

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

16/05/2018
 DATE

SIGNATURE

CASE NO: 55380/2014

66631/4

16/5/18

MARK VAN WYK

APPLICANT

And

MEMBER OF THE EXECUTIVE COUNCIL:
 DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING
 GAUTENG PROVINCIAL GOVERNMENT

1ST RESPONDENT

THE MINISTER OF THE DEPARTMENT OF RURAL DEVELOPMENT
 AND LAND REFORM OF THE REPUBLIC OF SOUTH AFRICA

2ND RESPONDENT

THE MINISTER OF PUBLIC WORKS OF THE REPUBLIC OF SA

3RD RESPONDENT

THE REGISTRAR OF DEEDS, PRETORIA

4TH RESPONDENT

THE SHERIFF OF THE COURT, PRETORIA SOUTH EAST

5TH RESPONDENT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Plaintiff has instituted an action against the 1ST Defendant, a Member of the Executive Council: Department of Local Government and Housing of the Gauteng Provincial Government ("the MEC"), also citing the Minister of Rural Development and Land Reform, the

Minister of Public Works ("the Minister"), the Registrar of Deeds, Pretoria ("Registrar") and the Sheriff of the Court, Pretoria (Sheriff"), as the 2nd to 5th Respondents, respectively, seeking an order in the following terms:

[1.1] **That the 1st Defendant (MEC) be ordered to sign all documentation and perform all such acts as may be necessary to effect transfer of Erf 302 Moreletapark and Erf 537 Moreletapark to the Plaintiff subject to:**

[1.1.2] that in the event that the 1st Defendant (MEC) had returned to the Plaintiff, the existing guarantee prior to the issue of the order, then only against prior delivery to the 1st Defendant (MEC) of replacement bank guarantees issued by a recognised financial institution for payment of the balances of the purchase prices in respect of Erf 302 and Erf 537 in the sum of R543 000.00 payable against registration of transfer of the respective properties.

[1.2] **Failing the 1st Defendant's (MEC) compliance with the order in 1.1** within 30 days of this order (in the event of the existing guarantee not having been returned to the Plaintiff), alternatively within 30 days from the date of delivery of the aforesaid replacement guarantee (in the event of the existing guarantee having been returned to the Plaintiff), **the Fifth Defendant (the Sheriff) is directed and authorised to sign all documentation and to perform all such acts as may be necessary on behalf of the 1st Defendant (MEC) in order to effect registration of transfer of Erf 302 Molereta Park to the Plaintiff.**

[1.3] **The 4th Defendant (the Registrar) is directed, to the extent required by law as a prerequisite for effecting transfer of the aforesaid immovable properties to the plaintiff to make such entries or endorsements in or on any relevant register, title deed or other documents to register Erf 302 Moreletapark and Erf 537 Moreletapark in the name of the MEC, in the alternative;**

[1.4] The repayment of the sum of R57, 000.00 plus interest at the rate of 15.5% per annum payable from April 2010 to date of payment.

On the following grounds, that:

[2] On 15 June 2000 he, on behalf of a Close Corporation to be formed, bought a property described as Erf 302 Moreletapark situated at Reseda Road, Pretoria ("Erf 302"), at a public auction put up by the Department of Housing and the Department of Development Planning and Local Government, the former predecessors of the MEC's Department of Local Government and Housing, for a purchase price of R570 000.00.

[3] He accordingly signed the Conditions of Sale accepting the sale of the property on the terms and conditions set out in the Deed of Sale, ("First Agreement") one of which was for the payment of a deposit of R57 000.00, payable on the day of the auction and the balance was to be secured by way of a guarantee issued by a recognised financial institution within (30) thirty days of the acceptance of the bid.

[4] The MEC accepted the bid. Plaintiff failed to provide the MEC with details and the resolution of the principal on whose behalf he purported to be buying the property and had

in view of that purchased it in his personal capacity by virtue of the provisions of clause 6 of the Conditions of Sale.

[5] On **20 January to 21 February 2005**, he entered into another written agreement ("**Second Agreement**") with the MEC represented by Mr B Ngomane ("Ngomane"), the Director: Land Management (formerly known as the Department of Development Planning and Local Government) and Mr P H Seabi, the Head of the Department of Local Government, in terms of which he bought from the MEC Erf 537 Moreletapark ("Erf 537") that was notarially tied to Erf 302 (together referred to as "the properties"), at a purchase price of R30 000.00.

[6] In terms of the Second Agreement the MEC was to effect transfer to the Plaintiff of Erf 302 together with Erf 537 on the terms as agreed at the auction, on acceptance by the Plaintiff of the MEC's offer to sell Erf 537, which Plaintiff duly accepted.

[7] The Plaintiff alleges further that:

[7.1] The Second Agreement constituted either a variation of the First Agreement alternatively an addendum strengthening the First Agreement or further alternatively a novation of the First Agreement; and

[7.2] **The MEC had at all material times waived the right to raise prescription, confirmed the First Agreement of sale of Erf 302 and that of Erf 537 to the Plaintiff, acknowledged its liability and undertook to effect transfer of the properties to the Plaintiff, inter alia and more specifically for the reason that:**

[7.2.1] **its Department of Local Government requested, accepted and deposited a substitute cheque for the deposit** in view of having neglected to deposit the Plaintiff's initial cheque for the sale amount and **made an offer and transacted with the Plaintiff in respect of Erf 537**. The Plaintiff furnished the MEC with the substitute cheque on 27 October 2003 which was deposited on 21 November 2003.

[7.2.2] **its Director: Land Management requested the signed bank guarantees and granted the Plaintiff an extension to deliver the guarantees to enable the parties to finalise the matter.**

[7.2.3] **its Department of Local Government indicated that the MEC was busy with an application for an issue of certificate in terms of item 28 (1) of Schedule 6 to the Constitution of the Republic of South Africa 108 of 1996 by the 2nd Defendant, the Minister of the Department of Rural Development and Land Reform of the Republic of South Africa.**

[7.2.4] its Local Government acknowledged the MEC's liability to effect transfer to the Plaintiff and postponed the MEC's performance of the agreement until receipt by the MEC of the vesting certificate in terms of item 28 (1) which postponement Plaintiff was compelled to agree to.

[7.3] The s 28 (1) certificate in respect of both Erfs 302 and 537 was duly issued dated 25 November 2008 by the Minister Land Reform (2nd Defendant) which was then known as the Department of Land Affairs.

[7.4] The Plaintiff had also duly provided the MEC with a guarantee for payment of the balance of the purchase price for the properties in the sum of R543 000.00 on 10 May 2005.

[7.5] The MEC repudiated the sale on 14 April 2010 by denying that the property vested in the MEC (Provincial Government) at the time of the sale thereof and alleged that the sale was as a result null and void. He thereafter refused to furnish the Plaintiff with any particularity or documentation in support of such denial.

[7.6] To minimise its damages the Plaintiff is entitled to the return of the guarantee for the payment of the balance purchase price pending confirmation by the MEC that it will perform its reciprocal obligations in terms of the sale agreements. Alternatively until such time as the MEC is ordered by the court to transfer the properties to the Plaintiff against the payment of the purchase price.

[7.7] the Plaintiff tenders upon the effective withdrawal of the existing guarantee, delivery to the MEC of substitute guarantees for payment of the outstanding balance of the purchase price against confirmation by MEC or order of court of the MEC's liability to perform its obligations. The Plaintiff having performed all its obligations or alternatively tendering to perform any outstanding obligations.

[7.8] The properties at all relevant times constituted Provincial Land as per s 2 and as defined by s 1 of the Gauteng Land Administration Act 11 of 1996, vesting in the Gauteng Provincial Government in accordance with the provisions of s 239 of the 1993 Constitution which vesting was confirmed in memorandums by the Acting Chief Director: Gauteng Provincial Land Reform of the 2nd Defendant, (the Minister Land Reform on 30 July 2007, also by the Director: Public Land Support Services on 10 November 2008 and the Deputy Director General: Land and Tenure Reform Implementation on 25 November 2008.

[7.9] The certificate in terms of item 28 (1) was issued following an Application by the MEC and following confirmation of the vesting of Erf 302 and 537 in the Provincial State Land Disposal Committee, as confirmed by a memorandum issued by the Director Public and Support Services of the MEC on 10 October 2008.

[7.10] In the event the court finds that the Plaintiff is not entitled to the transfer of the properties as the agreements are void and unenforceable for any reason whatsoever, the Plaintiff pleads that he made payment of the aforesaid deposit of R57 000.00 to the MEC or his predecessors in the *bona fide* believe that the sale agreements are valid and enforceable and that the payment was due.

[7.11] Since the properties have not been transferred to the Plaintiff and remains in the possession of the MEC and the 2nd Defendant and the MEC unwilling to perform, he be paid his R57 000.00 back plus interest from 14 April 2010.

[8] The Plaintiff attached all the correspondence between the parties and the documentation referred to in the particulars of claim as part of his cause of action. The action was defended only by the MEC whose Plea, except for challenging the Plaintiff's *locus standi* to institute the legal proceedings due to failure to comply with the provisions of the Legal Proceedings against certain Organs of State Act, 40 of 2002 (the Act"), amounted to a bare denial. The Plaintiff did not raise an exception or request further particulars on close of pleadings and the matter proceeded to trial. Consequently the onus was left entirely on the Plaintiff.

[9] The minutes of the pre-trial conference held by the parties indicated that the Plaintiff requested that the documents attached to the Plaintiff's particulars of claim should be admitted by the Defendant to be what they purport to be and that copies thereof could be submitted to Court by either party as evidence without formal proof thereof. The Defendant was amenable to the request except for annexures **A1**, a copy of the advertisement of the auction by the Gauteng Provincial Government on 11 June 2000, **C** that is the standard forms of the Deed of Sale, **D** the written terms of the 2nd agreement and **F** a copy of the deposited cheque of R57 000.00. The MEC was furnished with a copy of the Notice in terms of s 3 (1) of Act 40 of 2002 to which it was going to revert to the Plaintiff regarding its Special Plea. The Special Plea was eventually argued before Tuchten J who dismissed it with costs.

Issue to be determined

[10] Going to trial, since the Defendant's plea is a bare denial of all the allegations in the Plaintiff's particulars of claim, the Plaintiff had to establish:

[10.1] the execution of the sale agreements concluded between the MEC and the Plaintiff as alleged;

[10.2] for the fact that Plaintiff alleges that the MEC repudiated the sale on 14 April 2010 by **denying that Erf 305 and 537 Moreletapark vested in the MEC at the time of the sale thereof, that** at the time of the sale the Gauteng Provincial Government was indeed in terms of s 239 (1) (b) of the Interim Constitution vested with the Properties as **per s 2 of the Gauteng Land Administration Act, 11 of 1996**, which property therefore constituted Provincial land as defined in s 1. Simply put, that the MEC had authority to sell the properties at the time of sale.

[10.3] **that the issued certificate in terms of item 28 (1) of Schedule 6 of the Constitution, Act 108 of 1996 confirmed the vesting of the property on the Provincial Government at the time of the sale of the property.**

Evidence on trial

[11] The evidence led was only on behalf of the Plaintiff who besides himself also called two other witnesses, that is Mr Savvas Skordis and Ms Kevin Gie. The matter was decided pretty much reliant upon this evidence. The Plaintiff was represented by Mr Nel and the MEC by Mr Ngoetjane.

[12] The Plaintiff confirmed during his evidence that he has practiced in the High Court as an advocate for 7 years and was the director of the property company, Land Development Corp (Pty) Ltd, living in Boksburg. He testified that on 15 June 2000 he purchased at a public

auction by the Gauteng Provincial Government Erf 302 with 2 other properties. The other two properties were eventually transferred to him. The Conditions of Sale and Deed of Sale that he signed for Erf 302 after the sale were handed to the government official or representative of the MEC, a Mr Ruan Buitendag ("Buitendag"), with whom he had previous dealings when he purchased the other state properties. He did not keep a copy for himself as there was no photocopier available. He was at the auction with a close friend Mr Savva Skordis ("Skordis"), who co-signed as a witness the Conditions and Deed of Sale signed by the Plaintiff for Erf 302. This was on the third day of attending public auctions that the MEC held on three consecutive days from 13 to 15 June 2000. He had also purchased a number of properties from the earlier state auctions of the 13th and 14th, and signed a couple of documents that were the same as the ones he signed for Erf 302 (which he had to sign four times for the 4 properties he bought) on 15th June 2000. The contents were identical. The only difference was the purchase price and the deposit payable for which Erf 302 was R570 000.00 and R57 000.00 respectively. The extent of Erf 302 was 1, 0100 hectares. He read all of the sale documents before signing them. They had signatures of both himself and Mr Skordis placed on the same places on each and every page. He presented to the court documents signed on property Erf 832, a property he bought the previous day and confirmed that the conditions of sale that were applicable were standard clauses and the contents identical. They were all completed and signed by him on behalf of a company to be formed.

[13] He said Buitendag was also given the cheque for the deposit. He used the letterhead of his CC. After 6 days the sale has taken place, he sent a fax dated 21 June 2000 to Buitendag confirming the sale and the deposit paid indicating that he was awaiting transfer. This was followed by various problems one of which was that the MEC did not have the cheque and was unable to speed up the process as the property was notarially tied to another property. The MEC offered him in writing the other property which was of a lesser extent and value which he accepted. He provided the required guarantees. The MEC then advised him that the property was registered in the name of the government and therefore item 28 (1) of Schedule 6 of the Constitution was required to be signed or obtained. The item 28 (1) certificate was later obtained.

[14] The MEC's then raised an objection saying that the agreement was invalid. **Although in the Plea the MEC now denies everything.** Plaintiff confirmed that the parties had at pretrial agreed to admit certain documents for trial. He presented a copy of the **title deed** of Erf 302. He also confirmed that he was now purchasing in his **personal capacity** as per conditions of sale. He also submitted to court that in terms of s 3 (1) of the Alienation of Land Act the sale in auctions need not be in writing. So the deed of sale even if not admitted, sale still valid. He confirmed that D1 is a letter dated 17 January 2005 he received from B Ngomane Director General of Land Affairs which confirms the Department's intention to pass transfer. He also received a letter from Patrick Mokoma from Land Management dated 10 March 2005 which indicates an acknowledgement of the existing sale by calling for the guarantees.

[15] On 5 April 2005 he received a letter from the Department attempting to cancel the contract. He thereafter received a letter dated 7 July 2005 from Mokoma: Director Land Management indicating that the MEC was awaiting item 28 (1) certificate to transfer the properties. He confirmed that Annexures, N was a **memorandum to the Minister constituting recommendations that the MEC concurs to the disposal of Erf 302**, K is the Certificate in terms of item 28 (1) dated 25 November 2008, M a letter from Mr Mawela the Directorate:

Land Management dated 14 April 2010, alleging that contract ultra vires, that property did not vest with Province at the time of sale and that the MEC is refusing to effect transfer, which led to this action due to repudiation. This was contrary to what was in the **MEC's referral to the Minister dated 30 July 2007 wherein the MEC confirms that the property already vested in the Province in 1998 and reserved as a provincial function.** Also to the recommendations that were made for the issuing of the certificate.

[16] He confirmed the extract of the advertisement of the public auction sales of the 13th to 15th June 2000 from a Sunday Newspaper. He indicated that at the time of the auction he was not notified of any intentions not to proceed with the sale. Transfer of some of the properties did take place. After the sale he, through his attorneys, wrote a lot of letters to the Department. In one of the letters that was directed to Ngomane, he confirmed having signed the sale agreements of the properties and enclosed what Buitendag also asked for, the cheque for the 10 % deposit, which was delivered *per* arrangement to the offices of the MEC. The 2nd cheque for R57 000.00, 10% deposit was delivered by Mr Gee an employee of his company at the office of the MEC who handed it to the secretary. He said he never stopped the 1st cheque. His banker also confirmed that the cheque was not stopped but became stale. The MEC still has his deposit, it has not been repaid. Mr Percy Masinga, a Gauteng Department official sent him an agreement for sale for erf 537 with same conditions as that of Erf 302 saying to him "please find attached the agreement for sale". He also received a letter from one Bongane, another government official, offering him Erf 537 for R30 000 confirming that Erf 302 could not be transferred alone as it was notarially tied to the former.

[17] Plaintiff argued that **the agreement was concluded at the sale that took place at the auction for Erf 302. The other Erf 537 was sold subsequent thereto to facilitate the finalization of the public auction sale and transfer of Erf 302,** the property he bought thereat. He accepted the purchase price asked for Erf 537 as the transaction was already completed. **In the sale for Erf 537 he duly signed the agreement as purchaser and the space for seller was again not signed. However Ngomane accepted on 17 January 2005 that he signed in acceptance of offer.** Ngomane replied on 5 April 2005 that everybody was happy to sign and extended the period to furnish guarantees which guarantees were issued on behalf of one of his companies and delivered by his attorneys. The attorneys might have also arranged for the signature of the person who received the guarantees. On 16 May 2005 a letter was received from P Mokoma from the Directorate acknowledging receipt of the guarantees and notifying him that a signed deed of sale was going to be forwarded to him.

[18] On 28 November 2008 the issue of the item 28 (1) certificate was raised and on April 2010 repudiation took place. Guarantees also came with an expense of a certain percentage on the amount guaranteed. He confirmed that he tenders the guarantee immediately the court grants the order to transfer. Percy Masinga a senior official at the Department of Land Affairs sent to his email address under a covering sheet an acknowledgement of receipt of document sheet on guarantees. The letter to Bongani was signed by him under his company letterhead and guarantees attached to the letter were directed to the MEC.

[19] Plaintiff was quizzed during cross examination about the signature of the seller not being on the 2nd sale agreement of the 20th January 2005. Also that the sale agreement at the auction on Erf 302 was not signed by the seller. He said he could not say. It was put to him that the cause of action as in the particulars of claim refer to an agreement that was signed

by the parties at the auction. He indicated that the agreement signed at the auction was the bid that was accepted subject to the conditions of sale. On the Deed of sale signed on 20 January 2005 he could not say if it was signed by the seller. He said at the auction he entered into an agreement to buy property which was sold to the highest bidder, which is the agreement referred in repetition in the 1st agreement. Conditions of sale were signed, they are repeated and confirmed at paragraph 9.1 of the particulars of claim. He indicated that a proper cause of action is set out in the papers and some of the terms he is relying upon are stated in the cause of action.

[20] **Mr Ngoetjane pointed out that, notwithstanding Plaintiff having practiced as an advocate for some years, he failed to comply with Rule 18 (6) as some of the conditions of sale were not signed by the seller in his presence.** Plaintiff said he could not say if they were not signed, he handed the documents over to the state official after signing them. He did not know if seller signed. He said the office of the MEC had a copy of the concluded sale agreements. He was then asked if a discovery of the signed conditions were requested. He said he was not in a position to comment. It was put to him that the material terms that are on paragraph 16 of his particulars of claim refer to D1 to D4 being written terms of the agreement signed on behalf of the MEC and in the MEC's possession, which are copies of the 2nd agreement. **He said in respect of 1st agreement the situation was similar to the agreements he signed and attached and with the 2nd agreement true copies were attached to the particulars of claim.** Mr Ngoetjane then pointed out that the seller's signature is missing on the 2nd agreement as well, whilst remarking that to constitute a written agreement, it had to be signed by both seller and purchaser. In addition the agreement refers to an approved person who must sign the agreement. **He pointed out that he did not require a written agreement to be bound by the terms of a sale at the auction. Their agreement was depended on both agreements.**

[21] In respect of the breach which he was told was a prerequisite before an action. He said on receipt of the letter from the Provincial Government that he said it indicates a breach, which was the failure by the Department to act, he had consulted with his attorneys who issued summons following the breach. He could not remember if he answered to the department's letter. **It was put to him that MEC denies concluding an agreement with him and there was no agreement that was signed by the MEC.** He refuted the allegation and indicated that Skordis was sitting beside him. He has also indicated in the particulars of claim that deposit paid by way of cheque to Rautenbach on the date of the auction and he had written to Rautenbach and mentioned the details of the cheque that was dated 21 June 2000. Rautenbach confirmed that department is in receipt of the deposit for Erf 302.

[22] On re-examination Plaintiff was referred to a letter dated 17 January 2005 wherein the Department indicated that it was experiencing difficulties in effecting transfer of the land to him due to it being notarially tied to Erf 537 and that the sale agreement incorporating the two properties was attached. He confirmed that it does not say anything about a requirement that the seller sign the agreement as a precondition for the sale but requests him to accept the price for Erf 537 which he did. Nevertheless he signed the agreement and notified Ngubane by letter **dated 21 July 2005** that the agreement has been signed. On 21 November 2011 the MEC received his letter dated 18 November 2011 wherein he gave notice of his intention to sue for the breach in terms of s 3 (1) (a) of Act 40 of 2002. There was also a letter from his attorney dated 6 September 2006.

[23] On further cross examination it was put to him that **the letter he sent to the MEC was a notice to institute legal proceedings not calling upon the MEC to rectify a breach**, neither does it state that it be done in 14 days nor give an indication by when, as required. **Plaintiff pointed out that on paragraph 5 of the Notice letter they do request the MEC to rectify the breach.**

[24] The next witness to testify was Skordis, the Plaintiff's close friend also from Boksburg. He recognized the advertisement of the public auctions by the Gauteng Provincial Government on 13th, 14th and 15th June 2000. He confirmed to have attended all three with the Plaintiff. He testified that he and the Plaintiff each purchased property on the first day. He purchased only one and the Plaintiff a few of them. On the 14th and 15th June 2000 he did not purchase anything but Plaintiff did on both days as well. He was with the Plaintiff when he placed his bids for all the properties. Plaintiff followed the bid procedure. Plaintiff would bid, on being successful, fill in the documents, pay the deposit on offer and sign the conditions of sale which Skordis co-signed as a witness. On 15 June 2000, the last day of the auction Plaintiff successfully placed a bid for Erf 302. It was allocated to him, same documents that were referred as having been signed on other properties was signed by the Plaintiff. He signed as a witness on all the documents for Plaintiff's successful bids. He does not know what happened to the documents. After signing the documents they were handed back to the auctioneer. He could not say if they were signed by the seller. They wanted to make photocopies but there was no copier, although there was one available on 13th and 14th June 2000. He confirmed his initials and signature on pages 9 to 13 which was appended at the same time when Plaintiff was signing the documents. He recognized the documents for property Erf 832 that Plaintiff bought on 14th June 2000 and submitted that they were the same as that of Erf 302. He confirmed that Plaintiff inserted his full names and Buitendag was given a full set of documents being the person who was in control of the auction. When he bought his own property on 13 June 2000, he read the documents before he signed them, they were the same as the ones they signed on 15 June 2000 with the Plaintiff.

[25] The next witness was Mr Kevin Ogie who testified that he was employed by Deutsche group in Kempton Park. Since 2002 January 26 to June 2005 he was employed by the Plaintiff. She delivered the letter dated 10 May 2005 by Mr Van Wyk to the Director; Land Management Development Planning and Local Government offices in Johannesburg which they signed for in acknowledgement of receipt on the same day. The guarantees issued by Absa Bank for the amount of R543 000.00 which is the outstanding balance for the purchase of Erf 302 and 537 was attached to the letter.

Analysis

[26] The evidence of all the witnesses was clear, cohesive and honest. The Plaintiff was not hesitant to mention what really happened even if he was not sure of the legal implication. Both witnesses who attended the auction together, that is, the Plaintiff and Mr Skordis were straight, very clear and sincere, confirming that only the Plaintiff completed and signed the conditions of sale. Afterwards the documents were handed over to the responsible official at the public auction. However Plaintiff refers to the correspondence that took place after the sale that clearly indicate that there was an agreement which was never refuted by the MEC. Even the reason that was stated by the MEC for not proceeding with the agreement that it never denied that the sale agreements were concluded **but that they were null and void** due

to the fact that the properties did not vest on the Provincial Government at the time of the sale. The MEC then refuted that the property was part of the provincial land alleging that **at the time of the sale** the MEC lacked authority to sell the property resulting in the concluded sale being not enforceable.

[27] Mr Ngoetjane, on behalf of the MEC argued that due to the MEC having not signed and or the Plaintiff failing to prove that the MEC may have indeed signed the conditions of sale or any of the sale documents there was no agreement concluded.

[28] Indeed in terms of s 2 of the Alienation of Land Act No 68 of 1981 an agreement alienating land must be reduced to writing for it to be valid. The section being directed at reducing uncertainty, disputes and possible malpractice; see *Clements v Simpson* 1971 (3) SA 1 AD at 7A. Both parties required to sign the agreement.

[29] However Section 3 (1) of the Alienation of Land Act creates an exception to the rule wherein the provisions of s 2 do not apply if the land is sold by public auction. For the reason that the sale process is conducted in public, and the agreement concluded, publicly, at the fall of the auctioneer's hammer where there is little scope for the perceived uncertainty, disputes or malpractice. The conditions having been read publicly to those present, who accepts such conditions by their continued participation in the procedure; see *Schuurman v Davey* 1908 T.S (1) 665 at 667-668 and *Noormohamed v Visser N.N.O* 2006 (1) SA 290 (SCA). The bid was found to have been made and accepted publicly, where the issue was the same, that there was no contract in writing signed by both parties.

[30] During the proceedings, the conditions of sale regulates an auction and are the rules of the game. In estate *Francis v Land Sales (Pty) Ltd and Others* 1940 (NPD) 441 at 457 it was stated by Broome J that:

"an auction is a form of a competitive bargaining with the object of a contract of sale resulting carried out in accordance with certain rules. These rules are the conditions of sale. They are framed by the seller to represent the terms upon which he is prepared to submit his property to competition. They are so to speak the rules of the game and they bind all parties."

In *Shandel v Jacobs and Another* 1949 (1) SA 320 (N) at 325 Carlisle J stated that:

"the conditions of sale are agreed upon in the first instance between the seller and the auctioneer and between these two they rest upon a contractual basis. When goods are offered for sale pursuant to them, they form the basis of bargaining carried out between the auctioneer and the bidders."

[31] The conditions of sale as mentioned are printed, either publicly displayed, announced or read out by the auctioneer and bind purchasers whether they in fact know them or not. **A sale on the terms as set out in the Conditions of Sale results at the fall of the hammer and the contract is a verbal contract.**; see *Clarke v C P Perks and Son* 1965 (3) SA 397 (ECD) at 400 D. The contractual business of a public auction is consequently concluded when the hammer falls.

[32] Furthermore when reading from the correspondence between the parties there was never an issue about the execution of the sale agreements. According to the letter dated 17 January 2005 from Mr Ngomane they were experiencing challenges in effecting the transfer of the Erf they sold because of it being notarially tied to Erf 537. They offered for sale Erf 537

to the Plaintiff to facilitate the transfer of the Erf 302 sold at the auction. The MEC never queried the execution of the sale agreements, albeit their validity and enforceability. Mr Ngomane as rightly alleged by the Plaintiff had confirmed that he was in possession of the signed agreement. The sale agreements were therefore concluded between the parties, albeit their validity put in question.

[33] Mr Ngoetjane's further contention was premised on an allegation of non-compliance with Rule 18 (6) of the Uniform Rules of Court that requires that a party who relies upon a written contract in a pleading, annex a true copy of it to the pleading. He argued that the Plaintiff's inability to annex the conditions of sale and deed of sale for both Erfs means that there was no cause of action. In *Absa Bank Limited v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 the court held that:

"Compliance with the rule was unrelated to whether there was a cause of action: the elements of the cause were determined by substantive law."

Further that:

"On a proper interpretation of the Rule 18 (6) itself, there is arguably a necessary implication that a copy need not be attached if it is impossible for the pleader to do so, though to avoid an objection to the particulars of claim, the pleader should explain the inability."

Finally that:

"If it is impossible for a plaintiff to produce the written contract or a copy of it, the law allows him to prove the execution and terms of the written contract by other evidence."

[34] The Plaintiff has satisfactorily proved the execution of the sale agreement at the auction and its terms by adducing oral as well as secondary evidence having annexed a similar agreement that was concluded during the same time. He has also indicated that the MEC was in possession of a copy of the second agreement. Therefore any contention in relation to the execution or terms of the sale agreements is unmerited.

[35] Similarly to the facts *in casu*, in *Transnet Ltd v Newlyn Investments (Pty) Ltd* 2011 (5) SA 543 (SCA) a Defendant reliant on an a written addendum to the lease agreement in opposing its eviction, did not annex the addendum to its plea, alleging that a copy thereof was not in its possession and was last in the possession of the Plaintiff. The original addendum was not adduced in evidence. The Supreme Court of Appeal (SCA) held that in the circumstances of the case, the Defendant was excused from producing the original and found that the execution and terms of the addendum has been sufficiently proved by oral testimony.

[36] Notwithstanding being satisfied that the execution of the sale agreements was proven, for the seller to be able to pass transfer or for the sale agreement to constitute a valid sale, the seller should be the owner or have been authorized by the owner to sell the property. Mr Nel has argued that the agreement concluded at the fall of the hammer and the one subsequent thereto were valid as at the time the properties were sold, they vested in the Provincial Government of Gauteng, and that fact was confirmed in the Memorandum from the Directorate.

[37] In terms of Deed of Sale that has been proven by the Plaintiff to be a replica of the Deed of Sale he concluded with the MEC in respect of Erf 302, the seller is the Department of

Housing and the Department of Development Planning and Local Government, the former predecessors of the MEC Department of Local Government and Housing, duly represented and having delegated powers and duties by virtue of a resolution of the Premier of the Province of Gauteng taken in terms of s 5 (1), (2) and (3) of the Gauteng Land Administration Act 11 of 1996 ("GLAA") and acting **on behalf of the Provincial Government of the Province of Gauteng as the seller. The second agreement of sale is between the Plaintiff and the Gauteng Provincial Government represented by Seabi as the Head of Department of Local Government duly authorised.**

[38] However the Title Deed T9685/78 that was in existence at the fall of the hammer signalling the conclusion of the sale of Erf 302 in 2000, specified that Erf 302 Moreletapark was ceded and transferred in full and free property to capacity to the **Republic of South Africa in 1978, for educational purposes.** In June 2005 when the second agreement was concluded, the said property was also held by the same. So the property was a state owned property registered in the name of the Republic of South Africa.

LEGAL FRAMEWORK

[39] Section 2 (1) of the State Land Disposal Act, 48 of 1961 (the "Disposal Act") provides that the State President may sell any state land on behalf of the state. **The 3RD Respondent, the Minister of Public Works is in terms of s 6, read with s 2 of the Disposal Act assigned with the statutory authority to sell state land. Consequently assets that vests in the national government, that is, immovable property and land, may only be disposed of in the manner prescribed by the Disposal Act.**

[40] The Provincial Government cannot therefore dispose of any property that vests in the national government. Whilst also in terms of s 2 (2) the State President shall not dispose of any land the disposal of which is governed by a provincial ordinance.

[41] The Gauteng Land Administration Act 11 of 1996 ("GLAA") as amended, states in its preamble that its purpose is to provide for the acquisition and disposal of land **owned** by the Gauteng Provincial Government. The keyword being the word **owned** "as being **vested**", **since to pass or transfer ownership of a property, the transferee must be the owner or have been authorised by the owner of the property.**

[42] The Premier of the Province is in terms of s 2 (1) of GLAA, empowered on such terms and conditions as he or she may deem fit to acquire immovable property or dispose of **Provincial land.** In terms of s 2 (2) of GLAA, the immovable property so acquired shall vest in the **Gauteng Provincial Government.** The Provincial Government can therefore not sell any state land unless it forms part of provincial land.

[43] **Accordingly s 1 of GLAA, describes Provincial land to mean any immovable property which vests in the Gauteng Provincial Government in accordance with the provisions of s 239 (1) (b) of the repealed Constitution of the Republic of South Africa, 1993 (Act 200 of 1993) together with any immovable property acquired by the Gauteng Provincial Government pursuant to this Act (s 2(1)).**

[44] The Applicable section 239 reads:

(1) All assets, including funds and administrative records, which immediately before the commencement of this Constitution vested in the authority referred to in s 235 (1) (a) (b) or (c) , or in a government, administration or force under the control of such an authority, shall be allocated as follows:

(a) Where any asset is applied or intended to be applied for or in connection with a matter which –

(i) does not fall within a functional area specified in Schedule 6; or

(ii) does fall within a functional area but is a matter referred to in paragraphs (a) to (e) of section 126 (3) (which shall be deemed to include a police asset)

Such asset shall vest in the national government.

(b) Where any asset is applied or intended to be applied for or in connection with a matter which is not a matter referred to in paragraphs (a) to (e) of section 126 (3), such asset shall, subject to pretty much paragraph (c), vest in the relevant **provincial government**.

[45] It is common cause that prior to the coming into effect of the new dispensation, a vast majority of immovable property owned by the state or a variety of statutory bodies was registered in the name of the Republic of South Africa (or in the case of land acquired pre 1961, the Union Of South Africa), regardless of whether the property had been acquired by national government, department or provincial administration.

[46] After 1994 the Constitution provided for the national government and each provincial government to be able to register the immovable property controlled by it in its own name. Section 239 made provision for the properties to be vested in the name of “the National Government of the Republic of South Africa” or the Provincial Government”. This amounts to a change in ownership where the land in question ceases to being owned by the “Republic of South Africa and is transferred into the name of a Provincial Government. Eventually all immovable state property has to be registered in either the name of national government or one of the provincial governments.

[47] According to s 239 the decision **on whether the property should vest in the national or a provincial government would depend on the purpose for which the property was being used on 27 April 1994 or, if unused at that date, the purpose for which the property was intended to be used.**

[48] The vesting of vacant land will then depend on the purpose for which the land was originally acquired, its present zoning (e.g. vacant site originally bought for a school site being zoned by the municipality as “Educational”), and, if applicable, its intended future use where there are plans afoot to develop the site in the reasonably near future.

[49] Item 28 (1) certificate **in terms of Schedule 6 of the Transitional Arrangements to the Constitution of the Republic of South Africa, 1996 (Act 108 OF 1996)** provides for the national

Minister for Agriculture and Land Affairs to issue a certificate stating that the immovable property owned by the state is vested in a particular government in terms of s 239 of the previous Constitution, and for the Registrar of Deeds to make such entries or endorsements on any relevant register, title deed or other documents to register that immovable property in the name of that government. It therefore gives effect to the vesting of state land from the Republic of South Africa in a particular level of government that has acquired the use of that particular property.

[50] Accordingly, an **item 28 (1) certificate therefore facilitates the registration by the Registrar of Deeds of the immovable property owned by the state. The Registrar of Deeds, on production of the certificate by a competent authority (presently the 2nd Defendant, that is the Minister for Agriculture and Land Affairs), that immovable property owned by the state is vested in a particular government (that is national or provincial) in terms of s 239 of the previous Constitution, shall make such entries or endorsements in or on any relevant register, title deed or other document to register that immovable property in the name of that government. The document does not effect transfer of the property.**

[51] Mr Nel argued as per particulars of claim that in terms of the recommendations to the Minister, the property already in 1998 was provincial land. In the MEC's referral to the Minister dated 30 July 2007 he confirmed that the property already vested in the Province in 1998 and reserved as a **provincial function** for that reason a request was made for confirmation.

[52] However a letter to the Plaintiff from **Mr Mokoma in the Department of Local Government confirmed that the properties have not** been vested with the Provincial Government and therefore causing a delay in the transfer process. **On 14 April 2008 Plaintiff was again informed that the office of the MEC was awaiting the vesting certificate in terms of item 28 (1) to finalise the transfer of Erf 302 and Erf 537.**

[53] An assertion that the Gauteng Department of Local Government was mandated to dispose of the property by the Gauteng Provincial Department of Education based on the contents of the Memorandum that was sent to the Minister; Agriculture and Land Affairs is misguided. The memorandum does state that both properties were **held by the state** vide Deed of Transfer T9685/1978 and the other by T42699/1981. The request to the Minister was strangely for him to confirm the vesting of the properties in the Provincial Government by issuing of the certificate and also to concur to their disposal. Simultaneously a converse assertion was made in the memorandum to the Minister that the properties had vested on the Provincial Government in 27 April 1994 as per Title Deed T 9685/1978 and reserved in its present status as a Provincial function since before 27 April 1994. This is contradictory to an allegation that the property already in 1998 was provincial land and requiring the Minister to issue a certificate in terms of item S 28 (1) for the confirmation of the vesting of the properties in the Gauteng Provincial Government

[54] The Deed of Sale that has been alleged by the Plaintiff to be a replica of the Deed of Sale he had entered into with the MEC, the agreement is between the Department of Housing and the Department of Development Planning and Local Government, the former predecessors of the MEC Department of Local Government and Housing, duly represented having delegated his powers and duties by virtue of a resolution of the Premier of the Province of Gauteng taken in terms of s 5 (1), (2) and (3) of the Gauteng Land Administration Act, Act

11 of 1996 and acting on behalf of the Provincial Government of the Province of Gauteng as the seller. The documents pretty much capture the essence of the factual difficulty that convoluted the implementation.

[55] In the process of the disposal of state land State Land Disposal Committees have been appointed that constitutes of representatives from the national Departments of Agriculture and Land Affairs as well as that of the Public Works plus representatives from provincial departments which control state land, appointed from each province to oversee vesting applications, **advise and make recommendations to the Minister**. If the committee decides that the property was being or intended to be used for provincial purposes as at cut-off date it will recommend accordingly to the **Minister of Agriculture and Land Affairs who will then on request issue the certificate in terms of item 28 (1) signed by the Minister personally**.

[56] The Title Deed T9685/78 that was in existence at the fall of the hammer, signalling the sale of Erf 302 Moreletapark indicated that the property was acquired, ceded and transferred in full and free property to capacity to the **Republic of South Africa**, the purpose for which was "educational. The property therefore at all relevant time vested in the national government for educational purposes as of cut-off date. There is no endorsement that has been effected in either 1994 or 1998 in relation to the Provincial Government.

[57] On the question of whether the issued certificate in terms of item 28 (1) of Schedule 6 of the Constitution, Act 108 of 1996 confirmed the vesting of the property on the Provincial government at the time of the sale of the property. It is noted that the certificate certifies that **the properties owned by the State have vested** in the Provincial Government of Gauteng, in terms of s 239 of the Constitution of the Republic of South Africa Act 200 of 1993. In terms of item 28 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 the Registrar Deeds, Pretoria is requested to endorse the vesting of the immovable property in the name of the said Government, the purpose would have been according to the cut-off date, educational.

[58] Firstly, the **item 28 (1) certificate was invalid since it was issued by the Acting Director General** of the Department of Land Affairs dated 25 November 2008, instead of the Minister. No causa for such endorsement is mentioned except that the Minister concur for its disposal. That is contrary to the purpose mentioned in the Title Deed for which the property was transferred to the state.

[59] Furthermore it was not possible for the Minister of Agriculture and Land Affairs to alter the vesting of a property from the National Government to the Provincial Government by merely issuing a new certificate in terms of item 28 (1). The court regarded the certificate as a tool to effect registration by the Minister of Land Affairs of a vesting to the National Government; see the unreported judgment of the SCA in *Yellowstar Properties v Department of Development Planning and Local Government* (549/07) [2009] ZASCA 25 (27 March 2009).

[60] The properties therefore at the time of sale were not vested in the Provincial Government, specifically the Department of Local Government and Housing or Department of Education. It was therefore ultra vires the MEC's authority to dispose of the properties that being contrary to the s 2 (1) provision of the Disposal Act.

[61] In the memorandum to the Minister it is mentioned that the properties were to be vested on the Provincial Government for the purposes of being disposed to third parties, which is not a valid causa for the purpose of transfer. The vesting is said to have already happened in terms of s 239 of the Interim Constitution when it came into operation on 27 April 1994. The effects of non-compliance or misuse of the certificate undermines the Constitutional principles contained in s 40 and 41 of the Constitution itself and hampers efficient land administration and reform.

[62] Since the Plaintiff paid the deposit amount to the MEC on a bona fide believe that the contract was valid and enforceable, he is entitled to the recovery of his deposit. He is also entitled to his full costs of trial since he has succeeded on the alternative claim. In addition the manner in which the 1st Defendant conducted its case merit such an order for costs.

It is therefore ordered that:

1. The Plaintiff's Claim 1 is dismissed.
2. The Plaintiff's alternative claim, Claim 2 is upheld.
3. The 1st Defendant is ordered to repay the Plaintiff the amount of R57 000.00 together with interest at the rate of 15.5% per annum payable from April 2010 to date of payment.
4. 1st Defendant to pay the Plaintiff' costs.



N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of Applicant:
Instructed by:

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On behalf of Respondent:
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