that, essentially, the Plaintiff made an offer by way of application and the Defendant, by way of resolution, indicated some form of acceptance. Such resolution, was purportedly annexed.

[17] I pause to state that the relied upon Annexure A, (the said resolution), was incomplete, in that it only contains two pages and that such annexure does not bear out the allegations set out more specifically in paragraph 6 of the Particulars of Claim.

[18] Nevertheless these allegations indicate that there was agreement, in principle, on the aspects apparently indicated in the resolution and the passing of such resolution also indicated the preparedness on the part of the 1st Defendant to enter into the requisite deeds of sale in respect of the erven in question.

[19] Residually implied in such agreement would obviously also be that such deeds of sale would ultimately have to comply with the requirements set by the statute.

[20] It appears therefore on an analysis of the Plaintiff's pleading that Plaintiff here basis his cause of action upon a separate agreement.

[21] Plaintiff does also not seek to enforce an inchoate agreement for the sale of land against the Defendants. He seems to rely on the *vinculum iuris* created between himself through his application to purchase and the basic obligation, assumed by the Defendants, in terms of the resolution, to accept such offer and to sell at the said prices.

[22] This resolution clearly does not constitute an act of sale. It merely forms the basis upon which the 1st and 2nd Defendants may enter into the envisaged agreements of sale. It forms the basis for the acceptance of an offer from a prospective buyer to buy immovable property from the 1st Defendant.

[23] This constitutes what *P M Wilson* (in his book *The Formalities of Sale of Land Act No. 71 of 1969 at page 60*), calls "*The legal relationship preparatory to sale*". This is clearly the cause of action relied upon by the Plaintiff in this instance.

[24] It was held further in the unreported judgment of *Jaco Nicholas Van Dyk v Rundu Town Council and 2 Others Case No. PA92/2007*, which was delivered on 11th May 2009, by His Lordship Mr Justice Angula, AJ at page 24 of that judgment that:

"the offer is the first step in the contract making process. The next step being the acceptance of the offer. Both the offer and acceptance thereof must comply with the formalities pertaining to that transaction, for instance it must be in writing in the case of sale of land. These considerations surely do not apply to the so called legal relationship preparatory to sale which is concluded prior to the making of any formal offer and the formal acceptance thereof which must comply with the requirements of the statute in order to obtain validity."

[25] The reason for this is simply that this so called 'preparatory contract' is not a contract for the sale of land, nor does it amount to an offer to buy land and the acceptance of such offer, both of which would have to be in writing, in order to constitute a valid Deed of Sale, in respect of

immovable property.

[26] Ultimately it appears therefore that the Plaintiff is seeking an order directing 1st and 2nd Defendants to conclude legally binding deeds of sale with him on the basis of the authority provided for in the resolution.

[27] I keep in mind also that the coming into existence of these agreements, do not depend on the free will of the Defendants anymore in the sense that, any order directing the 1st and 2nd Defendants to sign the deeds of sale, does not impact on 1st and 2nd Defendants right of freedom to contract.

[28] Any such order does not purport to compel 1st and 2nd Defendants to agree with Plaintiff, that the Defendants have already done, on their own volition, as the resolution shows.

[29] It follows therefore that the Plaintiff's Particulars of Claim, as they stand at present, disclose a valid cause of action,

[30] Whether or not, however, the Third Defendant's requisite approval for the intended transaction in terms of Section 30(1)(t) of the Local Authorities Act 1992 was obtained prior to the resolution or at all, and whether or not 1st Defendant's resolution was made subject to such approval, does at present not appear from the papers before me. This aspect was also not canvassed in argument.

[31] As this issue would have constituted another and altogether separate enquiry, and as compliance or non-compliance with the said Section 31(1)(t) of the Local Authorities Act, may have an impact on the further conduct of these proceedings, I hereby direct the parties attention to that aspect.

[32] For this reason I do not consider this aspect to impact on the validity of the Particulars of Claim at this stage, also as, (and again keeping in mind the applicable test), the Plaintiff's Particulars of Claim are possibly yet to be amplified or to be amended in this regard, and as the possible evidence, which may be led on this point, subsequently may still show, that also this requirement was met and thus does ultimately not pose any obstacle to the Plaintiff's claim.

[33] In the result, and only in deciding those issues which were squarely raised before this Court, I conclude that the exception is bad and falls to be dismissed with costs.

GEIER, AJ:

ON BEHALF OF THE PLAINTIFF

MR N TJOMBE

Instructed by:

ON BEHALF OF THE DEFENDANT

**MR M.C. KHUPE
GOVERNMENT ATTORNEY**