IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 2263/2019

In the matter between:

HORACE TERRY 1st Applicant
LORRAINE TERRY 2nd Applicant

and

MATLALI BERLINA SOLFAFA 1st Respondent
HILLANDALE HOMEOWNERS' ASSOCIATION (NPC) t/a WOODLAND HILLS WILDLIFE ESTATE 2nd Respondent

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HEARD ON: 8 AUGUST 2019

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 29 AUGUST 2019

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[1] In this application the Applicants seek an order directing the First Respondent to take all the necessary steps and to sign all the necessary documentation in order to effect the transfer into their names of a property they have purchased from the First

Respondent. They also pray for a further order directing the Registrar of the Court to do all the things necessary to effect the transfer, in the event of the First Respondent failing to comply with the Court order within 7 days after date thereof. The application is vigorously opposed by the First Respondent. The Applicants, who are married to each other in community of property, do not seek any relief against the Second Respondent.

[2] The facts of the matter are briefly the following:

Around **22 February 2019** the Second Applicant came across an advertisement of the First Respondent's residential property that was for sale for an amount of **R 2 600 000.00**. The Applicants immediately arranged to inspect the property, and having done so, they decided to buy the property. The First Applicant therefore signed an Offer to Purchase for the amount of **R 2 600 000.00** on **27 February 2019.** It is stated on the offer document that "*this constitutes an Agreement of Sale upon acceptance by the Seller*".

[3] The First Respondent found herself in Boksburg at the time. Her agent, Ms. Leandri Leach, who is an attorney of Leach Attorneys in Bloemfontein, took the offer to the First Respondent in Boksburg, where she signed acceptance thereof on **1 March 2019**. The First Respondent, however, contends that she called Ms Leach approximately 30 minutes after she had signed the offer, instructing her to withdraw the agreement and terminating the mandate of Ms Leach at the same time. This is denied by Ms Leach. According to Ms Leach, the call from the First

Respondent came approximately one hour after she had signed. She merely told Ms Leach that she was considering cancelling the agreement. Ms Leach then advised her against such a cancellation.

[4] Be it as it may, it so happened that the Second Applicant only co-signed the Offer to Purchase on **10 April 2019** at the insistence of the bank where the Applicants went to obtain a loan for the purchase price of the property. On the following day, **11 April 2019**, the bank notified the Applicants in writing that their application for a loan was approved. Notwithstanding, the First Respondent rejected the signed Offer to Purchase and refused to cause the transfer of her property into the names of the Applicants. Hence the application this Court now has to determine.

[5] In the papers before me, and at the hearing of the application, the First Respondent raised the following three defences to the relief sought by the Applicants: Firstly, the First Respondent contends that no valid contract could have been concluded because it was only the First Applicant who signed the Offer to Purchase, whilst the Second Applicant only signed the offer much later, that it is even after the First Respondent herself had signed. The First Respondent contends that therefore, the Offer to Purchase was not made in terms of the provisions of the Alienation of Land Act. Secondly, it is submitted that no valid contract could have been concluded because Ms Leach, the agent of the Respondent, acted in direct breach of her instructions when she communicated the First Respondent's acceptance and signature of the Offer to Purchase to the Applicants. Thirdly, it is contended that the

Applicants failed to comply with the suspensive conditions contained in the written agreement, with the result that it has lapsed and is of no force and effect. I propose to consider each of these defences under the following separate headings:

[6] **No valid contract due to only one signature for the Applicants:**

The position of spouses married in community of property is clearly regulated by relevant legislation. The Matrimonial Property Act 88 of 1984 leaves no doubt that the joint estate of those spouses is administered by both spouses concurrently, with the result that both husband and wife have equal capacity to perform juristic acts and equal powers to manage the joint estate, which powers can in most cases be exercised without the consent of the other spouse.[1] Section 15(2) of the Act defines in which events the other spouse has to give written consent when a juristic act is performed. One of these events is where one of the spouses, as a purchaser, enters into a contract as defined in the Alienation of Land Act 68 of 1981, and to which the provisions of that Act apply.[2] A contract is defined in the Alienation of Land Act as a deed of alienation, where the purchase price is payable in more than two instalments over a period of more than one year.[3] It is common cause that the present contract is not one of that kind, and that written consent by the Second Applicant was therefore not required. The First Applicant had full capacity to bind the joint estate by signing the Offer to Purchase without the written consent of the Second Applicant.

[1] Sections 14 and 15(1) of the Act
[2] Section 15(2)(g)
[3] Definitions, Section 1

[7] Mr Groenewald, appearing for the Applicants, referred the Court to an article published by Mr Roelie Rossouw in the GhostDigest of **12 February 2009**, in which article he gave the same interpretation to the legislation referred to above. On the basis thereof, he expressed the view that the decision in **Govender and Another v Maitin and Another 2008(6) SA 64 (D)** was wrong. I respectfully agree with his views in this regard. The learned Judge in the Govender case seems to have assumed that in all cases of the sale of land, the written consent of the other spouse is required, which is not the position, as pointed out above. For this reason, the defence under this heading cannot succeed.

[8] **No valid contract because Ms Leach was not mandated to communicate acceptance of the offer:**

In raising this defence the First Respondent relies on her allegation that she called Ms Leach, her agent, some 30 minutes after she had signed the offer, instructing her to withdraw the agreement and terminating the mandate of Ms Leach. On the basis hereof, the First Defendant contends that no agreement between her and the Applicants came into being because the acceptance of the offer was not supposed to be communicated to the Applicants. In this respect the First Respondent obviously relies on the common law principle that, unless the contrary is established, a contract comes into being when the acceptance of the offer is brought to the notice of the offeror.

[9] The question here is therefore whether that common law principle is applicable. The Supreme Court of Appeal has provided valuable guidelines in this regard in the case of **Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 2009(2) SA 504 (SCA)**, where the following was stated: *(a) In each case it will be necessary to consider the terms of the offer to determine the mode of acceptance required. (b) Where the offer takes the form of a written contract signed by the offeror, the inference will more readily arise in the absence of any indication to the contrary that the mode of acceptance required is no more that the offeree's signature.*[4]

[10] In its judgment the Court went on to endorse the views expressed in **Reid v Jeffreys Bay Property Holdings (Pty) Ltd 1976(3) SA 134 (C) at 137 D-G** to the effect that it is improbable that any of the parties to a contract would intend that the time and place of the conclusion of the contract would be determined not from the document itself but by way of evidence *aliunde*.[5]

[11] In the present case, the offer carries the heading "Offer to Purchase (This constitutes an Agreement of Sale upon Acceptance by the Seller)".

It is further stated in the document that the offer is irrevocable ad that *"the Seller agrees to sell the immovable property, together with the improvements thereon, to the Purchaser whom purchases from the Seller on the terms and conditions as set out in this Agreement."* Underneath this sentence the First Respondent

[4] At par 11 page 509 of the judgment
[5] At par 11 page 509 of the Withok judgment

signed as the Seller of the property. In the absence of any indication to the contrary, the inference is therefore unavoidable that it was the expressed intention of the parties that the mode of acceptance would be the signature of the First Respondent, and nothing more. The common law principle of acceptance by notice to the offeror, is clearly not applicable. In the premise, I find that the question whether Ms Leach was instructed not to communicate the acceptance to the Applicants, is irrelevant to the adjudication of this application. The defence under this heading can therefore not succeed.

[12] **The contract has lapsed because the suspensive conditions were not fulfilled:**

The written agreement contains two suspensive conditions. The first is that the Applicants should be able to raise a mortgage loan for the sum of **R 2 600 000.00** to be secured by the registration of a first mortgage over the property in favour of a recognised financial institution or registered bank within thirty working days. It is further provided in the agreement that this suspensive condition shall be deemed to have been fulfilled on the date upon which the financial institution issues a written loan quotation/document to the Applicants for an amount equal or higher than the **R 2 600 000.00**. It is common cause that on **11 April 2019** the Applicants were informed in writing by FNB that their application for a mortgage loan was approved for a total amount of **R 3 900 000.00**. This date falls within the period of 30 working days stipulated, and this suspensive condition has therefore been fulfilled.

[13] The second suspensive condition in the agreement requires the successful sale of the property of the Applicants, situated at Langenhovenpark, for an amount of **R 1 900 000.00**, or lesser amount that may be acceptable to the Applicants, within sixty days after the date on which the agreement was signed by the First Respondent. It is again common cause that the Applicants concluded a written agreement of sale in respect of their Langenhovenpark property on 22 April 2019 for an amount of R1.66 million. The agreement of sale was therefore concluded within the sixty day period. The Applicants allege that the transfer of their Langenhovenpark property is currently in the process of being finalised and that the purchasers have already taken occupation of that property on **1 July 2019**. The First Respondent, on the other hand, contends that no "successful sale" of the property has taken place within the sixty days period, because transfer has not taken place within that period. She states that if a valid agreement of sale had come into existence between her and the Applicants, it had now lapsed because the sale did not become "successful" within sixty days.

[14] Mr Sander, appearing for the First Respondent at the hearing of the application, submitted that there must be registration of transfer before it can be said that a sale was successful. What is significant, however, is that the Applicants allege in their founding papers that the purchasers of the Langenhovenpark property have duly complied with the terms of the agreement pertaining to that property. In her response to this allegation, the First Respondent states that she has not knowledge thereof, and can therefore

neither admit nor deny same. The allegation of the Applicants in this regard is therefore not denied.

[15] Be that as it may, the crucial question is how the phrase "successful sale" should be interpreted. The judgment in **Koen v Punyer 1984 (1) SA 344 (SECLD)** is to the point. The facts in that case are basically the same as in the present case, in that there appeared a suspensive condition in a deed of sale to the effect that the sale was subject to the successful sale of the defendant's property. It was held by Solomon J, as he then was, that the phrase in question was intended by the parties to mean the successful signing of the deed of sale, and not the completion of the transaction and the payment of the purchase price. As far as the present case is concerned, I cannot think for a moment that the parties had the intention that the Applicants were to find a purchaser for the property, that they had to sign a deed of sale after a purchaser was found, that possible suspensive conditions in that deed had to be fulfilled, and that the registration of transfer into the purchasers name, all had to take place within the limited period of 60 days only.

[16] I therefore find that the phrase "successful sale" in the present agreement means nothing more than the successful signing of a deed of sale, as was found in the Koen case, supra. The defence raised by the First Respondent in this regard can therefore also not succeed.

[17] It follows that, in the absence of any valid defence to the application filed by the Applicants, I make the following order:

1. The Application succeeds with costs to be paid by the First Respondent;
2. Prayers 1 and 2 of the Notice of Motion are granted.

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P.J. LOUBSER, J

For the Applicants:	Adv. W.J. Groenewald
Instructed by:	De Lange Attorneys Bloemfontein

For the First Respondent:	Adv. A. Sander
Instructed by:	Lovius Block Bloemfontein