

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

**Reportable
Case no: 555/03**

In the matter between:

NAZEER NOORMOHAMED

Appellant

and

ALEC JOHANNES VISSER NO

First Respondent

ROBERT SCHILZ NO

Second Respondent

**Coram : SCOTT, MTHIYANE, BRAND JJA,
COMRIE et PATEL AJJA**
Date of Hearing : 3 NOVEMBER 2004
Date of delivery : 19 NOVEMBER 2004

Summary: A purchaser who assigns rights and obligations arising from sale at public auction not a 'nominee' or 'trustee' in terms of Conditions of Sale

JUDGMENT

SCOTT JA/...

SCOTT JA:

[1] This appeal concerns a sale in execution of certain immovable property by public auction on 21 August 2001. At the time of the sale the property fell within the area of jurisdiction of the second respondent who was then the acting sheriff for the district of Pretoria Central. In July 2002 the first respondent, who is the sheriff for the district of Pretoria North-East, assumed jurisdiction over the area in which the property is situated. Nothing turns on this; I mention it only to explain why the respondents, being the sheriffs for Pretoria Central and Pretoria North-East respectively, instituted jointly the proceedings which give rise to the present appeal.

[2] It is common cause that the auction was conducted by Mr Eugene Schilz ('Schilz'), the second respondent's deputy. (The latter is Mr Robert Schilz.) It is also common cause that the appellant's bid of R1 250 000 was the highest and that the property was knocked down to him. The appellant did not sign the Conditions of Sale, the terms of which had been read out before the auction. Instead, later the same day, the document was completed by the insertion of the words 'S Moosa or nominee' as purchaser and was signed both by Mr David Nicholas, another of the second respondent's deputies on behalf of the latter, and by Mr S Moosa as purchaser. At the same time Moosa handed Nicholas a cheque payable to the sheriff Pretoria Central, in the sum of R132 980.

This amount represented a deposit of R125 000 on the purchase price plus commission and VAT. The cheque was subsequently dishonoured.

[3] Some 15 months later the respondents instituted motion proceedings in the Pretoria High Court against both the appellant and Moosa. The order sought against the appellant was first an order declaring that he had purchased the property and directing him to sign the 'duly completed conditions of sale', together with ancillary relief. In the alternative, an order was sought declaring that the appellant had 'acted in his capacity as nominee for a purchaser to be nominated by him at the sale' and directing him to sign the Conditions of Sale. An order was also sought against Moosa, who was cited as the second respondent, declaring him to have accepted the nomination by the appellant and directing him to fulfil his obligations in terms of the Conditions of Sale. (Proceedings had previously been instituted against Moosa for the same or similar relief but subsequently withdrawn.)

[4] In the court below the respondents abandoned their claim to have the appellant declared the purchaser of the property and relied solely on their alternative claim. In other words, they sought an order directing him to sign the Conditions of Sale by reason of his having acted 'in his capacity as nominee for a purchaser to be nominated by him' The object of this relief, whatever the meaning of the words quoted may be, was to bring the appellant within the purview of clause 16 of the

Conditions of Sale and so render him liable as surety and co-principal debtor for the obligations of Moosa as purchaser. The clause reads:

'16. In the event of the Purchaser being a company, a corporation or a partnership, or in the event of the Purchaser signing as a nominee or a trustee then and in all such events the person signing these conditions shall be deemed to have bound himself as surety and co-principal debtor for all the obligations of the Purchaser and, if applicable, jointly and severally with any other person signing these conditions on behalf of the Purchaser and hereby renounces the benefits of excussion and division, no value received and errors in calculation, the effect of which he acknowledges to be aware.'

The respondents were successful in the court *a quo* and their alternative claim against the appellant was upheld. The present appeal is with the leave of that court. The relief sought against Moosa was also granted. There is, however, no appeal against that order and nothing further need be said about it.

[5] The circumstances in which the appellant participated in the bidding at the auction and in which Moosa came to sign the Conditions of Sale as purchaser are largely common cause. Schilz's version, as set out in his founding affidavit and amplified in his replying affidavit, is briefly the following. He said that shortly before the auction the appellant approached him and asked whether he could bid and thereafter (in the event of his bid being successful) nominate another 'entity' as purchaser of the property. Schilz explained that this was not an uncommon practice

and that he was agreeable to the appellant's proposal. His understanding of what was proposed was clearly that the appellant would in the first instance be the purchaser of the property but would have the right to nominate another in his stead. In this regard he pointed to the fact that immediately after the property had been knocked down to the appellant he, Schilz, completed a document headed 'Proof of Sale' in which he recorded the purchaser as being 'N Noormohamed or nominee'. He also contended that the same description of the purchaser should have been recorded in the Conditions of Sale before being signed by the appellant.

[6] The appellant's version of what was agreed before the auction is recorded in his answering affidavit as follows:

'Two commercial properties were put up for auction by the Sheriff on 21 August 2001. The one property being at the premises of 335 Bloed Street, Pretoria [the subject property] and the other one nearby around the corner.

I and a number of my friends, family and business colleagues decided to attend both auctions as we were interested in buying the properties.

The auction of the property situated at 335 Bloed Street was to be conducted first.

Prior to the start of the bidding it was agreed upon amongst our contingent that I would do the bidding on the property first to be auctioned and if successful, and depending on the price, agreement would thereafter be reached as to who would be nominated to be the purchaser of the property.

...

Prior to the start of the auction, which took place at approximately 13:00, I approached Mr Eugene Schilz, who was to conduct the auction, and informed him of the aforementioned arrangements. He accepted it and indicated that it would be no problem.'

[7] It is not in dispute that the sale of the property was subject to the terms of the Conditions of Sale which, as I have said, were read out to those present before the sale. (Cf *Clarke v C P Perks & Son* 1965 (3) SA 397 (E) at 400C.) Clause 16 is quoted above. The only other clause relevant for present purposes is clause 6. It reads:

'The Purchaser shall as soon as possible after the sale and immediately upon request by the sheriff, sign these conditions.'

[8] It is common cause that the appellant was not required to sign the Conditions of Sale. After the property had been knocked down to the appellant, the latter approached Schilz and asked for time to decide which of the group would be the purchaser. Schilz agreed. Some while later the same afternoon the appellant, Moosa and others returned to the sheriff's office where the appellant informed Nicholas that he, the appellant, had nominated Moosa as the purchaser. Moosa was acceptable to Nicholas who, as I have said, inserted the words 'Moosa or nominee' on the last page of the Conditions of Sale which was then signed by Moosa as purchaser.

[9] The respondents' contention, upheld in the court below, was that on these facts the appellant was obliged by reason of clause 6 to sign the Conditions of Sale and that once having done so he would, in terms of clause 16, be liable as surety and co-principal debtor to the respondents for Moosa's obligations in terms of the sale.

[10] The starting point in deciding whether this contention was correctly upheld or not is to determine the true nature of the oral agreement between the appellant and Schilz prior to the auction. Counsel for the respondents argued that the agreement was to the effect that the appellant would act as a 'nominee' of the group of friends, family members and colleagues (including himself) and in that capacity he would, in turn, be afforded the right to 'nominate' a purchaser. I pause to observe that the order sought in the Notice of Motion and granted by the court *a quo* was an order declaring the appellant to be a nominee not of the group but of the person to be nominated. In the alternative, counsel argued that it was agreed that the appellant would purchase the property as a trustee for the benefit of the third party, ie the purchase would constitute a *stipulatio alteri*. Accordingly, so counsel contended, the appellant was either a 'nominee' or a 'trustee' within the meaning of clause 16 and hence bound by its provisions. In my view this contention cannot be upheld. It is founded upon a version which is not only

inconsistent with the respondent's own case as reflected in the evidence of Schilz but is in any event not justified on the papers.

[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. The second is that it is now well-established that a sale by public auction without reserve is concluded as soon as the bidding closes. (See eg *Schuurman v Davey* 1908 TS 664 at 668; *De Villiers v Parys Town Council* 1910 OPD 55 at 58; *Clarke v C P Perks & Son, supra*, at 400D; *Nicolau v Navarone Investments (Pty) Ltd* 1971 (3) SA 883 (W) at 884H.) Against this background, it seems to me that the most probable inference arising from the appellant's brief description of what passed between himself and Schilz prior to the auction (quoted in para 6 above), or at the least one which is wholly consistent with that description, is that the agreement was simply that if the appellant purchased the property at the auction he would be permitted, if he so wished, to cede his rights and delegate his obligations as purchaser to another in his stead. Significantly, this coincides with Schilz's own understanding of what was agreed. In this regard, it will be recalled that he described the purchaser as 'N Noormohamed or nominee' in the 'Proof of Sale' which he completed immediately after the auction. As far as he was concerned there was no question of the

appellant having purchased the property in any capacity other than in his ordinary personal capacity. The ordinary meaning of 'nominee' is, of course, simply a person who is nominated or appointed. But it is a word that is frequently used in commerce to mean different things in the legal sense depending on the context. In the context in which it was used by Schilz in his return of service it clearly means 'assignee' or, in other words, a person to whom rights may be ceded and obligations delegated. (See eg *Elkam (Pty) Ltd v Jackwall (Pty) Ltd and another* 1968 (1) SA 554 (W) at 559F-G.) The practice of affording such a right to a party to a contract, as pointed out by Greenberg JA in *Hughes v Rademeyer* 1947 (3)

133 (A) at 139, is both commonplace and in accordance with established legal principle. It follows that applying the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) it must be accepted that what was agreed between Schilz and the appellant was no more than that in the event of the latter purchasing the property at the auction he would be entitled, if he wished, to assign his rights and obligations to someone else.

[12] Had the appellant been requested to sign the Conditions of Sale immediately after the auction he would have been obliged to do so by reason of the provisions of clause 6. But without first doing so, the

appellant ceded his rights and delegated his obligations under the sale to Moosa who was accepted as the purchaser in his place by Nicholas acting on behalf of the second respondent. In the result, the appellant was released from his obligations under the sale and the *vinculum iuris* between the appellant and the second respondent ceased to exist. He could not subsequently be required to sign the Conditions of Sale.

[13] Even if the appellant had signed the Conditions of Sale the position, I think, would have been no different. Clause 16 provides that a 'purchaser' signing the Conditions of Sale 'shall be deemed

to have bound himself as a surety and co-principal debtor' in three situations. The first is where he signs for and on behalf of 'a company, a corporation or partnership', the second where he signs as a 'nominee' and third where he signs as a 'trustee'. A purchaser who purchases property in his ordinary personal capacity but who is afforded the right to assign his rights and obligation under the sale falls into none of these categories.

[14] It follows that in my view the appeal must succeed.

[15] The following order is made:

- (a) The appeal is upheld with costs.
- (b) The order of the court *a quo* is altered as follows:

(i) Paragraphs 1.1 and 1.2 are deleted and the following is substituted in their place:

‘The application against the first respondent is dismissed.’

(ii) Paragraph 2 is deleted and the following is substituted in its place:

‘The first and second applicants are jointly and severally liable for the first respondent’s costs.

The second respondent is to pay the applicants’

costs on an unopposed scale.’

D G SCOTT
JUDGE OF APPEAL

CONCUR:

MTHIYANEJA

BRAND JA

COMRIE JA

PATEL AJA