

NOT REPORTABLE

CASE NO.: I 900/2011
IN THE HIGH COURT OF



NAMIBIA

In the matter between:

BERTA DOS ANJOS DIOGO LUIS
NELSON MAUELE DIOGO LUIS

1ST PLAINTIFF
2ND PLAINTIFF

and

JOSEPH HAUSIKU NKOTONGO
JIN WEI CHEN
THE REGISTRAR OF DEEDS
MUNICIPAL COUNCIL OF THE MUNICIPALITY OF RUNDU

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT

CORAM: SMUTS, J

Heard on: 26 March 2012
Delivered on: 8 May 2012

JUDGMENT

SMUTS, J.: [1] This is an exception taken by the second defendant against the plaintiffs' particulars of claim, styled as a declaration in this matter. It may have been so styled because the plaintiffs seek a declaration of rights in the main relief claimed, to the effect that the plaintiff is the sole rightful owner of Erf 1241 Rundu, Extension No. 3, (the property). In the alternative to this claim, the plaintiffs seek a declaratory order to the following effect:

“That first plaintiff is the only person having “permission to occupy” (PTO) in respect of Erf 1241 and thereby is the only person in whose favour third respondent should register ownership of the property.”

[2] The plaintiffs also seek an order against the Registrar of Deeds to transfer and register the property in the name of the first plaintiff and costs against any defendant opposing the action. In addition to the Registrar of Deeds, cited as third defendant, the Municipal Council of the Municipality of Rundu is cited as the fourth defendant.

[3] In support of the relief claimed in this action, the plaintiffs make the following averments in the particulars of claim after describing the parties to the action:

- “7. On or about 20th August 1996 first defendant was granted permission to occupy a stand known as Erf 1618, measuring 1, 055 square meters, situated in Rundu, Republic of Namibia. I attach hereto a copy of this PTO hereto and marked annexure “BL1”. (sic)*
- 8. On or about 27th July 2000, and at Rundu, Julio do Rosario Luis, Identity Number 3705100100123, late husband of first plaintiff (hereinafter referred to as “predecessor”), acting for himself and first defendant being represented by Agent – Private Detective International PDI, Rundu, who was duly authorized thereto, entered into a written Deed of Sale. A copy of such written Deed of Sale is annexed hereto as annexure “BL2”.*

9. *First defendant was granted permission to occupy (PTO) Erf 1241, dated 8th February 2000. A copy of this PTO is attached hereto and marked annexure "BL3".*
10. *The following were the express, alternatively implied, in the further alternative tacit terms of the said Deed of Sale:*
 - 10.1 *First defendant would sell and the first plaintiff's predecessor would purchase a building complex described by the parties as "Zobra Salon" situated on Erf No. 1618, an Erf measuring 1, 055 square metres, situated in Rundu.*
 - 10.2 *The purchase price of the said property was an amount of N\$ 35, 000.00.*
 - 10.3 *The purchase price was payable as follows:*
 - (a) *a deposit in the amount of N\$8, 000.00 was payable on 27th July 2000;*
 - (b) *six instalments in the amount of 4, 500.00 were payable at the end of May 2000, June 2000, August 2000, September 2000, and October 2000, respectively;*
 - 10.4 *The payment of the said purchase price would be made at the offices of Lisikamena Trust Fund t/a Linus Tuzeerendo Neumbo;*
 - 10.5 *The first plaintiff's predecessor would take possession of the property immediately after the payment of the said deposit;*

10.6 *First defendant would pay the agent's commission; and*

10.7 *The said sale of Erf No. 1618 was subject to a suspensive condition, namely, that it would be registered in the name of first plaintiff's predecessor after it has been surveyed and/or serviced by fourth defendant.*

11. *Second plaintiff paid to first defendant the purchase price referred to above on behalf of plaintiff's predecessor. The last payment was made during September 2000.*

12. *First Plaintiff's predecessor complied with his obligations in terms of the said agreement.*

13. *First plaintiff's predecessor occupied (PTO) Erf 1618 including "Zobra Salon".*

14. *First plaintiff's predecessor passed on in September 2000.*

15. *On a date unknown to plaintiffs, Erf 1618 was declared to be situated within the boundaries of fourth defendant. Subsequently, fourth defendant renumbered the aforesaid Erf No. 1618 as Erf No. 1241.*

16. *After the first plaintiff's predecessor had occupied Erf 1241, Lisikamena Trust Fund t/a Linus Tuzeerendo Neumbo, of P.O. Box1519 Rundu, who is no longer in existence, approached first plaintiff's predecessor and alleged that first defendant did not pay back the full loan granted to him for the construction of the said "Zobra Salon". Linus Tuzeerendo Neumbo requested second plaintiff to pay the said outstanding amount to it on behalf of first plaintiff's predecessor.*

17. *First plaintiff's predecessor paid the said outstanding amount in full to Linus Tuzeerendo Neumbo.*
18. *After the untimely passing away of the first plaintiff's predecessor, first plaintiff inherited the property of her predecessor, including the said Erf 1241.*
19. *On about 5th September 2008, first defendant sold and second defendant bought Erf No. 1241, Rundu (Extension No. 3), in the Town of Rundu, Registration Division "B", Okavango Region, measuring 1056 square metres, first transferred and still held by Deed of Transfer No. T. 1433/2008 and the aforesaid property was subsequently transferred in the name of second defendant on 3rd April 2009. A copy of the said Deed of Transfer No. T 1443/2009 is attached hereto and marked "BL4".*
20. *At all material times hereto first defendant knew or ought to have known that first plaintiff's predecessor was the rightful owner of the aforesaid Erf 1241, including "Zobra Salon".*
21. *The permission to occupy Erf 1241 granted by fourth defendant to first plaintiff's predecessor was capable of forming part of the estate of first plaintiff's predecessor, and therefore inheritable by first plaintiff.*
22. *First defendant had no right to alienate the aforesaid Erf 1241 to second defendant as first defendant had no title or any right whatsoever to such property.*
23. *After the said Erf 1241 has been surveyed by fourth defendant it should have been registered into the name of first plaintiff, as the full purchase price has already been paid to first defendant by first plaintiff's predecessor.*

24. *In the circumstances the transfer of the said Erf 1241 into the name of second defendant is null and void and of no legal force.*

25. *Notwithstanding due and proper demand first and second defendants refused and/or failed and/or neglected to transfer the said property into the name of first plaintiff.”*

[4] The second defendant excepted to the particulars of claims on the following grounds:

“1. *Firstly, the plaintiffs in paragraph 7 of the particulars of claim allege that the first defendant was granted permission to occupy (PTO) Erf 1618, and as proof thereof plaintiffs rely on annexure “BL1”.*

2. *The first defendant’s right to occupy (PTO) contained in annexure “BL1”, specifically provides that:*

“The holder shall not have the right to transfer, mortgage, cede, lease, sublet or alienate this right to occupation, the whole or any portion thereof without the written consent of the Permanent Secretary, which consent shall not be unreasonably refused.”

3. *Moreover, the permission to occupy (Annexure “BL1”) granted the first defendant an option to purchase Erf 1618.*

4. *The plaintiffs’ particulars of claim contains no averments, that the first defendant ceded his option with written consent as required or that first defendant exercised his option and thereafter sold the property to plaintiff.*

In law a person cannot give a greater right to another than they themselves already have.

5. *Secondly, first plaintiff in paragraph 9 alleges that on the 8th February 2000 she was granted permission to occupy Erf 1241 (formerly Erf 1618, see paragraph 15 of the particulars of claim). As proof hereof plaintiffs annex annexure "BL3".*
6. *In paragraph 8 of the particulars of claim the plaintiffs allege that on the 27th July 2000 the first plaintiff bought Erf 1618.*
7. *A careful perusal of annexure "BL3" contradicts and negate any sales transaction between first plaintiff because:*
 - (a) *the first plaintiff already had an option to buy Erf 1618, on the 8th February 2000, by virtue of annexure "BL3";*
 - (b) *the sales agreement is void ab initio and therefore unenforceable by virtue of annexure "BL3".*
8. *The plaintiffs in paragraph 8 of the particulars of claim rely on a deed of sale concluded on or about 27 July 2000.*
9. *The deed of sale relied upon in paragraph 8 of the particulars of claim does not comply with section 1(1) of the formalities in respect of the formalities in respect of contracts of sale of land Act 71 of 1961 in that:*
 - (a) *the purported deed of sale does not have an amount for which the land was allegedly bought;*
 - (b) *on the face of it annexure BL2 was entered into with a certain LISIKAMENA TRUST FUND RUNDI t/a LINUS TUZEERENDO*

NEUMBO an agent of PRIVATE DETECTIVES INTERNATIONAL PDI and crucially not of first defendant;

- (c) *the plaintiffs allege in paragraph 7 of the particulars of claim that the land in issue belonged to the first defendant and ex facie annexure "BL2" the agent was not acting on behalf of first defendant".*

[5] When the matter was called, Dr S. Akweenda, who appeared for the plaintiffs, rightly conceded that the particulars of claim did not disclose a cause of action for the main declaratory sought by the plaintiffs. He said that the plaintiffs would no longer seek that relief but would however persist in the alternative claim, contained in prayer 2 of the particulars of claim and quoted above. He also conceded, as far as that claim was concerned that there were certain contradictory elements in the particulars of claim and conceded that the exception against that claim was also well founded for that reason. That concession is correctly made. It follows that the exception is well taken and is to be upheld. On behalf of the plaintiffs, he also tendered the costs of the exception but sought leave for the plaintiffs to amend their particulars of claim.

[6] Mr Coleman who appeared on behalf of the second defendant submitted that it would serve no purpose for this court to afford the plaintiffs the opportunity to amend their particulars of claim as the relief sought in prayer 2 (in the alternative to the main declaratory relief) was not sustainable and not capable of being supported even if the plaintiffs were afforded the opportunity to amend within a specified period. He submitted

that the plaintiffs would also need to deal with the second defendant's ownership of the property which was not covered by the alternative claim. That, he submitted, would require a separate cause of action.

[7] I have some difficulty with this approach. Once it is accepted that a permission to occupy is, as a matter of law, capable of being transferred from one party to another (upon the fulfilment of conditions and in compliance with the terms of the PTO and the law pertaining to such rights), then relief sought to the effect that a valid transfer of a PTO had occurred would be capable of being claimed. It remains of course another matter entirely whether the plaintiffs are in a position to make averments necessary to sustain such a cause of action. What is clear, as is correctly conceded by Dr Akweenda, is that the particulars of claim cast in their current manner do not sustain such a cause of action.

[8] As is made clear in *Herbstein and van Winsen The Civil Practice of the High Courts of South Africa*, courts usually give a respondent an opportunity to file an amended pleading within a stated time when allowing an exception¹. I see no reason to depart from this well established approach. As to Mr Coleman's contention that such relief was not capable of being sustained because the second defendant's ownership of the property was not addressed by the alternative claim, I agree that this would need to be dealt with and properly addressed. But an amendment could also entail seeking further relief to deal with this aspect. It would certainly have been open to the plaintiffs

¹Fifth edition by Cilliers, Loots and Nel, Vol 1 at p 646
See also *Group Five Building Ltd v Government of the Republic of South Africa* 1993(2) SA 593 (A) at 602-603 (per Corbett, CJ).

to have filed a notice to amend after the exception was taken and even after I had reserved judgment. I see no reason why they should not be able to do so within a specified period after this ruling is provided.

[9] The order I accordingly make is that the second defendant's exception is upheld with costs and the plaintiffs' particulars of claim are set aside with costs and the plaintiffs are given leave, if so advised, to amend their particulars of claim within 14 days of the date of delivery of this judgment. The second defendant's costs are to include those of one instructing and one instructed counsel.

SMUTS, J

ON BEHALF OF THE PLAINTIFFS:

DR S. AKWEENDA

Instructed by:

HARMSE ATTORNEYS

ON BEHALF OF THE SECOND DEFENDANT:

ADV COLEMAN

Instructed by:

ANGULACOLEMAN