

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-MOT-REV-2021/00074

In the matter between:

**ACASIA RESORTS (PTY) LTD**

**APPLICANT**

and

**MINISTER OF URBAN AND RURAL DEVELOPMENT**

**1<sup>st</sup> RESPONDENT**

**OANOB DAX INVESTMENT CC**

**2<sup>nd</sup> RESPONDENT**

**REHOBOTH TOWN COUNCIL**

**3<sup>rd</sup> RESPONDENT**

**Neutral citation:** *Acasia Resorts (Pty) Ltd v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2021/00074) [2023]  
NAHCMD 671 (20 October 2023)

**Coram:** RAKOW J

**Heard:** 3 October 2023

**Delivered:** 20 October 2023

**Flynote:** Application – Joinder Application for strike out of the content of the applicant’s application – Application by applicants filed out of time – Condonation application – If the joinder application is allowed, it will automatically follow that the amendment application should be allowed as far as it relates to the joinder application – Condonation granted.

**Summary:** The current application before court is one of joinder for the joining of various parties to the defendants namely the Environmental Commissioner, the Registrar of Deeds and the Chairperson of the Urban and Regional Planning Board. This application is opposed by the second respondent who brought a further application to strike out the content of the application brought by the applicants. The applicants filed their application outside the timelines provided for filing and therefore brought an application for condonation as well.

*Held that:* If the joinder application is allowed, it will automatically follow that the amendment application should be allowed as far as it relates to the joinder application.

*Held that:* For the joinder application, it is necessary to consider whether the parties to be joined indeed required as a matter of necessity and not just as a matter of convenience.

*Held that:* The court finds that the Chairperson of the Townships Board as well as the Registrar of Deeds are indeed parties of necessity and should therefore be joined to these proceedings. On the other hand, the Environmental Commissioner's decision to issue an environmental clearance certificate will be revisited by the second respondent in due course as they will have to apply for a new clearance certificate and at such a stage the applicants would be at liberty to object to the granting of such a certificate and will have the right to be heard by the Environmental Commissioner.

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## ORDER

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1. Condonation for the late filing of the replying affidavit is hereby granted.
2. The joinder of the Chairperson of the Townships Board and the Registrar of Deeds is hereby granted.
3. The notice of motion is amended to include the following:

3.1 Condoning the late delivery of the application to declare as lapsed, alternatively unenforceable, in the further alternative null and void, the contract of sale concluded between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 6 October 2014.

3.2 Declaring as lapsed, alternatively unenforceable, in the further alternative null and void, the contract of sale concluded between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 6 October 2014.

3.3 Condoning the late delivery of the application to set aside the transfer from the 3<sup>rd</sup> respondent to the 2<sup>nd</sup> respondent of Farm no 1127 (a portion of Portion 31) of the Farm Rehoboth Dorpsgrond No. 302.

3.4 Setting aside the transfer from the 3<sup>rd</sup> respondent to the 2<sup>nd</sup> respondent of Farm no 1127 (a portion of Portion 31) of the Farm Rehoboth Dorpsgrond No. 302.

3.5 Condoning the late delivery of the application to set aside the recommendations by the Townships Board (the legal predecessor of the 4<sup>th</sup> respondent) to the 1<sup>st</sup> respondent concerning the 2<sup>nd</sup> respondent's application for township establishment on Farm 1127.

3.6 Reviewing set aside the recommendations by the Townships Board (the legal predecessor of the 4<sup>th</sup> respondent) to the 1<sup>st</sup> respondent concerning the 2<sup>nd</sup> respondent's application for township establishment on Farm 1127.

4. The costs of this application is granted to the applicant, to include one instructing and two instructed counsel but capped in terms of rule 32(11).
5. The wasted costs associated with the amendment of the notice of motion is to be carried by the applicant.
6. Matter is adjourned to 28 November 2023 for a status hearing. Parties to file a joint status report on or before 23 November 2023

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## JUDGMENT

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RAKOW J:

Introduction

[1] The applicant in the main matter is Acasia Resorts (Pty) Ltd, a private company registered under the laws of Namibia with its primary place of business at Lake Oanob Resort, Rehoboth district, Namibia. The first respondent is the Minister of Urban and Rural Development of the Republic of Namibia cited in his official capacity. The second respondent is Oanob Dax Investments CC, a Close Corporation registered under the laws of the Republic of Namibia, with its registered address at the 1<sup>st</sup> floor, Moth Center Building in Peter Müller Street, Windhoek. The third respondent is the Rehoboth Town Council, a Local Authority constituted in terms of s 6 of the Local Authorities Act 23 of 1992.

[2] The current application before court is one of joinder for the joining of various parties to the defendants namely the Environmental Commissioner, the Registrar of Deeds and the Chairperson of the Urban and Regional Planning Board. This application is opposed by the second respondent who brought a further application to strike out the content of the application brought by the applicants. The applicants filed their application outside the timelines provided for filing and therefore brought an application for condonation as well.

### Background

[3] The applicant concluded a written lease agreement with the Government of the Republic of Namibia on 11 November 1994, which lease agreement covered four portions of land specifically identified in the lease agreement. The leased land is situated around the Oanob Dam which is in the Rehoboth district. The lease agreement is for 50 years and includes an option for the applicant to extend the agreement for another 50 years. The applicant took occupation of the leased land in 1995 and has developed it since.

[4] The third respondent is the legal successor of the Government of the Republic of Namibia's title in the leased land.

[5] During 2013 the members of the second defendant noticed an undeveloped piece of land at Oanob dam and went to the Rehoboth town council, who owned the land, to enquire as to who is occupying the land as there was no sign of any occupation at that time. The Rehoboth Town Council indicated that the land belonged to them.

The members of the second defendant further went to the Rehoboth Deeds Office to confirm that the land belonged to the Rehoboth Town Council and that there were no servitudes, leases or bonds registered over the approximately 245 hectares of land on the western side of the dam.

[6] The second defendant then made a proposal to the Rehoboth Town Council to purchase the land in order for them to develop the said land. The proposal, dated 7 February 2014, offered to purchase the said land for N\$5 000 000 from the Town Council. They proposed to build a lodge with conference facilities, recreational facilities, 20 luxury chalets and a real estate development consisting out of 30 houses. This proposal was in principal approved in April 2014 and they proceeded with the surveying of the undeveloped land as well as the town planning.

[7] The second respondent required NAMPAB approval for the development of the land as well as an Environmental Clearance Certificate, Townships Board approval and Town Planning Establishment Certificates. These applications were submitted including the application to the Ministry of Urban and Rural Development for the establishment of a township to specifically the Townships Board. This was done on 18 May 2017. On 8 August 2017 Mr Shikongo on behalf of the applicant appeared at a meeting of the Townships Board and objected to the approval of the Townships Board on the basis of a lease over the land.

[8] The applicant's objection was overruled by the Township Board during a meeting of 10 and 11 October 2017 and on 3 December 2018 the first respondent approved the second respondent's application for a township establishment. On 30 July 2020 the Minister declared the land which the second respondent had purchased to be an approved township in the local authority area of Rehoboth as published in Government Gazette 7309 of 14 August 2020. It is against this decision of the Minister that the review proceedings were instituted.

#### The application

[9] The applicant filed an application for joinder of certain parties as well as the amendment of the initial notice of motion. This application reads as follows:

'A. Joinder

1. Joining THE ENVIRONMENTAL COMMISSIONER as the 4th respondent in the main application.
2. Joining the REGISTRAR OF DEEDS as the 5th respondent in the main application.
3. Joining the CHAIRPERSON OF THE URBAN AND REGIONAL PLANNING BOARD as the 6th respondent in the main application.
4. Directing the 4th and 6th respondents to deliver the records of their decision making, together with any reasons for their decisions, within 10 days of the court order.
5. Authorising the applicant to further supplement its founding affidavits within 20 days of receipt of the records and reasons from the 4th and 6th respondents.
6. Directing the 4th to 6th respondents, if any or all of them intend to oppose the main application, to deliver notice of intention to oppose the main application within 5 days of delivery of the applicant's further supplementary founding affidavit, and deliver their answering affidavits, alternatively points of law alone, if any, within a further 20 days.
7. Directing that any of the existing respondents who may want to amplify their existing answering affidavits may do so within 20 days of delivery of the applicant's further supplementary affidavit.
8. Directing the applicant to deliver any replying papers to all of the answering and amplified answering affidavits, within 20 days after receiving the 4th to 6th respondents' answering affidavits; or, if the 4th to 6th respondent select not to file answering affidavits, within 20 days after receiving notice of such respondents' election not to file answering affidavit, or within 20 days of receiving any amplified answering affidavit, whichever should occur last.

B. Amendment of notice of motion

9. Permitting the applicant to amend its notice of motion in the main application to include the following relief in addition to that sought in the existing notice of motion:
  - 9.1. Condoning the late delivery of the application to set aside the 4<sup>th</sup> respondent's decision to grant an environmental clearance certificate dated 14 October 2016 concerning the 2nd respondent's application for township establishment on Farm 1127.
  - 9.2. Reviewing and setting aside the 4th respondent's decision to grant an environmental clearance certificate dated 14 October 2016 concerning the 2nd respondent's application for township establishment on Farm 1127.
  - 9.3. Condoning the late delivery of the application to declare as lapsed, alternatively unenforceable, in the further alternative null and void, the contract of sale concluded between the 2nd and 3rd respondents on 6 October 2014.
  - 9.4. Declaring as lapsed, alternatively unenforceable, in the further alternative null and void, the contract of sale concluded between the 2nd and 3rd respondents on 6 October 2014.

9.5. Condoning the late delivery of the application to set aside the transfer from the 3rd respondent to the 2nd respondent of Farm no 1127 (a portion of Portion 31) of the Farm Rehoboth Dorpsgrond No. 302.

9.6. Setting aside the transfer from the 3rd respondent to the 2nd respondent of Farm no 1127 (a portion of Portion 31) of the Farm Rehoboth Dorpsgrond No. 302.

9.7. Condoning the late delivery of the application to set aside the recommendations by the Townships Board (the legal predecessor of the 4th respondent) to the 1st respondent concerning the 2nd respondent's application for township establishment on Farm 1127.

9.8. Reviewing set aside the recommendations by the Townships Board (the legal predecessor of the 4th respondent) to the 1st respondent concerning the 2nd respondent's application for township establishment on Farm 1127.

#### C. Costs and alternative relief

10. Costs for two instructed and one instructing counsel, only in the event of opposition, against those respondents who may oppose, jointly and severally of more than one, the one paying the other to be absolved.

11. Further and / or alternative relief as the court may deem appropriate.'

#### The condonation application

[10] The applicant's replying affidavit in the joinder application was filed late. It included the affidavits of an expert Town Planner and expert Valuer. It was argued by the applicants that their evidence is important to allow the court to uncover the truth about (at least) two significant issues in this litigation. The first issue is that the second respondent appears to have acted unlawfully in securing the sale agreement with the Rehoboth Town Council, the Environmental Clearance Certificate, the transfer of the land into its name, and all its other approvals that led to the Minister's eventual approval of the Townships Board recommendation. The second issue relates to the price at which the Rehoboth Town Council sold the land to the second respondent. The sale was for N\$5 million in October 2014. The second respondent had not paid for the property yet.

[11] The second respondent offered explanations for these allegations but the affidavits were unusually long and raised numerous legal and factual issues. Considering the obvious significance of the two issues, it was necessary for the applicant to secure experts of its own to fully understand the explanations and to deal

with the explanations. The replying affidavit was due by 2 February 2023. There was an unfortunate miscommunication in the division of labour within the attorneys' firm that led to delays. Only close to the deadline, did the miscommunication become apparent. By then it was too late to meet the deadline. The court granted leave until 14 February 2023. Despite their best efforts, the applicant's legal team could only secure experts later in February.

[12] The applicant further explained that the affidavits of Messrs Van Wyk and Kisting are crucial to allow the court to understand and evaluate the evidence tendered by the second respondent's experts. The public importance of the issue is a weighty consideration. The public importance of the issue, the extent of the delay, its impact as well as the explanation, along with all other relevant facts and circumstances must be weighed against one another, to assess whether it would be in the interests of justice to grant condonation. It was further argued that the delay was not extensive. The delay was explained. There was no element of willfulness. There was no attribution of blame for the delay on the applicant itself.

[13] On behalf of the second respondent it was argued that it is essential and trite that an adequate factual basis must be set out for seeking condonation. It is also trite that such factual basis which must cover every portion of the period in which the delay took place must be set out in the founding papers. It was further submitted that, both, seeking condonation relief and setting out an adequate factual basis for such relief, are essential and are required to be addressed in the founding papers. Very little was, however, devoted to the issue in the founding affidavit. It does not avail the applicant to now attempt to supplement its founding papers in its heads of argument. Counsel for the second respondent further took issue with the fact that the applicant did not make out a case for prospects of success.

#### Discussion on condonation application

[14] In dealing with a delay in explanation for an amendment to pleadings the court in the matter of *Pharmaceutical Society of Namibia v Pharmacy Council of Namibia*<sup>1</sup> said the following which is also applicable in condonation applications:

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<sup>1</sup> *Pharmaceutical Society of Namibia v Pharmacy Council of Namibia* (HC-MD-CIV-MOT-REV 507 of 2020) [2022] NAHCMD 588 (27 October 2022).



'Having found that the delay was unreasonable, the next question is whether the court should condone it? To begin with, there is no application for condonation and in the absence of such an application, to assist the court, it is extremely difficult for the court to condone the delay as there is no full explanation for the delay.

[39] In *Gecko Salt*<sup>2</sup> the court said: 'The applicant was under an obligation to give a full and detailed explanation and not hold back any or further reasons or facts that explain the delay, as it appears to have decided in its wisdom. In my view, the explanation suffers from candour and forthrightness to justify an indulgence from the Court.'

[15] Regarding the decision whether to grant condonation or not, the application must meet two requirements. In the matter of *Telecom Namibia Limited v Mitchell Nangolo & 34 Others*<sup>3</sup> Damaseb JP identified the following as principles guiding applications for condonation:

1. It is not a mere formality and will not be had for the asking. The party seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the grant of condonation.

2. There must be an acceptable explanation for the delay or non-compliance. The explanation must be full, detailed and accurate.

3. It must be sought as soon as the non-compliance has come to the fore. An application for condonation must be made without delay.

4. The degree of delay is a relevant consideration;

5. The entire period during which the delay had occurred and continued must be fully explained;

6. There is a point beyond which the negligence of the legal practitioner will not avail the client that is legally represented. (Legal practitioners are expected to familiarize themselves with the rules of court).

7. The applicant for condonation must demonstrate good prospects of success on the merits. But where the non-compliance with the rules of Court is flagrant and gross, prospects of success are not decisive.

8. The applicant's prospect of success is in general an important though not a decisive consideration. In the case of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*, Hoexter JA pointed out at 789I-J that the factor of prospects of success on appeal in an application for condonation for the late notice of appeal can never, standing alone, be

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<sup>2</sup> *Gecko Salt (Pty) Ltd v Minister of Mines and Energy* 2019 JDR 1130 (NM) at para 23.

<sup>3</sup> *Telcom Namibia Limited v Nangolo and Others* (LC 33 of 2009) [2012] NALC 15 (28 May 2012).

conclusive, but the cumulative effect of all the factors, including the explanation tendered for non-compliance with the rules, should be considered.

9. If there are no prospects of success, there is no point in granting condonation.'

[16] In the matter of *South African Poultry Association and Others v Minister of Trade and Industry and Others*<sup>4</sup> Smuts JA said the following regarding the granting of condonation:

'[58] In deciding whether or not to grant condonation after finding that a delay is unreasonable, the criterion to be applied under the common law is the interests of justice, as was recently reiterated by the South African Supreme Court of Appeal (SCA) in *South African National Roads Agency Ltd v Cape Town City (SANRAL)*.<sup>5</sup> In determining this question, the SCA reaffirmed that regard should be had to all the facts and circumstances.

[59] The SCA also referred to the decision of the Constitutional Court in *Khumalo and Another v MEC of Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) (2014 (3) BCLR 333; [2013] ZACC 49) para 57, where the latter court stated:

'An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.'

[60] The SCA in SANRAL further found that although the delay issue in reviews should first be dealt with before the merits of the review are entertained, this —

“cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.”

[61] Further factors would include the prejudice suffered by the administrative functionary — in this case the minister — and the need for certainty, particularly in respect of a trade measure of the kind in question, the extent and cause of the delay, the reasonableness of the explanation for it, the effect on the administration of justice, the importance of the issue raised and the

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<sup>4</sup> *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC).

<sup>5</sup> *South African National Roads Agency Ltd v Cape Town City (SANRAL)* 2017 (1) SA 468 (SCA) ([2016] 4 All SA 332; [2016] ZASCA 122) para 80.

prospects of success. A further factor could be whether the failure to launch the application within a reasonable time was in good faith.

[62] The public interest is plainly served by bringing certainty and finality to administrative action or the exercise of public power of the kind in question — where the minister invokes a power within a statute to regulate trade by way of a restriction upon imports which at the very least can be challenged on legality grounds of not having been taken within the confines of the Act and would thus not be lawful. A decision of this nature in implementing economic policy through legislative powers has wide implications — including budgetary, in the form of balance of payment consequences, and the pursuit of employment creation. The prejudice to NPI would also need to be considered. But as Mr Unterhalter pointed out, much of the investment in setting it up was effected before the notice was published. Nonetheless, there would be some prejudice in a delay to a challenge to the notice, as was investigated in some detail by the High Court.’

[17] Considering all that was submitted by the applicant as well as the guidelines in *Telecom Namibia Limited*<sup>6</sup> and the decision above in *South African Poultry Association and Others*<sup>7</sup> and taking into account the possible prejudice, the court concludes that it is indeed in the public interest to grant condonation in this instance.

#### The joinder application.

[18] The application for joinder and amendment was filed because of points that were raised by the respondents in the main application, and conduct that was only appreciated and contextualized on a close consideration of the respondents’ answering affidavits. The application was not unduly delayed and did not interfere with a scheduled hearing. In summary the application was launched within a reasonable time of the applicant becoming aware of the need to launch the application.

[19] When applied to the facts, the three public bodies clearly have a direct and substantial interest in the outcome of this litigation. Even if they do not, they are eminently best placed to assist the court in arriving at a just and fair resolution of the dispute. Considering the nature of the allegations about them, it will be in the interests of justice if they are joined. The allegations about possible malfeasance by or against their statutory offices makes it their constitutional duty to investigate and address the claims, and to assist the court in its attempts to bring justice.

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<sup>6</sup> Supra.

<sup>7</sup> Supra.

[20] It was further argued on behalf of the applicants as set out in the founding affidavit for the joinder application, the Environmental Clearance Certificate granted by the Commissioner had been based on materially misleading information. Although that certificate has now lapsed, the applicant applies to join the Commissioner and applies to have the certificate set aside to avoid any technical defences, to ensure that no reliance can be placed now or in future on the existence of that certificate under the *Oudekraal* principle or any other legal principle, and to ensure that the Commissioner has the opportunity to deal with this issue.

[21] The applicant also pointed out that if the court in the main application should accept the allegations of fraud by the second respondent, and the allegation that the second respondent did not pay the purchase price for the land, the transfer of the land would have to be set aside. As the defects taint both the real and the underlying agreement, "ownership does not pass". The Registrar of Deeds would have to give effect to this order, thus, the need to join him.

[22] The relief regarding the Chairperson of the Urban and Regional Planning Board is sought because this body made the relevant recommendation to the Minister, which the Minister accepted. One would have expected that the Minister would have ensured that this body place its position on record, so that the court would be apprised of all relevant facts. Instead, the Minister took the point that he cannot speak for the body and that the body itself ought to have been joined. Which is exactly what the applicant is doing.

[23] The second respondent objected to the joinder and amendment applications. They in fact filed a strike out application against the amendment application. Mainly their concern centers around the fact that the information regarding the parties and the transaction and transfer of the property has been available for many years in which time the applicants failed to bring their proposed joinder and amendment application. It is further not necessary to attack the Townships Boards decision as it is merely a recommendation. No explanation is further put forward to explain the delay in bringing the said application.

[24] They further argued that it is common cause that the Environmental Clearance Certificate already lapsed in October 2019 in terms of s 40(2) of the Environmental Management Act 7 of 2007. This is now some four years later when the applicant effectively seeks to set it aside by reviewing it and setting aside the decision of the Environmental Commissioner to grant such a certificate. The information for the review has been available to the applicants for many years but they failed to bring a review. It was also submitted that this will be a wholly academic exercise as it relates to a certificate which already expired four years ago.

### Legal considerations

#### *Joinder*

[25] In the matter of *Judicial Service Commission and another v Cape Bar Council and another*<sup>8</sup> the South African Appeals court said the following regarding non-joinder:

‘It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA)* para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA)* para 7; and *Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5 ed vol 1 at 239* and the cases there cited).

[13] In *Bowring NO v Vrededorp Properties CC and Another* (supra) Brand JA formulated the test as follows:

‘The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned.’

#### *Amendment of pleadings*

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<sup>8</sup> *Judicial Service Commission and another v Cape Bar Council and another* 2013 (1) SA 170 para 12.

[26] The principles regulating the granting of a proposed amendment of a pleading are very clear and were summarized in the Supreme Court judgment of *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek*<sup>9</sup> as follows:

[38]. . . The established principle that relates to amendments of pleadings is that they should be "allowed to obtain a proper ventilation of the dispute between the parties ... so that justice may be done", subject of course to the principle that the opposing party should not be prejudiced by the amendment if that prejudice cannot be cured by an appropriate costs order, and where necessary, a postponement . . .'

[27] A further elaboration on these principles can be found in the matter of *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC*<sup>10</sup> wherein it was held that:

[55] Regardless of the stage of the proceedings where it is brought, the following general principles must guide the amendment of pleadings: Although the court has a discretion to allow or refuse an amendment, the discretion must be exercised judicially . . .The overriding consideration is that the parties, in an adversarial system of justice, decide what their case is; and that includes changing a pleading previously filed to correct what it feels is a mistake made in its pleadings . . . A litigant seeking the amendment is craving an indulgence and therefore must offer some explanation for why the amendment is sought . . . A court cannot compel a party to stick to a version either of fact or law that it says no longer represents its stance. That is so because a litigant must be allowed in our adversarial system to ventilate what they believe to be the real issue(s) between them and the other side.'

[28] Regarding the general principles applicable to amendments, the following is clear from our case law:

- a) Amendments should create triable issues.<sup>11</sup>

<sup>9</sup> *DB Thermal (Pty) Ltd and Another v Council of the Municipality of City of Windhoek* (SA 33-2010) [2013] NASC 11 (19 August 2013).

<sup>10</sup> *I A Bell Equipment Company (Namibia) (Pty) Ltd v Roadstone Quarries CC* (I 601-2013 & I 4084-2010) [2014] NAHCMD 306 (17 October 2014).

<sup>11</sup> *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 641. See also *Hartzenberg v Standard Bank Namibia Ltd* (*supra*) at para 54 and, generally and relating to amendment applications in this regard, *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) at 462 – 464.

- b) Amendments that introduce excipiable matter, i.e. defences that, in law, are unsustainable, should be refused.<sup>12</sup>

### Conclusion

[29] Taking into account the submissions made by the parties and the case law on both the aspect of joinder as well as amendment the court considered the question as to whether the amendment presents triable issues and whether it introduces excipiable matter or not. The court finds that if the joinder application is allowed, it will automatically follow that the amendment application should be allowed as far as it relates to the joinder application.

[30] For the joinder application it is necessary to consider whether the parties to be joined are indeed required as a matter of necessity and not just as a matter of convenience. The court finds that the Chairperson of the Townships Board as well as the Registrar of Deeds are indeed parties of necessity and should therefore be joined to these proceedings. On the other hand, the Environmental Commissioner's decision to issue an environmental clearance certificate will be revisited by the second defendant in due course as they will have to apply for a new clearance certificate and at such a stage the applicants would be at liberty to object to the granting of such a certificate and will have the right to be heard by the Environmental Commissioner. It will be indeed an academic exercise to join the Environmental Commissioner to these proceedings.

[31] In the result, I make the following order:

1. Condonation for the late filing of the replying affidavit is hereby granted.
2. The joinder of the Chairperson of the Townships Board and the Registrar of Deeds is hereby granted.
3. The notice of motion is amended to include the following:

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<sup>12</sup> *Cross v Ferreira* 1950 (3) SA 443 (C) at 449; *Fischer Seelenbinder Associates v Steelforce* 2010 (2) NR 684 (HC) at 694 para [22].

- 3.1 Condoning the late delivery of the application to declare as lapsed, alternatively unenforceable, in the further alternative null and void, the contract of sale concluded between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 6 October 2014.
- 3.2 Declaring as lapsed, alternatively unenforceable, in the further alternative null and void, the contract of sale concluded between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 6 October 2014.
- 3.3 Condoning the late delivery of the application to set aside the transfer from the 3<sup>rd</sup> respondent to the 2<sup>nd</sup> respondent of Farm no 1127 (a portion of Portion 31) of the Farm Rehoboth Dorpsgrond No. 302.
- 3.4 Setting aside the transfer from the 3<sup>rd</sup> respondent to the 2<sup>nd</sup> respondent of Farm no 1127 (a portion of Portion 31) of the Farm Rehoboth Dorpsgrond No. 302.
- 3.5 Condoning the late delivery of the application to set aside the recommendations by the Townships Board (the legal predecessor of the 4<sup>th</sup> respondent) to the 1<sup>st</sup> respondent concerning the 2<sup>nd</sup> respondent's application for township establishment on Farm 1127.
- 3.6 Reviewing set aside the recommendations by the Townships Board (the legal predecessor of the 4<sup>th</sup> respondent) to the 1<sup>st</sup> respondent concerning the 2<sup>nd</sup> respondent's application for township establishment on Farm 1127.
4. The costs of this application is granted to the applicant, to include one instructing and two instructed counsel but capped in terms of rule 32(11).
5. The wasted costs associated with the amendment of the notice of motion is to be carried by the applicant.
6. Matter is adjourned to 28 November 2023 for a status hearing. Parties to file a joint status report on or before 23 November 2023

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E RAKOW  
Judge



**APPEARANCES**

**APPLICANT:** R Heathcote SC (with him R Maasdorp and A Brendell)  
Instructed by Shikongo Law Chambers, Windhoek

**RESPONDENTS:** G Totemeyer SC (with him G Dicks and A Naude)  
Instructed by Office of the Government Attorney, Windhoek