

REPORTABLE

CASE NO: SA 33/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARTHA NAMUNDJEBO-TILAHUN N.O.

First Appellant

HADDIS TILAHUN

Second Appellant

and

NORTHGATE PROPERTIES (PTY) LTD

First Respondent

TOWN COUNCIL OF THE MUNICIPALITY OF HELAO

NAFIDI

Second Respondent

REGISTRAR OF DEEDS

Third Respondent

MINISTER OF REGIONAL AND LOCAL GOVERNMENT

AND HOUSING AND RURAL DEVELOPMENT

Fourth Respondent

Coram: MARITZ JA, MAINGA JA and STRYDOM AJA

Heard: 15 November 2012

Delivered: 7 October 2013

APPEAL JUDGMENT

STRYDOM AJA (MARITZ JA and MAINGA JA concurring):

[1] The first respondent brought an application in the High Court of Namibia for a review in terms of rule 53, alternatively a declaratory order in which it claimed the following relief:

1. Calling upon the respondents to show cause why-
 - 1.1 the decision of the first respondent taken on or about 13 June 2007 to enter into an agreement of sale with the second respondent for the purchase of immovable property belonging to first respondent, such property being described as:

Erf No. 13, Oshikango
In the town of HelaoNafidi
Registration Division "A"
Oshikango Region
(hereafter "the property")

Should not be declared *ultra vires* the powers of the first respondent and accordingly null and void, alternatively be reviewed and set aside in terms of Rule 53 (1)
 - 1.2 declaring the agreement concluded between the first and second respondents pursuant to the decision aforesaid – annexure "**HH13**" to the founding affidavit – in terms whereof the second respondent purchased the property from the first respondent, to be null and void and of no force and effect.
 - 1.3 directing and ordering the third respondent to cancel the entry in the Deeds Registry indicating that the property belongs to the second respondent.
 - 1.4 directing that the matter be referred back to the first respondent and that the first respondent consider applicant's exercise of its right of pre-emption in respect of the property.

2. Ordering the first and second respondents, and any other respondents who may oppose this application, to pay the costs of this application jointly and severally, the one paying the others to be absolved.
3. Further and/or alternative relief.'

[2] At a later stage the first respondent amended its notice of motion by inserting, after para 1.4 of its original notice, and in the alternative to its original notice, the following paragraphs, namely:

- '1. Declaring the agreement concluded between the first and second respondents pursuant to the decision aforesaid – annexure "**HH13**" to the finding affidavit – in terms whereof the second respondent purchased the property from the first respondent, to be null and void and of no force and effect;
2. Directing and ordering the third respondent to cancel the entry in the Deeds Registry indicating that the property belongs to the second respondent;
3. Directing that the matter be referred back to the first respondent and that the first respondent consider applicant's exercise of its right of pre-emption in respect of the property.'

[3] The first respondent's application was successful and the following order was granted by the Court:

- '1. That the agreement of sale concluded between the first and second respondents 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 respondent is directed to cancel the entry in the Deeds Registry indicating that the property belongs to the second respondent.
3. That the matter is referred back to the first respondent to consider the applicant's exercise of its right of pre-emption in respect of the property.
4. That the conditional counter application is dismissed.
5. That the second and third respondents are ordered to pay the costs of the application and the conditional counter application, jointly and severally, the one paying the other to be absolved such costs to include the costs of one instructing and two instructed counsel.'

[4] The appellants lodged an appeal against the whole of the judgment and orders made by the Court *a quo*.

[5] In the Court *a quo* the second respondent in the appeal was the first respondent. The first appellant was styled as the second respondent with the Registrar of Deeds and the Minister of Regional and Local Government and Housing and Rural Development respectively as third and fourth respondents. The first respondent in the appeal was the applicant. Only the first and second appellants

appealed the order of the Court *a quo*. The second appellant had been joined as a party during the proceedings. In order to avoid confusion I will refer to the respondents cited in the appeal as follows:

to the first respondent as 'Northgate';

to the second respondent as 'the Town Council';

to the third respondent as 'the Registrar'; and

to the fourth respondent as 'the Minister'.

Because the appellants drew a distinction between Namundjebo Northgate Properties (Pty) Ltd and Northgate Properties (Pty) Ltd I will, wherever I intend to refer to the first named, refer to 'Namundjebo Northgate Properties'

Background

[6] Northgate alleged that it was the holder of a Permission to Occupy (PTO) in regard to Erf 13, Oshikango, situated within the Township of Helao Nafidi. A certificate, issued in the name of Namundjebo Northgate Properties (Pty) Ltd, was attached to its application. On 25 July 2008, through their legal practitioners, Northgate discovered that the property, known as Erf 13, Oshikango, had been transferred to a trust known as the Namundjebo Family Trust (the Trust) and of which the appellants were the provisional trustees. Prior to the transfer, Mr Kutzner, the legal practitioner on behalf of Northgate, had informed the legal practitioners of the Trust of Northgate's rights in regard to Erf 13 and had threatened to bring an urgent interdict to prohibit the transfer

of the Erf in the name of the Trust. However, it did not make good its threat and Erf 13 was registered in the name of the Trust. Northgate then brought the present application in the High Court of Namibia

[7] Before independence, and until after independence the areas of Municipalities and Village Councils were delimited and proclaimed and even were measured and set out, no private persons or registered companies could own land in what is now known as communal areas such as the then Owambo. 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 transferable 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 PTO's and the effect and status of a PTO there is no dispute between the parties.

[8] Mr Hamm, the deponent on behalf of Northgate, further explained that this particular PTO had been granted to Mr George Namundjebo, a brother of the first appellant, on 1st October 1996. Thereafter, the company Namundjebo Northgate Properties was established with a shareholding of 4000 shares of which only a 100 shares were issued. Of these, 10 shares were held by Mr Namundjebo and 90 shares by Namibia Breweries Ltd (NBL). Mr Namundjebo thereafter applied for the transfer of the existing PTO, held by him in his personal capacity, to Namundjebo Northgate Properties. Permission was granted and the certificate, referred to herein before, was issued to reflect the name of the new holder of the PTO. The property was developed to the tune of N\$7,5 million with capital provided by NBL.

[9] It was further explained that Mr George Namundjebo had entered into various business ventures of his own without much success and soon found himself deep in debt. To assist him and to extricate him from his indebtedness NBL bought his shares in Namundjebo Northgate Properties and in Northgate Exports (Pty) Ltd for an amount of N\$1,1 million and further advanced to him a loan of N\$58 151,13. This is all reflected in a written agreement entered into by the parties. NBL was now the only shareholder of Namundjebo Northgate Properties. On 28 May 2008, application was made to the Registrar of Companies to drop the word 'Namundjebo' from the company name. This was only a change of name and NBL remained the only shareholder in Northgate.

[10] After the Town Council of HelaoNafidihad been established a MrShivolo, the CEO of the Municipality, addressed a letter to Namundjebo Northgate Properties as the PTO holder of Erf 13 'to offer you the first opportunity to purchase off such plot/erf'. The letter was dated 24/03/2005 and furthermore the PTO holder was given 21 days from the date of notice to indicate its willingness to purchase Erf 13. Namundjebo Northgate Properties did not respond to this invitation. On the 18th September 2006 a further letter was addressed, this time to NBL, to offer them the purchase of Erf 13, and it was given until the 30th October 2006 to make all the necessary arrangements to buy the erf. A third letter, dated 9th November 2006, was addressed by MrShivolo to NBL in which reference was made to a telephonic communication regarding the payment of the erf and MrShivolo undertook to take up the concern of NBL, regarding the payment of the erf, with the Town Council. Thereafter, and on 6th June 2007, an application to purchase the property was sent to the Town Council together with a request to inform Namundjebo Northgate Properties of the purchase price of the erf and an undertaking was given to transfer such amount to the bank account of the Town Council, seemingly once the purchase price had been determined.

[11] Further correspondence followed upon this request but no progress had been made to finalise the sale. From the correspondence it seemed that the legal practitioners of Namundjebo Northgate Properties were of the opinion that there was some unnecessary stalling on the part of the CEO to finalise the purchase of Erf 13. MrShivolo then informed Namundjebo Northgate Properties that it had come to his

knowledge that there was a dispute between the company and the Namundjebo family as to the status of the premises and advise Namundjebo Northgate Properties that the Municipality did not want to become entangled in such dispute and 'will wait for clarity before we can act promptly'. The existence of such a dispute was denied by Namundjebo Northgate Properties. Whilst the correspondence was still ongoing, and notwithstanding MrShivolo's intimation that the Town Council did not want to become entangled in the dispute, he entered into a contract of sale with the first appellant, as nominee trustee for the Trust, whereby he sold Erf 13, Oshikango, to the Trust.

[12] The first appellant deposed to an affidavit on behalf of the Trust. She stated that for as long as she could remember, and prior to the proclamation of the township HelaoNafidi, the land surrounding the area known as Oshikango was allocated to the Namundjebo family in accordance with the customs and traditions applicable in that area. This included the disputed property, Erf No 13. When her father died her brothers George and Phillip(the latter also being a headman and steeped in the customary law of that area) had been appointed as joint executors of the estate. Her late father had various business interests and himself held various PTO's in the communal areas in northern Namibia. The first appellant together with her brothers and mother were the beneficiaries of the Trust and she and the second appellant were the first trustees appointed. She stated that her brother George, as joint executor of the estate of her late father, attended to the interests of the estate in the Oshikango area, including Erf 13. It was in that capacity that a PTO was issued to

him. However, it was incorrectly issued in his personal capacity and should have reflected that he was holding the PTO in his capacity as a joint executor of the estate.

[13] The first appellant described how Mr List of the Ohlthaver and List group of companies had become interested to establish a warehousing and trading facility for the distribution of the products of NBL to Angola. This led to the formation of Namundjebo Northgate Properties which was a defensive name registered by her brother George. She stated that it was never the intention of her brother George or the Namundjebo family that the PTO should have been registered in the name of the company. According to her brother George, it was contemplated that NBL would provide capital for the purposes of laying a floor in the warehouse, which was already partly constructed, and which would have sufficient strength to accommodate forklifts and other heavy machinery. As a *quid pro quo* NBL would not pay rental to the estate, or later, to the Trust, until the capital costs invested by it had been applied and set off against such rental and use.

[14] First appellant went on to state that the registration of the PTO in the name of Namundjebo Northgate Properties had been a mistake and had never been intended by the joint executors or the family. Such registration had therefore been done in error by the Ministry at the time and those records needed to be rectified. To that extent the first appellant launched a conditional counter claim for the rectification of the Ministry's records.

[15] It was further explained that first appellant's brother George started a supermarket on the premises of Erf 13 but, as a result of financial losses, a company of the Ohlthaver and List group under the name of Safeway and Pick and Pay was subsequently established on the property.

[16] During 2005 Mr George Namundjebo received a copy of a letter addressed to Namundjebo Northgate Properties by the Town Council in which the Town Council had offered to sell the property, Erf 13. This letter was shown to the first appellant and she then approached Mr Shivolo, the former Town Clerk of HelaoNafidi. First appellant explained to him that the said property had previously been allocated to her family and that the Trust had succeeded the estate. In her capacity as nominee trustee of the Trust, the first appellant then applied to purchase the property. This happened on 6 June 2007. Subsequently an agreement of sale was concluded and thereafter the property was transferred by registration to the Trust.

[17] In regard to the shareholding of Mr George Namundjebo in the company Namundjebo Northgate Properties, the first appellant denied that that shareholding had anything to do with the PTO and she stated that it only related to his participation in the company conducting the warehousing and trading business on the premises. In regard to the sale and with reference to the affidavit of Mr Sheelongo, the acting CEO of HelaoNafidi, the first appellant submitted that the Town Council was capable of ratifying the sale and would be approached to do so in so far as it might be necessary. First appellant further denied that s 63(1) read with s 63(2) were

applicable to the Town Council. She also denied that improvements to the sum of N\$7,5 million had been made on the property.

[18] In regard to the affidavit by MrSheelongo, the first appellant disputed his authority to make such affidavit. This was done on the strength of a communication by her brother, Philip Namundjebo, who was the Chairperson of the Management Committee of the Town Council, who stated that no such meeting had been held whereby MrSheelongo was authorised to make such affidavit.

[19] Although the Town Council did not oppose the application by Northgate,MrSheelongo, its acting Chief Executive Officer, filed an affidavit on the instructions of his Management Committee to set out the facts of which the Council had knowledge concerning the dispute and which facts may have been relevant to assist the Court.

[20] MrSheelongo pointed out that the property known as stand No 13 was formerly administered by the Ohangwena Regional Council. The HelaoNafidi Town Council was established on 1st September 2003 by publication by the Minister in Government Gazette No 3054 of 2003. Prior to its proclamation the said Regional Counsel had the power to allocate and distribute land on behalf of the State.

[21] According to the records a PTO in respect of the stand known as Erf 13, Oshikango, was granted to Mr George Namundjebo on 1 October 1996. However,

on 9 October 1996, an application was made by Mr Namundjebo for the transfer of the PTO to a company, Namundjebo Northgate Properties (Pty) Ltd. In both instances copies of the relevant documents, evidencing the granting of the PTO to Mr Namundjebo and the later transfer thereof to Namundjebo Northgate Properties, were attached by Mr Sheelongo. This change of ownership of the PTO to Namundjebo Northgate Properties (Pty) Ltd was duly granted by the Permanent Secretary and again the deponent attached the relevant documents in support of this allegation.

[22] Mr Sheelongo continued to state that a valid offer was extended to Namundjebo Northgate Properties on 24 March 2005 to buy the said stand but it did not take up the offer and did not exercise its right of pre-emption of the stand.

[23] Mr Sheelongo then explained the procedure followed by the Municipality where a property was sold privately. A Land Allocation Committee was established by the Town Council to consider applications for land. All land within the Town Council's jurisdiction could only be sold or allocated through the Land Allocation Committee. This committee considers applications and, if satisfied that all the requirements of the Council had been met, it recommends the sale of land by public or private tender to the Town Council for approval. If the sale is by private tender, permission of the Minister to sell the land is obtained after the Council has resolved to sell the land.

[24] MrSheelongo further stated that the Town Council did not take a decision to enter into an agreement of sale of Erf 13, Oshikango, to the first appellant. He stated that MrShivolo, the then CEO of the Town Council, was fully aware that Namundjebo Northgate Properties was the lawful holder of the PTO over the property. The Town Council had been aware of the dispute between the holder of the PTO and the Namundjebo family concerning Erf 13 and Council was not prepared to sell the property to either party until the dispute had been resolved.

[25] The deponent further stated that the Town Council was unaware of the sale of the Erf by MrShivolo to the first appellant. For this reason the Town Council conceded that the sale was null and void. MrSheelongo further explained that because of serious allegations of mismanagement of the assets of the Town Council, including his dealings in regard to Erf 13, MrShivolo had since been suspended from his position as CEO of the Town Council. He stated that the Council was fully aware of Namundjebo Northgate Properties' right of pre-emption but had as yet not resolved to sell the property to either of the contestants because of the dispute.

[26] MrSheelongo went on to state that it was common cause that MrShivolo did not have the consent of the Town Council to sell the property to first appellant, nor did he follow the procedure to refer the matter to the Land Allocation Committee for their consideration and recommendation to the Council. However, he was aware that the Town Council's legal practitioners, LorentzAngula Incorporated, were instructed by Shivolo to attend to the transfer of the property to the first appellant and once they

had received a duly signed Power of Attorney by the CEO they were, in his opinion, obliged to give effect thereto.

[27] The deponent further stated that he was informed by a MsGreyvenstein, the Town Council's legal practitioner, that she was contacted by a MrKutzner, the legal practitioner for Northgate, who enquired about the status of the transfer of the property and that he advised MsGeyvenstein that they would prepare an urgent application to stop the transfer. MrSheelongo then advised MsGreyvenstein that the Town Council would only consider stopping the transfer if Northgate brought an urgent application setting out their reasons why the transfer should not proceed.

[28] MrSheelongo ended his affidavit by again conceding, on behalf of the Town Council, that the sale between itself and the first appellant was invalid and should be set aside.

[29] What is clear from the affidavit of MrSheelongo is that the previous CEO of the Town Council acted from the start without any authority by the Town Council as the Town Council, because of the existing dispute, was not willing to even consider a sale of Erf 13 until the dispute had been resolved one way or the other. Not only did he not have any authority for his dealings in this regard but he also did not follow the procedure laid down by the Council, namely to refer the matter first to the Land Allocation Committee for their recommendation to the Council. The fact that he had offered to sell the stand to Northgate is a clear indication that he had no intention to

obtain the prior approval of the Minister for the sale. This is further strengthened by the fact that it is common cause that MrShivolo also did not obtain the prior approval of the Minister for the sale of Erf 13, Oshikango, to the Trust. The bestMrShivolo could do was perhaps to invite Northgate to make an offer to purchase the stand but he himself did not have any authority to offer Erf 13 for sale to Northgate.

The issues to be decided

[30] Although various points *in limine* were foreshadowed in the affidavit of the first appellant these, with the exception of the review point, either fell away because of the Court *a quo*'s finding that the matter was not reviewable or were rejected by the Court *a quo*. Before us the only preliminary point that we were addressed upon was the standing of Northgate to bring the application. I will deal with this issue at a later stage.

[31] It seems to me that there are only two main issues, with some subordinate points, to be decided by this Court. The main issues are firstly the question of who the rightful owner of the PTO was and with that, the issue of the standing of Northgate to have brought this application, The second main issue is the validity of the sale agreement signed by MrShivolo, purportedly on behalf of the Town Council, and flowing from that also the issues of the alleged lapsing of the offer to buy the property, the effect of the registration in the name of the Trust and the issue of estoppel.

[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 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).)

[36] In regard to the PTO held by Northgate there is a clear paper trail leading up to the granting of the PTO to Namundjebo Northgate Properties. The first PTO granted in respect of Erf 13, Oshikango, was on a pro forma application form in which Mr George Namundjebo applied, in his personal capacity, on 1 October 1996 for the right to occupy this Erf in order to conduct a business thereon. Written permission was granted by the Permanent Secretary of the Ministry. On 8 October Mr George Namundjebo applied for the transfer of the PTO to Namundjebo Northgate Properties. Again written permission was granted by the Permanent Secretary of the Ministry and a written certificate in the name of Namundjebo Northgate Properties, containing also the conditions for such occupation, was issued.

[37] In contrast to the above, the appellants' claim to be the rightful owner of the PTO in regard to Erf 13 is, to say the least, confusing. The claim is firstly based on the allegation that land, including Erf 13, Oshikango, was allocated to the family, and

more particularly the late father of the first appellant, in terms of the traditions and customs of the people of that area. In this regard there is the affidavit of Mr Julius Shelunga, a headman in the area, supporting the allegation by the first appellant. This however, did not constitute, in the light of the legislation referred to above, a PTO and, as was pointed out by Mr van der Nest SC, at best only allowed for the use of the property. Later on the first appellant contended that her late father was granted the particular PTO either expressly or tacitly. This claim was based on the final liquidation account of her late father's estate which, under the heading immovable property, referred to various properties, *inter alia*, also a shop at Oshikango. The reference to immovable property is a misnomer as at that stage no private person was allowed to possess immovable property in communal areas. The first appellant's evidence in this regard is also contradicting. She firstly stated that her brother, Mr. George Namujndjebo had started a supermarket on Erf 13, Oshikango, which was unsuccessful and now she claimed that her late father, the holder of the PTO, ran a shop on the same premises. The requirement that the PTO must be in writing seems to me to exclude the granting thereof tacitly or expressly unless it had been reduced to writing. The first appellant was not able to produce any written PTO granted to her late father in regard to the property. In my opinion there is no such PTO otherwise a PTO could not have been granted to Mr George Namundjebo over a property which had already been held by another person. I am satisfied that on the evidence the first PTO which had been granted over the property, Erf 13, Oshikango, had been the PTO granted to Mr George Namundjebo.

[38] However, it was also contended by the appellants that Mr George Namundjebo, being an executor in the estate of their late father, should have applied for the PTO in the name of the estate of her late father or should have reflected that he applied for it in his capacity as an executor of the estate. It was further explained that the company Namundjebo Northgate Properties was supposed to only deal with the shareholding of the company, of which Mr.Namundjebo was a shareholder,and was separate of, and did not also include, the land on which the business was to be conducted. It was alleged that the name of the company, Namundjebo Northgate Properties, was only registered as a defensive name.

[39] All the documentary evidence placed before the Court gainsaid the above allegations. The applications for the PTO and the transfer thereof to Namundjebo Northgate Properties were made in the personal capacity of MrNamundjebo, unqualified as is alleged above. What is more there is no explanation by MrNamundjebo why he applied for the PTO in his personal capacity when he was supposed to have acted only as an executor of their late father's estate. Likewise there is no explanation why he applied for the transfer of the PTO to Namundjebo Northgate Properties if the company had nothing to do with the land and was something separate from the holding of the land. As a person involved in business, he should have been well aware of the significance and the effect of acquiring a PTO and its further transfer thereof in the name of the company. Similarly, when he had sold his shareholding in the company, he should have realisedthat he had effectively divested himself of having any say in regard to the PTO. Why did he or the family not

take any steps to rectify the situation if it was all along the intention to separate the holding of the land from the shareholding of MrNamundjebo in the company? MrNamundjebo's silence on all these issues raises doubt as to the veracity of such allegations.

[40] The fact that Namundjebo Northgate Properties, and later Northgate, did not pay any rent for their occupation of Erf 13 was explained as a set off against the capital loaned by NBL to construct the floor of the warehouse. Again, there is only the bare allegation made without any detail in regard to such agreement. The information about the said agreement could only have come from Mr George Namundjebo and the Court would have expected him to provide details concerning the terms of such agreement i.e. what the amount of the loan was, at what rate per month the loan was paid off etc. Such evidence would have been important because it could have explained why no rent was ever paid by Namundjebo Northgate Properties to the Namundjebo family or the estate and could have strengthened the case for the appellants. Again, the bare allegation of such an agreement raises more questions than answers.

[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. For the same reasons set out above it follows that the conditional counterclaim of the appellants must also be dismissed.

[43] Mr Bokaba SC, assisted by Mr Rajan and Mr Namandje, challenged the standing of Northgate to have brought the application on the basis that it was a different entity from that of Namundjebo Northgate Properties (Pty) Ltd in whose name the PTO had been issued. He referred to the allegation by Mr Sheelongo that he had no knowledge of Northgate being the holder of the PTO. Counsel submitted that there had never been a cession by Namundjebo Northgate Properties (Pty) Ltd to Northgate or any other entity and that Northgate therefore lacked the necessary standing to have brought the application.

[44] In support of his submissions counsel referred the Court to the case of *Maasdorp and Another v Haddow NO and Another*, 1959 (3) SA 861(C) where the following was stated at 866A-E, namely-

'It is essential throughout that it be borne in mind that applicants' contract was not with the company but with certain private individuals and that, notwithstanding the confused language of clause 2, it related to shares and not to the immovable property of the company. A change in the personality of the shareholders would not ordinarily affect the legal rights of a company in and to its immovable property, for it would remain vested with the ownership and would continue in possession and occupation thereof. All that would be changed would be the control of the company. Shareholders could not, without the consent of the company, merely by selling their shares, give the purchasers in their private capacities a possession and occupation of the immovable property adverse to that of the company.'

[45] Counsel submitted therefore that the PTO remained vested in Namunjeko Northgate Properties (Pty) Ltd and that, whatever rights flowed from the PTO, could only have been exercised by Namunjeko Northgate Properties (Pty) Ltd and no other entity.

[46] After its standing had been challenged Northgate attached a notice in terms of s 44(1)(b) of the Companies Act, 61 of 1973, whereby the name of the company was changed by dropping the name 'Namunjeko' from the name of the company. What happened constituted only a change of name. The company and its structure were not altered and NBL remained the only shareholder of the issued shares in Northgate. Where, as in this instance, the name of a company is changed without change of its structure, no cession of rights or assignment of obligations are necessary. The change of name of the company did not affect any rights, debts, liabilities or obligations of the company. It did also not render defective any legal proceedings by

or against the company instituted or defended by such company. (See s 44(3) of Act 61 of 1973.)

[47] In regard to the second main issue namely, the validity of the sales contract concluded between MrShivolo, purportedly acting on behalf of the Town Council of HelaoNafidi, and the appellants, on behalf of the Trust, I am satisfied that any selling of immovable property which forms part of the Townlands of that Township is subject to the prior approval of the Minister in terms of s 30(t) of the Act. This section provides as follows:

'30(1) Subject to the provisions of subsections (2) and (3), a local authority council shall have the power-

"(t) subject to the provisions of part X111, to buy, hire or otherwise acquire, with the prior approval of the Minister and subject to such condition, 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;"

[48] Subsections (2) and (3) are not relevant to the issues to be decided in this matter. S 63(1) of the Act renders the provisions of s 30(t) subject to the provisions of s 63(1)(a) and (b) and provides that a local authority council has the power to let immovable property provided that the period of lease does not exceed one year. (Ss(a)). Furthermore the Municipalities mentioned in Schedule 1 of the Act, namely

Windhoek and Swakopmund, have the power to let, sell, encumber or hypothecate townlands without the prior approval of the Minister(ss(b)). It is further clear from the definition of the words 'local authority council' in s 1 of the Act that that includes 'any municipal council, town council or village council'. Therefore where s 30(t) refers to a local authority it included, by definition, a town council and so far as the sale of immovable property by a Town Council was concerned s 30(1)(t) was not altered by s 63 and the sale of such property still required the prior approval of the Minister.

[49] I am furthermore satisfied that the words 'or to **so** let, sell etc.' (my emphasis) can only be a reference to the manner in which it can be let or sold, namely with the prior approval of the Minister otherwise the word 'so' would have no meaning and would be redundant. As was stated in the case of *City of Cape Town v Premier, Western Cape and Others*, 2008(6) SA 345 at 376 para [70], it is a trite principle of statutory interpretation that a statute should not be construed so as to render any part thereof superfluous. (See also *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd*, 1993 (4) SA 110 (A) at 116F–117B.) The above interpretation is also supported by the context of the Act because, if a local authority had the power to let and sell immovable property without the prior approval of the Minister, then it would not have been necessary for the Legislator to enact s 63(1)(a) and (b) whereby the provisions of s 30(1)(t) were specifically made subject to this section in regard to the letting and selling, etc of property.

[50] It is common cause that in this particular instance the prior approval for the sale of Erf 13, Oshikango, to the Trust was not obtained before the sale and, for that matter, also not thereafter. The appellants contended that s 30(1)(t) was not applicable to this issue but that the sale was subject to s 68. Section 68 is enacted under Part XIV of the Act and deals with the valuation of rateable property within local authority areas and the section establishes a valuation court which has, after due advertisement of the session of the court, to consider the valuation roll and any objections thereto. It has in my opinion nothing to do with the selling of immovable property by a local authority.

[51] It follows therefore that the sale of Erf 13, Oshikango, did not comply with the provisions of the Act, and more particularly s 30(1)(t) thereof. The question is now what the effect of such non-compliance is.

[52] I am satisfied that it was the intention of the Legislator to visit such non-compliance with invalidity. I say so for the following reasons:

- (i) The Minister can, in terms of s 30(1)(t), grant his approval subject to any conditions imposed by him. It follows that to by-pass the Minister, before the contract of sale was concluded, may render the power of the Minister to impose conditions nugatory.

- (ii) The members of a Town Council may not always have the necessary commercial expertise to deal with and to enter into contracts to the advantage of the Township with its most valuable asset, namely its land. This may be especially so in the areas where previously no Town Councils existed and where no land could be owned by private individuals or companies. In those instances the members of the Town Council, as well as their officials, may lack the necessary experience and expertise to deal with valuable assets such as the landed property of the Council. There would also not be any guidelines which could be followed to determine i.e. the value of land. That the Legislator was mindful of this problem is further demonstrated by the exception that was made in this regard to the Municipalities of Windhoek and Swakopmund, both of which are old and long established institutions well versed in commercial dealings with land and with easy access to experts in regard to these aspects when and if necessary.
- (iii) The inexperience of Councils could lead to the commission of serious irregularities and, without the necessary control by the Minister, the system was also open to exploitation as was proven in this particular instance.

[53] It follows therefore that the agreement entered into by Shivolo, purportedly on behalf of the Town Council, and the appellants, on behalf of the Trust, is null and void

ab initio and the registration of the property in the name of the Trust must be set aside. Both counsel addressed us on the effect of our abstract system of registration of landed property. I agree with counsel that after the registration of the transfer of such property not every defect in the contract giving rise to the real agreement will necessarily vitiate the real agreement. (See the article by C.G. van der Merwe: 27 *Lawsa*(1st re-issue) under the heading 'Things' paragraphs 362, 363 and 365, and *Kriel v Terblanche* 2002 (6) SA 263 (NC).)

[54] However, in the case of *Farren v Sun Service SA Photo Trip Management (Pty) Ltd* 2004 (2) SA 146 (CPD) the applicant in that matter applied for specific performance in terms of a written agreement of sale of immovable property. The respondent relied on the provisions of s 228 of the Companies Act, Act 61 of 1973, to avoid transfer of the property to the applicant. The section prohibits the disposal of the undertaking or greater part of the assets of a company by its directors unless such sale was ratified in a general meeting of the shareholders of the company. No such ratification occurred in this instance. It is generally accepted that s 228 was introduced for the protection of shareholders (p 153A-C). The learned Judge Cleaver, J, dismissed the application. At 155A-B the following is stated:

'I agree with him that the issue is not so much whether a transaction entered into in contravention of section 228 is void or voidable. It is clearly unlawful in the sense that it is concluded in contravention of the section. It also has no legal effect, but that can be cured by subsequent ratification by the shareholders in general meeting.'

The same sentiment was expressed by the learned Judge when he stated at 157J–158A, namely:

'As far as section 228 is concerned an agreement concluded on behalf of the company in contravention of the section has no legal effect unless and until it is ratified by the shareholders.'

To the same effect is the article by Professor van der Merwe where he stated at para 365, *supra*, as follows:

'In certain types of contract the vitiating element attaches to both the preceding contract and the real agreement. Thus not only contracts aimed at achieving an illegal object, for example, illicit diamond dealing, are void but also the real agreements and transfers which are affected in terms of such contracts. Certain contracts are unenforceable because they do not comply with certain statutory requirements: thus writing, official approval or a certain manner of achieving an object may be prescribed. Whether a real agreement or performance in terms of such an unenforceable contract is vitiated by the defect in the preceding contract depends on the intention of the legislature in rendering such a contract void on the ground of non-compliance with a certain requirement.'

[55] For the reasons set out above there is no doubt in my mind that it is the intention of the Legislator to visit non-compliance of the provisions of s 30(1)(t) with invalidity.

[56] Notwithstanding the clear evidence of MrSheelongo that Shivolo had no authority for any of the actions taken by him, each of the parties still attempted to

extract from MrShivolo'sirregular and unauthorised acts some advantage to bolster their claims. So it was submitted on behalf of Northgate that the offer to sell Erf No 13, Oshikango, was a valid offer which they had accepted and that the process must continue from there. In turn MrSheelongo tentatively wanted to rely on the lapsing of the time afforded to Northgate by MrShivolo within which they were required to accept the offer. On behalf of the appellants the point was taken that the offers made to Northgate had been valid offers and by not exercising its right within the time period stipulated in the letters the offers had lapsed and Northgate had no further rights. It was furthermore also argued by MrBokaba SC, on behalf of the appellants, that the Town Council, when it allowed the transfer of the property to go forward notwithstanding its knowledge that Northgate was the holder of the PTO, and that they disputed transfer of the property to the Trust, thereby, ratified any unauthorised acts by MrShivolo. It was also submitted by counsel that the Town Council was estopped to now rely on the unauthorised acts of their former CEO.

[57] In my opinion none of the above submissions can be sustained. I have already pointed out that MrShivolo had no authority to offer to sell the Erf 13, Oshikango, to anybody and consequently its offer to Northgate to sell the property could not bind the local authority. If Northgate is correct that the offer by Shivolo was valid then acceptance of the offer could have resulted in a binding contract of sale which, because of the provisions of s 30(1)(t), would in any event have been null and void. For the same reasons no reliance could therefore be placed on the time schedule within which the offer to sell had to be exercised. If the offer was invalid it follows that

its terms met the same fate. As was pointed out by Mr van der Nest SC a nullity cannot be ratified. In this instance we do not only deal with an unauthorised act by Mr Shivolo but also an unlawful one which cannot be ratified in any way. However, it is not open for the appellants to rely on either the doctrine of estoppel or the rule in *Turquandas* that would have the effect of perpetuating an unlawful act because of the non-compliance with s 30(1)(t) of the Act. Although I am of the opinion that the learned Judge *a quo* was correct that estoppel could not be raised in these proceedings against the Town Council I will for purposes of this judgment accept that it could. However, in the matter of *City of Tswane Metropolitan Municipality v RPM Bricks Ltd*, 2008 (3) SA 1 (SCA) the following was stated in regard to the defence of estoppel at 5F – 6A, namely:

[11] It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different 'categories' of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other. That broad distinction lies at the heart of the present appeal, for the successful invocation of the doctrine of estoppels may depend upon it.

[12] In the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with. Such persons may then rely on estoppels if the defence raised is that the relevant internal arrangements or formalities were not complied with.

[13] As to the first category: failure by a statutory body to comply with provisions which the legislature has prescribed for the *validity* of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore *ultra vires*. (Reference to authorities omitted).

(See further the *Kriel*-case, *supra*; *Klerck N.O. v Van Zyl and Maritz N.N.O.*, 1989 (4) SA 263 (SECLD); *Strydom v Die Land en Landbou Bank van Suid-Afrika*, 1972 (1) SA 801 (A) and *Stand 242 HendrikPotgieter Road Ruimsig (Pty) Ltd v Gobel*, 2011 (5) SA 1(SCA).)

I respectfully agree with the exposition of the law as set out above.

[58] In the result I have come to the conclusion that the appeal cannot succeed. Because I have come to the conclusion that the offer to sell Erf 13, Oshikango, was unauthorized and did not bind the Town Council, the third order granted by the Court *a quo* must be slightly amended.

[59] The appeal is dismissed with costs, including the costs of one instructing and two 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 HelaoNafidi 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.’

STRYDOM AJA

MARITZ JA

MAINGA JA

APPEARANCES

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