**REPUBLIC OF SOUTH AFRICA**
**IN THE GAUTENG LOCAL DIVISION, JOHANNESBURG**
**JOHANNESBURG**

**CASE NO: 2013/08853**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
9/10/2015

In the matter between:

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| **QMM** | First Applicant |
| **IMM** | Second Applicant |

and

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| **GOLDEN TRUST SERVICES (PTY) LTD** | First Respondent |
| **ASSET AUCTION (PTY) LTD** | Second Respondent |
| **JOHANN BLIGNAUT** | Third Respondent |
| **DAMIEN OLSEN** | Fourth Respondent |

**JUDGMENT**

**WINDELL, J:**

**Introduction**

[1] This is an application in terms of which both applicants seek an order granting them various types of relief including, but not limited to, a review and the setting aside and cancellation of a sale of immovable property by the receiver and liquidator of the assets of a joint estate in circumstances where the property has been transferred to a *bona fide* purchaser.

**The parties**

[2] The first and second applicants (Ms M[....] and Dr M[....]) were formerly married to one another in community of property. They were divorced on 17 May 2002. A decree of divorce issued by the Central Divorce Court incorporated a deed of settlement which was made an order of court. The second paragraph of the deed of settlement made provision for proprietary claims between the parties which unequivocally provided that there would be a division of the joint estate.

[3] The applicants were unable to reach an agreement after the divorce as to how the joint estate should be divided. Dr M[....] approached the Central Divorce Court in 2008, six years after the divorce, seeking the intervention of the court to procure the appointment of a liquidator. The application was served personally on Ms M[....]. On 3 October 2008, Johann Blignaut (the third respondent) was appointed as receiver and liquidator of the assets in the joint estate of the erstwhile married couple.

[4] The immovable property of the applicants was sold on instruction of Mr Blignaut on 18 September 2012, four years after he was appointed. At the time of the sale of the property, Mr Blignaut was an employee of the first respondent, Golden Trust Services (Pty) Ltd. The second respondent, Asset Auction (Pty) Ltd, was appointed by Mr Blignaut to facilitate the auction of the applicants' immovable property. Finally, the fourth respondent, Mr Damien Olsen, was the *bona fide* purchaser of the immovable property.

**The joint estate**

[5] The joint estate consisted inter alia of an immovable property described as Erf [....], S[....] Park situated at [....] A[....] Road, East Village, Boksburg (the property). The property consisted of a house measuring in extent 1222 square metres.

[6] Acting upon instructions of Mr Blignaut, Asset Auction (Pty) Ltd offered the property for sale by way of public auction. Mr Olsen made the highest bid in the amount of R810 000, 00. In terms of the conditions of sale, Mr Olsen's offer was subject to confirmation by the seller within fourteen calendar days from the date of the offer to purchase. Mr Blignaut subsequently confirmed the sale on 2 October 2012 in the absence of receiving any indication to the contrary from the applicants or their legal representatives to whom the conditions of sale were communicated.

[7] On 25 February 2013, the property was transferred to Mr Olsen and his spouse, Mrs Caslynn Olsen.

[8] The applicants launched the current application, which is opposed by all the respondents.

**First and second applicants**

[9] Ms M[....] confirmed in her founding affidavit that she and Dr M[....] could not reach an agreement after the divorce as to how the joint estate should be divided and that they were engaged in on-going negotiations to that end.

[10] Ms M[....] stated that when a notice board of sale by public auction was erected outside the property, she contacted her ex-husband regarding the sale of the property who confirmed that he was unaware of the fact that the property was for sale.

[11] Ms M[....] instructed her attorney, Mr Jake Maseka (Mr Maseka) to address a letter on 14 September 2012 to Golden Trust Services (Pty) Ltd requesting that the public auction of the property be cancelled, failing which, an urgent court application would be brought to stop the said sale. Mr Maseka acted as Ms M[....]'s attorney-of-record in the divorce proceedings in 2002 and in subsequent negotiations.

[12] Mr Blignaut replied in writing on 17 September 2012 in response to Mr Maseka's letter of 14 September 2012 as follows:

> "*Similarly from the correspondence between the writer and yourself it appears that all the reasonable steps were taken to accommodate Mrs M[....] to make appropriate arrangements to acquire such assets from the settlement as she desired*.
> *It is accordingly recorded that the decision to sell the property by public auction was reasonable and fair particularly considering the following:*
> *Mrs M[....] was appraised of the decision prior to any adverts being placed to advise her of the property being sold. As such, she attended our offices during early July 2012 and gave notice by furnishing her Attorney's name and contact particulars, being a Mr Raymond Mashazi;*
> *In the sequence of events Mr Raymond Mashazi was notified of the property being auctioned who accepted the arrangement and confirmed in writing that "they" will attend the auction;*
> *Clearly as correspondence was conducted with Mr Mashazi, acting on behalf of Mrs M[....], the confirmation was that both he and Mrs M[....] would be in attendance;*
> *For your knowledge and records, I attach* a copy of the draft Conditions of Sale and is your attention specifically drawn to Clause 20 thereof.".*

[13] Ms M[....] contended that the threat of legal action in the form of urgent court proceedings never materialised as she and her former husband were unable to place Mr Maseka in funds.

[14] Instead, on the day of the auction, both applicants each addressed a letter to Golden Trust Services (Pty) Ltd and Mr Blignaut wherein they stated the following:

> *"An alternative arrangement to dispose of the property has been agreed upon and finalized between me and my ex-spouse, resulting in a decision to cause cancellation of the auction sale…the property will thus be sold as per arrangement,…and the arrangement does not involve a sale by auction.".*

[15] Ms M[....] delivered both letters to the office of Mr Blignaut together with a request made to Mr Blignaut not to proceed with the auction of the property.

[16] A short while later, both applicants discovered that the property had been sold to Mr Olsen for the amount of R810 000.00. The applicants contend that the property was valued in the amount of R2 000 000.00.

[17] Both applicants confirmed that they were aggrieved by the conduct of the first, second and third respondents as they had not acted in the applicants' interest by proceeding to sell the property by way of public auction. On 10 January 2013, both applicants addressed correspondence to Standard Bank informing the latter that they wish to withdraw the bond from cancellation as they did provide any instruction for it to be cancelled. The applicants continued to make payment of the mortgage bond instalments in the amount of R5219,78 during October 2013, November 2013 and December 2013.

**Attempts to divide joint estate**

[18] In the answering affidavit, Mr Blignaut stated that after his appointment in 2008, he had attempted to fulfil his mandate and exercise his duties and powers as set out in a court order in a satisfactory manner to accommodate both the applicants.

[19] These attempts included convening several meetings with the parties as well as discussions and the exchange of correspondence between himself and Ms M[....]'s respective legal representatives.

[20] Mr Blignaut brought the attention of the court to the following examples of how he attempted to fulfil his mandate and perform his duties and powers:

20.1 On 5 November 2008, Mr Maseka wrote a letter to Mr Blignaut wherein it was recorded what Ms M[....] contended the joint estate to consist of;

20.2 Mr Blignaut replied in writing on 10 November 2008 requesting further details of the alleged assets to which the he received no reply;

20.3 Mr Blignaut obtained a valuation of the property together with valuations for two motor vehicles, namely, a Mercedes Benz C200 and an Opel Astra. On 10 February 2009, the property was valued at R780 000.00.

20.4 Furthermore, Mr Blignaut addressed correspondence to the Ms M[....] on 20 March 2009 setting out Dr M[....]' s version as to what assets the joint estate consisted of requesting further details or proof of any contradictory assertions made by her;

20.5 Mr Blignaut met with Ms M[....] on 29 May 2009 and held a telephonic discussion with Dr M[....] on the same occasion. At that stage, it was apparent that Ms M[....] wished to retain the property whereas Dr M[....] would have preferred it if all the assets in the joint estate could be sold and proceeds distributed equally;

20.6 Mr Blignaut continued to engage with both the applicants during 2010 and 2011. Dr M[....]'s attitude remained unchanged in that the property must be sold. At the time, Dr M[....] complained about the fact that Ms M[....] continued to reside in the property without making any financial contribution to the payment of the mortgage bond. It also became apparent that both applicants failed to make payment of municipal charges. Ultimately, the protracted delay in the division of the joint estate coupled together with the continued non-payment of municipal charges would reduce the amount of equity in the property available for distribution.

[21] Mr Blignaut stated that Ms M[....] attended his office in July 2012 and confirmed that she would be represented by Mr Raymond Mashazi (Mashazi). Ms M[....] provided Mr Blignaut with Mr Mashazi's contact details.

[22] After a telephone conversation between Mr Blignaut and Mr Mashazi on 20 July 2012, a letter was addressed to Mr Mashazi wherein the following was confirmed:

*"Mrs M[....] has, on numerous occasions advised that she will be making arrangements to acquire her former husband's share but has, to date, not submitted any offer documentation. In the circumstances, the liquidator has no alternative but to dispose of the property forthwith by public auction.".*

[23] Mr Mashazi responded by means of an e-mail on 20 July 2012 stating:
*"Thanks, we will attend."*

[24] Mr Blignaut understood Mr Mashazi's e-mail to mean that Ms M[....] and Mr Mashazi would attend the auction and that Ms M[....] would seek to purchase the property at the auction.

[25] Thereafter, Mr Blignaut proceeded to arrange the auction. Mr Mashazi was informed in writing on 4 September 2012 of when the auction would take place.

[26] During the week of 10 September 2012, Mr Blignaut held a telephonic discussion with Dr M[....] during in which Dr M[....] was reminded that he and Ms M[....] had not yet concluded any settlement agreement and accordingly advised Dr M[....] that the property would go on auction on 18 September 2012.

[27] On 14 September Mr Blignaut received a letter from Mr Maseka wherein it was stated that Mr Maseka has received instruction from Ms M[....] to cancel the auction, failing which an urgent application will be brought to stop the sale. Mr Blignaut responded with a letter dated 17 September 2012 wherein he drew Mr Maseka's attention to the fact that all reasonable steps were taken to accommodate Ms M[....] to make appropriate arrangements to acquire such assets from the settlement as she desired. Mr Blignaut further stated in this letter that Ms M[....] was apprised of the decision to sell the property prior to any adverts being placed to advise her of the property being sold and that she attended his office in July 2012 and indicated that Mr Mashazi was her attorney. Mr Blignaut informed Mr Maseka that Mashazi was therefore notified of the auction in writing and that Mashazi indicated that he and Ms M[....] would be in attendance. Mr Maseka's attention was further drawn to clause 20 of the Conditions of Sale which provided that any offer would be subject to written acceptance by the seller within a period of 14 days from date thereof.

[28] On the day of the auction, Mr Blignaut received letters from both applicants requesting the cancellation of the auction. In the absence of a court order prohibiting

the public auction of the property, Mr Blignaut decided that it would be in the interests of both applicants to proceed with the public auction. He proceeded to give effect to his mandate in terms of the court order which empowered his appointment. The auction was imminent and substantial wasted costs would be incurred by a cancellation of the auction at such a late stage.

[29] The public auction commenced as scheduled on 18 September 2012 at 11h00 at the property. In argument before court, it was stated that Ms M[....] was present at the time inside the residence and passively observed proceedings taking place outside at the auction through a window.

[30] On 20 September 2012, in correspondence addressed to Mr Maseka and Mr Mashazi as well Dr M[....], Mr Blignaut again drew their attention to clause 20 of the conditions of sale. They were also informed that Ms M[....] was entitled to submit either a higher offer or conclude a settlement agreement with Dr M[....] before the expiry date of the confirmation period on 2 October 2012.

[31] Mr Blignaut received no response from Mr Maseka or Mr Mashazi. On 1 October 2012, Mr Maseka and Mr Mashazi were informed of the confirmation of sale. This information too, failed to draw any response from Mr Maseka and Mr Mashazi. The offer to purchase was accepted and Mr Maseka and Mr Mashazi were informed thereof on 8 October 2012. In argument before court, Mr Maseka freely volunteered the fact that he was prevented from replying to any of the correspondence addressed to him on behalf of Ms M[....] as she had not paid his fee to enable him to write a letter. Of noteworthy importance is that Mr Maseka did not withdraw as the Ms M[....]''s legal representative during this crucial exchange of correspondence. He omitted to act in the interest of Ms M[....]. The essential difficulty with Mr Maseka's conduct is that he may have compromised his duty to Ms M[....] as an attorney.

[32] After 2 October 2012, having heard nothing from Mr Maseka and Mr Mashazi, Mr Blignaut proceeded to make arrangements to implement the sale of the property.

**The fourth respondent**

[33] Mr Olsen states that he purchased the property by public auction on 18 September 2012. The purchase price was R810 000.00. He subsequently paid a deposit of R81 000.00. He paid a deposit in the amount of R81 000.00 and complied with the terms and conditions of the agreement. In total, an amount of R831 102.40 (which included ancillary costs) was paid by Mr Olsen in respect of the purchase price. The property was registered in the name of Mr Olsen on 25 February 2013 at the Deeds Registries office, Johannesburg.

[35] At no stage, before or during the public auction, did Mr Olsen have any knowledge of the background dispute or agreements related to the authority of the first, second or third respondents to sell the property. Moreover, Mr Olsen was also unaware of any arrangements or dispute between the applicants nor did he know of any arrangement or dispute between the applicants and the first second or third respondents.

[36] The position in which Mr Olsen finds himself in, namely, that of a bona fide purchaser, is not disputed by the applicants.

**The legal position**

[37] The applicants aver that the sale of the property must be set aside as the property was sold against the wishes of the applicants.

[38] Although paragraph 1 of the notice of motion is reminiscent of a review, the application was not brought in terms of rule 53. Section 1 of the Promotion of Administrative Justice Act 3 of 2000 defines administrative action as follows:

> *Any decision taken, or any failure to take a decision, by -*
>
> *(a) an organ of State, when -*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an*

*empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.*

[39] Mr Blignaut's action in selling the property does not constitute the exercise of public power or the performance of a public function and it was not performed in terms of an empowering provision. The decision of the respondent to sell the property impacts only on the applicant and has no direct consequence for any other citizens. Accordingly, the decision to sell the property was not an administrative action.

**Conclusion**

[40] Mr Blignaut was appointed as receiver and liquidator of the assets in the joint estate of the applicants after the applicants failed to reach an agreement. In terms of an order of the Central Divorce Court, Mr Blignaut was empowered and required to "*receive, liquidate and distribute the assets of the joint estate"* and to *"sell and dispose of any assets of whatever nature, movable or immovable, corporeal or incorporeal, of whatever nature that may comprise the joint estate either by private treaty, public auction, tender or in such other manner as he may deem fit and under such conditions as he may deem fit".* It follows that, in his capacity of receiver and liquidator, Mr Blignaut did not act as an agent for either Ms M[....] or Dr M[....] and he was not required to act in accordance with their instructions.

[42] In *Gillingham v Gillingham* 1904 TS 609 Innes CJ said at 613:

'When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has power to appoint some person to effect the division on its behalf. Under the general powers which

the Court has to appoint curators it may nominate and empower some one (whether he is called liquidator, receiver, or curator - perhaps curator is the better word) to collect, realise, and divide the estate. And that that has been the practice in South African courts is clear."

[43] Joubert (ed) *The Law of South Africa* vol 19 (*sv* `Partnership') at para 428 states the following:

'As a general rule, and in the absence of any contrary agreement between the partners or any other directions in this respect, the liquidator must convert all partnership property into money by means of a sale, usually a public auction. This is not, however, mandatory and a court may be approached to give alternative directions regarding the mode in which the assets are to be valued and distributed. A liquidator may not purchase partnership assets at a public auction himself without the partners' consent. Without prior agreement the liquidator cannot sell the partnership assets to any individual partner.

[44] The order appointing Mr Blignaut gave him detailed powers. His task has been straightforward: effect the division of the joint estate. Mr Blignaut has endeavoured to carry out his task but has met with little success. He accordingly wrote numerous letters to the applicants and their legal representatives in an attempt to settle the dispute between the applicants. Four years after he was appointed he indicated to the parties that the only solution was to sell the immovable property.

[45] Proper notice was given to both applicants and the auction was advertised. Four days before the auction Mr Maseka on behalf of Ms M[....] objected to the sale of the property and stated that Mr Maseka still holds instructions from Ms M[....] to "have the joint estate divided equally between the parties". Mr Blignaut indicated that the sale will proceed but specifically drew attention to clause 20 of the Conditions of Sale which provided that any offer would be subject to written acceptance by the seller within a period of 14 days from date thereof. On the day of the auction the applicants wrote letters to Mr Blignaut wherein they objected to the sale. In the letters they indicated that *"an alternative arrangement to dispose of the property has been agreed upon"*, but fail to indicate what the arrangement was. Astonishingly,

both applicants were now suddenly in agreement as to how to divide the joint estate despite being in disagreement thereto since, at least, 2003 when the second applicant himself applied to the Central Divorce Court for the appointment of a receiver and liquidator.

[46] Although Mr Maseka threatened an urgent application, the application was never brought. Mr Blignaut further informed the applicants on at least three separate dates after the property was sold, that the offer was subject to his written confirmation and that Ms M[....] was entitled to submit either a higher offer or to conclude a settlement agreement between her and Dr M[....]. Notwithstanding the fact that they were made aware that the property was sold on 18 September 2012, they failed to submit either a higher offer or to conclude a settlement agreement before the expiry date of the confirmation period. The applicants ultimately did nothing at all for a period of almost 6 months.

[45] The applicants further showed an absolute lack of bona fides in the bringing of this application. The application was first launched on 6 March 2013. The application was postponed on three occasions and, in one particular instance, struck from the roll due to non-appearance. Punitive cost order were made against the applicants on two occasions. After the matter was postponed on the request of the applicants on 14 June 2013, the applicants delivered an application termed " Application for Condonation" In the founding affidavit they now alleged that Mr Blignaut's appointment was invalid because it was not served on Ms M[....] and Dr M[....] "did not know about " Mr Blignaut's appointment. These allegations are false as Mr Blignaut was appointed as receiver and liquidator on the application of Dr M[....] and the application was personally served on Ms M[....].

[47] In *Brighton v Clift (2)* 1971 (2) SA 191 (R), having decided that a liquidator should be appointed Macauley J dealt with a liquidator's powers in these terms:

> 'With regard to the powers to be conferred on the liquidator, it seems to me that it is not this Court's function to act as a liquidator and to anticipate problems which may present themselves to the liquidator at a later stage. Doubtless, these will arise in any liquidation, but they are matters for the liquidator to decide and, in doing so, he may seek the parties' concurrence in

any course he takes. Failing their agreement, his decisions are open to objection by either party with recourse to the Courts. “

[47] The abstract theory of transfer applies to immovable property and in accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery, which in the case of immovable property, is effected by registration of transfer in the Deeds Office, coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. See *Legator Mc Kenna v Shea* 2010 (1) SA 35 SCA at par [22]. I am satisfied that the sale of the property fell within Mr Blignaut’s powers and that the property was validly transferred to Mr Olsen.

[48] In the result the following order is made:

The application is dismissed with costs.

**L WINDELL**
**JUDGE OF THE HIGH COURT**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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| DATE OF HEARING: | 18 September 2015 |
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