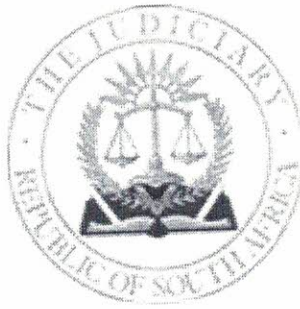


27/9/2017

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 50948/11

DATE: 2017/05/09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 27 September 2017

SIGNATURE

In the matter between  
ANITA HELENA NEL

Applicant in the leave to appeal

and

ANDRIES DE BRUYN

Respondent

In re

ANDRIES DE BRUYN

APPLICANT

And

ANITA HELENA NEL & OTHERS

RESPONDENTS

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LEAVE TO APPEAL JUDGMENT

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**VICTOR J:**

[1] The applicant in this leave to appeal application was the first respondent in the main application.

[2] It clear from a history of this matter that the applicant has adopted delaying tactics. Notwithstanding the prior court order and the agreement that the Willows was owned in partnership, the applicant continues to claim to be the sole owner of the property.

[3] The litigation commenced in 2011 and it is now some six years later and the matter is not resolved. The respondent had to institute action to establish his rights to the property. The trial was set down for 11 February 2013 – prior to the hearing the applicant agreed that there was a partnership in respect of the Willows property and the only issue referred to Adv. Davis SC as referee was for the rendering and debatement of account. By 11 April 2014 when it was time to market the property the trouble started again. She told estate agents the property was not for sale. Eventually she brought an application to review the Referee's decision. She abandoned most of the relief sought in the review application and sought an alternative prayer. Makgoka J, hearing the review application dismissed her review application and made a punitive costs order. This was done on the basis that the applicant accepted there was a partnership and then tried to renege on it. After receiving the Valuer's

report she refused to comply with the referee's order and the consequences of Makgoka J's order resulting in further delay.

[4] This suited her as she is still collecting on her version R90 000 and on the respondent's version R150 000 per month from the property. Despite my order together with the fact that she has not appealed my order she is not paying any amount into the respondent's attorney's trust account. The referee made his award on 3 December 2013 and the applicant continues to collect that money. The applicant has a cavalier disregard for court orders.

[5] The issue for determination is whether the applicant could have waived her right to confirm the sale as the purchaser, the fourth respondent in the main application, did not sign the sale agreement timeously in terms of clause 3.1 of the auction sale agreement. The second ground of appeal is whether the purchaser paid the 5% deposit in terms of clause 2.1 of the Auction Sale agreement.

[6] When a property is sold by way of auction the sale is complete by the fall of the hammer. The Alienation of Land Act No 68 of 1981 provides in s 3 that 'The provisions of s 2 do not apply to the sale of land by public auction'. The agreement which the applicant expected the fourth respondent to sign was ancillary to the sale.

[7] The terms of the award by the referee appointed by court



were binding. In particular the Willows property was owned in partnership. The parties could agree a private sale and in the absence of an agreement the property had to be sold by public auction. It was no longer open to the applicant to consider whether she unilaterally could waive or not waive conditions of sale. This ground of appeal can be disposed of by simply considering the terms and conditions of the auction.

### **Clause 3.1 of the Conditions of sale**

[8] The applicant now refers to a point that was not raised in the papers but raised at the hearing of the application for the first time. . Nowhere in her papers does she raise the question of waiver. This is not a point that can be justifiably raised at the hearing stage. The respondent may well have had an opportunity to deal with this aspect in his replying affidavit. There are no facts on affidavit on this point. It was argued on her behalf that she never waived her rights in terms of clause 3.1 of the conditions of auction and sale. This clause defines the acceptance period. In terms of clause 3.2 acceptance means acceptance in writing. She now submits that the sale lapsed because the sale agreement was not signed by the fourth respondent within the seven day acceptance period.

[9] The first point is that it was never raised on affidavit. The second point is that weight must be given to the document which is headed terms and conditions of auction. At the top of the page the

terms and conditions of the auction are clear <sup>1</sup> 5% deposit payable on the fall of the hammer and 10% commission and VAT on Commission payable on the fall of the hammer. There are no further terms and conditions. At the foot of the page the rules of Auction and Conditions of Sale contain the registration requirements: 'if you intend to bid on behalf of another person or entity the Rules of Auction and Condition of Sale/Deed of Sale contain the registration conditions' The bid was done by fourth respondent. There was no necessity for the Rules of Auction and Conditions of Sale to be signed by the purchaser. The sale was complete when the hammer fell.

[10] In *Noormohamed v Visser and another* NNO 2006 (1) SA 290 (SCA) Scott JA stated at para 11:

'It is necessary at the outset to make two observations. The first is that by reason of the provisions of s 3 of the Alienation of Land Act 68 of 1981 the sale of the property in the present case was not required to be in writing and signed by the parties.'

[11] Accordingly I find that the property was sold by the fall of the hammer. In the light of the referee's award and the failed review application it was no longer open to the applicant as seller to exercise any further right in relation to the sale other than that the sale was concluded by the fall of the hammer.

[12] I find that another court would not come to a different

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<sup>1</sup> Page 239

conclusion. The sale at the fall of the hammer did not revert to the transaction to that of a private sale. The conditions as set out in clause 3.1 could not apply even if I has incorrectly found that she had waived her rights.

### **Deposit paid by third party**

[13] The applicant appeals the finding that a deposit paid into the Auctioneers Trust account by a third party was not payment by the purchaser and therefore the deposit has not been paid. In *Absa Bank Ltd v Moore and another* 2017 (1) SA 255 (CC)

‘payment of a debt without the consent — and even without the knowledge — of the debtor. This contrasts with the position of the creditor, whose knowledge of and assent to payment are required. It is well established in both in our common-law jurisprudence and case law that a debt owing by A to B ‘may be extinguished by a payment made by a stranger to B in discharge of that debt even if A is unaware of such payment’. This proposition is supported by long-standing common-law authority in the Roman-Dutch sources. These hold that a debt paid by a third party in the name of the debtor extinguishes the debt, even when payment is unauthorised, or even if the debtor opposes it. The debtor is discharged, willy-nilly. This does not apply to the discharge of an obligation which by its nature can be properly performed only by the debtor in person.’

[14] Payment of the deposit is not in the nature of a personal obligation. I have already referred to the fact that the agreement does not take the place of the terms of the auction as set above. Clause 2.1 relating to the deposit is one of those. Therefore the applicant’s ground of appeal on this ground must fail. The terms and

condition of the sale were set out as referred to above.<sup>2</sup> In conclusion I am of the view that another court would not come to a different conclusion on the grounds of appeal.

The order I make is as follows:

The application for leave to appeal is refused with costs.

A handwritten signature in dark ink, appearing to be 'M Victor', is written over a horizontal line.

JUDGE M VICTOR

JUDGE OF THE HIGH COURT

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<sup>2</sup> Page 239 of the application.