FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2781/2008

In the case between:

ITUMELENG ESTATES (EDMS) BPK	1st Applicant
HENDRIK ADAM ALBERTYN LAMBRECHTS N.O.	2nd Applicant
JAN GEORGE FOURIE N.O.	3rd Applicant

and

MANGAUNG PLAASLIKE MUNISIPALITEIT	Respondent

JUDGMENT: NXUSANI, AJ

HEARD ON: 7 MAY 2009

DELIVERED ON: 21 MAY 2009

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[1] On 14 January 1998 Hennie Lambrechts Architects made an offer to the Respondent's predecessor, the Bloemfontein Transitional Local Council, to purchase the property upon which the Bloemfontein Golf Club is situated. This property is described as the remainder of the farm Bloemfontein 654, in extent 109,32 hectare.

[2] The Applicants have not put up a copy of the letter of 14 January 1998 to enable the Court to determine the terms thereof.

[3] The Applicants intended to develop the land into a golf estate with a course, a sports academy, residential units, commercial and other facilities including a hotel.

[4] Hennie Lambrechts Architects made a second offer to the Respondent. They wanted to purchase the land to the east of the Bloemfontein Golf Course because more land was needed for the golf estate. This happened on 24 April 1998. This piece of land is described as subdivision number 92 of the farm Bloemfontein 654, in extent 24.15 hectare.

[5] This second offer was contained in annexure "R13". It reads as follows:

> "We wish to apply for an extension of our application to purchase the land on the eastern boundary of the Bloemfontein Golf Club up to the by-pass road."

A Site indication was attached to the letter of 24 April 1998. It is the alleged alienation of this latter portion which has caused the Applicants to bring this application.

[6] The eastern portion (the subdivision 92 of the farm Bloemfontein 654) can be seen at page 33 of the papers. A pencil has been brought onto the coloured diagram to indicate where it is situated.

[7] It cannot be argued that the offer of 24 April 1998 had anything to do with the Bloemfontein Country Club Trust ("the Trust") because the Trust only appointed the Second Applicant as a Trustee on 28 April 1998.

[8] The Respondent informed Hennie Lambprecht Architects that the council was in principle willing to approve the application to purchase the first piece of land. The willingness of the council emerged at its meeting of 25 June 1998. The final approval would only be made subject to certain the conditions. These conditions are not repeated

in this judgment. The Respondent requested Hennie Lambrechts Architects to indicate, in writing, their acquiesence to the council resolution. Hennie Lambrechts Architects was to forward detailed development proposal for consideration.

[9] In its letter of 30 September 1998 (which has the words “ontvangs 5-10-1998”), the Respondent notified Hennie Lambrechts Architects that it had resolved on 23 September 1998 to approve the offer to purchase the land on the eastern boundary of the Golf Club. Additional conditions, which constituted a counter offer, were imposed. This counter offer did not require, in its terms, any written acceptance.

[10] Hennie Lambrechts Architects amplified their offer to purchase the two pieces of land on 26 October 1998. They aksed the council to consider a number of requests. One of these was for a discount in the purchase price. This request was not made on behalf the Trust but in their own stead.

[11] There is a second letter of 1 December 1998 written by Hennie Lambrechts Architects. This document was not discovered by either of the parties. I assume that nothing turns on the contents thereof.

[12] The Respondent accepted the offers made by Hennie Lambrechts Architects. This acceptance is contained in a letter dater 7 February 1999. It was received by Hennie Lambrechts Architects on 8 February 1999. There were additional conditions, not foreshadowed in the first and second offers. The salient part of the decision is captured in paragraph C as follows:

> "That the Bloemfontein Gold Club and surrounding land (portion of the remainder of the farm Bloemfontein 654 as well as subdivision 92 of the farm Bloemfontein 654), in extent over 110 ha as shown on the proposed lay-out clam (attached as annexure B), be alienated to you and/or nominee and that the selling price of the said land and improvements be equal to the amount of the outstanding loan namely, R3 361 862,00 (VAT excluded), but that the request for a total discount not be

> granted due to the yearly financial loss to council, i.e. R470 424,00 for the first financial year and also further subject to the following conditions,"

[13] A number of conditions were set out in this letter. They required Hennie Lambrechts Architects to comply with several obligations. These relate to matters such as rezoning; the appointment of a consultant to consolidate the land; the liability for certain costs; the appointment of a professional land surveyor; the obtaining of a certificate from the Free State Provincial Government; the submission of a traffic impact study; the details of future access to the premises; the completion of an environmental impact study; the reduction of noise levels; the provision for the protection of the fauna and flora; matters relating to the electricity required for the premises; provision for municipal services; the protection of the lessee in the Deed of Sale; and the provision of rates and sanitation fees.

[14] Hennie Lambrechts Architects was asked to indicate their written acceptance of the council's resolution.

[15] It is common cause that no written acceptance of the council's resolution was ever delivered.

[16] I am going to assume that a contract came into existence between the Respondent and Hennie Lambrechts Architects and/or their nominee. I also assume that there was compliance with the Alienation of Land Act, 68 of 1981. It is trite that such a contract can compose of several written instruments.

See: **CRAIB v CRISP 1984 (3) SA 594 (T), BAILES v HIGHVELD 7 PROPERTIES (PTY) LTD** 1998 (4) SA 42 (N)

[17] Hennie Lambrechts Architects then began complying with the conditions set out in the letter of acceptance. One such example is to be found in the letter of 20 July 1999 containing an application for Consistency with the Guideline for Bloemfontein. In this application, Hennie Lambrechts Architects represetnted to the Head: Spatial Planning Directorate, that they were acting on behalf of

their client, the Trust. The letter was also signed for and on behalf of the Trust. Hennie Lambrecht also signed an application, on behalf of the Bloemfontein Country Club Trust IT775/98 and on behalf of Jan George Fourie This happened, on 31 May 1999. It was addressed to the Free State Provincial Government for Consistency with the Guide Plan. The subsequent letters written to the Respondent had the words at the end thereof: “Principle [sic] Agents”, qq Bloemfontein Country Club Trust”. The letters written dated 31 May 2005, 21 September 2005, 26 January 2006, 7 April 2006, 11 April 2006, 16 May 2006, and 8 June 2006 did not give any indication that the author was doing so in his capacity as a Trustee. The only response from the Respondent is dated 7 November 2006. The rest of the leters were simply ignored. Hennie Lambrecht Architects request for progress reports fell on deaf ears.

[18] I digress to indicate the Courts concern at the failure of the Respondent to deal with correspondence properly and timeously. The Constitution requires local government to be

accountable and to ensure a public service committed to high standards of professional ethics, the efficient, economic and effective use of resources. It is the duty of a municipality to ensure a public service committed to transparency by providing timely, accessible and accurate information.

[19] The Respondent imposed three additional conditions which were omitted in the letter of 1 February 1999. These related to the provision of a professional engineer to investigate the design and supervise the construction of new municipal services; the obligation of the "applicants" for damages in case civil services were moved or increased, and, the provision for servitudes in favour of the Respondent. The Second Applicant alleges that he accepted all the conditions imposed by the Respondent.

[20] There were considerable delays thereafter. Numerous letters were written to the Respondent. In some of the letters the author clearly acted in a representative capacity and in others no such indication was given.

[21] On 22 January 2007 the Acting Executive Director: Economic Development and Planning of the Respondent wrote a letter to Hennie Lambrechts Architects in the following terms:

> "Please be informed that the purchase price of the above-mentioned property remains unchanged and stand at R3 360 000 000-00 (Three million three hundred and sixty thousand).
>
> The municipality is prepared to proceed with this transaction, however subject to the following conditions, namely,
>
> i that the Deed of Sale be signed within three (3) months from the date of this letter, failing which the allocation of the property in question shall lapse;
>
> ii that the necessary town planning and surveying processes be finalized with [sic] a further period of twelve (12) months from the date of signature of the Deed of Sale referred to under paragraph i above, failing which the allocation of the property in question shall lapse and all wasted legal costs in respect of the drafting of the Deed of Sale be for your account;

iii that transfer of the property and payment of the purchase price be effected within a further period of three (3) months from the expiry of the period referred to under ii above, failing which the allocation of the property in question shall lapse and any wasted costs be for your account; and

iv that the development must be completed within a further period of twenty four (24) months from the date of transfer of the property into the name of the purchaser failing which the land shall be transferred back to the municipality for the sole cost of the purchaser or any successor in title and that council's liability be the payment of the initial purchase price paid by the first purchaser, without any claim for interest. [sic]

Your acceptance hereof is urgently awaited so that this long outstanding matter can be finalized."

[22] Some weeks after the letter of 22 January 2007 and some twenty days before the three month period, the Second Applicant notified the Respondent that the Trust accepted the purchase price as well as the stipulations set out in i,ii, iii and vi in the letter of 22 January 2007. The Trust

requested the Respondent to "proceed urgently with the preparation of the Deed of Sale as well as all necessary documentation". The minutes of the Respondent indicate that the Applicant for the purchase of the "Country Club" was "Messrs Hennie Lambrecht Architects acting on behalf of a client".

[23] The 2nd and 3rd Applicants, alive to the deadline of 22 April 2007 wrote a letter on 12 April 2007 to the Respondent. They reminded the Respondent of its stipulation that the Deed of Sale had to be finalised before 22 April 2007. They requested the Respondent to make available the necessary documentation to be signed by the 2nd and 3rd Applicants.

[24] There is a memorandum dated 30 March 2007 containing a recommendation that the signing of the Deed of Sale be held in abeyance. It asked that the matter be referred to council to consider rescinding the resolution of 28 January 1999. The memorandum contained the signature of one M J Thithi, the General Manager: Social Development, the

Executive Director: Community and Social Development. The signature was brought thereon on 4 April 2007. The City Manager approved the recommendation. This document served before the Respondent's mayoral committee on 10 May 2007. It adopted the recommendation of the municipal manager.

[25] On 17 May 2007 a lively debate occurred among the counsellors. They complained that the property had not been valued; that the only public golfing facility was being lost; that there had been a substantial delay and that the value of the property was now worth more than the R30 million. In the end the counsellors unanimously resolved to accept the recommendations of the municipal manager.

[26] The Applicants then appointed one Molefi Litheko, ("Litheko") a director of Econ Initiate, Consultants in "business and related law" to promote the interests of the Applicants. Litheko put up an affidavit setting out his efforts in the matter. Subsequently a report of the executive

mayor was tabled on 17 May 2007. It contained the recommendations to which I have referred.

[27] The Respondent did not notify the Applicants of the decision taken at the meeting of 17 May 2007. The reasons therefor are not contained in the papers.

[28] The 2nd Applicant received a letter from the City Manager advising them that the Respondent had resolved on 17 May 2007 to rescind the resolution of 28 January 1999 based on objections contained in a report prepared by the Community and Social Development Directorate. The City Manager recoreded that the matter was closed for discussion. This only occurred on 12 March 2008.

[29] Litheko made minutes of the council available on 15 May 2008. The minutes related to a meeting of the council on 20 September 2007. The extract quoted by the Applicant indicated that the land previously allocated to Hennie Lambrecht Architects during 1999 was now available for allocation. There was mention of the receipt of an

application from Growth Property Group received before 1 October 2005. It was suggested that the Respondent should finalise that application.

[30] The Applicants contend that a decision has been made to sell the property to Growth Property Group. I disagree. The extract cannot be construed so as to conclude that a decision has been made to sell. In my judgment this fact is fatal to the Application.

[31] The Applicants approached their attorneys. They recorded that the Applicants were not accepting the repudiation of the sale agreement; that the Applicants had learned of the Respondent's intention to sell the property to a certain Moroi. Incidentally, the name of the alleged purchaser is spelt elsewhere in the papers as Moroe. The Applicants requested an undertaking and threatened litigation. The matter remained quiet with the attorneys until 6 June 2008 when they sprung into action. According to the Applicant's legal representatives, the Applicants instructed them that the eastern portion (the second piece of land) had been

sold to the Growth Property Group. Reference was made to a supplementary affidavit apparently tabled in a special meeting of the Respondent on 20 September 2007. They also requested the Respondent not to proceed with the transfer pending a review application. This drew no response.

[32] The Applicants contend that the sale to Growth Property Group and Mr Moroe caused damages to them in the amount of R19,97 million.

[33] On 31 July 2007 the Applicant's representatives Econ Initiate, threatened to institute legal proceedings by 3 August 2007.

[34] The Respondent has taken the point that the Deed of Alienation was not contained in a written instrument as provided for in Section 2 of the Alienation of Land Act, 68 of 1981. It has also taken the point that to the extent that the Applicants rely on an agreement of 1999 any rights flowing

from there have been extinguished by prescription in terms Section 11 of the Prescription Act, 68 of 1969.

[35] The Respondent also contended that when the offer of 22 January 2007 was made to Hennie Lamprechts Architects there was non compliance with Section 14 of the Local Government: Municipal Financial Management Act, 56 of 2003. The Respondent disputed the authority of the writer of the letter of 22 January 2007.

[36] The Respondent also attacked the validity of the sale because the instrument was not signed within 3 months as set out in the letter of 22 January 2007.

[37] The Respondent also disputed the authority of Lambrecht to act for the Trust. The Respondent’s counsel, Mr Reinders, referred the Court to extracts of the trust deed. He argued that the resolution of 28 April 1998 only gave Hennie Lambrechts the authority to sign documents for and on behalf of the Trust. He argued that there was a distinction between contracts, deeds and other documents

as contemplated in clause 9 of the Trust Deed. In my judgment there is no substance to the argument. I find that the Seconf Applicant was authorised to sign contracts as well.

[38] The Applicants took issue with the authority of the General Manager: Property and Land Management. Mr. Danzfuss who appeared for the Applicants realised the weakness in the point and correctly, in my view, abandoned the point.

[39] Mr Danzfuss submitted that the Applicants have not brought the application solely to institute a review action. The Applicants, he argued, were relying on the contents of paragraph 41.1 and the letter of their attorney, annexure R. Mr Danzfuss referred the Court to several instances in the founding affidavit where reference was made to "the necessary litigation". This he argued was not limited to a review. Mr Reinders pursued his attack on the purpose behind the application. He argued that there had been a considerable period of delay and no such a review had been instituted by the Applicants.

[40] Mr. Danzfuss contended in argument that the Applicants required the necessary interim protection and it was founded on three grounds. The first was that the Applicants had a valid contract of sale and intended to take legal steps for the transfer thereof in the name of the Trust. Secondly, Mr. Danzfuss argued, that the Respondent had taken a decision to sell the property to a third party and that such conduct occurred without the requisite *audi alteram partem.* It was effected secretly thus discriminating against the Applicants. He argued that the sale to Growth Property Group did not comply with Section 14 of the Local Government: Municipal Finance Management Act. In the third instance, the Applicants contended, that the decision of the Respondent was reviewable and that they were entitled to interim relief pending a review.

[41] The argument, as I understand it, advanced by the Applicants is that a deed of alienation need not necessarily exist in one written document but may compose of several such documents. Mr Danzfuss argued that the documents

which compose the contract can be found in the letters going back to 1998. I pointed out to Mr Danzfuss that the earlier letters, to which I have made reference, required of the Applicants to accept the terms thereof in writing. I asked when the contract was entered into. Mr Danzfuss submitted that this occured on 2 April 2007 when Mr Lambrechts accepted the offer on behalf of the Trust.

[42] When it was suggested that if the agreement was entered into on 2 April 2007 it would have been hit by the Local Government: Municipal Finance Management Act, Mr Danzfuss argued that on a proper construction of Section 14 it was only the transfer of ownership as a result of a sale which was hit by section 14 and that such a transfer had not as yet occurred.

[43] Section 14 provides as follows:

> "(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 receive in exchange for the asset.

(3) a decision by a municipal council that a specific capital asset is not required to provide a minimum level of basic municipal service, 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 determinations referred to in subsection (2)(a)(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.

(6) this section does not apply to the transfer of the capital asset to another municipality or a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework."

[44] In order to avoid the consequences of the Act, Mr Danzfuss was constrained to argue that the decision to alienate the capital asset occurred before the Act came into operation. He argued that the conduct which occurred on 22 January 2007 did not, on a proper construction of the section, constitute a disposal. I accept that the conduct of January 2007 does not constitute a transfer. I doubt very much whether the same can be said of the offer and acceptance of 2007.

[45] I do not think the Section lends itself to the meaning given to it by the Applicant. The purpose behind the Section is to

ensure that public property is disposed in a manner which is fair and which ensures proper consideration to the fiscus of a municipality.

[46] It is not in dispute that the property in question upon which the Bloemfontein Golf Course is situated is some 109.32 hectares in extent and that it was valued in excessive of R40 million. On the Applicants own reckoning they stand to loose R19.97 million in respect of the 13 hectares which has been or is being sold to Growth Property Group and/or Mr Moroe.

[47] If the sale occurred on 2 April 2007 it would be *prima facie* hit by the Act and would either be void or at the least susceptible to a review. Reliance cannot be placed on the rights acquired in 1999. The claim emanating from this transaction has become prescribed. Section 12(1) of the Prescription Act provides that prescription shall commence as soon as a debt is due. A debt is due if it is immediately claimable by the creditor or, where there is a debt, in

respect of which, a debtor is under an obligation to perform immediately.

DELLOITTE HASKINS & SELLS CONSULTANTS (PTY) LTD v BOWTHORPE HELLERMAN DEATSCH 1991 (1) SA 525 (A) at 532 H

BENSON & ANOTHER v WALTERS AND OTHERS 1984 (1) SA 73 (A).

[48] In my judgment the Applicants are not entitled to rely on the contract which came into being during 1999.

DESAI NO v DESAI AND OTHERS 1996 (1) SA 141.

[49] On either of the constructions given to the documentation and on the assumption that the contract can be gleaned from various letters the, the Application must fail.

[50] The capacity in which Mr Lambrechts acted was placed in issue. Lambrechts did not and could not have made the offer to purchase the land for the 1st Applicant. He was not

a Trustee on 24 April 1998. The first and the second offer he made cannot therefore be attributed to the Trust.

[51] The Applicants relied on the doctrine of fictional fulfilment to counter the Respondent's defence that the deed of sale had not been signed within three months. This defence was only raised in reply. Mr Reinders urged me not to have regard to the replying affidavit which raised new matter because as he argued the case of **SWISSBOROUGH DIAMOND MINES (PTY) LTD AND OTHERS v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 1999 (2) SA 279 (T) ,prohibited the applicants from so doing.

[52] The Applicants alleged, in the founding papers, that there had been a delay on the part of the Respondent which had nothing to do with them. The Respondent simply replied that they were not aware of the delays being referred to. I find that there was a delay in the sense of nonfeasance.

[53] I intend, in this judgment, to have regard to the case put up in reply.

[54] The question of the onus in relation to fictional fulfilment does not appear to have been adequately resolved by our Courts. It was raised thus by Holmes JA in **SCOTT AND ANOTHER v POUPARD AND ANOTHER** 1971 (2) SA 373 (A) at 379:

> "Furthermore, what must a plaintiff prove when invoking the doctrine? Must he prove (a) non-fulfilment of the condition, (b) the defendant's breach of his duty with intention to frustrate the fulfilment, and (c) a causal link between (a) and (b)? Does (c) involve proof by the plaintiff that, but for (b), the condition would probably have been fulfilled?"

[55] Christie, in his *erudite* work, **The Law of Contract in South Africa**, 5th Edition, Butterworth's at page 151 considers that the best answer is that once the plaintiff has proved (a) and (b) it is for the defendant to show, if he can,

that the condition would in any event not have been fulfilled.

[56] It was held in **FERNDALE INVESTMENTS (PTY) LTD v DICK TRUST (PTY) LTD** 1968 (1) SA 392 (A) that deliberate nonfeasance would bring the doctrine into operation if some positive action by the conditional debtor was necessary for the fulfilment of the conditions.

[57] The argument, so it went, was that the Applicants expected of the Respondent to prepare the Deed of Sale and having failed so to do it must be presumed under the doctrine of fictional fulfilment that the deed of sale was entered into within the three month period. Such a sale or disposal would have been hit by Section 14 of the Municipal Finance Management Act.

[58] The Applicants were required to prove on a balance of probabilities that they had (a) a *prima facie* right, though open to doubt; (b) a well-grounded apprehension of irreparable harm if the interim relief was not granted and

the ultimate relief is eventually granted; (c) that the balance of convenience favoured the granting of an interim interdict; and (d) that the Applicants had no other satisfactory remedy.

[59] An interim interdict is discretionary in nature and the requisites must therefore be judged as a whole. **SETLOGELO v SETLOGELO** 1914 AD 221; **ERICSEN MOTORS, (WELKOM) LTD v PROTEA MOTORS WARRENTON** 1973 (3) SA 685 (A); **MASUKU v MINISTER VAN JUSTISIE EN ANDERE** 1990 (1) SA 832 (A). It is designed to preserve or restore the *status quo* pending the final determination of the parties respective rights.

[60] According to Lambrechts he nominated the First Applicant, the company, as the purchaser because he was entitled to do so in terms of the agreement. This cannot be since the contract of 1999 is a nullity. The 2007 ‘contract’ did not permit Lambrechts to appoint a nominee.

[61] There is no resolution by the 1st Applicant authorising Lambrechts to enter into a deed of alienation for the immovable property in question. There is also no evidence that the Trust authorised Lambrechts to nominate the 1st Applicant in the stead of the Trust. The provisions of the Trust Deed and in particular Clause 9.1 provided that the signing powers in respect of contracts, deeds and other documents relating to the Trust matters was to be determined by the Trustees. The Trust Deed provides that decisions must be properly minuted and is a pre-condition to the exercise of signing powers in respect of contracts, deeds and other documents.

[62] The minute of the meeting held on 28 April 1998 only authorised Lambrechts to sign documents on behalf of the Trust in his capacity as Trustee and as their architect. I must agree with Mr Danzfuss that contracts and deeds are documents. The Second Applicant was properly authorised to sign documents, nothing more.

[63] The problem of course is that there is no written authorisation enabling the 2nd Applicant to nominate the First Applicant as the purchaser in the stead of the Trust. This hernia has several implications for the 2nd and 3rd Applicants.

[64] If it is to be accepted that Lambrechts was properly authorised by the 1st Applicant to enter into a deed of alienation for the immovable property or to accept a nomination, this conduct appears *prima facie* at odds with his position as a Trustee. After all he must profess that he was authorised to acquire the property on behalf of the Trust. But a careful reading of the papers shows that he has not pinned his flag to the mast on this issue. The first difficulty with the proposition is that there would have been an inherent conflict between Lambrecht, in his capacity as a shareholder of the 1st Applicant, and, in his capacity as a Trustee. He also cannot contend that he nominated the 1st Applicant as the purchaser and that even though the Trust did not authorise him so to do he has now abandoned the nomination of the 1st Applicant and has instead nominated

the Trust. The very essence of the Trust's case is that a valid contract was entered into with the Respondent. The contract could not have ben simultaneously entered into with the First Applicant. The other problem is that the Trust did not make the offers in 1998. It is difficult to fathom, how it could have been party to the Respondent's acceptance in 1999. There is no cession of rights evident on the papers. The Trust cannot rely on the contract which came into existence when the Respondents accepted Lambrecht's offer to purchase. Even if it could, it would not be able to get past prescription.

[65] Lambrechts cannot contend in this case that he was the agent of the Trust and I do not understand him so to contend. See **HOOSEN AND OTHERS NNO v DEEDAT AND OTHERS** 1999 (4) SA 425 SCA [1999] 4 ALL SA 139 at para [21].

[66] It is trite that the 2^{nd} and 3^{rd} Applicants were obliged to act jointly. Can it be said though the resolution of 28 April 1998

that this authorised Lambrechts to act on behalf of the Second Applicant?

[67] It must be remebered that we are dealing with a contract for the sale of immovable property. In these instances both Trustees must become parties thereto. Trusts, unlike a partnership, require that a deed of alienation of immovable property be signed by all the Trustees.

TABETHE AND OTHERS v MTETWA NO AND OTHERS 1978 (1) SA 80 (T).

[68] It was held in **TABETHE** that the failure by all the Trustees to sign the deed of alienation rendered the contract of no force and effect for want of compliance with the Section 2(1) of the Alienation of Land Act, 68 of 1981.

[69] In my judgment I find that Lambrechts nominated the First Applicant contrary to any authorisation given to him by the Trust. The same applies to the First Applicant. The contract which he says came into existence is a nullity. Such a contract cannot be subsequently given life by

contending, in the alternative, that the contract was entered into between the Trust and the Respondent.

[70] Lambrechts acted in the interests of the First Applicant and simultaneously also acted in the interests of the Trust. In my view he was not entitled so to act. A Trustee has a duty of utmost good faith toward the Trust and may not act in a manner *inimical* to its interests. Lambrechts would have appropriated Trust property to an entity in which he and Litheko had an interest to the detriment of the Trust. There might then have ben a dispute regarding the rights of the 1st Applicant and those of the Trust. This would have given rise to unnecessary and considerable dispute. The very object of the Alienation of Land Act would thereby have been frustrated resulting in needles litigation. It has been held that the object of the Act is "on the grounds of public policy to facilitate proof by requiring the authority of a purchaser and their agents to be in writing and so to avoid needles litigation."
THORPE AND OTHERS v TRITTENWEIN AND ANOTHER 2007 (2) SA 172 (SCA) at 178D.

[71] The concession, in the papers, that the nomination was invalid and the joinder of the Trust confirms that Lambrechts did not have authority to enter into a contract for the Applicants.

[72] Lambrechts cannot approbate and reprobate. Can it be argued that the letter of 2 April 2007, effectively nominated the Trust as the purchaser? In my judgment I find that this cannot be.

[73] The 'Deed of Sale' comprising the letters, as contended by Mr Danzfuss, in my judgment only relate to the acceptance on 2 April 2007. The disposal would therefore have taken effect, not in 1999 as contended by Mr Danzfuss, but in 2007. Accordingly, the Trust would have to show that there was compliance with section 14 of the Municipal Finance Management Act. It cannot do so.

[74] There is a further problem for the trust. Even if I were able to find that the transaction occurred in 1999 and the

provisions of the Munisipal Finance Management Act were not applicable, parties to the disposal or sale of Municipal capital assets were still required, in terms of the Constitution, to ensure that the transaction was in accordance with a system which is fair, equitable, transparant, competitive and cost effective.

[75] Accordingly, when the property was allegedly alienated, on Lambrechts's version, to either of the Applicants in 1999, the Respondent was obliged to comply with the requirements of Section 217 of the Constitution. There is no evidence to suggest that this occurred. The minutes of the Respondent do not support such a conclusion. On this basis too, the argument, that the alienation took place in 1999 cannot assist any of the Applicants.

[76] This Court cannot look solely at what occurred in 1999 for purposes of the Municipal Finance Management Act and ignore what occurred on 2 April 2007. It is, with respect, a non sequitur. It must be remembered that the contract, on the Applicant's version, only come into existence when

there was an acceptance. On this reckoning, the provisions of the Municipal Finance Management Act would have been applicable.

[77] I am therefore of the opinion that the applicant does not have a *prima facie* case. This being the case there would be no point in granting interim relief.

[78] The further problem for the Applicants is this. The application by the Growth Property Group to purchase the piece of land to the east of the golf course does not constitute a decision adverse to the Applicants which may be reviewed. It is common cause that the property has not yet been sold. It would therefore be pointless to grant the Applicants interim relief to institute a review arising out of the application by Growth Property Group because a decision thereon has not been taken. It cannot assist the Applicants to contend that this may yet happen.

[79] There is no evidence on the papers that the Respondent has or intends to sell the land upon which the Bloemfontein Golf Course is situated.

[80] As regards the property on which the Bloemfontein Golf Course is situated there appears to be no reason to issue an interim interdict.

[81] There has been a considerable delay in launching these proceedings. It must be remembered that by Litheko's own threat of 31 July 2007, the Trust threatened to move an application as early as 3 August 2007 at a time when it was already clear that the Respondent was not prepared to sign the contract within the three months period stipulated in the letter of 22 January 2007. Close on a year later they were more or less in the same position. Another year has now since passed and the Applicants do not have any significant evidence more than that which they had one year ago. As I indicated earlier there can be no review of the application by Growth Property Group to purchase the

property to the east of the Country Club because no decision has been made.

[82] The delay herein is in my view of such a nature that a Court, have regard to all the circumstances, should not exercise the discretion, which it may have, in the Applicant's favour.

See **CHOPRA v AVALON CINEMAS SA (PTY) LTD AND ANOTHER** 1974 (1) SA 469D at 472:

> "There is such a thing as the tyranny of litigation, and a court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict pendente lite which, from its very nature, requires the maximum expedition on the part of an applicant." **AN WYK, J., in Juta & Co. Ltd. v Legal and Financial Publishing Co. (Pty.) Ltd.**, 1969 (4) SA 443 (C) at page 445 of the judgment.

[83] It is also in the interests of the public that there be certainty in regard to the status of the public land in question. It seems to me improper to permit a state of affairs to continue where public land is effectively out of circulation to

private investors. The public is best served by the certainty about the capital assets owned by the Respondent. To grant the Applicant's an interim interdict *pendente lite* would, in my view, also not serve the interests of justice.

[84] There is the spectre of a review being launched on the basis that the Respondent, as an Organ of State, has not acted fairly towards, whichever party, may be entitled to assert the contract. But that is not the case which the Applicant have prosecuted to obtain the interim relief herein.

[85] I would, consequently, having regard to all the facts herein, dismiss the application.

[86] I therefore grant an order dismissing the application with costs.

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NXUSANI, AJ

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