

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2021/25152

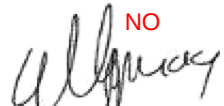
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1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

30 March 2022


Judge Dippenaar

In the matter between:

VASUTHEVAN NAICKER N.O

(In his representative capacity as Trustee for the time being of the
VEN FAMILY TRUST)

(Masters Reference: IT 000927 / 2018D)

First Applicant

ELAINE NAICKER N.O

((In her representative capacity as Trustee for the time being of the **VEN FAMILY TRUST**)

(Masters Reference: IT 000927 / 2018D)

Second Applicant

LORRAINE DOORASAMY N.O

(In her representative capacity as Trustee for the time being of the **VEN FAMILY TRUST**)

(Masters Reference: IT 000927/ 2018D

Third Applicant

and

**PARK VILLAGE AUCTIONS & PROPERTY SALES (PTY)
LIMITED**

First Respondent

**K P M M CONSTRUCTION (PTY) LIMITED
(In Business Rescue)
(Registration Number: 200000070307**

Second Respondent

**NEIL MILLER N.O
(The Business Rescue Practitioner for
K P M M CONSTRUCTION (PTY) LIMITED**

Third Respondent

BIESEMAN & BIESEMAN (PTY) LIMITED

Fourth Respondent

THE REGISTRAR OF DEEDS-PRETORIA

Fifth Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Sixth Respondent

THE MASTER OF THE HIGH COURT

Seventh Respondent

JUDGEMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 30th of March 2022.

DIPPENAAR J:

[1] The application concerns the validity of an auction sale of an immovable property situate at Erf 3613, Cnr Constantia Street and EP Malan Street, Pomona Ext 128, district

Ekurhuleni Metropolitan Municipality (“the property”), sold by the first respondent at the behest of the second and third respondents to the fourth respondent pursuant to an auction on 2 March 2021.

[2] The applicants are the trustees of the Ven Family Trust (“the trust”), who made offers of R17 million and R20 million for the property subsequent to the auction on 11 March 2021 and 25 March 2021 respectively. The trust did not attend the auction.

[3] The second respondent is a financially distressed company. The third respondent¹ is its appointed business rescue practitioner, who decided to sell the second respondent’s property by way of public auction pursuant to which the first respondent was mandated to do so. The latter auctioned the property on 2 March 2021. The application is opposed by the second, third and fourth respondents.

[4] In their notice of motion, the applicants sought orders: (i) interdicting the transfer of the property into the name of the fourth respondent; (ii) setting aside the sale agreement dated 30 March 2021 of the property concluded between the second and fourth respondents pursuant to an auction sale conducted by the first respondent on 2 March 2021; (iii) directing the second respondent to accept the trust’s offer dated 25 March 2021 to purchase the property for the sum of R17 million and in the alternatively directing the second respondent to accept the trust’s offer of R20 million in terms of an addendum to the offer dated 25 March 2021; together with costs.

[5] At the hearing, the applicants sought slightly attenuated relief and sought orders interdicting the fifth respondent from effecting transfer of the property into the name of the fourth respondent; setting aside the sale agreement concluded at the auction sale between the second and third respondents and the fourth respondent on 2 March 2021 and directing the second respondent to accept alternatively give consideration to the

¹ Together with Mr Chevalier, who was not cited as party to the application. This is however not an issue in this application.

applicants' offer of R17 000 000. Reliance on the purported offer of R20 million was in my view correctly jettisoned by the applicants as the offer was unsigned and thus falls foul of s2(1) of the Alienation of Land Act².

[6] The applicants' case is primarily predicated on a challenge to the validity of an extension of the offer period in clause 4.1 of the first respondent's terms and conditions of sale ("the auction terms") and a challenge to the fourth respondent's bid and the acceptance thereof as a proper purchase and sale. The applicants contend that the first and third respondents breached the auction terms by accepting the fourth respondent's offer outside the fourteen day offer period and that the first respondent had no option but to accept the trust's offer of R17 million as the only legitimate bid offer for the property. They further contend that there are adequate grounds to set aside the sale agreement concluded with the fourth respondent.

[7] The second and third respondents' case as supported by the fourth respondent is that the application is ill conceived and the applicants have illustrated no entitlement to any of the relief sought. They argue that there were no breaches of the auction terms and that a valid agreement of sale was concluded with the fourth respondent. In its explanatory affidavit, the sixth respondent adopts the same position, although it abides the court's decision.

[8] The applicants seek final relief. The matter is thus to be determined on the basis of the so called Plascon Evans test³. It is well established that motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Where there is a genuine dispute of fact, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can be safely rejected on the papers.⁴ The respondents' respective versions are

² 68 of 1981.

³ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C; National Director Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para [26]

⁴ J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para 12

supported by documentary evidence and cannot be rejected on the papers as palpably false or clearly untenable and must thus be accepted.

[9] The relevant facts are not contentious. The relevant portions of the auction terms provide:

“4.1 This document Constitutes an Offer to Purchase by the Purchaser, which is subject to written acceptance by the Seller within 14 (fourteen) business days (hereinafter referred to as “the offer period”) from date hereof and shall remain irrevocable and open for acceptance by the Seller at any time during the offer period. For the sake of clarity, the Purchaser’s offer is open for acceptance until 17h00 on the 14th (fourteenth) business day after the signature hereof by the Purchaser, the counting of the 14 (fourteen) business days to commence on the 1st (first) business day after date of signature hereof and shall endure until 17h00 on the 14th (fourteenth) business day thereafter.

4.2 During the offer period, the Seller or the Auctioneer may continue to market the property in the normal course of business as they may deem fit and in consequence of same, they may take in further and better written Offers to Purchase from prospective Purchasers, to be submitted for the seller’s consideration.

4.3 The Auctioneer shall advise the Purchaser in writing (which may either be by telefax or by electronic mail) of any higher written offer (hereinafter referred to as “a competing offer”) which is received from any third party during the offer period. The Purchaser shall, for a period of 24 (twenty-four) hours (hereinafter referred to as “the option period”) after transmission of the written advice of the competing offer by the Auctioneer as aforesaid, have the option to increase the purchase price offered by him in terms of this agreement to an amount equal to the purchase price of the competing offer but subject otherwise to all other terms and conditions of this agreement.

4.4 If the Purchaser wishes to exercise the option to match the competing offer during the option period, the Purchaser must do so in writing in clear and unambiguous terms, which notice must be delivered to the Auctioneer before the expiry of the 24 (twenty-four) hour option period. This written notice must either be hand delivered to the business premises of the Auctioneer and a receipt signed in respect thereof, or may be telefaxed to the Auctioneer at the indicated telefax number or email, provided that in such an instance the Purchaser must telephonically confirm receipt of the said telefax or email at the business premises of the Auctioneer, as the onus rests upon the Purchaser to confirm receipt of the said notice by the Auctioneer.

4.6 Should the Purchaser exercise the option within the option period and match the competing offer, the purchase price in terms of this agreement shall be the increased amount. The Seller shall be entitled until the lapse of the offer period to accept this agreement at any increased purchase price. This option process is a continuation of the original process and any sale thus concluded shall be a sale by auction.

4.9 The Seller reserves the right to decline the purchaser’s offer. The Seller shall have no obligation to accept the offer and shall not be obliged to furnish a reason for the rejecting (sic) of an offer. If the Seller rejects the purchaser’s offer, the Seller shall be entitled to accept any other offer that may be received in respect of the property.”

[10] The fourth respondent was the highest bidder at the auction held on 2 March 2021, with an offer of R14 million, exclusive of VAT.

[11] Subsequent to the auction, the fourth respondent received an email from an employee of the first respondent on 16 March 2021, requesting it to agree to an extension of the 14 day offer period to Wednesday 24 March 2021. The fourth respondent agreed to the request in writing. The reason for the request was that a competing offer from a prospective purchaser was awaited.

[12] The competing offer was relayed to the fourth respondent on 24 March 2021. Within 24 hours and on 25 March 2021, the fourth respondent exercised its right of first refusal and matched the offer from the trust. The fourth respondent made the required payments, whereafter the third respondent accepted the offer on behalf of the second respondent on the same date, to wit 25 March 2021. Later that same day, the trust purported to increase its initial offer to R20 million by way of an unsigned offer⁵, but only after the fourth respondent's offer had been accepted by the second and third respondents. The following day, the trust was advised that its higher offer could not be accepted as the fourth respondent's offer had already been accepted.

[13] I turn to consider the issues. It is trite that to obtain final interdictory relief, the applicants must illustrate a clear right, an injury actually committed or reasonably apprehended and the lack of an adequate alternative remedy in order to obtain the relief sought⁶.

[14] These elements were not addressed in the applicant's founding papers at all but are only addressed for the first time in reply. It is trite that a party must make out its case in its founding affidavit and a case cannot for the first time be made out in a replying

⁵ Falling foul of the provisions of s2(1) of the Alienation of Land Act 68 of 1981.

⁶ Setlogelo v Setlogelo 1914 AD 221 at 227

affidavit.⁷ Equally trite is that in motion proceedings, the affidavits constitute both the pleadings and the evidence and the issues should appear clearly from the founding papers⁸. This strongly militates against the granting of interdictory relief.

[15] In any event, the applicants have not in my view illustrated a clear right to interdictory relief. I am further not persuaded that the applicants have illustrated any entitlement to the remaining relief sought for the understated reasons.

[16] First, the applicants did not attend the auction and did not make any auction bid. The auction terms thus do not apply to them and the trust's offer was not regulated by and did not fall under the ambit of the auction terms. The applicants' argument that the trust became a party to the prospective sale agreement the moment it made an offer which it did in terms of clause 4.1 of the conditions of sale, is misconceived. For the same reasons, the argument that the trust was not an outsider in the contractual relationship, does not pass muster.

[17] Second, the trust's offer is regulated by the terms of its offer. Clause 2.3 of the trust's offer confirms the common law position that it creates no binding rights and obligations and that the third respondent was under no obligation to accept the applicants' offer or to provide reasons for its rejection thereof.

[18] Third, I am not persuaded that there was any breach of the auction terms by the first, second or third respondents, as contended by the applicants. Under clause 4.4 of the terms and conditions of sale the fourth respondent had a right of first refusal which it exercised during the extended offer period. The offer period was extended by mutual agreement. The fourth respondent's offer was the highest offer received during the offer period. The reason for the extension of the period, being to await a further offer from a prospective purchaser must be accepted. Moreover, the auction terms did not preclude

⁷ *Betlane v Shelly* Court CC 2011 (1) SA 388 (CC) par [29]; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) 635H-636B

⁸ *Minister of Land Affairs and Agriculture v D & fWvevell Trust* 2008 (2) SA 184 (SCA0 at 200D

the parties from agreeing to extend the offer period. The applicants were unable to point to any prejudice they would suffer as a result of the extension. It is further undisputed that when the acceptance of the offer was communicated to the fourth respondent, there was no higher offer in existence and that the fourth respondent's higher offer of R17 million matched the trust's offer and represents the purchase price.

[19] Fourth, the applicants' argument that there is no legally binding agreement between the second and fourth respondents for the sale and purchase of the property and that the second respondent is legally obliged to accept the trust's offer is not supported by the undisputed facts.

[20] Fifth, the applicants did not provide any cogent factual basis for the contention that they had a legitimate expectation that they would be allowed to make a further offer, considering the auction terms and the terms of the trusts offer to purchase. No reasonable grounds were provided on which a court may set aside the extension of the offer period. Moreover, the applicants did not request the court to review and set aside the decision of the third respondent to sell the property to the fourth respondent. It is by no means clear that in law they would have been entitled to do so. No case was made out for the setting aside of the decision of the third respondent or for the setting aside of the sale agreement.

[21] Sixth, the applicants are not entitled to circumvent the business rescue practitioners and their compliance with their statutory obligations and powers under Chapter VI of the Companies Act⁹. No cogent factual case was made out in the applicant's papers for the alleged breach of the third respondent's fiduciary duties.

[22] Last, the argument that the auction proceedings were performed in an unjust manner and that it would be just and equitable for the auction sale to be set aside and bids to be reopened, is not underpinned by any cogent basis, either in fact or in law.

⁹ 71 of 2008

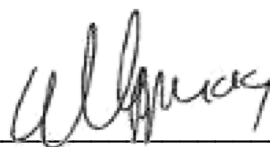
[23] I conclude that the applicants have not illustrated any legal right to any of the relief sought and have failed on all grounds advanced to make out a proper case for relief. It follows that the application must fail.

[24] There is no reason to deviate from the normal principle that costs follow the result. I am persuaded that the costs of two counsel is justified, considering the complexities involved.

[25] I grant the following order:

[1] The application is dismissed;

[2] The applicants are directed to pay the costs of the application, jointly and severally, including the costs of two counsel, where so employed.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 07 February 2022
DATE OF JUDGMENT	: 30 March 2022
APPLICANT'S COUNSEL	: Adv. A. Jeffrey SC
APPLICANT'S ATTORNEYS	: Kathy James Attorneys

2nd and 3rd RESPONDENT'S COUNSEL

: Adv A. Bester SC

: Adv K. Mvubu

**2nd and 3rd RESPONDENT'S
ATTORNEYS**

: Knowles Husain Lindsay Inc.

4th RESPONDENT'S COUNSEL

: Adv. P. Wilkins

4th RESPONDENT'S ATTORNEYS

: Strydom Attorneys