REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **61930/2012**

21/4/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

E M Kubushi 21/04/17
SIGNATURE **DATE**

In the matter between:

MARTIN BREEDT	**APPLICANT**
VS	
MELANI BREEDT	**1ST RESPONDENT**
SHERIFF CENTURION WEST	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS	**3RD RESPONDENT**
ALL FOR APPLIANCE SERVICES (PTY) LTD	**4TH RESPONDENT**

JUDGMENT

KUBUSHI J

[1] The application before me is an opposed application for leave to appeal against the whole of my judgment handed down on 25 January 2016 in which I dismissed the applicant's application with costs. The applicant seeks leave to appeal to the Supreme Court of Appeal alternatively the Full Bench of this Division.

[2] In the main application, the applicant sought an order to declare the auction held on 12 May 2014 and the subsequent agreement of sale in execution concluded between the second respondent and the fourth respondent, null and void for non-compliance with the court order granted on 10 September 2013 by agreement between the applicant and the first respondent. Ancillary to the said order, the applicant sought a cost order, in regard to the additional costs and the wasted costs associated with the sale in execution, against the first respondent.

[3] The factual matrix in this matter is mostly common cause between the applicant and the first respondent (the parties). The parties were previously married to each other and were consequently joint owners of immovable property situated in Centurion, Gauteng. The marriage was dissolved by an order of court on 2 April 2012. As part of the divorce order, the parties concluded a settlement agreement which was made an order of court.

[4] In terms of that court order the applicant was to pay to the first respondent an amount of R475 000 on date of transfer as compensation for her undivided share in the property. This, however, did not materialise due to what I can refer to as unforeseen circumstances. Despite efforts to find an amicable solution regarding the property, the parties could not settle the matter which resulted in the first respondent launching an application to court.

[5] On 10 September 2013, the parties entered into another settlement agreement which was also made an order of court. The said court order reads as follows:

"By agreement between the parties the following is made an Order of Court

1. Both parties shall immediately secure an independent valuation of the immovable property from two reputable estate agents within 7 days from date of this order and shall deliver a copy of such valuation to the other party's attorneys of record. For purposes of the order the average value of the two valuations shall be deemed to be the market related value.
2. Both parties shall be entitled to market the immovable property in the open market in an endeavour to procure a willing and able buyer for the immovable property at a market related price over a period of three months from the date of this order. Unless acceptable bank guarantees are received from a purchaser the provisions of paragraph 3 *infra* shall apply.
3. The Second Respondent (the sheriff and second respondent in the present application as well) shall be authorised to sell the immovable property, after the lapse of the three months period referred to in paragraph 2 *supra* to sell the immovable property by public auction for a market related value. For purposes of this paragraph the market related value shall be the lower of the two valuations referred to in paragraph 1 *supra*. The Second Respondent shall continue this process until the immovable property is sold.
4. From the net proceeds arising from the sale of the immovable property the Applicant shall be paid the amount of R475 000-00 together with interest or the aforesaid amount at a rate of 15, 5% per annum calculated from 3 July 2012 to date of payment.
5. Both parties undertake to sign all documentation necessary to effect transfer of the immovable property into the name/s of the purchaser/s failing which the Second Respondent is authorised to sign all such documentation on behalf of the defaulting party at such party's costs.
6. First Respondent shall be obliged to allow the applicant's estate agent/s to market the immovable property and must co-operate with the said agents
7. The First Respondent is ordered to pay the Applicant's costs from lodgement of this application up until January 2013 when the counter-application was lodged."

[6] It is common cause that the property was eventually evaluated at the market related value of R1 400 000. It also appears that both parties' individual attempts to sell the property on the open market for the agreed market related value was unsuccessful. There is evidence that the applicant provided the first respondent with

no less than two proposed offers to purchase the property but none of the two offers materialised.

[7] When it became clear that the parties were not able to sell the property, the first respondent approached the sheriff (the second respondent in the application) as mandated by the court order of 10 September 2013, to have the property sold on auction. On the basis of the writ of execution issued by the first respondent the property was attached and thereafter sold in execution through the sheriff's auction process. The property was auctioned off the first round at the reserve price of R1 400 000. When there were no bids reaching the reserve price the sheriff proceeded to auction the property again, with no reserve price. The property was eventually sold to the highest bidder, being the fourth respondent at a price of R1 181 000 which is an amount far less than the agreed market related price of R1 400 000.

[8] The applicant raises various grounds of appeal in the application for leave to appeal. In particular the applicant contends that I rescinded and/or varied/or amended the court order granted on 10 September 2013 by ignoring the market related value as contained in the said court order.

[9] At the hearing of the main application, the applicant's arguments were based on the grounds that the sale in execution was premised on a fatally defective process employed by the first respondent and that the court order of 10 September 2013 did not provide for the market related value to be discarded merely because the market related price could not be attained.

[10] In my judgment I found the process employed by the sheriff, the sale by public auction, to be valid. I also interpreted paragraph 3 (the last sentence thereof) of the court order not to mean that the sheriff should continue with the process, selling the property at the same price of R1 400 000 *ad infinitum*.

[11] At the hearing of the application for leave to appeal, the applicant's counsel conceded that the process followed by the sheriff when selling the property was valid. What remained in issue was the interpretation I had given to the last sentence of paragraph 3 of the court order. The contention is that the first respondent and/or the sheriff were not entitled to sell the property at a lesser price than the agreed valuation amount of R1 400 000.

[12] The argument by the applicant is that when considering the intention of the parties another court will come to a different interpretation of the said last sentence of paragraph 3 and find that the property should not have been auctioned off at a price less than the agreed valuation amount of R1 400 000.

[13] The crux of this application, therefore, lies in the interpretation of the last sentence of paragraph 3 of the order of 10 September 2013.

[14] An application to be granted leave to appeal is made in terms of s 17 (1) *(a)* of the Superior Courts Act 10 of 2013 (the Act). The section provides, inter alia, that –

> "1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> (a) (i) the appeal would have a reasonable prospect of success;
>
> or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

[15] It is has now become trite that the wording of subsection 17 (1) *(a)* (i) of the Act has, by the use of the word "would", raised the bar of the test that has to be

applied to the merits of the proposed appeal before leave to appeal can be granted. The requirement is no longer the reasonable prospects that another court might come to a different conclusion, but, that the appeal would have a reasonable prospect of success. The use of the word "would" in the new statute is said to indicate a measure of certainty that another court will come to a different conclusion.[1]

[16] It is not in dispute that the application before me turns mainly on the interpretation of the last sentence of paragraph 3 of the court order.

[17] The proper approach to interpretation has been enunciated in the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality.* [2] The court in that judgment stated as follows:

> '[18] . . . The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. (my emphasis) Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. . ."

[1] See The Mont Chevaux Trust (IT 2012/28) v Tina Goosen unreported judgment of the LCC case no. LCC14R/2014 para 6.

[2] 2012 (4) SA 593 (SCA) para 18.

[18] Whilst it is said that the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.[3]

[19] In the light of the above quoted judgments, I am of the view that the applicant's submission that I did not take the intentions of the parties into account when interpreting the sentence in question is incorrect. In addition to the intention of the parties, being to sell the property, I also considered the surrounding circumstances and the circumstances attendant upon the coming into existence of the court order. The fact that the house had not been sold for a period in excess of three years despite various attempts by the parties to sell it, played an important part. I have in my judgment set out various scenarios indicating the attempts made by either party to sell the property unsuccessfully. From the facts placed before me, there is no indication that the property will sell at the agreed market related value of R1 400 000.

[20] Similarly, as reasoned in my judgment, to grant leave to appeal against the factual background of this application would be to cause a fundamental injustice to the first respondent. The applicant had, at all material times hereto, the benefit of occupation and use of the property to the prejudice of the first respondent.

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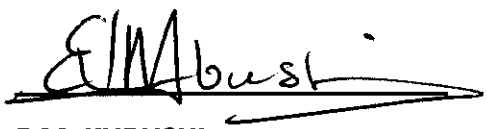
[3] See Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) para 12.

[22] Leave to appeal must, in my view, be refused as another court would not come to a different conclusion on the merits.

[23] The application for leave to appeal is dismissed with costs.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

Counsel for Applicant:	**Adv. C. Zietsman**
Instructed by:	**Anton Rudman Attorneys**
Counsel for 1st Respondent:	**Adv. C. Van Schalkwyk**
Instructed by:	**Ven&Muller Attorneys**
Date heard:	**12 April 2017**
Date of judgment:	**21 April 2017**