

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Exercising its Admiralty Jurisdiction

Case No : A30/2012

Name of ship: mv 'Newlead Gujarat'

In the matter between :

Modion Maritime Management SA

Applicant

and

Admiralty Shipbrokers and Consultants (Pty) Ltd

First Respondent

Chartworld Shipping Corporation and/or its
nominee Golden Star Investments Ltd

Second Respondent

Bank of Scotland PLC

Third Respondent

The Registrar of the KwaZulu-Natal
High Court Durban

Fourth Respondent

JUDGMENT

Lopes J

[1] The applicant in this matter, Modion Maritime Management SA ('Modion'), seeks an order declaring it to have been the purchaser of the mv 'Newlead Gujarat' ('the ship') pursuant to the sale by auction of the ship, conducted by Admiralty Shipbrokers and Consultants (Pty) Ltd ('the auctioneer') on the 3rd

May, 2012. The history of the matter may be summarised as follows:-

- a) the third respondent in this matter, Bank of Scotland PLC ('the Bank of Scotland'), concluded loan agreements during 2010 with the owner of the ship, Bethune Properties SA ('the owners');
- b) the owners and a co-debtor failed to make timeous repayment of the loans and the Bank of Scotland caused an action in rem to be issued against the ship, pursuant to which it was arrested at Richards Bay. The ship has also been arrested by at least one other creditor;
- c) the owners and their co-debtor were thereafter unable to satisfy the debts owed by them, and accordingly the Bank of Scotland applied to this court for authority to sell the ship. On the 29th March 2012 an order for the sale of the ship was granted. Annexed to the sale order was a set of what are referred to as the 'Conditions of Sale by Public Auction' ('the conditions of sale');
- d) once the necessary pre-sale steps were taken, the ship was sold at Durban by the auctioneer on the 3rd May 2012.;
- e) the highest bidder at the auction was Modion. Alleging that Modion had not paid the deposit within the time limit set allowed, the auctioneer cancelled the sale to Modion, and declared the second respondent, Chartworld Shipping Corporation and/or its nominee Golden Star Investments Ltd ('Chartworld') to be the purchaser;
- f) Modion then brought this application as a matter of urgency before Swain

J on the 7th May 2012. An order was granted suspending the sale of the ship, interdicting the auctioneer from giving possession of the ship to Chartworld, and ordering that the obligations of the purchaser of the ship are suspended and are to run afresh from the date upon which this court determines the further relief sought by Modion;

- g) the further relief, which is contained in a Second Order Prayed provides that the decision of the auctioneer to declare Chartworld to be the purchaser of the ship be set aside, and that Modion be declared to be the purchaser.

[2] Having heard the parties on the 11th May, 2012, I must now decide whether the Second Order prayed should be granted. I have been asked to deal with this matter on an urgent basis because the crew of the ship (which is in the roads outside Richard's Bay harbour) have not been paid their wages for the last three months. Those wages are to be paid as a matter of priority from the fund constituted by the sale of the ship. There is thus an urgent need to declare which of the parties is the correct purchaser. Failing this, the crew and their families will continue to be prejudiced. Crew members have always been accorded a form of favoured status by our courts, and I have accordingly prepared this judgment on an urgent basis. Consequently, I have been unable to devote the time and consideration to this judgment which I would have preferred to have done.

[3] Relevant provisions of the sale order, and the conditions of sale, are;-

a) the sale order provided at paragraph 1.2 that :

'The ship and the Bunkers shall be sold in (sic) the conditions set out in Annexure "A" hereto.' ;

b) clause 20 of the Conditions of Sale provided :

'The Purchaser shall pay ten per cent (10%) of the equivalent of the highest or second highest bid in United States Dollars (or such other currency as may be designated by the Auctioneer) on the fall of the hammer, either by way of direct telegraphic transfer into the account of the Registrar or by way of a bank draft or cheque drawn on a commercial bank registered in South Africa and payable upon presentation in Durban, and which is guaranteed by such bank as being good for the amount of the cheque.';

c) clause 22 of the Conditions of Sale provided :-

'Notwithstanding the provisions of Clause 20 above, the Auctioneer may in his sole discretion allow the Purchaser a period not exceeding two (2) hours within which to pay the deposit but, in those circumstances, the Auctioneer may stipulate that, should the deposit not have been paid upon the expiry of the two hour period, the auction be reconstituted after such period has elapsed or he may then declare the second highest bidder to be the Purchaser.';

d) clause 26 provided that :-

'In the event of the deposit aforesaid not being paid as required or the balance of the Purchase Price not being paid or secured, the Auctioneer may in his discretion cancel the sale and either –

26.1 forthwith make application to court on notice to the Registrar for such further directions as the court may deem appropriate, whether for the re-sale of the Ship and the Bunkers in terms of these conditions or otherwise; or

26.2 declare the second highest bidder to be the Purchaser.'

[4] Modion was the highest bidder at the auction, the ship having been knocked down to it for US\$22 400 000,00. Chartworld was the second highest bidder at US\$22 390 000,00. The fall of the hammer was recorded by the auctioneer as having occurred at 12H15. The auctioneer notified the attorneys representing Modion and Chartworld (Mr Stephenson and Mr Dwyer respectively) that 'the clock has started' and that there were two hours within which to meet the deposit requirement.

[5] Mr Stephenson then suggested that a portion of the deposit (US\$2 000 000,00) be paid immediately, with the balance to follow. Mr Martin, the managing member of Admiralty and the actual auctioneer, indicated that part-payment would be unacceptable. In this regard it is clear from the tenor of Mr Martin's affidavit that he understood that the suggested balance of the deposit to be paid later, would be paid outside of the two hour period allowed. Mr Martin believed that the suggested part-payment of the deposit would be made from a Customer Foreign Currency ('CFC') dollar denomination account held by Woodhead Bigby & Irving (of which Mr Stephenson is a director and which firm represented Modion).

[6] During the bidding, and at the fall of the hammer, Mr Stephenson was in telephonic contact with Ms Botsiou of Modion's legal department, and she

immediately set into motion arrangements with Modion's bankers for the transfer of the funds to enable the deposit to be paid to the Registrar.

[7] Mr Stephenson signed the conditions of sale as he was obliged to do, and at 13H49 received an email from Ms Botsiou to which was attached a copy of a SWIFT communication. SWIFT is an acronym for Society for Worldwide Interbank Financial Telecommunication, and is basically a secure financial message system for the exchange of financial messages between member banks across the world. These messages are intended to be delivered quickly and securely between member banks.

[8] Ex facie the SWIFT message sent to Mr Stephenson sent by Ms Botsiou, it was sent by BNP Paribas (Suisse) SA of Geneva (Modion's bankers) to BNP Paribas USA in New York, instructing that bank to pay into the account of the Standard Bank in South Africa, the sum of US\$ 2 240 000, to be credited to the account of the Registrar. The value date of the payment is recorded as the 3rd May 2012. (The value date is the date upon which the funds are to be transferred between the various banks.) It was however necessary for there to be an intermediary between BNP Paribas USA and Standard Bank, which intermediary was Deutsche Bank and Trust Americas, and to which BNP Paribas USA in due course sent a second SWIFT message. This extra intervention was necessary because BNP Paribas New York was not a correspondent bank of Standard Bank, whereas Deutsche Bank and Trust Americas was.

[9] Both the SWIFT messages were what are referred to as 'MT103' messages. It is common cause between the parties that these messages are not instruments of payment in themselves (as, for example, would be a cheque), but are payment instructions between member banks. The SWIFT messages must be sent from, and received into, recognised SWIFT addresses. This not only ensures the integrity of the message, but triggers the recipient bank's right of recourse against its fellow member, the remitting bank. The first SWIFT message was copied to Standard Bank in South Africa within the two hour period, but this constituted no more than a record of the communication between the Geneva and New York branches of BNP Paribas, requiring their New York office to attend to the transfer of the funds.

[10] The importance of having the Registrar paid by 14H15 was appreciated by Mr Stephenson, as is evident from his email to the Registrar at 14H00, stating 'Our client is working with BNP Parabas (sic) to have them arrange with Standard Bank that the funds will show as a credit in your Ship Account (per the attached) by 2.15 pm'. He attached to his email the communication from BNP Paribas which sets out the SWIFT MT103 message from BNP Paribas Geneva to BNP Paribas New York requesting it to transfer the funds to Standard Bank.

[11] Mr Stephenson then sought confirmation from both Mr Martin and the Registrar that the SWIFT document would constitute sufficient confirmation that

the deposit had been paid. However at 14H56 Mr Martin sent both Mr Stephenson and Mr Dwyer (the representative of Shepstone & Wylie, Chartworld's attorney) an email recording that as of 14H29 no payment had been received, and that, in terms of Clause 22 of the conditions of sale, Chartworld was declared to be the purchaser.

[12] What is clear from the affidavits is that the deposit had not been credited to the Registrar's account within the two hour 'grace period' afforded to Modion by the auctioneer. It appears that the deposit from Modion was only received into Standard Bank's overseas bank account with Deutsche Bank and Trust Americas in New York at 15H41, more than an hour after the expiry of the two hour period. Those funds remain there awaiting the outcome of this judgment, and have not been paid over to the Registrar's account.

[13] Mr *Pammenter* SC, who appears for Modion, submits that three issues arise on a proper interpretation of the sale order and the conditions of sale:-

- a) did Modion pay the deposit in accordance with the provisions of clause 22 of the conditions of sale?
- b) If not, did the auctioneer have a discretion to condone that late payment?
- c) If so, did the auctioneer correctly exercise that discretion?

[14] Mr *Pammenter* conceded in argument that Modion had not shown that the

deposit had been received in Durban by Standard Bank. In this regard he conceded that a SWIFT payment was revocable in certain narrow circumstances, at least until the bank account of the client of the recipient bank was credited. Even if a provisional credit had been made in the account of the Registrar, it could not be said that the money was available to the Registrar.

[15] Mr *Pammenter* drew to my attention the decision in *Tayeb v HSBC Bank plc and another* [2004] EWHC 1529 (Comm) (also [2004] 4 All ER 1024), where it was held that no debt can be created in favour of a bank's client unless and until the bank has decided to accept the payment. In the present matter there had been no acceptance by Standard Bank of the amount due by Modion. Accordingly, both factually and on the strength of this authority, there was no payment made to the Registrar within the allowed time.

[16] Mr *Pammenter* further submitted that if one examines clause 20 of the conditions of sale, none of the three methods of payment authorised - ie. a direct telegraphic transfer into the account of the Registrar, or a bank draft or a bank guaranteed cheque – result in money actually appearing immediately in the Registrar's account. What these methods of payment envisage, is that the money is 'on the way and will arrive'. The mischief sought to be avoided by the clause is that the deposit is not paid.

[17] This argument however fails to take account that the sale order stipulates

the applicable conditions of sale and clause 20 thereof is peremptory in providing that :-

‘the Purchaser shall pay ten percent of the purchase price . . . on the fall of the hammer . . .’ (my emphasis);

[18] The language of the clause is clear, and does not permit of an interpretation that it is sufficiently complied with if the purchaser provides a payment mechanism which does not ensure that the money is available to the Registrar in accordance with the clause. In this case, Modion provided a document showing that its Geneva bankers had issued an instruction to its New York bankers to pay the deposit to the account of the Registrar’s bankers in South Africa. That instruction was, in addition to what is stated below, revocable. In any interpretation of the conditions of sale it must be borne in mind that they constitute an authority to sell in terms of a sale order in which the court is the seller – the sale is fundamentally different from the sale of property in pursuance of a warrant of execution. (See : *MV Guzin S (No 1) Hamburgische Landesbank – Girozentrale v Fund created by the sale of the MV Guzin S (Allied Sales Corporation and Another intervening)* 2002 (6) SA 113 (D) at 124 J – 125 G).

[19] The auctioneer, however, exercised what is referred to as his ‘sole discretion’ in clause 22 of the sale conditions, and allowed Modion two hours after the fall of the hammer within which to pay the deposit. That period of time was the only extension which the auctioneer was authorised, in terms of the sale

conditions, to extend to the purchaser. In so doing, the auctioneer then had a further discretion to state, at the time of granting the extension, that if the deposit was not paid within the two hours, then the auction would be reconstituted after the lapse of the two hours. It is common cause that he did not state at the time of granting the extension that the auction would be reconstituted in the event of a failure to pay.

[20] As submitted by Mr *Mullins* SC , who appeared for Chartworld, the only further action the auctioneer could then have taken is prescribed in Clause 22 which provided that the auctioneer could, after the lapse of the two hour period, declare the second highest bidder to be the purchaser. This is precisely what Mr Martin did.

[21] Mr *Pammenter* submitted that clauses 22 and 26 must be read together, and that once the auctioneer had decided not to reconstitute the auction in the event of a failure to pay timeously, he was then given two options in terms of clause 26.

[22] The two further options in clause 26 were to cancel the sale and then either approach the court for directions whether to resell the ship or otherwise, or declare the second highest bidder to be the purchaser.

[23] Although clauses 22 and 26 do overlap because they both provide

possible courses of action to be followed by the auctioneer in the event that amounts due in terms of the conditions of sale are not paid timeously, there are differences between the two. Both clauses authorise the auctioneer to declare the second highest bidder to be the purchaser in the event of non-payment or non-timeous payment. However the other option available to the auctioneer in each clause seems to indicate that they were intended to solve different problems;

- a) in clause 22 the auctioneer has a discretion to reconstitute the auction.

This is something which he must give the parties notice of when granting an extension of time within which to pay the deposit. This clearly envisages that interested parties will wait until the two hours have elapsed in order to ascertain whether or not the auction will be reconstituted because of non-payment;

- b) in clause 26 the auctioneer is given authority to apply to court for directions, whether for the resale of the ship in terms of the conditions of sale or otherwise. This option appears to contemplate a situation where parties are no longer immediately available to reconstitute the auction – as would be the case where the balance of the purchase price is payable within five days after the auction, and is not paid.

[24] Thus although clauses 22 and 26 both deal with similar problems, each need only be considered where appropriate. In this case the auctioneer did not stipulate when he exercised his discretion to grant Mr Stephenson the extended

two hours that the auction would be reconstituted in the event of non-payment. There was, therefore, no need for him to consider the provisions of clause 26.

[25] Mr *Pammenter* also submitted that because the object of the sale was to secure the highest price in the interests of creditors, the auctioneer incorrectly and unreasonably exercised his discretion in declaring Chartworld to be the purchaser.

[26] This approach would appear to be in the form of a review of the auctioneer's decision. I could only make a ruling on that basis if the decision of the auctioneer fell within the definition of 'administrative action' as defined in s 1 of the Promotion of Administrative Justice Act, 2000. Mr *Pammenter* submits that I need not determine that issue because I need only decide whether the conditions of sale afforded the auctioneer the discretion to condone late payment. This is because the auctioneer did not understand the nature of his discretion, and accordingly his decision falls to be set aside.

[27] I do not need to, nor do I make, any decision as to whether the discretion exercised by the auctioneer constituted 'administrative action'. I am prepared to assume, solely for the purpose of this judgment, that it does. The decision of the auctioneer to declare Chartworld to be the purchaser was, in my view, neither an irrational nor an unreasonable decision.

[28] Mr *Pammenter* submitted that Mr Martin had no appreciation of the fact that he had a discretion which he could exercise. In this regard he referred to an email sent to Mr Stephenson by Mr Poseman of Cox Yeats, the attorneys representing the Bank of Scotland stating that Mr Martin had 'no alternative' but to award the ship to Chartworld. Mr *Pammenter* submitted that this email bound the auctioneer because Mr Poseman was also acting as its attorney. However Mr Poseman has made it clear in his affidavit dated the 9th May 2012 that as at the date of the auction he was not representing or advising the auctioneer. The letter relied on by Mr *Pammenter* was accordingly not written on behalf of the auctioneer and cannot assist Modion's case.

[29] Mr *Pammenter's* final submission was that any excess time over and above the two hours allowed, and taken by Modion, falls into the category of being 'de minimus', alternatively that there had been substantial compliance by Modion in complying with the conditions of sale.

[30] Given:-

- a) the nature and extent of the first discretion given to the auctioneer in clause 22 of the conditions of sale; and
- b) the fact that the day before the auction, Mr Martin advised Mr Stephenson that he should, at the very least, have control of the funds constituting the deposit in order to meet the deadline for the payment of the deposit;
- c) the manner in which the auctioneer exercised that discretion by warning

the parties that the clock was running (and, in the case of Mr Stephenson, warning him twice);

Modion was sufficiently alerted to the fact that it was required to perform timeously. The fact that it was unable to do so because of the logistical problems involved in transmitting the necessary SWIFT messages and executing the instructions therein within the two hour period, is irrelevant. The auctioneer could only grant an extension of two hours, after which he was bound, in terms of the sale order and conditions of sale, to take the further steps permitted by the conditions of sale. Those steps did not include granting a further extension of time to Modion. I agree with Mr *Mullins* that the auctioneer was in fact precluded from granting condonation of late payment otherwise than in terms of the conditions of sale. Mr Martin exercised the only discretion which he could have done in the circumstances, and did so correctly.

[31] The first respondent abides the decision of this court.

[32] Mr *Wallis* placed himself on record for the Bank of Scotland only insofar as the counterclaim was concerned. The counterclaim is for an order that any deposit made by Modion be kept in the account of the Registrar as security for any damages which the Bank may have suffered as a result of the cancellation of the sale to Modion. Mr *Wallis* indicated that the counterclaim would be dealt with in due course at times to be determined between the Bank and Modion. I was accordingly not required to make any decision in that regard at this stage.

[33] Mr *Pammenter*, in reply, recorded that Modion accepted the tender to deal with the counterclaim at a later stage on the express condition that Modion reserved its rights to claim any damages it suffers in the form of lost interest on the money.

[34] A point was raised by Mr *Mullins* that the application had been brought in the name of the wrong applicant. This was dealt with by Mr Stephenson in his replying affidavit, and, insofar as it may be necessary for me to do, I record that the applicant is Modion Maritime Management SA, a company registered in the Marshall Islands and having its registered office at Trust Company Complex, Ajeltake Road, Ajeltake Island, Majuro Marshall Islands, MH 96960 and its principal place of business at 44 Tatoiou Street, Kafissia, 145 64 , Attiki, Greece.

[35] For all the reasons set out above, I make the following order:-

- a) the application is dismissed;
- b) the cancellation of the sale of the mv 'Newlead Gujarat' to the applicant on the 3rd May,2012 is confirmed;
- c) the appointment of the second respondent as the purchaser of the mv 'Newlead Gujarat' is confirmed;
- d) those clauses in the conditions of sale forming annexure 'A' to the order for the sale of the ship, and which were suspended by operation of paragraph 1(c) of the order of the 7th May,2012, are to run anew from the

- date of this order;
- e) the applicant is to pay the costs incurred by the second respondent in opposing this application, such costs to include those consequent upon the employment of senior counsel;
 - f) the counterclaim by the third respondent is adjourned *sine die*.

Date of hearing : 11th May 2012

Date of judgment : 15th May 2012

Counsel for the Applicant : C J Pammenter SC (instructed by Wodhead Bigby & Irving)

Counsel for the Second Respondent : S R Mullins SC (instructed by Shepstone & Wylie)

Counsel for the Third Respondent : P J Wallis (instructed by Cox Yeats)