

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1119/2009

In the matter between:

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

PLAINTIFF

and

NORTHLAND DEVELOPMENT PROJECT LTD

FIRST DEFENDANT

HELAO NAFIDI TOWN COUNCIL

SECOND DEFENDANT

THE REGISTRAR OF DEEDS

THIRD DEFENDANT

Neutral citation: *Minister of Regional and Local Government, Housing and Rural Development v Northland Development Project Ltd and others* (I 1119-2009) [2013] NAHCMD 145 (31 May 2013)

Coram: VAN NIEKERK J

Heard: 26 September 2012; 15, 16, 17 October 2012

Delivered: 31 May 2013

Flynote: Local Authorities Act, 23 of 1992 – Section 30(1)(t) requires prior approval of Minister when local authority disposes of immovable property – Section 30(1)(z)(ii) requires prior written approval of Minister when local authority makes any donation – *In casu* local authority donated undeveloped land to first defendant without such prior written approval – Donation null and void – Subsequent transfer of land into name of first defendant also null and void .

ORDER

There shall be judgment for the plaintiff for:

- (a) An order declaring the Deed of Donation dated 10 September 2005 by the second defendant in favour of the first defendant null and void and of no legal effect.
- (b) An order declaring the transfer of Portion 4 of Helao Nafidi Town and Townlands No. 997 measuring 49 9986 hectares to the first defendant under Deed of Transfer T7251/2005 null and void and of no legal force.
- (c) An order that the first defendant pays the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

VAN NIEKERK J:

[1] The plaintiff is the Minister of Regional and Local Government, Housing and Rural Development ('the Minister'). The first defendant is Northland Development Project Ltd ('Northland'), a company incorporated under the laws of Namibia. It is defending this matter. With leave of the Court, Northland is represented in these proceedings by Mr Antoine Mbok, its sole director. The second defendant is Helao Nafidi Town Council ('the town council'), a local authority council established under the Local Authorities Act, 1992 (Act 23 of 1992), as amended. The third defendant is the Registrar of Deeds. No relief is claimed against the town council and the Registrar.

[2] It is common cause –

- (i) that the town council was at all relevant times the owner of a certain piece of land known as Portion 4 of Helao Nafidi Town and Townlands No. 997 ('the property'), measuring 49, 9986 hectares and situated at the town of Helao Nafidi in the Ohangwena Region;
- (ii) that on or about 10 September 2005, Northland and the town council concluded a deed of donation in writing, Northland being represented by

Mr Mbok and the town council being represented by its chief executive officer, Mr Christiaan Petrus Shivolo;

- (iii) that in terms of the deed of donation the town council donated the property to Northland, who accepted the donation;
- (iv) that in terms of the deed of donation Northland would be liable for all services and development costs of the property, as well as the transfer and conveyancing costs;
- (v) that the third defendant transferred the property and registered same in the name of Northland by deed of transfer T7251/2005 on 10 September 2005.

[3] The Minister alleges that the deed of donation was unlawfully concluded and that the subsequent transfer and registration was also unlawful because his prior approval for the transaction was not obtained as required by statute. This is disputed by Northland. The Minister's claim is for an order declaring both the deed of donation and the subsequent transfer of the property null and void.

[4] The Minister bases his case on the provisions of section 30(1)(t) and section 30(1)(z)(ii) of the Local Authorities Act. Section 30 provides for the powers, duties and functions of local authority councils. Section 30(1)(t) states that a local authority council shall have the power –

'..... to buy, hire or otherwise acquire, with the prior approval of the Minister and subject to such conditions, if any, as may be determined by him or her, any immovable property or any right in respect of immovable property for any purpose connected with the powers, duties or functions of such local authority council, or to so sell, let, hypothecate or otherwise dispose of or encumber any such immovable property'.

[5] Section 30(1)(z)(ii) provides that a local authority council shall have the power –

with the prior approval in writing of the Minister in every particular case and subject to such conditions as he or she may determine, to make grants or donations'.

[6] Ms Frieda Andreas is a public servant and senior official in the Ministry's subdivision of land management, where she deals with land administration and land

management in terms of the Local Authorities Act. She testified about the procedure to be followed when a local authority like the town council in this case wishes to dispose of land. She stated that the matter is governed by section 30(1)(t) of the Local Authorities Act. The local authority is required to pass a resolution at a properly constituted meeting and then to forward a written request for prior approval via the Permanent Secretary of the Ministry to the Minister. In the normal course such requests from a local authority would be directed to her office for scrutiny. She would check whether the request is complete and accompanied by the required resolution, the draft deed of sale or donation or joint venture agreement (if applicable). Once the request is complete she draws up a submission or report to the Permanent Secretary recommending approval or disapproval. After consideration by the Permanent Secretary, a submission will be forwarded to the Minister, accompanied by a recommendation. The Minister's decision will be relayed back in writing via the Permanent Secretary's office to the local authority.

[7] During 2009 she was tasked with other officials to conduct an investigation into certain affairs of the town council. She checked certain property files held by the town council and discovered that the file relating to the property in question was incomplete, *inter alia* in that it contained only the deed of donation, but no other documentation, such as a town council resolution, a written request for the Minister's approval for the proposed donation and no prior written approval by the Minister for the donation. Furthermore, the deed itself was not co-signed by the chairperson of the management committee or other authorized staff member as required by section 31A of the Local Authorities Act. During her investigation she found no evidence that the Minister had ever given any permission for the property to be alienated or disposed of in any manner. While she was still busy with the investigation, she by chance noticed in a local newspaper's edition of 20 February 2009 that the particular property was being advertised for sale by public auction to be held on 7 March 2009. She alerted her superiors. As a result Mr Johan de Kock, who was the Chief Regional Planner in the Ministry and who also testified at the trial, ascertained that the transfer of the property had been attended to by a conveyancer of Shikongo Law Chambers. He obtained documentation in this regard from her, where after an

urgent application was launched in this Court to interdict the auction from taking place.

[8] The plaintiff also called the Permanent Secretary, Mr Erastus Ipinge Negonga, who served in that capacity from 30 April 2003 to 31 May 2012, to testify. He confirmed the procedure to be followed and that no documentation was anywhere to be found recording that there ever was a request by the town council for the Minister's approval or that such a request was ever handled, considered, commented upon, or forwarded to or received and considered by the Minister or that he made any decision on the matter. The conclusion reached was that there had been no attempt to obtain any prior approval and that none was ever given.

[9] He confirmed that action in this matter was instituted on 2 April 2009. During October 2009 it came to his attention that Northland again intended to sell the property to a certain buyer in the United Kingdom. A second urgent application was launched. On 23 October 2009 a rule *nisi* was issued, interdicting the sale of and other transactions in relation to the property. This rule was confirmed on 27 November 2009.

[10] I understood Mr Negonga's evidence to amount thereto that, as a matter of policy, the donation of land to the private sector would be most unusual, if not impossible, especially in the case of such a large portion of valuable land as the property in this case.

[11] Mr Phillipus Namundjebo, who was a member of the town council from 2004 to 2010, testified that the donation of the property to Northland was never discussed at any meeting of the council. He is not aware of any resolution by the council to donate the property to Northland. He denied attending any meeting between the council and representatives of Northland where the issue was discussed and testified that the council never approached the Minister for approval to donate the property to Northland.

[12] On the pleadings Northland's case amounted to a denial that the deed of donation and the transfer were unlawfully executed; a lack of knowledge about the relevant statutory provisions; an allegation that it always acted in good faith with the

town council and that it could not be held legally accountable for the town council's actions. Northland also raised a special plea that the plaintiff's claim has prescribed.

[13] At the trial Northland's case shifted direction. It no longer denied knowledge of the relevant statutory provisions, but its cross-examination and the testimony given on its behalf by Mr Mbok was to the effect that the town council did in fact approach the Minister for the required prior approval; that Northland participated in preparing the town council's written submission to the Minister; and, what is more, the required approval was indeed obtained on or about 16 March 2005. However, Mr Mbok explained, the particular person who was the Minister at the time that the property was allegedly donated, had passed away in the meantime and at the trial the particular holder of the appointment as Minister is not the same person. The gist of Mr Mbok's cross-examination on behalf of Northland was that for some undisclosed and apparently sinister reason the witnesses before the Court had been instructed to withhold information about the true position from the Court. Mr Mbok rhetorically posed the question, 'Now that the Minister is dead, who will ever know the true position?'

[14] It is indeed common cause that the particular Minister did pass away. However, Ms Andreas testified that she was already working at the Ministry during 2005 and that there was never a request for the Minister's approval. Besides, even if the particular holder of the ministerial appointment did pass away, there should have been a paper trail, which there is not. In my view it is highly improbable that no shred of evidence could be found anywhere in any office of the town council, of the Permanent Secretary, of the sub-division of land administration and land management or of the Minister that there was an application by the town council application for approval to donate the property which had been processed and had been successful.

[15] Mr Mbok suggested to Ms Andreas that this was merely a matter of the particular property file of the town council being incomplete because the relevant documents were deliberately removed by someone. He claimed, to rather startling effect, that he had all these documents in his possession. However, these

documents were never discovered and there was never any attempt to place them before the Court, despite counsel for the Minister inviting Northland to do so.

[16] Northland did file and use a small bundle of other so-called discovered documents. There was no objection to these documents being used, but it turned out that they had in fact not been discovered. Be that as it may, Mr Mbok presented a document to the court which is a memorandum of understanding reached between the Town of Helao Nafidi, represented by its town council members and Northland. He testified that the town council had offered the property to Northland at the time at no cost to persuade Northland to establish a development there instead of in another Region. The document records 'land transfer and acquisition conditions' between the two parties and states that the town council offers a piece of undeveloped land measuring 50 hectares to Northland for the construction of 'Northland City' without cost, based on certain terms and conditions set out in the memorandum. The document is dated 30 March 2005 and signed by Mr Handjaba, the mayor, Mr Shivolo, the chief executive officer, Mr Kennedy, the then chief executive officer of Northland, Mr Mkusa, the then corporate finance director of Northland and several witnesses, including Mr Mbok. Significantly, although the name of Mr Namunjebo appears as a witness on this document, it is not signed by him. He also denied attending the meeting at which the terms recorded in this document was allegedly discussed. I accept his evidence.

[17] When he was shown this document during cross-examination, Mr Negonga described it as 'false'. However, I do not think that it is a false document. It is probable that this document was indeed drawn up as a recordal of a meeting between the town council and Northland where an understanding along the lines set out in the document had been reached.

[18] I am also prepared to accept for purposes of this case that as a result of this understanding, Northland set in motion the process to apply for the sub-division of a certain piece of land known as the Remainder of Helao Nafidi Townlands No. 997 into two portions, namely Portion 4 (the property) and the Remainder. Mr de Kock agreed in cross-examination that the Namibia Planning and Advisory Board resorting in the same Ministry granted this application subject to certain conditions in terms of

section 21 of the Townships and Division of Land Ordinance, 1963 (Ordinance 11 of 1963), as amended, and that it issued a certificate to this effect on 4 July 2004.

[19] However, as both Mr de Kock and Ms Andreas emphasised, this approval of the sub-division is a separate process which does not mean that the Minister has given the required approval for the donation of the property to Northland. In the absence of any proof of prior written approval by the Minister, I am driven to the conclusion on the probabilities that none was ever given.

[20] In a similar matter, namely *Northgate Properties (Pty) Ltd v The Town Council of the Municipality of Helao Nafidi and others* (High Court Case No. A350/2008, unreported del. 5 May 2011), Miller AJ had occasion to consider an application against the same town council as in this case for an order declaring as null and void an agreement of sale concluded by the town council without prior approval by the Minister as required by section 30(1)(t) of the Local Authorities Act. The Court was also requested to direct the Registrar of Deeds to cancel the entry in the Deeds Registry indicating that the property belongs to the purchaser. The Court granted this relief after stating (at p12-13):

[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 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 from 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 this 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) S009 (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 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 Minister'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.'

I am in respectful agreement with this authority.

[21] As stated before, Northland also raised a special plea of prescription. It alleges that the plaintiff's cause of action arose on 10 September 2005 when the deed of donation was concluded between the parties and that as the action was only instituted on 2 April 2009, the plaintiff's claim had become prescribed on 9 September 2009. The plaintiff raises several defences in replication. It is not necessary to deal with all of them. Suffice it to say that on the probabilities the plaintiff only became aware of the illegal deed of donation during 2009 and took immediate action. Any plea of prescription must accordingly fail.

[22] The result is that there shall be judgment for the plaintiff for:

- (a) An order declaring the Deed of Donation dated 10 September 2005 by the second defendant in favour of the first defendant null and void and of no legal effect.
- (b) An order declaring the transfer of Portion 4 of Helao Nafidi Town and Townlands No. 997 measuring 49 9986 hectares to the first defendant under Deed of Transfer T7251/2005 null and void and of no legal force.
- (c) An order that the first defendant pays the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.

K van Niekerk

Judge

APPEARANCE

For the plaintiff:

Adv S Akweenda

Instr. by Government-Attorney

For the first defendant:

Mr A Mbok

Director of the first defendant (with leave of the Court)