IN THE HIGH COURT OF SOUTH AFRICA,

NORTHERN CAPE DIVISION, KIMBERLEY

Not reportable

Case No: 790/2017

In the matter between:

CORNELIUS HERMANUS DORFLING **FIRST PLAINTIFF**

ANTONITA DORFLING **SECOND PLAINTIFF**

And

GAMAGARA LOCAL MUNICIPALITY **DEFENDANT**

Date heard: 26 and 28 November 2019

Date Delivered: 20 December 2019

JUDGMENT

Phatshoane AJP

[1] Mr Cornelius Hermanus Dorfling and Ms Antonita Dorfling, the first and second plaintiff, are married to each other in community of property. They instituted action against Gamagara Local Municipality, the

defendant, to enforce a contract of sale of an immovable property they alleged to have concluded with the municipality. They tender an amount of R860 000.00 (exclusive of VAT) as the purchase price for the property in question and seek an order that the municipality be ordered to sign all the necessary documents to give effect to the transfer of the immovable property concerned into their names, including but not limited to a written Deed of Sale. In the alternative, they claim payment of an amount of R894 000.00 with interest on the basis that the municipality was enriched at their expense.

[2] At the commencement of the trial on 26 November 2019 the parties applied for the separation of the contractual claim, the main claim, from the enrichment claim. They submitted that they have orally agreed to do so during the pre-trial conference. However, on their pre-trial minute filed on 19 November 2018 it is recorded that there existed "no necessity for the issues to be separated". In other words the two disputes were to be dealt with jointly. This appears to have been an ideal way in respect of which the issues ought to have been disposed of because the evidence adduce in respect of the contractual claim may have a bearing on the other claim. The action was certified trial ready on both the merits and the quantum on 19 February 2019. In my view, the separation of the disputes is a dilatory exercise. The following remarks by Madlanga J in *Eke v Parsons* 2016 (3) SA 37 (CC) at 51 para 34, albeit said in the context of settlement agreements, are apposite:

> "The court must still act in a stewardly manner that ensures that its resources are used efficiently. After all, its 'institutional interests . . . are not subordinate to the wishes of the parties'.

[3] In view of the fact that the parties were unprepared for the hearing of the enrichment claim, which in their view would have required experts to be

called at additional costs, the matter proceeded on the basis that only the contractual claim was to be adjudicated upon.

[4] Mr Dorfling entered into employment with the municipality on 01 January 2005. He is a chief traffic officer and resides at 30 Geelhout Street, Kathu ("the property"), since the date of commencement of his duties with the municipality. The property belongs to the municipality whereas he is a tenant. During 2014 he informed Mr Tumelo Patrick Maamogwe, an asset manager in the employ of the municipality, that he was interested in buying the property in issue. Later on, in July 2014, Mr Maamogwe brought to him a letter addressed to "To whom it may concern" with the subject: "An offer to purchase" which was not on an official letterhead of the municipality but signed by Mr Maamogwe. It reads:

> "This letter serves as a confirmation that the following property is owned by Gamagara Municipality:
>
> Stand No: 318
>
> Address: 30 Geelhout Street, Kathu, 8446
>
> Market Value: R860 000 Vat excl.
>
> The <u>generation</u> of an offer to purchase for [Mr] Cornelius Hermanus Dorfling with ID…..who is currently residing at the above mentioned property will be in terms of section 14 and 90 of the Municipal Finance Management Act No: 56 of 2003 which speaks to the disposal of municipal property. The value will be market related as per 2014 property valuation roll of Gamagara Local Municipality, where an arm's length transaction is concluded between the knowledgeable willing buyer and willing seller.
>
> Please feel free to contact me in case of clarity needed regarding this matter."

[5] Mr Dorfling discussed the above document with Mr Maamogwe including the purchase price of the property. He then enquired from Maamogwe when he would receive documents approved by the municipal council authorising him to buy the property. On 13 August 2014 Mr Maamogwe

provided Mr Dorfling with another “Offer to purchase” couched in almost similar terms as the previous offer to purchase. Mr Maamogwe advised him to cause a letter to be delivered to the municipality which shows that he has an interest in purchasing the property. On 25 September 2014 Mr Dorfling lodged an application with the municipality to purchase the property. His written motivation was that he had been resident on the property for eight years and had been in the service of the municipality for the same period. He incurred costs in effecting improvements on the property and was entitled to purchase it. At the end of the application he captured words to the effect that a favourable consideration of his application by the municipal manager would be appreciated.

[6] Mr Dorfling intimates that following the lodging of his application to purchase the property he repeatedly requested the municipal manager to provide him with a document or proof which would enable him to secure a loan to buy the property. The Municipal manager never reverted him. Almost a year later, following the launching of his application, Mr Dorfling’s attorneys dispatched a letter to the municipality, on 11 September 2015, in which they demanded that the municipality provide their client with the aforesaid offers to purchase; that despite numerous verbal requests that the municipality provide their client with the written Deed of Sale, so as to give effect to the offer to purchase, it failed or refused to comply. Attached to the letter was a Deed of Sale which the attorneys urged the municipality to sign and return. The municipality was furthermore placed on terms that should it refuse to adhere to the demand this Court would be approached to compel it to do so.

[7] Mr Maamogwe’s version slightly differs from that of Mr Dorfling. He says that during 2014 Mr Dorfling approached him for advice on how to acquire the property that he leased from the municipality. Few days later, Dorfling requested him to assist him in drafting a letter to acquire this

property. He furnished Mr Dorfling with an offer to purchase which was not on the municipality's official letter head. The purpose of this he says was to give Mr Dorfling some guidance on the process to be followed to procure a municipal property. He addressed this to "To whom it may concern" because Mr Dorfling explained that he would take the letter in question to someone who would assist him on this score. He further advised Mr Dorfling that persons who wish to acquire municipal properties ought to follow the procedures as contained in ss 14 and 90 of the Local Government: Municipal Finance Management Act, 56 of 2003 (the "MFMA").

[8] According to Mr Maamogwe Mr Dorfling ought to know that he could not sell the property to him because only the municipal council is empowered to dispose of municipal properties. Mr Maamogwe reproduced the "Offer to purchase" on the municipality's letterhead because Mr Dorfling informed him that "his people" needed the letter to be captured on the official letterhead. He then captured the words "Precedent" to the letter in issue to show that this was an example of what Mr Dorfling had to do.

[9] What arises for consideration is whether there was a valid offer to sell the property by the municipality and the acceptance thereof by Mr Dorfling capable of being enforced by this Court. Section 14 of the MFMA reads in part:

"14 **Disposal of capital assets**

(1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-

(a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

(b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

(3) A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of.

(4) A municipal council may delegate to the accounting officer of the municipality its power to make the determinations referred to in subsection (2) *(a)* and *(b)* in respect of movable capital assets below a value determined by the council.

(5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111…."

[10] Section 90 of the MFMA is phrased in similar vein as s 14 but applies to municipal entities as opposed to municipalities. The processes foreshadowed in s 14 of the MFMA were not followed in this case. For example, it is axiomatic that no municipal council meeting that was open to the public had been called to decide on reasonable grounds that the property in issue is not needed to provide the minimum level of basic municipal services or to consider its fair market value including its economic and community value to be received in its exchange.

[11] On the plain reading of the two purported "offers to purchase" they certainly do not evince any intention on the part of the municipal council to sell the property to Mr Dorfling. The contents of the so-called offers to purchase are irreconcilable with their subject heading "An offer to Purchase". They refer to the *"generation".* Put differently, the creation of an offer to purchase which "*will be"* subject to s 14 of the MFMA. It is also inconceivable that the said offers to purchase were not directed to Mr

Dorfling as a prospective purchaser but are addressed to an amorphous "To whom it may concern". In any event, it is incredible that the municipality could have made an offer to purchase instead of an offer to sell the property.

[12] Mr Dorfling's fared badly as a witness. In his account Mr Maamogwe advised him to direct a letter to the municipality expressing his interest to purchase the property which he did. Therefore, I fail to comprehend his argument that the municipality had made an offer to him which he accepted. Even more bizarre is that he admitted being knowledgeable that the municipality had the choice to either approve or disapprove his application to purchase the property. This clearly accords with the last sentence in his application urging the municipality to favourably consider it.

[13] It is also remarkable that Mr Dorfling penned the application to purchase the property after the purported offers to purchase were delivered to him. If these were valid offers, as he professes them to be, then it makes no sense that Mr Dorfling would make an application to the municipality to purchase the property when he could have simply accepted the offer.

[14] Quite significantly Mr Dorfling explained that he made an offer which was not responded to by the seller. This is in total contradiction of a case he made in his particulars of claim where he states the following in paras 6.1 and 6.2:

> "6.1 On 25 September 2014 and at Kathu, the first plaintiff [Mr Dorfling], acting in his personal capacity and on behalf of the second plaintiff [Ms Dorfling], accepted the written offer.
>
> 6.2 A copy of the written acceptance is attached hereto as annexure "C".

[15] Annexure "C" to the particulars of claim is the application Mr Dorfling made to the municipality to purchase the property referred to earlier. When probed on the above discrepancy his response was that he did not settle his pleadings, fair enough. He also intimated not knowing if the municipality took a decision to conclude a contract with him.

[16] The Dorflings accepted in the Rule 37 pre-trial minute, correctly so, that they bore the onus, *inter alia*, to proof that the municipality made a valid written offer to sell the property to them which they accepted. In my view, they failed to discharge that onus. What the Dorflings want the Court to do is to compel the municipality to conclude a contract it does not wish to enter into or to create an opportunity for parties to transact. That is impermissible. The Dorflings' contractual claim is ill-conceived and must fail. Costs are to follow the results on party and part scale.

Order:

1. The contractual claim of Mr Cornelius Hermanus Dorfling and Ms Antonita Dorfling (the first and second plaintiff) is dismissed with costs on party and party scale.

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MV Phatshoane AJP

APPEARANCES:

FOR THE FIRST AND SECOND PLAINTIFF: Adv A. Stanton
Instructed by Engelsman Magabane Inc.

FOR THE DEFENDANT: Adv A.Sander
Instructed by Van De Wall Inc.