IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : MTHATHA

REPORTABLE

CASE NO: CA 16/11

In the matter between :

NONCEBA PRESENTIA GAMA-MPANTSHA	**First Appellant**
ODWA WOPULA	**Second Appellant**
NWABISA WOPULA	**Third Appellant**

and

NKOSIVUMILE HAROLD MPANTSHA	**Respondent**

FULL COURT APPEAL JUDGMENT

STRETCH AJ :

During February 2008 the respondent brought a vindicatory application (also seeking other relief) in this Division claiming return of ownership of Erf 1220 (2055) Lusikisiki (hereinafter referred to as “the property”).

[1] On 8 January 2009 Matiwane AJ (granting the relief sought) made the following order (in citing the order, the parties are referred to as they were in the Court *a quo*) :

> *1.1 That the resolution taken by the fifth respondent's council (the Qaukeni Local Municipality) on 28 February 2007 to sell Erf 1220 (2055) Lusikisiki is hereby declared wrongful, unlawful and irregular and is set aside.*
>
> *1.2 That the power of attorney signed by the fourth respondent (the municipal manager) on 15 June 2007 to pass transfer of Erf 1220 (2055) Lusikisiki is declared unlawful and irregular and is set aside.*
>
> *1.3 That the sale of the said property by the fifth respondent to the first respondent (NONCEBA PRESENTIA GAMA-MPANTSHA) is declared wrongful, irregular and of no force or effect and is set aside.*
>
> *1.4 That the sale of the said property by the first respondent to the second and third respondents (ODWA WOPULA and NWABISA WOPULA) without the co-operation*

of the applicant (NKOSIVUMILE MPANTSHA) is declared wrongful and unlawful and is set aside.

1.5 That the fifth respondent is ordered and directed to cancel deeds of transfer T001297/2007 and T001298/2007 registered by him in respect of Erf 1220 (2055) Lusikisiki in favour of the first, second and third respondents.

1.6 That Erf 1220 (2055) Lusikisiki is hereby declared to be the joint property of the applicant and the first respondent by virtue of their marriage in community of property.

1.7 That the second and third respondents and any other respondents acting in consort with them are interdicted and restrained from evicting the applicant from Erf 1220 (2055) Lusikisiki.

1.8 That the respondents are directed to pay the costs of the application on the party and party scale jointly and severally, the one paying the other to be absolved.

[2] On 13 January 2011 the Supreme Court of Appeal granted the first, second and third respondents leave to appeal to the Full Court

of this Division, setting aside the costs order granted by the Court *a quo* in dismissing the application for leave to appeal and directing that the entire costs of the application for leave are to be costs in the appeal.

[3] I shall hereinafter refer to the erstwhile first, second and third respondents as the first, second and third appellants, and to the erstwhile applicant as the respondent.

BACKGROUND

[4] The third appellant (born in 1983) is the first appellant's natural daughter.

[5] In 1986 the first appellant married her first husband LUVUYO EARNEST GAMA ("Gama").

[6] In 1987 the first appellant and Gama had a boy by the name of Olwetu.

[7] Gama died in 1990.

[8] The first appellant married her second husband (the respondent) in 1999.

[9] The respondent together with the first appellant, the third appellant and Olwetu lived in a house situated on the property in question.

[10] During 2006 the first appellant was appointed as the executor of Gama's deceased estate.

[11] During the same year the first appellant caused a divorce summons to be served on the respondent.

[12] During February 2007 the council of the erstwhile fifth respondent (the Quakeni Local Municipality) passed a resolution to sell the property to the first appellant.

[13] During June 2007 the erstwhile fourth respondent (as manager of the Quakeni Local Municipality) signed a power of attorney to effect the transfer of the property from the municipality to the first appellant, which transfer was duly effected.

[14] During the latter half of 2007 the first appellant transferred the property to the second appellant (son-in-law) and the third appellant (her daughter, married to the second appellant in

community of property) and the property was registered in the names of the second and third appellants.

[15] On 3 December 2007 the first appellant's attorney (Mr Atkins Noxaka) advised the respondent that the property had been sold and he was given until 31 December 2007 to vacate.

THE RESPONDENT'S VERSION

[16] The respondent alleges that he is married to the first appellant in community of property. The first appellant confirms this in her answering affidavit. Indeed this fact is confirmed in all the documents which served before the Court *a quo*.

[17] Their marriage certificate reflects that he and the first appellant entered into a civil marriage at Port Shepstone on 19 March 1999.

[18] In her particulars of claim in the divorce action the first appellant confirms that she is married to the respondent in community of property. This is not only confirmed on oath by the third appellant, but is stated as an undisputed fact in a judgment delivered by Luthuli AJ in this Division, in a matter where the respondent and the first and third appellants were all parties to

proceedings which were finalised during 2007 (TkD case no. 1184/06).

[19] The respondent says that about a year after he married the first appellant he bought the property in question from a developer by the name of James Roderick Todd Arthur (hereinafter referred to as “Arthur Homes”) who then represented the municipality of Lusikisiki by virtue of the provisions of section 170(2)(a) read with section 172(1) of the **Municipalities Act, 1979** (Act no. 24 of 1979).

[20] His founding papers are supported by a deed of sale reflecting an agreement entered into between the Lusikisiki Municipality as represented by Arthur Homes and the respondent. This document also describes the marriage between the first appellant and the respondent as being in community of property.

[21] This sale agreement appears to have been signed by the respondent on 10 January 2000. Annexed to his documents is a receipt from Arthur Homes dated 13 February 2000 reflecting that the respondent had paid R1 497-00 for a “title deed”. The respondent’s evidence is that he was told by Arthur Homes that this title deed had subsequently been destroyed in a fire.

[22] The respondent alleges that thereafter and at his own costs he built a home on this property and he and the first appellant lived in this home together with her two children.

[23] In the premises the respondent avers that the property belongs to him and the first appellant jointly by virtue of their marriage in community of property.

[24] The third appellant on oath verifies that the property in question was acquired after the marriage in community of property between the respondent and the first appellant was entered into. She says that both the respondent and the first appellant acquired the property.

[25] The respondent adds that the letter which he received from the first appellant's attorney on 3 December 2007 (to vacate the property) was not the first attempt to evict him from his home. The problems began in 2006 when the marriage was already taking strain and the first appellant sought to secure his eviction by way of a domestic violence interdict.

[26] He says that although she obtained *ex parte* interim relief in the Lusikisiki Domestic Court, the Court restored his occupation on 27 September 2006.

THE FIRST APPELLANT'S VERSION

[27] The first appellant disputes that the respondent acquired the property in question after her marriage to him or at all.

[28] She says that she acquired the property in February 1997, after the demise of her first husband Gama and before she married the respondent.

[29] She says that when she was appointed as the executor of Gama's deceased estate in 2006 she, believing that this property formed part of a joint estate which she had enjoyed with the deceased Gama, used her powers as the executor of Gama's deceased estate to transfer the property to the second and third appellants. The certificate recording her marriage to Gama however, reflects a marriage out of community of property.

[30] In her opposing affidavit she makes much of the fact that the original notice of motion cited seven respondents, with attorney Atkins Noxaka as the fourth respondent.

[31] She relies on discrepancies between the citations in the notice of motion and those in the respondent's founding affidavit. It

appears from this founding affidavit that the present respondent refers to the Municipal Manager as the fourth respondent (instead of the fifth respondent as cited in the notice of motion), to the Qaukeni Local Municipality as the fifth respondent (instead of the sixth respondent as cited in the notice of motion), and to the Registrar of Deeds as the sixth respondent (instead of the seventh respondent as cited in the notice of motion).

[32] It was clarified during argument before this Court that at some stage attorney Atkins Noxaka was “released” as a respondent in the Court *a quo*.

[33] Not only is this obvious from a proper reading of all the papers, but attorney Noxaka who himself appeared on behalf of the three appellants, did not argue the contrary. Subsequent to the hearing of this appeal, and with the consent of the parties, this Court received replying papers which pertinently confirm the fact that attorney Atkins Noxaka is no longer a party to these proceedings. My comments on why this attorney, who is also the appellants’ attorney of record, failed to include these papers in the appeal record, will follow.

[34] The first appellant in her affidavit before the Court *a quo* avers that the respondent had previously before Luthuli AJ admitted that

she (the first appellant) acquired the property in question after Gama's death and before she married the respondent.

[35] This averment is incorrect. The respondent in his affidavit in that matter refers to Erf 1143 Lusikisiki and Erf 1165 Lusikisiki. The subject matter of these proceedings is Erf 1220 (also known as Erf 2055).

[36] For the reasons set forth hereinafter, it is in any event not relevant to the determination of this matter whether the first appellant acquired the property after Gama's death but before she married the respondent (as she avers) or whether the respondent acquired the property after he married her (as he avers).

CREDIBILITY FINDINGS

[37] Having said this I am of the view that it is necessary at this point to comment on the adverse credibility findings made by the Court *a quo* particularly with respect to the appellants.

[38] On 3 July 2007 the first appellant, having apparently taken transfer of the property from the Quakeni Municipality on 15 June 2007, signed a power of attorney in favour of M Barnard and/or P Botha, to pass transfer of the property to the second and third

appellants. Significantly, the first respondent fails to explain why the Municipality's council sold the property to her for R180 000-00 on 28 February 2007 (as recorded in the Municipality's power of attorney to pass transfer), when she, on her version, was already the owner of the property by virtue of her acquisition thereof in February 1997.

[39] This power of attorney reveals that the first appellant is incorrectly described as an unmarried person by the name of "Nonceba Presentia Gama", whereas in various other documents of record she either describes herself as "Nonceba Presentia Mpantsha - born Xaki" (as in her divorce particulars of claim) or as "Nonceba Presentia Gama-Mpantsha" (as in her affidavit in the present matter).

[40] The aforesaid power of attorney also does not describe her as acting in her capacity as executor of Gama's estate (as she avers in her affidavit) but describes her as selling the property to the second and third appellants in her personal capacity as the lawful owner thereof.

[41] In the absence of any evidence explaining these misdescriptions (which coincidentally are also reflected not only in the deed of transfer in favour of the second and third appellants, but

also in the power of attorney to pass transfer to the first appellant allegedly signed by the Municipal Manager of the Qaukeni Local Municipality, as well as in both the deeds of transfer in favour of the first appellant and the second and third appellants jointly), I am constrained to accept that not only did this false information emanate from the first appellant, but that the second and third appellants, having been aware that the information was false, nevertheless appended their signatures to the relevant documents without correcting or questioning these misdescriptions.

[42] The Court *a quo*, in referring to section 17(2)(c) of the **Deeds Registries Act, 1937** (Act no. 47 of 1937) found that the Registrar of Deeds would have refused to register the transfer of the property firstly into the first appellant's name and secondly into the names of the second and third appellants, had it been brought to the Registrar's attention that the first appellant was at the time of registration of transfer, married to the respondent in community of property. We agree.

[43] The relevant portion of the **Deeds Registries Act** reads as follows :

"***17 Registration of Immovable Property in Name of Married Persons***

(1) From the commencement of the Deeds Registries Amendment Act, 1987, immovable property, real rights in immovable property and notarial bonds which would upon transfer, cession or registration thereof form part of the joint estate shall be registered in the name of the husband and the wife.

(2) Every deed or any other document lodged with the Registry for execution, registration or record shall –

(a) State the full name and marital status of the person concerned;

(b) Where the marriage concerned is governed by the laws in the Republic or any part thereof state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998;

(c) Where the person concerned is married in community of property, state the full name of his spouse; and

(d) Where the marriage concerned is governed by the law of any other county, state that the marriage is governed by the law of that country.

(3) Where a marriage in community of property has been dissolved by the death of one of the spouses before property which on transfer or cession thereof

would have transferred or or ceded to the administration of any disposition be the joint the estate of the formed part of the joint estate could be ceded, that property shall be transferred joint estate of the spouses, pending the thereof, and is, subject to the provisions with regard to that property, deemed to property of the surviving spouse and of deceased spouse."

[44] From the aforegoing it is clear is that the Court *a quo* correctly and with sufficient cause had serious misgivings about the credibility of the appellants.

THE APPEAL NOTICE

[45] As stated hereinbefore, the Supreme Court of Appeal granted leave to appeal to the three appellants only. Having been granted this leave, the appellants, in their notice of appeal, proceeded to attack a number of aspects of the order granted by the Court *a quo* which is set forth at the beginning of this judgment.

[46] It is clear that the Court *a quo* was not asked to make a determination on the status of the marriage regime between the first appellant and the respondent, it having been common cause when the matter came before that Court, that the parties were married in community of property.

[47] The status of the marriage is surprisingly raised for the first time in the notice of appeal.

RELEVANT LEGISLATION

[48] Mr Noxaka appearing for the appellants, urges this Court to interfere with the judgment of the Court *a quo* in the event of this Court finding, as a matter of law, that the marriage between the first appellant and the respondent was not in community of property.

[49] He argues that although the marriage was entered into and solemnised in what is now known as KwaZulu-Natal, it is governed by section 8 of the Transkei **Marriage Act, 1978** (Act No. 21 of 1978).

[50] This section reads as follows :

"8.(1) Any person who is under the provisions of this Act authorized to solemnize any civil marriages in any country outside Transkei -

– (a) may solemnize such civil marriage only if the parties thereto are both citizens of Transkei and domiciled in Transkei; and

(b) shall solemnize any such civil marriage in accordance with the provisions of this Act.

(2) any civil marriage so solemnized shall for all purposes be deemed to have been solemnized in the district in which the male party thereto is domiciled."

[51] The equivalent of this section is section 10 of the South African **Marriage Act, 1961** (Act No. 25 of 1961) which reads as follows :

"10. Solemnization of marriages in country outside the Union

(1) Any person who is under the provisions of this Act authorised to solemnize any marriage in any country outside the Union -

(a) may so solemnize any such marriage only if the parties thereto are both South African citizens domiciled in the Union; and

(b) shall solemnize any such marriage in accordance with the provisions of this Act.

(2) Any marriage so solemnized shall also be deemed to have been solemnized in the province of the Union in which the male party thereto is domiciled."

[52] The **Marriage Act, Extension Act, 1997** (Act No. 50 of 1997) extended the operation of the 1961 Act to the whole of South Africa on 12 November 1997, with retrospective effect from 27 April 1994.

[53] The purpose of this was to make the 1961 Act apply to the former independent territories of Transkei, Bophuthatswana, Venda and Ciskei, whose own marriage laws had remained in force even after they were integrated back into South Africa.

[54] Although the Act was only published on 12 November 1997 it was deemed to be retroactive as from 27 April 1994, being the date on which these independent territories were reintegrated as a consequence of the commencement of the 1993 Constitution of the Republic of South Africa.

[55] The effect of this is the following :

55.1 Section 8 of the Transkei Marriage Act does not apply to this marriage entered into on 19 March 1999, as it did to the first appellant's marriage to Gama in 1986.

55.2 By 1999 the Transkei had already been reintegrated back into South Africa and as such neither the respondent nor the first appellant were either citizens of the Transkei or domiciled in the Transkei (assuming for the moment that there is evidence of this before us, which there is not).

55.3 Neither does section 10 of the South African Marriage Act apply to the marriage between the parties. This section refers to a marriage solemnised

in a country outside the Union. The marriage in question was solemnised in Port Shepstone which is part of South Africa, formerly known as the Union.

[56] Mr Noxaka has attempted to extend this argument by submitting that if section 8 of the Transkei Marriage Act applies, then so does section 39(1) thereof, which reads as follows :

"39.(1) Subject to the provisions of sub-section (2), a marriage contracted in terms of the provisions of this Act shall produce the legal consequences of a marriage out of community of property and of profit and loss.

(2) It shall be competent for the parties to any intended civil marriage who desire that community of property and of profit and loss shall result from their marriage –

(a) to enter into an antenuptial contract which provides for community of property or of profit and loss; or

(b) to declare jointly before a magistrate or marriage officer, at any time prior to the

solemnization of their civil marriage and substantially in the prescribed form, that it is their intention and desire that community of property and of profit and loss shall result from their civil marriage ....”

[57] This section was repealed by the **Recognition of Customary Marriages Act, 1998** (Act no. 120 of 1998) which came into operation on 15 November 2000 after the first appellant’s marriage to the respondent was concluded.

[58] That this happened after the wedding date is neither here nor there.

[59] The extension of the South African Marriage Act to the former independent territories with retrospective effect as from 27 April 1994 means that all marriages after this date are deemed to be South African marriages.

[60] Why then was it specifically necessary for the legislature to declare that section 39 of the Transkei Marriage Act had been repealed by the Recognition of Customary Marriages Act with effect from 15 November 2000?

[61] The answer is simple. Section 39 did not only deal with the presumption against community of property but also, and more importantly, entrenched the Draconian concept of male marital power in a civil marriage.

CASE LAW

[62] This concept was declared to be inconsistent with the Constitution on 11 December 1997 by Miller J in the matter of **Pryor v Battle and Others 1999 (2) SA 850 TkD.** This declaration was subsequently elevated to a declaration of invalidity in the **Recognition of Customary Marriages Act** (sections 6 and 7), resulting in the Schedule to that Act confirming that section 39 of the Transkei Marriage Act had been repealed.

[63] Universal community of property is the normal matrimonial proprietary regime in this country. Where there has been derogation from it, the onus of proving any derogations from the normal incidents of the law rests upon the person averring it :
Edelstein v Edelstein N.O. & Others 1952 (3) SA 1A at 10

[64] Mr Noxaka has invited this Court to find that this presumption does not apply to the marriage between the first appellant and the respondent for the following reasons :

64.1 The provisions of section 8 of the Transkei Marriage Act applies to a person who was domiciled in Transkei at the time of the marriage;

64.2 The respondent was domiciled at Flagstaff (in the former Transkei) at the date of his marriage.

[65] In support of these submissions Mr Noxaka relies on the **Pryor** judgment which I have already alluded to.

[66] As mentioned many times before, it is a common cause on the papers that the parties are married in community of property. Indeed the marriage certificate describing this marriage (which was issued in terms of the regulations made under the 1961 South African Marriage Act), is remarkably different from the first appellant's marriage certificate describing her marriage to her first husband, Gama, 13 years previously. The Gama marriage certificate, describing a marriage which appears to have been solemnised at Bizana (in the former Transkei) not only states that the certificate was issued in terms of the Transkei Act 21 of 1978, but also describes both parties as Transkeian citizens. More specifically, it also states that the marriage is without antenuptial contract or by declaration, thereby making it clear that *ex facie* the

document the marriage is out of community of property as envisaged in the then applicable section 39 of the Transkei Marriage Act.

[67] Similar to the Gama marriage, **Pryor's** case also describes a marriage entered into before this country's Marriage Act became applicable as from 27 April 1994. In fact the **Pryor** marriage was solemnized but a week before this on 21 April 1994 at Port St Johns in the former Republic of Transkei. It was in any event common cause in that case that that marriage was solemnized in terms of the Transkei **Marriage Act 21 of 1978**.

[68] These facts are not even remotely similar to the facts before us.

[69] The marriage between this respondent and the first appellant was entered into outside of the former Republic of Transkei and there is no evidence before us that the parties intended the marriage to be anything other than a marriage in community of property. Indeed, Mr Noxaka has conceded that there is also no evidence that the respondent (or either of the parties for that matter), was domiciled in and a citizen of the former Republic of Transkei when the marriage was entered into (as required by section 8 of the Transkei Act).

[70] This being the case, the Court *a quo* correctly accepted that the marriage is in community of property.

[71] Accordingly the provisions of the **Matrimonial Property Act, 1984** (Act no. 88 of 1984) apply to any property forming part of this community estate, either by virtue of having been brought into the estate on marriage, or having been acquired during the marriage.

[72] It is clear that the property in question forms part of the joint estate irrespective of which version is preferred. The first appellant seems to suggest that she acquired the property from Arthur Homes in 1996, after the death of her first husband, and before she met the respondent. The respondent says that he bought the property from Arthur Homes during the year 2000 (after his marriage to the first appellant). Indeed, the deed of sale which he refers to reflects that he is married in community of property, an admission which happens to favour the first appellant.

[73] The third appellant (the first appellant's biological daughter) also confirms that the property was acquired after the first appellant's marriage to the respondent. She says that the respondent and the first applicant in fact acquired the property together.

[74] This version seems to dovetail far more with the respondent's version than with the version of her own mother.

[75] Notwithstanding the differences in these three versions, in respect of all of them, the property (in the absence of any evidence to the contrary) falls squarely into the community estate.

[76] It is clear from the provisions of section 15(2) of the Matrimonial Property Act, that the first appellant is prohibited from alienating or from entering into any contract for the alienation of any immovable property forming part of the joint estate, without the written consent of the respondent.

[77] An order similar to the one made by the Court *a quo* was made by Dlodlo J in the matter of **Visser v Hull and Others 2010 (1) SA 521 WCC**.

[78] In that matter, the applicant approached the High Court on motion to set aside an agreement in terms of which the applicant's deceased husband, to whom she had been married in community of property, had sold immovable property, belonging to himself and to the applicant, to the first and fourth respondents. The sale was concluded and the property was transferred to the respondent

without the knowledge and consent of the applicant. The applicant discovered this when she was served with eviction papers. The applicant averred that the sale was void because it had been concluded without her consent, and that the respondents had at the time known that she and the deceased were married to one another. In support of this averment she relied on the fact that the respondents were related to the deceased and had visited the applicant and the deceased at the property where they resided as husband and wife. The applicant averred further that the deceased concluded the sale in deliberate fraud of her rights in the joint estate. The respondents resisted the application on the ground that, although they knew that the applicant and the deceased lived together at one stage and had children together, they did not know that they were married to one another. In support of their contention, they referred to the transfer documents in which the deceased had declared that he was unmarried and to the fact that the applicant's name did not appear in the title deeds.

[79] Dlodlo J held that a third party was required to take reasonable steps to establish whether the contracting spouse had obtained the consent of the non-contracting spouse. The third party could not simply rely on a bold assurance by the contracting spouse that he/she was unmarried. An adequate enquiry by the third party was required. He held that an enquiry into the marital status of the

applicant and the deceased was all the more necessary when the respondents were related to the deceased and knew that they were living together. He held that the respondents had connived with the deceased and that the purpose of this was obviously to prejudice the applicant's interest in that asset of the joint estate. The sale was declared null and void and was set aside.

CONCLUDING REMARKS

[80] I am of the view that these appellants similarly connived to prejudice the respondent's interest in the joint estate, particularly when, in terms of the divorce particulars, the first appellant claims forfeiture of the assets in the joint estate in any event.

[81] Accordingly the Court *a quo* did not err in making the orders resulting in the setting aside of the respective sales and in restoring the property to the joint estate.

[82] The appellants have not challenged the remaining orders and I see no reason to interfere with them, save to amend the costs order to ensure that the joint estate is not mulcted with the costs order.

CONDUCT OF PROCEEDINGS

[83] One further issue deserves mention.

[84] On 15 February 2011 the appellants submitted heads of argument comprising 21 pages. On 5 May 2011 the appellants submitted “supplementary” heads of argument comprising a further four pages.

[85] On 17 May 2011 the respondent submitted relatively concise heads of arguments to which the appellants immediately replied with a further six page response headed “Further Appellants’ Supplementary Heads of Argument”.

[86] Sub-rule 8(d) of the Rules of Practice pertaining to this Division reads as follows :

*"**Heads of Argument :***

- *shall consist of a concise and succinct statement of the main points which will be argued and should not contain unnecessary elaboration;*
- *in particular, shall not contain lengthy quotations from either the record or from authorities to which reference will be made;*
- *are not to refer in general to the record and authorities but to the specific pages and paragraphs of relevance;*
- *shall be accompanied by a list of the authorities to be quoted in support of the argument;*
- *shall, if any such authority is not readily available, be further accompanied by copies of the text to which reference is made – particularly in the case of unreported decisions, where a copy of the entire judgment should be attached."*

[87] None of these rules have been complied with by the parties. On the contrary, there has been substantial non-compliance on the part of the appellants' legal representatives.

[88] My criticism does not begin with the heads of argument. It goes back further to the affidavits with which the Court *a quo* was seized.

[89] The affidavits submitted on behalf of all the parties before the Court *a quo*, exude emotion and are charged with irrelevant verbage and sarcastic remarks.

[90] I am constrained to express my disappointment and displeasure about the manner in which lawyers have failed this Court and their clients by burdening the record with this type of vitriol instead of confining the papers to the succinct issues before the Court.

[91] When this matter was argued, it became apparent that the record which served before this Court not only missed certain relevant pages of the first appellant's answering affidavit which served before the Court *a quo* (for example where she avers that she bought the property from Arthur Homes in 1996) but also all the documents in reply where the respondent not only deals with the citation of the erstwhile seven respondents, but annexes a supporting affidavit from the person who signed his sale agreement on behalf of Arthur Homes.

[92] The appellants (on whom the duty rests to ensure that a full record of the proceedings in the Court *a quo* is placed before this appeal court) not only omitted relevant portions of this record but their legal representative confined much of his argument to the incorrect citation of parties and the status of the respondent's sale agreement, all of which had been adequately (in my view) addressed in reply.

[93] This was only discovered after the matter was argued before this Court when the replying documents which served before the Court *a quo* were handed in by consent. This, after the appellants' attorney had certified, in writing that "*the record filed in these proceedings is correct*".

[94] I am of the view that this shoddy presentation of the appeal record and the deliberate abuse of this Court's lack of knowledge of the existence of relevant documents which served before the Court *a quo*, is a serious abuse of the position of trust which lawyers hold when they present their clients' respective cases.

[95] These legal representatives and any other representatives who are inclined to follow suit are warned that this Court will not hesitate, should this tendency continue, to make punitive costs

orders to emphasize its disapproval of such conduct, irrespective of the merits of any particular matter.

[96] Having accordingly dealt with the conduct of this matter and having considered the merits of the appeal, the following order is made :

ORDER

(a) The appeal is dismissed.

(b) The order of the Court *a quo* is confirmed.

(c) The appellants are directed (jointly and severally, the one paying the others to be absolved), to pay the costs of this appeal, including the costs of the applications for leave to appeal before the Court *a quo* and before the Supreme Court of Appeal.

(d) All costs orders pertaining to this matter shall be excluded as liabilities of the first appellant’s and the respondent’s joint estate.

I. T. STRETCH

ACTING JUDGE OF THE HIGH COURT

I agree :

_____

F DAWOOD

JUDGE OF THE HIGH COURT

I agree, and it is so ordered :

_____

Y EBRAHIM

JUDGE OF THE HIGH COURT

Matter heard on	:	10 June 2011
Judgment delivered on	:	18 August 2011
Attorney for the appellants	:	Mr A F Noxaka of A F Noxaka & Company
Counsel for the respondent	:	Mr N R Mtshabe Instructed by Mduma Mjobo Attorneys, c/o Fikile Ntayiya & Associates