

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 2403/2012
1855/2012

In the matter between:

SATYENDRA PERSADH

Applicant

and

JOHN WYLES N.O., M.A.A WYLES N.O.,
W. SENZENI N.O & E. MSELEKU N.O.
(TRUSTEES OF IAN WYLES AGENCIES TRUST t/a
IAN WYLES AUCTIONEERS AND APPRAISERS)
HARESH OUDERAJH
BINA BENE OUDERAJH
BOSCHRAND BELEGGINGS EDMS BPK.
REGISTRAR OF DEEDS FOR THE
PROVINCE OF KWAZULU-NATAL

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

JUDGMENT

HENRIQUES J

Order in respect of **Case No 1855/2012**

1. The application is dismissed with costs.
2. The applicant is directed to pay the costs of the first to fourth respondents, such costs are to include those consequent on the employment of two

counsels where applicable.

Order in respect of **Case No 2403/2012**

1. The application is dismissed.
2. The applicant is directed to pay the second, third and fourth respondents costs occasioned by the application, such costs to include the costs consequent upon the employment of two counsel where applicable.

Nature of the Applications

1. In the matter under case no.2043/2012 the parties agreed to a consent order before Balton J, on 2 March 2012. In terms of the consent order, the first and fourth respondents undertook to withdraw the transfer of the immovable property lodged for registration with the fifth respondent and further undertook not to lodge the transfer pending the outcome of the application under case number 1855/2012.
2. Consequently, the only remaining issue to be determined in that application are the costs occasioned by the application. These would be the costs of the 2nd, 13th and 28th March 2012. The applicant seeks an order directing the first to fourth respondents to pay the costs occasioned by the application, such costs consequent on the employment of two counsel.
3. The merits and costs of this application cannot be considered in isolation from the application under case number 1855/2012.
4. In respect of case no. 1855/2012, the applicant seeks a declaratory order and an interim interdict. The orders sought are as follows:

- “1. *That the Applicant’s non-compliance with the Rules of Court be condoned and that the forms and service provided for in the Rules be dispensed with in terms of the provisions of Rule 6 (12) of the Rules of Court.*

2. *That a rule nisi do issue calling upon the respondents to show cause, if any, on or before the day of 2012, why orders in the following terms should not be granted:*
 - 2.1 *an order declaring that the sale by Public Auction on the 25th January 2012 of the immovable property description bearing the Title Deed description: Lot 3141, Registration Division FU, Province of Kwa-zulu Natal and which bears the physical address: 36 Gizenga Street, KwaDukuza, Kwa-Zulu Natal, is invalid and is set aside;*

 - 2.2 *an order that:*
 - 2.2.1. *the first to fourth respondents are interdicted and restrained from giving effect to the sale by Public Auction on the 25th January 2012 of the immovable property bearing the Title Deed description: Lot 3141, Registration Division FU, Province of Kwa-Zulu Natal and which bears the physical address: 36 Gizenga Street, KwaDukuza, Kwa-Zulu Natal;*

 - 2.2.2. *the first to fifth respondents are interdicted and restrained from transferring the above property to the fourth respondent pursuant to the above auction sale;*

3. *That the relief set forth in 2.2 above operate as an interim order with immediate effect pending the final determination of this*

application alternatively pending the final determination of an action to be instituted by the applicant for an order in terms of para 2.1 hereof.

4. *That the costs of this application be paid by the first respondent, alternatively by the first respondent and any other person who opposes the relief sought by the applicant herein, jointly and severally, the one paying the other/s to be absolved, such costs to include the costs consequent on the employment of two counsel.”*
5. The second and third respondents have lodged a conditional counter-application, and paragraph 1 of the order sought would deal with one of the applicant's complaints in seeking the declaratory relief.
6. The terms of that order, inter alia authorises and directs the auctioneer to conduct the auction of the immovable property, in accordance with the usual practice of such auctioneer in conducting such auctions, as set out in the first respondent's standard terms as applicable at the date of the sale, including but not limited to the placing of suitable advertisements, and in compliance with the Consumer Protection Act.
7. I propose to deal with the application under case no 1855/2012 first.
8. Having regard to the affidavits filed, the issues for determination as raised by the parties are the following:

whether the applicant has met the requirements for the granting of the interim interdict;

whether the auction sale of the immovable property is invalid and falls to be set aside, as a result of a material deviation from the standard terms and conditions used to conduct the sale, and those standard terms and conditions authorised by the order of 1 December 2011.

in the event of the answer to 8.1. and 8.2 above being yes, then whether the second and third respondents have made out a case for the granting of the order sought in the conditional counter-application.

9. The essential question to be considered in my view is the interpretation of paragraph 1.1. of the court order of Madonsela AJ of 1 December 2011 , under case no 4807/2011, specifically what is meant by “ *conduct a proper auction... in accordance with the usual practice of the said auctioneer in conducting such auctions, set out in its standard terms and conditions....*”.
10. In doing so one must consider the background to the application and the circumstances under which the order was granted.

Background

11. The parties, specifically the second and third respondents have been engaged in what can only be termed acrimonious litigation. The litigation between them dates back considerably. This is evident if one has to have regard to the affidavit of the first respondent. The applicant has launched no less than 5 interdict applications to retain his interest in the property. These are under the current case number and inter alia case numbers 11769/09; 6396/2010; 13768/2010; 15639/2010 and 493/2012.
12. It would appear that the second and third respondents acquired a half share in the immovable property, as a result of certain settlement agreements concluded based on monies loaned and advanced to the applicant.
13. The applicant, second and third respondents are co-owners in equal and undivided shares of the aforementioned immovable property pursuant to a declaratory order entitling the second respondent to an undivided half share in the property, issued by Jappie J on 4 May 2010. In terms of the court order, on registration of such undivided half share, co-ownership in the property was to be dissolved by selling the immovable property by way

of public auction by auctioneers Auction Alliance.

14. An auction sale was conducted which was subsequently set aside after several interlocutory applications and interim interdicts. The applicant objected to the appointment of Auction Alliance.
15. Subsequently, on 1 December 2011, this court appointed the first respondent to sell the immovable property by way of public auction. The order issued by Madonsela AJ provided for the first respondent to “*do all things necessary to give effect to a proper auction of the said immovable property, in accordance with the usual practice of the said auctioneer in conducting such auctions set out in its standard terms and conditions, including but not necessarily being limited to the placing of suitable advertisements.*” The reserve price for the immovable property was the sum of R14 million.
16. The application was instituted by the second and third respondents. However, it was the applicant who sought the appointment of the first respondent pursuant to a counter application launched in those proceedings.
17. This order was issued pursuant to a supporting affidavit filed by the first respondent through its trustee John Wyles. In that affidavit he confirmed that the auction would be conducted in accordance with the usual practice of Ian Wyles Auctioneers when conducting such auctions and annexed to his affidavit a copy of Ian Wyles standard terms and conditions in conducting such auction sales.
18. Wyles states that he was contacted for the first time regarding the affidavit on the morning of 1 December 2011 and he was requested to sign the affidavit as a matter of urgency, and annex a copy of the standard terms and conditions used in auction sales. He goes on to say that at the time that he did so he did not know the circumstances to which the auction sale would relate and that there was no such thing as standard terms and conditions.

19. He goes on to explain that there is no such thing as standard terms and conditions applicable to auctions as there are various types of auctions each requiring their own terms and conditions.
20. It is common cause between the parties that clause 4 of the terms and conditions relating to the receipt of further offers referred to in the terms and conditions annexed to his affidavit, were not included in the conditions of sale. In addition, the clause requiring the sellers to confirm the sale within seven days was also excluded. Wyles indicates that on receipt of the court order he became aware that this was a forced sale and elected to alter the auction conditions to one more suitable to a forced sale.
21. This is consistent with the right reserved in the auction brochure namely that the auction conditions were subject to change without prior notice. Consequently, the sale became a sale at the fall of the hammer subject to the reserve price. The change in the conditions was essential because of the litigation between the parties and it was foreseeable that a disgruntled party would frustrate the auction.
22. The new auction conditions were available for public viewing on the first respondent's website with effect from 10 January 2012. In addition they are available for inspection and are read out prior to the auction sale. The applicant's former attorneys engaged Wyles in correspondence prior to the auction sale taking place on 25 January 2012, and did not take issue regarding the changes in the auction conditions, specifically the non inclusion of the terms relating to further offers as well as the seller's confirmation of the sale.
23. Subsequently on the 24 January 2012, under case no 493/2012 a further application for an interdict was issued. An explanatory affidavit was filed by the first respondent in response to the allegations of the applicant. Interestingly enough the applicant never complained regarding the exclusion of these two clauses as a basis for staying the auction.

24. At the auction sale the purchaser Moosa, bid R 14.5 million for the property. He nominated the fourth respondent as purchaser. The applicant made a written offer to purchase the property for R15 million but such offer was rejected on the basis that the property was sold at the fall of the hammer.

Summary of the Submissions

25. In summary the respective parties submissions are the following. The applicant seeks to have the auction sale set aside as he alleges that the order of 1 December 2011 in case number 4807/2011, authorises the first respondent to conduct the auction sale in accordance with the standard terms and conditions referred to in the affidavit filed by the first respondent in that application.

26. Consequently, the applicant contends that in light of the fact that the clauses relating to further offers and the sellers confirming the sale was not included in the conditions of sale, there was a material deviation from the court order which vitiates the sale.

27. The ordinary rules of interpretation apply and the court order must be interpreted on its ordinary grammatical meaning. In addition, he submits that the provisions of the Consumer Protection Act read together with the regulations do not apply.

28. The first and fourth respondents submit that the applicant has not established the requirements for an interdict. In addition the first respondent alludes to the history of litigation between the parties and avers that he was entitled to amend the conditions of sale to bring them in line with the usual practice relating to the conduct of such forced auction sales.

29. This entails the auction sale and conditions complying with the provisions of the Consumer Protection Act and the regulations thereto at the time of

the auction.

30. The second and third respondents submit that what was contemplated by the order was that the auction sale would be conducted in terms of the usual practice of the auctioneer set out in its standard terms and a condition prevailing at the time the auction was conducted. The terms and conditions applicable were those relating to forced auction sales.

What meaning must be ascribed to the phrase to give effect to the words in the order"to give effect to a proper auction of the said immovable property, in accordance with the usual practice of the said auctioneer in conducting such auctions, set out in its standard terms and conditions mean"?

31. Does it mean, as the applicant contends, a proper auction is conducted in compliance with the court order if the terms and conditions as advertised are those referred to in the affidavit of Wyles?
32. I have considered the authorities in respect of the interpretation of a court's judgment. The intention must be ascertained "...*primarily from the language of the judgment or order....*". ¹.
33. In Natal Joint Municipal Pension fund and Endumeni Municipality ² Wallis JA had cause to consider the proper approach to interpretation. The current approach is encapsulated at paragraph 18 of the judgment.
- '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 its coming into existence. Whatever the nature of the document, consideration*

¹ Van Rensburg and Another NNO v Naidoo and Others NNO:Naidoo and Others NNO v Van Rensburg NO and Others 2011(4) SA 149 (SCA) at paragraph 42

² [2012] 2 All SA 262 (SCA)

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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is language of the provision itself." read in the context and having regard to the purpose of the provision and the background to the preparation and the production of the document '

34. I align myself with the approach adopted by Wallis JA to interpretation. In addition having regard to paragraphs 25 and 26 of his judgment it is clear one cannot ascertain the meaning of words in the abstract. Consequently the provisions of the court order and the words used must be interpreted in the "context in which they were used" and a meaning must be "ascribed which would avoid an absurdity." The interpretation which I must give to the order must not lead to an "impractical, unbusinesslike or oppressive consequence."

35. I am of the view that the interpretation contended for by the applicant is not the correct one. To adopt that interpretation, would not be sensible, would not achieve a businesslike result and would be oppressive to the respondents. It would also result in the order granted being in conflict with the provisions of the Consumer Protection Act.

36. Having regard to the context in which the order was granted, a proper auction in my view is one conducted in terms of the usual practice of an

auctioneer set out in the standard terms and conditions prevailing at the time of the auction sale.

37. This was a forced sale. The terms and conditions applicable were those which applied at the time the auction was conducted and which complied with the Consumer Protection Act and regulations. To hold otherwise and allow the interpretation contended for by the applicant would result in an “impractical, unbusinesslike or oppressive consequence.” One also cannot, in my view, separate the words ‘proper auction’ from the rest of the words used in the order.

38. I say so for the following reasons. If one considers the history of the litigation between the parties and the order authorising the auction sale, the appointment of the first respondent was taken pursuant to a counter application by the applicant. The applicant had frustrated and delayed and thwarted every auction sale which had been conducted prior to the one which is the subject matter of this application. The context in which the order was taken was to force a sale of the property against a history of acrimonious litigation between the parties and the applicant’s conduct of doing everything in his power to frustrate a sale of the property and not relinquish control. The purpose was to achieve a fair sale price by public auction and to divide the property between the owners. It was clearly intended to be a forced sale on short notice subject to the reserve price of R14 million rand.

39. Prior to the auction, it is clear that the first respondent advertised the conditions of sale. These conditions complied with the provisions of section 45 of the Consumer Protection Act and the applicable regulations. The applicant is aware of the changes to the conditions of sale on 10 January 2012, engaged with the first respondent, through correspondence yet did nothing about these changes. In fact he never raised any objections to them prior to the auction sale either in correspondence nor in the application which was dismissed on 24 January 2012 under case no 493/2012.

40. I agree with the submission of the second and third respondents, that judgments must be interpreted on a basis which results in lawful directions.³ Section 45 (3) of the Consumer Protection Act provides that “*a sale by auction is completed when the auctioneer announces its completion by the fall of the hammer*”. This justifies the exclusion of clause 4 and any therefore offer received after the fall of the hammer is incapable of lawful acceptance.

41. Section 45 (4)(b) and 45(5) provides that notice must be given in advance that the auction is subject to a right to bid by the owner or auctioneer. Unless notice is given in advance of the auction sale by the owner or auctioneer and they comply with the registration requirements set out in the regulations they cannot lawfully bid. The applicant did not register as a bidder.

42. Consequently, the application must fail as the interpretation contended for by the applicant cannot be sustained. The applicant has not satisfied the requirements either for a declaratory order or for an interim interdict.

43. The order I thus make is the following:

The application is dismissed. The applicant is directed to pay the first to fourth respondents costs occasioned by the application, such costs are to include the costs consequent upon the employment of two counsel where applicable.

44. I now turn to the application in case no 2403/2012. If one considers the history of litigation between the applicant and the second and third respondents, it is apparent that the applicant has done everything to retain control of his interests in the immovable property. The second and third

³ Amalgamated Telecommunications Contractors (Pty) Ltd v Telkom SA Ltd and Others [2005] 4 All SA 415 (T)

respondents have been thwarted with numerous urgent applications interdicting the various auction sales of the immovable property. This application and the necessity thereof, must also be construed in the light of the allegations in the papers filed in case no 1855/2012

45. I have in the course of preparation of this judgment, had the benefit of considering the papers annexed to the various affidavits referring to such applications and also had the benefit of perusing the various court files and affidavits in the various interdict applications where available. The applicant has launched no less than 5 interdict applications to retain his interest in the property. These are under the current case number and inter alia case numbers 11769/09; 6396/2010; 13768/2010; 15639/2010 and 493/2012.

46. In the last of such applications, case number 493/2012, launched on 24 January 2012, a day before the auction sale, the applicant was unsuccessful. As in most of the applications, the applicant challenges the auction sales due to deficiencies in the advertising. The applicant had sought to interdict the auction sale as he was not consulted prior to the auction as joint owner and he needed time to raise the necessary finance as he wanted to bid at the auction.

47. At no stage did the applicant in his founding affidavit challenge the change to the terms and conditions of auction sale as constituting a material deviation from the court order of 1 December 2011. In fact the first time it is raised is in his founding affidavit filed in case no 1855/2012. It is also not raised in any of the correspondence exchanged with the respective parties legal representatives prior to the launch of these proceedings.

48. He was aware as at 10 January 2012, of the new conditions of sale. He engaged with the first respondent but did not seek to set aside the amended conditions. In fact he sought to have the auction sale set aside because his offer was not accepted. In the one breath he alleges non compliance and in the next then “accepts” the conditions of sale by making a counter offer. In my view he is attempting to obtain an unfair advantage.

49. Of concern, is the time taken to institute the proceedings under case number 2403/2012 and 1855/2012. The impression gained from a perusal of the various court files and specifically having regard to the contents of the correspondence exchanged, is that it is the applicant's *modus operandi* to change legal representatives to secure an advantage and create in some instances urgency. In addition, it is highly undesirable for legal representatives to litigate via correspondence in the manner as has been in these two applications.

50. The general principle that a successful party is entitled to its costs is trite. However, the award of costs is a matter in which a court exercises a discretion and a court may for good reason in the exercise of its discretion deprive him of those costs. See in this regard Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd ⁴ .

51. If one considers the application in isolation then it would at first glance appear that the applicant was entitled to launch the urgent application and seek to interdict the transfer pending the declaratory order. However, I am of the view that the applicant had no prospects of success in the main application under 1855/2012. Having regard to the history of the litigation between the parties and more specifically the grounds advanced by the applicant in this application for the setting aside of the auction sale and the self created urgency, I am of the view that in the exercise of my discretion the applicant ought to bear the costs occasioned by the application specifically those of the second, third and fourth respondents.

52. My reasons for doing so are to indicate the courts displeasure at the conduct of both the applicant's former legal representatives and the first respondents having regard to the content of the correspondence exchanged, which in my view in certain instances can be considered defamatory. I am of the view that to grant a costs order to the first respondent, would give the impression that courts condone this type of

⁴ 1948 (1) SA 839 (A)

exchange. I am also of the view that the applicant delayed in launching the proceedings in this application and that the urgency was what is often termed *self-created*.

53. Consequently, the most appropriate order is the following:-

the application is dismissed.

the applicant is directed to pay the second, third and fourth respondents costs occasioned by the application, such costs to include the costs consequent upon the employment of two counsels where applicable.

HENRIQUES J

DATE OF HEARING: 28 MARCH 2012
DATE OF JUDGMENT; 10 AUGUST 2012

APPLICANTS ATTORNEYS: H.S. TONI
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