IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

Civil Case No. 654/2011

In the matter between:

ALI KHAN	**APPLICANT**
AND	
NJABULO MABUZA	**First RESPONDENT**
NQABA MZIKAYISE DLAMINI	**Second RESPONDENT**
NTOMBI DLAMINI	**Third RESPONDENT**
BUSISIWE NGCAMPHALALA	**Fourth RESPONDENT**
THE REGISTRAR OF DEEDS	**Fifth RESPONDENT**
THE ATTORNEY GENERAL	**Sixth RESPONDENT**
CORAM	MCB MAPHALALA, J
FOR APPLICANT	N. Fakudze
FOR RESPONDENTS	L. Mzizi

Summary

Civil Procedure - Contract for the sale of immovable property - Purchaser complies with terms of contract inclusive of purchase price and transfer costs -Seller concludes another sale in respect of same property with Third Party and effect transfer - Purchaser seeks order for Specific Performance For transfer of property - Seller pleads impossibility of performance.

JUDGMENT
6th APRIL 2011

[1] An urgent application was instituted for an order directing that the purported sale of Lot No. 1216 situate at Madoda Township in Manzini by the First Respondent to the Bhubhudla Family Trust is null and void; he further asked for an order directing the First Respondent to transfer or cause to be transferred the said property to the Applicant. In

addition, he asked for an order directing the Fifth Respondent to cause the deregistration of the property in the name of Bhubhudla Family Trust and have same registered in the name of the Applicant.

[2] The applicant and the First Respondent concluded a written contract for the sale of Lot No. 1216 situate at Madoda Township in Manzini on the 27th September 2010 for a purchase price of E320 000.00 (Three hundred and twenty thousand Emalangeni). In terms of the contract, the parties acknowledged that an initial payment of E25 000.00 (Twenty five thousand Emalangeni) as well as a deposit of E75 *000.00* (Seventy five thousand Emalangeni) had been paid. The balance of E220 000.00 (Two hundred and twenty thousand Emalangeni) was payable in two equal instalments; the first instalment was payable on the 30th October 2010 and the balance was payable upon the transfer of the property into the name of the purchaser.

[3] The applicant alleges that on the 4th November 2010, the First Respondent was paid an amount of E99 900.00 (Ninety nine thousand nine hundred Emalangeni) by cheque being the first portion of the balance of the purchase price. At the end of November 2010 the applicant gave his Attorney a cheque of E120 000.00 (One hundred and twenty thousand Emalangeni) for payment to the First Respondent upon registration of transfer of the property into his name; furthermore, he paid to his conveyancers E23 107.68 (Twenty three thousand one hundred and seven Emalangeni sixty eight cents) being

transfer costs. He further signed all transfer documents and handed them to the conveyancers in respect of the transfer.

[4] The applicant further alleges that the First Respondent requested his Attorneys to pay an amount of E9 885.71 (Nine thousand eight hundred and eighty five Emalangeni seventy one cents) to the Swazi Bank in respect of a loan account held with the bank. This money was paid from the moneys held by the Applicant's Attorneys in trust pending transfer. In addition, the First Respondent requested Applicant's Attorneys to pay E10 918.75 (Ten thousand nine hundred and eighteen Emalangeni seventy five cent) to the Manzini Municipal Council in respect of rates owed; again, this money came from the money held by the Applicant's Attorneys in trust pending transfer. Furthermore, the First Respondent requested Applicant's Attorneys to pay him E20 000.00 (Twenty thousand Emalangeni) from the money held by his Attorneys in trust since he had pressing financial commitments.

[5] The Applicant also alleges that he was advised by the Conveyencer that the First Respondent was duly given transfer documents to sign and return -them to him; however, he did not return the documents as advised. The First Respondent is alleged to have taken the Rates Clearance Certificate from the Applicant's Attorneys on the pretext that he wanted to use it to obtain a Tax Clearance Certificate from the Department of Income Tax; however, he did not give any of these documents to the Conveyancer.

[6] The Applicant further alleges that on the 16th February 2011, he was advised by his Attorney that the First Respondent had sold the property to, the Bhubhudla Family Trust for a purchase price of E360 000.00 (Three hundred and sixty thousand Emalangeni). He argued that the First Respondent did not have the right to sell the property to a Third Party since he had sold the property to him. On the 10th February 2011, the First Respondent delivered to Applicant's Attorney a cheque of E165 855.46 (One hundred and sixty five Thousand eight hundred and fifty five Emalangeni forty six cents) being a refund of all monies paid to him by the Applicant in respect of the purchase price of the property; the applicant refused to take the cheque and demanded that the property should be transferred to him.

[7] The applicant's Attorney Zonke Magagula has deposed to a Confirmatory Affidavit in support of the allegations made by the Applicant in his Founding Affidavit. In addition, he confirmed that the First Respondent took the Rates Clearance Certificate from his office, and that he did not return it despite repeated calls to do so; and, that he only resurfaced in January 2011 with the refund cheque saying that he had sold the property to a Third Party. The Applicant demanded the enforcement of the agreement.

[8] The First Respondent opposes the application and he has filed opposing papers. In *limine* he has raised two points: First, that the matter is not urgent because he sold the property to a Third Party in January 2011, and, that the Applicant was aware of the sale. Secondly, that there are material disputes of fact which cannot be resolved

through Motion Proceedings. In particular, he stated that the Applicant was aware that he was no longer the owner of the property, and that the applicant had agreed that he could sell the property and refund him of the purchase price. He further argued that the Applicant had failed to pay the purchase price timeously when it fell due; in addition, he alleged that the applicant had failed to sign the agreement of sale. However, during the hearing, the First Respondent did not pursue the Points
in *Limine,* but, he proceeded to make submissions on the merits. -

[9] The applicant had lent and advanced E25 000.00 (Twenty five thousand Emalangeni) to the First Respondent which, and, he failed to repay on the agreed date. They agreed that the applicant could use the loan amount as part of the purchase price. The applicant further sold him a Land Rover import motor vehicle at a purchase price of E75 000.00 (Seventy five thousand Emalangeni); it was agreed that this amount would be set-off from the purchase price of the property. The First Respondent conceded taking the motor vehicle; however, he alleges that he returned it after a week because it had mechanical problems.

[10] The First Respondent conceded to signing the Deed of Sale in respect of the property at the offices of the Applicant's Attorney; and that he did this in the absence of the applicant. He further conceded that he received payment of E99 900.00 (Ninety nine thousand nine hundred Emalangeni) and E20 000.00 (Twenty thousand Emalangeni) respectively as alleged by the Applicant. The First Respondent also

alleged that he returned the motor vehicle to the Applicant and demanded a refund of the purchase price but the Applicant failed to pay him. He conceded selling the property on the 11th December 2010 for a purchase price of E360 000.00 (Three hundred and sixty thousand Emalangeni), and, that prior to the sale he verified from Applicant's Attorneys if the balance of the purchase price had been paid; and, that he was informed by Siceliwe Magagula, an accountant employed by Applicant's Attorneys that the final payment had not been made. The accountant further informed him that the Applicant had not signed the Deed of Sale.

[11] It is not in dispute that on the 10th February 2010, the First Respondent delivered to Applicant's Attorneys the refund cheque of E165 855.46 (One hundred and sixty five Thousand eight hundred and fifty five Emalangeni forty six cents). The Applicant rejected the refund cheque and demanded the transfer of the property.

[12] The First Respondent denies concluding the contract with the Applicant on the 27th September 2010 as reflected in the Deed of Sale; he alleges that on the 10th December 2010, the applicant had not yet signed the contract. He further argued that the applicant's signature appearing on the Deed of Sale was different from the one appearing on the Founding Affidavit; he suspected that the Deed of Sale was signed by a person other than the Applicant in order to cover up the fact that the applicant had not signed the agreement.

[13] He denied that the Applicant had complied with the agreement, and argued that the applicant had paid E99 900.00 (Ninety nine thousand nine hundred Emalangeni) and not EI 10 000.00 (One hundred and ten thousand Emalangeni) as reflected in the contract; and, that the said payment was made after the due date of 30th October 2010. He argued that the Applicant was acting in breach of the contract by failing to make the payment timeously. The First Respondent further denied that the Applicant had paid the balance of EI20 000.00 (One hundred and twenty thousand Emalangeni) to his Attorneys pending transfer on the basis that no proof was annexed to the application.

[14] The First Respondent further alleged that on the 9th February 2011, he informed the Applicant that he had sold the property to a Third Party; and, that he would pay the refund of the purchase price. The First Respondent further alleged that the applicant had consented to the sale. This is denied by the Applicant.

[15] The First Respondent conceded that Applicant's Attorneys paid E9 895.71 (Nine thousand eight hundred and ninety five Emalangeni seventy one cents) to the Swazi Bank on his behalf. Furthermore, he conceded that Applicant's Attorneys paid arrear rates at the Manzini Municipal Council on his behalf. He further conceded receipt of E20 000.00 (Twenty thousand Emalangeni) from Applicant's Attorneys.

[16] The First Respondent further denied that he took transfer documents from applicant's Attorneys; however, he conceded taking

the Rates Clearance Certificate from Applicant's Attorneys. He said he could not have taken the transfer documents because he had not been paid the balance of the purchase price. This argument is misleading and incorrect because the balance was only payable on registration of transfer.

[17] The First Respondent further argued that he was entitled to sell the property because the applicant had breached the contract by failing to pay the agreed purchase price timeously. He further argued that as at the 10th December 2010, the applicant had not signed the Deed of Sale; he denied that the Agreement was signed by the applicant on the 27th September 2010 as reflected in the agreement. He further justified selling the property on the basis that the applicant had verbally told him that he should sell the property to a Third Party and refund him the purchase price paid.

[18] The First Respondent also argued that the property was sold to an innocent Third Party who has already taken transfer of the property; and, that it was impossible for him to transfer the property to the Applicant because it does not belong to him anymore.

[19] Sandile Mabuza deposed to a Confirmatory Affidavit in which he confirmed the allegations made by the First Respondent in his Answering Affidavit. In particular, he confirmed that he went to the offices of the Applicant's Attorneys with the First Respondent on the 10th December 2010, and, that they were attended by an accountant employed by the Applicant's Attorneys. The latter had told the First

Respondent that the Applicant had not yet paid the balance due; she further confirmed that she was not in a position to give the First Respondent a copy of the Deed of Sale because the applicant had not signed it.

[20] In his replying affidavit, the applicant denied the existence of a material dispute of fact, and re-iterated that the contract was concluded on the 27th September 2010; and, that the first payment was made on the 4th - November 2010 in the sum of E99 900.00 (Ninety nine thousand nine hundred Emalangeni). He admitted knowledge that the property was sold to a Third Party but denied that the First Respondent had the right to do so on the basis that he had sold the property to him. He denied giving the First Respondent permission to sell the property, and argued that he could not do so since he had paid for the property in full.

[21] The applicant denied that the First Respondent kept the motor vehicle for a week but alleged that he kept it for two months; thereafter, he brought it to his workshop alleging that the sun-roof was malfunctioning. He further denied that his mechanics had failed to repair the motor vehicle but that they were awaiting delivery of parts from Japan; furthermore, he alleged that the First Respondent said he did not need the motor vehicle immediately, and that he would collect it once the repairs had been completed. He further conceded that the First Respondent signed the Deed of Sale in his absence, but argued that his presence was not necessary for the validity of the contract as long as there were witnesses who were present when he signed the

document. He further alleged that sometime in December 2010 the First Respondent came to his workshop to check if the motor vehicle had been repaired; he found that the parts were now available and ready to be fitted into the motor vehicle.

[22] The Applicant further alleged that the First Respondent had mentioned to him immediately after the conclusion of the contract that there was a Person who was interested in purchasing the property, and, he had told him that the said person should get in touch with him; he denied consenting to the sale of the property to the Third Party or demanding a refund of the purchase price.

[23] The applicant denied that he had not made payment of the balance of the purchase price at the time when the First Respondent went to the offices of his Attorneys in December 2010 to check if payment had been made; according to him, his Attorneys had already deposited the cheque in their Trust Account awaiting clearance. He further argued that the balance of the purchase price was payable to the First Respondent upon registration of transfer.

[24] Furthermore, the Applicant conceded that the First Respondent did ask for a copy of the Deed of Sale from the Accountant; however, she advised him that she could not find it in the office of his Attorney. He denied that the Accountant told the First Respondent that he had not
yet signed the contract of sale.

[25] The applicant further argued that he could not have paid the cheque of E99 900.00 (Ninety nine thousand nine hundred Emalangeni) on the 4th November 2010 if he had not signed the Deed of Sale. He confirmed signing the Deed of Sale in the presence of witnesses on the 27th September 2010 as well as the Founding Affidavit before a Commissioner of Oaths; he denied that the signatures were not similar.

[26] The applicant denied that he acted in breach of the contract as alleged or at all and argued that if he had done so, it was open to the First Respondent to cancel the contract formally in accordance with the prodedure laid down in the contract. He argued that the First Respondent continued after the 10th December 2010 and instructed his Attorneys to make payments on his behalf to Swazibank and the Manzini Municipal Council; and according to the applicant, such conduct is inconsistent with an intention of cancelling the contract. He attached copies of cheques drawn in favour of his Attorneys with a Nedbank stamp dated 30th October 2010 in the sum of El00 000.00 (One hundred thousand Emalangeni), 30th November 2010 in the sum of E100 000.00 (One hundred thousand Emalangeni), 4th December 2010 in the - amount of E20 000.00 (Twenty thousand Emalangeni), and 7th December 2010 in the amount of E23 107.00 (Twenty three thousand one hundred and seven Emalangeni). According to him, the said payments proved that he complied with the contract, paid the purchase price in full as well as transfer costs.

[27] The Applicant further argued that after payment of the transfer costs, his Attorneys asked the First Respondent to give them the Rates Clearance Certificate but he told them that he owed Rates; hence, he requested his Attorneys to pay the rates on his behalf. Furthermore, the First Respondent did not have the original Title Deed because of his loan account with Swazibank; again, he requested Applicant's Attorneys to pay the bank on his behalf in order to have the original Title Deed released. He argued that without the Title Deed and the Rates Clearance Certificate he could not take transfer of the property. He re-iterated that the First Respondent had taken the Transfer Documents for his signature but did not return them.

[28] The applicant further denied that the First Respondent told him that he had sold the property. He further denied that there was an agreement that he would pay E75 000.00 (Seventy five thousand Emalangeni) to the First Respondent after the motor vehicle had been returned; He further argued that the First Respondent was not entitled to be given the balance of the purchase price prior to the transfer of the property; the money had to be kept by the conveyancers pending transfer. Again, he re-iterated the fact that the balance of the purchase price was paid and kept in Trust by his Attorneys pending transfer. He argued that the First Respondent was not entitled to sell the property before he had cancelled their agreement.

[29] The Accountant in the office of Applicant's Attorney deposed to an affidavit in which she conceded that the First Respondent came to her office and asked for a copy of the Deed of Sale; he was in the company

of another person she did not know. She looked for the copy in the office of Attorney Zonke Magagula but could not find it; she denied telling the First Respondent that the Deed of Sale had not been signed by the Applicant. She further denied telling the First Respondent that the applicant had not paid the balance of the purchase price. She confirmed that the applicant had paid two cheques of EI00 000.00 (One hundred thousand Emalangeni) each; the first cheque was dated 30th October 2010 and the second cheque was dated 30th November 2010. The first cheque was deposited in their Trust Account on the 1st Ndvember 2010 at the instance of the First Respondent who pleaded that he needed money urgently; hence, a special clearance of the cheque was requested from the bank notwithstanding advice given to him that a special clearance attracts high bank charges. The First Respondent asked to be paid E99 *900.00* (Ninety nine thousand nine hundred Emalangeni), and he was duly paid the said amount on the 4th November 2010; again he requested a special clearance for the said cheque, and, it was granted.

[30] The Accountant further stated that on the 1st December 2010, she deposited the second cheque of EI00 000.00 (One hundred thousand Emalangeni); and, that she did not ask the bank for a special clearance for two reasons: First, the First Respondent did not ask for money; Secondly, Attorney Zonke Magagula had told her that the money would only become payable to the First Respondent upon transfer of the property to the Applicant. She conceded that at the beginning of December 2010, the First Respondent enquired if the second cheque had been cleared by the bank, and, she told him that it had not yet

been cleared; but she told him that payment to him of this amount would only be made upon transfer of the property to the applicant. The First Respondent was accompanied by another person she did - not know; and, that it was during the same, occasion that he asked for a copy of the Deed of Sale.

[31] The Accountant confirmed that she advised the First Respondent to furnish a Tax Clearance Certificate, a Rates Clearance Certificate as well as the original Title Deed for purposes of the transfer. However, he indicated that he was unable to produce these documents; and, he asked to speak with Attorney Zonke Magagula but he was not in the office that day. The First Respondent had to come back on another day where he spoke with him. She doesn't know what was discussed between them. Mr. Magagula later instructed her to draft the Power of Attorney, the Seller's Declaration as well as the Purchaser's Declaration; he further instructed her to prepare cheques for payment to the City Council in respect of rates and the Swazibank in respect of the bond settlement. The First Respondent gave her the figures to write on the cheques; and, the cheques were later dispatched by the office messenger. It was on the same day that the First Respondent told her that the purchase price paid by the Applicant had a shortfall of E20 000.00 (Twenty thousand Emalangeni); thereafter, she telephoned Applicant's Business Manager, Lindiwe Dlamini, and asked her to report this shortfall to the applicant. On the 14th December 2010, the applicant paid the cheque of E20 000.00 (Twenty thousand. Emalangeni) to her office as requested.

[32] After she had paid for the rates and the bond, the First Respondent asked her for an amount of E20 000.00 (Twenty thousand Emalangeni) as he was financially embarrassed. She informed Applicant's Attorney of the request by the First Respondent; and, he instructed her to prepare the cheque of E20 000.00 (Twenty thousand Emalangeni) and give it to the First Respondent.

[33] Subsequently, the First Respondent informed her that he was unable to obtain the Tax Clearance Certificate and that she should give him the Rates Clearance Certificate for the attention of the Income Tax Department in order to convince them that he needed the Tax Clearance Certificate to transfer property and nothing more; the accountant was aware that what the First Respondent was saying was unusual, but she did not suspect any foul play because the First Respondent was a respected person in the country. The First Respondent did not return to her until February 2011 when he gave her a refund cheque of E165 855.46 (One hundred and sixty five thousand eight hundred and fifty five Emalangeni forty six cents); and, he told her to deposit it immediately. The Applicant's Attorney instructed her not to deposit the cheque pending receipt of further instructions from the Applicant. She further pointed out that when the First Respondent took the Rates Clearance Certificate, he did not tell her that he had sold the property or that he would use it in transferring the property to a Third party. She further confirmed that the First Respondent had on numerous occasions been reminded on his mobile phone to return the transfer documents; however, he did not do so

despite promises to bring them. She further denied that the contents of the Confirmatory Affidavit of Sandile Mabuza are true and correct.

[34] Attorney Zonke Magagula also deposed to a Confirmatory Affidavit in which he disputed the allegations made by the First Respondent that he never met him; and, he alleged that the First Respondent had met him on a number of occasions pertaining to this matter. On the 19th February 2011 he came to his residence on a Saturday and persuaded him to mislead the applicant. He further stated that it was the First Respondent who requested him to pay rates as well as the Loan Account with Swazibank. He denied telling the First Respondent that the applicant was dishonest or that he had compelled him to purchase a motor vehicle from him; he had told the First Respondent that the applicant had borrowed him a motor vehicle which later broke down, and that-he had-to pay for repairs because he- was using it at the time. He had assured the First Respondent that his Land Rover would be repaired because the applicant had good mechanics.

[35] He confirmed that he learnt of the sale of the property in February 2011; and, that the date appearing in his Confirmatory Affidavit attached to the Founding Affidavit as January 2011 was in fact a typing error. He confirmed payments to the First Respondent because he pleaded that he had urgent financial commitments; and, that the balance of the purchase price was payable on transfer of the property.

[36] The Replying Affidavit deposed by the Applicant and supported by the Confirmatory Affidavit of Attorney Magagula and his Accountant

dispute the defences raised by the First Respondent. In particular, they dispute that the contract was not signed by the Applicant on the 27th September 2010 as reflected in the contract. They reject the evidence of the First Respondent that he returned the motor vehicle to the Applicant because it could not be repaired; they allege that the First Respondent was advised that they were awaiting delivery of parts of the motor vehicle from Japan. They denied that the Applicant had told the First Respondent to sell the property- to a Third Party and refund him his money. They denied that the Applicant had breached the contract by failing to pay the purchase price timeously; they annexed copies of chaques showing that the Applicant had paid the purchase price in full as well as transfer costs. They confirmed giving the First Respondent Transfer documents to sign, and, that he never returned them. They confirmed paying his outstanding rates and loan account for the bond. They insisted that the First Respondent never demanded payment of the E75 000.00 (Seventy five thousand Emalangeni) in respect of the value of the motor vehicle, but, in any event the motor vehicle was repaired after the parts had arrived from Japan. The First Respondent did not apply to court for leave to file a further Affidavit in response to the Replying Affidavit; hence, the allegations of fact in the Replying Affidavit remain uncontroverted.

[37] The allegation by the First Respondent that there was an oral variation of the terms of the contract is inconceivable; and, if it did occur, it is legally unenforceable. The First Respondent alleged that the Applicant had verbally agreed that he should sell the Property to a

Third Party, then refund him of the purchase price. Clause 8 of the Deed of Sale provides the following:

. v "This agreement contains all the terms and conditions-of the sale of the property to the purchaser hereunder. No variations, additions to or amendments to this agreement either written or verbal shall be of any further force or effect unless it is reduced into writing, agreed to and signed for by both parties."

37.1 In the case of **Soar v. Mabuza** 1982-1986 SLR 1 at 29, **His Lordship Justice Nathan** said the following:

"...this was a contract for the sale of immovable property which has by statute to be in writing. It is well-settled law that extrinsic evidence, whether oral or contained in writing such as preliminary drafts or correspondence, instruments or the like is inadmissible to add to, vary, modify or contradict a written instrument."

37.2 In the case of **Carmichael v. Oswin** 1982-1986 SLR (2) 421 at 422 **Hannah CJ** said the following:

"... Section 31 of the Transfer Duty Act No. 8 of 1902...reads: "No contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents duly authorized in writing. It is trite law that the effect of this provision is that all the essential elements of the contract must be set out in writing and that one such - essential is a description of the property sold."

[38] Clause 6 of the contract provides the following:

> "The parties hereto undertake and agree to sign and execute all such further papers and documents and to do all such other acts and things when called upon to do so in order to give full force and effect to this Deed of Sale."

38.1 It is apparent from the evidence before Court that the First Respondent breached the contract by failing to sign the transfer documents in order to effect transfer of the property to the Applicant; furthermore, it is apparent from the evidence that the Applicant complied with the terms of the contract including payment of the purchase price as well as transfer costs.

[39] Clause 5 of the contract provides the following:

> "Should the purchaser fail to pay the purchase price or provide the bank guarantee within the period referred to in clause 2 or pay transfer costs within a reasonable time after demand has been made for the same, then the Seller shall be entitled to cancel this Deed of Sale upon giving 7 days written notice."

39.1 Clause 5 of the contract lays down the circumstances which could entitle the First Respondent to cancel the contract as well as the procedure for terminating the contract in the event the Applicant acts in breach thereof. The evidence shows that the First Respondent did not follow the procedure laid down in Clause 5 when cancelling the contract for the following reasons: First, he

cancelled the contract in the absence of a breach thereof by the Applicant; Secondly, he did not make any written demand as contemplated by the contract. Thirdly, he did not give a written notice to the Applicant of his intention to cancel the contract within a period of seven days as required by the provisions of clause 5. Notwithstanding noncompliance with Clause 5 hereof, he proceeded and sold the property to Bhubhudla Investments (PTY) Ltd at a relatively higher price.

[40] The next enquiry relates to the enforcement by the Applicant of an order for specific performance. The applicant in his Founding Affidavit argued that the First Respondent was not entitled in law to sell the property on the basis that he had already sold the property to him; furthermore, be argued that he had complied with the terms of the contract and paid both the purchase price as well as transfer costs. The First Respondent argued that it is impossible for him to transfer the property to the applicant on the basis that it is now owned by a Third Party.

[41] During the hearing, the applicant submitted that the trustees of the "new owner" were cited and served with the present application; however, they did not file papers opposing the application. He further argued that the relief sought by the applicant was capable of performance; and, that the court could declare the sale unlawful, null and void and order the First Respondent to transfer the property to the applicant.

[42] In the case of **Benson v. S.A. Mutual Life Assurance Society** 1986 (1) SA 776 (A) at 781-782 **Hefer JA** stated the law as follows:

> "It is settled law that the grant or refusal of such an order is entirely a matter for the discretion of the court.... In **Haynes v. King William's Town Municipality** (supra at 378) **De Villiers AJA** dealt with the matter in the following terms:... that in our law a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach....This right of choice a defendant does not enjoy; he cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him.
>
> It is, however, equally settled law with us that although the court will as far as possible give effect to a plaintiffs choice to claim specific performance, it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod* interest. The discretion which a court enjoys, although it must be exercised judicially, is not confined to specific types of cases nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances."

[43] At page 783 **Hefer JA** continued and said the following:

> "This does not mean that the discretion is in all respects completely unfettered. It remains after all a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously. Nor upon a wrong principle. It is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance and the basic principle thus is that the order which the court makes should not produce an unjust result...: Another

principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy."

[44] In **Haynes v. King Williams Town Municipality** 1951 (2) SA 317 (A) 371 at 378, **De Villiers AJA**

"As examples of the grounds on which the courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the court to enforce its decree, (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature.... (e) where it would operate unreasonably hard on the defendant, or where the agreement giving rise to the claim is unreasonable or where the decree would produce injustice, or would be inequitable under all the cir cu m stance s..."

[45] The legal position is clear that a party to a contract is always entitled to claim specific performance subject to the discretion of the court. In the case of **Farmers' Co-op Society v. Berny** 1912 AD 343 at 350 **Innes CJ** said the following:

"*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible a performance of his undertaking in terms of the contract.... The right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt. It is true that courts will exercise discretion in determining

> whether or not decrees of specific performance will be made. They will not, of course be issued where it is impossible for the defendant to comply with them. And there are many case in which justice between the parties can be fully and conveniently done by an award of damages.... The election is rather with the injured party, subject to the discretion of the court."

[46] The First Respondent argued that specific performance is in the circumstances impossible because he has already sold the property to an innocent Third party; furthermore, that he has transferred the property to the Third party by registration in the Deeds Registry. The onus is on the First Respondent to show that specific performance is impossible. **Miller JA** in the case of **Tamarrilo (PTY) Ltd v. B.N. Aitken (PTY) Ltd** 1982 (1) SA 398 at 442 stated that it is the defendant who is called upon to perform and who has peculiar knowledge concerning his ability to do what is required of him, and that the defendant bore the burden of alleging impossibility in his pleadings and adducing evidence of facts or circumstances upon which the court is to exercise its discretion against the grant of the order.

[47] The property in dispute has not been developed; it is a vacant piece of land. The First Respondent has not adduced any evidence or facts or circumstances of the impossibility. All that he alleges is that he sold and transferred the property. An order for specific performance could be enforceable and no hardship could be experienced by the First Respondent. The circumstances of this case are such that more injustice would be exerted on the Applicant if the order is not issued in view of the conduct of the First Respondent; he sold the property to a

Third Party when both the purchase price and transfer costs had been paid. The Applicant had not acted in breach of the contract. Furthermore, the Third Party through its Trustees was served with the application but it elected not to oppose the application. The application is granted with costs on the ordinary scale.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT