



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 192/2014

In the matter between:

**HANSA SILVER (PTY) LTD
IVOR ICHIKOWITZ
JAN JONATHAN SERFONTEIN
ERF G OF THE FARM DUIKERBULT 360 CC
THABA PHUTI SAFARI LODGE (PTY) LTD**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT
FIFTH APPELLANT**

and

**OBIFON (PTY) LTD t/a THE HIGH STREET
AUCTION COMPANY**

RESPONDENT

Neutral citation: *Hansa Silver (Pty) Ltd v Obifon (Pty) Ltd t/a The High Street Auction Company* (192/2014) [2015] ZASCA 54 (30 March 2015).

Coram: Navsa ADP, Shongwe and Saldulker JJA and Van der Merwe and Meyer AJJA

Heard: 3 March 2015

Delivered: 30 March 2015

Summary: Auction — sale with reserve price — whether vendor bids should be identified as such depends on the facts of each case — bids by auctioneer on behalf of sellers in present circumstances not constituting misrepresentation inducing sale.

ORDER

On appeal from Gauteng Local Division, Johannesburg (Masipa J sitting as court of first instance):

1 The appeals of the appellants are dismissed with costs, including the costs of two counsel.

2 The cross-appeal is upheld with costs, including the costs of two counsel and the order of the court a quo is supplemented by adding the following:

‘The applicants are jointly and severally ordered to pay the costs of the third party proceedings, including the costs of two counsel.’

JUDGMENT

Van der Merwe AJA (Navsa ADP, Shongwe and Saldulker JJA and Meyer AJA concurring):

[1] This appeal concerns the validity of sale agreements entered into pursuant to a public auction. The central issue is whether the sale agreements were invalidated by bids of the auctioneer on behalf of the sellers. The court a quo (Masipa J) on application by the purchasers seeking an order of invalidation, held that they were not invalid. I shall say more about the purchasers in due course.

Background

[2] The Thaba Phuti Safari Lodge (the lodge) is a game farm and lodge comprising immovable properties and a business as a going concern. The third appellant, Mr Jan Jonathan Serfontein, the fourth appellant, Erf G of the Farm Duikerbuilt 360 CC, and the fifth appellant, Thaba Phuti Safari Lodge (Pty) Ltd, (the sellers) were the owners of the assets comprising the lodge. At all relevant times the sellers were represented by Mr Serfontein. The

respondent, Obifon (Pty) Ltd t/a The High Street Auction Company (High Street), conducted business as an auction house.

[3] On 28 August 2011 the sellers gave a written mandate to High Street to sell the lodge by public auction or private treaty. In terms of the mandate a reserve price of R25 million was fixed. In terms of the mandate the sellers appointed High Street or its agent, to bid on their behalf at a public auction, up to the reserve price. It provided further that should the sellers sell the lodge during the mandate period or within a period of 12 months after the mandate period to any purchaser introduced to the sellers or the lodge within the mandate period, the sellers would be liable for payment of commission of 10 per cent plus VAT on the sale price. The mandate was to endure until 1 January 2012.

[4] Thus the lodge was offered for sale at an auction held on 2 November 2011. The auction was conducted on behalf of High Street by Mr Jonathan Anthony van Reenen (the auctioneer). He held impressive qualifications in the field and had vast experience in conducting auctions in South Africa and abroad. High Street's rules of the auction were contained in a document signed by the auctioneer. The document stated that the rules complied with s 45 of the Consumer Protection Act 68 of 2008 (the CPA) and the regulations thereunder. These regulations were promulgated by Government Notice R293 in Government Gazette no 34180 of 1 April 2011 (the regulations).

[5] The rules of the auction stated that the sale in respect of any lot was complete when the auctioneer announced its completion by the fall of the hammer and the statement 'sold', and that until then, a bid may be retracted. The following rules of the auction are of significance:

- '3. Unless otherwise announced, all lots are sold subject to a reserve price and to a five day acceptance period in favour of the seller;
4. Unless otherwise announced, the High St. Auction Co and the Auctioneer are entitled to bid on behalf of the seller up to the reserve price.'

[6] The auction was advertised in 'The Auctioneer'. The advertisement stated that the rules of the auction were available on a specified website as well as at the offices of High Street. In terms of the advertisement, notice was given that all sales were subject to a 'minimum reserve', unless otherwise stated. The advertisement made clear that the auctioneer had the right to bid on behalf of the owner.

[7] The advertisement attracted the attention of the second appellant, Mr Ivor Ichikowitz. He was interested in acquiring the lodge for another entity, which turned out to be the first appellant, Hansa Silver (Pty) Ltd (Hansa). I refer to Mr Ichikowitz and Hansa collectively as the purchasers. Mr Ichikowitz made contact with High Street and expressed his interest in the lodge. High Street took Mr Ichikowitz by helicopter to inspect the lodge prior to the auction and he consequently attended the auction on 2 November 2011.

[8] Although he was equivocal in his founding affidavit, Mr Ichikowitz had in fact registered as a bidder at the auction and had signed the standard bidder registration form which had been completed by his personal assistant. In the bidder registration form Mr Ichikowitz acknowledged that he had read, understood and was bound by High Street's terms and conditions of the auction. He also provided the documents that High Street required in compliance with the Financial Intelligence Centre Act 38 of 2001 (FICA). He was presented with paddle number 129.

[9] At the commencement of the auction the auctioneer read out the rules of the auction to approximately 50 persons present. A transcript thereof was attached to the papers. The transcript confirmed that after he had read the rules to the audience, the auctioneer had invited questions. It is uncontested that there were no questions from the audience. Mr Ichikowitz said that he had not paid attention to the rules that regulated the auction, even though he realised that they constituted contractual terms of the auction. The purchasers correctly admitted that Mr Ichikowitz was bound by the rules of the auction. It is trite that if the rules of an auction are read out at the commencement of the auction or made available by another reasonable method, 'they are binding

even on bidders who arrive late and have not read them or heard them read out'. See R H Christie, the *Law of Contract in South Africa*, 6 ed (2011) at 47. Regulation 21(8)(a) of the regulations is to similar effect. It provides that the rules of an auction need not be read out at an auction, if they had been made available to the general public at least 24 hours prior to the commencement of the auction.

[10] The lodge was lot 5 at the auction. It was sold to Mr Ichikowitz for R20 million, in circumstances fully set out below. Pursuant hereto three written agreements of sale were entered into on 9 November 2011. In terms of these agreements each of the sellers sold its respective portion of the assets comprising the lodge to Mr Ichikowitz on behalf of a company to be formed. The total purchase price in terms of the three agreements was R20 million. High Street was a party to each agreement. Each agreement provided that the purchaser was liable for payment of commission to High Street in the amount of 10 per cent of the purchase price plus VAT. The total commission amounted to R2,28 million and was duly paid to High Street.

[11] On 10 January 2012 a first addendum was entered into in respect of each of the three sale agreements. The parties to these addenda were the respective sellers and Hansa, on the basis that it was nominated by Mr Ichikowitz as the purchaser of the lodge. In terms of the addenda each sale agreement was essentially amended to provide for extension of the date on which the balance purchase price had to be secured and for Hansa to take occupation of the lodge on 1 January 2012, which it did.

[12] There are two video recordings of the events at the auction. One displays a view from the auctioneer's podium onto the floor and another provides a view from the floor towards the auctioneer. The former recording was shown to Mr Ichikowitz by High Street during February 2012. This happened at the request of Mr Ichikowitz, after the media carried a story of alleged misconduct at an auction of a well-known wine estate. Attorneys acting for the purchasers obtained copies of both video recordings. Correspondence between the attorneys of the purchasers and High Street

followed, culminating in a letter by the former dated 15 May 2012. In terms of this letter High Street was notified that the purchasers did not consider themselves bound by any of the sales pursuant to the auction. A refund of the commission was demanded. No similar letter was directed to the sellers. High Street took issue with the stance adopted by the purchasers and refused to accede to their demand.

[13] Consequently, on 27 August 2012, the purchasers launched the application referred to earlier in terms of which they, inter alia, sought an order that they were not bound by the sale agreements and also claimed repayment of the commission paid to High Street. Notably, on the same date Hansa and the respective sellers signed the second addenda to the sale agreements. The second addenda were signed on behalf of Mr Ichikowitz on 4 September 2012. The second addenda amended the sale agreements and the first addenda. In terms of the second addenda certain transactions, defined as 'trigger events', were required to be concluded by 31 October 2012. If they were not, a total credit of R2 million in respect of the purchase price of the lodge was to be given. The first of these transactions was a sale agreement in terms of which Mr Ichikowitz would acquire shares held by Mr Serfontein in a company named UIS Analytical Services (Pty) Ltd. The second was a joint venture heads of agreement in terms of which a joint venture would be established by Mr Ichikowitz and Mr Serfontein and to which Mr Serfontein would provide free geological services to the value of R2 million. These transactions were concluded within the stipulated time. The properties constituting the lodge were therefore transferred to Hansa in terms of the sale agreements as amended by the first and second addenda thereto against payment of R20 million. In short, the object appears to have been to exclude High Street's entitlement to commission.

[14] High Street opposed the application. It also joined the sellers as third parties in terms of rule 13 of the Uniform Rules of Court. In the notice High Street claimed payment of its commission in respect of the auction from the sellers, upon condition that the purchasers are successful in the main application. For this relief High Street relied on the terms of the mandate and

its performance in terms thereof. The sellers objected to the third party notice on the basis that it constituted improper use of rule 13. On the merits they opposed the relief claimed mainly on the ground that the conduct of the auctioneer as described in the founding affidavit, disentitled High Street from payment of commission in terms of the mandate. I shall in due course allude to the alleged conduct of the auctioneer in some detail.

[15] The court a quo found for High Street and dismissed the application of the purchasers with costs, including the costs of two counsel and considered it unnecessary to deal with the third party proceedings. Consequently it made no order in respect of the costs thereof. The purchasers applied for leave to appeal against the dismissal of the application. The sellers applied for leave to appeal on the ground that the court a quo failed to deal with the third party proceedings and should have ordered High Street to pay the costs thereof. High Street in turn applied for leave to cross-appeal for an order that the purchasers jointly and severally pay the costs of the third party proceedings. Leave to appeal to this court was granted by the court a quo in respect of all these applications.

The auction

[16] In the founding affidavit Mr Ichikowitz said that the video recordings indicated the following in respect of the bidding after the price of R15 million had been reached. By gesticulating around the room, so Mr Ichikowitz claimed, the auctioneer represented that bids emanated from genuine bidders, whilst there were none. A representative of High Street would, so it was alleged, point to an area where a bid was supposedly made when in fact there had been no such bid. The auctioneer would conduct himself as though he was accepting a bid from a bidder in that area. No bid was in any manner identified as a bid by or on behalf of the sellers. In sum the case of the purchasers was that the video recordings provided evidence of fraudulent conduct — sham bidding — by the auctioneer and other representatives of High Street.

[17] In the answering affidavit, however, the auctioneer provided a detailed and materially different version with specific reference to the timestamp on one of the video recordings. Some of its significant moments are reproduced below. It is necessary to explain that a third party bidder by the name of Dr S A Hoseini was registered with the auctioneer. Messrs Beck, Jacobson, Kleynhans and Dall were representatives of High Street that rendered assistance at the auction. The second applicant is of course Mr Ichikowitz:

00:27:05: I announce the nominal opening bid to get the auction started at R9 million;

00:27:20: The third party bidder places his bid for R12.5 million.

00:27:28: I place a vendor bid on behalf of the seller at R15 million by saying "I have it at 15 sir";

00:27:50: The second applicant places what I believe to have been his first bid at R16 million. I confirm receipt of the bid by saying "I have got your 16 sir";

00:27:54: Beck confers with the second applicant by crouching down to his level. Beck then signals me that the second applicant wanted to bid an increment of R500 000 and not a million. However, I had already by then placed a further bid for R17 million on behalf of the seller by saying "I have it at 17 now sir";

00:28:04: The second applicant places a further bid for R18 million.

00:28:06: I place a further bid at R19 million on behalf of the seller by saying "I am back at 19 sir";

00:28:25: I call for bids at R19.5 million;

00:28:31: Jacobson confers with the second applicant and on the second appellant's instruction makes a bid. I assume the bid is R19.5 million but Jacobson corrects the second applicant's bid to R19.25 million;

00:28:50: I make a further vendor bid at R19.5 million by saying "I have it at 19.5";

00:29:04: I say that we are going up in quarters and Jacobson thereafter places a bid for another "quarter" on behalf of the second applicant, thus raising the bid to R19.75 million. Dall is conferring with Serfontein who indicates to Dall that he would accept R20 million for the lot. At that point the seller is thus reducing his reserve price from the stated R25 million to R20 million;

00:29:28: Pretorius indicates to me that the third party bidder is out. At this point in the vicinity of the seller Kleynhans joins Dall and Dall explains to Kleynhans that Serfontein had indicated that he would reduce the acceptable price to R20 million.

Kleynhans then confers with and gets confirmation of this from Serfontein, whereupon he moves towards the direction of the second applicant;

00:29:54: Kleynhans reaches the second applicant and advises the second applicant that his bid of R19.75 million is a little too low, but that if he went to R20 million, the seller will accept it;

00:30:07: The second applicant indicates to Kleynhans that he is prepared to up his bid by R250 000 to R20 million so as to meet the price indicated by the seller:

00:30:10: Kleynhans indicates to me that he has a bid for R20 million from the second applicant and that it is “on the market”, indicating to me and the floor that the seller’s reserve price has now been reduced and met by the bid;

00:30:25: I indicate that the property is on the market;

00:30:30: Pretorius indicates that the third party bidder is definitely out by waving his hands in front of his stomach; and

00:30:34: I bring the hammer down on the sale at R20 million.’

The picture that emerges is of bids by Dr Hoseini and Mr Ichikowitz interspaced by bids by the auctioneer on behalf of the sellers, all below the reserve price.

[18] In reply Mr Ichikowitz said that he had been advised that in the light of the competing version of the auctioneer, the court would not be in a position to conclude that the sale of the lodge had been fraudulently procured, without the hearing of oral evidence, but submitted that the court should nevertheless find in favour of the purchasers on the version of the auctioneer. Significantly, however, he also said the following:

’15.1 In these paragraphs Van Reenen deals with the events at the auction itself.

15.2 I am advised and submit that the court is obliged to accept what is stated by Van Reenen subject to:

15.2.1 a comparison therewith with the video recordings; and

15.2.2 the fact that what he alleges is not complete in all respects.’

No indication was given that a comparison of the version of the auctioneer with the video recordings would reveal a material difference.

Analysis

[19] In this court the purchasers relied on two grounds for the claim that the sale agreements and the first addenda were invalid. The first was that

because of non-compliance with the regulations, the auctioneer was not permitted to bid at the auction at all. The second ground was that the auctioneer was obliged to identify his bids on behalf of the sellers, but failed to do so.

[20] The purchasers relied on regulations 26(3) and (4) which provide:

'(3) The auctioneer must ensure that a person who intends to bid on behalf of another, produces a letter of authority expressly authorising him or her to bid on behalf of that person, and both that person and the person bidding on his or her behalf must meet the requirements of subregulation (2).

(4) The auctioneer must ensure that if a person will be bidding on behalf of a company, the letter of authority contemplated in subregulation (3) must appear on the letterhead of the company and must be accompanied by a certified copy of the resolution authorising him or her to do so.'

The bidder's record indicated that paddle number 355 had been registered for purposes of vendor bidding in respect of lot 5. It is common cause, however, that the auctioneer did not produce any such document.

[21] These provisions must be read with regulation 26(1) and (2). In terms of regulation 26(1) the auctioneer must have a bidder's record for every auction 'to record the identity of all bidders at an auction'. Regulation 26(2) states that the auctioneer must ensure that every prospective bidder is registered prior to the commencement of the auction. Such registration must with the necessary changes meet the requirements of Chapter 1 of the regulations in terms of FICA.

[22] The ordinary meaning of regulation 26(3) and (4) is clear. The auctioneer must ensure compliance by prospective bidders. Their purpose is clearly to identify bidders in order to enable communication with successful bidders for purposes of matters such as delivery of the goods and securing payment of the purchase price. In this context the ordinary meaning of these provisions makes good sense. Everybody at an auction knows or could easily ascertain the identity and location of the auctioneer and the auction house, where applicable. Regulation 21(2)(b) provides that the rules of an auction

must contain the full names, physical address and contact details of the auctioneer, and where applicable, of the auction house. I find therefore that regulation 26(3) and 26(4) are not applicable to an auctioneer who intends to bid on behalf of a seller.

[23] As stated earlier, the purchasers' queries were prompted by media reports of sham bidding at the auction of a wine estate. Auction bids by or on behalf of the seller (vendor bidding) must be distinguished from sham bidding. Instances of sham bidding are bids in terms of an underhand arrangement to artificially raise the sale price or a non-existent bid represented as a real bid. Sham bidding is of course unlawful. In terms of the common law vendor bidding is prohibited at auctions without reserve. See G Hackwill *Mackeurtan's Sale of Goods in South Africa* 5 ed (1984) at 250 para 16A.12. Subject hereto, vendor bidding and bidding by or on behalf of the auctioneer is expressly recognised by the CPA. Section 45(4) and (5) thereof provide:

- '(4) Notice must be given in advance that a sale by auction is subject to —
- (a) a reserved or upset price; or
 - (b) a right to bid by or on behalf of the owner or auctioneer, in which case the owner or auctioneer, or any one person on behalf of the owner or auctioneer, as the case may be, may bid at the auction.
- (5) Unless notice is given in advance that a sale by auction is subject to a right to bid by or on behalf of the owner or auctioneer —
- (a) the owner or auctioneer must not bid or employ any person to bid at the sale;
 - (b) the auctioneer must not knowingly accept any bid from a person contemplated in paragraph (a); and
 - (c) the consumer may approach a court to declare the transaction fraudulent, if this subsection has been violated.'

[24] The argument of the purchasers raised the question whether vendor bidding is only permissible if identified as such at the time. We were not referred to any authority for such proposition. Contemporaneous identification of vendor bidding is not required by s 45 of the CPA. Section 45(5) requires no more in this regard than that notice must be given in advance that the sale is subject to the right to bid by or on behalf of the owner or the auctioneer. Regulation 21 deals extensively with prohibited behaviour of an auctioneer.

Regulation 28 contains provisions in respect of bidding. Neither requires identification of vendor bids as such. This accords with the position of other bidders. A bidder is not obliged to identify himself or herself when bidding.

[25] It is common knowledge that the auctioneer is the agent of the seller and that the purpose of the auction is to obtain the best possible price for the benefit of the seller. It is not intended to provide the public with the opportunity to obtain bargains. Vendor bidding is only permitted in case of prior notice thereof. No person is compelled to bid at such auction nor to bid higher than what the bidder is willing to spend. A vendor bid up to the reserve price does not deprive a bidder of a sale below the reserve price. That is the result of the reserve price itself. And the acceptance of a bid below the reserve price is, in any event, within the control and province of the seller.

[26] In my view the enquiry should centre on whether the non-disclosure of a vendor bid in any given case constituted a misrepresentation. That question must of course be decided on the facts and circumstances of each case. If the failure to identify a vendor bid as such does constitute a misrepresentation in the particular circumstances, an auction sale may in terms of general principles of contract be avoided if the misrepresentation was material and induced the sale.

[27] High Street submitted that the auctioneer's bids on behalf of the sellers were in fact identified as such in the context in which they were made. This submission finds support in the New Zealand judgment in *Commerce Commission v Grenadier Real Estate Ltd* – [2004] 2 NZLR 186, to which we were referred by the purchasers. There the court referred to the Fair Trading Act of 1986 which provides that the vendor of property makes a false or misleading representation with respect to the price of the property if the vendor, or any agent acting on behalf of the vendor, makes a vendor bid for the property. However, this does not apply if there is a reserve price for the property and the bid is made before the reserve price is reached and is clearly identified as a vendor bid. The New Zealand legislation therefore expressly

requires clear identification of a vendor bid. In para 44 of the judgment the following is said in respect of the identification of a vendor bid:

‘Clarity in this respect could be achieved in a number of ways. No particular language would be needed. It would not, for instance, be necessary to use the words “vendor’s bid” or the equivalent on each occasion of lodging such a bid. Some degree of shorthand which does not have a tendency to mislead would suffice, such as the expressions which Mr Smith and Mr Woodley referred to in their evidence: “The bid is with me” or “I have the bid now”.’

I find no material difference between these bids and the vendor bids of the auctioneer as reflected in para 17 above.

[28] In addition, the purchasers did not show that the auctioneer’s bids on behalf of the seller constituted material misrepresentations that induced the sale agreements. The rules of the auction made clear that the auctioneer was entitled to bid on behalf of the seller up to the reserve price. Mr Ichikowitz is an experienced businessman who had in the past purchased several properties on auction. It is very unlikely that a person in his position who had been made aware of the possibility of vendor bidding by the auctioneer, would be misled by the vendor bids in question. Mr Ichikowitz has only himself to blame for ignorance of the possibility of vendor bidding by the auctioneer. What is more, he took a deliberate decision to raise his bid to meet the reduced reserve price of R20 million. Any prior misrepresentation therefore in any event did not induce the sale agreements.

[29] It follows that the court a quo correctly refused the relief claimed in the notice of motion. Although there is much to be said for the argument that the purchasers did not cancel the sale agreements qua the sellers and therefore cannot approbate and reprobate, it is not necessary to decide that issue.

[30] As a last resort the purchasers asked that the matter be referred to trial. This was prayed for in the alternative in the court a quo. It must therefore be accepted that it exercised the discretion not to refer the matter to trial. The question is whether there is any ground on which the exercise of this discretion could be interfered with on appeal. The exercise of this discretion

should to a large extent be guided by the prospects of viva voce evidence tipping the balance in favour of the purchasers in respect of the allegations of fraud. See *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 A at 979H. In the light of para 18 above and the fact that the purchasers made no attempt to place the video recordings before court, there appears to be little or no prospect of establishing the alleged fraud at a trial. I am by no means convinced that the court a quo should have referred the matter to trial.

[31] It remains to deal with the costs of the third party proceedings. I do not agree that rule 13 could not be employed by High Street in respect of the sellers. In terms of rule 13(1)(b) a party may, inter alia, make use of third party procedure where an issue in a matter is substantially the same as an issue which will arise between such party and a third party and should properly be determined between any of the parties to the matter and the third party. Rule 13 is intended to avoid multiplicity of actions. Rule 6(4) makes it applicable to applications. The purchasers relied on the alleged conduct of the auctioneer to avoid the sale agreements. The sellers relied on the same conduct to avoid payment of commission in terms of the mandate. That is substantially the same issue that was properly determined between the purchasers, High Street and the sellers. It was reasonable in the circumstances for High Street to join the sellers. The issue on which the purchasers and the sellers made common cause, was determined in favour of High Street. In my view the court below should have ordered the purchasers jointly and severally to pay the costs of the third party proceedings.

[32] A judgment or order may subsequently be supplemented in respect of accessory or consequential matters which the court overlooked or inadvertently omitted. See *Firestone South Africa (Pty) Ltd v Gentiruco* 1977 (4) SA 298 (AD) at 306H; *Ex Parte Minister of Social Development & others* 2006 (4) SA 309 CC para 30-31. The costs of the third party proceedings in the court below is such a matter. Counsel for the sellers intimated that either the purchasers or High Street should pay these costs and that it did not matter who it was. In these circumstances it was not necessary for the sellers to appeal. They should in my view have approached the court a quo for an order

in respect of the costs of the third party proceedings. It follows that the appeal of the sellers must fail and that High Street's cross-appeal must succeed.

[33] In the result the following order is made:

1 The appeals of the appellants are dismissed with costs, including the costs of two counsel.

2 The cross-appeal is upheld with costs, including the costs of two counsel and the order of the court a quo is supplemented by adding the following:

'The applicants are jointly and severally ordered to pay the costs of the third party proceedings, including the costs of two counsel.'

C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For 1 and 2 Appellant: P van Blerk SC (with him A Laser)

For 3rd to 5th Appellants: B M Slon

Instructed by:

Brian Kahn Inc, Craighall Park

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For Respondent:

A R Gautschi SC (with him C J Bresler)

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