

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/01/2015

Case Number: 66864/2014

In the matter between:

DONÉ FOURIE

VANÉ FOURIE

And

ABSA TRUST LTD

MARTHINUS CHRISTOFFEL BARNARD N.O.

PHIL MINNAAR AUCTIONEERS GAUTENG CC

AARCO JOINT CIVILS

TIM DU TOIT & KIE

MASTER OF THE SUPREME COURT, PRETORIA

NOTE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

23/1/15

DATE

SIGNATURE

First Applicant

Second Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

JUDGMENT

BAM J

(APPEARANCES: Adv J G Cilliers SC for the applicant;

Adv J J Botha for first and second respondents;

Adv T P Kruger for the fourth respondent.

1. Due to time constraints, I had to deal with more than 20 urgent applications within 4 days, this judgment is not as comprehensive as I would have preferred it to be.
2. The Applicants, in an urgent application, applied for an order prohibiting the respondents from transferring a property purchased by the fourth respondent on 9 September 2014 at an auction held by the third respondent, pending the finalisation of an application to be brought by the applicants against the respondents, within 30 days, for an order to declare the sale of the property null and void, alternatively, unenforceable.

3. The salient facts are as follows. The property initially belonged to the deceased mother of the two applicants and two other siblings. They were the heirs of the property. Due to the fact that the heirs were not *ad idem* what should happen to the property, the executors of the estate decided to sell the property on a public auction. The two applicants, prior to the auction intimated that they intended to purchase the property. The offer made by the applicants was however not accepted. It was accordingly decided by the relevant parties that the auction should proceed on 9 September 2014 at 11h00 as advertised. On the day of the auction the applicants approached the Court on an *ex parte* basis with an application to stop the auction. The application was successful. A rule *nisi* issued with a return date. Before the auction commenced the auctioneer, third respondent's officer, was informally informed of the applicant's said urgent application but nevertheless proceeded with the auction. The property was sold to the fourth respondent. The court order was handed to the auctioneer only after the auction. Subsequently the return date of the Rule *nisi* was anticipated by the respondents and the order was dismissed. Despite the threat of an urgent application in the beginning of December 2014 and certain correspondence between the parties, no agreement was reached. It appears that the transfer of the property in the name of the fourth respondent became imminent. This prompted the applicants to lodge this application.
4. Mr Botha and Mr Kruger submitted that the application was not urgent at all and that it did not merit the attention of the urgent court. In my view the matter in fact became urgent after no agreement could be reached between the parties in respect of the transfer of the property which was then looming.
5. In regards to the basis of the applicant's case it was submitted by Mr Cilliers that the interdict granted on 9 September 2014 effectively stopped the auction. The auction was therefore unlawful and thus null and void. In countering this point Mr Botha submitted that the original Rule *nisi* would not have been granted if the presiding judge had been aware of all the relevant facts. It was further submitted that the fact that the Rule was subsequently dismissed, by consent, is proof thereof.
6. Although the auctioneer was not in possession of the court order at the time of the commencement of the auction, he was acutely aware of the application for the interdict. There are conflicting versions whether the auctioneer was indeed informed, before the auction that the relevant order had already been made. However despite the auctioneer's admitted knowledge of the court proceedings by the applicants to obtain an order interdicting the auction, the auctioneer nevertheless proceeded with the auction thereafter without determining the status of the application. This conduct was clearly, to say the least, opportunistic and suspiciously *mala fide* and not something which should be expected from any auctioneer. The auctioneer surely realised that in proceeding with the sale he could have been violating a court order. In my view it is inexplicable why the auctioneer proceeded with the auction regardless of the consequences and repercussions.

7. Objectively the auction was null and void. The fact that the interdict was rescinded on the anticipated return date by consent, is immaterial. The dismissal of the interim order had to follow in view thereof that a confirmation of the order would have amounted to a *brutem fulmen* order that could have had no effect at all. The auction had already been finalised. Mr Botha's argument that the dismissal of the interim order by consent proved that the order should never have been granted is therefore fatally flawed.
8. The applicants, soon after the auction, voiced their dissatisfaction with the state of affairs. I am in agreement that the only real remedy that remained was for the applicants to lodge the present application.
9. This is however not where the matter ends. The question that has now arisen is what the applicants intend to achieve and whether it is viable and whether there are any prospects in that regard. In this regard several arguments were advanced by Mr Cilliers. One of the issues raised was that some prospective buyers, when they learnt about the interdict on the morning of the auction, apparently decided not to participate in the auction. In my view this is material. It surely could have had a detrimental effect on the eventual amount the property was sold for.
10. Taking into account the conduct of the auctioneer I am satisfied that the applicants should succeed with their application and to be granted a limited time to lodge their intended application.
11. Mr Botha's contentions in respect of the respondents' counterclaim to set aside the initial order made by this Court on 9 September 2014, need no further comment. It is, in any event totally unsubstantiated.
12. The auctioneer, third respondent, at all relevant times represented the first and second respondents at the auction. The first and second respondents became aware of the factual situation but steadfastly maintained that the auction was lawful.
13. The fourth respondent, as an interested party, was cited in the application but was actually not a party to the dispute between the applicants and the first and second respondents in respect of the question whether the auction was null and void. Why the fourth respondent really joined in that dispute never became clear. Although it is appreciated that the fourth respondent was entitled to protect its rights, its contentions, submitted by Mr Kruger, mainly turned upon the issue whether the applicants were entitled to lodge this application on an urgent basis during court recess. Mr Kruger submitted, in sometimes uncalled for strong terms, that if the Court should grant the application it would amount to a total disregard of the Practice Rules. These contentions were without substance.

14. In respect of the costs of the application, as far as the applicants and the first and second respondents are concerned, in view of the order I intend to make, should be reserved. In regards to the fourth respondent's costs I am of the view that it should bear its own costs.

ORDER

1. The first and second respondents are prohibited to effect transfer of the property known as Plot 103, Berg Avenue, Hartbeeshoek, Amandasig, Akasia Pretoria North, Gauteng from the Estate of the Late Estelle Veronica Chamberlain to ARCO Joint Civils and/or any person or entity pending the finalisation of an application to be brought by Applicants against respondents for an order to declare the sale of the mentioned property on the 9th of September 2014 on an auction held by third respondent to be null and void *alternatively* unenforceable.
2. The applicants are ordered to institute the proceedings referred to in paragraph 1 above within 14 days of the date of this order.
3. Costs in respect of the applicants and first and second respondents is reserved.
4. Fourth respondent is ordered to pay it's own costs in respect of this application.


A J BAM JUDGE OF THE HIGH COURT

23 January 2015