

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

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: 1347/2014

**DATE HEARD: 05/06/2015
DATE DELIVERED: 8/06/2016**

In the matter between:

PHOKWANE MUNICIPALITY

Applicant

and

TRIPLE SEVEN COMMERCIAL HOLDINGS CC

1st Respondent

KAREL ERASMUS ALBERTSE

2nd Respondent

Coram: Olivier, J

JUDGMENT

Olivier J:

[1.] This is in essence an application aimed at enforcing a right of pre-emption.

[2.] During 1999 the Hartswater Municipality sold immovable property to the first respondent, Triple Seven Commercial Holdings CC. In terms of the contract, as well as a later amending addendum thereto:

- 2.1) the first respondent undertook to *“erect and develop a beet-sugar or sugar beet industry and/or a nursery and/or aquacultural development and the processing of by-products from the abovementioned products”*;
 - 2.2) the written consent of the seller would be needed for any variation of this obligation; and
 - 2.3) the first respondent granted the Hartswater Municipality a pre-emptive right to purchase the property back at the same price *“in event that the proposed project does not realize, ie does not commence as set out in clause 15(1) above”*.
- [3.] In terms of clause 15(1) the purchaser was obliged *“to erect and construct within 3-years – any one of the factories or developments, or within such extension of time as agreed upon by the seller”*.
- [4.] In terms of clause 3 of the contract transfer would be given as soon as possible after the first respondent had complied with its obligations.
- [5.] The applicant, the municipality of Phokwane, is the successor in law to the Hartswater Municipality.
- [6.] During 2002 the first respondent obtained default judgment and an order compelling the applicant to effect transfer of the property to the first respondent. The applicant then lodged an application for the rescission of that judgment. That application was subsequently

settled and in the deed of settlement, which was made an order of Court on 17 December 2004, it was *inter alia* agreed that the first respondent would have 24 (twenty four) months from the date of transfer of the property to comply with its obligations regarding development of the property.

- [7.] The transfer took place on 23 February 2005. The transfer was subject to certain conditions recorded in the deed of transfer one of which (Clause) was that:

“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 of 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 an 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.”

- [8.] On 3 September 2007 the applicant addressed a letter to the first respondent, claiming that the first respondent had not effected any development within the period of 2 (two) years of the date of

transfer and calling upon the first respondent to give effect to the applicant's right of pre-emption.

- [9.] On 3 October 2007 the first respondent's attorney responded and stated that the agreed development had commenced on 3 January 2007.
- [10.] After a visit to the property during October 2007, at the invitation of the first respondent and its attorney, Mr Z W Nikani, an employee of the applicant, addressed a letter to the first respondent's attorneys, recording that he had observed what the first respondent claimed to be the first phase of a nursery, that he disputed that the development had taken place within the agreed time, that he denied that it could be regarded as a nursery and that the applicant would not withdraw its claim that the pre-emptive right be given effect to.
- [11.] On 1 February 2008 the first respondent addressed a letter to the applicant proposing that the first respondent and the applicant become joint partners in the residential development of the property and on 18 November 2008 the applicant approved such a partnership.
- [12.] On 8 November 2011 the first respondent addressed a letter to the applicant, recording:

12.1) that *“We together with the officials from the municipality, however, finally came to realise that we do not have the capacity to embark upon a project of this magnitude”*;

12.2) that the first respondent had decided to sell the property to the Department of Land Affairs; and

12.3 that the applicant was requested to renounce its rights in terms of the deed of sale.

[13.] In August 2011 the applicant resolved not to renounce its right of pre-emption and on 26 March 2014 it called upon the first respondent to give effect to that right against tender of payment.

[14.] The two issues arising from the papers are:

14.1) whether the applicant’s right of pre-emption had become enforceable; and, if so

14.2) whether the applicant’s pre-emptive right has been extinguished by prescription.

[15.] The issue of prescription, if decided in favour of the first respondent, would make it unnecessary to decide the other issue.

- [16.] It was common cause that the applicable period of prescription would 3 (three) years in terms of section of the Prescription Act¹.
- [17.] It was also not in dispute that, on any conceivable construction of the events, that period would have expired before the application was lodged.
- [18.] Calculated from the expiry of the 2 (two) year period after transfer of the property, the 3 (three) year extinctive prescription period would have expired in February
- [19.] Even if it is to be assumed that the pre-emptive right only arose or became enforceable when the first respondent in its letter of indicated its desire to sell the property, the 3 (three) year prescription period would still have expired before this application was lodged on
- [20.] **NOTA AAN SELF: HANDEL VERDER MET DIE REGSPOSISIE TEN AANSIEN VAN DIE VRAAG OF 'N VOORKOOPSREG VATBAAR IS VIR VERJARING.**

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

¹

For the Appellant:	MS CILITSHANA
Instructed by:	
For the Respondent:	ADV. VAN NIEKERK S.C.
Instructed by:	