Reportable:	**YES**/NO
Circulate to Judges:	**YES**/NO
Circulate to Magistrates:	**YES**/NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

JUDGMENT

Case No: **1347/2014**

In the matter between:

PHOKWANE MUNICIPALITY — APPLICANT

AND

TRIPLE SEVEN COMMERCIAL HOLDINGS CC — FIRST RESPONDENT

KAREL ERASMUS ALBERTSE — SECOND RESPONDENT

Date heard: 21 June 2016
Delivered on: 09 September 2016

Phatshoane J.

INTRODUCTION:

[1] On 22 September 1999 Hartswater Municipality, represented by Mr Willem Karel De Jongh, its chief executive officer, concluded a Deed of Sale with Triple Seven Commercial Holdings CC (Triple Seven), the first respondent, represented by Mr Karel Erasmus Albertse, the second respondent, who bound himself as surety and co-principal debtor in favour of the municipality for the due and proper performance of all the obligations arising out of the terms and conditions of the Deed of Sale.

[2] In terms of the Deed of Sale Triple Seven purchased a portion of Erf 285, Hartswater, which was later renamed Erf 1898, a portion of Erf 258, Hartswater,

measuring approximately 200 (two hundred) hectares from Hartswater Municipality at the purchase price of R1.00 (one rand) per hector, in other words, for about R200.00 (two hundred rand). The contract stipulates that should the extent be in excess of 200 hectares, the purchaser would effect immediate payment of the balance following the survey of the property and should it be less than the estimated 200 hectares, the difference in the amount already paid would be reimbursed to the purchaser. In October 1999 the property was surveyed and measured 150, 9924 hectares. A diagram of the subdivision thereof was prepared and approved. Apparent from the Deed of Transfer No T939/2005 is that the property was sold for an amount of R150.91 (one hundred and fifty rand, ninety one cent).

[3] The applicant, Phokwane Municipality, is in terms of s14(1) of the Local Government: Municipal Structures Act, 117 of 1998, the successor in law and in title of Hartswater Municipality, a Transitional Local Municipal Council which was established by Provincial Proclamation No: 10 of 1994, published in Provincial Gazette No: 09 dated 19 September 1994 in terms of the provisions of the Local Government Transition Act, 209 of 1993, and later disestablished by Notice No: 27 of 2000, in terms of s 14(2) of the Municipal Structures Act, 1998.

[4] Phokwane Municipality has a reversionary right to repurchase the land in issue upon the nonfulfillment or breach of certain conditions encapsulated in the Deed of Sale and the Deed of Transfer. In this application the municipality seeks a declarator that Triple Seven and its co-respondent, Albertse, are in breach of the amended Clauses 15(1) and 16 of the Deed of Sale and Condition "C" of the Deed of Transfer No T939/2005; and also seek an order directing the respondents to take all steps necessary to retransfer Erf 1898, a portion of Erf 258, Hartswater, to it. Put differently, it seeks an order to enforce its right of pre-emption reserved in terms of Condition "C" of the Deed of Transfer No T939/2005 and Clause 18 of the Deed of Sale.

[5] I deal later with the point *in limine* relating to extinctive prescription because its outcome hinges on the merits of the case which are treated extensively hereinafter.

THE CLAUSES OF THE DEED OF SALE AND THE DEED OF TRANSFER RELEVANT TO THE APPLICATION AND THE FACTUAL MATRIX GIVING RISE TO THE APPLICATION:

[6] The following are the salient clauses of the Deed of Sale:

6.1 Clause 15 of the Deed of Sale stipulates in part:

"15.1 The purchaser is obliged to erect and construct within 3 (three)[1] years hereof anyone of the factories and development, or within such extension of time as agreed upon by the seller.

15.2 Services as far as purified water and electricity shall be supplied by the seller, but the costs for the internal distribution, system and lay out shall be borne by the purchaser.

15.3 The purchaser will negotiate water supply from the canal to the site with the Department of Water Affairs and the seller shall assist him in this regard, costs for the account of the purchaser.

15.6 It is hereby recorded that the previous inhabitants of a portion of the property have lodged a claim against the State with the Land Claims Court and the purchaser hereby acknowledges that he is aware of this claim."

6.2 Clause 16 thereof stipulates:

"It is recorded that the property is sold to the purchaser to erect and develop a beet sugar industry as well as a nursery – and aqua-cultural development, and the processing of by-products from the above mentioned projects. For variation of this, written consent must be obtained from the seller, which shall not be withheld unreasonably."

6.3 Clause 18 captures the pre-emptive right (*Voorkoopsreg*) as follows:

"It is recorded that the purchaser grants a pre-emptive right to the seller, to purchase the property back for the same amount

[1] In terms of the Deed of settlement which was made an order of this Court on 17 December 2004 under Case No: 916/02 the phrase "three years hereof" was deleted and substituted with the phrase "24 [twenty four] months from date of transfer of the property". This Court order is annexure "G" to the answering affidavit and appears at page 74-77 of the record. Not much is said in the papers about the proceedings under Case No: 916/02 but it appears that whatever was at issue in those proceedings was resolved.

as paid by the purchaser, in the event that the proposed project does not realise, i.e. does not commence as set out in Clause 15(1) above. In such event all fixed improvements shall fall to the seller and the seller shall have no obligation to reimburse the purchaser for any improvements and shall be considered as rue-bargain (*roukoop*)."

[7] On 20 October 1999 Hartswater Municipality and Triple Seven signed a memorandum of agreement amending the Deed of Sale by adding thereto Clause 19 to deal with the "Ecological system involving the creek". On 13 December 1999 a further memorandum of agreement was signed amending Clause 16 above to read as follows:

"It is recorded that the property is sold to the purchaser to erect and develop a beet-sugar **or** sugar beet industry **and/or** a nursery- **and/or** aqua-cultural development and the processing of by-products from the above mentioned projects. For variation of this, written consent must be obtained from the seller, which shall not be withheld unreasonably."

[8] Five years later, on 23 February 2005, the property was transferred to Triple Seven subject to certain conditions which were registered against the title (Deed of Transfer No T939/2005). The condition relevant for present purposes is contained in Clause "C" of the Deed of Transfer. This reads:

"The transferee is obliged to establish at least one development on this erf within a period of 2 years, calculated from the date of registration, onto the name of the transferee, or within such extension of time as granted by the transferor. In the event the transferee failing to comply with this conditions, the transferee hereby grants a pre-emptive right to the transferor to purchase the property back from the transferee for the same amount as paid by the transferee in such event all fixed improvements on the erf shall become the property of the transferor and the transferor shall have no obligation to reimburse the transferee for any improvements."

[9] Almost two years later, in 2008, Triple Seven proposed to form a partnership with the municipality for purposes of developing the property. Around 18 November 2008 by Resolution 129/2008 the municipal council resolved as follows[2]:

"1. That council approves the partnership development with Triple Seven for residential development on site 258 as per previous decision.

[2] Council Resolution 129/2008 was attached to the founding affidavit as "MPD5" (page 37 of the record).

2. That council re-confirms its decision that on undertaking the partnership development preference be given to mixed claimants for the erven, before any other disposal is undertaken.

3. That the process of development be speeded up, as it will assist with the growing need of the erven."

[10] The purported partnership development came to naught. Three years following the aforementioned resolution, on 08 June 2011, Triple Seven directed a letter to the municipality in these terms[3]:

"We, Alfonso Visser and Stanley Rudman, as the interested parties in Triple Seven Commercial Holdings CC, would hereby like to request the council of Phokwane to renounce any right it might have to the Triple Seven lands and to enable the owners to transfer the land to the Department of Land Affairs.

We have been working diligently for the past few years, in close co-operation with the officials of Phokwane Municipality and members of Council to develop a framework and future development of housing on the current Triple Seven land to the south-east of Hartswater.

We spent many hours to develop a joint venture between ourselves and Council and spent large amounts of money to facilitate the development of the town lay-out and the infra-structural design. *We, together with the officials from the municipality, however, finally came to realize that we do not have the capacity to embark upon a project of this magnitude, hence our decision to sell it to the Department of Land Affairs, whom we are confident will be able to develop it further in collaboration with yourselves.*

Since there is a condition of sale attached to the Deed of Sale that the Phokwane Municipality must renounce before we can proceed with the sale of the land, we hereby then wish to request your good selves to give your consent and to sign the document attached hereto." (My emphasis)

[11] By means of Resolution 80/2011[4] dated 16 August 2011 the municipal council resolved not to renounce its pre-emptive right attached to Condition "C" of the Title Deed recited in para 8 above. At the special council meeting held on 05 June 2013 it resolved[5]:

"1. Council rescinds Council Resolution 129/2008[6] and any other resolution which was taken in favour of Triple Seven;

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[3] The letter is marked "MPD6" and is to be found at page 38 of the papers.

[4] The extract from the minutes of a council meeting held on 16 August 2011 which captures Resolution 80/2011 is marked "MPD7" to the founding affidavit, page 39.

[5] The extract from the minutes of a special council meeting held on 05 June 2013 appears at annexure "MDP8", page 40.

[6] This is a resolution pertaining to the formation of a partnership between Phokwane Municipality and Triple Seven.

2. Council re-confirms its Resolution 80/2011;
3. Council resolves to implement Clause "C" of the Deed of Transfer;
4. Council commits to availing a portion of this land for use by the Mixed Location Claim."

[12] The municipality contends that Triple Seven did not develop the land as agreed and therefore breached the amended Clause 15.1 and 16 of Deed of Sale. Furthermore it contended that Triple Seven did not comply with Condition "C" as contained in the Deed of Transfer. Mr Moeketsi Piet Dichaba, the municipal manager of Phokwane Municipality and its deponent, explained that the municipality, having ascertained that Triple Seven had no capacity to develop the property as set out in the deeds, took a decision to sell the property to the Department of Land Affairs. On 26 March 2014, through the office of the State Attorney, the municipality directed a letter to Triple Seven notifying it, *inter alia*, that the municipality "wants to exercise its right of pre-emption" in terms of Condition "C" of the Deed of Transfer and tendered payment in the amount of R150.91, being the original purchase price, as reflected in the Deed of Transfer. It also requested Triple Seven to provide it with the Title Deed and to confirm that its conveyancer would attend to retransferring the property to the municipality within 14 days from date of the letter in question. It is this failure by Triple Seven to comply with the demand which precipitated this application.

[13] Mr Pieter Alfonso Visser, the sole member of Triple Seven, acknowledged that the land was purchased to promote development within the municipality. He intimated that he and one Mr Dirk Van Rensburg purchased the members interest in Triple Seven in October 2006 for an amount of R500 000.00 on the exclusive basis that Triple Seven was the owner of the property in issue and that the initiative to develop the property for residential purposes was on course. He says that when he became the only member of Triple Seven, on the date unspecified, there was already a prickly pear orchard established on the land by Triple Seven with the knowledge of the municipality. This being phase 1 of the planned prickly pear nursery. He says that on 03 September 2007 one Adv Ndwanya, a legal advisor of the municipality, directed a letter to Triple Seven in terms of which it was notified that the municipality sought to exercise its right of pre-emption in accordance with Condition "C" of the Deed of Transfer

on the basis that Triple Seven was obliged to have at least one development on the erf within a period on two years, calculated from date of registration of the Deed of Transfer. Ndwanya averred therein that the two-year period expired without the development of the property. Triple Seven was placed on terms to comply with Condition "C" within seven days from the date of the letter. On 05 October 2007 Mr Daan Botha, the erstwhile attorney of Triple Seven, responded to the municipality partly as follows:

"It was our client's instructions that it did comply with its obligations in terms of the now amended Clause 16 of the agreement.

It is our client's obligations to develop and erect a nursery on the property, alternatively to erect and develop an aqua-cultural development on the property.

Our client did comply as can be seen from the enclosed pictures.

This development started on 03 January 2007 and is now in its first phase.

Our client will start with the erection of whatever processing facilities after the establishment of the plants on the property.

We shall request your good selves to attend to an onsite visit to point out the development".

[14] Visser states that an onsite inspection took place during October 2007. Present were Visser, Daan Botha and Mr Zithulele Nikani of the municipality, who was satisfied that there was compliance with Clauses 15.1 and 16 of the Deed of Sale read with the conditions contained in the Title Deed of the property. He says that Nikani's satisfaction was confirmed in a letter from the municipality to Duncan and Rothman attorneys dated 05 November 2007. I should point out that the alleged contentment by Nikani is not apparent from this letter. On the contrary, this letter disputes that a prickly pear orchard qualified as a nursery or that such development was made within the time-frame set out in the Deed of Sale. It goes on to state:

"We therefore have no intention of withdrawing our claim and reiterate that your client comply with our request as per Condition "C" and our correspondence dated 03 September 2007".

[15] Following the inspection referred to in the preceding paragraph Visser says that the need for residential development came to the fore with Triple Seven commencing the process and sought the municipality's consent to use the land for that purpose. The negotiations were lengthy and ongoing which led to the municipal council, on 18 November 2008, resolving to approve the establishment of the aforesaid partnership with Triple Seven for residential development.

[16] Visser intimated that, after the conclusion of the partnership, Triple Seven commenced with the earthworks in preparation of the land for the residential development. In that process the prickly pear orchard which had been established on the land was destroyed. He reminded that the municipality had to deliver municipal services to the developed property as part of its obligation towards the development and added that the seller (municipality) would in future receive income tax on the developed land. Visser claims that the municipality reneged on its obligations as a partner in the joint venture. This resulted in the development not progressing. He says that Triple Seven decided, if at all permissible, to sell the land to the Department of Land Affairs. It therefore forwarded the letter dated 08 June 2011(quoted in para 10 above) to the municipality requesting it to relinquish its right of pre-emption. It did so with caution as the municipality's right had already been extinguished by prescription. He says that the sentence which starts with the phrase "*We do not have capacity*.....", as appearing in this letter, was with reference to the municipality's lack of capacity and claimed that Triple Seven had at all relevant times and still has the capacity to develop the land. This, I must hasten to say, defies credulity.

[17] In reply Dichaba states that the allegations regarding the prickly pear orchard is a feeble last minute attempt to misrepresent facts concerning Triple Seven's alleged compliance with the conditions precedent to the Deed of Sale and the Title Deed when the municipality insisted on proof of compliance. He states that prickly pears grow naturally in that area. Approximately 100-200 m^2 of that land was cleared of alien plants and/or trees and debris. The mowed down prickly pears cactus were subsequently replanted in rows and watered. Dichaba

intimates that the Housing Unit of the municipality, of which Nikani is an official, conducted an onsite inspection on 05 March and 31 August 2007 and found no development whatsoever on the property. He says that the ground works were fresh and the pieces of planted prickly pear blades were loose with no roots. Nikani's report to Ndwanya to the effect that no development took place is attached to the replying affidavit. Dichaba says that the prickly pear orchard is neither a beet-sugar industry nor nursery or even an aqua-cultural development as envisaged in Clauses 15 and 16 of the Deed of Sale. Nikani attested to a confirmatory affidavit to the replying affidavit by Dichaba. He denied, amongst others, having attended an onsite inspection where Daan Botha was present.

[18] Dichaba questioned the basis upon which Triple Seven purportedly commenced the ground work for purposes of residential development because the partnership agreement never came into being. The Deed of Sale, which encapsulates a non-variation clause, was never varied by the parties. In any event, he says, there was no infrastructure to demolish and no residential development could have commenced without rezoning the land from farming to a residential land. No environmental impact study was conducted by the registered owner of the land nor was the municipality placed on terms for the alleged breach of the partnership agreement, because there was no breach.

THE POINT *IN LIMINE*:

[19] Triple Seven took a point *in limine* that the municipality's claim to exercise its right of pre-emption was extinguished by prescription. Mr Van Niekerk SC, for Triple Seven, relies on s 10(1) read with ss 11(d), 12(1) and 16 of the Prescription Act, 68 of 1969. He contended that the municipality's claim to exercise its pre-emptive right and have the property in issue transferred into its name is a debt as envisaged in s 16 of the Prescription Act. He argued that the municipality's pre-emptive right became due and enforceable after the expiry of two years reckoned from 23 February 2005, this being the date in respect of which the property was registered in the name of Triple Seven. This is so because the restrictive condition set out in Clause "C" of the Deed of Transfer provides that Triple Seven is obliged to establish at least one development on this erf within a period of 2 years, calculated from the date of registration of the

property into its name. In the event the transferee failing to comply with the condition, the pre-emptive right to repurchase the property would be due and enforceable. He argued that prescription commenced running around 23 February 2007 and that in terms of s 11 of the Prescription Act the three year period, within which the municipality ought to have enforced its right, lapsed around 22 February 2010. He contended that this application was filed on 07 August 2014, long after the claim had prescribed.

[20] Ms Mdalana, for the municipality, countered that the Deed of Sale and the Deed of Transfer are silent on a period within which the right of pre-emption could be invoked. According to counsel prescription ought to run from the date of the notice given by the grantor of the pre-emptive right of his/her intention to sell the land to the grantee. As no such notice was issued by the grantor to the grantee the right of pre-emption remained in force and intact, the argument went.

[21] Deeksha Bhana in the article "Pre-emption as an option? The saga continues in *Van Aardt v* Weehuizen [*Van Aardt and Another v Weehuizen and Others* 2006 (4) SA 401 (N)] 2008 SALJ 680 aptly gives the narrow and wide definitions of pre-emption as follows:

> "A contract of pre-emption is a preliminary agreement in terms of which the grantor agrees to give preference to the grantee to purchase a particular merx in the event of its sale by the grantor. In other words, the grantee of a right of pre-emption obtains a conditional preferential right to purchase. The suspensive condition (the so-called trigger event) is usually the grantor's manifestation of a decision to sell (Floyd op cit at 253; Bhana op cit at 571 and 574). To expound, upon occurrence of the trigger event, the grantor must make an offer to sell the merx to the grantee first (*Soteriou* (supra) at 932E-H [*Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A)] and *Hirschowitz* (supra) at 762B-J) [*Hirschowitz v Moolman* 1985 (3) SA 739 (A)] or alternatively, the grantor must give the grantee the first opportunity to make an offer to purchase the merx which the grantor must then consider seriously (*Hartsrivier* (supra) at 705H-706A) [*Hartsrivier Boerderye (Edms) Bpk v Van Niekerk* 1964 (3) SA 702 (T)].
> To reiterate: the pre-emption contract contemplates action on the part of both the grantor and the grantee. Importantly, the content of the envisaged main contract is within the (substantive) discretion of the party who is required to make the offer. The other party then has discretion in terms of acceptance of the offer in question. The pre-emption contract is thus meant merely to facilitate

the *bilateral* process of concluding the substantive contract of sale between the grantor and the grantee (Bhana op cit at 571-3). This view of the pre-emption contract constitutes the narrow definition of pre-emption. It is often referred to as pre-emption in its 'true' sense because it emphasizes not only the presence of a trigger event but also the contemplation of bilateral action involving an exercise of substantive discretion. (Note that I use the term 'substantive discretion' to describe discretion that relates to the actual determination of the terms of the envisaged contract and not the relevant party's decision whether he is agreeable to those terms or not; see Bhana op cit at 570n11 and 571-5.) There is also a wider definition of the pre-emption contract which, in addition to encompassing the narrow conception of pre-emption, allows for a prescribing of the content of the envisaged main contract ex ante. In other words, the complete main offer can be set out in certain or ascertainable terms in the pre-emption contract itself (Reinecke & Otto op cit at 23-5; *Krauze v Van Wyk* 1984 (2) SA 702 (NC); *Hattingh* (supra) [*Hattingh v Van Rensburg*1964 (1) SA 578 (T)]). The result is that upon occurrence of the trigger event, the main offer becomes unconditional. The grantee can then bring the envisaged main contract into being by mere acceptance of the offer. The wider definition therefore regards the presence of the trigger event as the definitive feature of pre-emption so that a pre-emption contract can contemplate either *bilateral or unilateral* action."

[22] It should firstly be determined whether the claim by the municipality to exercise its pre-emptive right is a debt as contemplated in s 10(1) of the Prescription Act[7]. This matter raises an important issue of public interest and property rights which are subject to the protection entrenched in s 25 of the Constitution. In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC)[8] the ConCourt did not determine the exact meaning of the word "debt" as envisaged in s 10 of the Prescription Act. However, it reaffirmed the legal position enunciated in *Fraser v ABSA Bank Ltd* 2007(3) BCLR 219 (CC) at para 43 that Courts must at all times bear in mind the provisions of s 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in s 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.[9]

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[7] Section 10(1) of the prescription Act provides that: "Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

[8] See para 92 of the judgment

[9] See para 88 of Makate's judgment.

[23] The relief sought by the municipality is vindicatory in nature. In *ABSA Bank Ltd v Keet 2015* (4) SA 474 (SCA) at 483B-484A para 25 the SCA pronounced as follows on the phrase "debt" with regard to vindicatory actions:

"[25] In the circumstances the view that the vindicatory action is a 'debt' as contemplated by the Prescription Act, which prescribes after three years is in my opinion contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a 'debt', becomes extinguished simultaneously with that debt. In other words, **what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a 'debt' has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act.**" (my emphasis).

[24] In *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at 538 para 20 the Court accepted, without deciding, that the obligation of grantor of pre-emptive right to perform in terms of the grantee's right of pre-emption constituted a debt. In determining when such debt became due the Court made the following seminal enunciation at 542 paras 36-39:

"[36] In *Hirschowitz* [*Hirschowitz v Moolman and Others* 1985 (3) SA 739 (A) at 765] Corbett JA said the following with regard to the exercise of a right of pre-emption and specific performance:
'It seems to me that in order that the holder of a right of pre-emption over land should be entitled, on his right maturing and on the grantor failing to recognise or honour his right, to claim specific performance against the grantor (assuming that [h]e has such a right), the right of pre-emption itself should comply with the Formalities Act. **Were this not so, the anomalous situation would arise that on the strength of a verbal contract the grantee of the right of pre-emption could, on the happening of the relevant contingencies, become the purchaser of land. This would be contrary to the intention and objects of the Formalities Act.**'
[37] **Specific performance can only be ordered if the holder of such right had been presented with a written offer which had then been accepted. According to the wording of the right as contained in the title deed and its context, it is clear, viewed objectively, that an option had to be given which complied with the formalities as prescribed in s 2(1) of the**

Alienation of Land Act 68 of 1981. If such an offer was not presented the appellant would not have been able to exercise his right, or claim specific performance.
[38] **Therefore, the appellant did not have a complete cause of action for specific performance, as Johannes did not make a written offer to the appellant to exercise his right of pre-emption.**
[39] **In the premise I am of the view that the respondent failed to show that there was a trigger event that initiated the running of prescription. The trigger event, according to the wording of the clause, would be the granting of a written option, and in that event the right to purchase, if not exercised, would lapse in 60 days.**" (My emphasis).

[25] The municipality has attempted on several occasions since 2007 to exercise its pre-emptive right by directing letters to Triple Seven and placing them on terms. For example by means of a letter dated 03 September 2007 it sought to exercise its pre-emptive right because it was of the view that Triple Seven did not establish at least one development on the land as set out in Conditions "C" of the Deed of Transfer. On 05 November 2007 it reiterated its demand to exercise its pre-emptive right. Almost four years later, on 08 June 2011, Triple Seven requested the municipality to renounce its pre-emptive right. It proposed to sell the land to a third party without offering same to the municipality by virtue of its preferential or reversionary right to buy. On 16 August 2011 the municipal council refused to renounce its pre-emptive right. Almost two years later, on 05 June 2013, it once more resolved to exercise its right of pre-emption. All the efforts by the municipality became ineffectual because Triple Seven frustrated its right of pre-emption or its claim of specific performance.

[26] Insofar as the exercise of the right of pre-emption *in casu* concerns the sale of land, on the basis of the authorities cited above, the grantor of the pre-emptive right ought to provide an offer to the grantee which complies with s 2(1) of the Alienation of Land Act, 68 of 1981,[10] and same ought to be accepted by the grantee. There was no compliance with s 2(1) of the Alienation of Land Act in this case to complete the course of action which would trigger the running of

[10] Section 2(1)of the Alienation of Land Act, 68 of 1981, provides: No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

prescription. Therefore there is no merit in the point *in limine* raised and stands to be dismissed.

[27] Even if I am wrong Triple Seven is faced with another hurdle. It relies on s 11(d) in its contention that the municipality's claim to exercise its right of pre-emption had prescribed. Section 11 of the Prescription Act provides:

"11 Periods of prescription of debts
The periods of prescription of debts shall be the following:
(a) thirty years in respect of-
(i) any debt secured by mortgage bond;
(ii) any judgment debt;
(iii) any debt in respect of any taxation imposed or levied by or under any law;
(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
(b) **fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a)**;
(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);
(d) **save where an Act of Parliament provides otherwise, three years in respect of any other debt**."

[28] There can be no question that the so-called debt arose out of the sale of land. Having said this it is important to consider whether a municipality falls within the purview of the phrase "the State" for purposes of s 11(b) of the Prescription Act.

[29] In *Holeni v The Land and Agricultural Development Bank of South Africa* [2009] 3 All SA 22 (SCA) the term "State" as envisaged in s 11(b) of the Prescription Act came under scrutiny. At 26c-27b paras 17-22 the Court pronounced:

"[17] It should also be borne in mind that, when the Act was promulgated, the definition of "organ of State" in section 239 of the Constitution was more than two decades into the future. It can hardly be contended that the legislature, at that time, had in mind a broader meaning of "the State" to coincide with what is presently contained in that definition. In any event, the Constitution itself differentiates between the State and organs of State. The Constitution can, therefore, not be used as authority for the proposition that "the State" in the Act should be interpreted so as to include organ of State.

[18] I agree with the submission on behalf of Mr Holeni that, since section 11(*b*) of the Act provides for a 15-year prescription period – an exception to the general prescription period of three years – the meaning attributed to "the State" should be restricted.

[19] The benefit for the State provided by section 11(1)(*b*) came about because it was thought that the treasury should be protected. To my mind, contextually, the plain meaning of "the State" as it appears in section 11(*b*) of the Act is that of a juristic person, capable of suing in its own name for what is due to the treasury. It is being referred to in its incarnation as government, going about government business and recovering monies due to treasury. Further support for this conclusion appears in the next three paragraphs.

[20] The State is referred to in two other places in the Act. In section 19, the following appears:

"This Act shall bind the State."

This provision was necessary because of the rule, at the time, that the State is not bound by its own laws. The reference here must be to the State as a governing entity with legal personality.

[21] In section 11(*a*)(iv) of the Act, referred to above, the State has the benefit of a 30-year period of prescription in respect of any share of profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances. There can be no doubt that the reference to the State in that context must mean the State in its role as government acting for the benefit of the treasury.

[22] Thus, in terms of the rule of interpretation that the same words must be similarly interpreted in different parts of an Act, the reference to "the State" in section 11 must also be to the State as government and as a juristic person in its own right, unless there are indications to the contrary..." (Footnotes omitted)

[30] In *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA) at 875-876 the Court held:

"[15] .....In its ordinary meaning for the purposes of domestic law the word [State] is frequently used to include all institutions which are collectively concerned with the management of public affairs unless the contrary intention appears. In this sense the State may manifest itself nationally (through the executive or legislative arm of central government), provincially, locally and, on occasions, regionally. In *R v Bethlehem Municipality* 1941 OPD 227 Van den Heever J said the following at 231:
'A facile distinction is sometimes drawn between municipalities and other entities with legislative and executive powers on the ground that municipalities are mere creatures of statute. This is undoubtedly so, but so are provincial councils and, for that matter, the Union Parliament. With respect to authority of course they differ vastly and are ordered in a definite hierarchy, but the function

of each is government. A municipality is not merely a corporation like a company; it is a phase of government, local it is true, but still government.'
And in *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) the same Judge commented at 855:
'The modern trend is to recognise that municipal government may be local, yet it is a phase of government.'..."

[16] As Baxter points out in Administrative Law at 95, although the expression 'the State' is extensively employed in legislation, it is not used with any consistency. The precise meaning of 'the State' depends on the context within which it is used."

And at 879 para 23 the Court held:

"[23] To sum up: regional service councils and the appellant are both authorities which exercise a myriad of governmental functions - at a regional level in the case of the former and at a local level in the case of the latter. As such they are organs of government..."

[31] In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at 199 para 43 the ConCourt held that s 40 of the Constitution defined the model of government contemplated in the Constitution. In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and 'not assume any power or function except those conferred on [it] in terms of the Constitution'. See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 27 where the Court held that the term 'State' is broader than 'national government' and embraces all spheres of government.

[32] From the aforegoing authorities I am persuaded to conclude that the municipality, for purposes of the claim in issue, falls within the realm of the phrase "the State" as contemplated in s 11(b) of the Prescription Act. Insofar as the debt owed to it arose out of a sale of land by it to Triple Seven it could only be extinguished by prescription after the lapse of fifteen years. To hold

otherwise would, in my view, offend against the public policy which must be determined with reference to the values that underpin our constitutional democracy. Triple Seven's reliance on s 11(d) is misplaced.

THE MERITS OF THE APPLICATION:

[33] What remains is whether the condition set out in the amended Clauses 15(1); 16 and 18 of the Deed of Sale and Condition "C" of the Deed of Transfer were fulfilled or whether they had been breached by Triple Seven. Just to recap, Clause 16 stipulates that the property is sold to Triple Seven to erect and develop a beet-sugar or sugar beet industry and/or a nursery- and/or aqua-cultural development and the processing of by-products from the above mentioned projects. Condition "C" of the Deed of Transfer No T939/2005 which was registered on 23 February 2005 should be read in conjunction with Clause 18 of Deed of Sale. It obliges Triple Seven to establish at least one development on the land within a period of 2 years, calculated from the date of registration of the property into its name or within such extension of time as may granted by the municipality. Failing compliance Triple Seven accorded a pre-emptive right to the municipality to repurchase the land from it for the same amount as paid for by Triple Seven in which event all fixed improvements on the property would be the property of the municipality free of charge.

[34] There is a dispute of fact on whether the purported establishment of the prickly pear orchard is a development or a nursery as contemplated in the amended Clause 16 of the Deed of Sale or Condition "C" of the Deed of Transfer. In accordance with the trite *Plascon-Evans*[11] rule, where disputes of fact arise on the affidavits, a final order can be granted only if the facts as set out in the applicant's affidavit, which have been admitted by the respondent, together with the facts set out by the respondent, justify such an order. This approach was reaffirmed as follows in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA):

"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the

[11] 1984 (3) SA 623 (A) at 634H – I.

interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

[35] Triple Seven's version that the prickly pear orchard constitutes a development or nursery is not without difficulty. On 08 June 2011 it purported to sell the land in issue to the Department of Land Affairs and confessed that it "*together with the officials from the municipality, however, finally came to realize that we do not have the capacity to embark upon a project of this magnitude*". The confession followed on the failed partnership between itself and the municipality to develop the land for residential purpose. Its tactical turn around subsequently to lay the blame for lack of capacity on the municipality cannot avail it because it founders in the face of its contractual obligations as set out in the Deed of Sale.

[36] By Triple Seven's own admission the professed prickly pear orchard development was destroyed when it commenced with earthworks preparing the land for residential development. What it omits to say is what methods of earthworks were carried out on the land. Neither did it produce any document showing that the necessary town planning approvals and rezoning of the land were obtained from the municipality. It is important to bear in mind that Clause 12 of the Deed of Sale states that any relaxation or indulgence which the seller may show the purchaser shall not in any way prejudice its rights under the

agreement or be construed as a waiver or novation by the seller of its rights. Triple Seven and the municipality's unsuccessful attempt to create a partnership for purposes of residential development did not change the validity or efficacy of the Deed of Sale or render it ineffectual. This is so because Clause 13 of the Deed of Sale stipulates that no variation of the agreement shall be binding unless it is reduced to writing and signed by both parties. No variation of the agreement had been produced.

[37] The conclusion is irresistible that Triple Seven's version that the extinct prickly pear orchard establishment on approximately 100 – 200 m² of about the 150 hectares of land constituted a nursery or development as contemplated in the various deeds is untenable. Indeed the statement to the effect that out of 150 hectares of land the prickly pear orchard was established in just about 100-200 m² thereof surfaced in the replying affidavit. In my view, nothing prevented Triple Seven to seek leave of the Court to file a further set of papers in response to this averment. Regard being had to Clauses 15 and 16 of the agreement there can be no doubt that the transfer of the land to Triple Seven was intended to benefit the community of Hartswater. A decade later, it could hardly be said that that objective was achieved.

[38] Lastly, Triple Seven's argument that a party is entitled to enforce its right of pre-emption if it tenders payment of the appropriate purchase price is unsustainable. There is no question that the municipality tendered the amount of R150.91, this being the amount reflected in the Deed of Transfer as the purchase price. On the whole I am satisfied that the municipality is entitled to the order prayed for.

[39] On the question of costs: Mr Albertse, the second respondent, did not oppose the application. No order as to costs was sought against him. In respect of Triple Seven, there appears to be no reason why costs should not follow the results. I make the following order.

Order:

1. **It is declared that Triple Seven Commercial Holdings CC and Mr Karel Erasmus Albertse, the first and second respondents (the respondents), are in breach of the amended Clause 15(1) read with the amended Clause 16 of the Deed of Sale entered into between Hartswater Municipality and the respondents;**

2. **It is declared that the respondents are in breach of Condition "C" registered against the Deed of Transfer No T939/2005;**

3. **The respondents and/or their successors in title are ordered to take all steps necessary including compliance with the requirement of s 2(1) of the Alienation of Land Act, 68 of 1981, for purposes of eventuating the passing of the transfer of the property known as Erf 1898, a portion of Erf 258, Harstwater, situated in the Municipality of Phokwane, Division of Vryburg, in extent 150.9076 and held by the Deed of Transfer No T939/2005, into the name of Phokwane Municipality, the applicant, failing which the sheriff of this Court is authorised to sign all the necessary papers to cause the transfer of the property mentioned into the name of the applicant;**

4. **Triple Seven Commercial Holdings CC, the first respondent, is ordered to pay the costs of the application.**

[redacted]

MV PHATSHOANE

JUDGE, NORTHERN CAPE DIVISION

On behalf of the Applicant	Adv M.P Mdalana
Instructed by	The Office of the State Attorney
On behalf of the First Respondent	Adv J.G Van Niekerk SC
Instructed by	Engelsman Magabane Inc