



REPORTABLE

CASE NO.: SA 16/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

First Appellant

PRESIDENT OF THE REPUBLIC OF NAMIBIA

Second Appellant

and

AFFIRMATIVE REPOSITIONING MOVEMENT

Respondent

Coram: MAINGA JA, FRANK AJA and UEITELE AJA

Heard: 21 June 2023

Delivered: 26 July 2023

Summary: This is an appeal against a judgment of the High Court (Main Division) dismissing an exception to the respondent's (plaintiff *a quo*) particulars of claim. In its action in the court *a quo*, the respondent sought an order directing the first appellant

(first defendant *a quo*) to service 200 000 plots within a period of two years, in the alternative an order directing the first appellant to, within a period of two years, service 200 000 plots less the plots that the first appellant may have serviced since 24 July 2015.

For its claim before the court *a quo*, the respondent relied on a partly oral and a partly written agreement concluded between itself, represented by Mr Job Shipululo Amupanda and the first appellant represented by H.E. President Hage Geingob. The partly written agreement was marked as 'Annexure "JSA1"' and attached to the particulars of claim. In terms of the partly written agreement, it was resolved that in line with the War Declared on Poverty by the President during his inauguration and during the 2015 State of the Nation Address, a nationwide project was earmarked towards servicing of urban land and land allocation. In that regard, it was resolved that first appellant would immediately embark on a project to service 200 000 plots countrywide. Further, that this would start on a pilot project basis by servicing identified land in Windhoek, Walvis Bay and Oshakati. In return, the respondent would not continue with its intended radical programme of action to occupy land in urban areas. The respondent alleged compliance on its part and breach on the part of the first appellant. The terms of the alleged partly oral agreement feature nowhere in the particulars of claim.

The appellants excepted to the particulars of claim on the ground that (a) the alleged agreement was against public policy or the rule of law and was thus unenforceable, (b) there was no enforceable agreement that the court could enforce, (c) that when the second appellant acted as he did, he did so in his capacity as 'State President' and therefore his actions were executive in nature and were not enforceable in a court of law and (d) the resolutions set out in paras 2-7 of "Annexure JSA1" were policy matters of the Government of the Republic of Namibia and could not be enforced as terms of an agreement by a court of law.

The court *a quo* dismissed the exception and held that it could not be said that the agreement created no binding and reciprocal enforceable obligations between the parties.

On appeal, the appellants contended that by conflating the four bases of the exception into one, the court *a quo* failed to interpret the terms of the agreement as alleged and thereby failed to consider the nature of the relationship of the parties to the alleged agreement. The wrong approach adopted by the court *a quo* in the determination of the appeal, resulted in the wrong findings at paras 19, 24 to 31 and 36 of its judgment.

The respondent did not participate in the appeal.

Held that, the terms of the alleged partly oral agreement featured nowhere in the particulars of claim.

Held that, the resolutions lacked the binding nature of contracts.

Held that, the land issue was a national issue, it was not of a commercial or business nature.

Held that, there was no *animus contrahendi* in the sense required to found a legally enforceable contract and therefore the alleged agreement was not binding in law. At most, its terms were binding in honour only.

Held that, respondent's basis for the contract was illegal in our law. Respondent could not occupy land in urban areas without the consent of the owners.

Held that, the resolutions were policy utterances and nothing more.

Consequently, the appeal is upheld.

APPEAL JUDGMENT

MAINGA JA (FRANK AJA and UEITELE AJA concurring):

Introduction

[1] This is an appeal from a judgment of the High Court (Main Division) dismissing an exception to the respondent's (plaintiff's court *a quo*) particulars of claim in an action seeking an order directing the first appellant to service 200 000 plots within a period of two years, in the alternative an order directing the first appellant to, within a period of two years, service 200 000 plots less the plots that first appellant may have serviced since 24 July 2015. The respondent chose not to participate in this appeal.

[2] In its particulars of claim, the respondent alleged that:

- '5. On the 24 July 2015 and at Windhoek, the Plaintiff [Respondent], duly represented by Job Shipululo Amupanda and the 1st Defendant [1st Appellant] duly represented by the 2nd Defendant [2nd Appellant], entered into a partly oral and partly written agreement for the service of 200 000 housing plots country wide. The written portion of the aforesaid agreement is attached hereto and marked as "**JSA1**".
6. The express, alternative tacit and or alternately implied terms of the aforementioned agreement were as follows:
 - 6.1 That the plaintiff shall not continue with its intended radical programme of action to occupy vacant land in urban areas;

- 6.2 That 1st Defendant shall immediately implement a massive nationwide project earmarked towards servicing of urban land and land allocation;
 - 6.3 That on a pilot project, 1st Defendant will start by servicing identified land in the towns of Windhoek, Walvis Bay and Oshakati;
 - 6.4 That the 1st Defendant shall immediately embark on a project to service 200 000-00 plots country wide;
 - 6.5 That the finalization of the servicing of 200 000 shall be achieved within a reasonable time after the 24th July 2015.
7. Plaintiff duly complied with the terms of the aforementioned agreement as contemplated in that Plaintiff did not continue with its intended radical programme of action to occupy vacant land in urban areas.
 8. Despite a period of more than 5 years having passed, the 1st Defendant has failed to service 200 000 plots country wide and has merely serviced less than 15 000 plots country wide.
 9. The 1st Defendant has therefore breached the agreement entered into on the 24 July 2015 and the Plaintiff is entitled to an order directing the 1st Defendant to act in terms of the said agreement.'

[3] The annexure JSA1 reads as follows:

'ANNEXURE "JSA1"

Agreed Resolutions emanating from the meeting held between the Government of the Republic of Namibia, chaired by H.E. Dr. Hage G. Geingob, President of the Republic of Namibia, and the Affirmative Repositioning Movement.

Background

On invitation by H.E. Dr. Hage Geingob, President of the Republic of Namibia, Government met with representatives of the Affirmative Relocation Movement at State House to discuss and dialogue on the Land Issue.

H.E. the President extended an invitation to the Affirmative Relocation Movement to engage the Government at State House on 24 July 2015, which commenced at 10H00 up to 16H00.

The meeting chaired by H.E. the President, took place in a cordial atmosphere.

During the discussion it was discovered that there is common ground between the two solutions offered by Government and AR.

The meeting resolved as follows:

- 1. It was resolved that in line with the War Declared on Poverty as declared by H.E. the President during his inauguration and during the 2015 state of the nation Address, there shall be a massive nationwide project earmarked towards servicing of urban land and land allocation.**
- 2. In this regard, Government will immediately embark on a project to service 200 000 plots country wide.**
- 3. On a pilot project basis, Government will start by servicing identified land in the following towns: Windhoek, Walvis Bay and Oshakati.**
- 4. It was further resolved that the period between 29 July to 5 August 2015, will be dedicated to a nationwide clearance of identified urban land.**
- 5. The aforementioned cleared urban land will be serviced, and is for future allocation.**

6. **Under the Massive Urban Land Servicing Project, Namibians will be called upon to voluntarily participate in servicing identified urban land for future allocation.**
7. **To that effect, a technical committee will be established to work out all modalities regarding the Massive Urban Land Servicing Project.**

/ END /

[4] To this claim the appellant excepted on four grounds namely:

- (a) The alleged agreement relied upon by the respondent is against public policy, against the rule of law and unenforceable.
- (b) There is no enforceable agreement that this Court can enforce.
- (c) When the 2nd appellant acted in the manner alleged in the particulars of claim he acted in his capacity as State President and on this basis his actions are executive in nature and they are not enforceable in a court of law.
- (d) The resolutions set out in paras 2 - 7 of Annexure JSA1 are policy matters of the Government of the Republic of Namibia and they cannot on that basis be enforced as terms of an agreement by a court of law.

[5] Therefore, so it is alleged, the respondent's particulars of claim lack averments in law that are necessary to sustain an action, and additionally or alternatively, the respondent's particulars of claim are in some respects vague and embarrassing.

[6] The appellants persist with these grounds of exception in this Court.

The High Court proceedings

[7] The High Court dismissed the exception upholding that it is settled law that when adjudicating on exceptions, the court must accept the facts alleged by plaintiff as correct and that the excipient bears the onus of proving to court that on every interpretation of the particulars of claim no cause of action is disclosed. The court further held that the word radical is misunderstood to mean crime, delict or some unlawful conduct but that is not the true meaning of the word – the word means advocating for thorough or complete political or social change. It was further held that an exception to a pleading is upheld only if upon any reasonable reading of such pleading, no cause of action is disclosed and in the present case the particulars of claim are capable of disclosing a cause of action based on the agreement between the parties to service 200 000 plots and further that it cannot be said that the agreement created no binding and reciprocal enforceable obligations between the parties, therefore the court is not satisfied that the resolutions taken were political or executive statements in nature incapable of constituting an agreement and therefore the court was not satisfied that the particulars of claim are vague and embarrassing.

The submissions

[8] The appellants *ex abundanti cautela* filed a notice of appeal as of right to court on 17 March 2021 and also sought leave from the court *a quo* to appeal to this Court, which leave application was heard on 20 August 2021 and an order granting leave was delivered on 17 September 2021 followed by the reasons on 28 September 2021. When leave to appeal was granted on 17 September 2021, appellants did not file a notice to appeal as they accepted that the notice filed as of right sufficed. As a result of that uncertainty, appellants filed a condonation application on 26 October 2021 ventilating the uncertainty in the event it is found that the dismissal of the exception was interlocutory and required leave from the court *a quo* and appellants had no right to appeal as of right.

[9] It is then contended that the appellants in this case, could file the notice of appeal as of right for the reasons that, the court *a quo*'s decision on the dismissal of the exception (1) was final in effect and not susceptible to alteration by it;¹ (2) it was also definitive of the rights of the parties on the issue; (3) is wrong in law and therefore appealable even if it is interlocutory; (4) the underlying principle in s 18(1) and (2) of the High Court Act 16 of 1990 is that judgments and orders of the High

¹ Section 18(1) provides: 'an appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court.' Section 18(2) provides: 'an appeal from any judgment or order of the High Court in civil proceedings shall lie – (a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave to appeal shall be required.'

Court are appealable without leave. In the alternative, appellants rely on s 18(3)² of the High Court Act – hence the application for leave.

[10] In my opinion the submissions on the condonation application require no further consideration. Either way the appeal is properly before this Court. On the facts of the case, as I will demonstrate *infra*, the appellants were entitled to approach this Court as of right – application for leave to appeal to this Court was not necessary and condonation should be granted which I do.

[11] It is to the submissions on the main case I now turn. Appellants persist in the four grounds as a basis of the exception and contend that the alleged agreement (the resolutions in Annexure JSA1) that the respondent relies on does not in law exist or the alleged agreement cannot be legally enforced by any court of law, as in the circumstances the respondent's particulars of claim lack the necessary averments that should sustain its action or claims.

[12] It is further contended that the court *a quo* followed an incorrect approach in determining the exception, when the court conflated/fused the four bases of the exception into one ground, ignoring the different bases upon which each ground was based, the court *a quo* failed to interpret the terms of the alleged agreement as pleaded in the respondent's particulars of claim and failed to consider the nature of

² 'No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.'

the relationship of the parties to the alleged agreement in order to determine the nature of the alleged agreement. The wrong approach adopted by the court *a quo* in the determination of the exception, so it was contended, resulted in the wrong findings the court made in paras 19, 24 to 31 and 36.

[13] On the ground that the agreement was against public policy, the rule of law and being unenforceable, it was contended that when the court *a quo*, held that, ‘for an agreement to be categorized in this group (public policy), it must be established that it is indeed against public policy’ was to set the bar/test much higher which is an incorrect yardstick/test. That error was acknowledged by the court *a quo* in its judgment in the application for leave to appeal to this Court and it was on that point alone that leave was granted and on that concession alone the appeal ought to be upheld as indicated below. It is further contended that the correct approach and test was adopted in *Moolman & another v Jeandre Development CC*.³

[14] It is further contended that the respondent is seeking specific performance against the appellants on allegations in paras 6.1 and 7 of its particulars of claim of having desisted in its radical programme of action to occupy vacant land in urban areas and that it had complied with that agreement to which appellants excepted

³ *Moolman & another v Jeandre Development CC* 2016 (2) NR 322 (SC) para 66.

‘What is also clear from the authorities is that a court would determine in any given case whether a contract is contrary to public policy. The majority in *Sasfin* referred to an early exposition of the common law on the issue thus articulated by Innes CJ in *Eastwood v Shepstone* 1902 TS 294 at 302: “Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result.”’

asserting that the agreement is against public policy and against the rule of law, in that, had the respondent carried out its intention to occupy vacant land in urban areas such conduct would have been unlawful under the common law and under s 2(1) of the Squatters Proclamation AG 21 of 1985 as amended. It is further contended that the court *a quo* should have interpreted the terms pleaded in the particulars of claim together with Annexure JSA1 to assess the meaning, grammar and syntax of the words used in the written agreement in order to properly construe the words, as well as against the broader purpose and character of the document.

[15] It is further contended that the court *a quo* ought to have assessed whether the agreement had any business objective to understand the context within which the agreement was concluded and that the only contractual obligation that the respondent allegedly performed in para 6.1 of the particulars of claim which is the means by which the respondent allegedly would restore or intends to restore the alleged dignity of landless Namibians, which programme is illegal, against public policy and/or the rule of law and that in Namibia occupation of vacant urban land without the authorization of the various local authorities is illegal and respondent would have no right and does not have any right in law to occupy such land and therefore the agreement encouraging crime or delict and other unlawful acts cannot in law be enforced by a court of law.

[16] It is further contended that the court *a quo* erred when it found that the respondent's particulars of claim were capable of being read as disclosing a cause of

action, for the alleged agreement of servicing land in relation to the Government of the Republic of Namibia, is an issue that is in the public interest and government by public law and not the private law of contracts.

[17] It is further contended that the court *a quo* erred when it found that *prima facie* the terms of the alleged agreement appear to have imposed obligations on the parties. And further that on a proper construction of the expressed terms set out in resolution number one of Annexure JSA1, and the rest of the resolutions in Annexure JSA1 regard had to the context within which that resolution is made, it is clear that the resolution was a political statement or a policy statement made within the context of an inaugural political or executive statement that the second appellant made at his inauguration as the President of the Republic of Namibia in 2015, therefore Annexure JSA1 does not constitute contractual terms in or breaches, lacks reciprocal obligations, no *animus contrahendi* between the parties and therefore unenforceable.

[18] It is further contended that the court *a quo* erred when it found that the conduct of the appellants did not constitute executive functions and/or policy issues of the appellants and that Art 27(1) of the Republic's Constitution provides that 'the President shall be the Head of State and of the government . . .' and when he acted as described in JSA1 he was performing executive duties in his Constitutional capacity as President and not as a party to a contract and the discussion was nothing more than government policy expressions and the resolutions cannot be enforced as contractual terms.

[19] Finally, it is contended that the court *a quo* erred when it found that the respondent's particulars of claim were not vague and embarrassing and that the exception that a pleading is vague and embarrassing is not directed at a particular paragraph of a cause of action but goes to the whole cause of action. Further that respondent's particulars of claim do not comply with rule 45(5) of the High Court Rules and are therefore vague and embarrassing.

[20] Rule 57 (1) of the High Court Rules provides: 'Where a pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or a defence, the opposing party may deliver an exception thereto within the period allowed for the purpose in the case plan order or in the absence of provision for such period, within such time as directed by the managing judge or the court for such purpose on directions in terms of rule 32(4) being sought by the party wishing to except'.

[21] Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible

readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.⁴

[22] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*⁵, Harms JA said:

[3] Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that “cuts through the tissue of which the exception is compounded and exposes its vulnerability”. Dealing with an interpretation issue, he added:

“Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts.”

⁴ *Tem bani & others v President of the Republic of South Africa & another* 2023 (1) SA 432 (SCA) para 14.

⁵ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.

[23] The question which arises is whether the agreement between the parties was entered into and Annexure JSA1 was formulated with the intention that it would be final and binding and legally enforceable.

[24] In the *Government of the Self-Governing Territory of Kwazulu v Mahlangu & another*⁶ where the applicant had approached the court seeking orders setting aside certain rulings made during the negotiations of the multi-party negotiating council at the World Trade Centre in Kempton Park, Eloff JP said:

'It is necessary to stress that the sort of contract or agreement which has to be established is one entered into with the intention that it can be enforced. It is no doubt true that the fact that the 26 parties meet at the World Trade Centre is the consequence of an agreement that they would do so and the fact that they devised standing rules of procedure took place in consequence of an agreement. In this regard account might be had to the following *dictum* in *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A), where Van den Heever JA said (at 532F-H):

"The absence of *consensus* may render an ostensible contract void, but it does not follow that whenever two or more persons are in agreement they contract with each other. Many legal situations arise in which *consensus* was a *sine qua non* to validity but cannot be said to be contractual."

What is required before a Court can be approached to exercise powers of review is that the contract should appear to have been entered into and formulated with the intention that it would be final and binding and legally enforceable. The element of intention to enforce was crisply stated in the decision in *Rose and Frank Co v J R Crompton & Bros Ltd* [1923] 2 KB 261 (CA) at 288, where it was said:

⁶ *Government of the Self-Governing Territory of Kwazulu v Mahlangu & another* 1994 (1) SA 626 (T) at 635B-G.

“Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties did not intend that the agreement shall give rise to legal relations.”

The point was put as follows in the decision in *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers and Others* [1969] 2 ALL ER 481 (QB) at 496D-E:

“The fact that the agreements *prima facie* deal with commercial relationships is outweighed by other considerations, by the wording of the agreements, by the nature of the agreements, and by the climate of opinion voiced and evidenced by extra judicial authorities. Agreements such as these, composed largely of optimistic aspirations, presenting great practical problems of enforcement and reached against a background of opinion adverse to enforceability, are, in my judgment, not contracts in a legal sense and are not enforceable at law.”

[25] In para 5 of the particulars of claim, the respondent identifies the parties to the agreement and further alleges that the agreement was partly oral and partly written for the servicing of 200 000 housing plots country wide and that the written portion of the agreement is Annexure JSA1 above. The oral part of the agreement seems to be encapsulated in paras 6.1 and 6.5 of the particulars of claim the aspects that do not feature in Annexure JSA1. The claim goes on to allege that the express, alternative tacit and or alternately implied terms of the agreement is, that the respondent shall not continue with its intended radical programme of action to occupy vacant land in urban areas, which occupation without the consent of the owners, story short, is illegal. The claim further alleges that the first defendant shall immediately implement a massive nationwide project earmarked towards servicing of urban land and land

allocation. Again it is not clear how the President was going to implement the servicing of land and land allocation immediately. Was it immediately in the dictionary meaning of the word? The use of the word immediately further underscores the fact that it was not intended to create contractual obligations as the President could only, in terms of the policy statement he made, immediately request the relevant local authorities to take steps so as to give effect to the policy statement seeing the pivotal role of the local authorities in this regard.

[26] The claim further states that there would be a pilot project for servicing identified land in three towns of Windhoek, Walvis Bay and Oshakati; and that the first appellant shall immediately embark on a project to service 200 000-00 (sic) plots country wide. I assume the –00 after the 200 000 is an error and the word 'immediately' I assume in this context means after the pilot project. The claim further alleges that the servicing of the 200 000 plots should be finalised within a reasonable time after 24 July 2015 (the day of the meeting). Reasonable time was not defined or set but after a period of five years, that is September 2020 the first appellant had only serviced less than 15 000 plots and therefore breached the agreement and that respondent had complied with the agreement when it did not continue with its intended radical programme of action to occupy vacant land in urban areas.

[27] Annexure JSA1 speaks for itself – the President invited the Affirmative Repositioning Movement (ARM) (I suppose its representatives) to State House on 24 July 2015 to a meeting that commenced at 10H00 to 16H00. (The underlining is

mine). The President chaired the meeting which was cordial. It was only during the discussion that it was discovered that there is common ground between the two solutions offered by Government and ARM. Then seven resolutions were taken/adopted or the exact words used are, 'the meeting resolved as follows'. All seven resolutions have their genesis in the President's inauguration speech in 2015 repeated in the State of the Nation Address, where he declared war against poverty and declared that 'there shall be a massive nationwide project earmarked towards servicing of urban land and land allocation'. What follows after that opening resolution are modalities to implement that resolution, namely, the number of plots to be serviced, towns where the pilot project would commence, the period dedicated to a nationwide clearance of identified urban land, the servicing of that cleared urban land earmarked for its future allocation, a call would be made to Namibians to voluntarily participate in servicing the urban land so identified and the establishment of a technical committee to work out all modalities regarding the massive urban land servicing project.

[28] The whole context of the resolutions is the idea of the massive urban land servicing project, a brainchild of the President. He invited the respondent or its representatives and chaired the meeting. The issue of land was national, and was not of a commercial or business nature. The resolutions are silent on or lack binding nature of a contract. The parties agreed on the massive servicing of land and that was all, no *animus contrahendi* in the sense required to found a legally enforceable contract was established. The parties agreed that the policy statement be acted on

actively and nothing else. At most, they are binding in honour only – the President could walk away from that statement given other pressing issues of the Republic, for example drought, a health pandemic, etc.

[29] Apart from the fact that Annexure JSA1 are mere resolutions only, respondent's particulars of claim in para 6.1 and 7 is further indicative of this fact, but even if a contract was envisaged, such contract would be against public policy for the same reasons as well. The respondent could not rely on an illegal intended radical programme of action to occupy vacant land in urban areas to plead that it had duly complied with the terms of the agreement. In *Conradie v Rossouw*,⁷ De Villiers AJA said:

'A person promises another to commit a crime or not to commit a crime, in either case the promise is void. And the promise is void not because the ground of the obligation is bad, but because the promise or obligation itself is bad.'

[30] The author R H Christie⁸ states that 'and by Roman-Dutch times it was equally well established that a contract promising a reward for not committing an unlawful act was also void'. These prohibitions form part of our modern law.

[31] Respondent's performance as basis for the contract is illegal in our law. Respondent could not occupy land in urban areas without the consent of the owners

⁷ *Conradie v Rossouw* 1919 AD 279 at 314-315.

⁸ R H Christie *Law of Contract in South Africa*, 5 ed. 2006 p 356.

[32] Respondent's claim lacks legal efficacy – the parties did not intend a legally enforceable agreement as such is not apparent from the resolutions. Had the court *quo* carefully considered the resolutions and the relationship of the parties it should have concluded that they were policy utterances and nothing else. As a result the exception should have succeeded in the High Court and costs should follow the result.

[33] I therefore make the following order:

1. The appeal succeeds.
2. The order of the High Court is altered to read:

‘The exception is upheld.

The plaintiff's particulars of claim are set aside and the plaintiff is given leave, if so advised and/or minded, to file a notice to amend the particulars of claim within one month, failing which the defendants are granted leave to apply for the dismissal of the plaintiff's action within ten (10) days of the expiry of the period of one month afforded to the plaintiff.’

3. The period of one month referred to in para 33 (2) above begins to run from the date of the delivery of this judgment.

4. The respondent is to pay the costs of the appeal and High Court which costs include that of one instructing and one instructed legal practitioner.
5. The matter is remitted for further case management, if required, for the further conduct of the proceedings.

MAINGA JA

FRANK AJA

UEITELE AJA

APPEARANCES:

Appellants:

D Khama

Instructed by Government Attorney

Respondent:

Non-Appearance