

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b>  Omeya Golf Estate and Home Owners Association  and  Jan Hendrik Grobler	Plaintiff    Defendant	<b>Case No:</b> HC-MD-CIV-ACT-CON-2018/04626 <b>Division of Court:</b> Main Division <b>Heard on:</b> 11 March 2021
<b>Heard before:</b> Honourable Mr. Justice Usiku, J	<b>Delivered on:</b> 22 April 2021	
<b>Neutral citation:</b> <i>Omeya Golf Estate and Home Owners Association v Grobler</i> (HC-MD-CIV-ACT-CON-2018/04626) [2021] NAHCMD 179 (22 April 2021)		
<b>Order:</b> <ol style="list-style-type: none"><li>1. The defendant's special plea of lack of <i>locus standi</i>, is dismissed;</li><li>2. It is declared that there is only one plaintiff to the present action, namely: Omeya Golf Estate and Home Owners Association;</li><li>3. The costs in respect of the special plea shall be costs in the cause;</li><li>4. The matter is postponed to 12 May 2021 at 15h15 for status hearing;</li><li>5. The parties are directed to file a joint status report on or before 5 May 2021.</li></ol>		
<b>Reasons for order:</b>		
USIKU, J:		

## Introduction

[1] The issue before court for determination is a special plea raised by the defendant to the effect that the plaintiff lacks *locus standi* in respect of the first claim as set out in the plaintiff's amended particulars of claim.

[2] The plaintiff opposes the special plea, asserting that there are two plaintiffs in this matter and that the special plea has no merit.

[3] During oral argument the defendant submitted that even if it were to be accepted that there were two plaintiffs in this matter, Omeya Golf Estate and Home Owners Association has not established *locus standi* in respect of the first claim.

[4] Thus, the dispute between the parties requires the determination of two cardinal issues namely:

- (a) whether Omeya Golf Estate and Home Owners Association has established sufficient and direct interest in the matter to warrant it to prosecute the first claim against the defendant, and,
- (b) whether there is one or two plaintiffs in the present action.

## Background

[5] On or about November 2018, the plaintiff, Omeya Golf Estate and Home Owners Association, instituted the present action against the defendant seeking, among other things, payment in the amount of N\$354 958.62 being levies and building penalties allegedly due and payable to the plaintiff.

[6] On or about 03 July 2020 the plaintiff sought leave to amend its particulars of claim. On or about 10 August 2020 the court granted the plaintiff leave to amend its particulars of claim.

[7] The plaintiff delivered its amended particulars of claim on or about 19 August 2020. In the amended particulars of claim the plaintiff among other things, purported to introduce a certain Omeya Golf Estate and Residential Oasis (Pty) Limited as a first plaintiff and the plaintiff itself, as a second plaintiff.

### The amended particulars of claim

[8] In the amended particulars of claim the plaintiff (“or the plaintiffs”) claims payment from the defendant in the amount of N\$487 500 (‘the first claim’) allegedly due and payable to the first and the second plaintiffs, and payment in the amount of N\$65 909.80 (‘the second claim’), allegedly due and payable to the second plaintiff.

[9] In respect of the first claim, the particulars of claim aver that the first plaintiff and the defendant entered into a written agreement of sale on or about 2 March 2011 in terms of which the first plaintiff sold to the defendant certain immovable property situated at Omeya Township, in the Municipality of Windhoek. The defendant became the owner of the property on or about 3 May 2012. In terms of a Notarial Deed Of Imposition of Conditions registered against the property, the defendant is, among other things, bound by the Rules issued by the second plaintiff.

[10] Furthermore, the particulars of claim allege that, in terms of the aforesaid Notarial Deed and Sale Agreement, the defendant became obliged to complete a building of a dwelling house on the property within 4 years of the date of the registration of the transfer of the property into its name. It is further alleged that a penalty of 10% of the cost price of the undeveloped site is payable by the defendant where the first plaintiff has granted the defendant extension of time within which to complete the dwelling house. The penalty would be paid to the first plaintiff and / or the second plaintiff, who would share such penalty equally. The entitlement by second plaintiff to the aforesaid share, constituted a benefit to second plaintiff. The second plaintiff has accepted the benefit. The acceptance of the benefit by second plaintiff was communicated to the defendant. Should the defendant fail to build a dwelling house within such extended period, the first plaintiff is entitled to charge such additional levy as it deems fit.

[11] It is alleged that the defendant has failed to complete a building of a dwelling within the stipulated time or at all. The first plaintiff granted an extension and the first and the second plaintiffs charged the building penalties and such amounts are due and payable.

### Defendant's plea

[12] The defendant's delivered a plea to the plaintiff's amended particulars of claim, raising, among other things, a special plea of *locus standi*, asserting that the plaintiff namely: Omeya

Golf Estate and Home Owners Association is the only plaintiff to the action and that the plaintiff lacks locus standi to seek relief in respect of the first claim.

### Analysis

[13] In the deciding whether the particulars of claim do establish the standing of the Omeya Golf Estate and Home Owners Association to institute action in respect of the first claim, the facts alleged by the Association are to be taken as correct. In so far as it is relevant to the first claim, the Association has alleged that it is entitled to a half-share of the amount of money owed by the defendant in terms of the Notarial Deed and the Sale Agreement. The Association alleged that the defendant owes such amount which is now owing and payable and the Association is entitled to half-share of such amount. Whether the Association would be in a position to prove such entitlement is a matter to be established at trial and should not concern us at this stage.

[14] Having considered the allegations made by the Association in the particulars of claim, I am satisfied that the Association has made sufficient averments to establish a real and substantial interest, insofar as the first claim is concerned. The defendant's special plea therefore stands to be dismissed.

[15] I now turn to the issue of whether there are two or only one plaintiff in the present action.

[16] It was argued on behalf of the plaintiff that the plaintiff sought and obtained leave to amend its particulars of claim. It is correct that the plaintiff sought and obtained leave to amend its particulars of claim. It is significant to note that, in its application for leave to amend, the plaintiff did not expressly set out that the amendment it sought to make would include the introduction of a new party to an existing action.

[17] I am of the opinion that leave to amend does not entail joining additional parties to the action. In granting the plaintiff leave to amend, the court did not permit the plaintiff to do what is otherwise not permitted in terms of the rules of court, namely introducing new parties to an existing action under the guise of an 'amendment' to pleading. An 'amendment' to a pleading, within the context of the rules, does not entail a 'joinder' or 'intervention' of persons as plaintiffs or defendants. Rule 40 and 41 set out the procedure to be followed in respect of joinder of parties and intervention of persons as plaintiffs or defendants. It is common cause that the plaintiff did not follow the procedure set out in rule 40 nor has the purported 'first plaintiff'

followed the procedure set out under rule 41.

[18] For the foregoing reason, I am of the opinion that there is only one plaintiff to the present action, namely: Omeya Golf Estate and Home Owners Association.

[19] As regards the issue of costs, I am of the opinion that because of the conclusions I have come to in this matter, this is a suitable case to order that costs be costs in the cause, and I shall make an order to that effect.

[20] In the result, I make the following order:

1. The defendant's special plea of lack of *locus standi*, is dismissed;
2. It is declared that there is only one plaintiff to the present action, namely, Omeya Golf Estate and Home Owners Association;
3. The costs in respect of the special plea shall be costs in the cause;
4. The matter is postponed to 12 May 2021 at 15h15 for status hearing;
5. The parties are directed to file a joint status report on or before 5 May 2021.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
B Usiku Judge	Not applicable
<b>Counsel:</b>	
<b>Plaintiff:</b>	<b>Defendant:</b>
Ms Yoleta Campbell Of Lorentzangula Inc., Windhoek	Mr James Diedericks PD Theron & Associates, Windhoek