

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/48639

DATE:26/08/2011

REPORTABLE

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

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DATE

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SIGNATURE

In the matter between:

PIZZARO TRADING (PTY) LTD

Appellant

and

MILLER NICOLAS JAMES VAUGHAN

Respondent

MILLER MORGAN GEARY

Second Respondent

PAM GOLDING PROPERTIES (PTY) LTD

Third Respondent

J U D G M E N T

WEPENER, J:

[1] The applicant seeks an order declaring an agreement of sale (the agreement) in respect of immovable property entered into by the applicant as seller and the first and second respondents as purchasers (referred to as the respondents) to be of full force and effect and binding upon the parties. The third respondent is an estate agency whose employee, Birbeck, facilitated the signing of the agreement. The third respondent took no part in these proceedings but filed an affidavit to explain its roll and the facts which led to the signing of the agreement.

[2] The applicant is the registered owner of the immovable property. The applicant was at all times represented by Mr Segev (Segev) who also deposed to the founding and replying affidavits. Segev mandated the third respondent to find a purchaser for the property.

[3] During August 2010 Birbeck brought to the applicant a written offer to purchase the property, which offer had been signed by the respondents, addressed to Segev on behalf of the applicant. The written document contains the following on the first page: "To Joseph Segev. on Behalf of Pizzaro Trading (Pty) Ltd ("the Seller)". The offer indicated that it was open for acceptance until 16:00 on 21 August 2010 and it was deemed to be accepted on signature by the applicant irrespective of when notification thereof was given to the respondents.

[4] On 21 August 2010, prior to 16:00, Segev signed the offer to purchase resulting, on the face of it, in a written agreement of sale of the property coming into being.

[5] The written agreement contains some usual clauses pertaining to a sale of property and also a clause as follows:

“12.3 If the property is owned by a Company, Close Corporation, Trust or other juristic person the natural person who accepts this Offer shall do so on behalf of such Company, Close Corporation or Trust and warrants that he/she is duly authorised to represent the Seller”

[6] It is signed by Segev on the last page with the following words printed under his signature: “Seller (or on behalf of the seller and duly authorised)”.

[7] The respondents complained that they did not know that they would be contracting with a company and that they established that, because the seller was a company, the transfer would be delayed.

[8] However, in my view, the two facts referred to above should have alerted the respondents that the seller may be a juristic person.

[9] The respondents further alleged that the agreement was not completed when they signed it i.e. that a blank space was left when it was signed thus

rendering the agreement void for want of compliance with s 1 of the Alienation of Land Act 68 of 1981 (the Act).

[10] The blank space, it was said, was due to the absence of the name of the seller when the agreement was signed by the respondents. The respondents opine that as a result of the fact that there is a full stop after the deponent's name, before the company's name, it is apparent from the written document that the name of the company was inserted as an afterthought.

[11] Mr Cothill, who appeared for the respondents argued that the words "... on behalf of Pizzaro..." were filled in later. The respondents state that the "on behalf of Pizzaro" - portion was an afterthought. It is not clear when the afterthought allegedly occurred. However, according to Birbeck, the name of the seller was completed prior to Segev signing the agreement.

[12] The respondents are not able to contradict Birbeck. Indeed the respondents accept that Birbeck filled in the name of the seller. They do not positively state that it was filled in after Segev signed the offer to purchase, nor do they have any basis to so allege. There is consequently no dispute of fact as contended by Mr Cothill regarding this issue.

[13] It is therefore common cause that the name of the seller was left blank when the respondents signed the agreement, which led to the argument that the agreement is invalid for want of compliance with s 2(1) of the Act, which argument I deal with below.

[14] Mr Cothill raised a further defence to the relief sought by the applicant. He said that there are two contradictory clauses contained in the agreement which renders the agreement inchoate and thus null and void.

[15] An additional issue raised was the fact the Birbeck did not act as agent of the respondents. Mr Kuny, who appeared with Mr Lavine, did not argue differently and accepted that Birbeck fell into the category of persons referred to by Jajbhay J in *Just Names Properties 11 CC and Another v Fourie and Others* 2007 (3) SA 1 (W) at paragraph 32 where he said:

“In the present case I believe that Oosthuizen, who was the estate agent, was not an agent of either the seller or the purchaser in the technical sense of the word. She had acted as a mere nuntius between the parties. The conduct of Oosthuizen, in the circumstances of the present matter, reminds one of the learned article by Prof E Kahn in (1980) 97 SALJ 342, where the learned professor referred to the estate agent as ‘that legal oddity, the estate agent’. Professor Kahn further states:

‘Generally speaking, an estate agent is only entrusted with the task (no obligation) of finding a purchaser of immovable property. It is rare indeed for him to act as an agent stricto sensu, clothed with authority to enter into a contract on behalf of his principal. See Bird v Summerville 1961 (3) SA 194 (A) at 202C-E.’”

Mr Kuny however, argued that Birbeck was indeed authorised to fill in the name of the seller.

[16] I deal with the further defences raised in argument although there are other issues contained the affidavits and in counsel's heads of argument, which were not pursued.

[17] S 2(1) of the Act reads as follows:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority".

[18] In *Godfrey v Paruk* 1965 (2) SA 738 (D), Caney J said at 739F

"It is well established by a series of cases decided on the corresponding legislation which has prevailed for many years in the Transvaal and the Orange Free State, that for compliance with sec. 1 (1) the writing must identify the subject matter of the contract; it must be defined or described with such a degree of precision as to enable it to be identified without recourse to the evidence of the parties. In addition, the essential terms of the contract must be contained in it and the identity of the parties must appear. In Fram v. Rimer, 1935 W.L.D. 5 at p. 8, BARRY, J., said that the identity of the parties 'is as much an essential term of the contract as the subject matter', and this has been repeated more than once, but with the greatest respect to those who have used the expression "essential term" it appears to me more appropriate to say that the identity of the parties is an "essential part" of the contract, as HORWITZ, A.J., said in Rademeyer v. Hughes, 1946 O.P.D. 430 at p. 434..."

[19] As was the case in *Godfrey*, on the face of it the document under consideration in the matter before me would appear to constitute a binding agreement complying with the provisions of the Act. All the requirements

appear in it and it has been signed by the seller and the purchaser. The essential parts are contained therein.

[20] Mr Cothill argued that by leaving a blank space regarding the name of the seller, the agreement was null and void for want of compliance with s 2 of the Act. For this proposition he relied on *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) and *Just Names Properties 11 CC supra* – the latter case which was upheld on appeal in *Just Names Properties 11 CC and Another v Fourie and Others* 2008 (1) SA 343 (SCA).

[21] The *Fourlamel* matter at 342A-B accepts that difficulty may arise in agreements required by statute to be embodied in a document and signed by the parties. Miller JA, in *Fourlamel* at 341H-342B, said regarding documents which are required to be in writing:

“The plain, grammatical meaning of the words used in sec. 6 appears to me to be clear. The section presupposes that an agreement of suretyship has been reached - “contract of suretyship entered into” - and it provides thereafter that such agreement shall not be valid

‘unless the terms thereof are embodied in a written document signed by or on behalf of the surety’.

What is it that requires to be signed by the surety? It is surely the written document containing the terms of the agreement... In the case of an agreement which is not by law required to be in writing, it may be that a document signed by a party before the terms of the agreement had been embodied therein would be binding upon him in the absence of fraud or error in connection with the recording of the terms subsequent to his signature.... But, where the terms of a contract are required by statute to be embodied in a document and signed by a particular party as a manifestation of his assent to such terms, there are considerable

difficulties, both notionally and practically, in the way of acceptance that insertion by another of the terms of the agreement after the party has appended his signature to a blank piece of paper, constitutes compliance with such statute.”

[22] On the facts which I accept, Birbeck filled in the full name of the seller prior to the applicant signing the document. The respondents did not gainsay this. All they say is that the seller’s name was left blank when they signed it. It was explained by Birbeck how he, with full knowledge and agreement of the respondents, undertook to insert the correct name of the seller.

[23] However, the fundamental difference between an agreement required to be in writing, which is void and one which is valid was referred to in *Jurgens & Others v Volkskas Bank Ltd* 1993 (1) SA 214 (A). The distinction between the *Fourlamel* case and the facts of the matter under consideration was stated in *Jurgens* by Hoexter JA at 218J-218B:

“It need hardly be said that there is a fundamental difference between, on the one hand, the situation in which after a surety has signed and delivered a blank form to the creditor, the latter unilaterally completes the blank form by filling in some of the contractual terms, and, on the other hand, the situation in which the surety has signed a blank form which is then filled in, by, or for and on behalf of the surety, before the document so completed is delivered to the creditor. In the Fourlamel case this court was concerned only with the former situation.

A prerequisite for a contract of suretyship is that the offer communicated by the would-be surety to the creditor must be complete. In the instant case, so it seems to me, the appellants communicated their offers to the respondent when the documents in question, duly filled in, were delivered by or on behalf of the appellants

to the respondent. It cannot be suggested that, on the face of them, these offers were in any respect incomplete. At that juncture they contained the terms essential for the material validity of a contract of suretyship (the identity of the creditor; the identity of the surety or sureties; and the amount of the principal debt.) These terms had been incorporated at the group office by the secretaries of the group for and on behalf of the appellants. Each such document bore the signatures of those of the appellants named therein. It is not in dispute that the suretyships thus delivered to the respondent were accepted by it.”

[24] Birbeck fulfilled the function of the secretary referred to by Hoexter JA in *Jurgens*. The respondents received a copy of the signed agreement containing the seller's name two days after they signed it. Numerous correspondence followed in which the seller was referred to as Pizzaro Trading (Pty) Ltd or Pizzaro Trading. The respondents' reservation regarding the fact that the seller was a company manifested shortly after they received the signed copy of the agreement. The issue was raised thus:

“I am concerned that we were not made aware that the property was in a company name until after the agreement was signed. The seller's details were only inserted by you after we had signed the agreement in good faith. I had spoken to my lawyers ... as you know we need early occupation and transfer and opted to pay an occupational rent as soon as guarantees were in place. Under normal circumstances we would expect to have transfer in two to three months. We could be placed in a position that the transfer is delayed due to the necessary company information ... if we had known that the property was registered in a company name then we would have inserted more clauses in the agreement of sale which would have protected us from being penalised for such possible delays. Please can I have your comments.”

[25] The conduct of the respondents fall within what has been said in *Godfrey v Paruk* 1965 (2) SA 738 (D) at 742C-743:

*“Apart from the foregoing, there is another approach to the problem which also convinces me that the plaintiff’s declaration does disclose a cause of action. I consider that the approach should be realistic. The Courts are fully aware that, just as the owners of properties give options to persons entitling them personally or others to whom such options may be assigned, to purchase properties, so also persons wishing to buy properties sign offers which are intended to be put before the owners in the hopes of acceptance. Where such an offer bears the signatures of the seller and of the purchaser (the latter offering and the former accepting), I see no legal obstacle to finding that to be a contract, subject to any defences which may be raised in a plea. Although the principle is that “an offer can be accepted only by the person to whom it is made”, SCHREINER, J.A., saying that in *Hersch v. Nel*, supra, went on to say that that statement could be misleading if the person to whom the offer is made is understood in its ordinary sense as the person to whom the words of the offer are uttered or addressed;*

“for what decides who can accept an offer is the intention of the offeror as proved by the terms of the offer and by any other evidence that may be admissible”.

The learned Judge of Appeal goes on to show the variations that can be arrived at upon a proper construction of the offer.

The document in the present case, although addressed to Maghrajh, is not expressed as an offer to purchase the property from him; nor is the property described as being his. The plaintiff merely said: “I hereby offer to purchase the above described property . . .” The document bears in itself some indications of being based upon a stereotyped form for signature by prospective buyers; it contains in three places the word

“purchaser”, whereas if the plaintiff had written it as a letter in the ordinary course offering to buy the property, he would have used the word “me” in two of those places and “I” in the third. It also contains the word “seller”, whereas if the document were written as a letter offering to buy from Maghrajh it would in place of the expression “on the part of the seller” have read “on your part”. Moreover, it bears a formal caption.

It appears to me, consequently, to be not true to say that the document is an offer to Maghrajh, or that he is the offeree. Some undefined person is the offeree. This I arrive at without resort to any extrinsic evidence; the right to accept the offer, so long as it remains open, lay with some undefined person. It is true that by resort to extrinsic evidence the identity of that person might be discovered, but that is unnecessary because the defendant accepted the offer and the plaintiff was content. It might very well have happened that someone unacceptable to the offeror might have purported to accept his offer; in that event a contest would have arisen as to the right of that person to do so. That contest, however, is not before me. Someone who was acceptable to the offeror accepted the offer, namely the defendant, and the only question is whether the document satisfies the legislation. On the face of it, the parties are ad idem, subject to any defences that may be pleaded, and the document does satisfy the requirements of the legislation.”

[26] Apart from the evidence of Birbeck that he undertook to write in the correct name of the seller once established, the inference is that the respondents allowed this to occur. They were content that the name of the seller be inserted by Birbeck and they accepted it.

[27] In *Hill v Faiga* 1964 (4) SA 594 (W) Trollip J (as he then was) said at p 596D-G:

“Approaching the problem in that manner, I think that ex facie the document the respondent intended that the offer it embodied should be made to the owner of the property. At the foot of the document a space was provided for the acceptance of the offer by the owner of the property; and it must be assumed that the respondent was aware not only of what appeared above but also of that provision below her signature at the time she signed. The inference is then irresistible that by signing it she intended making the offer to the owner of the property who would, if he accepted, sign in the space therein provided. That she might not have known at that stage who the owner was is immaterial, because the offer, in order to be effective, does not necessarily have to be made

“for acceptance by a particular person whom the offeror has in mind, as an identified individual, at the time when he makes the offer”

(Hersch v. Nel, supra at p. 693). It follows that the person who was in fact the owner was entitled to accept the offer, and that this acceptance in writing under his signature would result in a contract valid and binding under sec. 1 (1) of the Act.”

[28] Although the *Hill* case continued to deal with admissible extrinsic evidence to identify the seller such need not be done in the present matter as the identity of this seller is not in dispute – it is indeed the applicant as is evident from the deed of sale itself.

[29] In *Hersch v Nel* 1948 (3) SA 686 (A) Schreiner JA said at p693

“An offer to the public generally, such as that in the smoke-ball case (Carlill v. Carbolic Smoke Ball Company (1893, 1 Q.B. 256)), illustrates the fact that an offer is not necessarily made only for acceptance by a particular person whom the offeror has in mind, as an identified individual, at the time when he makes the offer...”

[30] In the circumstances, and accepting that Birbeck acted as a *nuntius* and having regard to the evidence, the respondents authorised Birbeck to insert the seller's name and were indeed content that Birbeck could insert the name of the seller in the agreement resulting in a valid and binding agreement coming into existence when the agreement was signed by the applicant.

[31] The final argument by Mr Cothill was that the agreement was void as a result of two contradictory clauses. The argument is that clause 3 provides that the purchasers shall not be entitled to make any alteration or addition to the property prior to transfer whilst a handwritten clause 15 states that if the buyers wish to make certain changes to the exterior and interior regarding cosmetic decoration upon occupation or earlier and subject to the guarantees being furnished, they may do so. It is apparent that clause 3 deals with alterations and additions to the property whilst clause 15 deals with cosmetic decorations. It is trite law that the construction to be given to a contract should favour validity. See *Boland Bank Beperk v Steele* 1994 (1) SA 259 (T) and I am of the view that the clauses deal with two different types of activity. Clause three deals with alterations of a major or permanent nature whilst clause 15 deals with minor or temporary work which is also evident from the fact that clause 15 envisages the possibility of such cosmetic work being restored to its original condition in the event of the sale not continuing. In my view there is no merit in the defence.

[32] Should I be wrong in this conclusion, it is an established canon of construction that in written contracts where the contract is partly written and partly in print, effect should be given to both parts but where there is an irreconcilable conflict between the written and printed parts, the former prevails.

Wessels, in Law of Contracts South Africa 2nd ed paras 1981-1982 states:

“1981. Where a contract consists partly of printed and partly of written words, courts of law will construe both together, but will give greater weight to the written than to the printed portion where these are in conflict and where they tend to different results (Lawson, Contracts, s. 389 (4); Bishop, Contracts, s. 413; Simmons v. Hurwitz, 1940 W.L.D. 20; Bull v. Estate Bull and Another, 1940§W.L.D. 133).

1982. It sometimes occurs that a printed form of contract is used for the sake of convenience, in which blank spaces appear which are to be filled in according to circumstances; there is often a speace (sic) left where conditions are inserted in writing which are peculiar to the particular contract. In such cases if the blanks are not properly filled in, or if the printed matter is not carefully scrutinised, many words and phrases may creep in which are not germane to the particular contract the parties intended to make. The written part may then be in conflict with the printed portion. In such cases, courts of law usually give more importance to the written matter, for, having been prepared for the special occasion, it is more likely to express the real intention of the parties than the stereotyped language of the written portion. In Thornton v. Sheffield R.R. Co. (5 Am. St. Rep., at p. 339), STONE, C.J., says: ‘It is a rule of interpretation of deeds and other instruments partly written and partly printed that the written portions are presumed to have commanded the stricter attention of the parties; and if there is an irreconcilable conflict between them, the written prevails over the printed matter. This is but the teaching of human experience

crystallised into law.’ See Luis de Ridder, Ltd. v. Andre & Cie S.A. (Lausanne), 1941, 1 All E.R. 380.”

Also see *Taylor N.O. v The Master and Others* 1980 (4) SA 414 (T) at 417H-419F and *Stocks Construction (OFS) v Metter-Pingon* 1980 (1) SA 507 (A) at 519C-D.

[33] Mr Kuny sought costs on the attorney and client scale. Clause 10.2 of the agreement provides that in the event of the seller enforcing its rights by way of legal proceedings, the legal costs so incurred shall be paid by the purchaser on the scale as between attorney and client.

[32] The agreement is consequently not inchoate, but valid and enforceable.

[34] The respondents have failed to show any valid defence to the claim of the applicant and an order is issued in the following terms:

1. It is declared that the agreement of sale dated 21 August 2010 in respect of the property known as Portion 12 (a portion of Portion 1) of Erf 1301 Morningside, Extension 136 Township, Registration Division IR, Province of Gauteng entered into by the applicant and the first and second respondents is of full force and effect and binding on the parties to the agreement.

2. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, forthwith to make payment of an amount of R4 500 000 to the applicant by payment of the said amount to the trust account of attorneys Cranko Karp & Associates Inc within 7 days of the date of this order alternatively to furnish to Cranko Karp & Associates Inc a bank or other approved guarantee in favour of the applicant within the aforesaid period.
3. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved to pay to Cranko Karp & Associates Inc the costs of the transfer of the property into their name, including any interest in respect of transfer duty payable to the South African Revenue Services.
4. The first and second respondents are directed to sign or furnish all documents necessary in order to affect transfer of the property into their names when called upon to do so by Cranko Karp & Associates Inc.
5. In the event of the respondents failing to comply with paragraph 5 above within 14 days of date of this order the sheriff of this Court is authorised and directed to sign on behalf of the first and second respondents all documents necessary in order to effect transfer of the property into the names of the first and second respondents.

6. The first and second respondents are ordered to pay the costs of this application on the scale as between attorney and client.

FOR APPLICANTS: Adv D Kuny SC with Adv K Lavine
Attorneys: Cranko Karp & Associates Inc

FOR RESPONDENTS: Adv C Cothill
Attorneys: Henkel Gregory Inc

Date of Judgment: 26 August 2011