

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2021/00410

In the matter between:

NORTHGATE PROPERTIES (PTY) LTD

APPLICANT

and

THE TOWN COUNCIL OF THE MUNICIPALITY

OF HELAO NAFIDI

1st RESPONDENT

MINISTER OF URBAN AND RURAL

DEVELOPMENT

2nd RESPONDENT

Neutral citation *Northgate Properties (Pty) Ltd v The Town Council of the Municipality of Helao Nafidi* (HC-MD-CIV-MOT-GEN-2021/00410) [2023] NAHCMD 458 (31 July 2023)

Coram: Schimming-Chase J

Heard: 2 February 2023

Delivered: 31 July 2023

Flynote: Land – Communal land situated in Oshikango – Permission to

Occupy (PTO) – Entitled occupants to occupy immovable property for certain periods – Area proclaimed a Helao Nafidi Township on 1 September 2022 – Entitled holders of PTOs to apply for freehold of immovable property.

Contract – Interpretation of clause 10 of PTO – Proper approach to the interpretation of contracts – Context in which document drafted always relevant to construction – Unitary exercise – Interpretation of contracts a matter for court – Taking into account text as well as prevailing circumstances relating to PTOs and later proclamation of the communal area as a town – Interpretation of the terms of the contract granting freehold rights to owner through exercise of a first option of purchase – Meaning – only in the event of the holder of the PTO electing not to purchase property could the property be offered to another

Summary: The applicant was held, in a previous decision of this court and in the Supreme Court, in 2013, to be the lawful holder of a Permission to Occupy (PTO). In terms of the provisions of the PTO, a right of occupation was provided for a period of 20 years commencing on 23 October 1996 and terminating on 22 October 2016. The holder of the PTO was also given an option to renew the right of occupation for a further period of at least five years reckoned from the date of occupation. On 1 September 2003, the area forming the PTO was declared part of the Township of Helao Nafidi. Clause 10 of the PTO provided that '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 the sworn valuers, one to be appointed by the Government of Namibia and thereafter by the holder'.

During March 2005, the erstwhile CEO of the first respondent, offered certain immovable property (Erf 13, Oshikango), held under a PTO by the applicant to the applicant as a first opportunity to purchase within 21 days. However, on 13 June 2007, after the applicant submitted an application to purchase the property, the Town Council's CEO entered into a deed of sale with another entity. By 25 July 2008, the applicant established that the property

was formally transferred to the other entity via a deed of sale dated 13 June 2007.

On 24 November 2008, the applicant sought an order in this court declaring the decision of the first respondent taken on 13 June 2007 to enter into an agreement of sale for the purchase of the property with the separate entity in conflict with the Namibian Constitution and *ultra vires* the powers of the first respondent, and accordingly null and void. The applicant further sought an order declaring the agreement to be void and of no force and effect, and a further order directing that the Registrar of Deeds cancel the corresponding entry in the Deeds Registry. Finally, the applicant sought an order directing that the matter be referred back to the first respondent to consider the applicant's exercise of its rights of pre-emption in respect of the property, together with ancillary relief.

The entity to which the property was sold opposed the application, whilst the first respondent did not. Essentially the opposition of that entity was based on its purported ownership of the same PTO.

This court granted the applicant the relief sought on 5 May 2011. In particular, an order setting aside the agreement of sale. This court ordered that the matter be referred back to the first respondent to consider the applicant's right of pre-emption over the property. The entity appealed to the Supreme Court, which dismissed the appeal on 7 October 2013. The Supreme Court confirmed the orders of this court, and substituted the order directing referral back to the first respondent for consideration of the right of pre-emption with an order directing compliance with the provisions of the PTO.

On 21 October 2013, the applicant advised the first respondent that it exercised its option to purchase the property in terms of the PTO, and in terms of the Supreme Court judgment and order.

Instead, and on 5 March 2014, the first respondent informed that it had

formally resolved not to alienate the property until further notice. After a flow of correspondence between the two parties, the applicant sought to assert its rights to the property. In mid-2017, according to the first respondent, the PTO had expired, and the first respondent published a notice, indicating that it resolved to sell the property to yet another entity. The existence of the applicant's pre-emptive right was reflected in the notice published by the first respondent. However, the resolution of the first respondent was not communicated to the applicant.

Given the first respondent's resolution to sell, the applicant again sought enforcement of its pre-emptive rights which were triggered by the first respondent's resolution to sell. After a further flow of correspondence, the first respondent rescinded its decision to offer the property for sale and further resolved to stay any further sales of the property on 20 December 2018.

On 10 September 2020, the first respondent then resolved to renew the PTO held by the applicant until 22 October 2021.

Dissatisfied with the decision, the applicant launched an application to this court on 20 October 2021, seeking an order directing the first respondent to comply with the orders of this court and the Supreme Court regarding its pre-emptive rights.

The applicant's position was that an interpretation of clause 10 of the PTO, its right of pre-emption was triggered, at the very latest, when the first respondent formally resolved to sell the property, alternatively to offer to sell the property, which took place in March 2014.

The first respondent denied non-compliance with the orders of the court and argued that upon a proper interpretation of the PTO, it was an agreement of lease, and all that the applicant possessed was the right to undisturbed possession.

Further, as it had resolved not to alienate the property until further notice, the applicant's right of pre-emption was not yet triggered.

Held, on a modern contextual interpretation of clause 10, the court had to have regard to the context in which the documents were drafted, as well as the context of the legal principles applicable to PTOs at the time.

Held further, the Supreme Court held that the concept of a PTO was established by legislative enactment (see s 47 of Regulation 188 of 1969). It granted the holder thereof (in this case the applicant) certain rights in regard to the piece of land occupied, of which the most important was the right of pre-emption of the land whenever it was possible to own property in that area.

Held further, applying a modern contextual approach, the PTO made it clear that a right of pre-emption to the holder to own the land became possible once 'title to the allotment became possible.' This meant that once the first respondent resolved to sell the property, the applicant had first option to purchase. Only in the event that the applicant elected not to purchase the property, could the first respondent sell it to a third party.

Held further, from the time that the Helao Nafidi Township was proclaimed in 2003, it became possible for the applicant to own the property. It exercised its pre-emptive right a number of times.

Held further, the first respondent, as a matter of fact, and in breach of the PTO formally resolved to offer the property to a third entity which offer was published in the national newspapers.

Held further, the offer for sale was also in breach of clause 1.1 of the PTO, which gave the applicant the right to renew the right of occupation for a minimum period of five years.

Held further, the first respondent could not reprobate and appropriate. It was

directed by court order to comply with the agreement, and it remained in contempt of the court orders. The relief sought was accordingly granted.

ORDER

1. The Town Council is ordered immediately to comply with the court order handed down by this court on 5 May 2011 (under case A 350/2008) and the further court order handed down by the Supreme Court on 7 October 2013 (under case SA 33/2011) to the effect that

'The Town Council is ordered to comply with their contractual obligations in terms of the PTO issued in respect of Erf 13, Oshikango to the holder thereof, Northgate Properties (Pty) Ltd.'

2. In so complying with the aforesaid orders, the Town Council is directed to:

- 2.1. Obtain a sworn valuation in respect of Erf 13, Oshikango to establish a purchase price, being the average of such valuation and the valuation already obtained by Northgate in respect of Erf 13, Oshikango;

- 2.2. Approach the Minister of Urban and Rural Development to obtain approval for the aforesaid sale, as envisaged by s 30(1)(t) of the Local Authorities Act 23 of 1992 (as amended).

3. The Town Council is ordered to immediately comply with any further obligations as are required by law to effect the sale of Erf 13, Oshikango to Northgate.

4. The Town Council is ordered to pay Northgate's costs of suit, such

costs to include the costs of one instructing and two instructed counsel, where employed.

5. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] This is an application for a mandamus order, directing the Town Council of the Municipality of Helao Nafidi¹ (“the Town Council”) to comply with an order made by this court on 5 May 2011 (under case SA 350/2008),² and a further order, handed down by the Supreme Court on 7 October 2013 (under case SA 33/2011)³.

[2] The applicant is Northgate Properties (Pty) Ltd (“Northgate”), formerly known as Namundjebo Northgate Properties (Pty) Ltd, a company incorporated in terms of the applicable Namibian company laws. The first respondent is the Town Council of the Municipality of Helao Nafidi (“the Town Council”). The second respondent is the Minister of Urban and Rural Development (“the Minister”), duly appointed as such in terms of the Namibian Constitution, and the responsible Minister regarding the subject matter of this application. The Minister does not oppose the application.

¹ The first respondent, declared as such in terms of s 3(2) of the Local Authorities Act 23 of 1992 as amended, with principal place of business at Helao Nafidi, Ohangwena Region.

² Per Miller AJ in *Northgate Properties (Pty) Ltd v The Town Council of the Municipality of Helao Nafidi and 4 Others*.

³ Per Strydom AJA in *Martha Namundjebo-Tilahun NO and One other v Northgate Properties (Pty) Ltd and 3 Others* (5 May 2011).

[3] The Supreme Court order alleged not to have been complied with,⁴ reads as follows:

‘The Town Council of Helao Nafidi is ordered to comply with their contractual obligations in terms of the PTO issued in respect of Erf 13, Oshikango to the holder thereof, Northgate Properties (Pty) Ltd.’

[4] In addition, Northgate seeks an order directing the Town Council (in compliance with the aforesaid order) to:

(a) obtain a sworn valuation in respect of Erf 13, Oshikango to establish a purchase price, being the average of such valuation and the valuation already obtained by Northgate in respect of Erf 13, Oshikango;

(b) approach the Minister to obtain approval for the aforesaid sale as envisaged by s 30(1)(t), read together with s 63(1)(a) and (b) of the Local Authorities Act 23 of 1992 (as amended).

[5] Further and additional relief was sought relating to compliance with s 63(2)(b) of the Local Authorities Act, however, for the reasons dealt with later in this judgment, not necessary given the terms of the aforementioned provision.

Background facts

[6] The history of this matter is complex. The material facts are however not in dispute.

[7] Northgate (formerly known as ‘Namundjebo Northgate Properties (Pty) Ltd’) was granted a Permission-To-Occupy (‘PTO’) in respect of Erf 13

⁴ *Namundjebo-Tilahun NO and Another v Northgate Properties (Pty) Ltd and Others* (SA 33/2011) [2013] NASC 12 (7 October 2013).

Oshikango,⁵ by the Ministry of Regional and Local Government and Housing (now the Ministry of Urban and Rural Development) on 23 October 1996.

[8] In terms of the conditions attached to the granting of the PTO, Northgate enjoyed these rights for a period of 20 years, terminating on 22 October 2016. Clause 10 of the PTO conditions contains a right of pre-emption in favour of Northgate. Clause 10 reads as follows:

'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 sworn valuator's one to be appointed by the Government of Namibia and thereafter by the holder.'

[9] On 24 March 2005, the erstwhile CEO of the Town Council granted Northgate 'the first opportunity to purchase' Erf 13 within a specific period. Thereafter various communications were exchanged between the parties with the aim of purchasing the property. These interactions continued till mid-2008.

[10] On 25 July 2008, Northgate – through its legal practitioners⁶ – discovered that Erf 13 had been transferred by the Town Council to an entity called the Namundjebo Family Trust ('The Trust') in terms of a deed of sale signed on 13 June 2007.

[11] On 24 November 2008, Northgate launched an application to this court seeking to review and set aside the decision of the Town Council to enter into an agreement of sale with the Trust for the purchase of Erf 13. The Town Council did not oppose that application. The Trust opposed the application and filed a counter-application seeking an order that the records of the Ministry be rectified to reflect that the holder of the PTO was Mr George Namundjebo in his capacity as joint executor of the estate of the late

⁵ Herein after referred to as 'Erf 13' alternatively 'the property', interchangeably.

⁶ Most if not all of the correspondence referred to in this judgment was undertaken by the parties' legal practitioners of record.

Eliakim Dawid Namundjebo, alternatively the Trust. The relief sought by Northgate was granted and the counter-application was dismissed on 5 May 2011 by Miller AJ, and the following order was made:

1. That the agreement of sale concluded between the first and second respondents⁷ 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. That the third respondent⁸ is directed to cancel entry into 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's⁹ exercise of its rights of pre-emption in respect of the property.
4. That the conditional counter application is dismissed.
5. That the second and fifth respondents¹⁰ are ordered to pay the costs of this application and the conditional counter application, jointly and severally, one paying the other to be absolved with costs, such costs to include the costs of one instructing and two instructed counsel.'

[12] The Trust noted an appeal to the Supreme Court which was dismissed on 7 October 2013. The following order was made by the Supreme Court:

'The appeal is dismissed with costs, including the costs of one instructing and one instructed counsel. The third order issued by the court a quo is set aside and the following order is substituted therefore:

"(3) The Town Council of Helao Nafidi is ordered to comply with their contractual obligations in terms of the PTO issued in respect of Erf 13, Oshikango to the holder thereof, Northgate Properties (Pty) Ltd."

⁷ The Town Council and the Trust, respectively.

⁸ The Registrar of Deeds.

⁹ Northgate.

¹⁰ The Trust and one Mr Haddis Tilahun.

[13] Subsequent to the judgment and order of the Supreme Court, and on 21 October 2013, Northgate wrote to the Town Council advising that in terms of the Supreme Court judgment handed down on 7 October 2013, it was exercising its option to purchase Erf 13 in terms of clause 10 of the PTO. The Town Council was further requested to confirm that it would arrange for a sworn valuation, as Northgate was in the process of doing, in compliance with clause 10 of the PTO conditions. To date the Town Council has failed to do this.

[14] In support of its application for a mandamus, Northgate alleges that the Town Council (who at all times indicated it would comply with the courts' decisions) has been ducking and diving and failing to comply with the orders of this court and the Supreme Court. In particular, and on 19 February 2014, Northgate was informed that the Town Council had resolved not to alienate Erf 13 until further notice.

[15] On 5 March 2014, Northgate reiterated its entitlement to purchase Erf 13 in terms of clause 10 of the PTO, explaining that the condition in clause 10 of the PTO had been met, because title to the allotment became possible when Helao Nafidi was proclaimed a town. After receiving no response to this letter, the Town Council was advised in correspondence dated 19 September 2014, that it had no discretion and could not resolve not to alienate the property until further notice.

[16] Correspondence continued back and forth between the parties, each reiterating their respective positions.

[17] During mid-2016, it came to Northgate's attention that the Town Council issued a notice in terms of s 63(2)(b) of the Local Authorities Act, expressing the intention to sell Erf 13 to 'Northgate Namundjebo Properties' by way of a private transaction. A price of N\$1 233 388 was set, and the notice requested that written objections must be lodged before 1 August 2017. Northgate alleged that it assumed that the decision to sell Erf 13 to it

was taken pursuant to the judgment of the Supreme Court. It also assumed that the existence of Northgate's pre-emptive right was recognised in the aforementioned notice.

[18] The above was recorded in a letter sent by Northgate to the Town Council dated 27 July 2017. The letter also stated that should no objections be lodged to the sale of Erf 13, Northgate looked forward to receiving confirmation thereof, and in the event that an objection was lodged, Northgate similarly be informed so that written representations could be submitted by it before submission to the Minister as envisaged by s 63 of the Local Authorities Act.

[19] However, in a letter dated 11 October 2017, the Town Council advised Northgate that subject to the agreement to occupy Erf 13, Oshikango, same had been terminated by effluxion of time on 22 September 2016, and that Northgate was notified on 27 January 2017 that the Town Council would not renew the agreement. Further, a certain Mr George Namundjebo had approached the Town Council expressing an interest to purchase the property. The Town Council had made an offer to Mr Namundjebo, which resulted in the publication of the notice of sale in the newspaper on 19 July 2017, and Northgate incorrectly assumed that the notice referred to it instead of Mr Namundjebo 'or his purported company Namundjebo Northgate Properties'. The Town Council confirmed that the notice referred to George Namundjebo 'or his company.' Northgate was further informed that the Town Council resolved that due to the notice of sale being 'ambiguous and prejudicial to interested parties' the offer would be readvertised to Mr Namundjebo, and that 'affected parties be informed of the decision.'

[20] Northgate responded to the above correspondence on 25 October 2017, essentially reiterating its position that the Supreme Court order was being ignored. Further, it pointed out that clause 1.1 of the PTO expressly provided that the holder of the PTO had the right to renew its right of occupation for a further period of at least five years reckoned from the date

of termination and that Northgate had already on 5 October 2016 formally informed the Ministry that it wished to renew the right of occupation and that it reserved the right to enforce clause 10 of the PTO.

[21] Subsequent to the above correspondence, Northgate transmitted further missives dated 9 November 2017, 15 January 2018, and 19 February 2018. A response from the Town Council was received on 7 March 2018, essentially disputing Northgate's claim to the property and confirming that the PTO had expired on 22 October 2016.

[22] A meeting was later arranged between the parties, which took place on 12 March 2020. The meeting ended with the understanding that Northgate would make a formal offer to purchase the property. The Town Council also insisted that Northgate submit a business and development plan, but Northgate made it clear that this would be difficult. Northgate pointed out that this was in any event not a contractual requirement.

[23] On 10 September 2020, the Town Council confirmed in writing that it had resolved to renew the PTO held by Northgate until 22 October 2021. It also advised that it was in the process to have the Erf deregistered from the Namundjebo Family Trust in terms of the Supreme Court Order.

[24] On 16 September 2020, Northgate informed that it would not be able to support its first option to purchase before May 2020 due to the Covid-19 pandemic and the resultant lockdown measures in place. Instead, Northgate provided a copy of the valuation of the property and made a formal offer of N\$1 020 000 in accordance with the valuation which was attached to the correspondence. Confirmation was made that the option to purchase Erf 13 was being exercised in terms of clause 10 of the PTO, and the Town Council was requested to arrange for a valuation, which outcome Northgate awaited.

[25] On 22 November 2020, the Town Council informed that it had not resolved to alienate or sell the property to Northgate. Reference was also made to the absence of a business proposal.

[26] Again, a flurry of correspondence ensued between the parties, each reiterating their respective positions.

[27] By 2 March 2021, almost ten years after the order of Miller AJ was approved by the Supreme Court, Erf 13 was transferred back to the Town Council, and the PTO was extended.

[28] Northgate avers in this regard that the decision to sell Erf 13 to Mr Namundjebo was taken in contempt of the Supreme Court order. It further submits that the Town Council's actions were disingenuous for the following reasons. Firstly, and at all material times, Northgate continued to pay royalties as provided for in clause 7 of the PTO throughout the period after 23 October 2016, and continues to pay such royalties. Secondly, Northgate continues to pay all rates and taxes, as well as water and electricity, and other fees levied in respect of the property. Thirdly, when the resolution was taken by the Town Council on 20 June 2017, it approved the sale of Erf 13 to Northgate by reference to clause 10 of the PTO, confirming that the same was valid and binding. Fourthly, in correspondence dated September 2020, to Northgate, the Town Council confirmed that it had 'resolved to renew the right of occupation in terms of clause 1.1 of the PTO'.

[29] Northgate stresses that the Town Council had no right to make an offer to Mr George Namundjebo or to his company, allegedly Namundjebo Northgate Properties (Pty) Ltd, because such an offer was made in violation of Northgate's contractual rights in terms of the PTO (in particular clause 10 thereof).

[30] These are the facts that informed the current mandamus application before the court.

Parties' contentions

[31] It is Northgate's case that there is simply no legal basis upon which

the Town Council can lawfully refuse to comply with the orders of the High Court and the Supreme Court. This conduct is not only undermining the authority of Namibian courts, including its apex court, but also constitutes a flaunting by the Town Council of its contractual obligations owed to Northgate and confirmed by the aforesaid court orders.

[32] According to Northgate, this position of the Town Council was untenable in light of the order of the Supreme Court requiring the Town Council to comply with its contractual obligations. This is because Northgate was entitled to exercise the option to renew right of occupation for a minimum period of five years, as well as the option to purchase Erf 13, Oshikango. In order for the Town Council to proceed with the sale, it would have to comply – and it was so contractually obliged to do – in seeking the appropriate ministerial consent in terms of s 30(1)(t) of the Local Authorities Act.

[33] Northgate submits that on a proper interpretation of clause 10 of the PTO, in granting a pre-emptive right, the Town Council is not compelled to sell Erf 13 at Northgate's behest. Instead, it only compels the first respondent to offer Erf 13 to Northgate as the holder, where the Town Council intends selling property to a third party. This interpretation also confirms with the general rule that a right of pre-emption must be strictly interpreted against the grantee.¹¹

[34] Thus, the notice dated 19 July 2017 made it apparent that the Town Council had at the very least resolved to sell Erf 13. The fact that there was an intention to sell to someone else, does not detract from the terms of clause 10 of the PTO, as it had become possible to sell the allotment, and the Town Council had evinced intention to sell not only by the notice published in the newspaper, but by the correspondence dated 10 September 2020, wherein the Town Council advised that it would sell the property to Northgate.

¹¹ *Bellairs v Hodnett* 1978 (1) SA 1109 (A).

[35] Northgate submits that it has made out a case for the interdictory relief sought. For the reasons advanced, it submits, that it has demonstrated a clear right to protect its interests, and in so doing, to require that the Town Council complies with its obligations in terms of the orders of this court, as supplemented by the Supreme Court. Further, it submits that there is no basis for the Town Council to refuse to comply with the court orders and that this non-compliance not only undermines the authority of the Namibian courts, but constitutes a flaunting by the Town Council of its contractual obligations and its duty to comply with court orders. An example of the complete disregard for the rule of law was the ten years it took to transfer the property to the Town Council from the Trust. Accordingly, any attempts by the Town Council to allege that it has now resolved not to alienate the property after previously evincing its intention to do so on more than one occasion should be treated with circumspection.

[36] Northgate submits that it will suffer irreparable harm should the Town Council not comply with its contractual obligations. It states that it has invested a considerable sum of money – N\$2 million since 1999 – for the construction of a warehouse on the property. Should it not be able to exercise its contractual right, and should the Town Council sell the property to someone else, it is unlikely that Northgate would be compensated for the structures which it has constructed on Erf 13, Oshikango.

[37] Further, Northgate submits that it has no other satisfactory remedy in that the warehouse is strategically located and is an important part of the business operated on Erf 13, Oshikango. In any event, Northgate submits it is not obliged in the circumstances to simply resort to a damages claim but is entitled to the protection sanctioned by the orders of the court made in this matter by obtaining specific performance of its contractual right to purchase Erf 13, Oshikango.

[38] As regards the portion of its relief sought in the notice of motion, to the effect that the Town Council must comply with the provisions of s 63(2) (b) of the Local Authorities Act and advertise the sale as such, Northgate

submits that the Town Council is not required to comply with this provision because it is not referred to in Schedule 1 of that Act. The issue was raised in the context of the Oshakati Town Council in *Mouse Properties Ninety CC v Minister of Urban Rural Development and Others*,¹² where the Supreme Court held as follows:

[28] It is correct that the town council is not mentioned in part I of sch 1 to the Act. It thus follows that the requirements relating to the publication of notices do not apply to it. The requirements relate to municipalities listed in part 1 of sch 1 who need not obtain the prior approval of the minister for a disposal of property, but who must instead follow the applicable procedures provided for in s 63(2), eg either simply publish a notice of the intended sale with the relevant particulars where such sale is by public auction or by tender or publish a notice of the intended sale with the relevant particulars and invite objections thereto if the intended sale is by way of a private transaction. It thus follows that there was no legal necessity for the town council to make use of the procedures prescribed in s 63(2) of the Act.

[29] Was the transaction by way of a public tender or a private transaction? It is strictly speaking not necessary to deal with the aspect, as once it has been accepted, as I have found above, that s 63(2) is not applicable at all to the town council because it is not mentioned in part I of sch 1, there was no need for any notice in the print media irrespective of whether the sale was by way of tender or by way of private transaction. I am however of the view that the fact that the proposals were sought in respect of the development of the property in a public process or tender does not mean the sale was by way of a tender. It is clear that once the proposals had been assessed, a price would have to be negotiated and agreed to before a sale could be concluded. Price is an essential requirement for a sale and despite the fact that the parties were ad idem as to the merx and the envisaged development, a price still had to be agreed upon for the sale to be concluded. The price was determined by the town council and accepted by the appellant without any public input or a transparent public bidding process and the sale was thus in essence one by private transaction.

[30] It thus follows that the legal practitioner for appellant is correct in submitting that

¹² *Mouse Properties Ninety CC v Minister of Urban Rural Development and Others* 2022 (2) NR 426 (SC).

s 63(2) and (3) did not apply to the intended disposal of the property by the town council in this matter. This is not of any moment in this matter as the prior approval of the minister was and is required for the intended disposal pursuant to the provisions of s 30(1)(t) of the Act as pointed out above.'

[39] The Town Council has no issue with the above judgment. In fact, it conceded that Northgate is the proper holder of a valid PTO. However, it submits that as it has formally expressed that it does not have an appetite to sell the property, the right of pre-emption does not arise. This was also submitted to the Supreme Court.¹³

[40] The Town Council's opposition is based on three broad grounds:

(a) Northgate has misunderstood the tenor of the court orders handed down by the High Court and the Supreme Court relating to this matter;

(b) The Town Council has at no stage lawfully resolved to alienate Erf 13, Oshikango, since the offers to purchase were not authorised by the Town Council;

(c) The Town Council 'has at no stage expressed an appetite to sell the property to any of the occupants and this lack of appetite has been repeated to this date.'

[41] These grounds of opposition ultimately resolve into two issues: firstly, the correct interpretation to be given to the relevant court orders and the PTO; and secondly, whether the Town Council has lawfully resolved to alienate the property, thus triggering Northgate's right of pre-emption.

[42] The Town Council submits that the property was allocated to Northgate in terms of a lease agreement at the time referred to as the

¹³ Paras 24 - 26.

Permission to Occupy (PTO). Clause 10 of the PTO, according to the Town Council, is merely an option, and not a right of pre-emption. That lease agreement was extended, although belatedly, in terms of the provisions of clause 1.1 of the PTO.

[43] From the context of those provisions of the lease agreement, as interpreted by the Town Council, it had the prerogative to decide whether to sell the property or not, notwithstanding that the allotment to the title has become possible. Further that it is only in the event that the Town Council has decided to sell the property that the right of pre-emption would be involved and provided that the PTO is still valid. The Town Council resolved not to alienate the property. Northgate has accordingly not fulfilled these two preconditions in order to validate its claim.

[44] In the result, it was submitted, Northgate did not have a clear right, as alleged. It only enjoyed a *spes* or an expectation of the lifespan of the lease agreement. The *spes* is connected to a future occurrence or event - the occurrence being a decision by the Town Council to alienate the property. In this regard, the Town Council submits that it has not made that decision during the lifespan and existence of the PTO and therefore, Northgate cannot allege that its *spes*, under clause 10, has manifested into a clear right worthy of protection.

[45] Therefore, and in the above circumstances, all that Northgate can exercise is a right of pre-emption, only, and in the event that the Town Council resolves to alienate that property. This jurisdictional fact, as it were, would invoke the provisions of clause 10. On the above interpretation, the Town Council remains in compliance with the orders of both this court and the Supreme Court, as it remained in compliance with its contractual obligations. In any event, and therefore, the Supreme Court did not order anything else than compliance with the terms of the PTO, and in effect, the orders of the court merely reaffirmed the Town Council's prerogative to decide whether to sell the property or not.

[46] As regards the issue of the previous attempt to sell the property in 2005, and again in 2017, Northgate submits that the ratio of the Supreme Court judgment was that the erstwhile CEO of the Town Council did not have the consent of the Town Council either to offer for sale, or to sell the property. It was on this basis that the agreement of sale was invalid for non-compliance with s 30(1)(t) of the Local Authorities Act.¹⁴ The Supreme Court specifically held that the erstwhile CEO of the Town Council did not have the consent of the Town Council to sell the property to the Trust and has not followed the procedure to refer the matter to the Land Allocation Committee for their consideration and recommendation to the Town Council.¹⁵

[47] As regards the second offer to purchase the property, the Town Council submits that it is correct that a lawful offer to purchase the property was made on 19 July 2017 in The Namibian newspaper, and in the New Era newspaper. This was a decision taken in accordance with the Town Council's resolution number C30/22/06/2017/6 ODCM 2017. The offer was made to Namundjebo Northgate Properties (Pty) Ltd and the public was invited to make its objections.

[48] At that time, the PTO had already expired on 23 October 2016. During this time, all rights emanating from the PTO had lapsed. In any event, on 20 December 2018, the Town Council resolved to rescind the decision to offer the property to Namundjebo Northgate Properties (Pty) Ltd and to stay any further sales of the property.

[49] This, according to the Town Council, was a manifestation of its intention to not further alienate the property.

Discussion

[50] This case is to be determined on an interpretation of the provisions of clause 10 of the PTO in the context of the orders granted in this court and

¹⁴ Para 47 of the Supreme Court judgment.

¹⁵ Para 29.

the Supreme Court where compliance with its terms was directed.

[51] Counsel for the Town Council correctly cited the *Coopers* decision on the golden rule of interpretation of the language of the document, and that it is to be given its ordinary grammatical meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument.

[52] This principle was however reformulated in *Natal Joint Municipal Pension Fund*,¹⁶ and approved by the Supreme Court in *inter alia*, *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*,¹⁷ where it was held that a more modern and contextual approach should be applied to the interpretation of the document as a whole. It was expressed thus:

[18] South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality* Wallis JA usefully summarised the approach to interpretation as follows:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to,

¹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

¹⁷ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SCA) para 18.

and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.”

[53] Applying the above modern and contextual approach, regard needs to be had to the history and development of PTOs which was explained in the Supreme Court decision sought to be enforced in these proceedings as follows:

‘The concept of a PTO was established by legislative enactment (see s 47 of Regulation 188 of 1969). It granted to the holder thereof certain rights in regard to the piece of land occupied, of which the most important was the right of pre-emption of the land whenever it was possible to own property in that area. The certainty that the holder of the PTO could, in time, become the owner of the property occupied by him or her stimulated development of the areas held in terms of a PTO. Buildings were erected on the land so held, sometimes to the value of millions of dollars as is evidenced in this particular instance. A PTO was granted by the Permanent Secretary in the Ministry of Regional and Local Government and Housing and Rural Development and was not transferrable without his permission. The granting of a PTO was also a matter of record and certificates were issued to the holders thereof setting out the terms under which it was held. One such condition was that the holder of the PTO could not transfer any of his rights to another entity or person without the written consent of the Permanent Secretary of the Ministry. In regard to the law applicable to PTOs and the effect and status of a PTO, there is no dispute between the parties. The PTO endured for a period of 20 years.’¹⁸ (Emphasis supplied)

And further

‘[32] The granting of a PTO was a matter of record. Mr van der Nest SC, assisted by Mr Corbett, pointed out that in terms of s 25(1) of the Black Administration Act, No 38 of 1927, read with s 21(1) and 48(1) of the Black Trust and Land Act, No 18 of 1936 and in terms of Government Notice R188 of 1969, the then State President of South Africa issued certain Black Areas Land Regulations which also applied to the then South West Africa. In terms of Regulation 47(1) a person could apply for a ‘trading allotment’ in the form of a

¹⁸ Para 7.

PTO. Regulation 47(5) provided:

“(5) No person shall occupy any Trust land (read: “communal land”) within a black area unless he has been or has been deemed to have been duly authorised to do so under these regulations or any other law.”

[33] The occupation of land for business purposes was provided for in terms of s 6(1) of the Regulations and stated as follows:

“6(1) No person shall remain in occupation of any portion of land acquired by the Trust after the commencement of these regulations except with the permission in writing of the Bantu Affairs Commissioner and on such terms and conditions as such Bantu Affairs Commissioner may specify in such permission.”

[34] In terms of Article 140(1) of the Namibian Constitution this statutory regime of pre-independence laws, survived the independence of Namibia and Article 140(4) stated that 'any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia, or to a corresponding Minister, official or institution of the Republic of Namibia . . . '. The corresponding officer to the 'Bantu Affairs Commissioner' in R 6(1) is now the Permanent Secretary in the Ministry.

[35] As far as communal land was concerned; Article 100 of the Namibian Constitution vested the ownership of land 'if they were not otherwise lawfully owned' in the State. See further s 17(1) of the Communal Land Reform Act, Act No 5 of 2002 which provides that communal land is held in trust by the State for the benefit of the traditional communities residing in those areas. It furthermore provides that no right conferring freehold ownership is capable of being granted in respect of communal land. (See s 17(2).)

...

[41] After the Township was proclaimed, the ownership of the land within its jurisdiction became the property of the Township subject to existing rights. (See s 3(3)(a) and (b) of Act 23 of 1992.) It is common cause that those existing rights

are represented by PTOs issued before Independence or since by the Permanent Secretary of the Ministry. As there was no PTO in existence in regard to Erf 13, Oshikango, there was no legal impediment which prohibited the granting of the PTO to Mr George Namundjebo and its further transfer to Namundjebo Northgate Properties. It is also not alleged by the appellants that the granting of such PTO to Mr George Namundjebo was unlawful.

[42] For the reasons set out above I am satisfied that the evidence presented by the appellants do not raise a genuine or *bona fide* dispute in regard to who is the rightful holder of the PTO in regard to Erf 13, Oshikango, and I find that Northgate is the rightful holder of the said PTO...'

[54] It follows from the above, that once the Township had been proclaimed, holders of PTO rights, such as Northgate, would have the opportunity to apply for freehold ownership, which was previously not possible as the land in question was previously communal land, and not capable of freehold ownership. The terms of the PTO must be interpreted in this context. In this regard, I am guided by the concept of a PTO, and the nature of the contractual rights granted in terms of the PTO, as held in the Supreme Court judgment.

[55] The introductory words to clause 10 of the PTO reads as follows:

'Should title to the allotment become possible.'

[56] To my mind, these introductory provisions, which give context to the entire clause, premise that the right of pre-emption to the holder of the PTO would arise on the happening of an event that would make title to the allotment possible. Title to the allotment could only become possible once the land was proclaimed and not before, because this would be the only time that freehold ownership, and therefore title to the allotment, would become possible.

[57] The parties appear *ad idem* that this right could only come into being

when the Town Council decides to sell the Erf. Upon the happening of this event, the rest of the provisions would kick in, creating a responsibility on the Government of Namibia, through the Minister and the Town Council, to comply with the rest of the provisions of clause 10 of the PTO, and to give the holder (Northgate) the first option of purchase.

[58] On the facts, and on 10 September 2020, the Town Council confirmed *inter alia* that it had resolved to renew the PTO for the period 22 October 2016 to 22 October 2021.

[59] After the Township of Helao Nafidi was proclaimed, the Supreme Court found in *Northgate* that:

‘... the ownership of the land within its jurisdiction became the property of the Township subject to existing rights ... it is common cause that those existing rights are represented by PTOs issued before Independence or since by the Permanent Secretary of the Ministry.’¹⁹ (Emphasis supplied)

[60] This is the ‘certainty’ referred to in the Supreme Court judgment that in time, the holder of the PTO could become the owner of the property.

[61] I, therefore, disagree with the Town Council’s contention that the PTO was only a leasehold and gave leasehold rights. That may have been the case before, but not after the property was proclaimed. This argument is not in line with the dictum expressed by the Supreme Court, relating to the principles relating to PTOs which the Town Council had no disagreement with.

[62] To my mind, the terms of clause 10 of the PTO requires the Town Council to sell the property to Northgate, the holder of the PTO, once a decision is made to sell the property. Further, the Town Council could only offer the property for sale to another party, if the holder elects not to purchase it.

¹⁹ Supreme Court judgment at para 41.

[63] As regards the question of the requirement of the submission of a business plan by the Town Council, under normal circumstances, this would not appear to be unreasonable. However, it published the notice of sale without requiring a business plan, and it has not made the court aware that it insisted on compliance with this requirement when it effectively accepted the offer of a third party on its own version preceding the notice, without requiring a business plan. No allegations were made that this was a requirement. It is not a requirement of the PTO.

[64] What is more disconcerting is the conduct of the Town Council subsequent to the order made in the Supreme Court. Whilst it is accepted that the offer of purchase giving rise to the applications that resulted in the High and Supreme Courts orders, was undertaken without the requisite authority; the Town Council went ahead and resolved to advertise the property for sale. It issued a notice in terms of s 63(2)(b) of the Local Authorities Act indicating that it intended to sell the property to Namundjebo Northgate Properties (Pty) Ltd. This allegation cannot be disputed.

[65] The resolution to sell the property brought into being the Town Council's contractual obligations towards Northgate in terms of clause 10 of the PTO, to offer the property for sale to Northgate. If the Town Council was correct that it intended to offer the property to Mr George Namundjebo instead, this would be a flagrant example of contempt of the orders of court referred to, as well as the provisions of the PTO.

[66] I say this for the following reasons. Firstly, in terms of the PTO conditions, Northgate had the option to renew the right of occupation for a further period of at least five years reckoned from the date of termination. On the facts, the termination date was 21 October 2016.

[67] Prior to the termination date, Northgate exercised the option to renew the right of occupation by way of a letter dated 5 October 2016. In this letter, Northgate also expressly reserved its rights to enforce its contractual obligations arising out of clause 10 of the PTO conditions to purchase Erf 13.

Despite Northgate specifically requesting that written confirmation be given of such right to renew the PTO, none was initially forthcoming.

[68] It is not in dispute that Northgate's pre-emptive right was reflected in the notice but in a letter dated 11 October 2017. The Town Council's representative stated that it had been approached by another party who had expressed an interest in the purchase of the property. In this regard, there was no suggestion that the offer and publishing of the notice was not authorised by the Minister. In fact, this is not even suggested in the answering papers.

[69] What was suggested was that:

'... the first lawful offer to purchase the property was made on 19 July 2017 in *The Namibian newspaper* and the *New Era*. This decision was in accordance with the First Respondent's resolution No: C30/22/06/2017/6th ODCM 2017. A copy of the extract of the minutes of Namundjebo Northgate Properties (Pty) Ltd and the public was invited to make objections. At the time the PTO between the First Respondent and the Applicant had already expired on 23 October 2016. Almost a year has already passed.' (Emphasis supplied)

[70] Effectively, the Town Council committed two breaches of the PTO. Firstly, it purported to advertise the property in breach (on the Town Council's version) of the terms of clause 1.1, which specifically provided that Northgate would have the option to renew the right of occupation for a further period of at least five years recorded from the date of termination. This provision was ignored.

[71] The second breach of the PTO was to offer it for sale (on the Town Council's version) to Mr Namundjebo, when in terms of the PTO, as interpreted in this judgment, it had no legal right to do so. Even on its own interpretation of the agreement, it could not be seen to have complied with the terms of clause 10 of the PTO by advertising it for sale to a third party, and merely informing of the holder's option. This went entirely against the letter and spirit of the PTO. It is not lost on the court that initially, Northgate

assumed that the formal offer published related to it, but that this was later disputed by the Town Council.

[72] To make matters worse, and having realised the consequences of its actions, the Town Council later resolved not to sell and not to alienate the property until further notice. This is to all intents and purposes a disingenuous attempt to evade the terms of the orders of the High Court and the Supreme Court directing compliance with the terms of the PTO for the past ten years.

[73] It is imperative in a constitutional democracy for organs of the State to comply with the judgments and orders of this court, and the apex court of this country. Failure to do so sets an alarming and disconcerting precedent. To borrow from the sentiments expressed by Plaskett AJA in *Madibeng Local Municipality v Public Investment Corporation Ltd*,²⁰ although in a slightly different context:

‘As an organ of state, it is required to act ethically, and has failed dismally to do so in this matter. Litigation, said Harms DP in *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others*, ‘is not a game’; organs of state should act as role models of propriety; and they may not behave in an unconscionable manner.’

[74] On the facts before me, I cannot say that the Town Council, or the Ministry for that matter, have set an example as role models of propriety. Instead, the Town Council has done everything possible to evade complying with court orders.

[75] Given the aforesaid, Northgate has discharged its onus for the relief sought. Clause 10 must be complied with, and the first option of purchase should be given to Northgate immediately, in line with the terms set out in clause 10 as interpreted in this judgment, based on the Town Council’s previous election to sell, as captured in its own resolution, which gave rise to

²⁰ *Madibeng Local Municipality v Public Investment Corporation Ltd* 2018 (6) SA 55 (SCA) para 30.

the notice published in July 2017.

[76] In light of the foregoing, the following order is made:

1. The Town Council is ordered immediately to comply with the court order handed down by this court on 5 May 2011 (under case A 350/2008) and the further court order handed down by the Supreme Court on 7 October 2013 (under case SA 33/2011) to the effect that:

‘The Town Council is ordered to comply with their contractual obligations in terms of the PTO issued in respect of Erf 13, Oshikango to the holder thereof, Northgate Properties (Pty) Ltd.’

2. In so complying with the aforesaid orders, the Town Council is directed to:

- 2.1. Obtain a sworn valuation in respect of Erf 13, Oshikango to establish a purchase price, being the average of such valuation and the valuation already obtained by Northgate in respect of Erf 13, Oshikango;

- 2.2. Approach the Minister of Urban and Rural Development to obtain approval for the aforesaid sale, as envisaged by s 30(1)(t) of the Local Authorities Act 23 of 1992 (as amended).

3. The Town Council is ordered to immediately comply with any further obligations as are required by law to effect the sale of Erf 13, Oshikango to Northgate.
4. The Town Council is ordered to pay Northgate’s costs of suit, such costs to include the costs of one instructing and two instructed counsel, where employed.

5. The matter is regarded as finalised and removed from the roll.

EM SCHIMMING-CHASE

Judge

APPEARANCES

APPLICANT: A Corbett SC, with him, V Kauta
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