REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2023-120101

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

..... **.....**
SIGNATURE **DATE**

In the matter between:

JOAO PAOLO DE FIGUEIREDO PACHECO	**FIRST APPLICANT**
MONIBA ADILA AYOB ISMAIL HATLA	**SECOND APPLICANT**

and

ALOYS JOHN LOUIS	**FIRST RESPONDENT**
RUBIN POSTAN ATTORNEYS	**SECOND RESPONDENT**

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on Case Lines. The date and time for hand-down is deemed to be 18 December 2023.

G.S MYBURGH AJ

1. The applicants seek final relief in the form of a declaration of rights and an order compelling performance by the first respondent, as seller, relative to a disputed contract for the purchase and sale of a residential property. In the alternative they seek interim relief in the form of an interdict prohibiting the first respondent from alienating the property pending the determination of their claim for final relief. The application was brought on an urgent basis with truncated time periods for the delivery of answering and replying papers.

2. As I consider the matter to require an order (one way or the other) as a matter of some urgency, I do not propose to deal with the issues exhaustively but will instead confine myself to what I consider to be the central issues.
3. The facts can conveniently be summarised as follows:
    - On 13 October this year the applicants submitted a written offer to purchase an immovable property owned by the first respondent – to whit

erf 311 Bedfordview Extension 71. The applicants were assisted by a Ms Pretorius of Wanda Bollo Estates (“WBE”), which is an estate agency, and WBE conveyed the offer to the first respondent , as is the norm in respect of such transactions. The price offered was R3 100 000.00 (three million, one hundred thousand).

- On 19 October the first respondent returned the offer , which he had signed, to WBE. However the offer was not in its original form. In the first instance the first respondent had altered the price to read R3 200 000.00 (three million two hundred thousand). He had also deleted the clause which dealt with liability for agent’s commission and inserted a provision which provided that the purchaser would be liable for payment of WBE’s commission in the amount of R150 000,00 and which required the purchaser to pay that amount to the seller’s conveyancers (the second respondent) within three days. He also altered the document to stipulate that it would remain open for acceptance until 19 October 2023 – i.e. the day of its transmission to WBE.
- On 23 October WBE emailed a copy of what was alleged to be a contract of sale to the first respondent. The document had indeed been countersigned by the applicants; however, they had amended the clause relating to payment of agent’s commission by inserting a “4”, so that it provided for such payment to be made by the applicants within 43 days rather than 3 days as the first respondent had required.

- The document had also been signed by a representative of WBE and that signature was preceded by words which recorded that WBE had accepted the benefits conferred on them by the agreement.
- Shortly thereafter (the date is unimportant) the applicants paid the agreed deposit of R200 000.00 to the second respondent.
- On 31 October the first respondent addressed an email to the applicants in which he informed them that he was not in agreement with the change they had made to the document, that he had not signed the amendment and that he required the applicants to pay the agreed amount of R150 000,00 in respect of agent's commission to the second respondent failing which he would "cancel the sale".
- The next day the applicants duly complied and paid the amount of R150 000,00 to the second respondent.
- On 3 November (i.e. 2 days later) the first respondent informed the second respondent that he did not intend to proceed with the sale and instructed him to return the moneys which he had received.
- On the same day the second respondent forwarded that email to WBE and requested details of the applicants' bank account so as to be able to effect the refund.
- Correspondence followed between the respective attorneys. The applicants contended that they had concluded a binding agreement and required performance of it. The first respondent's position was the opposite – i.e. that he was not bound. In the meanwhile, the second

respondent continued to hold the funds which the applicants had paid to him (i.e. a total of R350 000,00) in trust.

- The applicants, having reached an impasse, launched the present application on 16 November this year for hearing in the week commencing 4 December (i.e. the roll commencing on Tuesday 5 December)

4. One of the defences raised by the defendant was that the matter was not urgent; alternatively, that the urgency had been self-created. I believe it to be well settled that the test in relation to urgency is whether the applicants would be able to obtain adequate and appropriate relief in due course. Given that the respondent has denied the existence of a binding agreement and insisted that he is entitled to sell the property to a third party (which he appears to be intent on doing), I am satisfied that the matter is urgent. I also do not believe that the delay of approximately two weeks, while the parties were involved in correspondence, should effectively non-suit the applicants. To this I would add that the time periods were not so truncated as to prejudice the respondents' ability to put their cases before the court.[1] I accordingly heard the matter on an urgent basis.

5. That said, and as I indicated to counsel for the applicants in the course of argument, I did not (and still do not) consider the application for final relief to be urgent in nature. I was therefore only disposed to entertain the application for interlocutory relief on that basis. That is accordingly all that I will deal with in this judgment.

[1] The second respondent in fact took no part in the proceedings.

6. The requirements for an interim interdict are so well known as not to bear restatement. Counsel for the parties were also *ad idem* in that regard. I will accordingly not adumbrate.

7. The starting point is the establishment of a right. It need not be established clearly. On the contrary, it may be open to some doubt – i.e. what is frequently referred to as a "*prima facie* right". While it is true that a strong balance of convenience in favour of an applicant can compensate for weaknesses in its case relative to the right contended for, the establishment of a right, albeit perhaps open to some doubt, is a *sine qua non*. If the applicant is not successful in crossing this threshold, then no relief will be granted. *In casu* the primary question is whether the applicants have succeeded in showing, at least *prima facie* (in the sense used above) that they concluded a binding contract of sale with the first respondent.

8. The first obstacle which arises in this regard is that it was not clear from the papers when the alleged acceptance took place. In their founding papers the applicants said that they immediately decided to accept the counteroffer; however, they did not say when they in fact signed the amended document. In the course of argument Mr Bollo, who appeared for the applicants, said that I could proceed on the basis that they did not do so prior to 23 October, which is when WBE communicated the countersigned document to the first applicant.

That was, of course, well outside the allowed period for acceptance. The enquiry does not however end there for it is settled that a party in the position of the first respondent has an election to treat a late acceptance as a nullity or to treat it as an acceptance notwithstanding its lateness. The enquiry thus turns to whether the first respondent in fact condoned the lateness.

9. On this issue, I am of the view that the facts favour the applicants. It is abundantly clear that the first respondent did not, at any time, adopt the attitude that the purported acceptance was out of time and hence ineffective. On the contrary, he clearly condoned the lateness. That he did so is clear from the content of his email communication of 31 October, in which he demanded payment of the amount of R150 000,00 in respect of agent's commission. At that time, he was clearly seeking to enforce the agreement, but *sans* the amendment which the applicants had made to the handwritten clause 5.2. That the "acceptance" had been out of time was never mentioned, and it was clearly not a fact that was of any concern to him.

10. This brings me to the crux of the matter – i.e. did what transpired give rise to a binding contract of sale? The answer to this question turns on the requirements of S2 (1) of the Alienation of Land Act ("the Act")[2]. That subsection stipulates that:

[2] Act 68 of 1981

> "*No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority*."

11. It is well settled that the requirement for the document to signed relates to the document in its final form – i.e., a signature which may have been appended prior to an amendment is irrelevant for the purpose of applying the sub-section in issue. Counsel who appeared for the parties were (unsurprisingly) *ad idem* in this regard.

12. That the first respondent did not at any time countersign the amended clause 5.2 was at all times common cause on the papers. This being so, the requirements of the sub section were, at least *prima facie*, not satisfied.

13. The argument which was advanced on behalf of the applicants on this issue was to the effect that clause 5.2 was in the nature of a *stipulatio alteri* which had duly been accepted by WBE. The position, so the argument went, was that clause 5.2 was, in truth, not a term of the agreement between the applicants and the first respondent but rather an agreement between the applicants and WBE. The fact that the amendment was never assented to or signed off by the first respondent was accordingly irrelevant. I was, in this regard, referred to a number of authorities which have dealt with the nature and effect of a so called *stipulatio alteri;* however, I have to say that I did not find any of them to be on point or helpful. While it may be so that the clause was of the kind contended for, it does not follow that it did not form a term of the sale alleged agreement. Indeed, I

understand it to be well settled that a term of that kind must necessarily form part of a valid agreement before it can be accepted by the *alterius.* As pointed out above, a contract for the sale of land has to be in writing, signed by the parties (or their duly authorised agents) in order to be valid. There is nothing in the act which suggests that it is sufficient for some but not all of the terms to be "signed off". I was also not pointed to any authority for that proposition. Clause 5.2 was clearly a term of the contract. The fact that the agent and the parties may, at an earlier date, (i.e. in the course of their exchanges) have reached an agreement or "in principle agreement" to the effect that the purchaser rather than the seller would be liable for is, to my mind, neither here nor there.

14. For these reasons I am of the view that the applicants have failed to satisfy the first requirement for an interim interdict – i.e. the existence of a so called "*prima facie right*". It is accordingly unnecessary for me to consider the remaining requirements for interdictory relief.

15. I accordingly make the following order.

ORDER

1. The application is dismissed with costs.

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G S Myburgh

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Date of Hearing: 8 December 2023

Date of Judgment: 14 December 2023

Appearances:

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