IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Not Reportable

Case No: M16/2023

In the matter between:

ROGER MENDO Applicant

and

RUSTENBURG LOCAL MUNICIPALITY First Respondent

COMBRINK KGATSHE INC. Second Respondent

MMAMI GIFT MOTLISI Third Respondent

Coram: Petersen ADJP
Heard on: 16 April 2026
Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 11 June 2026.

Summary: Immovable Property — Double Sale — Competing contractual claims to transfer — Municipality concluding prior written sale followed by later sale through admitted administrative error — Prior subsisting contractual rights of first purchaser preventing specific performance in

favour of later purchaser — Declaratory relief refused where no practical effect — Specific performance declined where prior valid sale renders performance impossible — Municipality to bear costs of all parties where its own administrative negligence was the sole cause of the litigation.

JUDGMENT

PETERSEN ADJP

Introduction

[1] This is an opposed application in which the Applicant, Mr Roger Mendo ("Mr. Mendo"), an adult male who describes himself as currently unemployed, seeks declaratory and mandatory relief against the First Respondent, the Rustenburg Local Municipality ("the Municipality"), a local authority duly established in terms of the Local Government: Municipal Structures Act 117 of 1998. The Applicant's claim arises from a dispute concerning the sale of immovable property described as Portion 14 of Erf 2[...], Rustenburg Extension 7 ("the property"). The Applicant seeks an order:

> '1.1 Declaring that the deed of sale concluded between himself and the First Respondent is valid and enforceable;
>
> 1.2 Directing the Second Respondent to transfer the property into the Applicant's name within seven days of the order;
>
> 1.3 Directing the Respondents to bear the costs of the application; and
>
> 1.4 Granting further and/or alternative relief.'

[2] The Second Respondent, Combrink Kgatshe Inc. ("Combrink Kgatshe"), is a firm of attorneys, notaries and conveyancers who, at all material times, acted as the conveyancers appointed by the First Respondent to attend to the transfer of the property which forms the subject matter of the application. The Third Respondent, Ms Mmami Gift Motlisi ("Ms Motlisi"), is an adult female employed by the First Respondent. She was joined to these proceedings by virtue of her competing claim to the property.

[3] The Municipality opposes the application. The Third Respondent, Ms Motlisi, who was subsequently joined to these proceedings, likewise opposes the relief sought and claims to be the rightful purchaser of the same property.

The Second Respondent, Combrink Kgatshe abides by this Court's decision but seeks an order that the Municipality pay its costs.

[4] The central question to be determined is which of the two competing purchasers, Mr. Mendo or Ms. Motlisi holds the enforceable right to take transfer of the property. This question arises from what the Municipality has frankly conceded was an administrative error resulting in a "double sale" of the same immovable property to two different purchasers.

Background

[5] The genesis of this dispute lies in a decision taken by the Municipality's Council during or about April 2017 to dispose of various residential stands situated in Geelhout Park Extension 6, Rustenburg Extension 7 (commonly known as Noord), and Rustenburg Extension 2 (Zinniaville). The property in dispute formed part of the stands in Rustenburg Extension 7.

[6] Pursuant to this resolution, the Municipality published an advertisement in the local newspaper, *Platinum Weekly*, on 21 April 2017. The advertisement stipulated, amongst other things, that the sale of the properties would be conducted on a "*first come, first served*" basis, and that preference would be given to first-time home owners.

[7] In terms of the stated requirements, a prospective purchaser was required to pay a deposit equivalent to ten percent of the purchase price, with the balance payable, or a bank guarantee provided, within thirty days of the signing of the purchase and sale agreement.

The third respondent's transaction

[8] It is apposite to commence in sequence, with the Third Respondent's transaction. On 5 July 2018, the Third Respondent, Ms Motlisi paid the required ten percent deposit in the amount of R10 000 into the Municipality's ABSA Bank account, thereby signifying her intention to purchase the property.

[9] On 5 September 2018, Ms. Motlisi concluded a written deed of sale with the Municipality in respect of the property. On 31 October 2018, she paid the balance of the outstanding purchase price of R90 000. It is common cause that this payment was made outside the stipulated 30 day' period and therefore constituted a breach of the written agreement of sale. However, the Municipality did not invoke the provisions of clause 10 of the agreement,

nor did it proceed to cancel the agreement. The late payment was accepted, and the agreement remained in force.

[10] It is undisputed on the papers that at the time of concluding her agreement with the Municipality, Ms. Motlisi was a first time home owner. She had no prior registered immovable property in her name.

The applicant's transaction

[11] Sequentially, Mr Mendo's transaction in respect of the same property, followed that of Ms. Motlisi. In circumstances that the Municipality describes as "inexplicable" and attributes to "*bona fide* error", the Municipality proceeded to sell the same property to Mr. Mendo. On 14 September 2018, the Municipality presented Mr. Mendo with a deed of sale for the property. Mr. Mendo signed this document. The date reflected on Mr. Mendo's signature page is incomplete, reading merely "14th" without specifying the month or year.

[12] Mr. Mendo made two separate payments of R10 000 each, totalling R20 000, in respect of the required ten percent deposit. On 3 October 2018, he paid the balance of the purchase price of R80 000.

[13] A further written deed of sale, signed by both Mr. Mendo and the Municipality's Director: Planning and Human Settlement, was subsequently executed. This document, annexed to the founding affidavit, bears the date "14th" alongside Mr. Mendo's signature (with the month and year omitted) and was signed by the Municipality's representative on 5 October 2018.

[14] It is significant to note that the date of 5 October 2018, upon which the Municipality's representative signed Mr. Mendo's agreement, falls exactly one month after Ms. Motlisi had concluded her deed of sale on 5 September 2018. Mr. Mendo's deed of sale contains a clause 5 which provides that possession of the property shall be given to the purchaser on the date of signing of the agreement. This clause differs materially from the standard deed of sale utilised by the Municipality, and from the agreement concluded with Ms. Motlisi, which provides that possession shall be given only upon registration of transfer. A further anomaly is that Mr. Mendo paid twice the required deposit amount, a circumstance consistent with administrative confusion within the Municipality's offices.

[15] Acting upon the purported sale agreement, Mr. Mendo took possession of the property and proceeded to erect structures thereon, including a borehole.

Discovery of the double sale and subsequent events

[16] Combrink Kgatshe identified the error of the "double sale" and brought this to the attention of the Municipality. Upon discovery of the double sale, the Municipality unsuccessfully attempted to resolve the impasse amicably with the co-operation and consent of both Ms. Motlisi and Mr. Mendo.

[17] On 3 September 2020, Mr. Mendo's attorneys addressed correspondence to the Municipality seeking clarity on why the transfer had not been effected. On 8 September 2020, Combrink Kgatshe responded, indicating that transfer could not be finalised due to "issues" arising out of the purchase and sale agreement. On 11 September 2020, the Municipality issued a legal notice instructing Mr. Mendo to remove any shelter or dwelling erected on the property, asserting that the property belonged to the Municipality.

[18] On 5 October 2022, the Municipality formally terminated the deed of sale with Mr. Mendo. The termination notice, attached to the Municipality's answering affidavit, cites numerous grounds. At the time of the conclusion of Mr. Mendo's agreement, a valid deed of sale had already been entered into between the Municipality and Ms. Motlisi. The advertisement of the properties stipulated a "first come, first served" basis. Ms. Motlisi's agreement was concluded prior to Mr. Mendo's, and the Municipality was bound to transfer the property to her based on the "first in time" principle. The deed of sale concluded with Mr. Mendo also contained various irregularities. The termination notice tendered a refund of the R100 000 purchase price paid by Mr. Mendo. Despite the termination of his agreement, Mr. Mendo refused to accept the cancellation and launched the present application.

[19] On 31 October 2022, the Municipality instructed Combrink Kgatshe to proceed with the transfer of the property to the Ms. Motlisi.

The third respondent's evidence regarding the applicant's property ownership

[20] In her answering affidavit, Ms. Motlisi adduced evidence, by way of Windeed searches, demonstrating that at the time Mr. Mendo purported to purchase the property, he was already the registered owner of at least five immovable properties. These properties include Erf 2[...]2, Rustenburg Extension 7, Title Deed No. T76627/2012, registered in 2012; Erf 2[...]3, Stellenbosch, Title Deed No. T72565/2007, registered in 2007; Portion 12 of Erf 2[...], Rustenburg Extension 7, Title Deed No. T11672/2018, registered in February 2018; Erf 7[...], Kaya Mandi, Title Deed No. T66188/2017, registered in 2014; and Erf 2[...]4, Rustenburg Extension 7, Title Deed No. T34209/2018, registered in January 2018. Mr. Mendo did not, in his replying affidavit, dispute the existence of these prior property registrations.

[21] Ms. Motlisi further averred that the Municipality, prior to concluding a sale agreement with any prospective purchaser, was required to verify whether such purchaser qualified as a first time homeowner, in accordance with the advertised preference. She contends that had this verification been properly conducted, Mr. Mendo would have been disqualified. Whilst this evidence stands uncontroverted, it will be shown that on a proper interpretation of the advertisement, nothing turns on this evidence.

[22] On 27 February 2023, after the termination of Mr. Mendo's agreement, the Municipality's Building Inspector, Mr Tshiamo Molefe, attended at the property and established that Mr. Mendo had proceeded to erect additional temporary structures on the property despite the termination.

Issues for determination

[23] In my view, the following issues arise for determination. Whether Mr. Mendo and Ms. Motlisi had concluded valid and enforceable deeds of sale with the Municipality. In that event, the question that arises is which agreement takes precedence in law. Mr. Mendo's failure to qualify as a 'first time' homeowner on the evidence of Ms. Motlisi as indicated above, must be considered on a proper interpretation of the advertisement of the Municipality. Lastly, the issue of an appropriate order as to costs arises.

The submissions of counsel

[24] I have had the benefit of the truncated heads of argument filed on behalf of the Municipality and the supplementary heads of argument filed on behalf of Mr. Mendo. Ms. Motlisi and Combrink Kgatshe were absent from and not represented at the hearing. Their papers filed of record have,

however, been considered. I have also had the benefit of oral submissions of counsel for Mr. Mendo and counsel for the Municipality, to the extent they bear upon the issues I must decide.

For the applicant

[25] Counsel for Mr. Mendo, on my count, advanced five principal submissions in support of the relief sought. These were supplemented by written supplementary heads of argument filed in response to the Municipality's truncated heads.

[26] First, it was submitted that Mr. Mendo's deed of sale complied in all material respects with the formal requirements of s 2(1) of the Alienation of Land Act 68 of 1981. The agreement identified the parties, the property (Portion 14 of Erf 2[...], Rustenburg Extension 7), the purchase price (R100 000), and the terms of payment. All *essentialia* of a sale of land were present in writing and signed by both parties. Counsel directed this Court's attention to the advertisement published in the *Platinum Weekly* newspaper and to the deed of sale itself. Mr. Mendo paid an initial deposit of R10 000 on 18 September 2018, a further R10 000 on the same date, and the balance of R80 000 on 3 October 2018, thereby discharging the full purchase price timeously. On 27 November 2018, the Municipality's Directorate: Planning and Human Settlement, through Ms M Parasi, wrote to Comprehensive Incorporated (the conveyancers then acting) directing them to effect transfer into Mr. Mendo's name, confirming that the purchase price had been paid in full. That letter is unequivocal evidence of the Municipality's own contemporaneous recognition of the validity of Mr. Mendo's agreement.

[27] Second, it was submitted that the absence of a completed date in Mr. Mendo's deed of sale was at most a clerical omission and not a vitiating defect. The Municipality acknowledged that its Director: Planning and Human Settlement signed the agreement on 5 October 2018, thereby making the date of conclusion ascertainable and known to all parties. On the Clause 5 discrepancy, it was argued that the variant wording was the Municipality's own drafting. Having presented Mr. Mendo with that document, having signed it, and accepted full payment, the Municipality could not repudiate the terms of the document it had itself tendered. The principle of *pacta sunt servanda* was invoked, with reference to *Tarentaal Centre Investments (Pty)*

Ltd v Beneficio Developments[1], which confirms that "*the principle gives effect to the constitutional values of freedom and dignity and that . . . public policy requires contracting parties to honour obligations freely and voluntarily undertaken*". Mr. Mendo, having performed in full and taken possession, the Municipality could not, in law, approbate and reprobate.

[28] Third, counsel submitted that the first time home owner condition could not be imported as an extrinsic term to invalidate Mr. Mendo's deed of sale. The agreement contained no express condition that the purchaser be a first time owner and no written suspensive condition to that effect. It was the Municipality that authored the deed of sale and presented it to Mr. Mendo. If a qualifying condition was intended to apply, it ought to have been expressly incorporated into the agreement. The Municipality's own negligence in omitting such a condition could not be deployed against Mr. Mendo to deprive him of rights arising from an agreement the Municipality itself had caused to be signed. To permit an unrecorded administrative criterion to override a signed written agreement would offend the very purposes of s 2(1) of the Alienation of Land Act. It was further submitted that there was no evidence that Mr Mendo had misrepresented his property status to the Municipality, which had the means to verify ownership before contracting.

[29] Fourth, it was submitted that Ms. Motlisi claim to be first in time was legally artificial. The payment of R10 000 on 5 July 2018, in the absence of any written deed of sale, could never constitute a valid agreement for the sale of land. Section 2(1) of the Alienation of Land Act is unequivocal, absent a written agreement, no valid sale of land exists. The earliest point at which Ms. Motlisi could arguably claim a valid agreement was the conclusion of the written deed of sale on 5 September 2018. That agreement, however, contained a suspensive condition requiring payment of the ten percent deposit upon signature of the deed. No such payment was made on 5 September 2018. The only payment traceable Ms. Motlisi's papers is the R90 000 paid at the end of October 2018, well beyond the 30 days stipulated for payment of the balance. The suspensive condition having never been fulfilled, the Municipality could not condone a breach of it. Ms. Motlisi's agreement was accordingly not in good standing from inception. Mr. Mendo by contrast, had performed timeously and in full at every stage and had been

[1] *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments* [2025] ZASCA 38 para 34.

given possession of the property by the Municipality itself under clause 5 of the deed of sale.

[30] Fifth, counsel submitted that the purported cancellation of Mr. Mendo's agreement on 5 October 2022 was unlawful. Clause 10 of the deed of sale set out an exhaustive regime governing breach and cancellation. Clause 10.2 required that, before any cancellation could be effected, a notice shall be given calling upon the defaulting party to remedy the breach within seven days. No such notice had been served because Mr. Mendo had committed no breach. Mr. Mendo had paid his deposit and the balance of the purchase price timeously and in full, and the Municipality had itself instructed its conveyancers to attend to the transfer. The cancellation was accordingly not premised on any recognised ground of contractual cancellation but was driven solely by the Municipality's belated realisation of its own error. On that basis, it was submitted that the Municipality's purported cancellation was without legal foundation, and the application for declaratory relief and specific performance should accordingly be upheld.

For the municipality

[31] Counsel for the Municipality submitted that the matter was straightforward on both the facts and the law. Mr. Mendo's counsel, it was posited, was seeking to modify the facts to tilt them in Mr. Mendo's favour. The Municipality's case did not depend on Ms. Motlisi having been the first to pay a deposit. The determinative fact, in terms of the law, was the date on which the seller concluded the deed of sale. Section 2(1) of the Alienation of Land Act requires a written agreement, and the relevant enquiry was when that agreement was concluded. On that basis, Ms. Motlisi's deed of sale was signed by the Municipality on 5 September 2018, and she was accordingly first in time. Mr. Mendo's agreement was signed by the Municipality only on 5 October 2018, one full month later. Once that fact was accepted, it was, on the Municipality's submission, the end of the matter for Mr. Mendo.

[32] On the suspensive condition argument advanced by Mr. Mendo, counsel for the Municipality submitted that the condition requiring payment of the deposit upon signature was inserted for the benefit of the Municipality as seller. The Municipality, as the beneficiary of that condition, had elected not to invoke it and had accepted Ms. Motlisi's late payment. That election had been communicated, and Combrink Kgatshe had accordingly been instructed not to transfer to Mr. Mendo once the double sale came to light.

The election was a lawful and valid exercise of contractual rights and could not be impugned. Counsel further submitted that Mr. Mendo had placed no special circumstances before the Court that would warrant a departure from the *prior tempore* rule. Mr. Mendo was second in time and had not established the exceptional circumstances necessary for the Court to exercise its equitable discretion in his favour. He relied on *Gugu and Another v Zongwana and Others*; *Fulsome Properties (Pty) Ltd v Selepe and Others*; and *Mahlangu v Mahlangu and Others*[2]. It was submitted that the application should accordingly be dismissed with costs.

[33] On the question of costs, counsel for the Municipality made a material concession. If this Court were of the view that it was the Municipality's administrative errors that had created the dispute between Mr. Mendo and Ms. Motlisi, the Municipality should not be awarded costs against Mr. Mendo. In those circumstances, the Municipality should rather bear the costs of the application itself. He further acknowledged that Combrink Kgatshe's claim for costs against the Municipality, arising from the conflicting instructions it had received, was well-founded.

For the applicant in reply

[34] In reply, counsel for Mr. Mendo urged the Court, even if it were inclined to apply the *prior tempore* principle, to exercise its equitable discretion in favour of Mr. Mendo on account of three special circumstances. First, Mr. Mendo had performed in full and timeously in terms of his agreement at every stage. Second, the Municipality was solely responsible for the double sale, having created the predicament through its own administrative negligence; it was entirely the Municipality's fault that the same property was sold twice. Third, Mr. Mendo had been in undisturbed occupation of the property for more than five to six years, having been contractually placed in possession by the Municipality itself under clause 5 of the deed of sale, and had in the interim drilled a borehole on the property. The Municipality, which was legally represented throughout, had never launched a counter-application to set aside Mr. Mendo's agreement, compel his eviction, or assert any right to the property. Counsel submitted that the balance of fairness firmly favoured Mr. Mendo and that the Court should

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[2] *Gugu and Another v Zongwana and Others* [2014] 1 All SA 203 (ECM) para 32; *Fulsome Properties (Pty) Ltd v Selepe and Others* (14001/2021) [2021] ZAGPPHC 196 para 36; and *Mahlangu v Mahlangu and Others* (19060/2015) [2016] ZAGPPHC 14 para 9.

accordingly depart from the strict application of the maxim and grant an order for transfer.

The applicable legal principles

[35] It is trite that a deed of sale for immovable property must comply with the formalities prescribed by s 2(1) of the Alienation of Land Act 68 of 1981, which requires that the contract be reduced to writing and signed by both parties or their authorised agents.

[36] Where competing contractual rights arise concerning the same immovable property, a court must consider the nature of the rights acquired and the remedy sought. Where the same immovable property is sold to two different purchasers by the same seller, and neither purchaser has yet taken transfer of the property, the general rule in our law is that the first valid sale in time prevails. This principle is encapsulated in the maxim *qui prior est tempore potior est jure* (he who is earlier in time is stronger in law). The rationale underlying this principle is that, upon the conclusion of the first sale, the seller assumes obligations inconsistent with a subsequent undertaking to transfer the same property to another purchaser. The maxim remains a useful principle for identifying competing claims, but it does not function as a rigid formula that automatically invalidates a later contract. The enquiry remains fact-sensitive and directed at determining which claimant possesses the stronger right to demand transfer in the circumstances of the particular case.

[37] A declaratory order is a discretionary remedy. The court must be satisfied that the applicant is an "interested person" in the sense of having a direct and substantial interest in the subject matter, and that the order would serve a practical purpose. A declaratory order will not be granted where it would be of merely academic interest or where no tangible benefit would flow from it.

[38] The remedy of specific performance, which Mr. Mendo in substance seeks by demanding transfer of the property, is likewise discretionary. A court will not decree specific performance where performance would be legally incapable of fulfilment, would conflict with prior enforceable rights, or would otherwise be inequitable in the circumstances.

The third respondent's agreement is valid and enforceable

[39] On the evidence before me, there can be no serious dispute that Ms. Motlisi concluded a valid and binding deed of sale with the Municipality on 5 September 2018. The agreement was reduced to writing, signed by both parties, and complies with the formalities prescribed by the Alienation of Land Act.

[40] The contention by Mr. Mendo that Ms. Motlisi's late payment rendered her agreement fatally defective is not sustainable. Ms. Motlisi paid the required deposit on 5 July 2018, predating even Mr. Mendo's deposit. She paid the balance of the purchase price on 31 October 2018. While it is true that the balance was paid late, thereby constituting a technical breach of the agreement, the Municipality elected not to cancel the agreement but instead accepted the late payment. The consequences of late performance were for the Municipality to invoke if it elected to do so. It did not do so. Instead, it accepted the late payment. Ms. Motlisi's contractual rights, therefore, remained operative. In law, the election not to cancel a contract following a breach operates as a waiver of the right to cancel on that particular ground.[3]

[41] The Municipality, through its answering affidavit deposed to by its Acting Municipal Manager, has unequivocally affirmed the validity of the Ms. Motlisi's agreement and has expressed its intention to honour that agreement by transferring the property to her. This stance is consistent with the legal opinion it obtained and with the instruction issued to Combrink Kgatshe on 31 October 2022.

The applicant's agreement is fraught with irregularities

[42] The Municipality identified various irregularities in Mr. Mendo's documentation, including completion anomalies and inconsistencies in the form used. Mr. Mendo's deed of sale is attended by several irregularities that may cast doubt on its validity and enforceability. It is not necessary to determine each of these issues conclusively.

[43] First, the date of Mr. Mendo's signature is incomplete. The document reflects only "14th" without specifying the month or year. While this defect might not be fatal in itself, if the surrounding circumstances could establish

[3] *Segal v Mazzur* 1920 CPD 634; *Mahabeer v Sharma NO* 1983 (4) SA 421 (D) at 423–424 (Kumleben J), approved in *Thomas v Henry and Another* [1985] ZASCA 56; 1985 (3) SA 889 (A) at 897I–898A (Van Heerden JA).

the date of signature, it is symptomatic of a broader lack of diligence in preparing the document. Second, and more significantly, the Municipality's representative signed Mr. Mendo's agreement on 5 October 2018. This was exactly one month after Ms. Motlisi had already concluded her agreement with the Municipality on 5 September 2018. By 5 October 2018, the Municipality had already bound itself contractually to Ms. Motlisi. It was therefore not open to the Municipality, consistently with its prior obligations, to undertake performance in favour of Mr. Mendo in respect of the same property. The subsequent agreement concluded with Mr. Mendo may have given rise to contractual rights as between Mr. Mendo and the Municipality, but those rights cannot prevail against the prior subsisting rights acquired by Ms, Motlisi under the earlier agreement. Third, clause 5 of Mr. Mendo's agreement, which purports to confer immediate possession upon the purchaser upon signature, differs materially from the standard terms of the Municipality's deeds of sale, including those of Ms. Motlisi. Ms. Motlisi's agreement provides that possession shall be given only upon registration of transfer. This discrepancy suggests that the document presented to Mr. Mendo may not have been the standard form utilised by the Municipality and may have been issued without proper oversight. Fourth, Mr. Mendo's payment of two separate deposits of R10 000 each, totalling R20 000 instead of the required R10 000, is consistent with administrative confusion. The Municipality's own description of the transaction as resulting from a bona fide error is borne out by the objective facts.

[44] Notwithstanding the aforesaid, and without finally determining every challenge raised concerning Mr. Mendo's agreement, I am prepared to assume in his favour that contractual rights arose between him and the Municipality capable of enforcement *inter partes*. This assumption, however, does not advance Mr. Mendo's claim to transfer because any such rights remain subject to the prior subsisting rights acquired by Ms. Motlisi.

[45] Mr. Mendo seeks to rely on the principle that a written agreement, once signed, constitutes the exclusive memorial of the parties' contract and cannot be varied or contradicted by extrinsic evidence of prior negotiations or conditions. This is the parol evidence rule, also known as the integration rule.[4] However, the parol evidence rule does not preclude evidence going to

[4] *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47; *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39.

the validity of the agreement itself, or evidence of fraud, misrepresentation, or mistake. The rule does not exclude evidence that an agreement is void for want of compliance with statutory requirements or for some other fundamental defect.

[46] In the present case, the evidence of the advertised conditions, particularly the "first come, first served" basis and the preference for first-time home owners, is relevant not to vary the written terms of Mr. Mendo's agreement, but to explain the context in which the Municipality's error occurred and to demonstrate why Mr. Mendo's agreement cannot, in equity and good conscience, be enforced against the Municipality when to do so would prejudice Ms. Motlisi, who complied with those very conditions.

[47] Whilst Mr. Mendo's failure to disclose his existing property portfolio to the Municipality, whether deliberate or not, may mean that he was not a person who fell within the class of intended beneficiaries of the Municipality's land disposal programme, this in my view does not operate in favour of Ms. Motlisi. *The "first time home owner" issue formed part of the broader factual context, but the advertisement referred to preference rather than an express contractual prohibition*. In my view, that issue is therefore not decisive of the impasse between the parties in this application.

The "first in time" principle applies

[48] In my view, due regard had to the discussion aforesaid and accepting that the agreements of Mr. Mendo and Ms. Motlisi are, on their own merits valid, the principle that the first valid sale in time must prevail. The application of this principle is dispositive of the matter. I am therefore driven to conclude that Ms. Motlisi's prior agreement takes precedence over Mr. Mendo's purported agreement. The chronology is clear. Ms. Motlisi paid her deposit on 5 July 2018 and signed her deed of sale on 5 September 2018. Mr. Mendo signed a document on a date in September 2018 (likely 14 September 2018), but the Municipality's representative did not sign it until 5 October 2018. Ms. Motlisi's agreement was thus perfected before the Municipality concluded the agreement with Mr. Mendo.

[49] Even if one were to accept that Mr. Mendo's agreement was concluded on 14 September 2018, the date he signed, Ms. Motlisi's agreement still predates it by nine days. On either approach, Ms. Motlisi's agreement is first in time. The Municipality, upon discovering its error, elected to honour the

first agreement and on 5 October 2022 purported to terminate Mr. Mendo's agreement whilst tendering repayment of the purchase price. Whether that cancellation was legally effective need not be finally determined for purposes of this application because, even if Mr. Mendo's contractual rights survived cancellation, those rights cannot prevail over the prior rights acquired by Ms. Motlisi.

[50] Mr. Mendo's insistence on transfer in the face of a prior valid sale to Ms. Motlisi is legally untenable. The Municipality cannot lawfully transfer the same property to two different persons. To compel transfer to Mr. Mendo would require the Court to disregard the prior contractual rights acquired by Ms. Motlisi and would produce an inequitable result inconsistent with established principles governing competing claims to the same property.

The declaratory relief

[51] Mr. Mendo seeks declaratory relief that his agreement is valid and enforceable. Even if contractual enforceability were assumed between Mr. Mendo and the Municipality, such a declaration would provide no effective practical relief once it is concluded that transfer cannot appropriately be compelled. The real controversy concerns transfer.

[52] It is well established that where a seller is unable to transfer property to a purchaser because of a prior sale to a third party, the purchaser's remedy ordinarily lies in a claim for damages rather than specific performance. Even assuming that contractual rights arose in favour of Mr. Mendo, the central controversy before this Court concerns entitlement to transfer. The existence or otherwise of a damages claim is not before this Court. In the circumstances, a declarator concerning contractual enforceability would not alter the parties' present legal position regarding transfer of the property.

[53] The Municipality has already tendered a refund of the R100 000 purchase price paid by Mr. Mendo. To the extent that Mr. Mendo may have suffered additional damages, including the cost of improvements effected on the property, his remedy lies in the pursuit of such relief in the appropriate forum. This Court is not seized with such a claim and expresses no view on its merits.

[54] In the premises, the declaratory relief sought by Mr. Mendo cannot be granted. Mr. Mendo has failed to establish that the declaratory order would

have any practical effect or serve any useful purpose in determining entitlement to transfer of the property.

Cancellation

[55] Mr. Mendo challenged the efficacy of the Municipality's purported cancellation. It is unnecessary to determine that issue finally. Even if cancellation were ineffective, Mr. Mendo would remain unable to secure the specific performance sought because the obstacle lies in MS. Motlisi's prior subsisting rights.

Costs

[56] The general rule is that costs follow the event. Although Mr. Mendo fails in the principal relief sought, this is an exceptional case. The litigation was caused entirely by the Municipality's admitted administrative failures in creating conflicting contractual expectations concerning the same property. It is therefore the Municipality that bears exclusive responsibility for the predicament in which all parties now find themselves. Neither Mr. Mendo nor Ms. Motlisi was responsible for the duplication and is an innocent party to a dispute created by the Municipality. The Municipality issued deeds of sale on non-standard terms, omitted dates, accepted duplicate deposits, and permitted Mr. Mendo to take occupation of the property in terms of a clause conferring possession upon signature. This clause appeared in no other sale agreement in the programme. The resulting litigation was entirely foreseeable and entirely avoidable.

[57] Combrink Kgatshe's involvement likewise arose directly from the Municipality's conduct. The Municipality should also be held liable for the costs of Combrink Kgatshe, whose engagement in these proceedings was necessitated by the conflicting instructions it received from the Municipality as a direct result of the double sale. I am edified in this conclusion by the concession made by counsel for the Municipality at the hearing that, if the Court found the Municipality's administrative failures to be causative of the litigation, costs should not be visited upon Mr. Mendo and the Municipality should rather bear the costs itself.

[58] In the circumstances, fairness dictates that the Municipality bear the costs occasioned by this litigation. In the exercise of this Court's discretion, it is just and equitable that the Municipality bear the costs of Mr. Mendo, Combrink Kgatshe Inc., and Ms. Motlisi.

Order

[59] In the result, I make the following order:

1. The Applicant's application for a declaratory order that the deed of sale concluded between the Applicant and the Municipality is valid and enforceable is dismissed.

2. The Applicant's application for an order directing the Second Respondent to transfer Portion 14 of Erf 2[...], Rustenburg Extension 7, into the Applicant's name is dismissed.

3. The Municipality is directed to refund to the Applicant the amount of R100 000 (One Hundred Thousand Rand) paid by the Applicant as the purchase price for the property, together with interest thereon at the prescribed legal rate *a tempore morae* from 5 October 2022 (being the date of cancellation) to the date of final payment. Such payment shall be made within thirty (30) days of the date of this order.

4. The Municipality shall pay the costs of the Applicant, the Second Respondent, and the Third Respondent, including the costs of their respective counsel where employed, such costs to be taxed on the party-and-party scale, Scale B.

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A.H. PETERSEN
ACTING DEPUTY JUDGE PRESIDENT
NORTH WEST DIVISION, MAHIKENG

<u>Appearances</u>

For the Applicant:	Adv. T J Makgate
Instructed by:	Mogau Attorneys, Mafikeng
For the Municipality:	Adv. O K Chwaro

Instructed by:	M.E. Tlou Attorneys, Mafikeng
For the Second Respondent:	No Appearance
Instructed by:	Combrink Kgatshe Inc.
For the Third Respondent:	No Appearance
Instructed by:	Kgokgong Nameng Tumagole Inc.