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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 42952/2013

21/8/2018

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
21 August 2018 DATE SIGNATURE	

In the matter between:

WISDOM THROUGH CHRIST MINISTRIES

Applicant

And

EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. The applicant, Wisdom Through Christ Ministries seeks an order declaring that the Ekurhuleni Metropolitan Municipality (*“the Municipality”*) replace Erf [...] with Erf [...] in Thokoza, Alberton. Ancillary relief includes requiring the Municipality to sign a new sale agreement and directing it to transfer the property into the name of the applicant.

2. The basis of the application is twofold. Firstly, an agreement that Erf [...] would be replaced with another suitable piece of land because of an undisclosed defect on the property. The other is that, by reason of this defect, the applicant is entitled to an alternative piece of land.
3. The respondent has brought a counter-application declaring that the initial sale of erf [...] was validly cancelled by reason of a breach of contract, alternatively that it is entitled to cancel the sale, retain all monies paid in respect of the purchase price and claim damages for breach. Clearly the counter-application can only be considered if the applicant is not entitled to the relief it claims.
4. It is necessary to preface this judgment with a number of observations.

Firstly, the critical facts are essentially undisputed. It is the task of the court to identify and resolve the real legal issues that arise from these facts.

Although the parties have characterised the matter in various ways, it would be incorrect to commence the characterisation of the issues by reference to a legal principle and then see if the facts can be squeezed to fit. That puts the cart before the horse.

The second is that provided the facts are before the court, and provided a possible legislative impediment is not raised for the first time after close of pleadings (subject to lack of prejudice) then it remains open for the court to raise a legal issue *mero motu*.¹

Thirdly it is a foundational principle that provided there is a legal right the law will provide a remedy². In practice this mean that the court has the

¹ See *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623H., *Pratt v First Rand Bank* 2009 (2) SA 119 (SCA) at para 12 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 27. Compare *Bank of Lisbon International Ltd v Venter en 'n Ander* 1990 (4) SA 463 (A) at 474G-475D

² *Minister of the Interior and another v Harris* 1952(4) SA 769 (AD) at 781A-B

power to fashion an appropriate remedy even if it is not expressly asked for. Again this is subject to neither party being prejudiced.

The last observation is that before a court can make a determination on legal principles other than those initially raised it should be satisfied that no additional facts could have been raised by the unsuccessful party.

5. In the present case the parties argued over the meaning to be attributed to correspondence between the parties, the issue of rectification, the requirements of the Alienation of Land Act 68 of 1981, the need for resolutions to have been passed by the Municipality, the question of whether there was a *volte face* on the part of the Municipality, whether the Municipality could be held to its commitment to provide alternative land as evidenced (so it was submitted) by the correspondence, the alleged subsequent intransigence of the Municipality and the validity of the obstacles that were claimed to exist which prevented it from being able to provide the alternative land that was identified by the applicant (which included the entitlement of the Municipality to first consider whether there were alternative pieces of land which might be available), the refusal to make a decision on providing alternative land and whether the court could intervene and direct that the erf be replaced if the Municipality's objections were not valid.

UNDISPUTED FACTS

6. Pursuant to a tender process the respondent had originally allocated to the applicant the land situated at Erf [...] Phola Park. This was in November 2004.

The land measured some 2 400m².

After the applicant had paid the full purchase price of R45 000 it turned out that the land had been invaded by squatters and was not suitable for its intended purpose.

The intended purpose was the development of buildings as a place of worship for the church's congregants with the provision of the usual ancillary communal activities and on-site parking.

7. The applicant then requested that the property be replaced with an alternative piece of land and suggested erf [...] as a possibility. The respondent's internal departments assessed the suitability of erf [...] for sale to the public. This included a determination by its then Road Transport and Civil Works Department (*"the RTCW"*) and its Water Department of the extent of any underground municipal pipes on the land.
8. The assessment disclosed only sewerage pipes traversing the property. As a consequence the respondent's interests required protection by means of a three metre wide servitude. It is evident that the applicant did not consider this to be a problem as erf [...] Thokoza was some 50% larger and measured 3 795m².³
9. The parties then agreed to replace the property with erf [...] Thokoza. This was achieved by the Municipality rescinding its previous resolution regarding the sale of the Phola Park property to the applicant, resolving that it no longer required to hold erf [...] Thokoza and that it be sold for R55 000. In a later resolution the Municipality also resolved that the purchaser would be the applicant and that the amount of R45 000 which was paid by the applicant for the Phola Park property would be held as part payment for the Thokoza stand.
10. At the time of the conclusion of the sale agreement, which was eventually signed on 16 October 2006, the respondent had disclosed to the applicant the existence of certain sewage pipes running across the stand and the applicant accepted this on the basis that it would not interfere with the intended land use. The applicant subsequently occupied the property although transfer had not yet been effected.

³ See Deed of Transfer at paginated p20

11. A year later in October 2007 the applicant discovered that there was also an underground storm water pipe running through the property. The papers sometimes refer to it as a sewage pipe. Nevertheless it is in fact a storm water pipe and is to be distinguished on this basis from the sewage pipes of which the applicant had been precognised and which was identified in the agreement as the *“3 metre wide sewer servitude indicated on the attached plan”*.
12. The applicant requested the respondent to replace the property with another on the ground that the existence of the storm water pipe had not been disclosed.
13. On 30 April 2008 the respondent through Mr Sibeko, it's Manager Corporate and Legal Services (Alberton Customer Care Centre) acknowledged in a letter addressed to the Chief Engineer Water Services that subsequent to the sale of the erf an *“additional sewer main”* was discovered running half way across the erf. This was in fact the storm water pipe.
14. On 17 July 2008 in a further letter addressed by Sibeko to the RTCW: Land Use department he stated that this pipe was *“a huge pipe ... in addition to the sewer line previously mentioned”* (emphasis added). The letter also acknowledged that the pipe was for storm water and that it had not been previously disclosed which *“is currently a huge embarrassment to Council”*.
15. Accordingly the respondent accepted that the storm water pipe had not been disclosed.⁴
16. On 23 April 2009 Mr Smit, who appeared to have replaced Mr Sibeko as the Manager; Legal and Administration Services, advised the applicant in a letter that:

“Kindly note that in the light of the attached comments received from the Roads, Transport and Civil Works Department confirming that no development would have been allowed in the

⁴ Annexures WTC003 and WTC004.

servitude area even if no service had been installed there, and your indication that your church does not agree with the said department and does not want to proceed with the transfer as a result of the said services affecting the property a meeting would serve no purpose.

You are requested to either identify an alternative erf or request Council to refund you the money already paid whereafter the matter will be submitted to Council for consideration. “

(emphasis added)

I should add that the applicant contended that the development of the land would not be possible, and might be unlawful, because of the location of the storm water pipe on the erf.

17. The applicant proceeded to identify erf [...] as the alternative piece of land it wished to acquire. On 17 June 2009 the respondent, still represented by the Manager; Legal and Administrative Services (but now a Mr Herbst who took over from Smit) advised the applicant that erf [...] was not available for purchase.

In this letter reference was made for the first time to the voetstoots clause contained in the agreement. The letter then directed the applicant to look for solutions with the Director: Roads, Transport and Civil Works.

18. Almost four years passed before the applicant, through its attorneys, wrote to the City Mayor. The letter added that there was a sink hole along the storm water pipe⁵. The letter claimed that the applicant had been in discussion with the Town Council during the intervening years without success. The letter again requested that the property be replaced with erf [...] which was on an adjacent piece of land. The letter requested the City Mayor's intervention.

⁵ Para 5 of the letter from Denga Inc to the Municipality dated 22 April 2013

19. On 7 October 2013 the applicant ascertained that erf [...] was available and requested that this piece of land replace erf [...]. The applicant also alleged in its founding affidavit that the land was not earmarked for development.⁶
20. Aside from effectively disputing every legal element of the applicant's case, the respondent counterclaimed that the applicant had breached the agreement by not taking transfer when it was requested in October 2013 to sign the necessary documents. As a consequence the respondent contends that it is entitled to cancel the agreement and retain the monies paid, which in fact is the full purchase price.

THE RESPONDENT'S DEFENCES TO THE APPLICANT'S CASE

21. The respondent argues that there is no contract between the parties in respect of erf [...] and that no case can be made out for rectification.
22. I believe that this begs the question. It is evident from the common cause facts that there was an agreement in terms of which a suitable piece of available municipal land selected by the applicant would be allocated in substitution for the land originally obtained through the tender, beneficial occupation of which was frustrated when squatters were found to be on it.
23. It is common cause that as a result, the applicant was entitled to and did in fact propose an alternative piece of land which was 50% larger than the original one. From the foregoing it was also clearly implicit that provided the proposed land was available for private development the respondent would be agreeable to substitute, and in fact did substitute the replacement piece of land, *via* the cancellation of the first sale and the signing of a subsequent sale.
24. It is evident from the facts that in October 2006 the parties had concluded a composite oral agreement (which I will also refer to as the "*Substitution Agreement*") comprising;
- a. the cancellation of the original November 2004 agreement for the sale of Erf [...] Phola Park;

⁶ See pp15-16 para 30

- b. a replacement agreement between the same parties which would be reduced to writing for a suitable alternative piece of land
- c. the transfer of the original amount already paid towards, or in settlement of, the purchase price of the land to be acquired under the replacement agreement.⁷

It is also evident that there would be no need to go to a tender process as the applicant had been the successful tenderer and the Municipality was unable to deliver as undertaken.

The outstanding requirement was that the land be available for private development, which of necessity would have included no more than a determination by the Municipality that it no longer required the land in question.

25. I am satisfied that the way in which the 16 October 2006 agreement came to be implemented through the substitution of another piece of land and without a new tender process, as well as the conduct of the parties as evidenced by subsequent correspondence, demonstrates that there was an implicit (i.e. tacit) underlying agreement between the parties that if there was any impediment in respect of the replacement land that was offered rendering it unsuitable for its disclosed purpose then another suitable piece of land would be found and substituted in its stead.

Tested another way; if the second storm water pipe had been disclosed on erf [...] prior to signature of the 16 October 2006 agreement then it is evident from the intention of the parties as revealed by their communications that the property would not have been agreed upon but another piece of land would have been found which was available for private ownership and capable of proper development by the applicant as a place of worship for its congregation with provision for the usual

⁷ See para 33-34 of the answering affidavit

accompanying communal activities and on-site parking. This alternate piece of land would have replaced stand [...] and, if applicable, there would have been an adjustment of the purchase price, based on a fair market value.

26. The applicant expressly averred that erf [...] was not suitable because of the subsequent discovery of the storm water pipe. This is beyond dispute since the respondent itself acknowledged in the two letters mentioned earlier that;

- a. the storm water pipe had not been disclosed; and
- b. by reason of its existence no development would have been allowed on the servitude area around the pipe, thereby further restricting the area available for development.

27. An overarching argument presented by the respondent is that the court cannot make a contract for the parties. The respondent however overlooks that there was a pre-existing oral agreement in terms of which it would provide the applicant with a suitable alternative piece of land. That is the agreement relied upon and for the reasons given in the preceding paragraph the physical attributes of erf [...] failed to satisfy this requirement, albeit that they were only discovered later.

Accordingly the court is not making an agreement for the parties. As for the merx; sufficient was agreed upon in relation to what would qualify and what would not when the selection choice was exercised. The implied term of the agreement, in order to give it efficacy (as had occurred on the previous occasion) was for that piece of land to be identified in the signed agreement. Similarly the purchase price was not subject to negotiation but based on an objectively determinable fair market value.

28. If the sale agreement for erf [...] stood alone then on ordinary principles the common mistake as to the existence of a state of affairs in relation to

the subject matter would vitiate it⁸, and place the parties in the position *status quo ante*⁹. This consequence arises since the development of the property was an express requirement, and therefore vital to the transaction.

29. In my view a *voetstoots* clause does not assist the respondent because it cannot go so far as to cover a state of affairs which is required to exist in order for the party who imposes the clause to meet a condition contained

⁸ See *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A) at 450B-C

⁹ See *Van Reenen Steel (Pty) Ltd v Smith NO and Another* 2002 (4) SA 264 (SCA) at para 1 and paras 9 to 13 which approved the following statement in *Wilson Bayly Holmes (Pty) Ltd v Maeyane and Others* 1995 (4) SA 340 (T) at 344I:

'a common mistake relating to the existence of a particular state of affairs will not render the contract void unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of affairs'. (emphasis added)

In *Van Reenen Steel* Harms JA (at the time) at paras 9 to 13 recognised that an assumption made by the parties as to a state of affairs regarding the subject matter of the transaction can be elevated to a term of the contract, even if only implied. Reliance was placed on the following: Firstly *Bell v Lever Bros Ltd* [1932] AC 161 (HL), where the court pointed out at 224 and 225 respectively that:

'It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties . . .'

and

'if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true'.

Reliance was also placed on the statement by Van der Merwe *et al* in *Contract: General Principles* at 19 that:

'A common mistake is said to be present where both parties to an agreement labour under the same incorrect perception of a fact external to the minds of the parties. Such a mistake, of course, does not lead to dissensus: the parties are in complete agreement, although their consensus is based on an incorrect assumption or supposition. This kind of mistake can be related to the concept of a common underlying supposition ("veronderstelling") on which the parties base their contract. In this manner the parties can introduce a common motive into the (terms of the) contract so that a mistake in their common motive will render the contract without further effect.'

Quite distinctly, it may also be assumed that both parties anticipated that in the nature of things the congregation would be expected to grow over time and space for parking and further development would be required.

in the agreement. Otherwise logic dictates that there would be an irresolvable ambiguity.¹⁰

30. The difficulty is that the 16 October 2006 agreement does not stand alone. It is the executive part of a composite agreement which, as mentioned earlier, is intrinsically one to substitute the first piece of land, lawfully acquired through a successful tender process in November 2004, with a suitable alternative piece of land that was available.

Both parties believed that the alternative piece of land selected, being erf [...], was capable of development save for one area; whereas in fact there was a second significant area which was incapable of being developed. In the present case a department within the respondent was to blame for not marking or identifying the second area; a failure which self-evidently induced the applicant to agree to swop the initial piece of land for this one and therefore, it might be argued that there was an actionable error induced by the other party.¹¹

31. In either event, the mistake or error is actionable but the remedy cannot be to annul the 16 October 2006 agreement since it is part of a composite agreement which in turn had cancelled the initial sale agreement of November 2004. In my view what is resurrected is the October 2006 oral agreement to substitute erf [...]. Phola Park with an available suitable property.

¹⁰ In cases of *error in corpore* consent to the whole agreement is vitiated- accordingly a voetstoots clause cannot survive. See *Maresky v Morkel* 1994 (1) SA 249 (C) at 255F-256C citing *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) at 170H-171F. So too would common error.

¹¹ This would render the error material, attributable to the other party and in all the circumstances *justus* or reasonable. See *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) and *Wille's Principles of South African Law* (9th ed) at 745-749. It will be recalled that in *Dibley v Furter* 1951 (4) SA 73 (C) the one area of the farm where graves were located had been ploughed over, was used as farmland and the usefulness of the property was not materially impaired. It is therefore distinguishable from the present case where the second area was unknown, not developed and is undevelopable by reason of the servitudal rights or bye-laws.

32. The applicant avers that it was entitled to select erf [...] to which the respondent raises a number of impediments. .
33. The one substantive argument presented by the respondent is that there is no written agreement in terms of which the property which the applicant wishes to acquire is identified and the letter relied on does not constitute a written contract for the sale of land as required under the Alienation of Land Act.

It was also argued that in order to act in a procedurally lawful manner the respondent would have to pass similar resolutions to those when it had agreed to replace the initial property with erf [...], and that this had not occurred.

34. In my view, once the agreement is vitiated by common mistake then as a matter of law the parties are restored to the position *status quo ante* (i.e. they are put back to the position *vis a vis* one another as if the agreement had not been concluded). The same would be the case if there had been an actionable unilateral mistake¹².

In the result restoring the parties to the *status ante quo* means that the oral Substitution Agreement of October 2006 is resurrected. In its terms the original piece of land which was unsuitable because of the presence of squatters is to be replaced with a suitable property selected by the applicant provided it is available for private development.

Since that agreement was purportedly implemented, the regularity of the actions of the Municipality regarding the process involved in giving consideration to an alternative piece of land for the applicant cannot be questioned. The Municipality does not again have to consider whether or not to provide the applicant with an alternative piece of land for the initial

¹² See *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 926F-927A

one¹³. That part of the resolution must still be implemented by reason of the transfer of erf [....] being vitiated resulting in the restoration of the *status quo ante*.

REMEDY

35. As mentioned earlier it is a basic principle of our law is that where there is a right there will always be an effective remedy.

The question then is: What remedy is available to the applicant?

36. The respondent has not suggested any alternate piece of land to the one the applicant alleges is available and which it is prepared to take in substitution; namely erf [.....] Thokoza. As a fact, since Herbst took office, the respondent has actively frustrated the securing of an alternative piece of land and has not suggested that any other suitable land is available despite having been given the opportunity of doing so over many years. It will be recalled that the only other suitable land pointed out by the applicant was said to be unavailable.

37. I have found that the October 2006 oral agreement to substitute erf [....] Phola Park with a suitable alternative piece of land remains operative and a part of its terms has in fact been implemented, namely the cancelation of the Phola Park agreement. The result is that there must be a remedy available that can give effect to the agreement.

38. However a number of legal obstacles have been raised and the question is whether they can be overcome.

The most serious is that the essential terms of an agreement for the sale of land must be reduced to writing and signed by the parties- this would

¹³ If only because of the presumption of the validity of an administrative act until set aside- *omnia praesumuntur rite esse acta*. See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para 102 and the cases cited at ftn 75

include the description of the property. The other is that post Sibeko and Smit, the respondent has adopted an obstructive approach. It is therefore not possible for the court to be satisfied that any alternate piece of land other than that identified by the applicant exists, and if it did, that the respondent will abstain from placing impediments in the path so as to frustrate the exercise of the right to which the applicant is entitled. For this reason it is inadvisable to simply direct that the respondent is to provide an available suitable piece of land in substitution. The risk of further litigation over an indefinite period is too great.

39. In the circumstances of this case where it was accepted that a substituted piece of land would be provided, and which was not at the sole discretion of the respondent, it seems appropriate to fashion a remedy that finds its roots in cases where there is a need to substitute property and the market related price because, at its lowest an error common to the parties. The only difference between the usual cases of rectification and the present one is that in the former the mistake arises in drafting the agreement incorrectly whereas here the mistake arose in the attributes of the property selected enabling another selection to be made which meets the specific criteria that had been agreed upon.
40. In my view this does not extend the law relating to rectification.

There are two reasons for this.

41. Firstly, Harms DP in *Amler's Precedent of Pleadings* (5th ed, 1998) under the subject of rectification referred to three situations where a mistake in drafting a document will permit the remedy of rectification. The first two are where there has been a *bona fide* mutual error or an intentional act of the other party. The last is of interest for present purposes; here the author describes “ *a mistake by the parties by wording the written agreement in such a way as not to exclude their oral agreement from operating together with their written agreement*”. In *Tesven CC and another v South African*

Bank of Athens [1999] 4 All SA 396 (A) Farlam AJA gave effect to this at paras 13-18 and cited with approval the explanation by Trollip J (at the time) in *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962(3) SA 399(T) at 411A-D of the then leading case on the subject; namely *Mouton v Hanekom* 1959 (3) SA 35 (A). The key element was the recognition that in such circumstances the parol evidence rule would not be offended by having regard to the oral agreement.

42. If I am wrong then the peculiar facts of the underlying oral agreement which was premised on substituting a piece of land in respect of which vacant possession could not be given for another suitable property should not be thwarted and rendered incapable of fulfilment by the self-evident subsequent frustrating and obstructive acts of Herbst who, for no valid reason, reneged on what amounts to admissions by both Sibeko and Smit whom he replaced as the head of the Municipality's legal and administration services.

Moreover it is not unusual for a local authority to encourage development of an area by making land available for that purpose and in some cases making temporary sites available on the basis that once development starts there will be a relocation to permanent sites. These types of transactions should not be discouraged or rendered unenforceable even though there is no specifically identified replacement site having regard to the common understandings and commitments each party makes to the project for their respective objectives but mutual benefit.¹⁴

43. The appropriate relief is to give effect to the oral substitution agreement by replacing the erf that was unsuitable with the only one identified by the respondent and which this court has found to be available and which is

¹⁴ See for example the encouraging of commercial enterprise in the mining town of Selebi-Phikwe in Botswana by providing temporary sites which would be converted into permanent land rights elsewhere once there was development. This appears from the facts of *Essack v. Bamangwato Concessions Ltd* 1983 BLR 307 (HC) *per* Hannah J

suitable to the applicant. It will also necessitate changing the size of the property and consideration price contained in the written agreement.

44. The terms of the agreement dealing with interest can be capable of variation on the basis that the situation which arose was not covered in the written memorial but which can be inferred from the express terms and the surrounding circumstances in order to give the agreement business efficacy¹⁵. In this regard it is relevant that the failure to pick up the defect in the substituted piece of land was the fault of the Municipality and it is evident that further delay arose when Herbst refused to respect the admissions made by both his predecessors. Effect will be given in the body of this court's order as to the tacit term of their agreement regarding when interest starts running. In doing so I have regard to the intervening circumstances mentioned. I add that interest is an ancillary provision in the agreement and is based on the existence of a debt that has become due, owing and payable on the basis that the reciprocal obligation of the other party has been performed. In addition the Municipality did not produce any resolution or document to suggest that market price for erf 11953 had been amended despite eight years having passed since the resolution relied upon.

45. This brings me to the next major issue raised; namely the identification of the replacement property and whether it is available for private development.

The respondent contends that erf [...] is unavailable to the applicant as it has been put out to tender.

46. At the outset it is common cause that erf [...] is available for private development. The difficulty facing the respondent is that the alleged resolution relied on to put erf 11953 out to tender was passed in April 2006

¹⁵ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H-532A and *Botha v Coopers & Lybrand* 2002(5) SA 347 (SCA) at paras 22-25

yet by February 2014 the respondent stated that the public tender process had not yet been conducted¹⁶.

Moreover of the four applications to purchase the property relied on by the respondent¹⁷, one is to lease, this one and two others predate the resolution (in one case by over a year) while the fourth application is unsigned and undated. It is evident that nothing has happened in regard to any development of that property for over seven years. This reinforces the applicant's statement in its founding affidavit that on 7 October 2013 Senior Pastor Tshirumbula attended the respondent's offices and was informed that erf 11953 was vacant and not earmarked for any development.¹⁸

47. It is also evident that there has been no publication of a tender for the acquisition of erf [...] even by April 2014 when the respondent filed a further affidavit. The respondent's averments regarding a resolution to go out to tender is therefore glib as it has never been implemented. On the contrary the only evidence produced demonstrates that the erf never went out to tender and that the requirements for a lawful tender process have never been followed.
48. The resolution relied on does however confirm that erf [...] was formally released for private development by the Municipality.
49. The respondent did not seek to refer the matter to oral evidence. Applying the *Plascon-Evans* principles I am satisfied that the respondent has not raised a real or genuine dispute of fact to support the legal positions contended for.¹⁹

¹⁶ Para 121.7 of the answering affidavit

¹⁷ Annexures DF28 to DF31 of the answering affidavit.

¹⁸ Para 30 of the founding affidavit read with para 121

¹⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – I which effectively requires a court to accept the version of the party against whom the application is brought unless there is no genuine defence raised or certain other exceptional features are present

50. Moreover the issue does not concern the exercise of administrative power.

By lawfully passing the initial set of resolutions which adequately provided the policy framework and going through a tender process that was regular in all respects²⁰ the Municipality entered the commercial arena and must submit to its consequences. The applicant is entitled to enforce the agreement for the provision of alternative available land. I have found that the respondent has not suggested any other piece of land and that there is no validly raised impediment to the land in question (i.e. erf [...]) being made available. In any event it is up to the respondent to regularise its internal situation if needs be, although there appear to be none as the Substitution Agreement was regularly concluded and remains extant while a resolution was in fact passed to release erf [...] for private development at a price of R95 800.

51. I have found that there is no impediment to the applicant acquiring erf [...].

The respondent intended to sell it at the price of R95 800²¹. By reason of the restoration of the position *status quo ante* the respondent remains obliged to honour the commitment made in the oral Substitution Agreement of 2006. It cannot attempt to sell this land without first ensuring that previous transactions in relation to the acquisition of suitable land that in fact were paid for are taken into account. I adapt the *qui prior est* doctrine to this since at this stage the rights are personal.²²

52. A final impediment raised is that even in 2006 erf [...] was valued at R95 800 and it is almost double the size of erf [...].²³

53. I do not believe that the greater size of erf [...] creates an impediment. It did not erf 430 Phola Park was swapped for erf [...] and an additional sum

²⁰ Compare *Minister of Transport NO and Another v Prodiba (Pty) Ltd* [2015] 2 All SA 387 (SCA) at paras 26, 27, 32 and 39

²¹ See para 121.4 of the answering affidavit and annexure DF2. On 24 April 2006 the respondent passed a resolution that it would alienate erf 11953 measuring 7 075 m² by public tender for R95 800.

²² "*Qui prior est tempore, potior est jure*"

²³ See ftn 13.

had to be put in. it could hardly be argued then that the Municipality could have resiled from the verbal agreement of October 2006 by refusing to sign the written agreement drawn despite the property being significantly bigger and more expensive. The Municipality never increased the consideration price it was amenable to receiving for erf 11953 and it was the prevailing price in the same year as the applicant concluded the Substitution Agreement. Therefore the only issue relates to whether the applicant is prepared to put the extra amount in. It is prepared to pay in the difference, as it had in fact been prepared to do and did in respect of the first substitution.

54. Moreover the value must be at the 2006 prices since any difference would amount to damages sustained as a result of at least a failure by the respondent's RTCW department to have ensured that the applicant was apprised of the second storm water pipeline. As mentioned earlier, it is also evident that the respondent's relevant department would not have sold erf [...] or swapped it had it known of the pipeline's existence as no development could have taken place along the servitodal line.
55. In all the circumstances this is a case where the municipality being an organ of state must act transparently and lawfully. It cannot take money and not meet its obligations under the 2006 Substitution Agreement which have yet to be complied with. It has refused to do so and in my view, to the extent that this is not simply the exercise of a contractual obligation which it is already empowered to take, but may result in an inroad into any additional administrative act that the respondent failed to take or ought to have taken this court is entitled to order that erf [...], Thokoza is to replace the original property known as 430 Phola Park, because;
 - a. the conduct of the respondent since its inexplicable and irrational *volte face* would render it unfair for the applicant to submit to the respondent's decisions again;
 - b. the respondent sought to cancel a putative agreement and take the entire purchase price paid as a penalty when it had acknowledged responsibility for not ensuring that servitodal lines were accurately reflected on its plans;

- c. it is not disputed that erf [...] is available, and available to a religious institution;
- d. further delay would cause unjustifiable prejudice as the applicant had paid in full for unsuitable land and was at all times willing to pay any additional amount required to obtain a suitable piece of land; and
- e. the result is a foregone conclusion as there was no suggestion that there were any other facts which could lead to a different conclusion; unless the municipality was to act in an obstructive manner and not in good faith (which would simply result in the matter being brought back to this court).²⁴

ORDER

56. It is for these reasons I ordered that:

²⁴ See on the court being entitled in similar exceptional circumstances to supplant its own decision for that of an administrative body under common law: *Johannesburg City Council v Administrator, Transvaal and Another (1)* 1970 (2) SA 89 (T) at 75H-77C;

Under s 8(1)(c)(ii)(a) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) see *National Tertiary Retirement Fund v Registrar of Pension Funds* 2009 (5) SA 366 (SCA) at para 26 and *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) at paras 28, 29 and 41; and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* 2015 (5) SA 245 (CC) at para 47

s8(1)(c)(ii)(aa) of PAJA reads:

Remedies in proceedings for judicial review

(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

- (c) setting aside the administrative action and-
- (ii) in exceptional cases-
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;

1. *The agreement between the applicant and the respondent signed on 16 October 2006 is rectified and amended as follows:*

a. *The words “erf [...], Thokoza measuring 3 795 m² in extent, as indicated on the plan annexed hereto marked “Annexure A” are replaced with the following:*

“erf [...], Thokoza measuring 7 075 m² in extent, situate at [...], Alberton”

b. *The purchase price in clause 2 of the agreement of “R55 000 (fifty five thousand Rand)” is replaced with the following:*

“R95 800 (ninety five thousand eight hundred Rand)”

2. *Interest on the outstanding balance of the purchase price as provided for in clause 3(b) is only to be calculated as from the date of this order. It is recorded that R55 000 of the purchase price has been paid*

3. *The respondent is interdicted and restrained from enforcing the provisions of clause 3(b) of the agreement unless the applicant fails to secure payment of the balance of the purchase price, as provided for in that clause, within thirty days after the date of this order.*

4. *The respondent is directed and ordered to transfer the aforesaid property situated at erf [...] Thokoza forthwith into the name of the applicant, and to cause its nominated conveyancers to have all necessary documents ready for lodging by no later than 60 days from the date of this order and if it fails to do so, then and in such event:*

a. *If applicable, no further interest shall be payable;*

- b. And provided further that the applicant has complied with all its obligations as required for transfer to be effected, the Sheriff of the High Court is directed and authorised to take all necessary steps, including signing the transfer documents in order to effect transfer of the property into the name of the applicant*
5. *The counter-application is dismissed*
6. *The respondent is to pay the costs of both the application and the counter-application.*

SPILG J

DATE OF REASONS:	21 August 2018
FOR APPLICANT:	Adv R N Ralikhuvhana Denga Inc
FOR RESPONDENT:	Adv G I Hulley SC Tshiqi Zebediela Inc