IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 1167/2024

In the matter between:

MADODA PHUMELELE MADIKIZA **Applicant**

And

EASTERN CAPE DEVELIPMENT CORPORATION **Respondent**

JUDGMENT

ZONO AJ:

Introduction

[1] The applicant approached this court on urgent basis and an interim relief was obtained by consent on the 14th March 2024 on the following terms:

> *"1. Any non-compliance with the rules relating to time frames, forms and services provided for in the Uniform Rules of Court is condoned in terms of Rule 6(12).*

2. *A rule nisi is hereby issued calling upon the respondent to show cause, if any, before this court on* ***Tuesday 2 April 2024 at 09H30****, or so soon thereafter as the matter may be heard, why the following order should not be made.*

   2.1 *That the respondent is interdicted and restrained from selling and/ or alienating and/ or disposing of* ***Erf 2[...],*** *situated at No [...] W[...] Drive, Fortgale, Mthatha (the property) without affording the applicant a right of first refusal to purchase the property.*

   2.2 *The respondent shall pay the costs of the application.*

3. *Paragraph 2.1 above shall operate as in interim interdict with immediate effect pending the return day and the final determination as to whether the applicant has a clear valid and enforceable right of first refusal to purchase the property"* (sic).

[2] The respondent, the Eastern Cape Development Corporation (ECDC) opposed this matter and in so doing it filed not only a notice of opposition, but also answering, and supplementary affidavit together with annexures. The applicant duly replied to ECDC's answering papers. On the 12th of March 2025 this matter came to this court apparently as a fully opposed matter and was postponed to the 19th of August 2025 for hearing of oral evidence in terms of the court order dated 05th of December 2024. I was not fortunate to find the court order dated 05th December 2024, where issues referred for hearing of oral evidence were outlined. The issues referred for hearing of oral evidence were not outlined in the court order dated 12th March 2025.

[3] However, the parties in terms of their joint practice note dated 19th August 2025, delineated the issues for hearing of oral evidence. It appears in paragraph 6 of the practice note that the contents of the court order dated 05th December 2024 are recorded as follows:

"*6.1 Whether in March 2021, there was a meeting between the applicant and Mr Dlulane, the then CEO of the respondent; and*

> *6.2 Whether in this meeting Mr Dlulane gave the applicant the right of first refusal to purchase Erf 2[...], No [...] W[...] Drive, Mthatha, and*
>
> *6.3 Whether this agreement was reduced to writing"* (sic).

[4] In paragraph 5 of their practice note it is recorded thus:

> *"5. The applicant in his replying affidavit dated 09th July 2024, requested that the matter be referred to oral evidence as there was a material dispute of fact relating to:*
>
> *5.1 Whether in March 2021, there was a meeting between the applicant and Mr Dlulane, the CEO of the respondent and;*
>
> *5.2 Whether in this meeting Mr Dlulane gave the applicant the right of first refusal to purchase Erf 2[...], No [...] W[...] Drive, Mthatha" (sic)*

[5] The court order dated 05th December 2024 and the practice note dated 19th August 2025 narrowed down issues for determination as are delineated therein. However, both the court order and the practice note flow from the pleadings. The relevant part of the founding affidavit is paragraph 7-8 thereof which read thus:

> *"7. I was unable to raise the purchase price within 90 days. Around March 2022 I held a meeting with Mr Ndzondelelo Dlulane, who was at the time the Chief Executive Officer of the respondent. The aim of this meeting was to negotiate with the respondent to give me more time to raise the purchase price. Mr Ndzondelelo Dlulane said he would not give me more time. He instead stated that the respondent was giving me a right of first refusal, in the event that the respondent decides to sell the property in question. The terms of the right of refusal were the same terms set out in paragraph 4.1 of the deed of settlement, namely that the respondent would conclude a deed of sale with me in terms of which the respondent would sell to me Erf 2[...], Umtata for purchase price of* ***R 1151 755.90*** *and afford me 90 days to raise and pay the purchase price.*
>
> *8. I left the meeting with a copy of the document containing the terms of the right of refusal. Ndzondelelo Dlulane also kept a copy of this agreement. The respondent's therefore have a copy of the agreement. Due to the extreme urgency in which this application has been brought I am unable to attach this document as I am still looking for it. I implore the respondent to make its copy available for this court*" (sic).

[6] In its answering affidavit ECDC denies that the applicant was given a right of first refusal as alleged by the applicant. It contends that if such right were to be given (which is denied) it would never be given on the same terms and conditions as the settlement agreement, i.e that the applicant would have a further 90 days to raise and pay the purchase price for the property. Mr Dlulane is no longer employed by the ECDC and there is no record whatsoever of any agreement being entered into with ECDC as suggested by the applicant. The ECDC states that it is not aware of the meeting the applicant had with Mr Dlulane. The ECDC denies that there is any document containing the terms of the right of first refusal that the applicant alleges. It concludes by saying, the fact that the applicant cannot locate what is an extremely important document to him serves to evidence that it does not in fact exist.

[7] The applicant undoubtedly relies on an alleged agreement entered into between him and the ECDC. In motion proceedings affidavits constitute both pleadings and evidence in support of the relief sought and/ or the defence raised. In application proceedings the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial[1]. Rule 18 of the Uniform Rules of Court (URC) is applicable in this matter especially that it ended up in the trial court. Rule 18(6) of URC provides that:

> *"(6) A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the*

[1] ***Transnet Ltd v Rubenstein*** 2006 (1) SA 591 (SCA) at 600G. In M***c Williams v First Consolidated Holdings (Pty) Ltd*** 1982 SA 1 (A) at 10E it was held that: it is clear that affidavits really constitute both pleadings and the evidence in support of the allegations made, and the <u>rules as to pleadings should, to that extent, be applied to affidavits.</u>

> *contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading*".

The provisions of Rule 18(6) of URC are obligatory.

[8] The applicant bases his cause of action against the ECDC upon a written agreement. The written agreement is a vital link in the chain of the applicant's cause of action against the ECDC. In order for the applicant's cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. An allegation that a party is not in possession of the written agreement relied upon, constitutes an acknowledgement that the basis for the cause of action advanced is lacking, or that a link in the chain of the cause of action advanced is missing. It is therefore clear that a party who bases its cause of action upon written agreement should obtain a true copy of the agreement before advancing its claim.

[9] However, there are exceptions. If the document is destroyed or lost, Rule 18(6) is not intended to compel compliance with impossibility. A document need not be attached if it is impossible to do so. Such non-compliance may be condoned in terms of Rule 27(3) of URC which provides thus:

> *"(3) The court may, on good cause shown, condone any non-compliance with these Rules".*

The subrule requires good cause to be shown[2]. This approach applies to all applications which may be brought under the subrule[3]. A defaulter should file an affidavit wherein he must furnish an explanation of his

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[2] ***Du Plooy v Anwes Motors (Edms) BPK*** 1983 (4) SA 212 (O) at 216H- 217D.

[3] Superior Court Practice- D_1-322 Service issue 17, 2021.

default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives[4].

[10] An applicant should, whenever he realizes that he has not complied with the Rule of court, apply for condonation without delay[5]. To start with there is no application before me that was made, either orally or in writing. This behoves me to deal with what appears in paragraph 8 of the founding affidavit contents of which are the following:

> *"8. I left the meeting with a copy of the document containing the terms of the right of refusal. Mr Ndzondelelo Dlulane also kept a copy of this agreement. The respondents therefore have a copy of the agreement. Due to the extreme urgency in which this application has been brought I am unable to attach this document as I am still looking for it. I implore the respondent to make its copy available for this court"* (sic).

The affidavit was deposed to on the13th March 2025 with the proceedings having been instituted on the same date. In paragraph 9 of the founding affidavit the applicant appears to have been advised of the import of the document, embodying his right of first refusal on the 12th March 2024.

[11] The respondent flatly denied in its answer the existence of the document relied upon by the applicant in their answer. In reply the applicant accepted that the respondent was unable to locate the document when the respondent was also denying its existence. The applicant made the following allegations in his reply:

> "*25. I maintain that there exists a document containing the terms of the right of first refusal as alleged in the founding affidavit. The inability to locate the document does not mean that it does not exists"* (sic).

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4 ***Sibber v Ozen Wholesalers (Pty) Ltd*** 1954 (2) SA 345 (A) at 353 (A).
5 ***Commissioner for Inland Revenue v Burger*** 1956 (4) SA 446 (A) at 449G-H.

The replying affidavit appears to have been served upon the respondent's attorneys on the 19th July 2024; which period exceeds four months after the filing of founding affidavit. I reiterate that the applicant promised in the founding affidavit to look for document embodying his right of first refusal. Four months later no application for condonation for the non-filing of the document embodying applicant's right of first refusal. On the 12th March 2025, more than a year or twelve months later, this matter came before court for its hearing as an opposed matter. The applicant still did not apply for condonation of non-filing of the document embodying his right of first refusal, instead the applicant declared a dispute of fact on the very issue of the existence of a right of first refusal, hence the referral for hearing of oral evidence.

[12] If I may revert to the replying affidavit the applicant alleges as follows:

> *"45. I am not able to find a copy of the written right of refusal even after a diligent search. During April 2023 there was a burglary at my home and most of my documents were stolen. The burglary was reported at Central Police Station under case no: 123/04/2023. I reiterate that I have a right of first refusal entered into between myself and Mr Ndzondelelo Dlulane, the later acting on behalf of the respondent.*

A case about the burglary and lost document only surfaced in the reply when no further pleading was expected from the respondent. It may be mentioned that the list of the items that were allegedly stolen during burglary is not placed before this court for this court to have an idea that applicant's documentary material was reported to have been stolen during the burglary that took place in applicant's home during April 2023. However, during his oral testimony the applicant testified that in 2022 some of the documents were taken away by the people as some were spewed all over his premises. This now presents a shift and variation from the version in the replying affidavit. The explanation therefore is not satisfactory and reasonable. It is now not clear if the burglary aforesaid was in 2022 or 2023. That being said, no application for condonation has been made. I express no view about the prospects of that application had it been made.

[13] On the conspectus of the above, it is now plain that the applicant has egregiously violated the provisions of Rule 18(6) of URC, thereby rendering applicant's cause of action incomplete, which cause of action is not sustainable. A matter without a complete cause of action cannot be sustained and that invariably leads to the dismissal thereof. This application cannot succeed.

[14] Even if I am wrong in this regard, applicant's case would still not succeed on a different ground. I deal with the ground hereinafter.

[15] In paragraph 5 hereof I have quoted verbatim the contents of paragraph 7 and 8 of the founding affidavit. It will be apposite to read those paragraphs together. In those paragraphs the applicant alleges that there was a meeting which resulted in an agreement to grant applicant a right of first refusal.

[16] It is important to understand and keep in mind the purpose of the alleged meeting. The CEO, Mr Dlulane and the applicant set out to talk and negotiate the extention of 90 days' period, which period the applicant was unable to meet to raise the purchase price agreed upon in the settlement agreement. When the parties were inviting each other, they had only that item on the agenda. When applicant's request was turned down by Mr

Dlulane, the CEO, an unexpected item[6] pitched up and formed an unexpected agenda item. A number of difficulties arise from this as I will demonstrate.

[17] Nowhere in the whole tenor of the founding affidavit does it appear that Mr Dlulane, the CEO was authorised to enter into an agreement with the applicant in relation to ECDC's property. No authority or whatsoever is pleaded by the applicant in his founding papers. In *Mistry*[7] Diemont JA makes this point aptly as follows:

> *"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and has been said in many other cases…. An applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny*."

The purpose of pleadings is to bring to the notice of the court and the parties the issues upon which reliance is to be placed for the rivalling contentions. It has been repeatedly said that the object of the pleadings is to define and ascertain definitely what the question at issue between the parties is and this object can only be attained when each party states his case with precision[8].

[18] The applicant adduced his oral testimony on the 19th August 2025. No evidence or whatsoever was tender on the subject. During argument Mr Msindo, applicant's Counsel was requested to make submission on the

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6 Especially on the part of the applicant.

7 ***Director of Hospital Services v Mistry*** 1979 (1) SA 626 (A) at 635-636A.

8 ***Imprefed (Pty) Ltd v National Transport Commission*** 1993 (3) SA 19 (A) at 107 C-H; ***ABSA Ltd v Blumberg and Wilkinson*** 1995 (4) SA 403 (WLD) at 409 C-F.

issue of the authority of Mr Dlulane and he requested to be given an opportunity to collect his thoughts and file his supplementary heads on the subject. He indeed filed applicant's supplementary heads of argument prepared by Adv A. Msindo. He strongly based his argument and relied on the authority of the Constitutional Court Judgment of Makate[9]

> *"65 ……… The concept of apparent authority as it appears from the statement by Lord Denning, was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent has authority to act on its behalf. If this appears to be the position to others and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement."*

[19] The above Constitutional Court judgment is binding on me. The doctrine of precedent, which requires court to follow the decision of coordinate and higher court is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution[10] . In *True Motives*[11] Cameron JA had this to say:

> *"100 …… Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions.*
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> *101. However, it is well established that precedent is limited to the binding basis (or ratio decidendi) of previous decisions. The doctrine obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision. Anything in a judgment that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (obiter dictum), and is not binding on subsequent courts*

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[9] ***Makate v Vodacom (Pty) Ltd*** [2016] ZACC 13 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) Para 65.

[10] ***Makhanya v University of Zululand*** 2010 (1) SA 62 (SCA); 2009 (8) BLLR 721 (SCA); 2009 (4) ALL SA 146 (SCA); 2009 30 ILJ 1539 (SCA) Para 6.

[11] ***True Motives 84 (Pty) Ltd v Madhi and others*** 2009 (4) SA 153 (SCA); 2009 (7) BCLR 712 (SCA); 2009 (2) ALL SA 548 (SCA) Pra 100-101.

[20] However, the dictum in *Makate* does not apply to the facts of this case. It is fundamental principle of our law that each case must be decided according to its own merits. It is clear from the dictum that the principal, ECDC in this case, must have created an impression that its agent, Mr Dlulane in this case, has the authority to act on its behalf. If this impression appears to be the position to others and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement.

[21] There is nothing pleaded by the applicant that would suggest that the ECDC created an impression that Mr Dlulane has the authority to enter into agreement to grant a right of first refusal to the applicant. During the oral testimony, the applicant also did not adduce any evidence that would demonstrate that ECDC created such an impression. The applicant, as the onus bearing party, has failed dismally to stablish facts that would support a conclusion that ECDC created an impression that Mr Dlulane was its agent in so far as it relates to the granting of right of first refusal. He who alleges must prove it.

[22] In line with Rule 18(4), which requires that "*every pleading shall contain clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto*", *Makate*[12]Judgment supports the proposition that authority must be pleaded. A party who wishes to rely on an Agency must allege and

[12] ***Makate v Vodacom (Pty) Ltd (Supra)*** Para 45 and 59.

prove the existence and scope of the authority of the alleged agent whether express or implied[13].

[23] The basic rules governing the incidence of the onus of proof have been set out in the case of *Pillay*[14] The three rules are the following:

> *"(a) if one person claims something from another in court of law, then he has to satisfy the court that he is entitled to it.*
>
> *(b) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quo ad that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.*
>
> *And*
>
> *(c) He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute*."

[24] Having stated above that the authority of Mr Dlulane was never pleaded and equally no evidence was adduced or led on behalf of or at the instance of the applicant to support or to establish that Mr Dlulane had authority to represent and bind ECDC in the agreement; I therefore come to a conclusion that applicant's submissions in supplementary heads on the issue of authority are an afterthought and a total thumbsuck.

[25] It is vital to note the following significant facts: The applicant could not tell the exact date when the alleged right of refusal was granted, contrary to what Rule 18(6) of URC requires. He was content with giving this court only the estimates. It is not expressly stated in the founding affidavit, at whose instance was the meeting called or convened. The

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[13] Harms Amler's Precedents of Pleadings, Seventh Edition, Page 23 and Case referred to therein.
[14] ***Pillay v Krishna and Another*** 1946 AD 946 at 951-2.

place of the meeting was not pleaded, contrary to what Rule 18(6) of URC requires. Much later in the oral evidence the applicant testified that the meeting was held at ECDC Boardroom at his instance. Looking at the purpose of the meeting, which was to negotiate the extention of the time within which to raise the purchase price, it is accepted that the meeting was called at the instance of the applicant. The manner in which that meeting was arranged is not clear both in the oral testimony and in the affidavits. That is important to give an idea as to the prior knowledge of the parties of the subject of the discussion thereat. It is vital to give an idea as to the possible arrangements and preparations that may have ensued to make a counter-offer to applicant’s proposal. Time or date when this meeting was agreed to. An *impromptu* meeting between the two individuals would not have afforded Mr Dlulane enough opportunity to secure and obtain the necessary authority and instructions from the ECDC. That points only to one direction that the applicant has failed to prove its case, especially that the ECDC disputes any knowledge of the agreement that gave rise to the alleged right of first refusal. It is not clear what could have veered the parties away from the original and basic agenda before the parties, and decide to talk about a matter that did not form part of the agenda. The meeting was about the extension of time within which to raise the purchase price, but the parties inexplicably agreed on a different issue about a right of first refusal. All the questions discussed in this paragraph and elsewhere in this judgment raise an issue of lack of probabilities on the applicant’s case.

[26] To bury the point about the issue of Mr Dlulane's authority, Ms Sephton, Counsel for the ECDC referred to section 14 of Act 2 of 1997[15] which provides thus[16]:

"14. <u>Chief Executive Officer</u>

> *(1) The board shall after consultation with the responsible member appoint a person as chief executive officer of the corporation who shall exercise such powers and perform such duties as may be authorised or prescribed by the board*."

[27] Both the ECDC[17] and the CEO[18] are creatures of statute. They have no inherent powers and their powers must be deduced from four corners of the statute. The powers the CEO would have had, would be the powers given to it by the Board of Directors appointed in terms of Section 7(3) of the Act. In terms of section 7(1) of the Act, the operations of the ECDC are managed and controlled by a Board of Directors, which may exercise all such powers of the corporation as are not required to be exercised by the shareholders of the ECDC. The operations include general functioning and working of ECDC excluding shareholder's powers and duties. Section 7(2) refers to the affairs of the operations of ECDC. It is plain that the power to manage and control the affairs of the ECDC is reposed to the Board of Directors. The South African Concise Oxford Dictionary meaning of the word *manage* is "*1 be in charge of; run; 2 Supervise."* The affairs of the ECDC are statutorily run and supervised by the Board of Directors. It is the Board of Directors that is in charge of ECDC affairs. This put paid to Mr Msindo's sigh of despair that the

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[15] Eastern Cape Development Corporation Act 2 of 1997
[16] Section 49 of Articles of Eastern Cape Development Corporation
[17] Section 2 of the Eastern Cape Development Corporation Act 2 of 1997
[18] Section 14 (Supra)

CEO is an accounting officer imbued with all powers to decide the affairs of the ECDC. There is no merit to such submission[19].

[28] Section 10 of the Interpretation Act[20] provides thus:

> *"…..*
>
> *(2) Where a law confers a power, jurisdiction or right, or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder".*

It therefore cannot be fathomed how a functionary can exercise a power without such power having been conferred upon him. The power to take charge of the operations and the affairs of the ECDC is statutorily conferred on the Board of Directors. There is no case made out for the delegation of that power to the CEO. There is no case made out to establish that the ECDC granted applicant a right of first refusal.

[29] The ECDC and the CEO comply with the definition of an organ of state[21]. Section 239(b) of the Constitution defines the organ of state to *inter alia,* mean:

> "………
>
> *(b) any other functionary or institution-*
>
> *(i) exercising a power or performing a function in terms of the Constitution or*
>
> *(ii) exercising a public power or performing a public function in terms of any a provincial constitution; or legislation."*

[19] Section 4(1) (r) of the Act provide *inter alia*, that the ECDC has the power itself to appoint or representatives in connection with any of its objects.
[20] Interpretation Act 1No 33 of 1957
[21] Section 239(b) of the Constitution.

ECDC exercises power in terms of the legislation. That makes it an organ of state. It therefore exercises public power.

[30] In *Chirwa*[22] Ngcobo J remarked thus:

> *"138 .... In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, "[t]hat power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution." Indeed, in Hoffmann v South African Airways, this Court held that "Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest."*

[31] The object of ECDC[23] shall be to plan finance, co-ordinate, market, promote and implement the development of the province and all its people in the field of industry, commerce, agriculture, transport and finance. For the attainment of its objects, ECDC shall have power to *" transfer"* any kind of movable or immovable property held by the corporation or any interest in such property[24]. It is therefore plain from these two provisions that the ECDC exercises its power in the public interest.

[32] The Doctrine of legality which requires that power should have a source in law is applicable whenever public power is exercised. Public power

[22] ***Chirwa v Transnet Limited and Others*** 2008 (4) SA 37 (CC); 2008 (3) BCLR 251 (CC) Para 138.
[23] Section 3 of Eastern Cape Developmnet Corporation Act 2 of 1997.
[24] Section 4(1) (5) of the Act.

can be validly exercised only if it is clearly sourced in law[25]. Khampepe J[26] had this to say:

> *"[1] State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law".*

[33] It is inapposite to contend that Mr Dulane, as the CEO, whose power in terms of the statute depended on what the Board of Directors would have given to him, would have had a power to enter into an agreement with a view to dispose of an asset of the ECDC. He does not have that power in terms of the law. His actions would have militated against the principle of legality which requires that all the exercise of public power must have a source in law. If Mr Dlulane did not have the power to enter into agreement encroaching to the management and control of the affairs of the ECDC[27], that exercise would have been unlawful and against the doctrine of legality. Applicant's case in this regard cannot succeed.

[34] Even if it can be said that there is a point in applicant's submission about authority, which is not the position, the applicant would still have a mountain to climb. Applicant vacillates between the fact that Mr Dlulane gave him a right of first refusal on the one hand, and the fact that there is an agreement of first refusal entered into on the other. Either way, the applicant seeks to enforce a contractual right as it is clearly argued in his heads of argument.

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[25] ***AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another*** 2007 (1) SA 343 (CC) Para 68.

[26] ***Head of Department, Department of Education, Free State Province v Welkom High School and another; Head of Department, Department of Education Free State Province and Another r v harmony High School and another*** 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) Para 1.

[27] Which power is reposed to the Board of Directors.

[35] What is stricking about applicant's case is the fact that, regarding the alleged giving of the right of first refusal, his affidavits and the oral testimony are completely silent about his reaction to all of this. Firstly, it is alleged that Mr Dlulane stated that he would not extend the time for the applicant to raise the purchase price, and further stated that he was giving him a right of first refusal in the event that ECDC decides to sell the property in question. However, no response appears to have been made to such an important statement. A proper response would have been to accept or reject such an offer. There is, importantly, no record of him accepting the offer, which reaction would have resulted in an agreement. Secondly, a document was given to him. Again, no reactionary attitude is exhibited both in the papers and oral evidence except to take the document and subsequently lose it. It is not clear if the document required both parties to sign. There is completely no record of the parties signing the document, as it would necessarily be the case if a written agreement was intended to be entered into. In a nutshell, how was the alleged offer accepted? There was no corresponding response to the alleged offer of the right of first refusal. One aspect of the rule that acceptance must be clear and unequivocal or unambiguous is that the acceptance must exactly correspond with the offer[28]. In the absence of clear and unambiguous acceptance which corresponded with the offer, there is no agreement at all. The right of pre-emption must comply with all the formalities and requirements of the agreement if the land is the subject of right of pre-emption[29].

Conclusion

[28] RH Christie: The Law of Contract in South Africa; 5th Edition, Page 62.
[29] AJ Kerr: The Law of Sale and Lease, 3rd Edition, Page 463.

[36] The probable facts of this case militate against the version of the applicant. An extract from the minutes of the meeting of the board of directors of 25th February 2021 demonstrates clearly that a resolution was taken by the board authorising the management to proceed with the property disposal as per the deed of settlement. Not only section 7 of the Act demonstrates that the management and control of the assets of the ECDC vests with the Board of Directors, also the practice as demonstrated by the resolution shows that. The CEO can only be authorised by the board to do anything. Only the implementation of the deed of settlement dated 16th March 2010 was authorised.

[37] Sequel to that, on 31st March 2021 the applicant was furnished with two deeds of sale, one in respect of Erf 2675 and the other in respect of Erf 2[...], for signatures. The applicant only signed the one relating Erf 2[…]2 and left the one relating to Erf 2[...] not signed. Reminders were made by ECDC to the applicant for him to append his signature, but to no avail. A letter dated 21st August 2021 was penned as a reminder following many reminders, but to no avail. On 30th September 2021, the settlement agreement dated 16th March 2010, which required that a deed of sale in respect of Erf 2[...], Umtata, between the applicant and the ECDC to be concluded, was cancelled. Even if it can be said that there was a right of first refusal in existence, it would have been discharged, extinguished or satisfied by the effort the ECDC embarked on to afford the applicant an opportunity to sign the deed of sale which substantially or exactly complied with the settlement agreement dated 16th March 2010. The applicant was directly offered to purchase the property on 31st March 2021 but failed to take up that offer as he deliberately chose not to sign a deed of sale relating to Erf 2[...], but preferred to sign one in respect of Erf 2[…]2. No explanation for such choice has been made to this court,

either in the papers or during oral evidence. This application clearly cannot succeed. As it fails it must do so with costs.

Order

[38] In the result I would make the following order:

1. **The rule *nisi* granted on 14th March 2024 is hereby discharged.**

2. **The application is hereby dismissed with costs.**

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

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For the Respondent : **ADV S.S SEPHTON**

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Matter heard on **:19 August 2025**

Delivered on **: 11 September 2025**