FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2916/2010

In the matter between:

MNR JOSé CARLOS DOS SANTOS N.O.	First Plaintiff
MEV ADRIENA CATHARINA DOS SANTOS N.O.	Second Plaintiff
MNR PIETER GIDEON NAGEL N.O.	Third Plaintiff

and

AUCOR (BLOEMFONTEIN) (EDMS) BPK	First Defendant
JGPR EIENDOMME (EDMS) BPK	Second Defendant

JUDGMENT: LEKALE, J

HEARD ON: 24 & 25 JANUARY 2012

DELIVERED ON: 2 FEBRUARY 2012

INTRODUCTION AND BACKGROUND

[1] This is an action for refund of a deposit advanced on the purchase of an immovable property at a public auction held by the first defendant on the 13th June 2007.

[2] The property involved belonged to the second defendant who entrusted it to the first defendant, as a company carrying on business as auctioneers in Bloemfontein, for sale.

[3] Plaintiffs are the trustees of High and Dry Trust (trust) which was the highest bidder at the auction. At all times material to the auction the trust was duly represented by the first plaintiff who was accompanied by one, Mr. Hilton Kotzé (Kotzé).

[4] The first plaintiff offered R2,7 million for the property, which is situated in Standerton and was subject to a lease contract in favour of South African Breweries (SAB), and paid R270 000,00 as a deposit upon signing the Conditions of Sale (the offer).

[5] The offer was irrevocable and expressly remained open for acceptance by the second defendant within seven days after 13 June 2007.

[6] The seller, however, only signed the offer in acceptance on the 8th day *viz* the 21st June 2007.

[7] A dispute, thereafter, ensued between the parties. The trust first sought to resile from the deal on the basis of an alleged material non-disclosure. The plaintiffs later claimed a refund of the deposit on the ground that there existed no sale contract because the offer had lapsed when the seller purported to accept it.

[8] On or about the 15th October 2008 the trust, through the first plaintiff and Kotzé, issued summons against the first defendant under Case no. 6316/08 claiming, in the alternative, a refund of the deposit on the basis that there existed no sale contract. This action was, however, eventually withdrawn. (See pages 54 and 77 of exhibit "A" *viz* first defendant's bundle of documents.)

[9] On the 11th June 2010 the plaintiffs eventually issued summons herein against both the auctioneer and the seller as first and second defendants respectively claiming a refund in terms of clause 12 of the offer.

[10] First defendant resists the claim on the grounds that it is not liable for refunding the deposit because a legally valid sale contract was concluded when the second defendant properly accepted the offer and that, in any event, it was, at all material times, acting as a fully authorised agent of a disclosed principal *viz* second defendant when it received the deposit.

[11] On its part the second defendant initially denied that it did not accept the offer within the prescribed time period and, further, maintained that the first defendant was liable for payment of a refund because it was an independent contracting party when it accepted the deposit.

[12] The parties, eventually, held a pre-trial conference in terms of which they crystallised the questions to be determined by the court.

[13] At the outset of the trial the parties submitted minutes of further pre-trial conference in terms of which the second defendant admits that there existed no valid and binding sale contract

because of its late acceptance of the offer. The first defendant, on its part, maintains that there existed such a contract. The plaintiffs, thereafter, withdrew the action against the second defendant who accepted the withdrawal subject to the question of costs being left for determination by the court.

DISPUTE

[14] In the pre-trial minute the parties effectively couched the legal questions to be determined in the following terms:

14.1 whether or not a contract was concluded between the trust and the second defendant; if not

14.2 who of the defendants is obliged to refund the deposit paid by the trust.

PLAINTIFFS' CASE

[15] The first defendant testified that following the successful bid on behalf of the trust, he and Kotzé were approached by the officials of Absa at the auction with an offer of financial assistance if they required the same. The said officials further informed them that they would liaise with first defendant to

secure the documentation in order to process and finalise the application. They later learned from Absa officials that the offer had been accepted. This information was later confirmed by the first defendant's Johnny Bateman (Bateman) who, however, did not furnish them with any documents to that effect. It later transpired that the lease contract in favour of SAB was not going to be renewed and was of a limited duration. This state of affairs did not bode well with Absa and it, eventually, declined financial assistance. They eventually involved attorneys to help them to withdraw from the deal to no avail. It was only after they had instructed a second firm of attorneys that they established that their offer was accepted one day too late and, as such, had lapsed by the time it was signed by the second defendant. He never condoned the late acceptance of the offer.

[16] Mr. Wessels contends that, in law, no agreement comes into existence until and unless an offer has been accepted. Once the time prescribed for the acceptance of the offer expires, the offer lapses and is no longer available for acceptance.

According to case law an auction sale entails three contracts *viz* an agency or mandate agreement between the seller, as the principal, and the auctioneer, as the agent; the sale agreement between the seller and the purchaser and the contract between the purchaser, as the highest bidder and the auctioneer. There was no sale contract between the second defendant as the seller and the plaintiffs and, as such, the second defendant is not liable for payment of the refund. The trust could not have ratified the transaction because it was not aware of the fact that the offer was accepted late. It could equally not condone the late signing of the offer because it was not aware of the lateness.

[17] Mr. Wessels, further, submits that the plaintiffs were justified in citing the seller as the second defendant because, in law, auctioneers are always agents and the second defendant was disclosed in the offer as the principal. The plaintiffs further did not know where the deposit was until the relevant disclosures were made in the pleadings.

[18] It is further contended for the plaintiffs that the circumstances of the present matter warrants a special costs order against the first defendant because it, *inter* alia, was mendacious in its conduct insofar as it maintained, throughout the trial, that there existed a sale contract between the trust and the second defendant when that was clearly not the case.

<u>FIRST DEFENDANT'S CASE</u>

[19] Mr. Johnny Bateman testified that he was head of property division with the first defendant at the relevant time and handled the auction. To his knowledge an offer lapses if it is not accepted timeously. The acceptance was signed a day late. Once he had signed the offer as the auctioneer his work was done and he had no further dealings with the matter. Normally he would have told a person in the position of Kotzé that the offer was, in principle, accepted and that they only had to wait for written acceptance. After the plaintiffs had refused to proceed with the sale, the property was sold to SAB for R3 million. He only learned five or six days before the trial, when he consulted with the first defendant's lawyers, that the plaintiffs

were, among others, raising the fact that the acceptance was signed late. He never told Kotzé and the first plaintiff that the offer was not accepted timeously.

[20] Mr. Grewar, effectively, maintains that the trust accepted the late signing of the offer by the seller because, by making simple and reasonable enquiries, the first plaintiff ought to have established that the offer was accepted late.

[21] It is, further, contended by Mr. Grewar that the first defendant is not liable for repayment of the deposit because it was, in law, an agent of the disclosed principal. His attitude is effectively that the plaintiffs are barking up the wrong tree and should not have released the second defendant as it would be liable for refunding the deposit if the court finds that no valid contract eventuated from the late acceptance of the offer.

APPLICABLE PRINCIPLES

[22] The parties are, effectively, in agreement that, in law, an offer which is not accepted within the prescribed time period lapses

in the absence of any consent to the contrary by the offeror. (See **LAWS v RUTHERFURD** 1924 AD 261 at 262 and **MANNA v LOTTER AND ANOTHER** 2007 (4) SA 315 (C)).

[23] Ratification, just like condonation, can only take place if the person, whose assent or authority is required in order for the contract to be validated, is aware of and

> "**gives his mind specifically enough to the contract**"

sought to be ratified. (Compare **VAN DYK v SOUTH AFRICAN RAILWAYS AND HARBOURS** 1956 (4) SA 410 (W) at 412 F.)

[24] Ratification may take the form of "word" or "an action". Where it is not expressed in words it can be inferred from the actions of the person whose assent is necessary. (See **STUTTAFORD & CO v OBERHOLZER** 1921 CPD 855.)

[25] For condonation of late acceptance of an offer to take place, the person alleged to have condoned or accepted the irregular acceptance must have been aware of the relevant defect or

irregularity alleged to have been condoned as the case is with alleged waiver of a right or benefit. (Compare **MANNA v LOTTER**, *supra*.)

[26] The time prescribed for acceptance of an offer benefits the offeror who can elect to waive it at his own discretion by accepting a late acceptance of the offer by the offeree. (See **MANNA v LOTTER**, *supra*, at par. [26].)

[27] There is a presumption against waiver and the onus, as in the case of ratification and condonation, is on the party alleging it to prove that the person alleged to have waived his right or benefit decided to do so with full knowledge of the right or benefit in question. See **LAWS v RUTHERFURD**, *supra*, at 263 and **BORSTLAP v SPANGENBERG EN ANDERE** 1974 (3) SA 695 (A) at 704.)

[28] The offer provides as follows in clause 12:

> "**... In the event of the sale not being confirmed by the seller, the amount paid by the purchaser will be refunded to the**

purchaser exclusive of interest."

FINDINGS

[29] The parties are effectively in agreement that the offer was accepted one day too late by which time it had lapsed.

[30] In my view, where the offeree purports to accept an offer outside the time prescribed for acceptance of the same and, thereafter, maintains that a valid contract ensued therefrom, the question is whether or not the offeror condoned or agreed to the late acceptance and, thereby, validated the contract.

[31] First defendant effectively contends that the trust condoned or accepted the irregular acceptance with the result that a sale contract eventuated.

[32] There is no direct evidence of condonation or acceptance of the late acceptance of the offer. The first defendant draws an inference of condonation or acceptance from its perception that the trust, through the first plaintiff, ought to have established the fact of the delay in accepting the offer with relative ease as well

as the fact that, as at the 27th November 2007, when its erstwhile attorneys wrote to the first defendant, the trust regarded itself contractually bound to the seller in a sale insofar as it sought to cancel the contract on the basis of alleged material non-disclosure.

[33] It is, however, not in dispute that, when the said letter was directed to the first defendant, the trust was not aware of the irregular acceptance. In this regard the first plaintiff and Bateman are in effective agreement that that fact was not disclosed and the latter only announced that the offer had been accepted.

[34] Bateman, further, testified that he was always under the impression that the offer was accepted properly and timeously. He further did not dispute that he never gave the first plaintiff or Kotzé a copy of the offer signed by the seller.

[35] There is, therefore, no evidence from which it can, in law and/or equity, be inferred that the trust, through the plaintiffs,

condoned and accepted the late acceptance of the offer.

[36] The late acceptance of an offer is treated by some academic writers and foreign authorities as a counter-offer which may be accepted or rejected by the original offeror at will. (See Kahn "**Some Mysteries of Offer and Acceptance**" (1955) 72 SALJ 246 at 268 – 269 referred to with approval in Christie's **The Law of Contract in South Africa** 6th Edition, p. 51.)

[37] Even if the late acceptance herein is regarded as a counter offer there is no evidence, direct or circumstantial, to suggest that same was accepted by the trust.

[38] Whether one treats the acceptance of the late acceptance of an offer as a simple condonation of the delay involved or a waiver of the "**exclusive benefit**" or acceptance of "**a counter-offer**" the end result is essentially the same. They all require a conscious and informed decision on the part of the person alleged to have condoned the delay, waived a benefit or accepted the counter-offer.

[39] There is, therefore, no sale contract concluded between the second defendant as the seller and the trust.

REFUND

[40] The next inquiry is whether or not the first defendant is liable for payment of the refund now that the second defendant is no longer before the court.

[41] Mr. Wessels, effectively, submits that first defendant is obliged to refund the deposit on the basis of the contract existing between it and the trust as reflected in the offer as well as the fact that it kept the money in trust and never paid it over to the second defendant as the seller.

[42] Mr. Grewar counters that the first defendant was an agent of the second defendant and, in law, cannot and should not be before the court.

[43] In reply, Mr. Wessels contends that only where there exists a sale contract between the purchaser and the seller and the

former seeks to enforce the same would the former, in law, be constrained to follow the seller as the principal.

[44] I am in respectful agreement with Mr. Wessels because the plaintiffs do not seek to enforce a sale agreement. They are simply relying on that part of the offer which constitutes an agreement between the trust and the first defendant as the auctioneer. The second defendant, as the prospective seller, never got to the party because it did no accept the offer timeously. Its mandate to the first defendant was for the sale of the property which never took place. (See **SPRINGFIELD OMNIBUS SERVICE DURBAN CC v PETER MASKELL AUCTION CC AND ANOTHER** 2006 (4) SA 186 (N)).

[45] A proper reading of the offer in its entirety reveals that a refund is only payable when the sale is not confirmed by the seller after a deposit has been paid to the first defendant as the auctioneers.

[46] The mere fact that the first defendant was an agent of the

second defendant does not, necessarily, mean that it was an agent for purposes of receiving the deposit on behalf of the second defendant. (See generally **BAKER v PROBERT** 1985 (3) SA 429 (A) at 439 C – F.)

[47] A further scrutiny of the offer shows that the first defendant, as the auctioneer, was entitled to deduct its 10% commission (plus VAT) and costs from the deposit advanced by the trust on acceptance by the second defendant of the offer. (**See clause 13 of the offer and clause 6.2 of the mandate signed by the second defendant in favour of the first defendant included in exhibit "A".**)

[48] It follows, in my view, from the above that the offer created an agreement, upon the signing thereof by the auctioneer, between the trust and the first defendant with regard to the payment of the latter's commission as well as the deposit. It was, further, clearly intended by the trust and the first defendant that the deposit was not to be paid over to the seller until and unless the sale had been confirmed and the first defendant had

deducted its commission, among others, therefrom. It is, furthermore, common cause that the deposit was held in trust by the first defendant in line with clause 6.2 of the mandate. (See **SPRINGFIELD OMNIBUS SERVICE DURBAN CC v PETER MASKELL AUCTION CC AND ANOTHER**, *supra*.)

[49] The first defendant is, therefore, liable to the plaintiffs for the refund.

COSTS

[50] The plaintiffs effectively contend that a special costs order against the first defendant is justified. In this regard they submit that the first defendant was mendacious and/or vexatious insofar as it was clear from simple arithmetic exercise that the seven day period expired on 20 June 2007 while the purported acceptance of the offer only took place on 21 June 2007. Mr. Wessels, further, submits that it was necessary for Mr. Kotzé to travel from Nelspruit where he is currently based in order to make himself readily available for trial, if necessary.

[51] Mr. Grewar, effectively, contends that there is no cause for a

special order of costs to be made and leaves the general issue of costs to the discretion of the court.

[52] During the cross-examination of the first plaintiff, Mr. Wessels gave notice that the plaintiffs intended to apply for such an order on the basis of, *inter alia*, irrelevant questions put to the said witness.

[53] In argument Mr. Wessels, further, relies on the evidence of Bateman to the effect that he was only consulted five or six days before trial and concludes that the first defendant's defence was spurious. This contention is challenged by Mr. Grewar on the basis that this piece of evidence is irrelevant.

[54] I am of the view that Bateman's evidence is relevant to the issue to the extent that only his evidence could, reasonably possibly, have formed the basis for the first defendant's defence that a sale contract was concluded. In this regard it should be recalled that the date inserted in the offer as the date on which same was accepted by the second defendant clearly

falls outside the prescribed time period. For the first defendant to have pleaded and persisted that there existed a sale contract it, most probably, needed to consult with Bateman as the first port of call insofar as he was undisputedly the only one who dealt with the matter and interacted with the first plaintiff and Kotzé.

[55] Bateman's evidence does not support first defendant's defence. It follows that, had he been consulted earlier, his statement would have, most probably, determined the fate of this matter sooner than later.

[56] The first defendant persisted in this contention notwithstanding the second defendant's admission to the contrary at the further pre-trial conference held on 6 December 2011. The first defendant stuck to its guns even after Bateman, its sole witness, had testified that the offer had lapsed as at the date when the seller signed it.

[57] The conduct of the first defendant in this regard cannot be

tolerated and, in my judgment, calls for a clear sign of disapproval. In my view and experience such conduct smacks of vexatiousness. It is further worth noting that the property in question was, eventually, sold by the first defendant without any formal cancellation of any agreement between the trust and the second defendant. If the first defendant genuinely believed that there existed a valid sale agreement, one would reasonably expect some effort on its part to ensure cancellation of such a contract before proceeding with the sale.

[58] In the circumstances I am in respectful agreement with Mr. Wessels that an order that the first defendant should bear the costs on the scale as between attorney and client is justified. (Compare **FRIEDERICH KLING GmbH v CONTINENTAL JEWELLERY MANUFACTURERS; SPEIDEL GmbH v CONTINENTAL JEWELLERY MANUFACTURERS** 1995 (4) SA 966 (C)).

[59] I am, further, persuaded that plaintiffs were justified in joining the second defendant in the proceedings. In this regard it

should be noted, among others, that the second defendant initially denied, in its plea, that it did not accept the offer within the prescribed period. It admitted that no valid sale contract followed as a result of failure, on its part, to accept the offer timeously only on 6 December 2011.

[60] The second defendant is generally entitled to its party-and-party costs.

<u>INTEREST</u>

[61] The plaintiffs pray that interest be levied on the refund from 21 June 2007 alternatively, from 21 July 2007 and further alternatively for the period of delay until date of final payment.

[62] The first defendant did not deal specifically with this issue.

[63] I am satisfied from available evidence that the first defendant became aware or ought reasonably to have become aware of the irregular acceptance of the offer on or about the 15th November 2008 when summons in Case no. 6316/08 was

issued against it.

[64] It is, however, clear from clause 12 of the offer that a refund payable upon non-confirmation of the sale does not include interest. In my view, the offer contemplated a situation where the seller outrightly refuses to confirm or accept the offer and the refund is, therefore, made within a reasonable time thereafter. In this case there was no outright rejection of the offer. A refund was, thus, payable within a reasonable time after the discovery of the delay in the acceptance of the offer. In my view equity, in the interpretation of clause 12 of the offer, demands that interest be charged on the refund from the 28th November 2008, being one month from the date on which the first defendant can reasonably be expected to have acquired knowledge of the irregular acceptance of the offer. In this regard it should be noted from page 70 of exhibit "A" that first defendant entered appearance to defend the matter in Case no. 6316/08 on the 28th October 2008.

ORDER

[65] In the result judgment is granted against the first defendant in

favour of the plaintiffs for:

65.1 payment of R270 000,00;

65.2 interest on the said sum at the prescribed rate of interest from 28 November 2008 to date of final payment.

[66] First defendant is ordered to pay the plaintiffs' costs of the action on the scale as between attorney and client;

[67] The first defendant is, further, ordered to pay the costs of the second defendant JGPR Eiendomme (Edms) Bpk on the scale as between party-and-party.

L. J. LEKALE, J

On behalf of plaintiffs: **Adv. M.H. Wessels SC**
Instructed by:
Rossouws Attorneys
Bloemfontein

On behalf of first defendant: **Adv. D. Grewar**
Instructed by:
Schoeman Maree Attorneys
Bloemfontein

On behalf of second defendant:	**Adv. S. Grobler** Instructed by: Van Deventer Thoabala BLOEMFONTEIN

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