

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: 117/2010
Date heard: 14 November 2012
Date delivered: 20 November 2012

In the matter between:

EDWARD LAI THOM

First Applicant
(First Defendant *a quo*)

PAM GOLDING PROPERTIES

Second Applicant
(Second Defendant *a quo*)

and

NIGEL COWLEY

First Respondent
(First Plaintiff *a quo*)

MARGARET COWLEY

Second Respondent
(Second Plaintiff *a quo*)

J U D G M E N T

DAMBUZA, J:

[1] The applicants, who were the defendants in the main action, have brought this application for leave to appeal against the whole of the judgment delivered on 25 September 2010.

[2] The main ground of appeal is that I erred in failing to find that the expiry date stipulated in the agreement was inserted for the benefit of the respondents who had waived their right to *“rely on the late acceptance of the offer”*, thereby concluding a valid sale agreement with the first applicant.

[3] Before I consider the submissions made on behalf of the parties in this application I first deal with the applicants’ interpretation of the findings I made in the judgment. In paragraph 1 of the Applicants’ Heads of Argument, the following appears:

“In paragraphs 23 to 26 of her Judgment the Honourable Dambuzza J held that the Respondents, despite being aware of the fact that First Applicant signed the offer of acceptance (sic) after the expiry date, being 7 April 2007, intended to proceed with the contract entered into between the parties.”

[4] The applicants’ understanding of my finding in this regard is incorrect. I found that no contract of sale was ever concluded between the parties. In the paragraphs referred to, particularly in paragraph 24 of the judgment, I referred to the evidence of the first applicant and that of the first respondent regarding the contents of their telephone discussion subsequent to discovery, by the first respondent, of the late acceptance of the offer to purchase. The evidence was contradictory. I could not make a finding thereon and I then considered the correspondence exchanged between the two of them. I found, in paragraph 26 of the judgment, that the respondents had expressed their continued interest in buying the property on the same terms as before, save that there would be no provision for a guarantee to be furnished. In the end I found that the

first respondent's insistence on the exclusion of the guarantee requirement constituted a counter-offer which was never validly accepted. I did not find that the respondents intended to proceed with the contract entered into between the parties.

[5] The submission, on behalf of the applicants, is essentially that, although the offer to purchase had lapsed when the first applicant purported to accept same, it was revived by an acceptance thereof. During argument I was referred to a judgment in *Matthysen v Stoney Ruver Properties 53 CC 2011 JDR 1866 (GNP)* (Case No 36508/2011). In *Matthysen*, Southwood J held, where an offer made at an auction had lapsed but was later accepted by the seller after negotiations, that the acceptance was invalid, as the offer had already lapsed, and that, for it to be valid, the purchaser would have had to sign the offer again to show that there was a new offer, and the seller would then have had to accept the new offer in writing (i.e. by signing the new offer). I respectfully align myself with the views of the Learned Judge and agree that, as submitted by *Mr Beyleveld* on behalf of the respondents, the judgment in *Manna v Lotter & Another 2007 (4) 315 CBD* is wrong. Even if, for argument's sake, the offer could be so revived, no other court would conclude, from the evidence on record in this case, that the first respondent waived the rights that the respondents had not to be bound by the "*contract*".

[6] The submission on behalf of the applicants implies, firstly that the first respondent had authority to waive the second respondent's rights in respect of the offer. Further it implies that the contents of the letter of 26 May 2007 addressed by the first

respondent to the conveyancers, constitute a waiver. In that letter the first respondent states that:

“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 lodgment 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”.

[7] Whilst I agree that a contract may still be concluded where there has been failure to timeously comply with a condition of an offer, that principle is, however, not without qualifications. The writer **Christie R H**; in *The Law of Contract in South Africa*,¹ writes as follows in this regard:

“Non-fulfilment of a condition precedent normally renders the contract void, and there is therefore no question of a party waiving his right to cancel the contract once there has been non-fulfilment, although he may waive the entire condition. In the same way the parties may agree to revive or reinstate the contract without the condition. Non-fulfilment of a condition that is exclusively for the benefit of one party may be waived by that party and cannot be relied on by the other party. Two riders must immediately be added to that proposition. The first is that it must be clear that the parties intended the condition to be exclusively for the benefit of the one party. If this is not clear, the other party is not bound by the waiver. The second rider is that if the contract places a time limit on the fulfillment of the condition, the party for whose exclusive benefit it was imposed cannot waive it after the time limit has expired. There is, of course, nothing to prevent the parties agreeing that non-fulfilment will give either or both parties the right to resile from the contract and to waive that right.”

¹ 5th ed; at 145-146.

[8] Further, the fact that the law stipulates that an agreement of sale of land must be writing is pivotal in this case.

[9] I am satisfied that no other court would find that the letter relied on by the applicant, or the utterances by the first respondent, either considered on their own or together with the signing of the transfer documents by the respondents, constituted a waiver by the first respondent of his rights and/or the rights of both respondents in relation to invalid acceptance of the offer. I am of the further view that no other court would find that the failure by the respondents to demand refund of the deposit immediately on cancellation of the agreement by the first applicant constituted a waiver of the respondents' rights under the offer to purchase.²

[10] During argument *Mr Pretorius* sought to add a further aspect of the respondents' conduct that, according to the applicants, constituted a waiver of their rights to repudiate the "*contract*". He submitted that payment of the deposit by the respondents on 25 April 2007 constituted a waiver of any rights the respondents had regarding "*contract*". As I found in the judgment, the respondents only became aware of the irregularity in the acceptance of the offer on or about the 24 May 2007. My finding in this regard is not an issue on which the applicants intend to appeal (according to their notice of application for leave to appeal). But I may as well state that no court would reasonably find, on the evidence on record, that the respondents were aware on 25 April 2007, of the irregularity in the acceptance of their offer.

² See Christie; (supra) at 441 regarding the requisites of waiver.

[11] In the end I am not persuaded that another court might find for the applicants on any of the issues they rely on in this application.

[12] In the result:

The application is dismissed with costs; the applicants are ordered to pay such costs jointly and severally; the one paying, the other to be absolved.

N DAMBUZA
JUDGE OF THE HIGH COURT

Appearances

For applicant/defendant:

Adv B Pretorius

Instructed by Greyvensteins Inc. Attorneys of Port Elizabeth

For respondent/plaintiff:

Adv A Beyleveld SC

Instructed by Kaplan Blumberg Attorneys of Port Elizabeth