THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

6018/11

In the matter between:

JAN DANIEL THERON Plaintiff

and

THE MINISTER IN THE WESTERN CAPE Defendant

DEPARTMENT OF TRANSPORT AND PUBLIC WORKS

JUDGMENT delivered this 23 of January 2013

NDITA; J

[1] The plaintiff's instituted action against the defendant for the specific performance of the latter's obligations arising from an alleged agreement between the parties for the sale of a residential property situate at 62 CJ Langenhoven Avenue, also known as Erf 3990, George, Western Cape. More specifically, the plaintiff seeks an order directing the defendant to take all necessary steps to effect transfer of the property to him. In the event that the defendant fails to comply with the above order within 14 days, he prays that the Sheriff of this Court be authorised to take such steps on behalf of the

defendant. The defendant is the Provincial Minister of Transport and Public Works, in whose portfolio the property in question, held by Deed of Transfer No. T6118/1975, vests.

[2] The property was assigned to the Western Cape Education Department for use by its officials. The plaintiff is the Area Manager of the said Department. As its employee, he has been in occupation of the property, utilising the house as his official residence, as well as an office for the purposes of his work since 1992, pursuant to a lease agreement. It is alleged by the plaintiff in his particulars of claim, that he accepted in writing an offer from the defendant to purchase the property for an amount of R800 000, 00 (eight hundred thousand rand) on 17 September 2005, but the defendant failed to transfer the property to him. Instead, on 26 November 2007 the defendant issued a notice that the plaintiff vacate the premises on or before 30 April 2008, thereby repudiating the agreement.

[3] The defendant in its plea has denied that a written agreement of sale came into existence pursuant to the letter it wrote to the plaintiff, as same was not intended to constitute an offer. According to the defendant, it did not accept the plaintiff's purported offer and no written contract was concluded in respect of the subject property. Furthermore, so alleges the defendant, the disposal of the property was subject to statutory requirements of sections 3 and 4 of the Western Cape Land Administration Act, No, 6 of 1998 ("The Act") and the Regulations promulgated thereunder. For this

reason, if the court finds that there is a valid offer and acceptance, such a contract is void as it did not comply with the statutory requirements set out in the relevant sections.

[4] The background facts to this action commence with a letter written by the plaintiff on 24 November 1998 to the Education Department wherein he expressed for the very first time, an interest to purchase the residential property he was occupying for a sum of R230 00.00. It is common cause that on receipt of the letter, the defendant on 18 March 1999 responded thus:

'Dear Sir

OFFER TO PURCHASE ERF 3990 –GEORGE

Your offer / enquiry dated 24 November 1998 to purchase the property refers:

Your offer has been noted and it will be ascertained whether the property can be alienated.

If the property can in fact be alienated, you will be notified and requested to submit an offer including the suspensive conditions as set out in department's Deed of Sale.

Attached is a guide setting out the process we will follow as far as possible relative to the disposal of immovable property as well as a standard Deed of Sale referred to above.'

[5] Subsequent to this letter, the property was endorsed in the name of the Western Cape Provincial Government and its market value was as on 24 April 2003 estimated at R430 000,00. The Department of Transport and Public Works informed the Plaintiff that the property may be sold for the stated amount. The Plaintiff in turn reaffirmed his intention to buy it for the determined amount. He thereafter awaited the Defendant's

response. Two more years lapsed without finality in the promotion of the sale of the property. The parties were however, during this period corresponding with each other. This culminated in a letter dated 8 September 2005, written by the defendant to the plaintiff to the following effect:

‘Geagte Meneer Theron

KOOPAANBOD: Woning gelee te CJ Langenhowenweg 62, George, ERF 3990

U aanbod om bevormelde eiendom te koop het betrekking.

Weens die tydsverloop in die bevordering van die verkoop van bevormlede woning, is ‘n opdateerde waardasie nou bekom. ‘n Onafhanklinke waardeer het op 3 September 2005 die huidige markwaardeerder het van Erf 3990 George op ‘n bedrag van R800 000.00 vasgestel.

Aangesien hierdie kantoor in terme van wetgewing (die Wes-Kaapse Wet op Grondadministrassie, Wet 6/1998), en die Beleid ten opsigte van die Verkoop Staatseiendomme verplig word om eiendom” teen die markwaarde te vervreem, verneem ons graag of u steeds wil voortgaan met die tranaksie teen die huldige markwaarde. Indien u nie verder sou belangstel nie, sal die eiendom dus in terme van bogenoemde wetgewing en beleid per openbare tender uitnodiging vervreem word.

Ons verneem dus graag dringend van u in hierdie verband.’

The above letter served as a basis on which the plaintiff in his particulars of claim alleges that it constitutes an offer. Be that as it may, the plaintiff responded to the letter as follows:

‘Geagte Heer

KOOPAANBOD: WONING TE CJ LANGENHOVENWEG 62, GEORGE ERF 3990, GEORGE

U brief onder datum 8 September 2005 is met dank ontvang.

Hiermee will ek graag bevestig date ek wil voortgaan met die transaksie om die bogenoemde eiendom teen die huidige markwaarde van R800 000,00 te koop.

Ek verneem graag verder u in hierdie verband, watter stappe gedoen moet word en wanneer dit sal geskied.

Met bedank by voorbaat.’

[6] The Plaintiff in his evidence confirmed the common cause facts alluded to above. Of note is an unequivocal admission by the plaintiff that he was advised by the defendant in a letter as early as November 1998 that certain procedures relating to the disposal of the property had to be followed. He further confirmed in his evidence that a guide and standard Deed of Sale was attached to the letter. Under cross examination the following transpired:

‘So wat ons nou kan aanvaar, mnr Theron, is die volgende. U aanvaar dat hierdie brief maak dit vir u heeltemaal duidelik dat u moet ‘n aanbod maak vir die koop van die eindom, korrek so? - - - Yes dit is korrek.

Nou as ons net ‘n bietjie – die laaste paragraaf, daar is ‘n verwysing in die laaste paragraaf na a guide setting out the process, nou dit is ongelukkig nie aanheg nie, kan u vir ons se presies

watter dokumentasie was by hierdie brief aangeheg gewees? - - - U Edele ek aanvaar dat dit die gids is waarna hier verwys word en die document, die verkoopsdokumnet, deed of sale.

Daar is verwysing wat u noem die gids en wat ek noem die guide, nie waar nie? --- Ja dit is korrek

Nou hierdie gis wat u van praat, het dit vir u vedduidelik dat die wet op die – die Wes-Kaapse wet op grond-administrasie, het daarna ook verwys – u het daarna u u verwys, daardie brief? Nee ek kan sien mnr Theron is nou 'n bietjie – u verstaan die vraag heeltemal korrek nie. Kom ek doen beter en vra die vraag weer oor. Hierdie bepaalde brief, het die guide of die gids, het dit verwys na die wet wat van toepassing is op die verkoop van hierdie grond? - - - U Edele ek moet se ek aanvaar so, wat ek het daardie gids baie lank gelees het.'

It is not in dispute that the statutory requirements referred to in the plaintiff's evidence had not been complied with.

[7] Given the fact that the plaintiff's cause of action is founded on his alleged acceptance of an offer from the defendant to purchase the property for the determined amount, it makes sense that cross-examination revolved around whether the plaintiff considered the defendant's letter as an offer. To this end, the plaintiff initially testified as follows:

'Ja die R800 000,00 was my aanbod op die departmente se vereiste dat hy teen markwaarde van R800 000,00 verkoop mote word.'

Upon further cross-examination on this aspect, the plaintiff denied that the offer to purchase the property emanated from him despite the fact that when the subject property's value was estimated at R430 000,00 in 2003, he had written a letter in similar terms, in respect of which he, during his evidence readily accepted he made an offer to the Defendant. It is necessary to refer to the said letter:

'Geagte Mnr Bailey

KOOPAANBOD: WONING TE LANGENHOVENWEG 62, GEORGE

U brief van Mei 2003 in benoemde verband het betrekking.

Ek wil graag hiermee bevestig date k steeds wil voortgaan met die transaksie.
Hierdie skrywe dien dus an 'n aanbod vir die eiendom teen die bedgra soos in u brief gemeld.

Geliewe my asseblief in kennis te stel watter stappe nou verder gedoen moet word en wanneer dit sal geskied.

Baie dankie vir u vriendlikheid en doeltreffende diens tot dusver.'

[8] After dispatching the letter affirming his intention to purchase the property on the terms set out in the defendant's letter, the plaintiff testified that he awaited the defendant's response, but would intermittently make telephonic enquiries. His wife on occasion also telephonically enquired on his behalf as to the progress of the sale. When no progressive response was forthcoming, the plaintiff on 27 September 2006 appealed to the defendant Minister, Mr M Fransman, seeking a speedy finalisation of

the process, presumably in view of the fact that his lease agreement was also due to expire on 30 April 2008. There is no indication that the defendant Minister responded to his appeal. However, on 27 November 2007, the defendant issued a notice directing the plaintiff to vacate the premises on expiration of the lease. The notice prompted the plaintiff to consult with his attorneys, Messrs Francois Van Zyl. Pursuant to the consultation the plaintiff's attorneys wrote a letter to the defendant's Property Manager demanding transfer of the property to the plaintiff's name. When that did not materialize, the plaintiff brought the present action.

[9] Mr Marius Bailey, who works as a property development officer responsible for disposal of the property, gave evidence on behalf of the defendant. He confirmed the plaintiff's version but denied the defendant's letter referred to above was intended to be an offer. According to his evidence the letter cannot and should not be perceived as such because in terms of procedural pertaining to acquisition of government property, a person interested in purchasing property should submit an offer. Once an offer has been submitted then a submission in line with Regulation 4(4) (a) promulgated in terms of section 10 of the Western Cape Land Administration Act No 6 of 1998, is prepared for consideration by the Head of the Department and the Minister. It is only when approval to accept the offer to purchase has been obtained, could the defendant effectively accept the offer. In the instant matter, so stated Mr Bailey, the plaintiff's offer was not accepted as there was no approval.

[10] It is trite that the plaintiff bears the onus of proving that on a balance of probabilities that he offered to purchase the property for an amount of R800 00,00 and

there was a corresponding clear, unequivocal and unambiguous acceptance of that offer by the defendant. Alternatively, the defendant offered to sell same for the mentioned amount, and the plaintiff accepted the offer. Counsel for the plaintiff contended that the external manifestations of the parties and the words used in the letter of 8 September 2005 entitled the plaintiff to assume that the parties were *ad idem* with regard to the terms of the sale of the property, and that the plaintiff would pay the determined market related purchase price to obtain its ownership; and if this truly be the case, a contract had been formed. In addition, the none-compliance with the relevant statutory prescripts, based on the quasi-mutual assent principle, does not render the contract void, but voidable. According to the plaintiff, this is so because the Regulations relating to the disposal of the subject land are not peremptory and can be complied with even after the offer has been accepted. The defendant's principal contention is that because the plaintiff seeks specific performance in respect of disposal of provincial state land, it is incumbent on him to prove that the statutory requirements have been complied with. Furthermore, according to the defendant there was no acceptance of the plaintiff's offer.

[11] The primary issues for determination are:

1. Whether there was a valid offer and acceptance for the purchase of the property.

2. If there was a valid offer and acceptance, whether the defendant's non-compliance with s 3 of the Western Cape Land Administration Act of 1998 renders the agreement void or voidable.

[12] I now turn to consider whether the defendant in the letter of 8 September 2005 accepted the plaintiff's offer. What is abundantly clear from the pleadings, the documentary as well as the oral evidence is that the plaintiff had at all times expressed an unwavering interest in buying the property. He admitted in his evidence that when he received a letter from the defendant on 26 May 2003 enquiring whether he was still interested in purchasing the property, he was already aware that he had to make an offer. The plaintiff was advised that his offer would be submitted for approval. This view is further compounded by the plaintiff's admission that the defendant's letter of 18 March 1999 explaining to him the process involved in the acquisition of the property clearly set out that in order to purchase the property he had to make an offer. In my view, it is clear on a preponderance of probabilities, that the plaintiff's letter of 17 September 2005 was an offer to the purchase of the property and not an acceptance of the offer made by the defendant. There is no logical explanation why his letter indicating that he was willing to purchase the property for an amount of R800 000, 00 should be construed differently from his previous letters written in similar vein. Regardless of whether or not the plaintiff's letter constitutes an offer or acceptance, Counsel for the plaintiff argued that the fact of the matter is that the intention of the parties is readily ascertainable that they were of the same mind that the plaintiff would buy the property for the agreed amount.

[13] As earlier pointed out, the disposal of the subject property is governed by of the sections 3(2) and 3(3) of the Act which set out the various ways in which the defendant may alienate or deal with immovable property. The sections provides as follows:

'Disposal of provincial state land

3 (1)…

(2) The Premier must publish in the Provincial Gazette in the three official languages of the province and in Afrikaans, an English and an isiXhosa newspaper circulating in the province in those respective languages, a notice of any proposed disposal in terms of subsection (1), calling upon interested parties to submit, within 21 days of the date of the notice, any representations which they wish to make regarding such proposed disposal; provided that the afore-going provision does not apply to any disposal concerning the releasing of provincial state land for a period not exceeding twelve months without an option to renew.

(3) The Premier must, in addition to the notices to be published in terms of subsection (2), cause to be delivered to –

(a) the occupants, if any, of the provincial state land to be disposed of;

(b) the chief executive officer of the local government for the area in which the provincial state land to be disposed off is situated;

(c) the Western Cape provincial directors of the National Departments of Land Affairs and Public Works; and

(d) the Western Cape provincial director of the National Department of Agriculture, if the provincial state land is applied or intended to be applied for agricultural purposes,

a copy of the notice referred to the subsection (1), and must advise those persons that they may, within 21 days of the receipt of such notice, make written representations regarding the proposed disposal.

(4) (a) The notices referred to in subsection (2) and (3) must include the following Information regarding the provincial state land concerned :

(i) the full title deed description of such land, including the title deed number, the administrative district in which the provincial state land is situated and, if applicable, the nature of any right in or over such land;

(ii) the current zoning of such land, and

(iii) the actual current use of such land.

(b) The notice referred to in paragraph (a) must include an office address at which full details concerning the provincial state land in question and the proposed disposal may be obtained.'

[14] Section 10 of the Act enjoins the Premier to make regulations, standards, and procedures applicable to, inter alia, the acquisition and disposal of provincial state land. The Premier of the Western Cape, promulgated the requisite Regulations, commonly referred to as Western Cape Land Administration Act 6 of 1998 Regulations. In terms of Regulation 4, a person desirous of contracting with the Province for the acquisition of provincial state land shall complete a written offer and submit it to the Component. Once the written offer is received the Component shall consider the offer and thereafter a recommendation whether or not it should be accepted for further consideration and notify the offeror in writing. If an offer is accepted for further consideration, as is in *casu*, the land shall be valued in writing by an independent valuer. On receiving the valuation report the Component must compile and submit to the Head of Component a written report giving reasons why the offer was accepted for consideration. The Head of Component shall, after consultation with the Minister decide whether the offer is to be accepted, and if so, shall sign the contract on behalf of the province.

[15] In the present matter, Mr Bailey, acted in the place of the Head of the Component. In a letter dated 30 June 2003, he wrote to the Minister T Essop recommending the sale of the property to the plaintiff. The recommendation was duly endorsed by the manager: Property Disposals, Senior Manager: Property Development and the Assistant Executive Manager : Property Management. The Minister however, did not indicate his/her approval or disapproval of the sale of the property to the plaintiff.

[16] It is against this background, I believe, that it was contended on behalf of the plaintiff that on the basis of the quasi-mutual assent doctrine, the evidence amply demonstrates that an agreement came into existence. Relying on *Neugarten v Standard Bank of SA Ltd* 1989 (1) SA 797 (A) at 813 H-I, Counsel for the plaintiff argued that not all contracts entered into in contravention of a statutory requirement are void because even if an expressed statutory provision exists, it may mean that the contract is voidable at the option of the party belonging to the class for whose benefit the statute was intended. It is so that the Court in *Neugarten* in interpreting the provisions of section 226 of the Companies Act, held that it is not a rule that in all cases where the consent of some person is a prerequisite (whether at common law or by virtue of a statutory prohibition), that there must be prior consent, generally speaking, consent may be given *ex post facto* by subsequent ratification. Whilst this may be the case, the facts of the present matter must be understood in the context of the applicable legislation as well as Regulations. In *Neugarten,* the Court in considering whether a contract made in conflict with a statutory provision is null and void applied the following principles stated

in *Tuckers Land and Development Corporation (Pty) Ltd v Wasserman* 1984 (2) SA 157 (T) at 159 and 160:

‘1. The validity of the contract in such circumstances depends upon the intention of the legislature. Generally the consequence of such conflict is nullity of the contract, but that is not an inflexible rule. A careful consideration of the wording of the statute and its objectives may lead to the conclusion that the Legislature did not intend invalidity to result.

2. *Indiciae* that point to an intention that invalidity of the contract should result include the following:

(a) The use of the words “shall” or “moet” in the relevant section.

(b) The fact that the provision is expressed in negative terms

(c) The provision of a penal sanction for contravention of the relevant provision, but in that case the question remains whether or not the Legislature was satisfied that the criminal punishment was to be sufficient sanction without the contract itself being rendered void.

3. A further consideration is whether or not visiting the contract with nullity will cause inconvenience or lead to more undesirable results than if the wrongdoer is merely punished criminally.’

[17] The Legislature in the present matter makes use of the word “shall”. However, as seen from the principles laid out in the *Wasserman* judgment, *supra*, the text, on its own is not an indicator of peremptory terms. However, a proper approach to statutory interpretation was fully explained by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC), para 90:

‘The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.

Recently, in *Thoroughbred Breeders' Association v Price Waterhouse,* the SCA has reminded that:

"The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in it if seemed on the face when blinkered peering at an isolated provision of a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914 D –E:

'I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'

The first question that arises is what is the purpose of the Act. The clear purpose of the entire Act is to regulate the manner in which the Western Cape Provincial government, as custodian of public resources and assets, disposes, alienates or acquires immovable property. That the Premier must publish in an Afrikaans, English and IsiXhosa newspapers a notice of the intended disposal calling upon interested parties to make representations with regard to such disposal is clearly indicative of the need to ensure equitability, accountability and transparent governance in the disposal of state land. The mischief the Act seeks to prevent is unfair and unbridled exercise of power in the disposal of state land. To elaborate the process set out in the regulations is clearly intended such that no offer for the purchasing of provincial state land is approved without consultation with the relevant officials and subsequently the Minister. This much is equally clear from the provisions of Regulation 3 (1) which requires the Minister to appoint a Provincial Property Committee whose function is to consider a report from the

Component on acquisitions and disposals of provincial state land, including offers of acquisition and disposal. Stated differently, provincial state land which is more than or equal to its market value can only be disposed subject to Regulation 3 (1).

[18] I do not agree with counsel for the plaintiff that there exists a contract between the parties entitling the plaintiff to an order for specific performance. If the plaintiff was to be permitted to have the property transferred to him without consideration by the Minister, that would have the untenable result of perpetuating the mischief the legislature seeks to prevent. A contract on these facts could only have come into existence after the defendant had applied his/her mind to the disposal of the property in line with the plaintiff's offer. In *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 SCA, para 5 the court considered the validity of lease agreement concluded with the respondent without establishment of a tender board in terms of the Provincial Tender Board Act (Eastern Cape) 2 of 1994 and held that:

'[5] Here, of course, we are dealing not with the form in which a statute requires a transaction to be clothed but with something more fundamental: the express conferment of sole power upon a specified entity, to the exclusion of any other person or entity, to arrange leases. (I say 'to the exclusion of any other person or entity' because that is undeniably the plain and ordinary meaning of the words 'shall have the sole power __ to arrange the hiring __ of anything ___ for or on behalf of the province. That does not mean of course that the criteria other than the language which are to be taken into account when the consequences of non-compliance with statutory requirements going to form (as opposed to *vires*) are under consideration are entirely irrelevant when interpreting the provision. But their persuasive impact would have to be

great indeed before a departure could be justified from what unambiguously and plainly appears to be a severely restricted confinement of *vires* to enter upon a particular kind of transaction."

Similarly in *Ferndale Crossroads Shareblock (Pty) (Ltd) and Others v Johannesburg Metropolitan Municipality and Others* 2011 (1) SA 24 (SCA), the court considered the effect of the respondent's council's failure to publish a notice of its resolution to lease certain land to the applicant in the light of section 79 (18) of the Local Government Ordinance 17 of 1939, regulating the method of acquisition, letting and alienating or disposing of any movable or immovable property and Mpati P stated thus:

"[21] Section 79 (18) (b) is intended to ensure that no immovable property of a local authority is alienated or disposed of without notice to the ratepayers and the affording to interested persons of the opportunity to object and have such objections duly considered. "Alienation" and "disposal" are concepts which are obviously to be liberally construed in the public interest. The agreement in question detracts from the Council's ownership of 627 square metres of its immovable property by transferring rights in that property to the appellants for 20 years ... Thus, the agreement factually gives rise to the very situation that the subsection was designated to regulate. The fact that the alienation may appear to be insignificant in the scheme of the agreement is irrelevant: the only question is whether or not there is an alienation or disposal. Once there is, interested parties could not be deprived of the opportunity to object."

The court further concluded that:

'[22] The effect of non-compliance with the provisions of s 79 (18) (b) and (c) of the ordinance, i.e failure by the respondent to cause a notice of its resolution, embodying its intention to let the the area of land described in the agreement, to be affixed to its public notice

board, and to publish it (the resolution) in a newspaper, calling for objections to the proposed lease before exercising its power to let, is that the jurisdictional fact necessary for the exercise of the power was absent. In terms of s 79 (18) (c) a council shall not exercise the power [to let immovable property] ... unless [it] has considered every objection'. In the absence of the necessary jurisdictional fact the respondent could not validly exercise the power, with the result that the lease element of the agreement was ab *initio* invalid.'

[23] Following the above dictum, the court in *Emalahleni Local Municipality and another v Propark Association & another* (089/12) [2012] ZASCA 177 declared the sale of council land *ab initio* invalid for failure to afford the ratepayers and interested parties the opportunity to object to the intended alienation.

[24] What is plain from the aforegoing decisions is that it is imperative that whenever the alienation of municipal land is contemplated, there has to be compliance with the relevant statutory obligations before the deed of sale develops into a completed contract and the property transferred to the applicant despite there being no express statutory declaration of nullity in the event of non-compliance. This is so because it must be ensured that in alienating public immovable property, openness and accountability is maintained and that the interests that are to be served by alienation of such property are not compromised. (See *Rinaldo Investments (Pty) Ltd v Giant Concerts CC* and other (311/2011) [2012] ZASCA 34 (29 March 2012). Although in the matter at hand, it can be accepted that by preparing the report and submitting it for approval to the relevant bodies, Mr Bailey sought to bring the contract in line with the Act but the failure of the defendant to apply its mind to the proposed alienation compromised the

accountability and openness the Regulations seek to achieve. In any event, the partial compliance cannot elevate an otherwise void agreement to a completed valid contract. The effect of non-compliance with the provisions of s 3(2), and 3 of the Act, as well as Regulation 4 renders the alleged agreement, ab initio invalid. It is therefore my judgment that the plaintiff failed to prove on a balance of probabilities that there was an offer and acceptance on the basis of which the defendant should be compelled to perform obligations arising therefrom. In the circumstances, I deem it unnecessary to consider the application of the quasi-mutual assent doctrine as the above findings are decisive of this matter.

[25] It should be mentioned that the plaintiff in his evidence raised the fact that he had been kept waiting for several years for the transfer of the property and the defendant kept *'shifting the goalposts*'. The following remarks of Marais JA in the *Contractprops* judgment at page 148, are, by parity of reasoning equally applicable to the instant matter:

'[13] . . . The fact that respondent was misled into believing that the department had the power to conclude the contract is regrettable and its indignation at the stance now taken by the department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were *ultra vires* the powers of the department and they cannot be allowed to stand as if they were *intra vires*.'

In addition, the plaintiff sought an order for specific performance, which is a contractual remedy. His claim was not in public law or administrative law. (See *Ferndale Crossroads*, supra page 34 paragraph 25).

[26] Flowing from the above findings, the following order will issue.

The plaintiff's claim is dismissed with costs.

NDITA, J

FOR THE APPLICANT:	Adv A **De Vos** SC
INSTRUCTED BY:	Francois Van Zyl Attorneys, George
FOR THE RESPONDENT:	Adv D. J. **Jacobs**
INSTRUCTED BY:	State Attorney
DATE OF HEARING:	07 July 2011
DATE OF JUDGMENT:	23 January 2013