**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE – PORT ELIZABETH)**

Case No.: 1117/2010
Date heard: 16 March 2012
Date delivered: 25 September 2012

In the matter between:

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| **NIGEL COWLEY** | First Plaintiff |
| **MARGARET COWLEY** | Second Plaintiff |
| And | |
| **EDWARD LAI THOM** | First Defendant |
| **PAM GOLDING PROPERTIES** | Second Defendant |

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**JUDGMENT**

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**DAMBUZA, J:**

1] In this action the plaintiffs, who are married to each other, seek an order declaring that there is no binding agreement of sale between them and the first defendant. They also seek refund of an amount of R115,000.00 which they paid into the second defendant's trust account, on an understanding that there was a valid agreement of sale between them and the first defendant.

2] The plaintiffs' case is that they discovered, after they had paid the deposit, that their offer to purchase certain property from the first defendant had expired by the time he accepted it.

3] The plaintiffs live in Perthshire, United Kingdom. During 2007 they were looking for immovable property to buy in and around Port Elizabeth. They eventually made an offer, through Pam Golding Properties (the second defendant) to buy Erf No 6 (No 28 Lazy Waves) Kini Bay, Port Elizabeth.

4] Because the plaintiffs were overseas when making the offer, most of the communication between them and the Estate Agent (and later, the attorneys who were to effect the transfer of the property to them) was by emails exchanged between them. The content of these emails was not in dispute at the trial. Evidence led was largely explanation of that correspondence. I shall therefore, in this judgment, refer extensively to that correspondence.

5] The evidence was that whilst the plaintiffs were looking for immovable property as stated, they were contacted by Linda de Lange, an Estate Agent employed by the second defendant, who showed them the property described above. The plaintiffs made an offer to purchase the property for R1,000,050.00; this offer was declined by the first defendant (the owner of the property). They then revised the offer to R1,150,000.00, which was accepted by the first defendant. The plaintiffs then paid the sum of R115,000.00 as deposit towards the purchase price into the bank account of Pam Golding Properties.

6] At the trial it was common cause that the plaintiffs' offer to purchase was to expire at *"10 pm"* on Saturday 7 April 2007. It was also common cause that the offer was accepted by the first defendant on 15 April 2007 and that the plaintiff paid the deposit of R115,000.00 on 25 April 2007. When the plaintiff's paid the deposit they were not aware of the late *"acceptance"* of their offer.

7] For a while after payment of the deposit it seemed that all was well, until 4 May 2007, when the conveyancers who were to attend to the transfer of the property, called for a bank guarantee from the plaintiffs in respect of the balance of the purchase price (R1,035,000.00). To this demand the first plaintiff responded that they had made arrangements for their funds to be available on 22 August 2007 as they had been advised, by the Estate Agent, that the balance of the purchase price would be payable on registration of transfer. He objected to the demand for transfer fees and the guarantee, stating that the deadline set (25 May 2007), by which they had to furnish the guarantee, was arbitrary.

8] Indeed clause 5 of the offer to purchase provided that registration of transfer would be effected on 22 August 2007 or as soon as possible thereafter. But clause 2.2 of the offer to purchase provided that:

"The balance of R**1,035,000 (One million and thirty five thousand rand)** shall be paid to the Seller's conveyancers (conveyancers) against transfer. When requested by the conveyancers, the Purchaser shall furnish a guarantee/s by a financial institution approved by and acceptable to the Seller, securing payment of such balance. Such guarantee/s shall be delivered by the Purchaser within 14 (fourteen) days of the conveyancers' request which request can be made at anytime but not before the fulfilment of any suspensive or resolutive conditions which are a necessary pre-requisite for the provision of such guarantees contained in clause 6 of this contract or otherwise provided for."

9] Clause 5 provided that:

"Transfer shall be effected by the conveyancers on **Registration ± 22-08-07** or as soon as possible thereafter, provided the Purchaser has complied with the provisions of 2.1 <u>and 2.2</u>, signed all necessary bond and transfer documents and paid all necessary costs of transfer. The Purchaser shall upon demand by the conveyancers make such payments and the Seller and the Purchaser shall sign all transfer documents when so required by the conveyancers. The Seller shall upon demand, if the conveyancers so require, pay to the conveyancers such amounts as may be necessary to obtain a rates and/or levy/ies clearance certificate to facilitate transfer." (my emphasis)

10] A flurry of emails was exchanged between the plaintiffs and Ms Samantha Craddock, the conveyancer, during the period 24 May to 28 May 2007. In that correspondence the conveyancer essentially demanded that the plaintiffs furnish a guarantee as provided for in the offer to purchase, and the plaintiffs refused to furnish same, on the basis that their understanding was that clause 2.2 of the offer to purchase was not applicable. In one of the emails dated 28 May 2007 Ms Craddock explained the demand for a guarantee to the first plaintiff as follows:

"We are aware that registration of transfer is only to be effected by the 22nd of August 2007 but our responsibility is to have the purchase price secured by means of a guarantee which does not entail the funds being paid out prior to 22-08-07."

11] Again Ms Craddock, in an email dated 25 May 2007, warned the plaintiff that failure to comply with the demand to furnish a guarantee (together with signed transfer documents) by 25 May 2007, would necessitate that they (the plaintiffs) be put to terms. To this, the plaintiffs responded in an email dated 26 May 2007, as follows:

"Regarding the offer to purchase contract, we have completed a number of offers to purchase in relation to this transaction due to numerous errors by Pam Goldings agents in relation to various dates and details regarding, for example, address details, expiry of the offer and dates of registration.
Pam Goldings agent categorically told us that we only had to pay our 10% deposit and the balance to be paid on transfer. Accordingly we took it that clause 2.2 that you refer to was not applicable. We also have 2 different copies of the offer to purchase – one where clause 2.2 was not completed and one where it was. <u>However our understanding is that the seller did not comply with the offer expiry date in the latter case</u>.

I trust then that you may understand that the handling of this contract to date has appeared somewhat disorganised and as such very different from our previous land purchase transaction in Kini Bay.

<u>We would however ask that you convey to the vendor that our offer and actions are in good faith and that we are serious purchasers as reflected by our lodgement of 10% ie. R115,000 (by no means a small deposit). The reason for our suggested completion / registration date is that our funds are tied up until the beginning of August and as such we will not be able to provide a guarantee</u>.

We will try to make contact with you this coming Monday (28th May) to discuss the situation more fully and will try to get the required documentation to you as soon as we are able.

Sincere apologies for any delays but as previously stated e-mail is not our best form of contact and we are in an **extremely** busy business period at this point." (my emphasis)

12] By 29 May 2007 the problems relating to the furnishing of a guarantee seemed to be resolved as the conveyancers wrote to the plaintiffs that the first defendant had agreed that the guarantee requirements be put on hold until the middle of or late in August 2007, when the plaintiffs' funds would be available.

13] Thereafter, correspondence between the conveyancers and the plaintiffs, during the period June to mid August 2007 related to the preparation and signing of transfer documents. In particular, during July 2007, the conveyancers wrote to the plaintiffs enquiring about transfer documents which had been forwarded to them and telephone (voice) messages which had been left for them to which there had been no response. In an email dated 18 July 2007 the conveyancers reminded the plaintiffs, amongst others, that registration of transfer was scheduled to take place on 22 August 2007. On 7 August 2007 the conveyancers wrote to the plaintiffs again confirming that registration of transfer was set for 22 August 2007 and inquiring once again as to when the balance of the purchase price would be transferred to them to enable them to proceed with registration of transfer.

14] By 24 August 2007 registration of transfer had not occurred, although the transfer documents had been lodged with the office of the Registrar of Deeds. Registration of transfer was held back because the plaintiffs had not paid the balance of the purchase price. The conveyancers then placed them on terms in a letter of demand, giving them 7 days from the date of the letter (24 August 2007), to transfer the balance of the purchase price and transfer costs into their trust account. Another letter (strangely, also dated 24 August 2007) was addressed to the plaintiffs, advising that the 7 day notice period had expired and that the first defendant had instructed the conveyancers to cancel the sale agreement as a result of the plaintiffs' default (by failing to pay the balance of the purchase price and transfer costs as demanded).

15] On 27 August 2007 the first plaintiff responded to the cancellation of the agreement as follows:

"As you acknowledged at that time, per clause 13 our offer to purchase

***'expire[d] at 10.00 pm on Saturday 7th April...' and '[was]...shall be deemed to be accepted on signature ... by the seller ...'***

You confirmed that in fact Mr Thom did not sign acceptance of that offer until the 15th April 2007, long after our offer had expired and through your subsequent actions seemed to acknowledge that in light of this fact the documentation relating to our offer to purchase does not in fact constitute a binding 'contract'. This failure by Mr Thom to respond in a timely manner had far reaching consequences in regard to our commitments at that time and moving forward.

I should note for the record however that to date you have not responded to the requests from both my wife and myself for hard copy of this documentation and it would seem inappropriate for us to be threatened with 'breach' or placed 'on terms' of a document which we have never been afforded access. **By copy of this letter I would hereby repeat my request for a clean and clear (legible) hard copy of this pivotally important document to be forwarded to us by post.**

Further I should note, in trust that you may relate to your client, that when this absence of a contractual agreement was identified my wife and I suggested to you in good faith that this be addressed by furnishing a 'clean and clear' offer to purchase for timely completion or a mutually agreed binding summary contract. Once again to date this suggestion has not been taken up in spite of adequate time having elapsed.

Whilst we could endeavour to make funds available within the three week timeframe previously suggested by your client if you indicated to us that this would be acceptable we should note that in the absence of a binding contractual commitment from the seller, which to date you have not furnished despite our requests, we will not be bound by your 'demands'.

I should also note that should Mr Thom withdraw his offer to sell represented by your firm for whatever reason we will demand return of the funds lodged with your firm / PGP (R115,000) in good faith as you have failed to furnish a binding commitment from the seller.

Finally, notwithstanding the above points, we should make it clear that it is still our desire and intention to complete the purchase once the appropriate agreement has been properly documented. You will understand that we would be reluctant to forward over R1,000,000 without clear documented assurance that a binding contractual agreement exists.

Without prejudice."

16] It was common cause at the trial that the last page of the *"accepted"* or signed offer to purchase that had been sent to the plaintiff by email was illegible, to the extent that the date of signature thereof by the first defendant was unascertainable therefrom. Hence, the request by the first plaintiff for a clear copy thereof. It is for the same reason that the plaintiffs did not immediately become aware that their offer had been accepted after the expiry thereof.

17] On 28 August 2007 the plaintiffs wrote to Ms Craddock as follows:

"**There is no contract with "terms" or conditions for you to place us "on terms" of or make demands on.**

Whilst we have indicated our desire to complete the purchase of ERF 6, Kini Bay – lodged a substantial deposit toward the purchase and attempted to complete required admin to that end in the interim – the fact remains that no actual contract with 'terms' exists.

Whilst you may wish to infer a 'verbal' or similar contract, certainly we have at no point indicated any willingness to accept any of the terms or conditions relating to our previously documented offer or otherwise. This was made perfectly clear to you at the end of May and by your actions in not following up on your previous threat to hold us 'in breach' and 'place us on terms' at that time I believe you have indicated that you understood this perfectly well.

I do not believe that you are in a position to hold us 'on terms' as no 'terms' have been agreed despite our previous request to furnish us with a binding commitment from your seller.

Without prejudice."

18] The response by the conveyancers was that the plaintiffs had requested them (the conveyancers) to advise the first defendant of their intention to continue with the purchase despite the late *"acceptance"* of the offer, and that response forms the basis of the defendants' defence in these proceedings. In their plea, the defendants contend that the conduct of the plaintiffs, after being aware of the irregularity regarding the acceptance of the offer, constituted a *"waiver"* of their right to elect not to be bound by the agreement and that the plaintiffs, in fact, accepted the existence of a valid contract.

19] On cancellation of the sale agreement R65,550.00 of the funds paid by the plaintiffs as deposit towards the purchase price were paid to the second defendant as commission whilst the balance was paid to the first defendant.

20] Apart from what is already stated above, Linda de Lange's undisputed evidence was that at no time, whilst she dealt with the plaintiffs, did the late acceptance of the offer or the validity of the agreement become an issue.

21] It is a general principle in the law of contract that where acceptance of an offer is stipulated to be made within a specified time, the offer expires at the end of the prescribed time and is no longer open for acceptance.[1] It is on this basis that the plaintiffs contended that there never was a binding agreement between them and the first defendant.

22] According to Christie, if the offeree purports to accept an offer after the fixed time has expired, the offeror is not bound to a contract and the proper way to interpret the late "acceptance" is as a counter-offer which the original offeror can accept or reject as he wishes.[2]

23] The plaintiffs' case in this regard, that they only became aware of the counter-offer on 24 May 2007, is not in dispute. Further the correspondence to which I have referred shows that until shortly before 24 May 2007 the plaintiffs consistently sought confirmation, from both Estate Agent and the conveyancers, that they had a valid agreement of sale with the defendant. At that stage, their concern was not being in possession of a hard copy of what they considered to be a *"duly signed agreement of sale".* On 30 April 2007 the first plaintiff wrote to Ms de Lange that *"Whilst I am assuming that we now have a binding agreement regarding the Kini Bay transaction I*

1 Christie's: The Law of Contract in South Africa; 6th edition; at 50.
2 *Supra* at 50 – 51.

*am aware that several aspects of the transaction and timescales etc are somewhat unusual because we are not 'local'".* The plaintiffs were assured by Ms de Lange that the copy of the signed agreement that had been emailed to them was the actual agreement. This, of course, was not correct, as the plaintiffs' offer had expired by the time of acceptance thereof.

24] Having become aware of the irregularity in the acceptance of their offer, the plaintiffs, on 26 May 2007, wrote the email letter quoted in paragraph 11 above. The evidence of the first plaintiff was that, immediately on being aware of the belated acceptance of the offer, he told the conveyancer, Ms Craddock that he did not consider himself (and his wife) bound by the "agreement" and that he could not be placed on terms on an invalid agreement. On the other hand, Ms Craddock's evidence was that the validity of the offer was never protested by the plaintiff; her recollection of the events was that the plaintiff remained keen on continuing with the agreement. I have difficulty in making a finding, on their oral evidence alone, as to what, exactly was expressed by the first plaintiff in the telephone discussions he had with Ms Craddock in this regard. But it is significant that in the first plaintiff's email of 26 May 2007 he specifically referred to the error regarding the "*expiry of the offer",* and to the failure by the first defendant to *"comply with the offer expiry date",* but he then requested Ms Craddock to "*convey to the vendor that our offer and actions are in good faith and that we are* *serious purchasers as reflected by our lodgement of 10% ie. R115 000 (by no means a small deposit). The reason for our suggested* *__completion/ registration__* *date is that our funds are tied up until the beginning of August and as such* *__we are not able to provide a guarantee__”.*

25] The plaintiffs’ *bona fides* regarding the transaction was, again, expressed by the first plaintiff in an email by the first plaintiff to the conveyancers on 27 May 2007.

26] I am of the view that whilst, in the email of 26 May 2007, the first plaintiff did complain of errors in the various documents drawn by the Estate Agent and the conveyancer, he did not convey any repudiation of the *“agreement”*. It seems to me that the plaintiffs intention was to continue with the transaction on the terms set out in their original offer to purchase, save that there would or should be no requirement that they furnish a guarantee. Indeed the evidence of the first plaintiff was that they were still interested in buying the property on terms that would allow them to pay the balance of the purchase price in August. The only aspect that would change would be that there would be no provision that a bank or any other guarantee for payment of the balance of the purchase price would have to be furnished.

27] At the trial the first plaintiff testified that although he did make the suggestion to Ms Craddock that the requirement to furnish a guarantee should not form part of the agreement, nothing was agreed on. I do not agree. As I have stated, Ms Craddock in the email of 29 May 2007 addressed to the second plaintiff, conveyed that the first defendant was happy that the transaction proceed on the terms suggested by the plaintiffs. Indeed no further demands were made for a guarantee to be furnished by the plaintiff.

28] My understanding of the sequence of events is therefore that after the plaintiffs had become aware of the first defendant's counter-offer they made their own counter-offer to him. I am satisfied that, when instructing Ms Craddock to *"hold off"* on the guarantee requirements, as Ms Craddock testified, the first defendant intended to accept the plaintiffs' counter-offer. It also appears from the evidence that such was the understanding of the parties involved in the transaction; hence no further demands on the plaintiffs to furnish a guarantee were made.

29] But the question is whether the first defendant's acceptance of the plaintiff's counter-offer resulted in a valid agreement of sale. It is trite that section 2 of the Alienation of Land Act (the Act) requires an agreement relating to alienation of immovable property to be *contained in a deed of alienation signed by the parties thereto or their agents acting on their written authority*.[3] Contracts which do not comply with the provisions of this section shall be of no force and effect and there is no room for argument that the section can be

3 Section 2(1) of Act 68 of 1981.

waived by either party.[4]

30] The evidence was that the first defendant's instruction that Ms Craddock should accept the plaintiffs' counter-offer was made telephonically and Ms Craddock communicated the acceptance of the counter-offer in the email of 29 May 2007. In that email Ms Craddock referred to a *telephonic conversation* which she had had with the first defendant earlier on that day. According to Christie: [5]

> "The requirement in s 2(1) that the contract be 'signed' is not fulfilled by the inclusion in an oral contract of a term that the contract will be reduced to writing. Nor is it fulfilled by a written document signed by only one party, nor by a written offer tacitly or orally accepted, since this would be 'admitting the very mischief which the law was passed to exclude". Nor is it fulfilled by signature of a blank page which is later completed with the terms of the contract. This difficulty cannot be overcome by appointing the one party to the contract as the agent of the other. But if the offer and acceptance are in writing the acceptance may be communicated by telegram, by telephone or orally. It does not matter whether the signed written document describes itself as the contract itself or as a memorandum or confirmation of a prior oral agreement, especially if it was drawn up by laymen."

And further, that the following appears:[6]

> "The question of how much of the contract must be in writing has led to some difficulty. There is no doubt that the material terms must be in writing. A document signed by the offeror, and then amended in a material respect by the offeror's orally authorised agent in the presence of the offeree, who then signs, is valid. But a written offer, together with a written counter-offer which is accepted, but not in writing, is invalid. Statements in some of the

4 Christie's (supra) at 116.
5 At 118
6 At 122

judgments that the essential terms of the contract must be in writing merely mean that unless all the essential terms of a contract of sale – subject-matter, parties and price – are in writing the written contract is so incomplete that it can have no legal effect. These statements do not mean that provided the three essential terms are in writing any additional terms, however material, need not be in writing but may be proved by extrinsic evidence."

31] In my view the acceptance, by the first defendant, of the plaintiff's counter-offer, that the furnishing of a guarantee/s should not form part of the agreement, did not comply with the pre-emptory provisions of section 2 of the Act. For that reason even the second attempt by the parties at concluding an agreement of sale, failed and in the end no agreement of sale was ever concluded by the parties in this matter.

32] Consequently, the plaintiffs are entitled to refund of the R115 000,00 paid by them towards the purchase price.

33] The defendants are ordered jointly and severally, the one paying the other to be absolved, to pay to the plaintiffs:

a) An amount of R115,000.00;

b) Interest on the said amount at the legal rate of 15,5% per annum *a tempora morae*;

c) Costs of suit.

**N. DAMBUZA**
**JUDGE OF THE HIGH COURT**

Appearances:

For the plaintiffs:

Adv A Beyleveld SC

Instructed by
Kaplan Blumberg Attorneys
of Port Elizabeth

For the defendants:

Adv B Pretorius

Instructed by
Greyvensteins Attorneys
of Port Elizabeth