IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: **YES**

Date: ***29th APRIL 2016*** Signature: _____

CASE NO: 2015/31475

In the matter between:

COOPER: DHANMATHIE Applicant

And

CLARK: PAULA Respondent

JUDGMENT

ADAMS AJ:

[1]. This is an application by the applicant for an order that the respondent refunds to her the amount of R330,000.00, being in respect of a deposit paid by the applicant in terms of an Agreement of Sale of immovable property. The main dispute between the parties is whether or not a valid and enforceable contract of sale came into existence. Put another way, the question is whether the respondent accepted, as required by law, an offer to purchase made by the applicant, which resulted in the conclusion of a contract?

[2]. On or about the 5th June 2015 the applicant made to the respondent a written offer to purchase [Erf 1…….] [M…….] Township *('the property')* for the purchase price of R6,300,000.00. The offer provided that same is irrevocable until midnight on the 10th June 2015. Under the heading *'Terms and / or Conditions',* clause 14 of the written offer provided as follows:

> *'Building inspector to inspect the property at the purchaser's costs within 14 days of the offer being accepted. The defects checklist signed by the seller forms part of this agreement and the purchaser has received a copy of this document'.*

[3]. On the 10th June 2015 the respondent purported to accept the offer by the signing of same as the seller. However, at the same time that she signed the acceptance she effected certain amendments to the written offer sent to her. Firstly, the respondent deleted a portion of a clause, which provided thus:-

> *'If the suspensive conditions referred to in Paragraph 6 and, if applicable Paragraph 14, are not fulfilled and subject to the purchaser not being in breach, Adrienne Hersch Properties CC shall refund to the Purchaser the deposit from which a fee will be recovered for the administration of the Trust Account'.*

[4]. Secondly, to clause 14, which is the clause with the heading *'Terms and / or Conditions'* the following provision was added

> *'This is not a suspensive condition and the acceptance of the offer will result in a binding agreement of sale'.*

[5]. On or about the 12th of June 2015 the applicant paid the deposit of R630,000.00, and thereafter she received a copy of the offer to purchase as signed and amended by the respondent. Shortly after receipt of the signed and amended *'Offer to Purchase'* from the respondent, the applicant advised the respondent that she does not accept the changes which were affected to the offer by the respondent.

[6]. On the basis of the aforegoing, the applicant is of the view that she is entitled not to proceed with the sale and she advised the respondent accordingly on the 22nd June 2015. The respondent's insertion to and the amendment of the offer to purchase, so the applicant contended, amounted to a counter – offer, with the result that no binding agreement came into existence. Accordingly, the whole amount of the deposit should be repaid by the respondent to the applicant.

[7]. Prior to the launching of the application, the respondent refunded to the applicant the amount of R300,000.00 of the R630,000.00 deposit, leaving a balance due of R330,000.00 which is the amount which the applicant claims in these proceedings.

[8]. The respondent opposed the application on the basis that a binding agreement of sale came into being. The respondent contends that having regard to a number of factors, notably the fact that the applicant paid the deposit and requested that an addendum to the sale agreement be prepared, the applicant had accepted that a binding contract came into existence. Therefore, so the respondent maintains, she is entitled to retain the R330,000.00 in terms of the breach clause in the contract which provides that she has the right to retain the remaining deposit as rouwkoop or penalty or as liquidated damages.

THE LAW

[9]. 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. In that regard see: *Da Silva v Janowski,* 1982 (3) SA 205 (A).

[10]. Also, conditional acceptance of an offer amounts to rejection of same and not conclusion of a contract, but may be a counter – offer. In *Command Protection Services (Gauteng) (Pty) Limited t/a Maxi Security v South African Post Office Limited,* 2013 (2) SA 133 (SCA), the Court held that when parties conclude an agreement while there are outstanding issues requiring further negotiation, two possibilities would follow: no contract formed because the acceptance was 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.

[11]. In *Rockbreaker and Parts (Pty) Limited v Rolag Property Trading (Pty) Limited,* 2010 (2) SA 400 (SCA), a written offer to purchase property was

signed by the respondent, the purchaser, on 20 October 2005 and by the appellant, the property owner, 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.

[12]. The SCA held from the authorities 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. (Paragraph [8] at 404F/G - H.). 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. (Paragraph [9] at 404I - 405A.).

APPLYING THE PRINCIPLES TO THE FACTS *IN CASU*

[13]. Having regard to the principles set out above, and applying these principles to the facts of this case, I am of the view that the respondent's alteration to the offer by the applicant materially altered the intended contractual terms. Her alterations amounted to a counter – offer, which was not accepted by the applicant, which means that no binding contract came into existence.

[14]. The point is that the respondent appreciated that clause 14 of the applicant's offer, that being the provision relating to the inspection of the property by a Building Inspector within 14 days of the offer being accepted, was at least capable of being interpreted as a suspensive condition. With a view to eliminating the risk of this possibility materialising, the respondent inserted the addition to clause 14.

[15]. I am, therefore, of the view that, in the circumstances of this case, there can be very little, if any doubt that, the manuscript insertion by the respondent was material and amounted to a counter-offer.

[16]. I therefore intend granting judgment against the respondent in favour of the applicant for the amount of R330,000.00, together with interest thereon as prayed for in the Notice of Motion.

ORDER

In the circumstances I make the following order:

1. The respondent shall pay to the applicant the amount of R330,000.00 (three hundred and thirty thousand rand).

2. The respondent shall pay to the applicant the interest on R330,000.00 (three hundred and thirty thousand rand) which has accrued on the said

amount by virtue of its investment in an interest bearing trust account pending the resolution of this dispute.

3. The respondent shall pay the applicant's taxed or agreed party and party costs.

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L ADAMS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	28th April 2016
JUDGMENT DATE:	29th April 2016
FOR THE APPLICANT:	Adv K D Iles
INSTRUCTED BY:	Werksmans Attorneys
FOR THE DEFENDANT:	Adv R J Stevenson
INSTRUCTED BY:	Clark Attorneys