

**EBERT NKALA**

**Versus**

**BERNARD NKALA**

**And**

**BULAWAYO CITY COUNCIL**

HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 2 June 2020 & 11 June 2020

**Civil trial**

*N. Mlala*, for the plaintiff  
*N. Sandi*, for the 1<sup>st</sup> defendant

**DUBE-BANDA J:** This matter came to this court as an urgent chamber application. This court granted the interim relief sought, whose terms interdicted 1<sup>st</sup> defendant from disposing and transferring of stand number 70832 Lobengula West, Bulawayo to a third party. The court also ordered that in the event a sale had occurred, 2<sup>nd</sup> defendant should not proceed and effect the transfer of the property to a third party.

On the return date, the matter was referred to trial. The plaintiff now seeks the following order from this court:

1. that the 1<sup>st</sup> defendant be and is hereby ordered to sign transfer papers of stand number 70832 Lobengula West, Bulawayo into plaintiff's name within 5 days of this order.
2. Failing paragraph 1 above, the Sheriff of Zimbabwe, Bulawayo be and is hereby ordered to sign transfer papers in the place and stead of the 1<sup>st</sup> defendant at 2<sup>nd</sup> defendant's offices.
3. the plaintiff also be and is hereby ordered to transfer stand number 6631 Pumula North into 1<sup>st</sup> defendant's name.
4. first defendant be and is hereby ordered to pay costs of suit on an attorney client scale.

The action is opposed by the first defendant. The second defendant did not participate in these proceedings. My conclusion is that it intends to abide by the order of this court.

### **Factual background**

In the founding affidavit filed with the chamber application, plaintiff says 1<sup>st</sup> defendant is his brother. It is said sometime between 1980 and 1981, the parties entered into an oral agreement where it was agreed to swoop stand number 70832 Lobengula West, Bulawayo (Lobengula West house), and stand number 6631 Pumula North, Bulawayo (Pumula North house).

The reason given for the alleged agreement is that 1<sup>st</sup> defendant was allocated the Lobengula West house, by the Bulawayo City Council (municipality), at the time of the allocation he did not have the sum of \$480.00 required as a deposit payment. Plaintiff says instead of him leading second defendant funds to pay the deposit, it was agreed that he pays the deposit, then occupy the house and finish paying for it through instalments. In return, 1<sup>st</sup> defendant would occupy the Pumula North, already owned by the plaintiff. This is said to have occurred in 1981.

It is alleged that, one Zebeth Nkala, the elder brother of the two litigants, is the one who facilitated the agreement and is the one who assisted in the acquisition of the two properties. Plaintiff says, sometime in 1995 the parties tried to change the registration of these properties but could not complete the process.

Plaintiff says he has finished paying for the Lobengula West house, and equally defendant has finished paying for the Pumula North house. He says again on the 14 March 2015, the parties met for the purposes of trying to change the registration of the two properties. He alleges that on the 6 June 2015, 1<sup>st</sup> respondent gave him notice to vacate the Lobengula West house. This is what motivated the filing of the urgent application, which gave birth to this case.

Mr *Zebeth Nkala*, deposed to a supporting affidavit. He says sometime between 1980 and 1981, the two litigants, who are his brothers, entered into an agreement to swoop their properties. He says this was caused by the fact that first defendant could not raise the deposit required for the purchase of the Lobengula West house.

Again one *Esther Mhlanga*, deposed to a supporting affidavit. She says, applicant has lived in the Lobengula West house since 1981 and he is the one who paid for it. 1<sup>st</sup> respondent has lived in the Pumula North house, since 1981 and he is the one who paid for it. She confirms

that on the 14 March 2015, the family met to discuss the transfer of registration of the properties. One *Elias Mazolo Ncube*, in a supporting affidavit, says that plaintiff has lived in the Lobengula West house, and defendant has always lived in the Pumula North house. He also confirms the meeting of the 14 March 2015.

In his opposing affidavit, 1<sup>st</sup> defendant accepts that there was an intention to snoop houses, between him and plaintiff. He says he is the registered owner of the Lobengula West house. He denies that he failed to pay the deposit for this house when it was allocated to him by the municipality.

He says he came to stay at the Pumula North house at the request of *Zebeth Nkala*. He says the Pumula North house is registered in plaintiff's name, together with *Zebeth Nkala*'s wife. To protect his interests in this house, *Zebeth Nkala*, the actual owner of the Pumula North house, then requested 1<sup>st</sup> defendant to stay thereat. He says he never regarded the Pumula North house as his, as a result he registered with the municipality for his own house. When he was allocated the Lobengula West house, *Zebeth Nkala* suggested that 1<sup>st</sup> defendant continues residing at the Pumula North house, and allow plaintiff, who for all intents and purposes had no house, to stay at the Lobengula West house.

1<sup>st</sup> defendant contends that the issue of swapping houses was first discussed in 1995. He was agreeable to the proposal, and the terms of the swapping were that, plaintiff would build, at his cost, an additional room to the Pumula North house. Plaintiff would also pay all the swapping costs. He says at the housing office, plaintiff refused to fund the transfer process. 1<sup>st</sup> defendant says he then realised that plaintiff would also renege on the agreement to build an extra room in the Pumula North house.

1<sup>st</sup> defendant says, later on he had an altercation with the children of *Zebeth Nkala*'s wife, who is registered as the spouse of the plaintiff in municipality, in respect of the Pumula North house. The children claimed that the Pumula North house is their mother's property. He says they ordered him to vacate the house.

1<sup>st</sup> defendant says he did not agree with the outcome of the family meeting. However, he agreed to swap houses on the terms that plaintiff constructs or gives him the value of a one-room extension to the Pumula North house, and to pay all the costs incidental to the cession of names for both properties, which plaintiff declined.

### **Plaintiff's version**

During *viva voce* evidence, the plaintiff told the court that 1<sup>st</sup> defendant is his elder brother. Plaintiff resides at the Lobengula West house, a property registered in the name of the 1<sup>st</sup> defendant. 1<sup>st</sup> defendant resides at the Pumula North house, a property registered in the name of the plaintiff. He says during the colonial era, no person was allowed to buy a house without a marriage certificate. One Zebeth Nkala (elder brother to plaintiff and 1<sup>st</sup> defendant), requested plaintiff to solemnise a marriage with one Khelita (Zebeth Nkala's wife), for the purpose of acquiring a marriage certificate and then use that certificate to acquire a house from the municipality. The need for a family home in Bulawayo, was necessitated by the fact that, because of the war, their parents moved to the city. They needed a place to stay.

On the basis of the marriage certificate, the municipality allocated plaintiff and Khelita house. This is the Pumula North house. It was allocated in 1980 and plaintiff says the agreement of sale was signed in 1981. Plaintiff produced a copy of the agreement of sale with the municipality. It is before court and marked Exhibit A1.

Zebeth Nkala was the first to stay at the Pumula North house with his wife Khelita and their family. Plaintiff says it was the wish of the three brothers (him, 1<sup>st</sup> defendant and Zebeth Nkala), that each one of them should own a house in Bulawayo. Zebeth Nkala was later allocated a house in Lobengula West, he then moved out of the Pumula North house. When he moved out, 1<sup>st</sup> defendant took occupation of the Pumula North house.

According to plaintiff, 1<sup>st</sup> defendant, while staying at the Pumula North house, had applied for his own house, he was then allocated the Lobengula West house. The house which is at the centre of this dispute. Plaintiff told the court that when 1<sup>st</sup> defendant was notified that his application had been approved and a house was ready for allocation, he (1<sup>st</sup> defendant) did not have money to pay the required deposit. Then the three brothers (plaintiff, 1<sup>st</sup> defendant and Zebeth Nkala), sat down and discussed the matter.

Plaintiff then informed the 1<sup>st</sup> defendant that he had the money to pay for the deposit for the Lobengula West house. He would pay if 1<sup>st</sup> defendant allowed him to take the property. He says 1<sup>st</sup> defendant agreed. He alleges that he produced the money, \$480.00, and handed it over to Zebeth Nkala to pay at the offices of the municipality. The payment was made and he then moved to occupy the house.

Plaintiff says because the Pumula North house, was on a leasehold, it was agreed that they waited until such time that it was on home ownership, then him and 1<sup>st</sup> defendant would effect the swap, plaintiff taking transfer of the Lobengula West house and 1<sup>st</sup> defendant taking

transfer of the Pumula North house. Plaintiff was paying rent for the Lobengula West house, which he was occupying, and 1<sup>st</sup> defendant was paying rent for the Pumula North house, which he was occupying.

Plaintiff produced proof of payment of rentals for the Lobengula West house, in the form of Exhibits A2, A3, A4, A5, A6, A7 and A8 before court. Plaintiff further says he put a perimeter wall around the property. He further did some other improvements to make the house habitable. However, he did not add a further room to the Lobengula West house. It is a five roomed house. He says 1<sup>st</sup> defendant also put a perimeter wall around the Pumula North house.

Plaintiff says in 1995 him and 1<sup>st</sup> defendant went to the Pumula Housing office intending to change registration of the Pumula North property from his name to that of the defendant. He says this could not happen because, the property was in arrears in the sum of \$300.00. He says from the Pumula Housing office, the two were supposed to proceed to Lobengula West housing office, to change the registration of the Lobengula West. This they could not do, as they had not managed to change the Pumula North house.

In cross examination, plaintiff accepted that 1<sup>st</sup> defendant moved to the Pumula North house, because it was a family home. He says every member of the family used to stay in the Pumula North house.

Plaintiff called the evidence of Elias Ncube Mazolo. He told the court that he is a cousin of the plaintiff and the 1<sup>st</sup> defendant. He says in 2015 the plaintiff and the 1<sup>st</sup> defendant attempted to swap houses. He tried to assist them as a mediator. He was asked whether before 2015, was there any attempt to change ownership? He said he was not there, so he does not know.

Finally, plaintiff called the evidence of Zebeth Nkala. He told the court that plaintiff and the first defendant are his brothers. He says the Pumula house belongs to the plaintiff and Khelitha, (witness's wife). The house was bought after he requested plaintiff to secure a marriage certificate with witness's wife. He was the first to occupy the house with his wife and his parents. He moved out of the Pumula house, when he was allocated his own house in Lobengula West. Then 1<sup>st</sup> defendant moved to the house. He says first defendant sometimes paid the rent, sometimes he – witness - paid rent for the Pumula North house.

According to this witness, 1<sup>st</sup> defendant applied for the Lobengula West house. A house was allocated to 1<sup>st</sup> defendant. However a deposit was required to be paid, 1<sup>st</sup> defendant did not have the money for the deposit. He says, “we sat down as brothers, the three of us (plaintiff, first defendant and Zebeth Nkala), and agreed that the plaintiff who had the money should pay

the deposit". He contends that plaintiff then produced \$480.00 and gave it to the witness to go and pay the deposit for the Lobengula West house. He says the agreement was that the Pumula North house would be transferred to the 1<sup>st</sup> defendant and the Lobengula West house to the plaintiff. In cross examination, the witness says, it was an agreement of the three brothers.

Plaintiff closed his case.

### **First defendant's version**

In his evidence, 1<sup>st</sup> defendant told the court that he resides at Pumula North house. He says he was approached by Zebeth Nkala, who requested him to move to the Pumula North house. According to 1<sup>st</sup> defendant, he stayed at this house, while awaiting the allocation of his own house, which he had applied for. He was allocated the Lobengula West house. He says he paid the deposit required by the municipality the day he signed the agreement of sale. The agreement of sale was signed on the 10<sup>th</sup> August 1982, a copy of the agreement is before court and marked Exhibit B1.

According to the 1<sup>st</sup> defendant, him and plaintiff went to the Pumula Housing office, and explained to the officers that they wanted to swap houses. He was then given a form to complete. He declined to complete it without the knowledge of his children. He says it is at this point that he noted that the Pumula North house was allocated to plaintiff on the basis of a marriage certificate with Zebeth Nkala's wife. He says he realised that staying in the Pumula North house would be a problem, because of the involvement of Zebeth Nkala's wife. He says he has been receiving threats from the children of Zebeth Nkala's wife, saying he is staying at their mother's house, he must move out. He says his wife has moved out of the Pumula North house because of the threats from the children of Zebeth Nkala's wife. He now wants to move to his Lobengula West house.

He says when he was allocated a house by the municipality, he told Zebeth Nkala that he wanted to move to his Lobengula West house. Zebeth Nkala requested him to continue staying at the Pumula North house. He says he told plaintiff that he wanted to move to his own house, the Lobengula West house, he did not succeed.

1<sup>st</sup> defendant appeared as someone of ill-health. At some point during his evidence, a request was made that he be permitted to testify while seated. I acceded to this request. He was subjected to long and winding cross-examination. At some point I had to caution and ask plaintiff's counsel to withdraw what I considered to be inappropriate language in cross examining a witness. Some questions were very long, double and triple barrelled questions.

Notwithstanding the untidy manner in which he was cross-examined, he stuck to his version. His version remained substantially compact. It was not dented.

At the conclusion of his testimony, 1<sup>st</sup> defendant closed his case.

### **The issues.**

The parties attended a pre-trial conference. The issues for determination as outlined in the pre-trial conference minute, are these:

1. Whether or not there was an agreement by the parties to swoop stand number 70832 Lobengula West and stand number 6681 Pumula North, Bulawayo.
2. Who paid for each of those houses until the purchase price was completed.
3. Who should be deemed the lawful owner of the respective houses?

The plaintiff, in moving the court to order the transfer to him of stand number 70832 Lobengula West, and to transfer stand number 6631 Pumula North to 1<sup>st</sup> defendant, is in effect seeking specific performance. This court will have to consider, on the factual matrix of this case, whether in the final analysis, plaintiff has made a case for specific performance. The *onus* is on the plaintiff on all issues.

### **What is plaintiff's cause of action?**

In *Abrahamse & Sons v S.A. Railways and Harbours* 1933 CPD 626, the court stated at 637 that the proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not arise or accrue until the occurrence of the last of such facts and consequently is sometimes loosely spoken of as the cause of action. See *David Tendayi Matipano v Gold Driven Investments (Private) Limited* SC 19/2014.

Plaintiff's appreciation of its own cause of action is most confusing. In the founding affidavit, and the *viva voce* evidence the cause of action was premised on an alleged agreement of between 1980 and 1981. However, in the cross-examination of the 1<sup>st</sup> defendant and closing submissions, *Mr Mlala* for the plaintiff started to submit on unjust enrichment and prescriptive prescription, which causes of action were not pleaded, nor identified as issues at the pre-trial conference.

*Mr Mlala* on being asked by the court as to what exactly was the plaintiff's cause of action, his answer was very unsatisfactorily. First, he submitted that the cause of action was the agreement, together with the unjust enrichment and prescriptive prescription. After a moment he changed track, and argued that the cause of action was the agreement, and in the alternative unjust enrichment and prescriptive prescription. Implicit in his submissions was that pleadings serve no useful purpose, a litigant can in the middle of a trial introduce a new cause of action which had not been pleaded.

Pleadings serve a useful purpose in pleadings. In general, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed. Again, the function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus arrive at certain clear issues on which both parties desire a judicial decision.

In *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182, the court remarked that the purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.

In *Courtney-Clarke v Bassingthwaighe* 1991 (1) SA 684 (Nm), the court remarked at page 698 that in any case there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings ... and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment.

The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the litigants. It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. Therefore, a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent.

According to *Mr Mlala*, plaintiff's cause of action is the agreement that he alleges he entered into with the defendant. He argues that the cause of action progresses and broadens to also include unjust enrichment and acquisitive prescription. He argues that the causes of action become intertwined – whatever that means - during the trial as it progresses. On reflection, he submits that these three causes of action should be considered jointly. He changes and submits

that he is raising these causes of action as alternatives. I do not agree. A party cannot be permitted to conduct litigation in such an unorthodox manner.

A party claiming acquisitive prescription must allege and prove; civil possession- i.e. possession with the intention to possess and control as if he were the owner; possession for an uninterrupted period of 30 years or for a period which, together with any period for which the thing was possessed by any predecessor in title, constituted an uninterrupted period of 30 years; and that possession was exercised openly. Plaintiff did not plead acquisitive prescription. This issue was raised for the first time in cross-examination. A court cannot allow the plaintiff to direct the attention of the 1<sup>st</sup> defendant to the alleged agreement, and then at the trial, attempt to canvass prescriptive prescription.

Plaintiff has also at the proverbial eleventh hour, raised the issue of unjust enrichment. To succeed with a claim based on undue enrichment the plaintiff must comply with four general requirements: First the plaintiff must be enriched, secondly the defendant must be impoverished, thirdly the defendant's enrichment must be at the plaintiff's expense and finally the defendant's enrichment must be unjustified, which means that it must be without a legal cause. Again this was not pleaded. This court cannot allow it to be raised at the trial stage.

In any event, no evidence was presented to show the extent the plaintiff was unjustly enriched. The evidence is that each party paid rentals for the property it was occupying. Both parties constructed perimeter walls in respective properties they occupied. There is a dispute as to whether plaintiff paid the \$480.00 deposit for the Lobengula West house, even if he did he occupied a bigger house than the defendant. This is so because there is evidence that the Lobengula West property has five rooms, while the Pumula North property has three rooms. A properly pleaded claim based on unjust enrichment would require the factoring in of all these exigencies.

The cause of action pleaded in the papers before court is that the plaintiff and the 1<sup>st</sup> defendant allegedly entered into an oral agreement sometime between 1980 and 1981 to swap houses. This is the cause of action that this court will consider. It is upon this cause of action that the plaintiff's case must stand or fall.

### **Is there contract between plaintiff and 1<sup>st</sup> defendant?**

In an action based on a contract, the material averments that must usually be made are the existence of the contract, the relevant terms of the contract and the applicability of those

terms to the particular right forming the basis *ex contractu* of the claim – *Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa*, op cit, p 569.

An agreement is not necessarily a contract. The party relying on the agreement must prove that the agreement was intended to be a contract - that is, the intention was to give rise to legal relations. See *Dilokong Chrome Mines (Edms) Direkteur-General, Department van Handel & Nywerheid* [1992] 2 All SA 209 (A), 1992 (4) SA 1 (A), *Government of the Self-Governing Territory of KwaZulu v Mahlangu* 1994 (1) SA 626 (T). A party alleging a contract must allege and prove the terms of the agreement on which he or she seeks to rely. See *McWilliams v First Consolidated Holdings (Pty) Ltd* [1982] 1 All SA 245 (A), 1982 (2) SA 1 (A), *Badenhorst v Van Rensburg* [1986] 4 ALL SA 417 (T), 1985 SA 321 (T) p. 335. Proof of the terms of the contract includes proof of the anterior question of whether the parties had the requisite *animus contrahendi* or intent to contract, i.e. an intention to be bound by contractual, treaty, or other legal obligations.

Has plaintiff proved that there was an agreement? If it has, has it proved that the agreement was intended to be a contract - that is, was the intention to give rise to legal relations? The *onus* is on the plaintiff. In order to determine these issues, it is necessary to traverse the evidence in some detail. Prior to doing so, however, I shall set out what I consider to be the proper approach to determining the facts in civil trials. Plaintiff must, in order to succeed, prove its claim on a balance of probabilities. What this means, what has to be done to discharge the *onus* and how a court must approach the evidence in a civil trial was dealt with in *National Employers General Insurance Co Ltd v Jagers*, 1984 (4) SA where the court said:

It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false. This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra

) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.

Plaintiff alleges that there was an agreement, the terms of which were that he would occupy the stand number 70832 Lobengula West, and 1<sup>st</sup> defendant would occupy the stand number 6631 Pumula North. That after the properties have been fully paid for with the municipality, then the swop would be consummated. He says in 1995 and 2015, there were family meetings attempting to resolve the issue between him and the 1<sup>st</sup> defendant. It appears to me that the reasons why there was need for a family meetings to convene and try to resolve the issue between the two, was because there was no agreement.

The role played by Zebeth Nkala, needs particular mention. He is the elder brother of the two litigants. The Pumula North house was his idea. He even went to the extent of having the plaintiff, his young brother solemnise a marriage of convenience with his wife (Zebeth Nkala's wife), for the purposes of applying for the house. When the municipality allocated the house, he was the first to reside at the house with his wife and family. He is the one who invited 1<sup>st</sup> defendant to move to the Pumula North house. When referring to the alleged agreement to swap houses, he says "we agreed," referring to him, plaintiff and first defendant. He says he is the one who was given money by the plaintiff to pay the deposit for the Lobengula West house. Everything that happened appears to have been his idea. I find him cunning.

I find the evidence of Elias Ncube Mazolo to have been rehearsed. He was happy to narrate how the plaintiff and 1<sup>st</sup> defendant agreed to swap houses. By his own evidence he got involved only in 2015 as a mediator. He says before 2015 he was not there, he does not know what happened. I take the view that, he was merely associating himself with the plaintiff's narrative.

Defendant says there was an intention to conclude an agreement. He would have agreed if plaintiff would build, at his cost, an additional room to the Pumula North house, and pay the costs of the swap. This, he contends, the plaintiff did not accept.

The evidence before court is that a family meeting was held in 1995 to discuss the issue of swapping houses. Another family meeting was held in 2015 to discuss the same issue. If there was an agreement, why still meet to discuss the same issue? There would be no reason to meet. If there was an agreement, why would Mr Elias Ncube Mazolo, mediate between the parties in 1915? The reason he mediated is because there was no agreement.

Again, according to the plaintiff, the agreement to swap houses was entered into between 1980 and 1981. At that point in time, the litigants had no houses to agree to swap. Plaintiff has not produced evidence that, at law he had authority to enter into an agreement in respect of the Pumula North house between 1980 and 1981. He only signed an agreement of sale with the municipality in 1982. 1<sup>st</sup> respondent denies that he entered into such agreement. Even if he did, at law, he could not, because he only had an agreement with the municipality in 1986.

Again, there appears to have been an attempt, marshalled by Zebeth Nkala, to arm-twist 1<sup>st</sup> respondent to enter into an agreement with plaintiff. Plaintiff and Zebeth Nkala, appear sophisticated persons, while 1<sup>st</sup> defendant appears unsophisticated. I could sense a real likelihood of the two brothers intending to take advantage of the poor 1<sup>st</sup> defendant.

The probabilities of the case favour first respondent's version, that there was an intention to agree, which did not occur.

*Mr Mlala* suspensive condition argument, throws more credence to 1<sup>st</sup> defendant's version. According *Mr Mlala*, the contract contained a suspensive condition, being that once the properties are ready for a transfer, then the swap would occur. He says the enforceability of the contract would occur when the suspensive condition would have been fulfilled, i.e. when both properties are ready for transfer. *Mr Mlala*'s argument, taken to its logical conclusion, is actually self-defeating. Stand number 70832 Lobengula West is not ready to be transferred. It has no title deeds. Again stand number 6631 Pumula North, is not ready to be transferred. It has no title deeds. Furthermore, no cession certificates were produced for the two properties. All the court has are agreements of sale, i.e. exhibit A1 and B1. Therefore, the suspensive condition has not been met. No action lies to compel a party to fulfil a suspensive condition. If the condition is not fulfilled, the contract falls away. See *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* [1978] 3 All SA 406 (A), 1978 (2) SA 872 (A).

I take the view that, there was an intention to seal an agreement, which was not done. The intention to seal an agreement, cannot be elevated to a contract, which can be enforced by a court of law. See *Dilokong Chrome Mines (Edms) Direkteur-General, Department van*

*Handel & Nywerheid* [1992] 2 All SA 209 (A), 1992 (4) SA 1 (A), *Government of the Self-Governing Territory of KwaZulu v Mahlangu* 1994 (1) SA 626 (T).

### **Specific performance**

The plaintiff, in moving the court to order the transfer to him of the Lobengula West property on the basis of the alleged agreement with 1<sup>st</sup> defendant, is in effect seeking specific performance. Specific performance is an extraordinary equitable remedy that compels a party to execute a contract in terms of the precise terms agreed upon. It is an order which grants the plaintiff what he bargained for in the contract. A valid contract must exist between the parties and the party seeking specific performance must have substantially fulfilled his obligations in terms of the contract. A party may also be granted the relief if he has offered to do or is ready and willing to do all acts that were required of him to execute the contract according to its terms. See *Claudio Chiarelli v Bouna Investments (Private) Limited T/A Bouna Safaris, Travel and Tour* HH 678-15.

There are many cases in which it was held that if one party to the agreement repudiates the agreement, the other party at his election, may claim specific performance of the agreement or damages in lieu of specific performance and that his claim will in general be granted, subject to the court's discretion. See *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Woods v Walters* 1921 AD 303; *Shill v Milner* 1937 AD 101; *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A); *Rens v Coltman* 1996 (1) SA 452 (A).

*Farmers' Co-operative Society* concerned a claim for the delivery of certain movables, alternatively for damages. The question was whether specific performance should be decreed. Innes JA answered that question as follows at 350:

*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in *Thompson vs. Pullinger* (1 O. R., at p. 301), "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt." It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. . .

In *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A), the court stated the plaintiff has the right of election whether to hold a defendant to his contract and claim

performance by him of precisely what he bound himself to do, or to claim damages for the breach. That right of choice a defendant does not enjoy. Although the Court will, as far as possible, give effect to a plaintiff's choice to claim specific performance, it has a discretion to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. That discretion must be exercised judicially. Each case must be judged in the light of its own circumstances. At p 783 C-D the court said -

This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, not upon a wrong principle (*Ex parte Neethling (supra)* at 335). It is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant.

The jurisprudence shows that it is settled that a plaintiff who elects to enforce a contract is entitled to specific performance where the defendant is in a position to perform the contract – because justice demands that those who enter into contracts should fulfil their obligations. See *Farmers Co-op Society v Berry* 1912 AD 343 at 350; *Smith & Ors v Zimbabwe Electricity Supply Authority* 2003 (1) ZLR 158 at 158G.

Specific performance is a discretionary remedy vested in the courts. In the exercise of such discretion, the general rule is that, *prima facie*, every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand the other party, so far as it is possible, to perform its undertaking in terms of the contract. Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. See *Hativagone & Another v CAG Farms (Pvt) Ltd & Others* SC 42-2015 at 16.

The judicial discretion must not be exercised capriciously, nor upon wrong principle. It must be exercised in such a manner as to prevent an injustice. See *Benson v SA Mutual Life Assurance* 1986 (1) SA 776 at 783. There are circumstances in which a court may refuse to grant the remedy of specific performance, e.g. a litigant cannot seek specific performance, unless it has performed its part of the bargain.

It is settled law that every party to a binding contract who is ready to carry out its own obligations under it has a right to demand from the other party, so far as it is possible, performance of that other party's obligations in terms of the contract. See *Farmers Co-Operative Society v Berry* 1912 AD 343 @ 380. In matters involving payment of money, the full amount must have been paid or at least there must be a tender for payment of the full

amount owing, otherwise the creditor is allowed to refuse the tender and the debtor is not entitled to specific performance. See Christie *The Law of Contract in South Africa* 5 ed p 405.

*In casu*, I have found that there was no agreement between the parties that could be elevated to a contract. The court cannot order specific performance where there is no contract.

Furthermore, even if a contract did exist between the parties, the court could still, in its discretion refuse to order specific performance. Both parties are in possession of agreements of sale with second respondent in respect of the properties in their respective names. The agreements of sale between the plaintiff and the municipality in respect of house number 6631 Pumula North was sealed 26 November 1986. Clause 11(a) of the of agreement of sale which is before as Exhibit B1, says the purchaser shall not at any time before the said piece of land has been transferred into his name, sell the piece of land or cede, assign, transfer or make over any of his rights under this agreement without the written consent of the municipality.

The agreement of sale between 1<sup>st</sup> defendant and the municipality was sealed on the 10<sup>th</sup> August 1982. Clause 12 of the of agreement of sale which is before court as Exhibit B1, says the purchaser shall not at any time before the said piece of land has been transferred into his name, sell the piece of land or cede, assign, transfer or make over any of his rights under this agreement without the written consent of the municipality.

There is no evidence before court, that at the time of the alleged agreement, as contended by plaintiff, the parties had complied with clause 11(a) and clause 12 of their respective agreements with the municipality. There is no evidence that has been placed before court that at the time of the trial of this matter, there was such compliance. The clauses are clear and peremptory. The purchase shall not at any time before the said piece of land has been transferred into his name, sell the piece of land or cede, assign, transfer or make over any of his rights under this agreement without the written consent of the municipality. It is immaterial that the municipality did not oppose this application. The sticking point is that neither of the parties have the written consent of the municipality to transfer the properties as sought by the plaintiff in this case. Even if such agreement was entered, it is at law invalid for non-compliance with the clauses 11(a) and 12 of the party's agreements with the municipality.

At the time of the alleged agreement, there was no written consent of the municipality. Even at the time of the trial, wherein a transfer order is sought from this court, no written consent of the municipality has been obtained.

The court cannot provide judicial assistance to a litigant who is intending to consummate an alleged agreement which is in non-compliance with municipality requirements.

This court cannot order transfer of the respective properties without proof of the written consent of the municipality. This court cannot order the municipality to effect the transfers, against a clear violation of its agreements of sale with the parties. This court cannot order the municipality to consummate agreements that violate its agreements with it. Without written consent of the municipality, this court would not even have come to the aid of the plaintiff. The written consent of council is required for a purpose. Is not given for the asking. There are requirements that the applicant for such written consent must meet before such consent is given. A court can then not order a transfer that seeks to bypass and undermine the requirements of the municipality. Even if there was an agreement, its performance is impossible.

In conclusion, my finding is that plaintiff has not proved its case on a balance of probabilities. The claim must therefore be dismissed.

The plaintiff has failed to obtain the relief he sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. The 1<sup>st</sup> defendant is therefore entitled to his costs of suit.

### **Disposition**

Plaintiff seeks the remedy of a specific performance, it must prove the existence of an agreement, which can be elevated to a contract. He who claims relief must assert and prove the facts on which his claim is based. Plaintiff has failed to prove a contract with clear and precise terms. It is therefore, not entitled to the remedy of specific performance. In the result, I order as follows:

1. The provisional order granted on the 16 June 2016, is and hereby discharged.
2. The plaintiff's case is dismissed with costs of suit.

*Sansole and Senda*, plaintiff's legal practitioners  
*Mlotshwa&Maguwudze*, 1<sup>st</sup> defendant's legal practitioners