

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case no: HC-MD-CIV-ACT-OTH-2022/00761

In the matter between:

**ONESMUS TOBIAS AMADHILA**

**PLAINTIFF**

and

**TOBIAS MUNDJELE**

**FIRST DEFENDANT**

**JOSEF PENDA MUNDJELE**

**SECOND DEFENDANT**

**ERF ONE SEVEN EIGHT FOUR ONDANGWA CC**

**(REG. NO. CC/2004/1528)**

**THIRD DEFENDANT**

**THE REGISTRAR OF DEEDS**

**FOURTH DEFENDANT**

**Neutral citation:** *Amadhila v Mundjele* (HC-MD-CIV-ACT-OTH-2022/00761)

[2023] NAHCMD 285 (26 May 2023)

**Coram:** MILLER AJ

**Heard:** 14 - 16 March 2023

**Delivered:** 26 May 2023

**Flynote:** Civil – Locus standi – Plaintiff is a member of the close corporation – Plaintiff lacks standi to institute and pursue claims on behalf of the CC.

**Summary:** The plaintiff approached court seeking certain orders; declaring a donation between the first and second defendants of the property Erf 1784, Extension 5, Ondangwa, Oshana Region (“Erf 1784”) unlawful alternatively fraudulent, declaring the transfer and registration of property Erf 1784 unlawful and for the transfer and donation to be set aside as well as for the first defendant to take the necessary steps to have the property Erf 1784 registered into the name of the third defendant being a CC.

The first, second and third defendants defended the matter and raised a number of defences, one of the defences being that the plaintiff has no *locus standi*.

The plaintiff alleges that a verbal agreement has been entered into between him and the first defendant. The plaintiff then testified that the terms of the agreement would be that a CC will be established, whereby each member will hold 50 per cent membership and that the first defendant would transfer ownership of Erf 1784 in the name of the close corporation once he acquired the ownership of the property from the Ondangwa Town Council.

The first defendant was not called as a witness. The second defendant was called to testify. Although he was not part of the discussions between the plaintiff and defendant, he could only repeat what was said to him by his father. He confirmed that ownership of Erf 1784 was transferred to him.

The court is satisfied that an agreement has been concluded between the plaintiff and the first defendant. However, the court is of the view that the agreement does not create any right on the part of the plaintiff to claim transfer of Erf 1784. Instead, it seeks to create a right to claim transfer in the CC.

*Held that*, the agreement is a *stipulatio alteri* in favour of the third party, which was to be the CC the plaintiff and the first defendant had in mind.

*Held that*, a claim for the vindication of a contractual obligation pre-supposes that the agreement creates the right which requires vindication.

*Held further* that, the plaintiff, through his membership in the close corporation would receive some benefit from the transfer of the property from the first defendant to the third defendant, but it does not create an enforceable right to claim specific performance in the form of transfer of ownership to the third defendant.

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### ORDER

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1. The plaintiff's claims are dismissed.
2. The plaintiff must pay the costs of the first and second defendants which will include the costs of one instructing and one instructed counsel.
3. The matter is finalised and removed from the roll.

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### JUDGMENT

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MILLER AJ:

[1] The plaintiff instituted action against the defendants seeking the following orders:

'(1) An order declaring the donation between the First and Second Defendants of the property at Erf 1784, Extension 5 Ondangwa, Oshana Region, Republic of Namibia as unlawful alternatively fraudulent.

(2) An order declaring the transfer to and registration into the name of the Second Defendant of the property at Erf 1784, Extension 5, Ondangwa, Oshana Region, Republic of Namibia from the First Defendant as unlawful and setting aside both the donation and the transfer.

(3) Ordering the First Defendant to take all such steps to have the property at Erf 1784, Extension 5, Ondangwa, Oshana Region, Republic of Namibia registered into the name of the Third Defendant within 60 (sixty) days of the Court Order.'

[2] The matter is defended by the first, second and third defendants. The fourth defendant took no part in the proceedings.

[3] The defendants raised a number of defences to the claim. It was alleged firstly that the plaintiff's claim had become prescribed by the time the action was instituted. Secondly, the existence of the alleged agreement upon which the plaintiff relies was placed in issue. As a third issue, it was alleged that the alleged agreement, if it is found that it existed, was an agreement for the benefit of another party, the third defendant, which acquired the rights flowing from the agreement. Consequently, the plaintiff has no locus standi. Lastly, it was pleaded that if the alleged agreement amounted to an agreement of sale, it is invalid for failure to comply with the formalities in terms of the Formalities In Respect of the Sale of Land Act, Act 71 of 1969.

[4] In order to place the issues into perspective, it is necessary to briefly sketch the factual background which gave rise to the dispute. The following facts are not in dispute:

4.1 The plaintiff was the beneficial holder of two pieces of land by virtue of a permission to occupy the land, then being communal land.

4.2 These pieces of land were subsequently incorporated into the town lands of the Municipality of Ondangwa and henceforth were described as Erven 1783 and 1784 respectively.

4.3 On 8 April 2002 and by virtue of title deed No. T2451/2002, the Municipality of Ondangwa transferred ownership of Erf 1784 to the first defendant. I may indicate that Erf 1783 was likewise transferred to the first defendant. This is not part of the issues before me.

4.4 By virtue of a written Deed of Donation, the first defendant transferred the ownership of Erf 1784 to the second defendant. The transfer was registered in the Deeds Office on 1 November 2017.

4.5 On 22 July 2004, a close corporation with the name Mouse Properties No. 24 CC was registered. The name was subsequently changed to Oshoto Guesthouse CC. The plaintiff and the first defendant were the members of the close corporation, each having 50 percent of the membership.

4.6 On 8 June 2007, the name, Oshoto Guesthouse CC was changed to Erf 1784 Ondangwa Close Corporation CC, currently 'the third defendant'. The membership remained as it was for the time being.

[5] At the heart of the plaintiff's claims lies the allegation that prior to the registration of any of the abovementioned close corporations, the plaintiff concluded a verbal agreement with the first defendant. According to the evidence of the plaintiff, the terms of the agreement were the following:

5.1 Plaintiff and the first defendant will establish a close corporation in which each of them would hold 50 percent of the membership.

5.2 The first defendant agreed to transfer the ownership of Erf 1784, to the Close Corporation, once the first defendant had acquired ownership of Erf 1784 from the Town Council of Ondangwa.

5.3 The close corporation would henceforth conduct business on Erf 1784.

5.4 The first defendant will keep the plaintiff apprised of the transfer of ownership to the first defendant, whereupon the first defendant would take the necessary steps to effect the transfer of Erf 1784 into the name of the close corporation.

[6] The first defendant did not testify at the hearing of the matter. The only witness called on behalf of the defendants was the second defendant. He was not privy to any discussions between the plaintiff and the first defendant. His evidence repeats what was said to him from time to time by his father, to first defendant. The second defendant confirms that the ownership of Erf 1784 was transferred to him as indicated above and that he is currently the registered owner of the property.

[7] The evidence of the plaintiff insofar as it relates to the conclusion of the agreement must be accepted as correct. The evidence tendered by the second defendant is secondary evidence which does not directly contradict the evidence of the plaintiff. Moreover, the probabilities support the evidence of the plaintiff that an agreement had been concluded between the plaintiff and the first defendant. The evidence establishes that following the conclusion of the alleged agreement, little time was wasted to acquire Mouse Properties No. 24 CC, which was a dormant shelf close corporation at the time. Thereafter, through changes affected in the membership of the close corporation and the name changes the entity, now known as Erf No. 1784 Ondangwa CC came into existence. These uncontested facts support the evidence of the plaintiff that an agreement had been concluded between himself and the first defendant.

[8] I do not deem it necessary for purposes of the judgment to deal with all the issues raised by the defendants. I propose to deal with only the issue raised regarding the lack of the locus standi of the plaintiff to institute and pursue the claims he instituted.

[9] The agreement relied upon by the plaintiff does not create any right on the part of the plaintiff to claim transfer of Erf 1784. Instead, it seeks to create a right to claim transfer in the CC. In that sense the agreement is a *stipulatio alteri* in favour of the third party, which was to be the close corporation the plaintiff and the first defendant had in mind. The plaintiff argues that what his claim is all about is to enforce specific performance of the agreement he concluded with the first defendant. A claim for the vindication of a contractual obligation pre-supposes that the agreement creates the right which requires vindication.<sup>1</sup>

[10] It is correct that the plaintiff, through his membership in the close corporation would receive some benefit from the transfer of the property from the first defendant to the third defendant, but it does not create an enforceable right to claim specific performance in the form of transfer of ownership to the third defendant.

[11] On that basis alone the claims made by the plaintiff must fail.

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<sup>1</sup> *Crookes N.O v Watson* [1956] 1 ALL SA 227 (A); *Potgieter v Potgieter NO and Others* [2011] ZACA 181.

[12] Having come to that conclusion, it is not necessary to deal with the remaining defences raised.

[13] I make the following orders:

1. The plaintiff's claims are dismissed.
2. The plaintiff must pay the costs of the first and second defendants which will include the costs of one instructing and one instructed counsel.
3. The matter is finalised and removed from the roll.

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PJ MILLER  
Acting Judge

PLAINTIFF:

S NAMANDJE

Of Sisa Namandje & Co. Inc., Windhoek

1<sup>ST</sup> – 3<sup>RD</sup> DEFENDANTS:

P C I BARNARD

Instructed by Dr Weder, Kauta & Hoveka Inc,  
Windhoek