

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



Date of hearing: 1 March 2017

Case number: A447/2015

Case number court a quo: 211/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. OK
	05/04/2017..
	DATE
	
	SIGNATURE

5/4/2017

In the matter between:

MUSINA LOCAL MUNICIPALITY

Appellant

and

PHILLIPPUS LODEWIKUS VAN DER MERWE

Respondent

JUDGMENT IN APPEAL

BRENNER, AJ:

1. The focal issue in the appeal is whether a binding sale agreement for the sale of immovable property was concluded between the appellant, Musina Local Municipality, ("the Municipality"), qua seller, and the first respondent, Phillippus Lodewikus van der Merwe ("van der Merwe"), (also known as "Sippy van der Merwe"), qua purchaser. Although the registrar of deeds was cited as a second respondent, it did not oppose the application. Other ancillary issues are traversed below.
2. In the court a quo, in motion proceedings coram Kgomo J, van der Merwe had successfully secured, inter alia, an order to compel the Municipality to transfer the then vacant erven 1667 and 1668 Messina Extension 12 Township ("erven 1667 and 1668") into his name, against payment of a purchase price of R153 900,00. The order is the subject of this appeal.
3. In conventional litigation, significant probative value may normally be attached to ex tempore pre-litigation correspondence. The issues in this case called for a detailed analysis of same.
4. It was undisputed that van der Merwe had run a panelbeating business in Musina for several years, and had conducted his business from portions 7,8 and 9 of erf 788 Musina since 1992. These properties were on the opposite side of erven 1667 and 1668, separated by a servitude road.
5. Erven 1667 and 1668 were still part of a portion of the Farm Messina 4MT, which were required to be excised from the Farm, and rezoned, and could not be transferred before the establishment of the proposed Messina Extension 12 Township.
6. In 2003, van der Merwe, then 54 years of age, expressed an interest in acquiring erven 1667 and 1668. On 15 September 2003, he wrote to the Municipality, the letter being quoted verbatim:

"Mussina Municipality

MUSSINA

To whom it may concern

APPLICATION OF LAND

First of all I want to thank you for considering my application.

I hereby apply to buy land from yourself for the extension of plot 788 in the area shown on the attached diagram.

Reason why I applied for the land:

- a) Visibility to the existing premises building.*
- b) Security and easy access to the area. As you know in the tomato season a lot of trucks deliver their products to Langeberg Co for processing and at peak time the trucks wait the whole day, some of them stays (sic) over night to deliver their loads. The drivers used the area for cooking, washing and toilets. I suggest that Langeberg supply them with the necessary facilities, and I will in return secure the area.*
- c) If the above area is incorporated, it will be ideal for future factory development.*
- d) All costs for dividing the land will be for our own account.*

Thank you for your cooperation.

Yours faithfully

Sippy van der Merwe"

7. On the diagram supplied by van der Merwe, the road servitude does not form part of the two erven. On this diagram, van der Merwe had also mentioned the letters of the alphabet, pre-printed on the diagram, which described the extent of both properties.

8. On 30 September 2003, the Municipality replied to the application, on a formal letterhead, in the following terms:

"Mr S van der Merwe

PO Box 631

Musina

APPLICATION FOR LAND

Your letter dated 15 September 2003 refers.

The matter was referred to Council and the following resolution was taken:

1. *THAT a portion of the Farm Messina 4MT and a portion of the road servitude as indicated on the sketch plan be sold to Mr S van der Merwe subject to Section 79(18) of the Local Government Ordinance, Ordinance 17 of 1939.*
2. *THAT the applicant appoints a Town Planner to do the necessary division of land, road closure and rezoning and that all costs incurred in respect hereof be for the account of the applicant.*
3. *THAT the applicant be liable for the necessary municipal engineering costs if required and monthly consumption costs.*

Please confirm your acceptance of the above resolution in order that the market related valuation be obtained and the objection notice published as required by Section 79(18) of the Local Government Ordinance, Ordinance 17 of 1939.

J NAUDE

COUNCIL SUPPORT AND ADMINISTRATION

CORPORATE SERVICES"

9. The "sketch plan" referred to by the Municipality in its letter is in fact the diagram attached to van der Merwe's letter of 15 September 2003. In argument before Court, this fact was conceded by Counsel for the Municipality. In the diagram, the merx does not include the road, and is not part of the acute triangle formed by the combination of erven 1667 and 1668, as demarcated by van der Merwe.

10. On 16 October 2003, van der Merwe wrote to the Municipality, for the attention of Joy Naude ("Naude"). The letter was delivered by hand on 20 October 2003. In it he said:

"Hereby I, PL van der Merwe confirm the acceptance of the resolution in your letter dated 30 September 2003."

11. After obtaining a valuation, the Municipality informed van der Merwe, by letter dated 13 November 2003:

"Mr PI van der Merwe

PO Box 631

MUSINA

APPLICATION FOR LAND

Your letter dated 16 October 2003 refers.

The market related valuation for the Portion of the Farm Messina 4MT and the Portion of the road servitude has been obtained and is R153 900 VAT included and is payable on registration.

Please contact the writer to finalise the necessary Deed of Sale.

J NAUDE

COUNCIL SUPPORT AND ADMINISTRATION"

12. Van der Merwe says that he proceeded to instruct *"all the necessary persons and institutions to proceed with all the necessary steps to effect township establishment of the property"*, and that he paid all costs in relation thereto. He even maintained that he provided his personal particulars to Naude to draw a deed of sale, and that he (subjectively) believed he had signed a formal deed of sale at some stage but could not recall the details.
13. On 21 July 2005, the Municipality formally approved the establishment of Messina Extension 12 Township, subject to various conditions. Its technical manager, JAP du Toit, informed the Surveyor General in a letter of the same date.
14. In the interim, steps appear to have been taken by Plankonsult, townplanners mandated by van der Merwe, to prepare the General Plan and to submit same to the Surveyor General for approval. Application was also made for the issue of a section 101 Certificate by the Municipality for the opening of the township register.
15. On 1 October 2006, Plankonsult wrote to attorney Deon Retief ("Retief"), to instruct him to attend to the opening of the township register. All relevant documents were attached to their letter to this end, and Retief was asked to account to van der Merwe for his costs. Retief was asked to

notify Plankonsult as soon as the register was opened, so that they could proceed with the proclamation of the township.

16. It is common cause that van der Merwe had engaged the services of Retief for many years for various matters requiring the services of an attorney. When Retief deposed to his affidavit in this matter on 19 February 2014, Retief confirmed that he had known van der Merwe for more than twenty years. Retief asserted that it was his firm which in most instances received instructions to attend to property transfers on van der Merwe's behalf. However, he alleges that in every such transaction, there was a "formal Deed of Sale". He asserts that van der Merwe was aware that he had to pay transfer costs and provide guarantees for the purchase price and sign transfer documents, where property was purchased.
17. According to Retief's affidavit, on 10 October 2006, Dante Moelich of Plankonsult visited him at his office to deliver the letter of 1 October 2006 to him. On perusing the layout plan and establishment conditions, Retief observed that the conditions had been imposed on the municipality, and this was the incorrect procedure, and "fatally defective and unusable". The technical manager of the municipality, Mr du Toit, instructed Retief to correct the township establishment process, and Retief attended to this. He accounted to the Municipality for his services and was paid by it.
18. The existence of the instruction to Retief to open the township register was confirmed by Plankonsult to van der Merwe in their letter to him of 6 December 2006.
19. Retief confirmed that he visited van der Merwe in March 2007 to uplift the General Plan, and was told that van der Merwe had purchased erven 1667 and 1668. Retief states that he was unaware of the correspondence of September 2003 and October 2003. According to Retief, there was a lengthy delay in the township establishment. This was mainly attributable to the unavailability of the title deed for the remaining extent of the Farm Messina from which the new portion 71 was to be excised, and due to the insistence by the deeds office that consents be obtained from Eskom for

its servitudes not to be made applicable to certain portions of land referred to in the township conditions.

20. At a Council meeting of the Municipality on 20 June 2007, it was resolved to establish Messina Extension 12 Township on the property formerly registered as portion 71 of the Farm Messina 4 MT. An extract from the minutes of this meeting corroborates this fact.

21. The township register was opened on 17 June 2009.

22. On 26 June 2009, Retief wrote to Plankonsult. The contents being of significance, same are quoted below, our emphasis included:

"DORPSTIGTING: MESSINA EXT 12

Ek verwys na bogemelde en moet berig dat die dorpsregister op 17 deser in die Akteskantoor geopen is.

Ingesluit is afskrif van die gewysigde Stigtingsvoorwaardes waarkragtens die dorp gestig word en wat ek ook per epos aan u deurstuur vir u gerief.

Geliewe derhalwe so gou doenlik te reël vir die plasing van die nodige kennisgewing i.t.v. Artikel 111 van Ordinsie 15/1986 in die Provinsiale Koerant sodat ons kan voortgaan om die reeds verkoopte erwe te transporteer.

Ek vertrou dat u ook sal toesien dat al die bepalings van Artikel 111(2) voldoen word nadat die kennisgewing gepubliseer is."

23. On 7 December 2009, the Municipality wrote to Plankonsult to apprise it of the opening of the township register on 17 June 2009, attaching the approved section 125 plans, and confirming that all pre-proclamation conditions had been fulfilled, and that the township could be proclaimed.

24. The township of Messina Ext 12 was proclaimed on 11 December 2009, by local authority notice 370, published in the provincial gazette.

25. On 3 December 2010, the Municipality gave its written, in principle approval to the operation of a truck/bus stop on erven 1667 and 1668. The approval was subject to the issue of a site development plan for the buildings, and building plans. It declined to agree to a diesel depot but

noted that this application had been sent to the community services and fire departments.

26. On 27 January 2011, the Municipality wrote to van der Merwe concerning the proposed development, and the need for sewerage connections, and the issue of certificates of compliance for new electrical installations, insecticidal treatment, roof structures, and occupation.
27. According to van der Merwe, he proceeded to develop the land at a cost exceeding R1 million and commenced trading with the truck stop in mid 2011. It is axiomatic to record that this occurred with the full knowledge and consent of the Municipality.
28. In mid April 2012, van der Merwe called in at Retief's office to enquire about the transfer of erven 1667 and 1668, as he had found from deeds searches that the properties were still not registered in his name.
29. On 19 April 2012, confirming his meeting with van der Merwe, Retief wrote to the Municipality enclosing the searches and a copy of the Municipality's letter of 27 January 2011. Retief stated that he awaited the signed deed of sale, failing which, he required to know the details of the purchase price and whether it was paid in full. If not, he asked for information to draw the necessary deed of sale and transfer documents.
30. Circa October 2012 van der Merwe again asked Retief about the progress with the transfer. Retief made enquiries with the Municipality which, on 10 October 2012, sent him correspondence between the parties, stating that no deed of sale could be found. Retief was asked whether the price should be the current value of R922 000,00 and whether van der Merwe was liable for rates and taxes since the council resolution.
31. On 11 October 2012, Retief wrote to the Municipality to record his conclusion that no deed of sale was ever signed. In his view, a total value of R922 000,00 for both erven was a fair price, given their sharply triangular shape, and the dysfunctional effluent tomato factory nearby. Retief had been told that van der Merwe had paid for surveying and

subdivision costs and the fees of Plankonsult regarding township establishment. In Retief's view, these costs should be quantified and credited against the purchase price.

32. On 29 October 2012, following enquiries from van der Merwe concerning the transfer, the Municipality wrote to him to say the following, our emphasis included:

"SALE OF LAND: ERF 1667 & 1668 MESSINA EXT 12

After investigation of the sale the above stands:

- a. **It is clear that the sale transaction applied for and approved in 2003 was never taken to conclusion.**
- b. *The subdivision was done in 2005 and the township (Messina Ext 12) was proclaimed in 2009.*

No Agreement of Sale or copy thereof could be traced in our records systems and you as the purchaser could also not provide a copy of the signed document. The only conclusion is therefore that such Deed of Sale was never signed.

- c. *You are herewith informed that the current market valuation of the erven is as follows:*

<i>Erf 1667</i>	<i>R533 000.00 (vat excluded)</i>
<i>Erf 1668</i>	<i>R389 000.00 (vat excluded)</i>

Kindly indicate if you are interested in purchasing the erven at the valuation price to enable us to instruct the Attorneys to proceed with the Deed of Sale."

33. Attorneys Beukes Sikhala, appointed by van der Merwe, replied to this missive on 1 November 2012, outlining the exchange of correspondence which in van der Merwe's view had culminated in a binding sale agreement.

34. The response, per letter of 4 December 2012, was that the parties had always contemplated the execution of a deed of sale post the exchange of correspondence. Because no such document was signed, no binding sale came into being. The offer to sell the property at the new valuations was

repeated. Beukes Sikhala asked the Municipality to keep this new offer open until instructions had been obtained.

35. On 25 March 2013, van der Merwe wrote to Retief to ask whether Retief still acted for him. The contents of this letter are important:

"Beste Deon

Ek bevestig dat jy my teen einde Oktober 2012 telefonies meegedeel het dat daar volgens jou geen geldige koopkontrak tussen myself en die Musina Munisipaliteit vir die verkoop van twee erwe 1667 en 1668 teen die gesamentlike koop prys van R153 900.00 tot stand gekom het nie.

Ek het jou nog destyds opdrag gegee om die dorpsstigting en oordrag as my prokureur to doen en het nooit jou opdrag beeindig nie. Jy het ook nooit as my prokureur onttrek nie.

Ek beoog nou verdere regstappe teen die Munisipaliteit en het 'n onafhanklike mening ingewin waarvolgens daar wel 'n geldige kontrak tot stand gekom het.

Ek het nou 'n prokureur nodig en wil graag bevestig of jy nog steeds vir my optree of nie, want ek weet nie waar ek staan nie.

Bevestig asseblief dringend skriftelik aan my of jy as my prokureur aanbly of nie. Ek moet dringend weet. As ek niks van jou hoor teen 12h00 op 26 Maart 2014 nie sal ek moet aanneem dat jy onttrek het as my prokureur vanaf laasgenoemde datum."

36. Retief replied on 26 March 2013 that he had established the township on the Municipality's behalf and denied ever having acted for van der Merwe in regard to the transfer.

37. Van der Merwe proceeded to engage alternative attorneys, Janse van Rensburg-Landsberg, who sent a comprehensive letter to the Municipality on 28 March 2013, recording that van der Merwe was entitled to transfer of the property against payment of R153 900,00.

38. As further proof of the Municipality's intention to sell the erven, van der Merwe attached Musina's municipal valuation roll for 2012 to 2016 where, at a particulars section, each erf is described as *"Intussen verkoop Sippie van der Merwe"*.

39. On 7 January 2014, the application in this case was issued. There is no return of service on record to indicate when the papers were served on the Municipality.

40. The application was opposed. Of significance is that the deponent on behalf of the Municipality, Johanson Makondelele Matshivha ("Matshivha"), the then municipal manager, confirms his employment with the municipality from August 2006 to June 2008 as manager: corporate services. From July 2008 to July 2012 he was employed by the Limpopo provincial government. He rejoined the Municipality in August 2012 and became its municipal manager on 16 December 2012. He states:

".....whereas the Applicant seeks to rely on occurrences which took place during the latter part of 2003 for his averments pertaining to an alleged Deed of Sale entered into by him with the First Respondent, I was not employed by the First Respondent at the time and have no personal knowledge in respect thereof."

41. The only supporting affidavit relied upon by the Municipality in its opposition to the application is that of Retief.

42. There were essentially three issues raised on appeal, namely whether:

- a. the correspondence of September and October 2003 constituted a valid sale agreement of fixed property, and whether there was consensus on the merx;
- b. Naude, the signatory to the letter of 30 September 2003, had the requisite authority to act as agent for the Municipality in the sale, and whether the doctrine of estoppel assists van der Merwe if such authority did not exist;
- c. Van der Merwe's claim to transfer had become prescribed by the date that the application was served on the Municipality.

43. There are peremptory statutory requirements for the sale of immovable property to be valid. This in terms of the Alienation of Land Act, 68 of 1981, ("the AL Act"), and specifically section 2(1), which 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.'

44. It merits mention that section 28 (referred to in section 2(1)), is of no relevance to the issues as there is no claim based on a void sale agreement or a terminated agreement.
45. "Deed of alienation" is defined in the AL Act as "*a document or documents under which land is alienated*". Plainly, the legislature contemplated an agreement which could be signed by way of separate offer and acceptance, taking the form of correspondence between offeror and offeree. It is not extraordinary in commercial practice for contracts to be concluded in this manner, despite the fact that in current prevailing practice one document is usually signed.
46. The letter of 30 September 2003 from the Municipality to van der Merwe constituted an offer to van der Merwe. It addressed all of the essentialia of a sale agreement, namely, the identity of the seller and purchaser, the property, and the price. The price was ascertainable and was to be determined by a market related valuation to be obtained by the Municipality. Van der Merwe unequivocally accepted the offer in writing. Both such letters were signed, the Municipality's letter by Naude, and van der Merwe's letter by him, personally.
47. Naude's letter of 13 November 2003 succeeded the conclusion of the sale agreement. The Municipality's offer letter did not express that it was still subject to the execution of a further "deed of sale". At best for the Municipality, it was an ex post facto attempt to unilaterally impose an additional term on an agreement which was already a *fait accompli*. Van der Merwe was not obliged to accept same. Accordingly, there can be no suggestion of the agreement being inchoate or non-binding absent signature of a separate "Deed of Sale".

48. The valuation and the subsequent letter to confirm same are collateral to the agreement, albeit that they evidence the agreed purchase price. From these facts simpliciter, the offer and acceptance in this case were made *animo contrahendi*.

49. In **Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986(2) SA 555 (A) at page 574 B-C**, concerning the fixing of a price, the Court held:

"They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them."

50. In **Benlou Properties (Pty) Ltd v Vector Graphic (Pty) Ltd 1993(1) SA 179 AD at page 185 F-G**, the Court endorsed the following comments by De Groot 3.19.7 read with 3.14.23:

"I must confess to considerable difficulty in grasping why a price (or rent) to be fixed by one of the parties should be regarded as less certain than one to be determined by a third party. As a matter of logic, it is also not clear to me why the requirement that a third party must act arbitrio boni viri – as to which see Voet 18.1.23 and Machanick v Simon 1920 CPD 333 at 336-9 – should not also govern the situation where it has been left to one of the parties to determine the price (or rent)."

51. Finally, in **Perdikis v Jamieson 2002(6) SA 356 WLD at paragraph 5 page 361 I-J**:

"Our law recognises the function of an expert who acts as a valuer is distinct from that of an arbitrator. The valuer's duty is not to hear and determine a dispute but to decide the questions submitted to him by the exercise of his judgment and skill without a judicial enquiry. He does not exercise a quasi-judicial function. The valuer is not required to hear or receive submissions from either party. All that is required is that he exercise an honest judgment, the arbitrium boni viri."

52. It is common cause that van der Merwe did not take issue with the valuation provided by the Municipality's valuer.

53. Concerning the identity of the merx, the Municipality takes issue with the fact that the Municipality had included the road servitude in the

description of the merx in its offer, and van der Merwe did not intend that it should be so included.

54. The inclusion of the road servitude as part of the merx was a patent error on the part of the Municipality. One may safely infer from the objective facts that the Municipality was in fact intending to offer van der Merwe the use of the road servitude and not ownership thereof. This could not have been otherwise, since, from van der Merwe's diagram, to which the Municipality adverted in its offer letter, this road was adjacent to several other properties, which were not the subject-matter of sale, and which gave rights of use of the road to various third parties. The established facts indicate that, objectively, the Municipality did not intend to cancel the road servitude and transfer ownership to van der Merwe. Nor was it legally permissible for it to do so without complying with other statutory requirements which did not guarantee its ability to do so, a fortiori since the right to use of the road affected various third parties.
55. Counsel for the Municipality conceded in argument that, consistent with the Municipality's true intention, (not to sell the road servitude), its conditions for the establishment of Messina Extension 12 (which formed part of the papers) did not include cancellation of the road servitude and the transfer of the land on which it was situate to van der Merwe.
56. In **Kruger v McCallum 1948 (3) SA 22 (T)**, it was accepted by the Court that parties may agree to the sale of property which has not yet been completely surveyed off, leaving it to the surveyor to determine the boundary to implement the agreement without further reference to the parties. This is indeed the case in this matter.
57. Further indicia which are consistent with the Municipality's animus contrahendi are, inter alia, the following:
- a. Apart from the affidavit of Retief, the Municipality produces no evidence from any official within its office, with personal knowledge,

who can directly controvert the assertions made in van der Merwe's founding affidavit;

- b. in compliance with and in acknowledgment of its obligations under a binding agreement, the Municipality proceeded to engage a valuer to value the property; this valuation was accepted by both parties;
- c. in compliance with and in acknowledgment of its obligations under a binding agreement, the Municipality proceeded with the establishment of Messina Ext 12 Township, and mandated Retief to this end;
- d. on 26 June 2009, Retief confirmed to Plankonsult that he intended to proceed with the transfer of the already purchased erven;
- e. in advance of the transfer, the Municipality permitted van der Merwe to develop the property, and indeed authorised the improvements, and thereafter permitted him to take occupation of same;
- f. on 29 October 2012, the Municipality wrote to van der Merwe in which it mentioned a sale transaction which was "applied for and approved in 2003";
- g. Retief attended to the opening of the township register, with the result that van der Merwe could legitimately expect that Retief would also attend to the transfer of the erven; this was confirmed in writing by Retief, who never notified Plankonsult (van der Merwe's townplanners), or van der Merwe, that his instructions had ever been revoked;
- h. there is no objective corroboration of Retief's denial that he was instructed by the Municipality and/or van der Merwe to attend to the transfer, nor independent corroboration for the retraction of his stated intention on 26 June 2009 to proceed with the transfer, and his communication of same to van der Merwe.

58. It is noteworthy that, in the normal course, the seller appoints its own conveyancer to transfer property but it happens from time to time that the seller agrees for the purchaser to engage its own attorneys to attend to the transfer.
59. We refer to the defence that the Municipality lacked authority to conclude the agreement and that Naude was not an agent who was authorised in writing, resulting in the agreement being void for non-compliance with section 2(1) of the AL Act. This is at variance with the unequivocal admission in the Municipality's letter of 29 October 2012 (mentioned above), that the sale transaction was applied for and **approved** in 2003.
60. This flies in the face of the incontrovertible fact that the Municipality's Council had passed a resolution to make the offer, and this resolution was recorded on a formal letterhead.
61. The offer, properly construed, and constituting the reiteration of a resolution of the Municipality, is signed by the Municipality per se, as a party. Naude was simply its signatory, or conduit, who was conveying the Municipality's offer to van der Merwe. She is not its agent stricto sensu. On the inherent probabilities, there would have been an independent resolution, (akin to the resolution of 20 June 2007 which resolved to establish the township, and which forms part of the record). Significantly, this was never produced by the Municipality.
62. Van der Merwe's proposal to acquire the erven was addressed to the Municipality and not to Naude, and the Municipality responded with its offer, following its formal resolution, the Municipality having had both the power and the authority to make the offer.
63. Even if we are incorrect on the foregoing, the following is of relevance. We refer to the "Delegated Authorities" document provided by the Municipality as at 30 April 2003. This document was circulated by Naude, (the same person who signed the letter of 30 September 2003), who

would, on the probabilities, have been acquainted with its contents, and would have known the limits of her authority.

64. It states that the only persons with authority to sign deeds of sale were municipal manager Abram Ntshavheni Luruli ("Luruli") or chief technical officer Jacobus Andries Petrus du Toit ("Du Toit"). In substance, at page two of this document, the municipal manager was authorised to exercise his delegated powers to designate Councillors/officials to meetings. (We assume that "exercise" is intended to mean "delegate" and that "designate Councillors/officials" is intended to mean "designated", as otherwise the sentence makes no sense). This much was conceded by Counsel for the Municipality in argument.

65. Significantly, there are no affidavits from Naude, or from Luruli, or du Toit to support the Municipality's contention that Naude had no written authority to make the offer, delegated or otherwise, assuming that this was required. We are at liberty, therefore, to draw an adverse inference from this omission, namely that, de facto and de lege, Naude was authorised to sign the offer letter.

66. In the light of the above, there is no need to deal with van der Merwe's defence of estoppel.

67. We refer to the issue of prescription. In its opposing affidavit, the Municipality alleges, in one discrete paragraph, and in bald and vague terms, that the right to claim transfer has become prescribed. It fails to assert when the obligation to give transfer became due, and when it became prescribed.

68. In reply, van der Merwe contends that prescription has not commenced to run because he cannot demand transfer before the necessary engineering services have been installed, and same have not been installed. He proceeds to assert that, in any event, the first time he was made aware of the Municipality's volte face was when it repudiated its obligations in its

letter of 29 October 2012. The application was served in January 2014, according to his affidavit.

69. Moreover, there had been several acknowledgments of the duty to give transfer from time to time, and such acknowledgments had interrupted prescription.

70. In the offer letter dated 30 September 2003, it is expressly stated that van der Merwe would be liable for *"the necessary municipal engineering costs if required."* In the opposing affidavit of the Municipality, deposed to by Johnson Makondelele Matshivha, concerning engineering services, he says the following, our emphasis included:

*"As appears from annexures PL2 and PL5 to Applicant's Founding Affidavit it was also a condition of the proposed sale that the Applicant would have to pay to First Respondent a further amount as contribution towards installation of the engineering services. The words "if required" in the letter PL2 can in my view only relate to the possibility of services not being required in the event of the land being consolidated with an already serviced erf. **Section 113(2)(c) read with 116 of Ordinance 15 of 1986 prohibits the transfer of erven in a township without installation of the necessary services.** I have been advised by the Technical Manager and believe that such contribution would have been substantial as inter alia for the supply of electricity to the two erven and twelve Business erven in Messina Extension 13 and 14 a new electrical power mainline had to be constructed over a distance of more than four kilometres."*

71. PL2 is the offer letter and PL5 is the internal Municipality memorandum containing manuscript comments from two officials regarding the viability of selling the erven.

72. While confirming that he has been paying for electrical consumption associated with his occupation of the erven, van der Merwe makes the following concession:

"I concede that it appears from annexures "PL2" and "PL5" that I would have had to pay the costs with relation to the Town-Planning Scheme and a contribution for municipal engineering services, if required."

I state that I have never been requested or required to pay any contribution towards engineering services.....I would have been able, willing and prepared to pay any such reasonable amount, if and when I was requested to do so.....

Insofar as the First Respondent may refuse to transfer the erven due to the non-installation of services, I respectfully submit that the wording of prayer 1 of the Notice of Motion is wide enough to include an order to the effect that the First Respondent must install the necessary services."

73. Section 11(d) of the Prescription Act, 68 of 1969 ("the Prescription Act") provides for the statutory extinction of a debt other than debts defined in sections 11(a), (b) and (c) within three years. Prescription begins to run as soon as the debt is due. (Vide section 12(1) of the Prescription Act.)

74. It is trite that a "debt" does not refer to a cause of action but rather to a claim. See **Drennan Maude and Partners v Town Board of the Township of Pennington 1998(3) SA 200 (SCA) at 212 G-I.**

75. The phrase "debt due" in section 12(1) was described in **Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991(1) SA 525 (AD) at 532 H-I** as:

"This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.....It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim."

76. Accordingly, on the Municipality's own version, van der Merwe's claim to take transfer will not become due until the installation of the engineering services contemplated in the Municipality's offer letter. This is dispositive of the prescription point.

77. In all the circumstances, we are satisfied that van der Merwe is entitled to take transfer of erven 1667 and 1668, in conformity with the terms of a valid agreement of sale concluded on 16 October 2003.

78. In terms of section 19(d) of the Superior Courts Act, 10 of 2013, the Appeal Court may confirm, amend or set aside the decision which is the

subject of appeal and render a decision which the circumstances may require.

79. Since the purchase price is not yet due, there was no warrant for the order at paragraph 2 escalating the price by 10% from 1 October 2003 to 29 October 2003. Nevertheless, Counsel for van der Merwe conceded in argument that this part of the order should stand inasmuch as there was no cross-appeal.

80. Concerning the installation of engineering services, Counsel for van der Merwe was satisfied that van der Merwe had other remedies at his disposal to invoke the rights afforded to him thereby.

81. There is only one practical issue which falls to be addressed in the light of this appeal, and this is the deadline date by which the transfer should be effected. The date should commence to run from the date of delivery of this judgment. To this extent, the amendment of the order is justified.

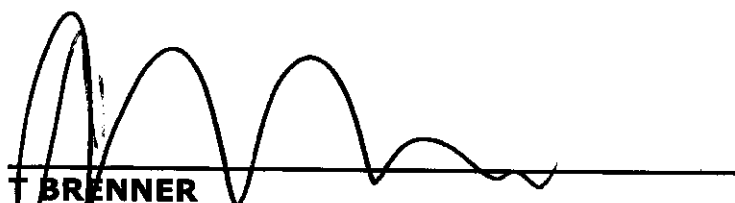
82. The appeal being unsuccessful, costs must follow the result. Both parties engaged Senior Counsel, and accordingly, the costs of one Senior Counsel are justified.

83. The following order is granted:

- a. The appeal is dismissed;
- b. the appellant is directed to pay the costs of the appeal, including the costs of Senior Counsel;
- c. the order of the court a quo dated 12 February 2015 is amended to read as follows:

*"1. The first respondent is hereby ordered to, **within 60 (sixty) days from the date of delivery of the judgment by this Court**, take all steps, sign all documents, and do all things necessary in order to have the property known as Erf 1667 and Erf 1668 Messina Extension 12, made up of separate erven or*

being one consolidated property, transferred and registered into the applicant's name against payment of the amount of R153 000,00 payable on the date of transfer;"

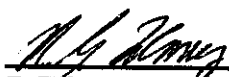


T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
14 March 2017

We agree.



P RABIE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



R TOLMAY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It is so ordered.

Appearances

For the Appellant:

Adv AJ Louw SC

Instructed by:

Friedland Hart Solomon Nicolson

Counsel for Respondent:

Adv C A da Silva SC

Instructed by:

Christo Coetzee Attorneys