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| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case No.: **4604/2022**

In the matter between:

G & H PUNT (PTY) LTD

Applicant

and

WASCHBANK BONSMARA CC
Respondent

First

**THE TRUSTEES FOR THE TIME
BEING OF THE GREEN VALLEY TRUST**

Second Respondent

THE REGISTRAR OF DEEDS, BLOEMFONTEIN
Respondent

Third

JUDGMENT BY: VAN RHYN, J

HEARD ON: 6 OCTOBER 2022

DELIVERED ON: This judgment was handed down electronically by circulation to the applicant and first respondent's legal representatives by email and released to SAFLII. The date and time for hand-down deemed to be at 09 h00 on 27 OCTOBER 2022.

INTRODUCTION.

[1] This is an urgent application issued on 21 September 2022 in terms of which the applicant seeks the following relief:

“1. That this matter being treated as one of urgency in terms of rule 6(12) of the Uniform Rules of Court;

2 That a rule *nisi* is issued requiring the respondents to are to show cause why the following order should not be made final;

2.1 That-

2.1.1 the First and Third Respondents be interdicted from transferring ownership of the following immovable property:

(i) The Farm Eden 335, District Dewetsdorp, Free State Province, being 85,6532 hectares in extent held under Title Deed T14927/2010, and;

(ii) The Remainder of the Farm Joubertpark 256, district Dewetsdorp, Free State Province, being 990,754 hectares in extent held under Title Deed T14927/2010;

(hereinafter collectively referred to as “the Farm”)

to the Second Respondent or anyone else, pending the outcome of this application and/or the action referred to in paragraph 3 hereunder.

2.2 Directing that the costs of this application shall form part of the costs of the action referred to in paragraph 3 below, unless the application is opposed, in which instance such opposing Respondent(s) be ordered to pay the costs of this application.

3. Directing the applicant to institute an action within 5 days of the granting of this order in which it claims the relief referred to in paragraph 2.1.

4. Directing that pending the said return date, the provisions of paragraph 2.1 above shall have interim effect.”

[2] The applicant is G & H Punt (PTY) Ltd, a company represented by Mr Johan Punt, a farmer and a manager of the applicant. The applicant has its registered address at Hermanus in the Western Cape Province. The first respondent is Waschbank Bonsmara CC, a close corporation having its registered address at Bloemfontein, Free State Province. The first respondent is the registered owner of the Farm which forms the subject of the

dispute between the applicant and the first respondent. The application is opposed by the first respondent.

- [3] The second respondent is cited as the Trustees for the Time Being of the Green Valley Trust IT 0015/2020 (E). The second respondent made an offer to purchase the Farm from the first respondent prior to the Farm being offered for sale at an auction held on 14 July 2022. The second respondent has been joined in this application by virtue of the interest that it may have in this matter.
- [4] The third respondent is the Registrar of Deeds, Bloemfontein (“the Registrar of Deeds”). No relief is claimed from the Registrar of Deeds.

BACKGROUND FACTS.

- [5] The application was served upon the first respondent on Thursday 22 September 2022. The first respondent was required to file its notice of intention to oppose the application on the same day and was allowed one day to file its answering affidavit. These truncated time periods were provided on the ground that a transfer of the Farm was imminent. At the time when the founding affidavit was deposed to on the 20th of September 2022, it was suspected that the transfer documents had already been lodged with the Registrar of Deeds. The applicant filed its replying affidavit on 27 September 2022.
- [6] Thereafter, on the basis that it would take months for the matter to be heard in the ordinary course, the application was enrolled on the urgent roll for 29 September 2022. On 29 September 2022, the application was postponed for a week to Thursday, 6 October 2022 due to an illness of applicant’s counsel.
- [7] The first respondent disputed the urgency of the matter and prayed that the applicant’s application be struck from the roll for lack of urgency with an appropriate cost order. To consider the urgency of this matter, the factual background circumstances should be considered.
- [8] On 14 July 2022 the deponent to the founding affidavit, Mr Punt, attended an auction presented by Nico Smit Auctioneers at the Farm. Mr Punt obtained permission from the auctioneer Mr Jeandre Smit (“Mr Smit”) to view the Farm.

On the day prior to the auction he inspected the Farm and decided to attend the auction with a view to purchase the Farm.

- [9] At the auction, Mr Smit informed Mr. Punt that there had been an unsuccessful offer to purchase the Farm. The said offer was subject to the purchaser procuring financing which had not been obtained, therefore the auction was proceeding. The conditions of sale were announced prior to the commencement of the auction. According to the applicant no mention of any reserve price was made. The seller of the Farm however had 21 days to confirm the sale. The conditions of sale made provision for the acceptance by the seller of a competing offer, subject to the right of the highest bidder to “meet or beat” the price so offered.
- [10] The applicant was the highest bidder at the auction. Johanna Wilhelmina Punt signed the document headed “Voorwaardes van verkoping van onroerende eiendom” (Conditions of Sale) on behalf of the applicant on 14 July 2022. In terms of the Conditions of Sale the applicant purchased and the first respondent sold the Farm for a purchase price of R 8 450 000.00 (eight million four hundred and fifty thousand Rand).
- [11] Mr Punt telephonically contacted the auctioneers on 1 August 2022 and spoke to Mr Smit who informed him that the first respondent had, prior to the auction, sold the Farm to the second respondent. The sale to the second respondent was subject to the acquisition of a loan for the purchase price. During the telephonic discussion Mr Smit indicated that the second respondent had not yet managed to procure financing and requested the applicant to consent to an extension of the 21- day period within which the first respondent was required to confirm the sale to the applicant.
- [12] On or about 1 August 2022, the first respondent’s attorney requested in writing that the applicant consent to an extension of the 21- day period which was afforded to the first respondent to accept the applicant’s offer to purchase. On 2 August 2022 the applicant replied that the request is denied. I will again refer to this aspect.
- [13] The Conditions of Sale contain a consent to the jurisdiction of the Magistrate’s Court. On 8 September 2022 the applicant lodged an urgent application in the

Dewetsdorp Magistrate's Court on the basis that the first respondent had lodged the deeds of transfer with the Deeds Office at Bloemfontein and that the transfer was expected to be executed shortly ("within the next day or so"). The application in the Magistrate's Court was heard on 12 September 2022 and was dismissed with costs. The applicant furthermore caused an action to be instituted against the first respondent out of the Magistrate's Court, Dewetsdorp.

- [14] On 21 September 2022 the applicant filed its notice of appeal against the judgment and order granted in the Dewetsdorp Magistrate's Court. On the same day the urgent application was issued in this court.

THE APPLICANT'S ARGUMENTS.

- [15] Mr Verster, counsel on behalf of the applicant, who was instructed on short notice after applicant's counsel fell ill the previous week, argued that the arguments on the merits be heard prior to addressing the issue of urgency merely because he was of the view that the applicant's case on the merits carry more weight than the arguments on urgency. Mr Verster furthermore requested this court to adjudicate this urgent application not just on the issue of urgency but on the merits as well on the basis that both parties have filed their affidavits and heads of argument. In the event of this court striking this matter from the roll for lack of urgency it would bring about another court to be burdened with the matter once more, at a later stage, when the matter is heard on the opposed roll.
- [16] Mr Verster argued that the crux of the dispute between the parties is the correct interpretation of clause 1 of the Conditions of Sale. The Conditions of Sale provides as follows:

"1. Die eiendom sal voorwaardelik toegeslaan word op die hoogste bieder onderworpe aan bekragtiging binne 21 (EEN EN TWINTIG) dae deur die gemelde Verkoper en die bieder sal gebonde bly by sy aanbod vir 21 (EEN EN TWINTIG) dae na ondertekening van hierdie Verkoopvoorwaardes deur die Koper.

Die verkoper sal geregtig wees om in die loop van die 21 (EEN EN TWINTIG) dae-periode waarna in paragraaf 1 verwys word, enige hoër

aanbiedinge van ander belangstellendes te werf onderworpe daaraan dat:

- 1.1.1 So 'n ander belangstellende geregtig sal wees om net een finale hoogste aanbod te maak; en
- 1.1.2 Indien die hoogste bieder op vandag se veiling so 'n latere aanbod ewenaar, die verkoper verplig sal wees om die eiendom aan hom te verkoop indien die verkoper besluit om die kooprys te aanvaar.”

[17] Clause 10 of the Conditions of Sale provides as follows:

“10.1 Onmiddellik nadat die Koper hierdie Verkoopvoorwaardes onderteken het sal die Koper 5% (VYF PERSENT) Deposito van die totale kooprys daarop by die Afslaers inbetaal by wyse van 'n bankgewaarborgde tjek aanvaarbaar vir die Afslaers.

10.2 Die Koper is verantwoordelik vir Afslaerskommissie van 7% (SEWE PERSENT) + BTW adissioneel tot die hoogste bod. Die Afslaers behou die reg by bekragtiging van hierdie verkoping deur die Verkoper, om hierdie genoemde kommissie asook kostes aangegaan van die deposito ontvangs af te trek. Hierdie kommissie word beskou as verdien te wees met bevestiging deur die Verkoper.

10.3....

10.4 Indien die verkoping nie deur die Verkoper bekragtig word nie sal die bedrag wat deur die Koper inbetaal is vry van rente aan hom terugbetaal word.”

[18] Apart from the interpretation of clause 1 of the Conditions of Sale the further issue is whether the applicant met the requisites for obtaining an interlocutory interdict. Generally, when a party applies for an interim interdict he or she has to satisfy the following provisions:¹

- 18.1 a prima facie right;
- 18.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- 18.3 a balance of convenience in favour of the granting of the interim relief; and

¹ Setlogelo v Setlogelo 1914 AD 221 at 227.

18.4 the absence of any other satisfactory remedy.

[19] Mr Verster contended that where an applicant contemplates an action for the delivery or transfer of property under a contract of sale, as in this matter, the requirements for obtaining an interim interdict to protect that property, are less stringent. It is contended that there are two exceptions to the rule that an applicant for an interlocutory interdict must comply with the requisites outlined in paragraph 17 above. In **Erasmus**² the two exceptions are explained as follows:

“These are applications for interdicts pending

- (i) vindicatory, and
- (ii) possessory (usually, but loosely, described as quasi-vindicatory) actions.

A vindicatory action is one in which the plaintiff claims delivery of specific property as owner or lawful possessor. An action is said to be quasi-vindicatory when delivery of specific property is claimed under some legal right to obtain possession. The most familiar example of the latter is an action for delivery or transfer of property under a contract of sale, which in certain circumstances supports a claim to an interdict restraining the seller from dealing with the property pending the action.

An applicant for an interdict pending vindicatory action to recover what he alleges is his own property need not show that he will suffer irreparable loss if the interdict is not granted. There is a presumption, which may be rebutted by the respondent, that the injury is irreparable. Nor need the applicant show that he has no other satisfactory remedy: a person who is entitled to vindicate property in the hands of another cannot be forced by the action of that person to accept merely the value of the property.

The practice of granting an interlocutory interdict without proof of irreparable loss is not confined to vindicatory actions properly so called but may also be applied in any case in which the applicant has established a prima facie right to delivery of a particular thing, since in all such cases the court is entitled to ensure that the thing shall be preserved until the dispute is finally decided. The interdict may be granted even if the probabilities of success in the action are against the

² Superior Court Practice Vol 2, D6-21.

applicant, and should ordinarily be granted if no harm would thereby be occasioned to the respondent.”

- [20] The applicant contends that clause 1, read in conjunction with its sub-clauses, creates a condition (as expressed in the use of the word “voorwaardelik”) that if the seller receives a higher offer than the bid of the highest bidder within 21 days, the highest bidder will obtain the Farm if he is willing to meet the higher offer. However, in order for him to meet the higher offer, the higher offer must be presented to him within 21 days. There is an obligation upon the seller or his agent, the auctioneer, to present the higher offer to the bidder. The applicant argues that if the offer is not presented to the highest bidder within the 21-day period, the condition is fulfilled and the highest bidder becomes the purchaser of the Farm.
- [21] It is common cause that the auction was not subject to a reserve price. Subsequent to the auction the applicant learned that the first respondent received an offer to purchase the Farm from the second respondent on 15 June 2022 in the amount of R10 536 000,00. The offer from the second respondent was subject to the condition that the second respondent obtain financing within 21 days, which lapsed on 4 August 2022. Therefore, so the argument goes, according to the *prior in tempore* rule, and due to the fact that after the lapse of the 21- day period the second respondent had not yet secured financing to purchase the farm, the applicant became the purchaser of the Farm.
- [22] The applicant therefore obtained a *prima facie* right and thus satisfies the first requirement for an interim interdict. Mr Verster contends that the balance of convenience favours the applicant on the basis that in the event of transfer of the Farm being passed to the second respondent, it will not be easy for the applicant to claim transfer of the Farm as a result of numerous challenges and the party who will suffer permanently will be the applicant. As to the third requisite of an alternative remedy, there is no necessity to address the issue at this stage in accordance with the

principles referred to in **Erasmus** when a quasi-vindicatory claim is at stake.

- [23] Due to the attorney's refusal to divulge information pertaining to the expected date of transfer of the Farm to the second respondent, the applicant is unaware of the exact time when transfer can be expected. Mr Verster indicated that the applicant has no way of obtaining information regarding the expected date of transfer and therefore does not even know whether the transfer has occurred or not.
- [24] Regarding the urgent application lodged at the Magistrate's Court at Dewetsdorp, the applicant contends that the application was not adjudicated upon on the merits as the magistrate found that the court did not have the necessary jurisdiction to hear the urgent application. On this basis the argument of *res judicata* raised by the first respondent is not applicable.
- [25] The further point raised by the first respondent that the principle of pre-emption applies in that the applicant accepted the re-payment of the deposit and the commission from the auctioneer is to misconstrue the reason why payment of these amounts was claimed by the applicant. Due to the fact that the applicant did not earn any interest on the amount paid in respect of the deposit and commission Mr Punt's son, who is a chartered accountant by trade, merely felt that it would be to the benefit of the applicant to ask for the re-payment of these amounts pending the finalisation of the sale. The intention was not to cancel the agreement.

THE ARGUMENTS OF THE FIRST RESPONDENT.

- [26] Mr Van der Merwe, counsel on behalf of the first respondent, firstly addressed the issue of urgency. The applicant approached this court 48 day after the 4th of August 2022, being the "trigger" date. The applicant launched the urgent application in the Magistrate's Court 35 days after the 4th of August 2022. The applicant did not act with maximum expedition with the result that any urgency that may exist has been self-created, which is fatal for the applicant's application. The application should therefore be struck from the roll for lack of urgency with a punitive costs order.

- [27] The application is based upon a factual error that the transfer will occur “within a day or two” which will leave the applicant without any recourse. In the event of transfer being registered at the Deeds Office there is no reason why the applicant may not claim transfer from the second respondent and to obtain an interdict for the transfer from the second respondent to other parties.
- [28] The applicant noted an appeal against the finding of the magistrate. According to the notice of appeal it is evident that the magistrate did not merely find that the Magistrates Court did not possess the necessary jurisdiction to adjudicate upon the urgent application. The magistrate dismissed the urgent application on the merits with the result that this application is *res judicata*.
- [29] Mr Van der Merwe argued that on a proper interpretation of clause I of the Conditions of Sale the applicant must keep his offer open for a period of 21 days and the offer is made subject to the acceptance or rejection thereof by the first respondent. The first respondent did not accept the offer. The applicant accepted the election made by the first respondent and requested re-payment of the deposit and commission from the auctioneer on 8 August 2022.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION.

- [30] The terms on which an auction is to be held are drawn up by the seller or auctioneer in the form of ‘conditions of sale’. The vital question of whether the auctioneer or the bidder is to be the offeror, and therefore which of them, as offeree, is to have the final decision whether the contract is to be concluded or not, may be laid down by the seller or the auctioneer, as the organiser of the sale. The terms on which the auction is to be held must be read out at the beginning of the auction.³
- [31] If it has been announced that the auction will be ‘without reserve’ or that the property will be sold ‘peremptorily, to the highest bidder’ the auctioneer is bound to sell to the highest *bona fide* bidder and has no general discretion to refuse a bid or withdraw the property from the auction.⁴ If no reserve price is announced, or in the case of doubt, the seller retains the right to decide

³ Noormohamed v Visser 2006 (1) SA 290 (SCA) at [7].

⁴ Christie’s Law of Contract in South Africa, Seventh Edition, p 56.

whether to sell or not, and each bid, including the highest, is an offer that the seller may accept or not in his absolute discretion.⁵

[32] Mr Van der Merwe referred the court to the matter of **Brandt v Spies**⁶. The court in the **Brandt**-matter reiterated that an option to purchase is comprised of two distinct parts: an option to purchase and an agreement to keep that offer open, usually for a fixed period. The undertaking to keep the offer open is of course a *pactum de contrahendo*. It is not an alienation as envisaged in the Alienation of Land Act⁷ and is not required to be in writing. The offer, however, which the *pactum* has undertaken to keep open, must be a firm offer which will result in a binding contract when it is accepted.

[33] In **Brandt v Spies** the principle applicable was explained as follows:

“It is implicit in these decisions that an option is comprised of two distinct parts- one is an offer to sell the property, and the other is a contract to keep that offer open for a certain period. Through the option the grantee acquires the right to accept the offer to sell at any time during the stipulated period; and if this right is exercised a contract of purchase and sale is immediately brought into being. It follows that the offer must be one which is capable of resulting in a valid contract of sale from the fact of acceptance by the person to whom the offer is made ...”⁸

And further:

Applying this reasoning, it is clear that when a party relies upon a contract flowing from acceptance of an offer, and the law prescribes that writing is essential to the validity of the particular contract, it must be shown that both the offer and the acceptance are in writing. If the offer is not in writing there is nothing which the offeree can accept so as to create a *vinculum juris* between himself and the offeror. An undertaking to keep open an offer which is incapable of forming the basis of a valid contract can itself confer no right upon the grantee- for in law there is nothing to keep open.”⁹

[34] The facts in **Withok Small Farms (PTY) LTD and Others v Amber Sunrise Properties 5 (PTY) LTD**¹⁰ are as follows: the printed conditions of sale of a property at an auction provided that the bidder bound itself to keep its bid

⁵ SWA Almalgameerde Afslaers (Edms) Bpk v Louw 1956 (1) SA 346 (A).

⁶ 1960 (4) SA 14 (E).

⁷ Act 68 of 1981.

⁸ At 16 E-G

⁹ At 17 B-C

¹⁰ 2009 (2) SA 504 (SCA).

open for a period of seven days. The true nature of the contract was an option granted by the bidder to the seller to sell the property on the terms and conditions set out in the document. The court held that it was a trite principle of the common law that, unless the contrary was established, a contract came into being when the acceptance of the offer was brought to the notice of the offeror. It was also trite that an offeror could indicate, whether expressly or impliedly, the mode of acceptance by which a *vinculum juris* would be created. If there were doubt, it would be presumed that the contract would be completed only when the acceptance of the offer was communicated to the offeror.

[35] The Supreme Court of Appeal held as follows at paragraphs 7 and 9:

[7] The document is poorly drafted. It is couched in language suggestive of a sale subject to a suspensive condition. Thus, clause 1 speaks of properties being 'provisionally' sold 'subject to confirmation by the seller'. There are numerous other references to the sellers being required to 'confirm' the sale. But as pointed out by this court in *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 178 (A) at 186F-J a distinction is drawn in our law between a pure and a mixed potestative condition. The former is invalid because its fulfilment depends entirely upon the unfettered will of the promisor. A typical example, and the one given in the *Benlou* case, is: 'I will pay you R500 if I wish to do so.' In the present case the conditions of sale reserved to the sellers an unlimited choice whether to sell or not. It gave rise to no obligation on their part whatsoever and accordingly no agreement of sale came into existence at the time of the auction."

And;

[9] In terms of clause 1 of the conditions of sale the respondent bound itself to keep its bid open for a period of seven days. To that limited extent a binding contract came into existence. The true nature of that contract was an option granted by the respondent to the sellers to sell the properties on the terms and conditions set out in the document. I accordingly agree with the court a quo that on a proper construction the reference in the conditions of sale to the confirmation of the sale had to be construed as a reference to the acceptance of an offer."¹¹

[36] Mr Van der Merwe argued that clause 1 of the Conditions of Sale clearly stipulates and provides that the first respondent did not confirm ("bekragtig")

¹¹ Withok at 509.

and therefore no agreement was entered into between the applicant and the first respondent. Furthermore, clause 16 of the conditions of sale stipulates that the seller “sal by bekragting van die verkoping hierdie voorwaardes teken”. It is not disputed that the first respondent did not sign the Conditions of Sale. Both clause 1 read with clause 16 is unambiguous and clearly provides that the bid (offer) had to be accepted by the first respondent. This however did not transpire. The offer was not accepted by or on behalf of the first respondent. This court is satisfied that no contract was concluded.

- [37] A suspensive condition suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event.¹² Mr Van der Merwe referred to the matter of **Mia v Verimark holdings (Pty) Ltd**¹³ to explain the legal effect of a suspensive condition:

“Suspensive conditions are commonly encountered in contracts for the sale of immovable property. Their legal effect is well settled. The conclusion of a contract subject to a suspensive condition creates ‘a very real and definite contractual relationship’ between the parties. Pending fulfilment of the suspensive condition the exigible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. No action lies to compel a party to fulfil a suspensive condition. If it is not fulfilled the contract falls away and no claim for damages flows from its failure”.¹⁴

- [38] The applicant argued that the offer to purchase the Farm by the second respondent was made prior to the auction which took place on 14 July 2022. It was not an offer made in terms of the Conditions of Sale of the auction. The applicant was not afforded an opportunity to meet the offer made by the second respondent and the failure of the first respondent to provide the applicant with an opportunity to meet the second respondent’s offer caused the condition to be fictionally fulfilled.

- [39] The agreement between the second respondent and the first respondent was subject to a suspensive condition in that the second respondent was awarded

¹² Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd 2013

(2) SA 133 (SCA) at [10].

¹³ [2010] 1 all SA 280 (SCA).

¹⁴ At [1].

a period of 21 days to obtain a loan, therefore it was still subject to a suspensive condition as at 4 August 2022. On this basis the applicant contends that the offer to purchase the Farm by the applicant came into existence at the fulfilment of the condition in clause 1 by 4 August 2022 when the sale between the second and the first respondent had not yet been concluded. It is thus submitted that the applicant has established a *prima facie* right to receive transfer of the Farm and that it is entitled to the interim relief which it seeks in the notice of motion.

[40] In the answering affidavit it is stated that the first respondent's existing indebtedness in terms of the bonds registered over the Farm exceeds the offer made by the applicant. The applicant became aware of the higher offer made by the second respondent during a telephonic conversation on or about 1 August 2022. The applicant, being willing and desirous to purchase the Farm, did not enquire as to the amount offered by the second respondent so as to "meet or beat" the offer. There is no evidence that the applicant, even when knowledge of the offer to purchase the Farm came to the knowledge of Mr Punt shortly prior commencement of the auction, tried to ascertain what the amount of the offer was.

[41] The deponent to the applicant's founding affidavit states the following regarding the offer to purchase made by the second respondent: "The fact that there was an existing sale which was subject to the suspensive condition that financing be provided was not disclosed at or prior to the auction". On 1 August 2022 the applicant received a letter from the attorney acting on behalf of the first respondent to request an extension of the time within which the second respondent had to secure a loan to purchase the Farm. The content of the letter addressed to Mr Punt is as follows:

"Ons wens te bevestig dat ons die prokureurs namens Waschbank Bonsmara (Pty) Ltd is en bevestig ons dat u aanbod die hoogste bod op die veiling was, te wete R8 450 000.00 uitgesluit BTW (lopende saak).

Ons bevestig dat u meegedeel is en te alle tye daarvan bewus was dat daar reeds 'n bestaande aanbod op die eiendom is van 'n derde party, onderhewig aan finansiering. Ons bevestig dat u reeds u deposito en alle nodige kostes aan die afslaer betaal het wie dit op trust hou.

Ons bevestig dat die tydperk vir die verkryging van finansiering van die derde party nog nie uitgeloop het nie en versoek ons dus on die 3-weke tydperk vir die aanvaarding van die aanbod te verleng met 'n verdere 3 weke. Ons is deur die bankbestuurder van die koper in kennis gestel dat hy binne die eersvolgende 10 werksdae uitsluitel rondom die finansiering sal hê. Ons wil graag met u in verbinding bly en indien hierdie koop nie realiser nie, met u koop voortgaan.

Ons vertrou u vind dit so in orde.”

[42] On 2 August Mr Gilbert Punt the son of the deponent, Mr Punt, replied to the correspondence from the first respondent's attorney:

“Soos jy bewus is verstryk die tyd vir die verkoper om ons aanbod te aanvaar Donderdag 4 Augustus 2022 teen die sluiting van besigheid. Alhoewel ons verbaal voor die veiling in kennis gestel was van 'n aanbod deur 'n derdeparty was dit nie in konteks geplaas dat die veiling juis gehou word weens die feit dat die dede party se finansiering nie suksesvol was nie.

Ons was dus nie bewus daarvan dat die aanbod van die derde party steeds oorweeg word nie. Hierdie inligting is ook nie vervat in die getekende terme van die veiling nie.

Ons is nie bereid om ons aanbod vir langer as die durasie soos per die terme van die veiling te verleng nie. Indien ons aanbod nie aanvaar word nie versoek ons graag dat ons deposito tesame met die kommissie aan ons terugbetaal word op Vrydag 5 Augustus 2022.

Ons behou ons regte voor in hierdie verband.

Geliewe verder instruksies van jul klient te kry en ons van sy besluit in kennis te stel voor sluit van besigheid op 4 Augustus 2022.”

[43] Due to the email by Mr Gilbert Punt that the applicant was not prepared to provide any extension and the fact that the first respondent did not accept the applicant's offer on or before 4 August 2022, the deposit was re-paid to the applicant on 8 August 2022. On 8 August 2022 Mr Gilbert Punt, per email requested re-payment of the deposit from the auctioneer as follows:

“Hi Wilma,

Sien gerus aangeheg. Dit blyk asof die verkoper nie die terme aanvaar nie.

Sal jy asb ons fondse vandag terug betaal- FNB bevestiging aangeheg. Sal jy my asb skakel om die besonderhede te bevestig alvorens julle die betaling maak.”

- [44] In reply the applicant indicates that the request to return the deposit was made because the auctioneer indicated that it would be in the applicant's best interest for it to be done in view of the fact that the amount which had been paid was not earning any interest and that there was every prospect that the matter would drag on for a considerable period of time. The doctrine of peremption states that a party must make-up his mind: the party cannot equivocate by acquiescing in a decision and thereafter change his mind.¹⁵ The conduct by the applicant to request the repayment of the deposit and commission on the basis that the offer made at the auction was not accepted by the first respondent within the period of 21 days is, to my mind, an unequivocal intention to acquiesce and is inconsistent with any intention to proceed with the offer to purchase the Farm.
- [45] The offer to purchase the Farm could not be withdrawn by the applicant prior to expiry of the 21-day period.¹⁶ The offer, in the form of the highest bid made at the auction, by the applicant was open for acceptance by the first respondent during the fixed period of 21 days. The first respondent did not accept the offer within the period of 21 days and therefore the offer has lapsed.¹⁷ The applicant did not waive the limitation of time agreed upon by granting an extension as requested by the first respondent.¹⁸
- [46] On the basis that the bid made by the applicant was not accepted by the first respondent, no contract came into existence. The language in the conditions of sale is sufficiently clear to indicate that the first respondent was entitled to, within the period of 21 days from the date on which the offer to purchase is signed by the highest bidder, source any higher offers subject thereto that the subsequent offer had to be more than the offer by the first respondent where after the highest bidder (the applicant) would be entitled to be notified of any such subsequent higher offer and would be afforded an opportunity to 'meet or beat' such offer. The first respondent would then be obliged to sell the Farm to the highest bidder if it accepted the purchase price.

¹⁵ Hlatshwayo v Mare & Deas 1912 AD 242.

¹⁶ Hersch v Nell 1948 (3) SA 686 (A).

¹⁷ Pick n Pay Retailers (Pty) Ltd v Eayrs and Others NNO [2012] 1 All SA 522 (SCA) at [21].

¹⁸ Laws v Rutherford 1924 AD 261 at 264.

- [47] There is no evidence that the first respondent obtained a higher offer to purchase the Farm subsequent to the auction held on 14 July 2022. In fact, the parties are *ad idem* that the offer made by the second respondent was received by the first respondent prior to the auction. The offer by the second respondent was made on 15 June 2022. The conditions of sale reserved to the first respondent an unlimited choice whether to sell the Farm to the applicant or not in the event of no higher offer being received after the auction took place.
- [48] I am in agreement with the arguments raised on behalf of the first respondent that the first respondent reserved the right (without qualification) to accept or reject the offer submitted by the applicant without any obligation to accept the applicant's offer. In the result the applicant has not established a clear right, though open to some doubt for the granting of an interim interdict.
- [49] It is common cause that the applicant applied for identical relief in the Magistrate's Court at Dewetsdorp on 8 September 2022 on the basis that a rule *nisi* be issued interdicting the first and third respondents from transferring the Farm to the second respondent pending an action which, at present, have already been issued in the Magistrate's court.
- [50] The first respondent raised the issue of *res judicata* on the ground that the magistrate had correctly dismissed the urgent application brought by the applicant in the Dewetsdorp Magistrate's Court. The applicant has filed a notice of appeal in respect of the judgment handed down by the magistrate.
- [51] The pleas of *res judicata* and *lis pendens* are undoubtedly cognate pleas and it follows that the elements required to establish the one are the same as the elements required to establish the other.¹⁹ The fact that an urgent application was brought by the same applicant, on the same grounds against the same first respondent and which judgment is now the subject of an appeal which is pending, affords *prima facie*, a good ground for a finding of *res judicata*, alternatively *lis pendens* on the basis that it is undesirable for there to be litigation in the Magistrate's Court, Dewetsdorp, this court, and a court of appeal on the same issue.

¹⁹ Smith v Porrit and Others 2008 (6) SA 303 (SCA) at [10].

- [52] With regards to urgency, this matter is proclaimed to be urgent since the launching of the urgent application in the Magistrate's Court, Dewetsdorp on 8 September 2022. The applicant did not provide any explanation for the delay of at least 30 days between 8 August 2022 when the applicant, in writing, received word that the offer had not been accepted until the 8th of September 2022 when the urgent application in the Magistrate's Court was lodged. On 21 September 2021, 43 days after receiving word that the offer to purchase the Farm had not been accepted, this application was launched in this court. I agree with the submission made by Mr van der Merwe on behalf of the first respondent that any urgency is self-created.
- [53] The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be²⁰. The ordinary practice is, of course, that costs follow the event but this principle is subject to the general rule that costs, unless expressly otherwise enacted, are in the discretion of the court²¹. The court should take into account all the circumstances before exercising its discretion as to costs. It must also strive to achieve fairness to both parties. The postponement of this application on Thursday, 29 September 2022 was due to the ill health of the applicant's counsel. The first respondent is entitled to the costs occasioned by the postponement.
- [54] In the affidavits filed by the applicant several allegations were made regarding the honesty and integrity of the legal representatives acting on behalf of the first respondent. I agree with the contention raised by Mr Van der Merwe that these remarks and allegations are uncalled for and unsubstantiated. Mr Verster, who appeared on behalf of the applicant at the hearing of this matter, was unaware of the fact that summons had already been issued out of the Magistrate's Court, Dewetsdorp. He obtained instructions at a late stage and indicated that the applicant should not be penalized for not receiving the correct legal advice which lead to the urgent application brought at Dewetsdorp.

²⁰ Erasmus v Grunow 1980 (2) SA 793 (O) at 798 B-C.

²¹ Union Government v Heiberg 1919 AD 477 at 484.

[55] On behalf of the first respondent a cost order is prayed for on an attorney and client scale, such costs to be payable by the applicant and the applicant's attorney *de bonis propriis*, jointly and severally, the one to pay the other to be absolved. Taking cognisance of the facts of this matter, the numerous legal principles applicable, the content of the correspondence appended to the affidavits and referred to in paragraph 54 above, the history of the litigation and costs incurred by the applicant, I am of the view that the first respondent is entitled to an order as prayed for except for the *de bonis propriis* order. In the result the following order is made:

ORDER:

- [56] 1. The application is dismissed with costs on the scale as between attorney and client.
2. The applicant shall pay the wasted costs occasioned by the postponement of the matter on 29 September 2022.

VAN RHYN J

On behalf of the Applicant:
VERSTER

ADV. M

Instructed by:

HORN & VAN RENSBURG ATTORNEYS
BLOEMFONTEIN

On behalf of the First Respondent:
MERWE

ADV. R VAN DER

Instructed by:

VAN WYK & PRELLER

ATTORNEYS

BLOEMFONTEIN