

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING  
EXCEPTION

<b>Case Title:</b> Municipal Council of Walvis Bay // Zelna Nardine Job and 3 others	<b>Case No:</b> HC-MD-CIV-ACT-CON-2019/03745
<b>Heard before:</b> Honourable Mr Justice Ndauendapo	<b>Division of Court:</b> High Court  <b>Delivered on:</b> <b>30 November 2020</b>
<b>Neutral citation:</b> <i>Municipal Council of Walvis Bay v Job</i> (HC-MD-CIV-ACT-CON-2019/03745) [2020] NAHCMD 549 (30 November 2020)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The defendants' grounds of exception are upheld.</li><li>2. The plaintiff's amended particulars of claim are set aside and plaintiff is given leave, if so advised, to file amended particulars of claim within fifteen (15) court days from the 30 November 2020.</li><li>3. The plaintiff is ordered to pay the costs of the defendants' exception such costs to include the costs of one instructing and one instructed counsel.</li><li>4. Matter is postponed to Thursday, <b>21 January 2021</b> at <b>15H00</b> for a status hearing.</li></ol>	
[1] The plaintiff issued summons against the defendants seeking certain relief. The defendants raised exceptions to the particulars of claim.	

The Relevant part of the amended particulars of claim is as follows:

'Agreement of Sale

[6] On or about 18 April 2017 and at Walvis Bay, the plaintiff and the first defendant entered into a written agreement of sale ("the agreement"). A copy of the said agreement is attached hereto and marked as annexure "A".

[7] At the time the agreement was entered into, the plaintiff (seller) was represented by Agostinho Thigipo Victor in his official capacity as General Manager Community & Economic Development and/or Johan Hendrik Rossouw in his official capacity as Manager: Financial Administration, whilst the First Defendant (purchaser) acted in person.

[8] The express material, alternatively implied, alternatively tacit terms and conditions of the agreement were, inter alia as follows:

8.1 The plaintiff sells to the first defendant a certain unimproved single residential Erf, described as 'Erf 693 Meersig, situate in the Municipality of Walvis Bay, registration division "F" measuring 805 square metres' ("the property") (clause 1).

8.2 The purchase price is computed and calculated at N\$161 000 (One hundred and sixty one thousand) Namibian Dollars (clause 2);

8.3 The first defendant shall be liable for all rates and taxes, electricity, water and all other municipal service charges incurred in respect of the property from date of signing the Agreement of Sale (clause 3.2);

8.4 The plaintiff's conveyancer shall effect transfer of the property as soon as possible after the first defendant has complied with its obligations in terms thereof (clause 4.1);

8.5 The first defendant agrees and undertakes to erect a main building, the necessary outbuildings and boundary fences, in accordance with approved plans and specifications in terms of the plaintiff's Building Regulations (clause 5.1);

8.6 The buildings and outbuildings shall not be deemed completed until such time as the plaintiff has issued a completion certificate (clause 5.5);

8.7 The first defendant shall at all times remain personally liable for his [sic] obligations in terms of this agreement (clause 5.8);

8.8 In planning retaining walls and of buildings to be erected on the property, the defendant

shall take into account the street levels and prevent any portion thereof from falling in the street (clause 5.10);

8.9 The plaintiff may withhold the issuing of clearance certificate referred to in section 78 of the Local Authorities Act 23 of 1992 as amended, until the first defendant or his [sic] successor in title has complied with his [sic] obligations, without exempting the first defendant of his [sic] liabilities thereof (clause 5.11);

8.10 The parties acknowledge that the provisions of the Agreement constitute the entire agreement between them (clause 6.2);

8.11 Should the first defendant breach any term of this agreement and fail to remedy such breach within 14 days of the receipt of notice requiring such breach to be remedied, the plaintiff shall be entitled, without prejudice to any other rights available in law, to cancel the agreement, claim immediate ejection of the first defendant and to claim such damages as it may have sustained by reason of such breach or, sue for specific performance (clause 7);

8.12 In the event of cancellation and transfer of the property having been given to the first defendant, the first defendant shall when called upon to do so, retransfer the property to the plaintiff. In this event, the first defendant shall be liable for all costs, which may include the costs of an application to court (clause 7.3);

8.13 In the event of cancellation, the first defendant shall not have any claim of whatever nature against the plaintiff arising out of such cancellation (clause 7.4);

8.14 The parties agree and undertake to have registered as part of the Title Conditions the following:

A right of pre-emption in favour of the plaintiff that the first defendant shall not sell or alienate the property or any portion thereof undeveloped for a period of 5 years from date of registration in the deeds office unless the first defendant has offered the property to the plaintiff to purchase the property at a price calculated on the original price paid for the property in addition to necessary costs incurred (clause 11.1.2);

[9] The plaintiff aver and contend that the terms and conditions of the agreement be read together and be incorporated herein *mutatis mutandis*.

#### The plaintiff's performance

[10] The plaintiff performed in all its obligations in terms of the agreement.

Transfer of the property to first defendant:

[11] On or about 23 October 2017 and at Windhoek, Masiza Law Chambers transferred the property from the Municipal Council of Walvis Bay to the first defendant under Deed of Transfer no. T 7136/2017.

[12] A copy of the Deed of Transfer is attached hereto and marked as annexure "B".

Transfer of the property to the second and third defendants

[13] On or about 3 June 2019 and at Windhoek, the first defendant transferred the same property under Deed of Transfer no. T 3238/2019 to the second and third defendants.

[14] A copy of the Deed of Transfer as referred to in paragraph 13 supra is attached hereto and marked as annexure "C".

Breach of agreement:

[15] The first defendant breached the terms of the agreement in one or more or all of the following:

15.1 The first defendant failed or neglected to erect a main building and/or the necessary outbuildings and/or boundary fences in accordance with the approved plans and specification in terms of the plaintiff's building regulations;

15.2 The first defendant failed or neglected, in planning retaining walls and of building to be erected on the property, to take into account the street levels by preventing the said retaining walls from falling into the street, alternatively any portion thereof;

15.3 The first defendant sold and/or alienated the property to the second and third defendants within 5 years of date of registration of the property, to wit, 23 October 2017 under Deed of Transfer number T 7136/2017 whilst the first defendant was precluded and prohibited to do so under the agreement;

15.4 The first defendant transferred the property to the second and third defendants without obtaining the clearance and/or building certificates from the plaintiff as required in terms of the agreement.

[16] As a consequence of the first defendant's breach of the agreement, the plaintiff cancelled

the agreement, alternatively cancels the agreement herewith.

Further breach of the agreement:

[17] The property was transferred on 23 October 2017 to the first defendant under Deed of Transfer no. T 136/2017 without the inclusion of the special conditions as provided for in clause 11.12 of the agreement.

[18] The non-inclusion of the aforementioned clause in the agreement as referred to in paragraph 17 supra, does not reflect the true intention of the parties and/or results in the parties not reaching consensus over the terms and conditions of the agreement and/or constitutes a breach of the agreement and/or deprives the plaintiff's rights to pre-emption in terms of the said agreement.

[19] The breach of the agreement as referred to in paragraph 18 supra, was not as a result of the actions, alternatively conduct and/or fault of the plaintiff.

Non-compliance with the Local Authorities Act:

[20] The contents of paragraphs 6 to 10 supra are repeated and reiterated.

[21] In terms of section 78 of the Local Authorities Act, Act no. 23 of 1992 ("the Act"), the registrar of deeds shall not register a transfer of any immovable property situated within a local authority area, unless there is produced to him or her a conveyancer's certificate;

[22] The plaintiff had not furnished the first defendant with a clearance certificate and/or building compliance certificate and have withheld the issuing of same as provided for in terms of section 5.11 of the agreement.

[23] The first defendant in breach of the agreement, and in contravention of the Act, has permitted, alternatively failed to prevent the transfer of the property to the second and third defendants under Deed of Transfer T 3238/2019 on 3 June 2019.

[24] In terms of section 6(1) and 6(2) of the Deeds Registry Act, Act 47 of 1937 of South Africa:

24.1 No registered deed of grant, deed of transfer, and certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of court.

24.2 Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond shall be revived to the extent of such cancellation.

[25] In the premises, as a consequence of the first defendant's breach of the agreement and contravention of the Act, the plaintiff cancels the agreement, tenders payment to the first respondent for N\$160 000 and moves for an order to cancel the Deeds of Transfer, to wit: T 7136/2017 and T 3238/2019 and to re-transfer the property to the plaintiff.

Relief claimed:

[26] WHEREFORE the plaintiff claims against the first, second and third defendants as follows:

- (1) Cancellation of the sale agreement dated 18 April 2017;
- (2) Cancellation of the Deed of Transfer with number: T 7136/2017 in terms of section 6 of the Deeds Registry Act, Act no. 47 of 1937;
- (3) Cancellation of the Deed of Transfer with number. T 3238/2019 in terms of section 6 of the Deeds Registry Act, Act no. 47 of 1937;
- (4) Re-transfer of the property to the plaintiff by the Second and Third Defendants;
- (5) The First Defendant to pay all costs pertaining to the re-transfer of the property to the Plaintiff;
- (6) Costs of suit;
- (7) Further and/or alternative relief.'

The second and third defendants grounds of exception

Grounds of Exception

First ground

[2] In paragraph 21 of the plaintiff's amended particulars of claim, the plaintiff avers that 'the registrar of deeds shall not register a transfer of any immovable property situated in a local authority area, unless there is produced to him or her a conveyancer's certificate.'

[3] Section 15 of the Deeds Registries Act 47 of 1937 ("the Deeds Act") provides as follows:

'...Save as is otherwise provided in any other law, no deed of transfer, mortgage bond, grant or deed or certificate of title or registration of any kind mentioned in Act shall be attested, executed or registered by a registrar unless it has been prepared by a conveyancer who may

recover the fees and charges to which he may be entitled in accordance with any regulation made under section ten...'

[4] Section 15A of the Deeds Act provides as follows:

'...(1) A conveyancer who prepares a deed or other document for the purposes of registration or filing in the deeds registry, and who signs a prescribed certificate on such deed or document, accepts by virtue of any such signing the responsibility to the extent prescribed by regulation for the purposes of this section, for the accuracy of those facts mentioned in any such deed or document or which are relevant in connection with the registration or filing thereof, which are prescribed by regulation.

[5] The provisions of subsection (1) shall apply *mutatis mutandis* to any person other than a conveyancer, who is prescribed by regulation, and who has in accordance with the regulations prepared a deed or other document prescribed by regulation for registration or filing in a deeds registry.

[6] A registrar shall accept, during the course of his examination of a deed or other document in accordance with the provisions of this Act, that the facts referred to in subsection (1) in respect of the registration or filing of a deed or other document in connection with a certificate referred to in subsection (1) or (2) has been signed, have the purposes of any such examination being conclusively proved: Provided that the foregoing provisions of this subsection shall not derogate from the obligation of the registrar to give effect to any order of court or any other notification recorded in the deeds registry under this Act or any other legal provision, and which effects the registration or filing of such deed or other document...

[7] Section 78(a)(i) and (ii) of the Local Authorities Act 23 of 1992 ("the Local Authorities Act") provides as follows:

'...Subject to the provisions of section 89(4) of the insolvency Act, 1936 (Act 24 of 1936) the registrar of deeds shall not register a transfer of any immovable property situated within a local authority area, unless there is produced to him or her-

(a) In the case of a registration of transfer in terms of the Deeds Registries Act, 1937 (Act 47 of 1937), or when a development scheme is to be registered or a registration of a transfer of a sectional title deed for a sectional title unit as defined in section 1 of the Sectional Title Act, 2009 (Act 2 of 2009), to be effected, a conveyancer's certificate; or

(b) ...

Certifying-

(i) That-

(aa) all rates leviable in respect of such immovable property in terms of this Act, and all the fees, charges and other moneys due to the local authority council in respect of any service, amenity or facility supplied to such property in terms of this Act, inclusive of any availability charge and minimum charge provided for in section 30(1)(u) has been paid; and

(bb) a building compliance certificate by the relevant local authority has been issued, unless the immovable property is unimproved; or

(ii) That such immovable property is not contained in the main valuation roll, a provisional valuation roll or any other register held by the local authority council...'

[8] Plaintiff further avers in paragraph 23 of the amended particulars of claim that 'in contravention of the Act, has permitted, alternatively failed to prevent the transfer of the property to the second and third defendants under Deed of Transfer T 3238/2019 on 3 June 2019.'

[9] The plaintiff further in paragraph 13 and 14 of the amended particulars of claim refer to Annexure "C", being a copy of the Deed of Transfer T 3238/2019. A conveyancer's certificate under section 78 of the Local Authorities Act 23 of 1992 appears at the last page of Annexure "C".

[10] It is respectfully submitted that, ex facie the plaintiff's amended particulars of claim as read with the annexures thereto, that the plaintiff does not disclose a cause of action, alternatively the amended particulars of claim do not contain averments necessary to sustain the cause of action.

[11] Further argument will be advanced on the defendants' behalf on this ground at the hearing of the exception.

### Second ground

[12] The plaintiff avers in paragraph 21 of the amended particulars of claim that 'the



registrar of deeds shall not register a transfer of any immovable property situated in a local authority area, unless there is produced to him or her a conveyancer's certificate.'

[13] Plaintiff further avers in paragraph 23 of the amended particulars of claim that 'in contravention of the Act, has permitted, alternatively failed to prevent the transfer of the property to the second and third defendants under Deed of Transfer T 3238/2019 on 3 June 2019.'

[14] Section 20 of the Deeds Registries Act provides as follows:

'...Deeds of transfer shall be prepared in the forms prescribed by law or by regulation, and, save as in this Act or any other law provided or as ordered by the court in respect of deeds of transfer executed by the registrar, shall be executed in the presence of the registrar by the owner of the land described therein, or by a conveyancer authorized by power of attorney to act on behalf of the owner, and shall be attested by the registrar...'

[15] *Ex facie* Annexure "C" to the amended particulars of claim, a conveyancer's certificate under section 78 of the Local Authorities Act 23 of 1992 appears.

[16] The relevant conveyancer, Mr. Willem Carel Kotze, is a necessary and interested party with a direct and substantive interest in this matter and its outcome.

[17] It is submitted that, *ex facie* the plaintiff's amended particulars of claim as read with the annexures thereto, in the absence of the joinder of Mr. Kotze alternatively his express waiver of being joined to the action being pleaded, the amended particulars of claim do not contain averments necessary to sustain the cause of action.

[18] Further argument will be advanced on the defendants' behalf on this ground at the hearing of the exception.

In respect of both the first and second grounds:

[19] In the circumstances it is respectfully submitted that:

44.1 the exception on the aforementioned grounds be upheld with costs, including the costs of one instructing and one instructed counsel (where engaged);

44.2 the plaintiff's amended particulars of claim or the plaintiff's claim be dismissed with costs;

44.3 in the alternative that plaintiff's amended particulars of claim be struck out with costs as above; and

44.4 the defendants be awarded the costs of the exception, including the costs of one instructing and one instructed counsel.

#### Vague and embarrassing

[20] The defendants in exception dated 23 July 2020 gave notice in terms of Rule 57(2) of their intention to raise an exception to the plaintiff's amended particulars of claim (as read with the annexures thereto) on the basis of same being vague and embarrassing. Despite having been afforded 10 days within which to remove the causes of complaint, the plaintiff failed to heed such request.

#### First ground

[21] In paragraph 21 of the amended particulars of claim the plaintiff avers that 'the registrar of deeds shall not register a transfer of any immovable property situated in a local authority area, unless there is produced to him or her a conveyancer's certificate.'

[22] The plaintiff further avers in paragraph 23 of the amended particulars of claim that 'in contravention of the Act, has permitted, alternatively failed to prevent the transfer of the property to the second and third defendants under Deed of Transfer T 3238/2019 on 3 June 2019.'

[23] The plaintiff further in paragraph 13 and 14 of the amended particulars of claim refer to and rely on Annexure "C", being a copy of the Deed of Transfer T 3238/2019. A conveyancer's certificate as envisaged by section 78(a)(i) and (ii) of the Local Authorities Act 23 of 1992 appears at the last page of Annexure "C".

[24] It is respectfully submitted that in the circumstances the plaintiff's amended particulars of claim are excipiable in that:

- 38.1 it is, when read with the annexures, vague and embarrassing;
- 38.2 contains allegations inconsistent with the content of the annexures; and
- 38.3 does not set out sufficient particulars to enable the defendants to know what case they have to meet and is prejudicial to all the defendants.

### Second ground

[25] The plaintiff refers to and relies in paragraphs 8.1 and 21 of the amended particulars of claim on section 78 of the Local Authorities Act, and the alleged non-issuing of a clearance certificate and building certificate as the basis for setting aside the transfer.

[26] Section 78 consists of subsections having different consequences and considerations in law.

[27] When relying on a statute in pleadings, a litigant must with at least reasonable clarity plead the sections relied on of a statute. Some of the provisions of section 78 relate to sectional titles (which the property relevant to this matter is not an immovable properties registered under the Registration of Deeds in Rehoboth Act, 1976 (Act 93 of 1976). It is submitted that the plaintiff has been afforded an opportunity to remedy this complaint and failed to do so.

### Discussion

#### The Law

[28] In *Van Straten N.O v NAMFISA*<sup>1</sup> the Supreme Court held that:

'Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the pleadings are taken as correct. In the second place it is incumbent upon excipient to persuade this court that upon every interpretation which the pleadings can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.'

In *Oryx Development group v GRN*<sup>2</sup>

<sup>1</sup> (SA 19-2014) [2016] NASC (8 June 2016).

<sup>2</sup> A 1635/2011 [2013] NAHCMD delivered 20 May 2013.

The court held that:

'The first principle in dealing with an exception is whether evidence can be led which can disclose a cause of action alleged in the pleading. If the answer is in the affirmative then it is not exposable on the basis that no possible evidence led on the pleadings can disclose a cause of action.'

[29] The plaintiff in the amended particulars of claim alleges that in terms of S 15(a) of the Deeds Registries Act (Act 47 of 1937, the Deeds' Act) section 78(a)(i) and (ii) of the Local Authorities Act 23 of 1992 (the Local Authorities Act) – a conveyancer's certificate must be produced to the registrar of deeds before the immovable is transferred in the name of another person. The conveyancer certificate must state that: 9(a) all rates leviable on the immovable property has been paid and 9(b) a building compliance certificate by the relevant authority has been issued, unless the immovable property is unimproved.

[30] In the amended particulars of claim, the plaintiff alleges (para 23) 'in contravention of the Act, has permitted, alternatively failed to prevent the transfer of the property to the second and third defendants under Deed of Transfer T 3238/2019 on 3 June 2019.'

[31] However in paragraph 13 and 14 of the amended Particulars of Claim, the plaintiff refers to Annexure "C" a copy of the deed of transfer T 3238/2019. At the last page of Annexure "C" a conveyancer's certificate under s 78 of the Local Authorities Act 23 of 1992 appears. In essence the plaintiff alleges that the transfer was effected without a conveyancer's certificate, yet a certificate was produced as it can be seen from annexure "C". It appears that the plaintiff complains that the first defendant transferred the property without obtaining clearance certificate from the plaintiff and therefore the conveyancer's certificate did not comply with the second requirement (a building compliance certificate) and that is why, counsel for the plaintiff in his heads submitted that the conveyancer's certificate was defective. But that is not only disclosed or pleaded in the Particulars of Claim but that is wrong because a building compliance certificate is only required if the erf is improved, but in this case the erf is unimproved and therefore the conveyancer's certificate is not defective. I therefore agree with the submission by counsel for the second and third defendants that the amended Particulars of Claim does not disclose a cause of action.

[32] The second ground of exception is that the conveyancer who prepared the

certificate has a direct and substance interest in this matter and should have been joined, unless he expressly waived that Mr. Kotze, the conveyancer, is the one who prepared the certificate. In terms of s 15A of the Deeds Act, who prepares a deed for the purposes of registration accepts by virtue of any such signing the responsibility for the accuracy of those facts mentioned in any such deed. (3) A registrar shall accept, during the course of his examination of a deed or other document in accordance with the provisions of this Act, that the facts referred to in subsection (1) in respect of the registration or filling of a deed or other document in connection with a certificate referred to in subsection (1) or (2) has been signed, have the purposes of any such examination being conclusively proved.

[33] The above quoted section of the Deeds Act places services responsibility on the conveyancer who prepares the certificate and the registrar of deeds relies on the conveyancer's certificate to effect transfer. Under those circumstances and in the light of the argument by the plaintiff's counsel, that the conveyancer certificate was defective the conveyancer, Mr. Kotze should have been joined.

In *Group Five Building Ltd v Government of RSA*<sup>3</sup> the court held that:

'As far as I am aware, in cases where an exception has successfully been taken to a plaintiff's initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it does not disclose a cause of action, the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.'

I agree with the *dictum* expressed above, as the correct approach to be followed.

[34] The certificate is not defective because the building compliance certificate is only needed if the erf is improved, but in this case the erf was unimproved, so the building compliance certificate was not needed. So there was nothing wrong with the conveyancer certificate, it complied with s 78(a)(i)(aa).

Vague and embarrassing:

First ground

[35] In paragraph 21 of the amended Particulars of Claim the plaintiff avers that 'the Registrar of Deeds shall not register a transfer of any immovable property situated in a Local Authority area, unless there is produced to him or her a conveyancer's certificate.'

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<sup>3</sup> Group Five Building Ltd v Government of RSA 1993(2) SA at593 at p 602C.

In paragraph 23 of the amended particulars of claim the plaintiff avers that the first defendant in contravention of the Act, has permitted, alternatively failed to prevent the transfer of the property to second and third defendants under Deed of Transfer T 3238/2019.

[36] A conveyancer certificate, in compliance with s 78(a)(i)(aa) of Act 23/1992 was produced by the conveyancer Mr. Kotze. The certificate is in compliance with s 78(a)(i)(aa) which states that all rates leviable has been paid. The conveyancer certificate does not refer to s 78(a)(i)(bb) which requires a building compliance certificate in case where the erf is improved in this case and by the plaintiff's amended Particulars of Claim, the erf was not improved. The conveyancer certificate is therefore in compliance with the Act, so what Act, was contravened? None

The particulars of claim are therefore vague and embarrassing.

Vague and Embarrassing

Second ground

[37] Counsel for the defendants argued that the plaintiff refers to s 78 of the Local Authorities Act and the alleged non-issuing of a clearance certificate and building certificate as the basis for setting aside the transfer, but plaintiff does not specifically refer to section or subsection of 2 of the Local Authorities Act. From the reading of the amended Particulars of Claim and the reference to s 78 of the Local Authorities Act and the non-issuing of the building clearance certificate, one can clearly deduce that the plaintiff is referring to s 78(a)(i)(bb) of Act 23/1992, because that is the section dealing with the issuance of a building clearance certificate. That exception is refused.

<b>G.N. NDAUENDAPO</b>	
<b>JUDGE</b>	
For the plaintiff: Mr H Stolze Instructed by Shikongo Law Chambers Windhoek	For the 1 <sup>st</sup> and 2 <sup>nd</sup> defendants: Mr. A Van Vuuren Instructed by Delpont Legal Practitioners Windhoek