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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 12286/2016

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

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DATE

.....

SIGNATURE

In the matter between:-

JUBI PROPERTIES (PTY) LTD

Applicant

and

GENIA STEPHANIE BOYCE

Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] This matter came before me on the opposed motion roll of 12 September 2016.

[2] The applicant sought orders in the following terms:

2.1 The rectification of an agreement regarding the transfer of an immovable property situated at Erf [...] Melrose North, Ext 2, being [...] I. Road, Melrose North ('the property'), entered into between the applicant and the respondent ('the agreement'), to reflect the date of signature of the agreement by the respondent as 14 December 2014;

2.2 Declaring the agreement valid and binding on the applicant and respondent;

2.3 Ordering the respondent to do all things and sign all documents necessary to effect transfer of the property to the applicant;

2.4 In the event of the respondent failing to comply with paragraph 2.3 above, within ten (10) days of the date of the order herein, that the Sheriff (or his lawful Deputy) be authorised to do all things, and sign all documents, necessary to effect transfer of the property to the applicant.

2.5 Costs of the application.

[3] Two issues arose for determination:

- 3.1 Whether or not the agreement lapsed for lack of fulfilment of the suspensive condition contained therein; and
- 3.2 Whether or not the applicant repudiated the agreement, as alleged by the respondent.

[4] Briefly stated, the common cause facts were the following:

- 4.1 The applicant submitted, on 9 December 2014, a written offer to purchase the property, ('the offer'), to the respondent.
- 4.2 The offer provided in terms that it was 'irrevocable until 5pm on Friday, 12 December 2014 (whereafter it shall be deemed to have lapsed)'.
- 4.3 The offer was not accepted by 17h00 on 12 December 2014.
- 4.4 At the request of the respondent, the applicant's authorised representative, one Mr Rubenstein ('Rubenstein'), met with the respondent, her attorney Mr R Kosviner, ('Kosviner'), and the estate agent, on Sunday 14 December 2014 at the property ('the meeting').
- 4.5 The parties' negotiated and agreed upon certain changes sought by the respondent to the offer, the terms of which were reduced to a handwritten document drafted by Kosviner at the meeting, and referred to as the 'heads of agreement' ('the heads of agreement').

- 4.6 The parties initially intended to draft a fresh agreement incorporating the terms agreed to on 14 December 2014, but elected instead at the meeting to utilise the offer together with the heads of agreement, which two documents together comprised the terms of the agreement.
- 4.7 The parties dispensed with the need for any further written agreement.
- 4.8 Thus, the agreement was concluded and signed by the parties at the meeting on 14 December 2014, by way of signature of the offer and the heads of agreement.
- 4.9 Notwithstanding, the parties decided at the meeting to date the agreement 12 December 2014. (I deal with the parties' contradictory versions as to why the agreement was backdated, hereunder.)
- 4.10 The material terms of the agreement relevant to this application are the following:
- 4.10.1 The purchaser of the property was identified as 'Jubi Properties and/or a nominee'.
- 4.10.2 A letter of satisfaction on due diligence would be issued to the seller in writing within 10 days. If the letter was not delivered, the due diligence would be deemed to have failed, and the agreement would be of no force and effect.
- 4.10.3 A non-refundable deposit of R400 000.00 (four hundred thousand rand) was payable by the applicant to the respondent

within 48 hours after confirmation of receipt by the applicant of the due diligence acceptance letter.

4.10.4 Upon registration of the rezoning of the property, the applicant would furnish a bank guarantee payable to the respondent or her nominee of R3 200 000.00 (three million two hundred thousand rand).

4.10.5 The offer was *“ACCEPTED BY THE SELLER on this the 12th day of December 2014”*.

4.11 In terms of the agreement, the applicant performed a due diligence exercise in respect of the property between 15 December 2014 up to and including 24 December 2014.

4.12 Rubenstein, on 24 December 2014, notified Kosviner together with the respondent and estate agent, that the due diligence requirement of the agreement had been satisfied.

4.13 Thereafter, the parties continued to give effect to the agreement on the basis that it had been rendered unconditional.

4.14 The deposit of R400 000.00 was paid into Kosviner's trust account.

4.15 The respondent signed a power of attorney on 6 January 2015, enabling the applicant to commence with the rezoning process.

- 4.16 Rubenstein, on 21 January 2015, received notification confirming that the respondent had instructed the conveyancing attorney, one Pestana, ('Pestana'), to proceed with the transfer of the property into the applicant's name.
- 4.17 During October 2015, the respondent requested an earlier implementation of the agreement than was provided for, as she was suffering financial difficulties and required funds sooner than originally anticipated.
- 4.18 On 11 December 2015, Pestana corresponded with attorneys Calteaux & Partners, to the effect that the respondent had given her approval for the transfer to proceed.
- 4.19 During January 2016, the respondent requested Rubenstein to furnish the guarantees 'as soon as possible' pursuant to her financial constraints at the time. The applicant lent the respondent R101 000.00 in respect of the rates clearance, and R49 000.00 for her personal use, to be repaid by way of setoff against the purchase price of the property.
- 4.20 On 14 January 2016, the respondent signed a power of attorney authorising Pestana to effect transfer of the property and signed the relevant transfer documents.
- 4.21 Rubenstein was advised that the applicant's nomination of 'Irene Road' as the entity to take transfer of the property, could potentially attract double transfer duty. Pursuant thereto, Rubenstein sought signature of a fresh agreement between Irene Road (as the purchaser), and the

respondent, ('the Irene Road agreement'), which the respondent undertook to consider.

- 4.22 On 3 March 2016, Rubenstein advised that a 'cancellation agreement' in respect of the agreement, would be signed only once the respondent had signed the Irene Road agreement.
- 4.23 During March 2016 or thereabouts, Rubenstein became aware that the respondent, notwithstanding the agreement, was attempting to sell the property anew. Hence, Rubenstein advised the respondent that if his nomination of Irene Road was problematic, he would proceed with the transfer in the applicant's name, which he elected to do.
- 4.24 On 15 March 2016, the respondent's then attorneys, Dykes Van Heerden Inc ('DVH'), advised the applicant that the agreement had lapsed due to non-fulfilment of the suspensive condition, or had been cancelled pursuant to applicant's alleged repudiation of the agreement, which repudiation the respondent had accepted.
- 4.25 (The lapse of the agreement allegedly arose from the respondent's acceptance of the agreement 'on or about 12 December 2014', and, the repudiation, pursuant to the applicant's alleged statement that it did not have sufficient funds. The latter was a purported reference to the applicant seeking to avoid the levy of double transfer duty on the transaction.)
- 4.26 The applicant procured the issue and delivery of the guarantees on 17 March 2016.

4.27 On 24 March 2016, DVH advised inter alia that the date of the agreement was 12 December 2014, and, the heads of agreement, which was signed before the offer was drafted, clearly stated that the agreement was subject to a due diligence taking place within ten days of signature of the heads of agreement.

4.27.1 Hence, the respondent alleged that the agreement had lapsed as the letter of satisfaction on due diligence, (which was to be issued to the seller in writing within ten days, failing which the due diligence would be deemed to have failed and the agreement to be of no force and effect), was completed and delivered to the respondent within ten days of 14 December 2014.

[5] The parties agreed that the provision for satisfaction of the due diligence and delivery of the letter of satisfaction within ten days ('the ten day period'), comprised a suspensive condition, ('the suspensive condition'), failure of which would result in the lapse of the agreement (as claimed by the respondent).

[6] Thus the critical issue for determination was the date upon which the ten day period for the performance of the due diligence and delivery of the letter of satisfaction, incepted.

[7] The applicant argued that commercial meaning must be given to the provision for the ten day period, which could only mean ten days from the date of the agreement coming into existence, being the date upon which acceptance of the offer was conveyed to the applicant.

[8] The issue was the date upon which the ten day period commenced and the fact that the parties backdated the agreement, which is perfectly acceptable in commercial dealings between parties, did not necessarily mean that the parties intended the ten day period to operate with effect from that date.

[9] The applicant explained in the founding papers that the reason the agreement reflected 12 December 2014 as the date of the respondent's acceptance, was the parties' common concern at the time that if the agreement reflected acceptance on 14 December 2014, the respondent would be accepting a lapsed offer. Hence, in order to avoid any confusion or dispute, they agreed to 'backdate' the respondent's signature to reflect 12 December 2014.

[10] As a result of the respondent's insistence that the date of the agreement was 12 December 2014, and the ten day period incepted with effect from that date, the applicant initially claimed rectification of the agreement to reflect the date of signature or acceptance as 14 December 2014, this being the date on which the agreement was concluded between the parties. The applicant agreed with me, ultimately, that it was unnecessary to rectify the agreement.

[11] It serves to mention that the counsel who drafted the respondent's heads of argument was not the counsel who argued the matter. Given that the respondent's counsel at the hearing disavowed reliance upon the respondent's heads of argument, (correctly so in my view), I do not deal with the arguments raised therein.

[12] Mr Hitchings on behalf of the respondent argued that the parties recorded the date of signature as 12 December 2014, as they intended the rights and obligations comprising the agreement to operate from that date. The parties' motive could not affect their common intention. Hence, the applicant was obliged to reconcile himself with a

reduction of the ten day period to eight days. Motive could not be conflated with intention and it was necessary only to consider what was written on the document.

[13] Pursuant to the respondent's reliance on 12 December 2014 as the date of the agreement, she contended non-fulfilment of the suspensive condition and the lapse of the agreement.

[14] In my view, the issue afore and hence the matter in its entirety, is capable of determination on a reasonably simple basis.

[15] The offer to purchase provided expressly that it would lapse if not accepted by 17h00 on 12 December 2014.

[16] The offer was not accepted as required and hence it lapsed automatically. The principle that; '(w)hen the acceptance of an offer is conditioned to be made within a time ... prescribed by the offeror, then the prescribed time limit ... should be adhered to', has applied in our law since at least 1924.¹

[17] Thereafter, on 14 December 2014, the parties met and negotiated the terms of an agreement to sell and purchase the property. The parties did so with reference to the content of the lapsed offer and the manuscript heads of agreement. Consensus was reached between the parties in respect of the sale and purchase of the property, on 14 December 2014. (Whilst the meeting was at the instance of the respondent, I do not consider this to be a material factor.)

¹ *Laws v Rutherford* 1924 AD 261; *Rose & Rose v Alpha Secretaries Ltd* 1948 (1) SA 454 (A).

[18] It is trite that in order for an agreement to come into existence, there must be an unequivocal acceptance of the offer. A contract is made at the time and place where consensus is reached.^{2'}

[19] Thus, it was on 14 December 2014 that both parties knew what the other intended by way of performance, and each consented to the other's intention³ in respect of the sale and purchase of the property. It was on that day that the parties reached agreement upon the terms of the agreement, and the contract was established. The contract came into existence on 14 December 2014.

[20] Initially, the parties intended signing a new document incorporating the terms of the agreement concluded on 14 December 2014. However, they agreed at the meeting on 14 December 2014 that the documents comprising the lapsed offer together with the heads of agreement, adequately served to incorporate and reflect the terms of their agreement. Hence, the parties signed those two documents, which together comprised their agreement,⁴ on 14 December 2014.

[21] I have already found that the offer lapsed upon the absence of acceptance by 17h00 on 12 December 2014. However, the fact that the parties chose to utilise the document comprising the lapsed offer in establishing their agreement on 14 December 2014, is irrelevant to the fact that the agreement came into existence on 14 December 2014. It was convenient for the parties to conclude the agreement with reference to the lapsed offer document, and the latter formed part of the agreement reached on 14 December 2014.

[22] It would be contrived and artificial, in my view, to reach any other conclusion.

² *Christie's Law of Contract in South Africa* G B Bradfield 7th edition 37.

³ *Wille's Principles of South African Law* Francois du Bois et al 9th edition 741.

⁴ *Johnston v Leal* 1980 (3) SA 927 (A).

[23] Given this finding, it is unnecessary to consider the applicant's argument that the stated time in the offer represented 'a stipulation for the exclusive benefit of the offeror, which benefit he can elect to waive'.⁵

[24] Nor is it necessary to consider the parties' conduct subsequent to 14 December 2014, which appeared to support the applicant's contention that as from 14 December 2014, the parties conducted themselves on the basis that the agreement was unconditional.

[25] As regards the date when the ten day period commenced, I do not consider it necessary to rectify the date of the agreement from 12 to 14 December 2014.

[26] Clause 12 of the lapsed offer document provided that:

26.1 'The purchaser requests 10 days due diligence on the property to ensure all aspects of a viable development are obtainable.'

26.2 'A letter of satisfaction on due diligence will be issued to the seller in writing within 10 days. If no letter is delivered, the due diligence has failed and this agreement is of no force and effect.'

[27] The heads of agreement provided that:

'1. Due diligence in respect of proposed sectional title development of not less than eight (8) units, within ten (10) days of signature hereof. ...

⁵ *Manna v Lotter* 2007 (4) SA 315 (C) [26].

3. Due diligence to include financial feasibility for above development, within ten (10) days of signature hereof, as well as positive geo-tech report on the sight. ...
7. These heads will be incorporated into the agreement of sale/offer to purchase. In the event of any conflict between the terms of the agreement of sale and the above terms, the latter terms shall take precedence and shall apply.'

[28] It is apparent that the lapsed offer document did not specify a date upon which the ten day period commenced whilst the heads of agreement referred to 'within ten days of the signature' thereof.

[29] As a general proposition, and absent a specific contractual provision, a term of a contract cannot come into existence or commence operation prior to the establishment of the contract. The suspensive condition could not incept prior to the applicant having knowledge of the respondent's acceptance thereof, or the agreement coming into existence, on 14 December 2014.

[30] Accordingly, the ten day period commenced with effect from 14 December 2014.

[31] Moreover, I am supported in my finding by the provision in the heads of agreement to the effect that in the event of a conflict between the lapsed offer document and the heads of agreement, the latter would take precedence and apply.

[32] Hence, the parties' stated intention in the event of a variance between the terms of the two documents, was that the heads of agreement would apply.⁶ Thus, the provision that the due diligence would be completed within ten days of signature of the heads of agreement, which date the respondent conceded was 14 December 2014, finds application.

[33] In respect of Mr Hitchings' argument that the parties intended the rights and obligations to flow from 12 December 2014, there was no evidence to indicate that the parties, (having signed on 14 December 2014, dated the agreement 12 December 2014, and determined that the heads of agreement would take precedence and apply in the event of a conflict), intended the rights and obligations comprising the agreement to flow from 12 December 2014.

[34] Furthermore, the argument failed to take account of the fact that the ten day period was a stipulation for the benefit of the applicant, and only the applicant could waive or reduce that period. Accordingly, the respondent had to demonstrate that the applicant was aware of the benefit of two days that he was allegedly waiving on 14 December 2014, and that he understood and assented thereto, which the respondent failed to do.

[35] The respondent referred briefly to the applicant's alleged repudiation of the agreement. There is no basis, however, for the alleged repudiation as the applicant, subsequent to becoming aware that the respondent intended utilising the proposal of the nominee as a basis for alleging repudiation, disavowed reliance upon the nominee and unequivocally affirmed his intention to take transfer in the applicant's name.

⁶⁶ *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) [23].

[36] In the circumstances, I find that an agreement was concluded between the parties on 14 December 2014, which agreement was dated 12 December 2014. The ten day period referred to in clauses 12 of the lapsed offer document and clauses 1 and 3 of the heads of agreement incepted with effect from 14 December 2014.

[37] Based on the foregoing, I grant the following order:

1. The agreement in respect of the transfer of the property situated at Erf [...] Melrose North, Ext 2, commonly known as [...] I. Road, Melrose North ('the property'), entered into between the applicant and the respondent on 14 December 2014, is declared valid and binding on the applicant and the respondent.
2. The respondent is ordered to perform all acts and things and sign all documents necessary to effect transfer of the property to the applicant.
3. In the event of the respondent failing to comply with paragraph 2 of this order within ten (10) days hereof, the Sheriff (or his lawful deputy) is authorised to perform all acts, do all things and sign all documents, necessary to effect transfer of the property to the applicant.
4. The respondent is ordered to pay the costs of the application.

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT	Mr J Blaauw SC.
INSTRUCTED BY	Edward Nathan Sonnenberg.
COUNSEL FOR RESPONDENTS	Mr B Hitchings.
INSTRUCTED BY	S Brown Attorneys Incorporated.
DATE OF HEARING	12 September 2016.
DATE OF JUDGMENT	7 December 2016.