CIV/APN/324/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

METAL TANK INDUSTRIES (PTY) LTD	**APPLICANT**
and	
PHILLIP REYNOLDS NO.	**1ST RESPONDENT**
SYMOUR CLYDE HARLEY NO.	**2ND RESPONDENT**
-and-	
THE MICHAEL JAMES ORGANISATION CC.	**3RD RESPONDENT**

JUDGMENT

Delivered by the honourabele Mr Justice WCM Maqutu
on the 10th day of April 2000

On the 11th August 1999, applicant brought the following application:

"1. The 1st, 2nd and 3rd Respondents are ordered to hand to the Applicant the goods auctioned as items: 9,10,11,12,13,14,15,16,17,25,26,29,34,35,36,37,38,39,40,41,42,43-44,59,60,61,62,63,64,65,67,68,69,70 and 71 on the auction held by the 3rd Respondents on instruction of the 1st and 2nd Respondents on the 21st of July 1999 at Mafeteng, Maseru in the insolvent of Highveld Ceramics (Pty) ltd (in liquidation) against payment by Applicant of the sum of R101,300.00 plus 14% VAT.

2. The 1st and 2nd Respondents are ordered to pay the costs of the Application jointly and severally, one paying the other to be absolved.

3. Further and/or alternative relief.

The sale was governed by conditions that were spelt out in the auction catalogue. This sale was to be held at Mafeteng on the 21st July 1999 at 10.30 a.m. It seems from the submissions that the sale was held, but it might not have been in Mafeteng but somewhere in Lesotho. This fact does not seem to be of importance. What is not denied is that the sale proceeded but it was stopped after applicant had bought some of the auctioned goods.

Applicant says respondents cancelled the sale (over the objections of applicants) and refunded deposits to the bidders. Respondents says it proposed to the bidders that the sale be cancelled and it was cancelled. It is not true (according to respondent) that applicant ever objected. The following day applicant tendered payment by letter and demanded the goods it had purchased.

The items that are being claimed in this application were part of the goods that had been offered for sale. There is no dispute these goods had been knocked down in favour of the applicant as the highest bidder by the auctioneer. There is no dispute that applicant had been ready to pay the R101 300-00 plus VAT or Sales Tax and take charge of the goods when the sale was cancelled. I specifically asked Mr *Fischer* whether it was respondent's case that applicant failed to pay for the goods immediately after the sale and he said no.

There is some dispute of what happened. Respondents say applicant agreed to the cancellation of the sale, while applicant says it did not. Applicant says it objected to respondent cancellation of the sale while respondents say applicant never raised any objection and accepted respondents cancellation of the sale and waived his rights to the goods.

In short applicant claims the goods that he has bought at an auction. The conditions of the sale were the following:

"1. The Auctioneer's sole obligation and responsibility shall be to exhibit goods placed with him and solicit offers or bids in respect thereof in such manner and at such times as the Auctioneer may determine in his sole and unfettered discretion.

2. Where the Auctioneer accepts any bid or offer, he in doing so, merely communicates the acceptance of the Seller and incurs no contractual obligation or liability on his own behalf.

3. The Auctioneer does not make any warranty or representation in respect of any lot or part thereof. All sales are "Voetstoots" and all rights flowing from any breach of contract or delict shall be exercised directly between the Seller and the Purchaser.

4. The contents of any advertisement, catalogue or other promotional material issued in respect of any lot or part thereof is not warranted and no bid shall be made or accepted other than in terms hereof.

5. The Auctioneer reserves the right to regulate the bidding and to withdraw, alter or vary any lot or parts thereof or vary the order of same.

6. Unless the highest bid is for an amount of less than the reserve or minimum price placed on any lot, the highest bidder shall be declared the Purchaser.
7. Should any dispute arise either during the bidding or thereafter the Auctioneer shall in his sole and unfettered discretion be entitled to put the lot or lots up again for auction or declare any of the disputing parties to be the Purchaser without prejudice to any claim which the Auctioneer or Seller shall have for damages.
8. The Auctioneer's decision shall at all times be final.
9. Risk in and to any lot shall pass to the Purchaser thereof at the fall of the hammer.
10. Ownership in and to any lot shall pass to the purchaser thereof when the purchase price and all other amounts payable have been paid in full notwithstanding that delivery or removal of any article sold has taken place.
11. Payment for any lot purchased shall be made by way of cash or bank guaranteed cheque immediately upon the conclusion of the sale. Should payment not be so made the Auctioneer shall in his sole and unfettered discretion be entitled to summarily cancel the sale without prejudice to any claim which the Auctioneer or Seller shall have for damages.
12. A R500 fee, payable in advance will be levied on any sale concluded where the Purchaser requires his invoice to be made out to a Financial Institution and payment is not received upon the conclusion of the sale.
13. All bids are exclusive of VAT and where applicable, VAT will be

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added at the current rate to the Purchaser's invoice.

14. The Auctioneer's Vendue Roll or any certificate purporting to be signed by the Auctioneer shall be final and binding and shall be conclusive proof of anything contained therein for the purposes of litigation, provisional sentence, summary or default judgements.

15. If the Auctioneer or any employee or associate is requested to bid or make any offer by a Buyer such bid or offer will at all times be made subject to the provisions hereof.

16. The Purchaser chooses as his domicilium citandi et executandi, the address given by him on the Buyer's card.

17. Either the Seller or the Auctioneer shall be entitled to institute action against the Purchaser in any Magistrate's Court having jurisdiction over the Purchaser notwithstanding that the amount in dispute may exceed the jurisdiction of the Magistrate's Court and the Purchaser consents to the jurisdiction of the Magistrate's Court accordingly. Notwithstanding the aforegoing the Seller or the auctioneer shall be entitled to institute action in the Supreme Court of South Africa and the parties hereto consent to the jurisdiction of the Supreme Court of South Africa (Witwatersrand Local Division)

18. Should the Seller or the Auctioneer institute actions against the Buyer arising out of this agreement any costs which may be awarded against the Purchaser shall be calculated on the scale as between Attorney and own client.

19. These conditions of sale form the sole basis on which the parties transact and no variation, alteration, novation, cancellation of this agreement of any of the terms hereof shall be of any force of effect

unless reduced to writing and signed by all the parties concerned."

What is not is disputed is that the sale was cancelled after the goods that are being claimed had been bought by the applicant. The respondent's reason was that the goods had been bought too cheaply. The applicant claims respondents acted unilaterally and high handedly in cancelling the sale. Respondents say after they had cancelled the sale, they persuaded applicant to agree to the cancellation, and applicant was persuaded. Applicant (according to respondents) cannot be heard to say he is still entitled to the goods.

I must pause here to observe that as Carlisle J said in *Shandel & Jacobs & Another* 1949(1) SA 320 at 321 "all conditions of sale form a contractual relationship between the auctioneer and the bidding public". I believe, it is precisely for that reason that Mr Fisher for respondent could not argue against any of the conditions of sale. It is also trite law that, the sale at a public auction is concluded at the fall of the hammer—*Nicolau v Navarone Investments (Pty) Ltd* 1971(3) SA 883 at page 884 H. It seems to me that as respondent's counsel conceded, the sale had been complete. His defence is therefore on other grounds.

Mr *Fischer* who appeared for applicant argues that respondent waived his claim to the goods. Mr *Ebberson* argues that he never did so. Applicant (according to his affidavits) never left respondents in doubt that he was not surrendering the goods that he had bought at a bargain price. Applicant says he left respondents in no doubt that applicant was breaching the contract in terms of which applicant had bought the goods.

By agreement the issues in its case were crisply put to me as follows:-

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Applicant must succeed unless:

(a) The sale was lawfully cancelled, and

(b) Applicant had by law waived his rights.

The court directed Mr Fischer for respondent to be the first to argue as soon as Mr *Ebberson* for applicant had finished outlining the issues. Mr *Fischer* had no objection. As his argument proceeded it soon became clear that the sale and the rights of applicant to the goods claimed could normally not have been open to challenge. Respondent's defence could neatly be summarised as that of waiver. Applicant, it was argued, had by conduct agreed to the cancellation of the sale and thereby waived his rights. In other words respondents knew they could not lawfully cancel the sale unless applicant agreed. Applicant agreed according to Mr. *Fischer.*

I have therefore to determine this central issue on the papers as neither of the parties applied for *viva voce* evidence to be heard. It is true that they recognised that if the court wanted to hear *viva voce* evidence; they would have to accept the courts decision. The court will only feel it has to hear *viva voce* evidence if there is a compelling reason to do so.

A bidder who goes to an auction normally has very few rights beyond what he is given by the conditions of sale. Indeed in Volume I of the *Dictionary of Legal Words and Phrases* by Classen at page 154 there is the following quotation from Grotius Introduction 3·14·30:-

> "In sales by public auction each bidder is bound by his bid, and he acquires no right if others bid higher."

I have already observed that all conditions of sale form a contractual relationship between the auctioneer and the bidding public. If this is the correct position I am bound not to agree with Mr *Ebberson*'s submission that there was ever a written contract which could exclude evidence from the parties. There was nothing however, to stop the parties from converting an oral contract into a written one if they so desired. Consequently Coertzee J in *Ex Parte Kramer* 1973(4) SA 163 at 167 G.H. said:

> "Whilst it seems beyond doubt that an oral contract results at the fall of the hammer, I cannot see why that oral contract should not therefore be capable of being turned into one "made in writing" ....But once parties have in fact reduced the agreement to writing, the document is, in general, regarded as conclusive as to the terms of their transaction which it was intended to record...."

Ex parte Kramer does not apply to the facts of this case, but clause 19 remains as Mr Ebberson said an important part of the auction sale.

That being the position, there can be no doubt that Clause 19 of the conditions of sale applies to this sale although the actual sale and the fall of the hammer constitute an oral contract. In other words the written conditions are the rules governing the sale and are written, while the sale itself was conducted and concluded orally. Therefore among the onuses respondents have to bear is that of overcoming Clause 19 of the conditions of sale which provides:

> "These conditions of sale form the sole basis on which the parties transact—and no variation, alteration, novation, cancellation of this agreement—or any terms hereof shall be of any force or effect unless reduced to writing and signed by all parties."

This condition that was intended to protect the interest of the auctioneer and its principals should also apply to those of the purchaser. The auctioneer had the right to put a reserve price and to stop the sale at any time during the sale.

It seems to me that in all auction sales the possibility of disputes is an ever present danger because the most material portions of the sale are done verbally. The dispute that is now before me is by no means unusual or unexpected. It is not surprising that clause 19 was put into the conditions of sales to help when problems such as this one arises. It was for Mr *Fischer* to persuade me that there were special reasons or grounds for avoiding the operation of clause 19 of the conditions of sale.

I will go over his arguments as I understood them.

Was the sale cancelled with applicant's acquiescence?

The sale in respect of the goods for which bidding had not commenced is not in issue. I will not (nor am expected to) deal with the sale in respect of those goods. If I understood the parties well, there was no dispute that the goods that applicant claims had been bought by applicant as there was no reserve price and he was the highest bidder.

It is not surprising that both parties agree that a sale had taken place. The four operative clauses of the conditions of sale are the following:

> "5. The auctioneer reserves the right to regulate the bidding and to withdraw, alter or vary any lots or parts thereof or vary the order of the same.

"6. Unless the highest bid is for an amount less than the reserve or minimum price placed on any lot, the highest bidder shall be declared the purchaser.

"8. The auctioneer's decision shall be at all times final.

"9. Risk in and to any lot shall pass to the purchaser thereof at the fall of the hammer."

On the facts admitted there can be no doubt finality had been reached. There were no disputes that could lead to any reconvening of the sale in terms of clause 7 of the conditions of sale. The auctioneer never altered the ground rules within the meaning of clause 5 of the conditions of sale. The auctioneer also never placed a minimum or reserve price. The goods were duly sold to applicant who was declared purchaser of the goods at the fall of the hammer.

My only problem which was no problem to Mr *Fischer* was whether the purchase price should not have been paid or tendered there and then in terms of clause 10. Mr Fisher said I could not visit failure to pay on applicant having regard to what subsequently happened after the hammer had fallen in favour of applicant. It was respondents who decided to cancel the sale and return the deposits that applicant and others had paid in order to participate in the sale. That being the case Mr *Fischer* said he would not go so far as to say applicant should be found to be in breach of clause 10. He could only be said to have acquiesced in the cancellation in accepting his deposit.

I had considerable difficulty with respondent's main deponent Mr Phillip Reynolds

who claimed to have acted in the creditors interests and those of the insolvent throughout. If he was there in the hall there is no evidence of that, because he never placed a reserve price as he was entitled to do. He seems suddenly out of the blue to have decided it was best if the plant should be sold to a single purchaser. This he could get the auctioneer to do in terms of clause 6 and that is not in issue. What is the bone of contention is what had already been sold. Mr Reynolds put what happened as follows:

> 6·2 At a point in time, I realised that the prices that were being obtained at the auction were far below the market-related value for the insolvent estate assets, essentially a ceramic plant ("the plant"). The plant was estimated to have a realisable sale value of R6 million. In the circumstances, it was clear to me that the auction was not in the best interests of the creditors and the insolvent estate, whose interests I am obliged at all times to protect.
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> "6·3 At that time I was and still of opinion, that selling the plant to a single purchaser in its entirety will best protect the creditors interests. I was however prepared to sell certain assets, not deemed to be part of the plant."

Mr Reynolds then goes on to show that when these ideas occurred to him, he called on Mr Tony Muller who was the auctioneer and put his views to him. He then requested Mr Muller to inform the bidders and explain the intention to cancel the sale so that a suitable purchaser of the assets could be sought. Mr. Harley and Mr Muller supported his request. Mr Reynolds says he realised that if any of the bidders objected, he would have to reconsider the intention to cancel the sale. Each bidder was to be refunded his deposit.

Mr Reynolds does not say clearly whether he was present when Muller the auctioneer talked to the successful bidders including Mc Gregor who acted for applicant All he can say is that Mac Gregor did not object to him or to any of the respondents. Mc Gregor accepted the arrangement and collected his deposit and left. The arrangement had been that if no suitable purchaser could be found, the goods purchased would be offered to them again by telephone.

It seems to me that the person in charge of the auction sale was Mr Tony Muller as more fully appears in paragraph 13 of the affidavit of Mc Gregor, the main deponent of applicant. This auctioneer had clearly and unequivocally said there was to be no reserve price and this is not denied. The sale went without any hitches until "there were no bids for certain items. When this happened, the auctioneer stopped auction and informed the bidders that he had to consult with joint liquidators namely first and second respondents who were present at the auction. See paragraph 17 of Mc Gregor's affidavit. This fact is admitted in the affidavit of Reynolds at paragraph 5·1. In other words the sale was stopped and consultations with other liquidators took place because there were no more bids. It cannot therefore be correct that Reynolds of his own volition called Muller in order to put his fresh ideas to him.

If Reynolds says he was in the hall throughout, it seems he was prepared to let the sale proceed as it was proceeding. He vaguely says "he realised at a point in time" that things were not going well, the goods were going for a song. Why he chooses to be so vague, I cannot say. I find him not being frank at all. It seems he deliberately left the lots to be acquired for very low prices while he was in the hall watching. When the rest of the goods were not being bought, he decided on the cancellation of the sale. He was entitled to cancel the sale in respect to unsold goods. No one seems to question that. He does not

deny that he had allowed what was saleable to be bought, but got concerned when he realised that what was left of the plant was unsaleable.

The onus of proof is on the respondents and they are very evasive, cagey and vague about what really transpired. What I have to determine is whether in the skeletal way they have proved that the applicant did waive its rights.

In respondents' favour is the fact that applicant accepted his deposit back. This deposit had been paid on the terms which appear at page 1 of the auction catalogue, which was as follows:

> "TERMS: A deposit of R5000 or equivalent Maluti to be made by way of cash or bank guaranteed cheque on registration, refundable if no purchases made."

A deposit according to Wille *Principles of South African Law* 8th Edition "is a contract whereby one person delivers to another a thing for safe keeping on the understanding that it be returned on demand". The holding of applicants deposit has a significance that is far from clear. In any event applicant never demanded his deposit, it was offered to him. It would seem that when applicant accepted his deposit back, it could be deemed to have made no purchases. Could it be that when applicant accepted its cheque back, it was indeed waiving its right to the purchased goods? It would seem that applicant was expected to add to his M5000.00 if he bought for more than that amount. If he bought for less, the balance would be refunded. That being the case nothing much turns on the acceptance of the deposit that was tendered to applicant by the respondents.

Respondents have a formidable task of persuading the court that a bargain hunter of the type that attends public auctions could readily forgo a bargain that he has got out of kindness to creditors or an insolvent. It is most unusual for businessmen to surrender a financial advantage without getting anything in return. What is even more unusual (as Reynolds for respondents alleges) is that applicant could have not have protested at a cancellation of a sale that had the effect of denying him the goods he had bought for a bargain price. Applicant denies he did not protest. Indeed respondents say they expected applicant and other successful bidders to protest. They do not suggest that they made any inducement that could make a reasonable man to forgo or surrender the goods that had already been bought.

As I have already pointed out, it is unlikely that the successful bidders could not protest when a sale which was highly favourable to them was being cancelled. I am alive to the fact that the most improbable stories can be true.

Applicant says after making his position clear that a valid agreement of sale had been concluded it withdrew from the conversation that was taking place, collected the deposit cheque and left. The following day, it embarked on a course that has culminated in these proceedings. Except for steps taken towards litigation, respondents deny applicant's version.

In its founding affidavit, the applicant insists that Muller the auctioneer went outside to discuss (with his colleagues who were in the background) the best way forward after bidders were no more bidding for the rest of the items that had been offered for sale. In the replying affidavit of applicant nothing is still said about Reynolds. It is Muller who is said to have done the talking. This is consistent with applicant's averments in the

founding affidavit. Indeed in terms of the conditions of sale, Muller is the only person who really matters. I find Muller's failure to make a full affidavit illogical. Muller the auctioneer only made a confirmatory affidavit of averments of Reynolds who was not an official at the sale but a virtual bystander or a backroom operator. Even Reynolds at paragraph 6 of his affidavit confirms that Muller did the talking, he only made known to Muller his views and ideas that were contrary to how the sale was being run. Reynolds confirms that it was Muller who faced and talked to the bidders.

Muller did not really make an affidavit as I believe he ought to have done so in the circumstances of the case. His short confirmatory affidavit reads:

> "1. I am an adult male auctioneer. At all material times hereto, I was the auctioneer in charge of the auction sale held on 21 July1999 and at Mafeteng Lesotho.
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> "2. I have read the affidavit of Phillip Wardel Moorress Reynolds to which this affidavit is annexed. I confirm the contents of that affidavit to be true and correct in so far as it relates to me."

Common sense dictates that it should have been Muller who made the main affidavit because (as he was and as he rightly states) "at all material times I was the auctioneer in charge of the auction sale held on 21 July 1999 and at Mafeteng Lesotho". In other words, Reynolds had no legal role to play at the sale.

Mr *Fischer* submitted that it was standard practice for one deponent to make an affidavit on behalf of others and the others merely to confirm what that deponent had said.

Whether an affidavit confirming facts from one deponent is appropriate depends on circumstances of a particular case—this to me seems obvious. Tedious repetition has to be avoided in all litigation where it can be avoided. But a court should not be deprived of the evidence it needs by this procedure. In this case Reynolds is not always clear and forthcoming about where he was when certain things were done or said. He has gone to great length about irrelevancies such as what he felt or thought was the best way the sale should have been conducted. He does not even say (if at all he was there) why he let the sale go on (in this manner that was prejudicial to creditors) until it got to a stage where there were no more bids and part of the plant was going to be unsold. Reynolds is also not specific about where he was when Muller relayed their decision to the successful purchasers except saying all the talking with bidders was in the hall. The court is being persuaded to assume from his ambiguous affidavit that he heard everything that was said and done. This is a problem that respondents created for themselves when they avoided making the main respondents' affidavit to be that of Muller who was the auctioneer. All sides agree that Muller did the talking and was present throughout Applicant says Reynolds was consulted outside the hall along with others who were interested in the sale in liquidation.

The impression I got from Mr *Fischer* was that it is now the accepted practice for the main deponent to make averments which may even be hearsay, and then get the witnesses who have actual knowledge of the facts to merely confirm the main deponents averments. If such a practice has grown, it is unfortunate, because it is wrong. In application proceedings, pleading and evidence are rolled into one. The growing and extensive use of application was never intended to cut corners in an attempt to save time. Courts still have to be given evidence of good quality in order to decide cases brought on motion. Hearsay is and will remain hearsay. The proper way is for the main deponent to

depose to facts within his knowledge and give an indication of what witnesses who know and have witnessed events are going to say but let them give the evidence in their supporting affidavits. Any other way is legally untenable, and I genuinely believe is based on a misunderstanding.

In Herbstein and Van Winsen *The Civil Practice of the Superior Courts of South Africa* 3rd Edition page 79, what is expected in application proceedings was neatly stated in the following words:

> "In application proceedings the affidavits constitute not only the evidence but also the pleadings and therefore while it is not necessary that the affidavits "should set out a formal declaration, or a replying affidavit set out a formal plea, these documents should contain, in the evidence they set out, all that would be necessary at the trial."

Certainly, at a trial, the main witness never just says in court that he confirms what has been said by other witnesses and sits down. In Wigmore *On Evidence* (1360-1684) Volume V *Chardbourn Revision* at page 85 referring to *Welsh v Rogers* 54 US 283, 287 it is said of affidavits:

> "Testimony thus taken is open to great abuse. At best it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepare the witness and examine him can generally have just so much or so little of the truth, or such version of it as will suit his case."

What Wigmore has said is perpetually true. Consequently, although motion proceedings and affidavits are being increasingly been used, we have to guard against abuses of this procedure that is bound to grow with its increasing use. Unfortunately mistakes of this

nature may creep into some text books.

Therefore as Herbstein & Van Winsen in *The Civil Practice of the Supreme Court of South Africa* 4th Edition at page 369 have put it "it may be necessary to file affidavits of persons other than applicant who can depose to the facts". This statement of the law is unassailable. But then the learned author adds the following words which have created a misunderstanding because of their ambiguity:

> "Alternatively, when a deponent includes in his affidavit facts in respect of which he does not have first-hand knowledge he may annex a verifying affidavit by a person who does have knowledge of those facts."

If verifying affidavit means an affidavit of a person who can and does in fact depose to the facts, then it is correct. But if these words mean the court may be given pages and pages of hearsay by the party's main deponent, and a person who has knowledge of the facts can merely file an affidaivt saying "I confirm the contents of that affidavit to be true and correct in so fai as it relates to me", then the learned authors of Herbstein and Van Winsen *The Civil Practice of The Supreme Court of South Africa* have not quite hit the nail on the head. The practice is only meant to avoid unnecessary repetition, but not to deprive courts of first hand evidence.

I have already said Reynolds has not actually said that he actually heard and saw what occurred between Muller (the auctioneer) and the bidders, he has left this equivocal. He has not stated in uncertain terms that he saw and heard what transpired. It can be argued that he should have seen or heard what transpired. He is contradicted by applicant. The court always wishes to be given the best evidence that is available, lest it smells a rat. We frequently hear of what is called the best evidence rule. The case of

Germenskapsontwinkkelingsran v Williams 1977(2) SA 692 deals with best evidence rule as a legal concept. In this case I have in mind the quality of evidence as a fact. The way evidence is evaluated is conditioned by the particular facts of a case although the evidence of Reynolds is legally acceptable. It is not the best evidence available on what happened at the sale. I am nevertheless attracted by the following words from King AJ at 497 of *Germenskapsontwinkkelingsran v Williams*:

> "The best evidence rule was that a party must always produce the best evidence of a fact available to him and evidence which itself suggested the existence of better evidence of that evidence is inadmissible. The latter class of evidence is called secondary evidence."

In modern times the term "best evidence" is seen as misleading. Evidence is often admissible although it is recognised that evidence of an even better quality exists. Such evidence may be in many respects first hand. If the evidence of a person who really knows the facts best is not adduced, it leaves many unanswered questions, especially where a witness like Reynolds contradict a main player like the applicant. Muller is accepted by all sides to have been the respondents' decision maker who did all the talkings yet it is Reynolds who is respondent's sole deponent to the facts that should be deposed to by the auctioneer. How does a bystander come to give evidence, and the chief official at the auction merely say "I confirm"? In such cases it was said in *Northern Mounted Rifles v O'Callaghan* 1909 T.S. 174 that the best evidence must emanate from a public officer. "It must have been made by a public officer in the execution of his public duty, it must be intended for public use, and the public must have access to it". The approach in *Northern Mounted Rifles v O'Callaghan* was technical and it dealt with a licence while mine is about the approach I should follow in assessing the weight to be attached to evidence that I am supposed to believe.

If my reading of Phipson *On Evidence* 9th Edition at page 51 is correct, the best evidence rule means that "the evidence must be given of which the nature of the case permits" this rule provides very little practical guidance. At page 53 it was concluded that:

> "In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be a matter for comment or affect the weight of that which is produced. All evidence is in general equally receivable."

The problem I have with Reynolds averrments are quality rather than receivability. Muller's evidence as auctioneer would have been much more weighty and proper in the circumstances. For Muller to confirm in less than two sentences the evidence of a less weighty quality such as Reynolds' and deny us of his own weighty one has not been particularly helpful. There is no compelling reason for Muller's failure to make the main affidavit for respondents since his affidavit was sworn to on the 10th September 1999 when that of Reynolds was sworn to on the 9th September 1999 . This was almost 30 days after the filing of the application. If then the auctioneer had such a substantial period at his disposal, why does he not tell us what happened himself?

Waiver

Mr *Fischer* for respondent nailed his colours to the mast of waiver. He displayed a consciousness of the fact that cancellation of contract might not be his strongest point. A litigant is said to have waived a right, and thereby lose it, if he declines to take advantage of it. De villiers CJ in *Stewart v Ryall* 5 SC 146 at page 153 said a waiver amounts to "a renunciation of a right, and such renunciation cannot be inferred except from clear evidence. "But waiver is a form of contract and it is necessary there should be an

intention to waive",—*Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd.* 1933 WLD 224 at 226. It follows therefore that waiver must be an intentional act to waive a right. In this case it was the respondents through the auctioneer (Muller) who decided to cancel the contract of a sale of goods that applicant had already bought. Indeed there was no action that could be deemed to have originated from applicant that could be deemed to be a renunciation of applicant's rights to the goods. At the worst, applicant could be said to have acquiesced. For acquiescence to be inferred clear evidence has to exist. In *Collen v Rietfontein Engineering Works* 1948(1) SA 413 at 421-22 Watermeyer CJ said of acquiescence and the problems it might cause:-

> "...because conduct to constitute an acceptance must be an unequivocal indication of the other party of such acceptance.... Quiescence is not necessarily acquiescence and one party cannot, without the assent of the other, impose a condition to that effect."

Waiver is normally pleaded as estoppel. When it is pleaded, it is grounded in surrounding facts that make an inference of personal bar, compelling. Very often among the grounds is that of delay in enforcing rights, which has led to the other side acting to its own prejudice. Waiver is also often backed up by existing commercial practice. In this case the practice in auction sales is against respondents. People do not go to such sales to surrender the bargains they have got. In *Collen v Rutherford Rietfontein Engineering (supra)* at 436 Centlivres JA referring to *Laws v Rutherford* 1924 AD 261 said:-

> "...that the onus of proving waiver is strictly on the party alleging it and he must show that the other party in the full knowledge of his right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

It is therefore this onus that is on the shoulders of the respondents.

Mr *Fischer* concedes in his Heads of Argument that the respondents initial defence was not waiver. He argues that it follows as a matter of course from respondents defence. My reading of *Hilsage Investments (Pty) Ltd v National Exposition (Pty) Ltd* 1974(3) SA 346 is that the party in whose favour a benefit was put in a contract can waive it. In this case this court is entitled to infer that, even if applicant never said a word, in view of clause 19 of the conditions of sale, applicant was protected, and need not have bothered to argue with respondent. This is particularly so because Reynolds does not say how he came to the conclusion that applicant had agreed to the cancellation. Reynolds merely confines himself to a denial that applicant objected and a bare allegation that bidders agreed to a cancellation. If indeed applicant had, respondents who were aware of clause 19 of the conditions of sale, should have insisted that the cancellation should be in writing in order to be of any legal consequence.

Even if clause 19 of the conditions of sale did not exist, I still think respondents have not discharged their onus on the balance of probabilities. Steyn CJ in *Hepner v Roodepoort-Maraisburg Town Council* 1962(4) SA 772 at 778 DE put what is expected of respondents in a case such as this one as follows "...in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the rights in issue". Very often even in business transactions, an express waiver can be withdrawn if the litigant decides within reasonable time in circumstances in which the other side has not acted to its detriment because of the waiver. In such cases Lord Denning MR in *WJ Alan & Co Ltd v El Nasr Export & Import Co.* [1972] 2 All ER 127 at 140 C observed:

> "But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by his waiver."

In the case before me not only is the circumstantial evidence on waiver weak, it seems tc be the applicant (if respondents' submission holds) alone who has gratuitously acted tc its prejudice on no reasonably conceivable grounds.

I simply am not persuaded on the evidence that applicant did not object. Even i: he had not said a word applicant was bound to succeed having regard to clause 19 of the conditions of sale. I therefore grant applicant's application.

It is ordered:

"1. The 1st, 2nd and 3rd Respondents are ordered to hand to the Applicant the goods auctioned as items: 9,10,11,12,13,14,15,16,17,25,26,29,34,35,36,37,38,39,40,41,42,43-44,59,60,61,62,63,64,65,67,68,69,70 and 71 on the auction held by the 3rd Respondents on instruction of the 1st and 2nd Respondents on the 21st of July 1999 at Mafeteng, Maseru in the insolvent of Highveld Ceramics (Pty) Ltd (in liquidation) against payment by Applicant of the sum of R101,300.00 plus 14% VAT.

2. The 1st and 2nd Respondents are ordered to pay the costs of the Application jointly and severally, one paying the other to be absolved.

.....
WCM MAQUTU
JUDGE

For applicant : Mr *Ebberson*
For respondent: Mr *Fischer*