

JUST A LESSON IN MANAGEMENT: IF YOU WANT IT, MAKE IT HAPPEN

Naicker N.O. and Others v Park Village Auctions & Property Sales (Pty) Limited and Others (2021/25152) [2022] ZAGPJHC 190 (30 March 2022)

The judgment paints a story of sour grapes after an opportunity was missed. The applicant-Trust wanted its higher offer for a property sold at an auction to be considered, after the highest bid at the auction (which the Trust did not attend) went to a third party purchaser, albeit at a lower price. The Trust hoped to succeed in making a later and higher offer, but the auction purchaser met the auction conditions and succeeded as purchaser of the property. The Trust simply lost an opportunity.

The Judgment can be viewed [here](#).

FACTS

On 2 March 2021, an immovable property situate in the Ekurhuleni Metropolitan Municipality was sold on auction to Pty Ltd ("Bieseman & Bieseman") at the behest of KPMM Construction (Pty) Ltd, in business rescue (KPMM) and its business rescue practitioner.

The trustees of the Ven Family Trust ("the trust") did not attend the auction, but made a higher offer in respect of the property, afterwards. At that time, however, an agreement had already been concluded with Bieseman & Bieseman. This prompted the Trust to launch the present application. It sought orders: (i) interdicting the transfer of the property into the name of the Bieseman & Bieseman; (ii) setting aside the sale agreement dated 30 March 2021 of the property concluded between KPMM and Bieseman & Bieseman; and (iii) directing the business rescue practitioner to accept the Trust's offer dated 25 March 2021 to purchase the property for the sum of R17 million.

The Trust's case is primarily predicated on a challenge to the validity of an extension of the offer period in clause 4.1 of the auctioneers' terms and conditions of sale ("the auction terms") and a challenge to Bieseman & Bieseman's bid and the acceptance thereof as a proper purchase and sale. The Trust contends that KPMM and its business practitioner breached the auction terms by accepting Bieseman & Bieseman's offer outside the fourteen day offer period and that the BTMM accordingly had no option but to accept the Trust's offer of R17 million as the only legitimate bid offer for the property. They further contend that there are adequate grounds to set aside the sale agreement concluded with the fourth respondent.

KPMM and its business rescue practitioner's case was that the application was ill conceived and that the Trust has illustrated no entitlement to any of the relief sought. They argued that there were no breaches of the auction terms and that a valid agreement of sale was concluded with the fourth respondent. In its explanatory affidavit, the sixth respondent adopts the same position, although it abides the court's decision.

HELD

- The Trust sought final relief. The matter thus has to be determined on the basis of the so called *Plascon Evans* test. (A litigious civil matter can be commenced in one of two ways, either by way of legal action or by way of application/motion. The main distinction between these two paths lies in whether the ultimate adjudication of the matter is possible on a consideration of affidavits (written evidence given under oath) alone, or whether oral evidence and witness examination is required. Application proceedings are mainly used in legal disputes which can be expeditiously determined on common cause facts; in other words, there is no material dispute of fact between the counterparties and mainly legal considerations are at issue. The *Plascon-Evans* rule, developed

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in the 1984 decision of the Supreme Court of Appeal in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, serves as a guide to the courts in determining which party's version should prevail when disputes of fact are found in motion proceedings. The rule holds that when factual disputes arise in circumstances where the applicant seeks final relief (i.e. interdicts), the relief should be granted in favour of the applicant only if the facts alleged by the respondent in its answering affidavit, read with the facts it has admitted to, justify the order prayed for. In other words, the rule allows the courts, in certain circumstances, to make a determination on disputes of fact in application proceedings without having to hear oral evidence and on the respondent's written version of events.)

- It is well established that motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Where there is a genuine dispute of fact, the respondent's version must be accepted. The respondents' respective versions are supported by documentary evidence and cannot be rejected on the papers as palpably false or clearly untenable and must thus be accepted.
- The relevant facts are not contentious. The relevant portions of the auction terms provide:
 - “4.1 This document Constitutes an Offer to Purchase by the Purchaser, which is subject to written acceptance by the Seller within 14 ... business days ... (“the offer period”) from date hereof and shall remain irrevocable and open for acceptance by the Seller at any time during the offer period. For the sake of clarity, the Purchaser's offer is open for acceptance until 17h00 on the 14th (fourteenth) business day after the signature hereof by the Purchaser, the counting of the 14 (fourteen) business days to commence on the 1st ... business day after date of signature hereof and shall endure until 17h00 on the 14th ...business day thereafter.
 - 4.2 During the offer period, the Seller or the Auctioneer may continue to market the property in the normal course of business ... and in consequence of same, they may take in further and better written Offers to Purchase from prospective Purchasers, to be submitted for the seller's consideration.
 - 4.3 The Auctioneer shall advise the Purchaser in writing ... of any higher written offer (...“a competing offer”) which is received from any third party during the offer period. The Purchaser shall, for a period of 24 ...hours (hereinafter referred to as “the option period”) after transmission of the written advice of the competing offer by the Auctioneer as aforesaid, have the option to increase the purchase price offered by him in terms of this agreement to an amount equal to the purchase price of the competing offer but subject otherwise to all other terms and conditions of this agreement.
 - 4.4 If the Purchaser wishes to exercise the option to match the competing offer during the option period, the Purchaser must do so in writing ...which notice must be delivered to the Auctioneer before the expiry of the 24 ...hour option period....
 - 4.6 Should the Purchaser exercise the option within the option period and match the competing offer, the purchase price in terms of this agreement shall be the increased amount. The Seller shall be entitled until the lapse of the offer period to accept this agreement at any increased purchase price. This option process is a continuation of the original process and any sale thus concluded shall be a sale by auction.
 - 4.9 The Seller reserves the right to decline the purchaser's offer. The Seller shall have no obligation to accept the offer and shall not be obliged to furnish a reason for...rejecting ...of an offer. If the Seller rejects the purchaser's offer, the Seller shall be entitled to accept any other offer that may be received in respect of the property.”
- Bieseman & Bieseman was the highest bidder at the auction held on 2 March 2021, with an offer of R14 million. Subsequent to the auction, Bieseman & Bieseman received an email from KPMM (on 16 March 2021) requesting it to agree to an extension of the 14 day offer period to Wednesday 24 March 2021. Bieseman & Bieseman agreed. The reason for the request was that a competing offer from a prospective purchaser was awaited.
- The competing offer was relayed to Bieseman & Bieseman on 24 March 2021. Within 24 hours, Bieseman & Bieseman exercised its right of first refusal and matched the offer from the Trust. Bieseman made the required

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payments, whereafter the business rescue practitioner accepted the offer on behalf of KPMM on the same date, 25 March 2021.

- Later that same day, the Trust purported to increase its initial offer to R20 million by way of an unsigned offer, but only after the Bieseman's offer had been accepted by KPMM and its business rescue practitioner. The following day, the Trust was advised that its higher offer could not be accepted as Bieseman & Bieseman's offer had already been accepted.
- It is trite that to obtain final interdictory relief, an applicant (the Trust in this matter) must illustrate a clear right, an injury actually committed or reasonably apprehended and the lack of an adequate alternative remedy in order to obtain the relief sought.
- These elements were not addressed in the Trust's founding papers at all and the Trust has not illustrated a clear right to interdictory relief. Essentially, Bieseman & Bieseman exercised its rights in terms of the auction conditions and there was no prejudice to the Trust. There was no breach of the auction terms by the KPMM or the business practitioner. Under clause 4.4 of the terms and conditions of sale Bieseman had a right of first refusal which it exercised during the extended offer period. The offer period was extended by mutual agreement. Bieseman's offer was the highest offer received during the offer period. The reason for the extension of the period, being to await a further offer from a prospective purchaser must be accepted. Moreover, the auction terms did not preclude the parties from agreeing to extend the offer period. The Trust was unable to point to any prejudice they would suffer as a result of the extension. It is further undisputed that when the acceptance of the offer was communicated to the fourth respondent, there was no higher offer in existence and that the fourth respondent's higher offer of R17 million matched the trust's offer and represents the purchase price. Neither did the Trust advance any cogent factual basis for the contention that they had a legitimate expectation that they would be allowed to make a further offer, considering the auction terms and the terms of the trusts offer to purchase. No reasonable grounds were provided on which a court may set aside the extension of the offer period.
- The Trust therefore has not illustrated any legal right to any of the relief sought and have failed on all grounds advanced to make out a proper case for relief.

CONCLUSION

The application accordingly had to fail.

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