

FORM A
FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

PARTIES: **MATTHEW GIBBS + 1 V NOLIVIA R VANTYI + 2**

REPORTABLE

- Case Number: **2555/07**
- High Court: **EASTERN CAPE, PORT ELIZABETH**
- DATE HEARD: **25 MAY 2009**
- DATE DELIVERED: **28 MAY 2009**

JUDGE(S): **JANSEN J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): **ADV S C RORKE JOOSTE**
- for the Respondent(s): **ADV A BEYLEVELD**

Instructing attorneys:

- Applicant(s): **GOLDBERG & DE VILLIERS**
- Respondent(s): **KAPLAN BLUMBERG**

CASE INFORMATION -

- ***Nature of proceedings:***
- ***Key Words:***
- ***Summary:***

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

REPORTABLE

Case No.: 2555/07

Date delivered: 28 May 2009

In the matter between:

MATTHEW GIBBS First Plaintiff

ZILINDILE MAKAPELA Second Plaintiff

and

NOLIVIA RICHMOND VANTYI First Defendant

THEMBISA TRYPHINA VANTYI Second Defendant

**ABM REAL ESTATE AND
AUCTIONEERS (PTY) LTD** Third Defendant

JUDGMENT

JANSEN, J:

The evidence in this matter has been presented by way of a stated case in terms of Rule 33(1) of the Rules of Court. The only issue for determination is whether or not a valid and binding agreement of sale was concluded between the plaintiffs and the first and second defendants in respect of the latters' immovable property.

The first and second defendants were the joint owners of an immovable property being Erf 9182 Motherwell. The defendants put the property up for sale at a public auction on 8 September 2005. The auction sale was conducted by the third defendant. It was conducted subject to Conditions of Sale which Conditions of Sale were prepared by the third defendant and read

out by the auctioneer, a representative of the third defendant prior to commencement of the auction. The property was knocked down to the plaintiffs on their bid of R1,6 million. As they were required to do in terms of the Conditions of Sale the plaintiffs paid to the third defendant on 8 September 2005 the sum of R225 920,00 made up of the third defendant's auctioneer's commission in an amount of R145 920,00 and a deposit on the purchase price in the sum of R80 000,00.

In terms of Clause 12 of the Conditions of Sale the purchase of the property was subject to the approval of the first and second defendants by 12h00 on Monday, 19 September 2005. It further provides that should the sale not be confirmed, all monies paid by the purchaser shall immediately be refunded to the purchaser free of interest unless otherwise agreed upon. Clause 28 of the Conditions of Sale reads as follows:

“All offers for a higher purchase price made after the public auction but before acceptance by the **Seller**, will be made to the **Auctioneer**. No offers will be considered by the **Seller** unless such offers are made to the **Auctioneer**. The highest bidder at the auction will have the right of first refusal during the acceptance period.”

On 15 and 19 September, during the acceptance period, the third defendant received two improved offers from an enterprise, Sizabantu Trust, to purchase the property and these offers were referred by the third defendant to the

plaintiffs to allow them to consider their right of first refusal as provided for in terms of Clause 28. The plaintiffs, in writing, on 19 September 2005 offered to purchase the property for a purchase consideration of R2,3 million. The parties are at *ad idem* that no binding agreement was concluded as a consequence of any of these three offers.

On 19 September 2005, prior to the deadline of 12h00 referred to in Clause 12, the first plaintiff, who was not in Port Elizabeth at the time, orally exercised his rights in terms of Clause 12 and offered an increased price consideration of R3 950 000,00 during a process concluded by a teleconference between the third defendant, represented by one Ben-Mazwi, the first plaintiff representing the plaintiffs, the first defendant representing the first and second defendants, and a representative of Sizabantu Trust, which offer was orally accepted and confirmed by the third defendant on behalf of the first and second defendants. It is common cause that the Conditions of Sale were not then signed.

The first plaintiff subjectively anticipated that a written agreement of sale was necessary and had to be concluded. Therefore, on 22 September 2005 the plaintiffs submitted to the defendants the Conditions of Sale, duly signed by them, to which an addendum was annexed providing for certain suspensive conditions which the plaintiffs required. The Conditions of Sale reflected that it was open for acceptance by the first and second defendants until 26 September 2005. On 26 September the defendants returned the Conditions of Sale to the plaintiffs, duly signed, but with the addendum and all

references thereto deleted. The defendants did not demand specific performance from the plaintiffs, and cancelled the agreement. They remain the owners of the property.

It is common cause that the exchange of the Conditions of Sale on 22 and 26 September between the plaintiffs and the defendants did not constitute a written Agreement of Sale.

It is the plaintiffs' contention that (a) an oral agreement was concluded between the parties on 19 September 2005 for the sale of the property by the first and second defendants to the plaintiffs for a purchase consideration of R3 950 000,00; (b) the conclusion of that oral agreement of 19 September 2005 does not form part of the public auction conducted on 8 September 2005 and that, therefore, the provisions of section 3(1) of the Alienation of Land Act No. 68 of 1981 do not apply; (c) the oral agreement of 19 September 2005 is accordingly invalid for want of compliance with section 2(1) of the Alienation of Land Act; and (d) the plaintiffs are accordingly entitled to repayment of the sum of R225 920,00 paid to the third defendant, referred to above, as prayed for in the Particulars of Claim.

It is the defendants contention that (a) the conclusion of the oral agreement of 19 September 2005 in terms of the provisions of Clause 28 forms part of the public auction conducted on 8 September 2005 and that, therefore, the provisions of section 3(1) of the Alienation of Land Act apply; (b) in light of the provisions of section 3(1) the provisions of section 2(1) of the Alienation of

Land Act do not apply to the oral agreement of 19 September 2005 which oral agreement is accordingly valid and binding upon the parties and; (c) that the third defendant is accordingly entitled to payment of R134 320,00 as prayed for in the third defendant's counter-claim, being the difference between the auctioneer's commission calculated on the purchase price of R3 950 000,00 and the auctioneer's commission already paid on 8 September 2005.

It is trite that generally an agreement alienating land must in terms of section 2 of the Alienation of Land Act be reduced to writing for it to be a valid agreement. The rule is directed against uncertainty, dispute and possible malpractices. That was emphasised in the well-known case of **Clements v Simpson** 1971 (3) SA 1 (AD) at p. 7A. There is an exception to this general rule. Section 3(1) of the Act provides that the provisions of section 2 do not apply to the sale of land by public auction.

It was correctly pointed out by Mr **Beyleveld**, on behalf of the defendants, that it is trite that the Conditions of Sale regulates an auction and are the "rules of the game" so to speak. He referred to **Estate Francis v Land Sales (Pty) Ltd and Others** 1940 (NPD) 441 at 457 where the following was stated by Broome J:

"An auction is a form of 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 the parties.”

Mr **Beyleveld** further referred to the decision of ***Shandel v Jacobs and Another*** 1949 (1) SA 320 (N) at 325 where the following was stated by Carlisle J:

“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.”

The Conditions of Sale are either displayed, announced or read out by the auctioneer and they bind purchasers whether they in fact know them or not. A sale on the terms as set out in the Conditions of Sale results on “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 400D. The contractual business of a public auction is in fact concluded when the hammer falls.

In my view, Mr **Rorke**, appearing on behalf of the plaintiffs, was correct in his submission that the Conditions of Sale applicable in the instant matter, and in particular Clause 28 thereof, provide for a separate process of bargaining subsequent to the fall of the hammer. Clause 28 refers specifically to offers

for a higher purchase price to be made after the public auction. No restriction is placed on the bidders entitled to make an offer for a higher purchase price. The bidder who comes up with such a higher offer might not have been present at the original public auction at all. On the facts set out in the stated case, it is common cause that two improved offers were received from the Sizabantu Trust. It is not known whether Sizabantu Trust was present at the auction. It is not known whether Sizabantu Trust was aware of the Conditions of Sale. There is therefore no merit in the submission made on behalf of the defendants that all parties concerned agreed that the auction sale could be extended beyond the actual day on which the auction was held. It is not known whether Sizabantu Trust was a party concerned.

An extended auction sale is not guaranteed to be transparent or open to the public. Such a separate process can hardly be said to be a public auction as contemplated by section 3(1) of the Alienation of Land Act. I agree with the submission on behalf of the plaintiffs that a contention that such a separate and subsequent bargaining process may ultimately result in a subsequent valid oral agreement being concluded, as contended by the defendants, is to open a door for the very mischief which section 2(1) of the Act was designed to avoid. Uncertainty, disputes and possible malpractices against which section 2(1) is directed may creep into the agreement. The exception to the general rule provided for in section 2(1) of the Act is premised on the notion that because an Agreement of Sale at a public auction is concluded publicly at the fall of the auctioneer's hammer there is little scope for uncertainty, disputes or malpractices. The process has been conducted in public. The

Conditions of Sale have been read publicly to those present who accept those conditions by their continued participation in the procedure. The procedure is concluded formally in public when the auctioneer's hammer falls. See in this regard ***Schuurman v Davey*** 1908 T.S. 665 at 667-668, quoted with approval by O'Hagan J in ***Sugden v Beaconshurst Dairies (Pty) Ltd*** 1963 (2) SA 174 at 185F-G.

Mr **Beyleveld** relied on ***Sugden***'s case in support of the defendants' case. In ***Sugden***'s case the Conditions of Sale provided that the auctioneer was not obliged to accept the highest bid, but the bidder was bound to keep his offer open for a stated period during which the auctioneer might convey the seller's acceptance of the bid by signing the memorandum attached to the Conditions of Sale. I agree with the submission on behalf of the plaintiff by Mr **Rorke** that the process contemplated by Clause 28 is to be distinguished from that in the ***Sugden*** case. No further negotiations were in that case permitted between the parties. Therefore, the auction, in terms of the judgment, remained a public auction. A very different process is contemplated by Clause 28, namely a separate and private bargaining arrangement in which the public elements of transparency and openness have clearly been lost. That being the case, an agreement entered into during the private bargaining arrangements cannot be said to be done at a public auction as contemplated by section 3(1) of the Act. Mr **Beyleveld**, in his heads of argument, correctly referred to the fact that the auctioneer, subsequent to the bidding process on the day of the public auction, had in terms of Clause 28 the right and "...

opportunity to canvas further informal bids so to speak and to present them to the purchaser for acceptance”

On a proper construction, the process contemplated by Clause 28 is entirely different to and separate from the public auction and cannot be considered as part of the earlier process. This being the case, any sale of the land concluded pursuant to the Clause 28 process must comply with the formalities for the sale of immovable property as provided for in section 2(1) of the Act. Section 3(1) does not find application.

In the circumstances, no valid agreement was concluded between the plaintiffs and the defendants. The defendants were accordingly not entitled to receive the monies which they did and the defendants are liable to reimburse the monies to the plaintiffs. On 18 December 2006 the plaintiffs demanded repayment of the monies but the defendants failed to make repayment.

In the result, the following order is made:

- (a) The third defendant, alternatively the first and second defendants jointly and severally the one paying the other to be absolved, is/are ordered to pay the plaintiffs the sum of R225 920,00 with interest thereon at 15,5% per annum as from 18 December 2006 to date of payment and costs of suit.
- (b) The third defendant's counter-claim is dismissed with costs.

J C H JANSEN

JUDGE OF THE HIGH COURT