

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

HC-MD-CIV-MOT-GEN-2017/00201

In the matter between:

RICHARD NCHABI KAMWI

APPLICANT

and

**THE CHAIRPERSON OF THE COUNCIL
OF THE LOCAL AUTHORITY OF KATIMA
COUNCIL
COUNCIL OF THE LOCAL AUTHORITY OF
KATIMA MULILO
THE MINISTER OF URBAN AND RURAL
DEVELOPMENT**

FIRST RESPONENT

SECOND RESPONENT

THIRD RESPONENT

Neutral citation: *Kamwi v The Chairperson of the Local Authority of Katima Mulilo*
(HC-MD-CIV-MOT-GEN-2017/00201) [2018] NAHCMD 367 (15 November 2018)

CORAM: MASUKU J

Heard: 16 May 2018

Delivered: 15 November 2018

Flynote: Law of Contract - Offer and Acceptance – Terms of the offer must be certain and definite - Acceptance of the offer must be unequivocal - Sale of land within local authority area is subject to the provisions of s 30 (1) (t) of the Local Authority Act 23 of 1992, as amended - where all the conditions of sale are not determined at time when offer is made and accepted – no binding contract comes into existence.

Summary: The applicant approached the court seeking an order for the Municipality of Katima Mulilo to conclude a sale agreement with him in respect of an offer he had accepted to purchase immovable property within the said Municipality.

Held – that in matters relating to local authorities, the offer to buy land and the acceptance thereof by the Municipality do not result in a binding contract for the reason that the consent of the Minister is required by the provisions of s. 30 (1) (t) of the Act. In the absence of the said consent by the Minister, no binding contract comes into existence, even if an offer had been made and ‘acceptance’ had been given.

Held further – that in the instant case, the Minister did not grant the consent required and the first and second respondents did not have the power to ‘order’ the Minister to consent to the sale of municipal property to an individual, as that power lies exclusively with the Minister.

The application was accordingly dismissed with costs and the first and second respondents were ordered to return the amount that had been paid to them by the applicant in anticipation of a sale going through.

ORDER

1. The second respondent is ordered to refund to the applicant an amount of N\$200 000 as agreed to in the case management report dated 16 October 2017;

2. The remaining prayers, that is, 1,2 and 3 are dismissed;
3. The applicant is ordered to pay the cost of the first and second respondent.
4. The matter is regarded as finalized and is removed from the roll.

JUDGMENT

MASUKU J:

Introduction

[1] This is an application wherein the applicant seeks to compel the second respondent to comply with the legal obligations arising from an offer to sell a certain Erf 559, situate in Katima Mulilo, to the applicant.

The Parties

[2] The applicant is Mr. Richard Kamwi a male person presently residing at Erf 34 Albatros Street, Hochland park, Windhoek. The first respondent is the chairperson of the second respondent. The second respondent is the Municipal Council of Katima Mulilo, a local authority established in terms of the provisions of the Local Authorities Act,¹ 'the Act'). The third respondent is the Minister of Urban and Rural Development, appointed as such in terms of s 32 (3) (1) of the Namibian Constitution, (the 'Minister;). The Minister is charged with administering the Act.

The relief sought

[3] The applicant, instituted application proceedings in terms of Rule 65 of the Rules of this court, and seeks from this court certain relief, against the first and second respondents only. This relief is set out in his notice of motion as follows:

¹ Act No. 23 of 1992, as amended.

'(a) An order directing the 1st respondent, alternatively, the second respondent to conclude a deed of sale with the applicant within 7 days from date of this court's order for the sale of erf 559 Katima Mulilo at the amount of N\$ 200 000,00;

Alternatively;

(b) An order directing the first respondent, alternatively the second respondent, to positively seek within 7 days from the date of this court order, approval from the 3rd respondent for the sale of erf 559 Katima Mulilo to the applicant at the amount of N\$ 200 000,00;

Alternatively

(c) An order directing the first respondent, alternatively the second respondent to submit within 7 days from the date of this court's order a positive motivation to the 3rd respondent motivating the sale of erf 559 Katima Mulilo to the applicant at the amount of N\$ 200 000,00;

Alternatively

(d) An order directing the second respondent to refund or pay the applicant within 14 days from the date of this court's order, the purchase price of N\$ 200 000,00 plus 20% interest per annum on this amount calculated from the 12th of November 2014 until the date of payment;

(e) An order directing the second respondent to pay the cost of this application on a scale as between attorney and own client which costs should include the costs of one instructing and one instructed counsel.'

The Applicant's version

[4] The applicant filed a founding and replying affidavit in which he affirms his version. In his founding affidavit, the applicant states that during 1998, he made application to the second respondent to purchase an industrial plot in Katima Mulilo, hereafter referred to as 'the property'. In 2002, the Chief Executive Officer ('CEO') of the first respondent informed the applicant of resolution 156 of 1999, in

terms of which the second respondent resolved to sell the property to the applicant for an amount of N\$20 000.

[5] Pursuant to the oral exchange between applicant and the second respondent, the applicant paid an amount of N\$5 000 as a deposit towards the purchase price of the property and awaited the second respondent to provide him with a confirmation letter and a deed of sale in respect of the said property.

[6] Thereafter, between 2004 to 2012, the applicant further deposes, he again engaged with the different CEO's of the second respondent in order to finalise the sale transaction, but to no avail. The applicant states that the transaction could not be finalized as the second respondent could not trace resolution 156 of 1999 and therefore the second respondent could not confirm that there was a decision to authorise the sale of the property to the applicant.

[7] In 2013 the applicant paid an additional amount of N\$10 000 towards the purchase price of the property, on the advice of a Mr. Nawa, the CEO of the second respondent at the time. In the same year the applicant, with the assistance of his legal representative, provided the second respondent with the applicant's particulars with the view to the latter preparing a draft deed of sale. This was, again in vain.

[8] On 1 October 2014, the second respondent resolved to offer the property to the applicant for sale for the amount of N\$200 000. On 12 November 2014, the second respondent made the offer in writing to the applicant and required the applicant to pay the purchase price within ninety days from date of offer. The second respondent also requested the applicant to provide it with his copies of the identity document and marriage certificate to enable it to draft the deed of sale.

[9] Pursuant to the written offer to purchase the property and in December 2014, the applicant paid an amount of N\$10 000 to the second respondent, as part payment of the purchase price of the property. The applicant made a further payment of N\$170 000 in April 2015, on the advice of the incumbent CEO at the time, in order for the parties conclude and sign the deed of sale.

[10] In May 2016 the second respondent informed, the applicant, that the third respondent declined permission to sell the property to the applicant. The applicant however avers, the letter of declinature was written and signed by the Permanent Secretary of the second respondent and not by the third respondent, who is the party vested with statutory power to decide on the disposition of immovable property within the jurisdiction of the second respondent. In any event the applicants allege that a closer scrutiny of the letter from the third respondent is rather an inquiry on the sale price and is not a rejection that the applicant purchases the property.

[11] In light of the aforesaid allegations, the applicant asserts that, upon the applicant accepting the offer for sale of the property made by the second respondent and subsequent payment of the full purchase price which the second respondent accepted, a binding contract came into force. On this basis, the argument further runs, the applicant is now the owner of the property and therefore the second respondent must be compelled to comply with its contractual obligations.

[12] Finally, in this regard, the applicant avers that the conduct of the second respondent in accepting accept the purchase price of the property and thereafter retracting the offer to sell the property to the applicant is unfair and must be set aside.

The Respondents' version

[13] The second respondent does not accept the version of events deposed to by the applicant and puts up its own version, which is diametrically opposed to that of the applicant.

[14] At the outset the respondents, raised a point in *limine*, namely, that because there has been non - compliance with s 30 (i) and (t) of the Act, there is no contract of sale of the property between the applicant and second respondent.

[15] The aforesaid section provides that any sale of immovable property, in a local authority, shall only be a valid sale, if it is approved by the third respondent and further that the notice of sale of the property is advertised in a newspaper. As a result of non-compliance with s 30 (1) (t), the ownership of the property did not pass to the applicant.

[16] The second respondent alleges that it resolved to sell the property to the applicant for an amount of N\$118 000, on 18 August 1999. Thereafter and on 2 March 2000, the second respondent communicated the offer in writing to the applicant to purchase the property for the aforesaid amount as resolved and directed the applicant to put up a structure on the property within one year from 2 March 2000.

[17] The second respondent denies that the purchase price of the property was N\$20 000. According to the applicant, the purchase price was always fixed at N\$118 000. Furthermore, the applicant was required to settle the amount on or before 30 September 2002, which he failed to do.

[18] In 2014, the first respondent further contends, the applicant had not complied with the conditions of sale, as communicated on 2 March 2000, in that he failed to pay the full purchase price, and therefor the offer to purchase the property lapsed. Nonetheless on 12 November 2014, the second respondent resolved to sell the property to the applicant by private treaty for an amount of N\$220 000. The second respondent communicated the offer in writing to the applicant, and the applicant accepted the offer. Accordingly, the offer of 12 November 2014 is the only offer accepted by the applicant.

[19] Simultaneously, the second respondent sought consent, for the sale of the property from the third respondent. The third respondent did not consent to the sale of the property. Instead, the Minister queried why the price of the property was below the valuation roll of that property. The second respondent avers that this decision not to consent to the sale of the property was made by the Minister and not by Permanent Secretary as alleged by the applicant.

[20] Further, the second respondent denies that the applicant paid the full purchase price and is only entitled to N\$20 000, which the second respondent received from the applicant. Consequently, the respondents denied that the applicant is the owner of the property. The respondents contend that at most, the applicant is entitled to compel the respondent to consent to the sale and advertise the sale of the property to the applicant.

Replication

[21] In reply, to the respondents' version, the applicant denies that the CEO has the authority to depose to the affidavit for the third respondent. The applicant also avers that the second respondent had the obligation to comply with s 30 (1) (t), that is, to obtain approval of the sale of the property from the third respondent.

[22] The applicant, further denied that the second respondent is a municipal council as envisaged in s 63(2) of the Act. He submitted that even if it is found that the second respondent falls within the ambit of this categorisation, the duty and obligations to comply with this provision lies with the second respondent.

[23] The applicant, accordingly maintains that he is the owner of the property, because he has paid the full purchase price and the second respondent accepted same.

Case management

[24] The parties held a case management meeting and filed a report in terms of rule 71 of the Rules of Court. The report was adopted as an order of court at the case management conference. In this regard the parties, are in agreement on the description of the property; that the second respondent made an offer to sell the property to the applicant; that the applicant is entitled to the refund of the purchase price paid to the second respondent only and not to the remainder of the relief sought.

[25] The parties agreed that the issues, that need determination are whether s 63 (2) and s 30 (1) (t) of the Act are applicable to the sale of the property in question; and further whether there was a valid offer between the applicant and second respondent for the sale of the property.

[26] The applicant's third alternative claim, that is repayment of the purchase price, which has been paid by the applicant and accepted by the second respondent has been dealt with, it is thus not necessary to deal with it in this judgement.

Offer and acceptance

[27] It is apposite at this juncture to set out the terms of the offer made by the second respondent and the acceptance of the offer by the applicant. The second respondent made the following offer to the applicant on 12 November 2014, in writing:

'Dr. Richard Nchabi Kamwi

.....

Dear Sir,

RE: PURCHASE OF INDUSTRIAL PLOT 559 KATIMA MULILO EXTENSION 2

Please be notified that the Katima Mulilo town council, in its meeting held on the 1st October 2014, resolved with Council Resolution Number 05/10/2014, that erf 559 Katima Mulilo extension 2 (industrial Area) be sold to you at NAD 200 000,00 (two hundred thousand Namibian Dollars), as purchase price for the property. This property measures 16 874.81 squares meters in extent. Please note that this resolution merely confirmed the price of NAD 200 000,00 which was given via council Resolution 156 of 1999 which resolution could not be found.

Kindly be advised that the sale has to be advertised once a week for two consecutive weeks in two newspapers in terms of the provisions of section 63 (2) of the Local Authorities Act, Act 23 of 1992 as amended. Further note that in terms of the provisions of section 30 (1) (t) of the same Act, approval has to be sought from the Ministry of Regional and Local Government, Housing and Rural Development (MRLGHRD), to enable Council to sell this property to you. These two processes are being implemented simultaneously

with this letter to you. Once the approval is made available, you will be notified to come and sign the Deed of Sale for the property

You are hereby further requested to indicate in writing not later than 90 days from the date of this letter whether you are still interested in proceeding with this transaction, to allow the Council to start with the transfer process once the ministerial approval is received.

May you also by return please provide us with certified copies of your identity documents and marriage certificate which information will be needed in drawing up the deed of sale.'

[28] The applicant accepted the offer in writing on 12 November 2014, in the following words:

'The Chief Executive Officer
Katima Mulio Town Council

....

Dear sir/ Madam,

RE: OUR TRANSFER: KATIMA MULILO TOWN COUNCIK/ RN KAWMWI OVER ERF NO 599, KATIMA MULILO

The above matter and your letter dated 12 November 2014 attached hereto for ease reference refers.

We hereby confirm that our client is still interested to proceed with the transaction and we await your further correspondences.

The balance of the purchase price will be paid as soon as the approval is communicated to our client.

Attached are the certified copies of the ID and marriage certificate.'

[29] I shall revert to the interpretation of the above offer and acceptance at a later stage, once the applicable law has been set out.

The applicable Law

[30] The answer to the applicant's case lies first in determining whether there is a binding offer between the applicant and second respondent. This answer is to be found in the law of contract.

[31] An offer is made when a party puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. In *Wasmuth v Jacobs*², Levy J said:

'It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it accepted it will bind the offeror'.

[32] As a general rule our law requires some manifestations of acceptance. In *Boerne v Harris*³, Greenberg, JA at p 799 propounded the applicable law as follows;

'Thus, although a contract, even if it be ambiguous, may be and generally is binding, the acceptance of the offer (or for that matter the offer itself) must be unequivocal, i.e. positive and unambiguous.' (The words in brackets are mine but are, I submit with respect to the learned Judge, permissible by virtue of the learned Judge's specific statement thereanent at 801 and his reasoning at 800 of the report.)

For his part, Schreiner JA, in the same case, stated as follows, at p. 809:

'I have said that an acceptance to be effective must be clear and unequivocal or unambiguous. But that does not mean, in my opinion, that it must necessarily be so free from blemish as to go beyond the need for interpretation or construction'

[33] Thus an offer and the acceptance of the offer must be unequivocal, and not ambiguous, to result in a binding contract.

² 1987 (3) SA 629 (SWA) 633D

³ 1949 (1) SA 793 (AD), important to note that Greenberg JA wrote the majority judgement, whilst Schreiner JA dissented, however both Judges agreed on the proposition of the law.

[34] The property concerned is an immovable property, located within the jurisdiction of the second respondent. The sale is thus subject to the Act⁴.

[35] The relevant provision of the Act is s 30 (1) (t),⁵ which provides as follows
'Subject to the provisions of subsections (2) and (3), a local authority council shall have the power –

(t) subject to the provisions of part XIII, to buy, hire or otherwise acquire, with the prior approval of the Minister and subject to such conditions, if any, as may be determined by him or her, any immovable property or any right in respect of immovable property for any purpose connected with the powers, duties or functions of such local authority council, or to so sell, let, hypothecate or otherwise dispose of or encumber any such immovable property;' (Emphasis added).

[36] In the matter of *Northgate Properties (Pty) Ltd v The Town Council of the Municipality of Helao Nafidi & Other*,⁶ this court dealt with the provisions of s 30 (t), as follows:

'[29] It is for this reason that the Minister is granted regulatory powers when a town council like the first respondent wishes to sell land to a third party, inasmuch as the Minister's prior consent is a requirement. Plainly it is the intention of the Legislature that town councils should not be permitted to alienate its land without the consent of the Minister . . . '

[37] Properly read in context, the section requires that the Minister approves the sale of immovable property, within the jurisdiction of the town council - in this case the second respondent, subject to such conditions as the Minister may determine.

[38] Having set out the applicable law, the first issue for determinations is to look at what terms of the offer made by the second respondent were accepted by the applicant

⁴ Act 12 of 1992

⁵ This section, 30 (1) (t), has been amended by the Local Authority Amendment Act 3 of 2018, which came into effect on 24 April 2018. The offer made to the applicant was made on 12 November 2014 and the relevant provision at the time is as set out at paragraph 33 in this judgement.

⁶ Case No. A 350/2008, an unreported judgment delivered on 5 May 2011.

[39] The terms of the sale, as set in the second respondent offer letter are: that second respondent will sell the property, erf 559, measuring in extent 16 hectares for an amount of N\$ 200 000, subject to s 63 (2) – advertisement in two newspapers; and s 30 (1) (t) - approval has to be sought and obtained from the Ministry of Regional and Local Government, Housing and Rural Development (MRLGHRD), to enable Council to sell this property to the applicant

[40] The provision of s. 63 (2) states that the property must be advertised in two newspapers. The provision of s 30 (1) (t) states that the Minister must approve the sale of the property subject to such conditions as the Minister may determine.

[41] The terms of acceptance by the applicant are as follows: that he is interested in proceeding with the transaction and awaits further correspondence and that the balance of the purchase price will be paid as soon as the approval is communicated to him.

[42] From the a foregoing, the applicant expected to receive further communication regarding the sale of the property, including the approval of the sale by the Minister, before a deed of sale could be concluded and signed.

[43] The applicant unequivocally accepted the second respondent's offer which offer included the statutory requirements provided in s. 30 (1) (t) and s. 63(2) of the Act. This means that the applicant accepted that the provisions of the aforesaid Act are part and parcel of the offer and that such must be fulfilled before a deed of sale can be concluded between the applicant and second respondent.

[44] In light of the fact that the sale of the property was subject to the provisions of s 30(1)(t), which conditions were never determined by the Minister and communicated to the applicant. This means that not all the terms for the sale of the property were agreed upon by the parties and therefore there is no deed of sale that came into existence. As a result, the applicant's application stands to be dismissed, as I hereby do.

[45] The order sought by the applicant, that the court directs the first respondent, alternatively, the second respondent to conclude a deed of sale with the applicant within 7 days from date of this court's order for the sale of erf 559 Katima Mulilo at the amount of N\$ 200 000, is, in view of the exposition of the applicable law carried out above, not proper or competent. The statutory requirements, which were unequivocally accepted by the applicant, have not been met and therefore no deed of sale can be concluded in the circumstances. The relationship between the parties, according to *Muadinohamba v Katima Mulilo Town Council and Two Others*⁷ is a legal relationship preparatory to the sale.

[47] In *Muadinohamba*, Geier A.J. cited with approval the following passage from a judgment by the then Angula A.J. in *Jaco Nicholas Van Dyk v Rundu Town Council and Two Others*,⁸ where the learned Judge made the following lapidary remarks:

' . . . The offer is the first step in the contract-making process. The next step being the acceptance of the offer. Both the offer and acceptance thereof must comply with the formalities pertaining to that transaction, for instance it must be in writing in the case of the sale of land. These considerations surely do not apply to the so-called legal relationship preparatory to the sale which is concluded prior to the making of any formal offer and the formal acceptance thereof which must comply with the requirements of the statute in order to obtain validity.'

[48] In view of the above authority, I am of the considered view that the applicant is barking the wrong tree and that his claim in the main, is therefor unsustainable. The parties, i.e. the prospective buyer and the municipality intending to sell, may not, by their preparatory agreement, serve to bind the Minister to a sale he does not approve of. As a result, the applicant's first prayer must be dismissed.

[49] As regards the second and third alternative claims, sought by the applicant, that is, orders directing the first respondent or the second respondent to positively seek approval from the Minister for the sale of erf 559 Katima Mulilo to the applicant at the amount of N\$ 200 000, 00; alternatively to motivate the third

⁷ Case No. I 1690/2010, per Geier A.J. at p.8 para [23].

⁸ Case No. PA 92/2007 at p. 24.

respondent to sell the property to applicant for the amount of N\$ 200 000, 00, I am of the considered view that these orders are similarly incompetent.

[50] As pointed out earlier, the provisions of s. 30 (1) (t) of the Act provide that the Minister shall determine the conditions for the sale or disposal of an immovable property. The statutory power to determine the conditions of sale or disposal of an immovable property falls squarely and exclusively with the Minister. Accordingly, the first and second respondent do not have the power to direct the Minister to approve the sale or to motivate to the Minister reasons why certain immovable must be disposed to a particular individual at a specific purchase price. Such an exercise derogates from the statutory requirement given to the Minister by the Legislature in its manifold wisdom.

[51] The intention of the Legislature is clear, that is, the conditions for the sale or disposal of immovable property in a local authority, can only be determined by the Minister. As indicated above, the first and second respondent are not vested with the power to dictate to or prevail upon the Minister the conditions of sale of an immovable property.

[52] The applicant also takes the point that there is no evidence that the Minister took the decision alleged for reason that the letter querying the proposed sale was written by the Permanent Secretary in the Ministry. I am of the view that nothing much should turn on this point for the reason that there is nothing to suggest that the Permanent Secretary was acting on a frolic of his or her own. It must be understood that in the mechanics of the working relationship between the Minister and the Principal Secretary, the latter is, and in some instances, must be regarded as the hands, feet and where necessary, the mouth-piece of the former.

[53] In any event, and more importantly, the applicant has not sought a *mandamus* compelling the Minister, to exercise his powers in terms of the Act, if the applicant was of the view that the Minister did not so exercise the powers, either at all or incorrectly. Had he sought an order against the Minister, the latter would, all things being equal, have had to answer to the allegations against made

against him and would have had to clarify whatever he may have found to be necessary in the circumstances of the case.

[55] As a result, the following orders are made:

1. The Second Respondent is ordered to refund to the applicant an amount of N\$200 000 as agreed to in the case management report dated 16 October 2017.
2. The Applicant's application is dismissed with costs.
3. The matter is removed from the roll and is regarded as finalised.

TS Masuku
Judge

APPEARANCES :

Applicant

Khama

instructed by Chris Mayumbelo & Co., Windhoek

Respondents

M Ndlovu

of the Office of the Government Attorney,
Windhoek