

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

Case Number: 38603/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

15 JANUARY 2024

J SPACE (PTY) LTD
(REG NO.: 2015[...])

Applicant

and

O-YES AUCTIONS CC
(REG NO.: 2008[...])

Respondent

This judgment was handed down electronically by circulation to the parties/and or parties' representatives and uploading on CaseLines. The date and time of hand-down is deemed to be 15 January 2024 at 10h00.

JUDGMENT

JORDAAN AJ

INTRODUCTION

[1] This is an opposed application for a declarator in terms of which the Applicant seeks an order in the following terms:

- "1. That the offers to purchase dated 10 October 2020 and 20 October 2020 be declared null and void;*
- 2. Directing the Respondent to pay the Applicant the sum of R277 500.00;*
- 3. Directing the Respondent to pay the Applicant interest on the sum of R277 500.00 at the rate of 7.75% calculated from 14 October 2020 to date of payment;*
- 4. Costs on the scale of attorney and client;*
- 5. Further and/ or alternative relief."*

[2] The Applicant is JSPACE (PTY) LIMITED (Registration Number: 2015[...]) a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, having its chosen *domicilium citandi et executandi* for the purpose of the

Application at care of: ALAN LEVY ATTORNEYS INCORPORATED, 21 Scott Street, Waverley, Johannesburg.

[3] The Respondent is O-YES AUCTIONS CC (Registration Number: 2008[...]) a close corporation duly registered and incorporated in terms of the company laws of the Republic of South Africa, having its principal place of business at 25 Silverstone Crescent, Kyalami Park, Kyalami. The Respondent carries on the business of an auctioneer of immovable property.

BACKGROUND

[4] This application arises within the context of a sale of immovable property described as Portion 109 of Farm 535 Nietgedacht, Reg Div J.Q. Gauteng, situated at 10 Pommery Avenue, North Champagne Estate, hereinafter referred to as "the Property", belonging to Chris and Monica Bolsover, hereinafter referred to as "the Sellers".

[5] The Applicant having noticed the property advertised by an estate agent, Alison Howard under the name and style of Howard and Currie Country Estate Agents, contacted the agent who referred the Applicant to the Respondent as the property was to be auctioned by the Respondent. The Respondent in turn provided the Applicant with a bidder's pack¹ containing the details of the property, how the bidding process works, amounts payable, date, place and time of the auction.

[6] On the 10th of October 2020 the Applicant participated in the auction for the sale of the Property under control of the Respondent, as auctioneers acting on behalf of the Sellers, by submitting bids for the property. The Applicant's bid the amount of R1 850 000.00 (One Million Eight Hundred and Fifty Thousand Rand) at the auction was not exceeded.

[7] Subsequent to the auction, the Applicant on the 10 October 2020 submitted a written offer to purchase the Property for the same amount of R1 850 000.00 (One Million Eight Hundred and Fifty Thousand Rand)² to the Respondent and paid the amount of R277 500.00 in terms of Clause 5.2 of Part A of the written offer to purchase which requires that an initial payment be made on signature of the offer to purchase. This offer to purchase was subject to the condition, which reads:

"The sale is subject to Confirmation by the Seller of the Property or O-YES Auctions on behalf of the Seller within 3(three) days (the Confirmation Period) from date of signature hereof by the Purchaser during which period the offer cannot be withdrawn by the Purchaser. Once the offer has been accepted by the Seller it shall constitute an Agreement of Sale"

[8] In terms of Clause 6.2 of the offer to purchase, the Purchaser shall on the signature date pay the deposit as per clause 5.2 of Part A of the Schedule. Clause 5.2 of Part A is headed Initial Payment and provides that upon signature of this offer to purchase by the Purchaser payment

¹ CaseLines pages 004-25 to 004-53 Annexure "FA1"

² CaseLines pages 010-52 to 010-63 Annexure "AA4"

which is made up of 3.5% on the Purchase Price, 10% of the Purchase Price for Buyer's Premium and 15% VAT on the Buyer's Premium, is payable by the Purchaser. This payment was effected on the 10 of October 2020.³

[9] In terms of Clause 5.3 of Part A this payment was to be made via EFT into the O-YES Auctions CC Trust Account.

[10] Clause 5.3 of Part B of the written offer provides that should the Seller not accept the Purchaser's offer, O-YES Auctions will refund any deposit paid by the Purchaser exclusive of interest.

[11] In terms of Clause 7.2 the Buyer's Premium shall be deemed to be earned and immediately payable on the Confirmation Date and O-YES Auctions shall be entitled to claim and retain the Buyer's Premium for its own account on that date.

[12] Clause 1.3 provides that the Confirmation Date means the date of acceptance of the offer by the Seller.

[13] In response to the Applicants written offer, the Sellers indicated that they would accept an offer of R1 950 000.00 (One Million Nine Hundred and Fifty Thousand Rand).

[14] On the 13th of October 2020 the Applicant submitted a second written Offer to Purchase with an increased purchase amount offered of R1 900 000.00 (One Million Nine Hundred Thousand Rand) on the same terms and conditions applicable as the first Offer to Purchase, to the Respondent.⁴

[15] On the 22nd of October 2020, the Applicant received a purported acceptance of the second Offer to Purchase. However, certain amendments were effected to Applicant's second written Offer to Purchase in that paragraphs 14.2 to 14.5 was deleted and paragraph 9.6 was altered. This purported acceptance was dated the 20th of October 2020 and signed by the Sellers.⁵

[16] The Applicant and Sellers could not agree on these terms pertaining to the sale of the property. The Seller then sold the property to another buyer.

POINTS IN LIMINE

[17] This Court had regard to the extensive submissions in regard to the Respondent's various points *in limine* to the application and rule as follows in respect of each:

17.1 Defunct Application

³ CaseLines pages 004-55 Annexure "FA3"

⁴ CaseLines pages 004-70 to 004-81 Annexure "FA5"

⁵ CaseLines pages 004-83 to 004-91 Annexure "FA7"

17.1.1 There is no dispute between the Parties that a written Offer to Purchase “FA5”, which Offer to Purchase form the Respondent provided to the Applicant, was submitted by the Applicant.

17.1.2 In terms of this written offer a contractual relationship, creating rights and obligations, came into existence between the Applicant and the Respondent for the following reasons:

17.1.2.1 In facilitating the sale agreement the Respondent is providing a service to the Applicant until the Offer to Purchase is concluded. The Offer to Purchase form was provided by the Respondent to the Applicant as part of the service. Until the Offer to Purchase is confirmed as a sale and accepted by the Seller, there is no Sale Agreement, only the Offer to Purchase which in itself create a contractual relationship between the Applicant and the Respondent.

17.1.2.2 In terms of Clause 6.2 of the Offer to Purchase, the Purchaser shall on the signature date pay the Deposit as per clause 5.2 of Part A of the Schedule. Clause 5.2 of Part A is headed Initial Payment and provides that upon signature of this offer to purchase by the Purchaser, payment which is made up of 3.5% on the Purchase Price, 10% of the Purchase Price for Buyer’s Premium and 15% VAT on the Buyer’s Premium, is payable by the Purchaser. Thus the peremptory deposit to be paid in terms of Clause 6.2 is to be paid as per Clause 5.2 which states what it comprises of.

17.1.2.3 In terms of Clause 5.3 of Part A this payment was to be made via EFT into the O-YES Auctions CC Trust Account. This payment was effected on the 10 of October 2020.⁶

17.1.2.4 Clause 5.3 of Part B of the written Offer to Purchase provides that should the Seller not accept the Purchaser’s offer, **O-YES Auctions(Respondent) will refund any deposit paid by the Purchaser(Applicant)** exclusive of interest.

17.1.2.5 The Respondent is basing his entitlement to retain the Buyer’s Premium on the same Offer to Purchase.

17.1.3 It is trite that the applicant seeking a declarator must have a direct interest in the right to which the order will relate.⁷ The Applicant is the party claiming repayment of money paid by the Applicant to the Respondent in terms of the Offer to Purchase which money the Applicant claim, is now being withheld by the Respondent without a lawful basis. The Applicant is claiming repayment on behalf of itself and thus have a direct interest in the right to repayment.

⁶ CaseLines pages 004-55 Annexure “FA3”

⁷ Preston v Vredendal Co-operative Winery Ltd 2001 (1) SA 244 (E) at 249

17.1.4 For these reasons, this point in limine is without merit.

17.2 Disputes of Fact

17.2.1 A material dispute of facts arises when material facts alleged by the Applicant are disputed and traversed by the Respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.

17.2.2 The denial by the Respondent of certain facts does not raise a real dispute of fact having regard to the facts as stated by the Respondent, together with the admitted facts in the affidavits of the Applicant.

17.2.3 Therefore this point in limine cannot be sustained.

17.3 Important Contractual Terms Misused and Explained

17.3.1 This point *in limine* does not address critical issues related to the admissibility of evidence or procedural matters that could significantly impact the proceedings.

17.3.2 In terms of Clause 6.2 of the Offer to Purchase, the Purchaser shall on the signature date pay the **Deposit** as per clause 5.2 of Part A of the Schedule. Clause 5.2 of Part A is headed Initial Payment and provides that upon signature of this offer to purchase by the Purchaser, payment which is made up of 3.5% on the Purchase Price, 10% of the Purchase Price for Buyer's Premium and 15% VAT on the Buyer's Premium, is payable by the Purchaser. Thus the peremptory **Deposit** to be paid in terms of Clause 6.2 is to be paid as per Clause 5.2 which states what it comprises of.

17.3.3 For these reasons, this point in limine is without merit.

APPLICANT'S SUBMISSIONS

[18] It was submitted by Adv Spiller, on behalf of the Applicant, that though the Applicant submitted the written offer to purchase and paid the deposit, this offer was never accepted and thus no sale Agreement came into effect.

[19] It was Adv Spiller's submission further that it could only be because of the fact that the first written offer was indeed not accepted by the Seller, that the Applicant submitted a second written Offer to Purchase in the amount of R1 900 000.00 (One Million Nine Hundred Thousand Rand) on the 13th of October 2020.

[20] Upon signature of the Offer, the Applicant made payment to the Respondent of the amount of R277 500.00 as per of Clause 5.2.

[21] Adv Spiller presented that the Sellers did not accept the Applicant's written offer within three (3) days, or at all, nor did the Respondent accept the offer on behalf of the Sellers within the time period. It was the Applicant's submission that The Sellers made a counter offer to the Applicant on 20 October 2020 (7 days thereafter). The Written Offer of the 13th of October 2020 had consequently lapsed on the 16th of October 2020.

[22] Applicant contended that as a result of the counter-offer, which was not accepted by the Applicant, and the fact that the Written Offer was not accepted by the Sellers, within 3 days of being made or at all, no valid legal binding agreement came into existence between the Applicant and the Sellers.

[23] It was submitted on behalf of the Applicant that the condition which would have entitled the Respondent to charge the Buyer's Premium, was not fulfilled. The Respondent therefore had no right to charge the Buyer's Premium and clause 5.3 of Part B expressly provided that the Respondent was obliged to refund the entire amount of the deposit paid.

[24] The Applicant for these reasons requested an order in terms of the notice of motion.

RESPONDENT'S SUBMISSIONS

[25] Adv van der Merwe on behalf of the Respondent submitted that there was a valid auction held on the 10th of October 2020 wherein the Applicant submitted the highest bid for the purchase of the Property and accordingly submitted a Written Offer of R1 850 000.00 (One Million Eight Hundred and Fifty Thousand Rand) and paid the deposit as required in Clause 6.2 to be paid as per Clause 5.2 Part A.

[26] The Respondent submitted that the Sellers indicated that they would accept a purchase price of R1,950,000.00 (One Million Nine Hundred and Fifty Thousand Rand). The Respondent further submitted that the Applicant accordingly on the 13th of October 2020, submitted a Second Offer which is contained in Annexure "FA5".

[27] Adv van der Merwe submitted that it is the Respondent's case that the Seller indeed accepted the Offer to Purchase dated 13 October 2020 on the 16th of October 2020 and a valid Sale Agreement came into existence, being Annexure "FA7".

[28] The Respondent contended that in terms of Clause 5.3 of Annexure "FA7" the Respondent must receive the deposit, however Deposit is not defined in the agreement.

[29] The Respondent further contended that the Initial Payment is made up of 3.5% on the Purchase Price in the amount of R64 750.00, 10% of the Purchase Price for Buyer's Premium in the amount of R185 000.00 and 15% VAT on the Buyer's Premium in the amount of R27 750.00. The Respondent, contending that a valid Sale Agreement came into existence entitling them to the Buyer's Premium and Vat on the Buyer's Premium, tendered payment of

R64 750(Sixty Four Thousand Seven Hundred and Fifty Rand), but not the Buyer's Premium or the VAT thereon.

[30] It was the Respondent's submission that the changes effected on Annexure "FA7" by the Seller are not material changes as:

30.1 the person liable to pay occupational rent in terms of Clause 9.6 remain the same it is simply the person who is to receive the payment that was changed

30.2 nothing changes by cancelling clause 14.1 as the property cannot be transferred without the Gas Certificate and the Seller remain liable

[31] The Respondent submitted that the Applicant's action lies against the Seller as there was a valid Agreement of Sale and accordingly requested that the application be dismissed with costs.

ISSUE FOR DETERMINATION

[32] The crisp issue for determination by this Court is whether a valid sale agreement came into existence between the Applicant and the Sellers.

THE LAW

[33] In South African law, no contract can come into existence unless the offer is accepted⁸, which acceptance must be clear and unambiguous.⁹ For acceptance of an offer to be effective it should correspond with the terms set out in the offer.¹⁰

[34] In principle, anything more or less than an unqualified acceptance of the entire offer amounts to a counter-offer and constitutes a rejection of the original offer.¹¹

[34] It is trite that in the case of a written contract, the party alleging same must prove that the other contracting party had agreed to the written contract in its final form.¹²

[35] The conditional acceptance of an offer amounts to rejection of same and not the conclusion of a contract, but may be a counter – offer. In the case of Command Protection Services (Gauteng) (Pty) Limited t/a Maxi Security v South African Post Office Limited¹³, the Court held:

"When parties conclude an agreement while there are outstanding issues requiring further negotiation, two possibilities would follow: no contract formed because the acceptance was

⁸ Tel Peda Investigation Bureau Pty Ltd v Van Zyl 1965 (4) SA 475 (E) 478G

⁹ Kahn v Raatz 1976 (4) SA 543 (A)

¹⁰ Erasmus v Santam Insurance Ltd 1992 (1) SA 893 (W)

¹¹ Von Mehren 'The formation of Contracts' International Encyclopedia of Comparative Law Volume 7(1992) Chapter 9 paragraph 158; Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A)

¹² Da Silva v Janowski 1982 (3) SA 205 (A)

¹³ 2013 (2) SA 133 (SCA)

conditional upon consensus, or a contract formed with an understanding that the outstanding issues would be negotiated at a later stage.”

In that case the court found that no final agreement had been reached, and a binding contract would only come into existence upon the successful finalisation of the negotiations. In summary, the court found that the letter of appointment was not an unconditional acceptance of the tender, but intended by the Post Office and accepted by Maxi as a counter-offer, and the agreement that then came into existence was an agreement to negotiate.

[36] In the case of *Rockbreaker and Parts (Pty) Limited v Rolag Property Trading (Pty) Limited*¹⁴, a written offer to purchase property was signed by the respondent who was the purchaser, on 20 October 2005 and by the appellant who was the property owner/seller, on 25 October 2005. The seller added the following words in manuscript: 'This offer is accepted subject to the seller obtaining registration of the subdivision of the property.' The manuscript insertion was neither initialled nor countersigned by the respondent.

[37] The Court held that if the manuscript insertion embodied a material alteration to the contractual terms and thus constituted a counter-offer that was never accepted in writing, then the contract would be unenforceable.¹⁵ The court held further that the insertion of the clause in manuscript served to protect the appellant from an action for damages in the event that the subdivision did not materialise. There was therefore no doubt in the circumstances of the case that the manuscript insertion was material and amounted to a counter-offer.

APPLICATION OF THE LAW TO THE FACTS

[38] Having regard to the principles set out above, the Applicant bid R1 850 000.00 at the auction and submitted the first written Offer to Purchase of R1 850 000.000 on the same date of 10 October 2020 which offer was communicated to the Seller and was subject to the condition, which reads:

“The sale is subject to Confirmation by the Seller of the Property or O-YES Auctions on behalf of the Seller within 3(three) days (the Confirmation Period) from date of signature hereof by the Purchaser during which period the offer cannot be withdrawn by the Purchaser. Once the offer has been accepted by the Seller it shall constitute an Agreement of Sale”

Clause 1.9 of the Offer to Purchase provides that days shall mean weekdays excluding Saturday, Sunday and Public Holidays.

[39] No facts were advanced that the Seller accepted the offer or confirmed the sale by/on the 15th of October 2020, as the 10th of October 2020 was a Saturday. It was submitted by the Respondent that the Seller, on being informed of the offer indicated that that they would accept an offer of R1 950 000.00 (One Million Nine Hundred and Fifty Thousand Rand), which amount was higher than what was offered and not offered by the Applicant- constituting in the circumstances a counter-offer.

¹⁴ 2010 (2) SA 400 (SCA)

¹⁵ *Rockbreaker and Parts (Pty) Limited v Rolag Property Trading (Pty) Limited* Paragraph [8] at page 404F - H

[40] The Applicant on the 13th of October 2020 submitted a second written Offer to Purchase in the amount of R 1 900 000.00(One Million Nine Hundred Thousand Rand) on the same conditions as the first written Offer to Purchase.¹⁶

[41] It was submitted that the Seller accepted the second Offer to Purchase on the 16th of October 2020, this is contrary to what the Seller under oath state as they confirm the founding affidavit which contain the statement that the Sellers did not accept the written offer within three days or at all, nor did the Respondent purport to accept the offer on behalf of the Sellers.¹⁷

[42] Annexure “FA5” was submitted on the 13th of October 2020 as the second Offer to Purchase. Annexure “FA7”, the purported accepted Offer to Purchase, had an alteration to Clause 9.6 and Clause 14.2 to Clause 14.5 was deleted. These deletions and alterations were not in the submitted second written Offer to Purchase, Annexure “FA5”. Clause 14.2 placed an obligation on the Seller to provide the Gas Certificate of Conformity and Clause 14.3 provided that the Seller is to provide the Electric Fence System Certificate of Compliance. These alterations and deletions of the clauses in the circumstances served to protect the Seller.

[43] Having regard to the facts and applicable legal principles, I find that the Seller’s indication that he would accept an offer of R1950 000.00 (One Million Nine Hundred and Fifty Thousand Rand) in response to the first Offer to Purchase, amounts to a counter-offer and constitutes a rejection of the first Offer to Purchase. In the circumstances, I find that no acceptance or confirmation of sale in respect of the first Offer to Purchase dated 10 October 2020 took place. Therefore, no valid Sale Agreement came into existence between the Applicant and the Seller.

[44] The Seller did not unqualifiedly accept the second Offer to Purchase, but effected alterations and deletions to the second Offer to Purchase which are material deletions. I therefore find, that the purported acceptance of the second Offer to Purchase by the Seller amounts to a counter-offer which constitutes a rejection of the second Offer to Purchase. In the circumstances, I come to the ineluctable conclusion that no acceptance or confirmation of sale in respect of the second Offer to Purchase took place. Therefore, no valid Sale Agreement came into existence between the Applicant and the Seller.

[45] I find that the Applicant has on 10 October 2020 in compliance with Clause 6.2 of Part B paid the Deposit as per Clause 5.2 Part A in the amount of R277 500.00 (in Clause 5.2 Part A under the heading Initial Payment) into the Respondent’s Trust Account (stipulated in Clause 5.3 Part A).

[46] Having regard that there is a lack of confirmation of the sale in respect of the first and the second Offer to Purchase and a lack of acceptance of the first and second Offer to Purchase, I

¹⁶ CaseLines pages 004-70 to 004-81 Annexure “FA5”

¹⁷ CaseLines page 004-16 paragraph 32 page 004-118 to 121 and 004-122 to 125; Annexure “FA8” paragraph 1.4

arrive at the inescapable conclusion that there is no Confirmation Date which is required to enable the Respondent to claim and retain the Buyer's Premium for its own account.

[44] I therefore make the following order:

ORDER

- [45] 45.1 The offers to purchase dated 10 October 2020 and 20 October 2020 are declared null and void;
- 45.2 The Respondent shall pay the Applicant the sum of R277 500.00 (Two Hundred and Seventy-Seven Thousand Five Hundred Rand);
- 45.3 The Respondent shall pay the Applicant interest on the sum of R277 500.00 (Two Hundred and Seventy-Seven Thousand Five Hundred Rand) at the rate of 7.75% p/a calculated from 23 February 2021 to date of payment;
- 45.4 The Respondent shall pay the Applicant's Costs on the scale of attorney and client.

M T Jordaan
Acting Judge of the High Court
Johannesburg

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