IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO:**1242/13**

In the matter between:

SELAD COWIES HILL	**PLAINTIFF**
and	
BRIAN MURRAY MACKAY	**FIRST RESPONDENT**
VISION HOMES COWIES HILL (PTY) LTD	**SECOND RESPONDENT**
PETRUS JOHANNES SCHOERIE	
AND OTHERS NNO	**THIRD RESPONDENT**

JUDGMENT

Delivered on:11 July 2013

KRUGER J:

[1] The Applicants, by way of Notice of Motion, supported by affidavits, seek an order in terms of which the Sheriff is authorised to sell an immovable property described as Real Right 10 in the development known as Belvedale Woods, by private treaty, failing which by public auction and to appropriate the proceeds of the sale towards the reduction of the indebtedness of the Respondents which was the subject of an arbitration award.

[2] The application arises from issues which have become common cause between the parties in Case No. 10974/2011 issued out of the High, Pietermaritzburg. Only the First and Second Respondents have opposed the application. The Third Respondents have been cited purely as interested parties and appear to abide the decision of this Court.

BACKGROUND FACTS

[3] The background facts are common cause and are briefly as follows hereinafter. Subsequent to the conclusion of sale agreements and the development agreements entered into by the Applicants, Vision Projects and the Second Respondent, the said parties fell into dispute. This dispute was the subject of an arbitration. On the 19th March 2010, the Applicants instituted an application out of the High Court, Durban and Coast Local Division, against the First Respondent and various other parties. In this action, the Applicants sought an order interdicting and restraining, pending the outcome of the aforesaid arbitration proceedings, the First Respondent from alienating various properties which included the property known as Real Right 10 in the development Belvedale Wood in Cowies Hill, Durban (‘the property”). During April 2010, the parties to the application resolved the issues and concluded a settlement agreement (“the agreement”).

[4] The provisions of the agreement that are of relevance to this application are the following:

“1.5 … Mackay is the owner of Real Right 10 … in the development.

2.5 Real Right 10: This consists of undeveloped land which is currently on the market for sale. It is anticipated that the market value of Unit 10 is in the region of R1.7 million.

2.6 If Mackay is able to find a suitable purchaser for Real Right 10 he must first notify Selad and obtain Selad's written consent to the sale of the Real Right.

2.7 From the sale price the conveyancers may deduct Estate Agents commission (if applicable) and the surplus proceeds must be held in an interest bearing trust account pledged to Selad as security for its claim. The proceeds may not be released by the conveyancers until the arbitration (or any appeal therefrom) has been finalised and the result know (sic) to the parties.

2.10 Should the properties not be sold at the time of conclusion of the arbitration (and any appeal therefrom) and should Selad be successful with its claim then Selad shall be entitled to demand that the properties are sold on terms that it stipulates and whatever is recovered from such sale/s shall be appropriated, on a without prejudice basis, to the indebtedness of the arbitration award."

[5] On the 8th July 2011 an arbitration award was granted in favour of the Applicants in the sum of R2 794771,90, together with interest and costs. This arbitration award was made an order of Court on the 31st August 2011. No appeal was noted or lodged in respect of the award. Real Right 10 had not been sold at the time the arbitration was concluded nor has it been sold at all.

[6] In the action instituted under Case No. 10974/2011, the Applicants, as Plaintiffs, sought an order, in Claim 1, that the property be sold by the Sheriff by public auction. In response the First Respondent, as First Defendant, pleaded as follows:

"25.

The First Defendant denies the allegation in paragraphs 32 and 33 and pleads that Real Right 10 ought to be sold by private treaty,

> failing which by auction, failing which it ought to be transferred to the Plaintiffs at an agreed consideration. The First Defendant pleads that he is willing to take all such steps in order to implement the sale of Real Right 10."

[6] As the common law facts are no longer in issue in the aforesaid action (Case No. 10974/2011), and as there is no longer a dispute between the parties, the Applicants now seek to enforce the obligations of the First Respondent. In this regard it is noted that the relief sought by the Applicants is in terms with or compliant with the First Respondent's plea.

[7] The First and Second Respondent have raised numerous defences to the Applicants' claim. At the hearing however, the parties agreed that the issues to be decided upon are the following:

(a) The interpretation of Clause 2.10.
(b) Whether the matter is *lispendens*.
(c) The non-joinder of the Sheriff.
(d) Competency of the order.

[8] The Respondents deciding not to pursue with the other defences.

THE INTERPRETATION OF CLAUSE 2.10

[9] This issue is the core of the debate. The Applicants contend that the interpretation of this clause allows them to sell the property on terms that they stipulate. Notwithstanding this, as well as the First Respondent's undertaking in his plea, to take all steps necessary to implement the sale

of the property, the First Respondent has failed to sign the necessary documentation to finalise the sale.

[10] The Respondents contend that the effect of Clause 2.10 is that the Applicants have the right to demand that the First and Second Respondents take all necessary steps to cause the property to be sold. The Applicants accordingly only have an "oversight" function or right and that the sale of the property can only proceed with their approval. The First and Second Respondents accordingly contend that:

(a) A proper interpretation of Clause 2.10 does not denude the First and Second Respondents of their "core rights of ownership" in and to the property.

(b) The provisions of Clause 2.10 do not entitle the Applicants to determine when and to whom and for what price the property is to be sold, without requiring any input from the First and Second Respondents.

[11] In interpreting the provisions of Clause 2.10, in order to ascertain the intention of the parties, I am guided by the judgment of Wallis JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA)**, where he held at paragraphs 18 and 19:

> "The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon it coming into existence. Whatever the nature of the document,

> consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. … the "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.
>
> (19) … This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate."

[12] The Shorter Oxford English Dictionary defines (stipulate) as: "… to specify (something) as an essential part of the contract" and "to require or insist upon (something) as an essential condition". This power to specify is, in terms of the contract between the parties, vested in the Applicants.

[13] In my view, the "sensible meaning" of Clause 2.10 is to give the Applicants the right, to enforce the sale of the property on terms and conditions that they stipulate and that whatever is recovered from the sale would be appropriated to the indebtedness of the arbitration award. A sensible interpretation of Clause 2.10 will not, in my view, lead to the conclusion that the Applicants are only vested with an "oversight" function as contended for by the First and Second Respondents.

[14] The First and Second Respondents' contention that a proper interpretation of Clause 2.10 provides the Applicants with the right to demand that the First and Second Respondents take all necessary steps

to sell the property is clearly contradictory to the ordinary grammatical, literal, sensible and businesslike meaning of the words in Clause 2.10. To accept the First and Second Respondents' contention would, in my opinion, necessitate a re-wording/re-writing of Clause 2.10 to introduce the concept of "necessary steps" and to define what these necessary steps are.

[15] The First and Second Respondents have also contended that the interpretation of Clause 2.10, as averred by the Applicants, would denude the First and Second Respondents of their "core rights of ownership". It is however noted that the First and Second Respondents expressly agreed to a loss of ownership of the property in the event that the Applicants won the arbitration award. If one considers this as a circumstance attendant upon the coming into existence of the said clause then the First and Second Respondents contentions are without merit.

[16] I am accordingly of the view that the interpretation of Clause 2.10 as contended for by the First and Second Respondents is contradictory in nature and would lead to an insensible and unbusinesslike result.

<u>LIS PENDENS</u>

[17] The First and Second Respondents contend that:

(a) As the relief sought by the Applicants is the subject matter of Claim 1 in the Pietermaritzburg High Court action currently pending between the parties;

(b) It arises from the same cause of action and

(c) Is in respect of the same subject matter, the application is vexatious and ought to be dismissed as an abuse of the court process. However, realising that a defence of *lispendens* is dilatory in nature Mr Phillips, on behalf of the First and Second Respondents, abandoned the request for the dismissal of the application and has instead argued that the proceedings be stayed pending the outcome of the action instituted in the Pietermaritzburg High Court, referred to earlier in this judgment.

[18] Mr Harpur SC, on behalf of the Applicants, has argued that the existing action and the application are not the same in that in the action, the order sought was one directing the Sheriff to sell the property by public auction, whereas in the application the relief sought is for the Sheriff to sell the property by private treaty. In essence the relief claimed in both the action and the application is the same. I do not agree. This is reinforced by the fact that the application is based on the admission by the First and Second Respondents in their plea. I am accordingly satisfied that the requirements of the defence of *lis alibi pendens* have been fulfilled.

[19] In **<u>Richtersveld Community v Alexkor Ltd and Another</u> 200(1) SA 337 (LCC)**Gildenhuys J held that:

> "Even if the requirements of a plea of *lispendens* had been met, I would still have had a discretion to allow this action to continue". (at paragraph 16).

[20] At paragraph 20 he held:

> "At the end of the day, considerations of convenience and equity must underpin the exercise of any discretion whether or not to allow the defence of *lispendens*".

[21] I totally agree with these sentiments. In *casu*, I am of the view that notwithstanding the fact that the requisites of the plea of *lispendens* have been met, considerations of convenience and equity demand that I exercise my discretion in favour of allowing the application to proceed. I say so for,*inter alia*, the following reasons:

(a) There is no longer any material dispute of fact in that the First and Second Respondents have conceded the relief sought by the Applicants.

(b) Given the lengthy delays in obtaining a trial date, to allow the defence of *lis alibi pendens* would unnecessarily delay the implementation of the rights of the Applicants which have now become common cause;

(c) It appears from the affidavits before me that the First Respondent, in particular, has deliberately frustrated the conclusion of the sale of the property. This resulted in a potential cash purchaser, Leigh Pereira, withdrawing her offer to purchase. A second offer to purchase by the Daphne Garlick Family Trust, appears destined for the same fate;

(d) The Applicants have undertaken that they will not proceed with the Pietermaritzburg High Court action in respect of Claim 1, pending the final outcome of the present application and if successful, will withdraw the said claim.

NON-JOINDER OF THE SHERIFF

[22] The only submission made by Mr Phillips in this regard is that given the form in which the order is sought, it is necessary to join the Sheriff as a Respondent. This argument has no merit and isludicrous. The Sheriff has absolutely no interest in the outcome of these proceedings and merely performs his duties in terms of the Order of Court. Accordingly this defence must fail.

<u>COMPETENCY OF THE ORDER</u>

[23] As I understood Mr Phillips' submissions, the First and Second Respondents' primary objection to the order is based upon their interpretation of Clause 2.10. In this regard it is argued that a proper order would be one compelling the First and Second Respondents to sell the property within thirty days, failing which the Sheriff is authorised to sell the property by public auction and is further empowered to sign all the necessary documents on behalf of the First and Second Respondents. This however would be contradictory to the plea of the First and Second Respondents and the action instituted in the Pietermaritzburg High Court referred to earlier in this judgment.

[24] Mr Phillips has also submitted, relying on the judgment of Wallis JA in **<u>City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others</u> 2012 (6) SA 294 (SCA) at paragraph 8** – that it does not form part of the Sheriff's duties or function to carry out orders of the nature sought by the Applicants, as the Sheriff's functions are prescribed by Statute. The order sought in the **<u>Changing Tides</u>** case was to authorise the Sheriff to enter the premises of a hijacked building and to compile a schedule of information regarding the occupiers and their personal circumstances. This was to enable the city of Johannesburg to discharge its Constitutional

obligations to these persons rendered homeless as a result of their eviction from the premises. This clearly is not a function of the Sheriff.

[25] Because of the difficulty in compelling a party to append his signature to a document, it has become a practice for the Court to authorise the Sheriff to sign the relevant documentation in order to give effect to a sale agreement. This practice has been recognised and approved by the Courts – **Van Aardt and Another v Weehuizen and Others 2006 (4) SA 401 (N);Carmel Trading Company Ltd v Commissioner, South African Revenue Service and Others 2008 (2) SA 433 (SCA)**.

[26] I am accordingly of the view that it is competent to authorise the Sheriff to carry out the order in the form sought by the Applicants.

COSTS

[27] Mr Phillips has submitted that as the First and Second Respondents have expressed a willingness to sell the property, the application could and should have been avoided and accordingly the Applicants should be held liable for payment of the costs incurred. In the alternative, the Court should direct that each party bears its own costs.

[28] The difficulty with this submission is that notwithstanding their expressed willingness to sell the property, the First and Second Respondents have to date, not done so. This despite a written offer to purchase submitted by the Daphne Garlick Family Trust, which offer was communicated to the First Respondent prior to the commencement of these proceedings. Instead and as already alluded to earlier in this

judgment, the First Respondent has sought to delay and frustrate the Applicants' attempts to recover that which is due to them in terms of the arbitration award.

[29] Given the aforesaid, as well as the nature of the defences to the relief sought, most of which were not pursued during argument, (correctly so for they were without merit), the Applicants are entitled to the punitive costs order which they seek.

CONCLUSION

[30] I accordingly grant an order in the following terms:

1. An order that Real Right 10 in the development known as Belvedale Wood shall be sold by the Sheriff on terms that the Applicants stipulate by accepting and signing any written offer to purchase that the Applicants may place before the Sheriff, and failing this sale within a period of thirty days from the date of this order, by way of public auction.
2. The Sheriff is authorised and directed to carry out the said sale and is directed and authorised to sign all and any documents and to do everything necessary for the said sale and for furnishing transfer to the purchaser.
3. The Sheriff's fair and reasonable charges and expenses shall be a first charge against the proceeds of the sale of that property, and to the extent that the Applicants have funded those charges and expenses in the meantime, the Sheriff is directed to refund such amounts to the Applicants as a first charge against the proceeds of the said sale.

4. The Sheriff is directed to pay the balance of those proceeds to the Applicants who shall be entitled to appropriate those proceeds in reduction of the indebtedness which is the subject of the arbitration award referred to in the founding papers;
5. The Sheriff is authorised to approach this Court for such further directions as may be necessary, on the papers, supplemented insofar as may be necessary.
6. The First Respondent is ordered to pay the Applicants' costs of suit on the attorney and client scale.

Date of CAV:	31 May 2013
Date of Judgment:	11 July 2013
Counsel for the Applicant:	G D Harpur SC
Instructed by:	de Villiers Evans & Petit
Counsel for the First and Seconds Respondents:	D Phillips
Instructed by:	Barkers