IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

8/11/13

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

08 November 2013
DATE SIGNATURE

CASE NUMBER: 25462/10

In the matter between:

LORENZO ENRICO FISHER	**1ST APPLICANT**
COLIN MARTIN ROWE	**2ND APPLICANT**
DANIEL THEODORUS BRITS	**3RD APPLICANT**
MAZIMANI SYTEVEN CHAUKE	**4TH APPLICANT**
DANIEL BENJAMIN ROOS	**5TH APPLICANT**
JOSPEHUS JOHANNES PRETORIUS	**6TH APPLICANT**
DEIDRE BARNARD	**7TH APPLICANT**
CAREL JACOBUS VERAMAAK	**8TH APPLICANT**
HENDRIK LEO DU PREEZ	**9TH APPLICANT**
ARNOLDI VAUGHAN	**10TH APPICANT**
M ROOS	**11TH APPLICANT**

And

EKURHULENI METROPOLITAN MUNICIPALITY	**1ST DEFENDANT**
THE REGISTRAR OF DEEEDS	**2ND DEFENDANT**

JUDGMENT

MAVUNDLA J

[1] *In casu*, the applicants withdrew their application against the first respondents on the day of the hearing thereof on the 3 June 2013, without tendering costs, as it would generally be expected. The parties having failed to reach an agreement with regard to costs, the only issue to be decided *was,* therefore, *the* question of liability of the costs.

[2] I am indebted to the counsel for the respective parties for the comprehensive heads of argument they have furnished me with. They have also fully addressed me in respect of why this court should make an order in favour of their respective clients and against the other party. I have since taken the view that the dictates of fairness demand, *in casu*, that in the exercise of my

discretion[1], I should order that each party should pay its own costs, for the reasons mentioned herein below.

[3] It is common cause that the applicants during June to July 2010, entered into a written agreement of sale in respect of certain immovable properties which relate to stands with existing dwellings thereon, which they purchased from the first respondent's predecessor in title (The Greater East Rand Metro).

[4] At the time of the conclusion of the said agreements of purchase and sale, the applicants were in the employ of the first respondent. The agreements were made subject to a suspensive[2] condition that, the relevant area within which the relevant properties were situated would be proclaimed a township. The suspensive condition with regard to proclamation were fulfilled in respect of all the agreements entered into by the applicants during 2008, and the applicants were advised in 2008 that the first respondent was in a position to transfer the above mentioned properties into their names as per the agreement of sale.

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[1] Vide Affordable Medecine Trust v Minister of Health 2006 (3) SA 247 (CC) AT 296 H [138] -297H.

[2] *Vide* Design & Planning Service v Kruger 1974 (1) SA 689 (T) at 695.

[5] The first respondent subsequently instructed its transferring attorneys not to effect transfer of the purchased properties.

[6] The applicants then brought an application against the respondents in May 2010, for an order directing the first respondent to transfer to the respective applicants the relevant purchased immovable properties sold to them by the first respondent. They also sought rectification of certain terms of the written agreements.

[7] The applicants in their papers averred, *inter alia*, that the agreements are valid and binding and that therefore, they are entitled to specific performance and that the first respondent should be ordered to have the immovable properties transferred to them.

[8] The first respondent filed its opposing affidavit in August 2010. The thrust of the first respondent's opposition to the application, was that the Council failed to: (i) affix a notice of the Council resolution of 25 April 2000 to the public, on the notice board of the council, (ii) publish such notice in a newspaper; (iii) allow any person, who may wish to do so, to object to the exercise of the power to dispose of its property; as required in terms of s79 (18) (b) of the *Local Government Ordinance* No 15 of `986 (*"the Township Ordinance")*; consequently the agreements were not valid and enforceable against the first respondent *ab initio*.

[9] The first respondent further contended that the resolution of the 25 April 2000 which resolved to offer the sale of the properties to the emergency Services personnel, in circumstances where the Ordinance does not provide for preferential treatment of employees over the general public in acquisition of the first respondent's movable property was discriminatory. The contracts concluded with the fifth and seventh to tenth applicants are not

valid, as the option to purchase such properties were exercised after 31 December 2000 without them having been offered to the open market.

[10] The issue of validity of the agreement remained a mute point between the parties. However, in the matter of *Ferndale Crossroads Share Block (Pty) Ltd and Others v Johannesburg Metropolitan Municipality and Otters,*[3] dealing with the validity of a lease agreement over immovable property, which was concluded without compliance with the provisions of s 79(18)(b), the Supreme Court of Appeal held that the lease agreement was invalid *ab initio*. Similarly, where the sale of the immovable property, as *in casu,* was made without compliance with the provisions of s 79(18)(b), the purchase and sale agreement was invalid *ab initio*. That as much has since been, belatedly conceded, by implication, through the very withdrawal of the action by the applicants. Consequently, I need not therefore decide the issue of invalidity in casu. It suffices to state that the point of invalidity of the agreement was well taken by the first respondent and it is held as such.

[3] 2011 (1) SA 24 (SCA) paras [21] –[22].

[11] In my view, the applicants dragged the respondents to court. When they brought the application, the applicants employed the services of the former legal employees of the first respondent, who, in my view, ought to have known better that there had been no compliance with the provisions of s 79(18)(b) of the Ordinance and that the agreements were therefore invalid. I am inclined to suspect that the whole process of the relevant sales was a deliberate exercise to fleece the first respondent of its assets to the advantage of the applicants and discrimination against the general employees of the first respondent. The applicants chose not to withdraw their action up to the door steps of the court on the hearing of the matter on the 3 June 2013.[4] This as much is good reason to mulct the applicants with costs of the application. On the other hand, the first respondent had invited the applicants to purchase the relevant immovable properties, without having ensured that it had complied with its statutory obligations[5]. This is, however, regrettable[6] but does not warrant, in my view that the

[4] Vide Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 -245 (CC)
[5] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hydro-Tech Systems (Pty) Ltd & Another* 2011 (11) SA 327 (CC).
[6] *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA.

first respondent should be mulcted with costs, as was contended on behalf of the applicants.

[12] It is common cause that in terms of the written agreement of purchase and sale, all the applicants were responsible, at their own costs, for the maintenance of their respective properties. It is common cause that there was no purchase price nor occupational rental paid by the applicants to the first respondent. The purchase price of the respective properties varied from R185, 000. 00, to R190, 000. 00. However, some of the respondents in anticipation of the property being transferred into their names, effected certain material improvements on the properties which they believed to have purchased, which improvements in some cases were in excess of two hundred thousand rand. This is the major consideration influencing me not to visit the applicants with the costs of this application. They have already suffered financial prejudice, which could have been averted much earlier had they been properly advised of the invalidity of the purported sales. I therefore take the view that the dictates of equity, fairness and justice demand that I should not mulct the applicants with costs, although they are technically, by withdrawing the application, in

the same position as the loosing parties. In my view, as already indicated earlier herein above, in the circumstances of this case, it would be fair and just to order that the respective parties should bear their own costs.

[13] In the result it is hereby ordered that each party to pay their own costs.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING	**: 06 / 06 / 2013**
DATE OF JUDGMENT	**: 08 / 11 / 2013**
APPLICANTS' ATT	**: LEN DEKKER & ASSOCIATES**
APPLICANTS' S ADV	**: ADV. J. S. STONE**
RESPONDENTS' ATT	**: NOZUKO NXUSANI INC**
RESPONDENTS' ADV	**: ADV. J.R. PETER SC**
	with ADV C. GEOGIADES