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G.P.-S.43575—1969-70—2,000

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE ~~Provincial~~ Division)
(~~Provinsiale~~ Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

DRIFTWOOD PROPERTIES (PROPRIETARY) LIMITED *Appellant,*

versus

ANDREW GEORGE McLEAN *Respondent*

Appellant's Attorney Schuurman & Honey
Prokureur vir Appellant

Respondent's Attorney Rosenhart & Venter
Prokureur vir Respondent

Appellant's Advocate S. Kentridge S C
Advokaat vir Appellant I P J van R Hermis

Respondent's Advocate D. Buchanan S.C
Advokaat vir Respondent I F Kroon

Set down for hearing on
Op die rol geplaas vir verhoor op 4 - 5 - 1971

24.5.8.10

Coram: van Blerk, Holmes, Hoexter, Muller, J.J.A.
et Kotzé A J.A.

ECD 9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 3.40 pm
3.55 pm — 4.15 pm

C A V.

van Blerk J.A.: The appeal is allowed with costs including those of two counsel and the order of the court a quo is altered to one granting the application with costs.

REGISTRAR.
21.5.1971

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

DRIFTWOOD PROPERTIES (PROPRIETARY) LIMITED.....Appellant

and

ANDREW GEORGE McLEAN.....Respondent

Coram: VAN BLERK, HOLMES, JANSEN, MULLER JJ.A. et KOTZÉ A.J.A.

Heard: 4 May 1971 Delivered: 2/ May 1971

J U D G M E N T.

VAN BLERK J.A.:

This is an appeal against a decision of the Eastern Cape Division refusing the appellant's application for an order compelling the respondent to cause certain fixed property registered in the latter's name to be transferred to the appellant. The appellant's case is that before its incorporation one Van Aswegen as trustee for a company about to be formed - which was eventually incorporated as the appellant company - concluded a written contract of sale

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with the respondent, the owner of certain portions of farm 314 situate in the Division of East London, whereby these properties were sold to the appellant. Particulars of these properties are set out in the notice of motion to which list of properties the property referred to by the Registrar of Deeds should be added.

The written contract on which the appellant relies is a document which is headed: "Offer to Purchase." The portions which are considered relevant for the purposes of this judgment, read as follows: "To: Andrew George McLean (the respondent) the registered owner of the following, whose full and proper description will be reflected in a Deed of Sale; ..... I, the undersigned Henning Johannes Van Aswegen, in my capacity as a Trustee for a company about to be formed do hereby offer to purchase the above mentioned properties from you upon the following terms and conditions:

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1. That the Purchase Price shall be the sum of Fifty Thousand (R50,000) Rand, payable in cash against transfer.

2. .....

3. .....

4. That you shall pay commission .....

5. That this offer to Purchase and the Deed of Sale is subject to the suspensive condition that the sale only becomes operative and x binding upon me on the date on which either the Local Authority or the Cape Provincial Administration grants to me or the Company a Certificate of Need and Desirability in terms of the Townships Ordinance, enabling me to establish a Township .....

6. .....

7. That this offer is open and binding upon both parties until signature by both parties on or before the 17th May, 1969, failing which it shall lapse if only signed by one party."

(The italics are mine.)

Van Aswegen, xx so it would appear, caused this document to be drafted and submitted by one Whitaker, who was

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a salesman in the employ of a firm of estate agents at East London, to the respondent for his signature. The respondent signed the document on 30 April 1969 and Whitaker attested his signature. Thereafter, on 17 May 1969, Van Aswegen appended his signature to the document. His signature too was subscribed to by a witness. The next day Van Aswegen under cover of a letter forwarded the signed document by post to respondent. The respondent never received this letter, nor did he receive the signed document. He stated that on 27 June 1969 - that is about 40 days after Van Aswegen had posted the document - he was for the first time told by a representative of the firm, to which Whitaker was attached, that the properties "had been purchased." On 4 July the respondent's attorneys on respondent's instructions wrote to this firm informing them that respondent did not consider that a sale had been entered into and that "the farm has now been sold for R80,000-00."

The defence to the appellant's claim is based

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on the ground that the unsigned offer to purchase, when presented to the respondent for his signature, was not binding and that by signing the document the respondent gave Van Aswegen an option until 17 May 1969 to purchase the properties, and that no agreement could be concluded unless Van Aswegen communicated his acceptance of the respondent's offer to sell by 17 May 1969 or within a reasonable time thereafter, and as this was not done there was no binding contract.

It is clear that the document, unsigned as it was, when presented to the respondent for his signature was not an offer by Van Aswegen as it did not comply with the requirement in terms of Section 1 of the General Law Amendment Act, 1957. It should have been signed in order to be capable of resulting in a valid contract from the fact of its acceptance by the respondent; cf. Brandt v. Spies 1960(4) S.A. 14 (E.C.D.) at p. 16. At most the document presented to the respondent was a proposed offer to purchase.

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In the Court a quo the matter was argued on the common basis that the document, ~~sign~~ when signed by the respondent, constituted an option to sell. The appellant's argument on this supposition was, as he submitted in this Court, that on a proper construction ~~f~~ of clause 7 of the document Van Aswegen's signature on 17 May, although not communicated, completed a binding agreement between them. The Court a quo decided the issue raised in this form in favour of the respondent. The Court considered that it was incumbent on Van Aswegen to communicate to the respondent on or before 17 May his acceptance of the offer, and that as he had not done so, no contract resulted from his mere signature.

Whitaker in his affidavit in support of the application deposed that he personally negotiated the transaction between Van Aswegen and the respondent which eventuated into "a sale" and that the document is a true reflection of a preceding oral agreement. It seems, however, on a proper construction of the document that what Van Aswegen and the respondent orally agreed upon was that the terms dis-

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cussed by them would be incorporated in the document containing the terms of the offer.

Although Van Aswegen titled the document an "offer to purchase", and addressed it to the respondent as an offer to purchase the offer, as will appear from clause 7, was open until signature by both parties (i.e. the purchaser and the seller) on or before 17 May 1969. This being so, and if regard is had to the fact that Van Aswegen and the respondent had orally agreed to the terms set out in the offer, it seems probable that they intended, and this is evidenced by their subsequent conduct, that either of them could have signed first and thereby be bound until the other party to whom the offer was open signed or failed to sign on or before 17 May 1969. This seems to be the only probable meaning of the words "this offer is open and binding upon both parties until signature by both parties." If therefore the respondent, the seller, by appending his signature to the document constituted himself the offeror and Van Aswegen the offeree then, unless the acceptance of the offer was in terms of the written document conditioned to be made in a particular manner, it is

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governed by the ordinary principles applicable to acceptance of an offer, which require Van Aswegen not only to sign the document, but also to communicate the fact of his having signed it to the respondent on or before 17 May 1969. Only then will there be an acceptance according to law.

It is trite that an offeror can indicate the mode of acceptance whereby a vinculum juris will be created, and he can do so expressly or impliedly. It was, however, argued on behalf of the respondent that the words used in the contract are obscure, and that, in the absence of clarity, the presumption that the contract will be completed when the offeror comes to hear of the offeree's acceptance, should prevail. That such a presumption in case of doubt exists appears from the following passage from Grotius de Jure Pacis ac Belli (Bk. 2, c. 11, par. 15) cited with approval in Dietrichsen vs. Dietrichsen 1911 T.S. 486 at p. 494, namely: "..... I may make an offer in two ways. I can either make and offer and say that the contract will be established by your mere acceptance; or I can make the offer

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and say that the contract will be completed when I come to hear of your acceptance. And if there is a doubt upon the matter, we must always presume that the second was the case ....." The contract, however, does not admit of such doubt. It does not contain the ordinary offer which is silent as to the mode of acceptance. The manner in which the contract was to be concluded was prescribed and not left to be governed by the legal principles applicable to acceptance.

Although it is clear that the parties were aware of the fact that the contract was to be concluded inter absentes (Van Aswegen lived on a farm in the district of Parys and respondent on a farm in the East London district) they, a prospective buyer and a prospective seller respectively, had already agreed as to the stipulated period, and the lapsing of the offer failing signature by both parties on or before 17 May 1969. In these circumstances it can be readily understood why the respondent, as the seller, in good faith and in the expectation that Van Aswegen would sign on or before 17 May signed the "offer to purchase" first, before Van Aswegen had signed it, thereby substituting himself as the offeror.

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It follows that he thus manifested his intention to be bound by Van Aswegen's signature on 17 May as envisaged by clause 7.

It is sufficiently clear from clause 7, badly phrased as it is, that failing signature by both parties on or before 17 May 1969 the offer shall lapse if only signed by one party. It shall lapse not because of failure of communication but because it was not signed. This clearly implies that the signature by Van Aswegen on 17 May 1969 turned the offer into a binding contract. The offer which did not then lapse could not have been accepted with any other resultant legal force. If it was the intention that the common law acceptance should have been complied with, it was not necessary to have referred at all to the effect of the signature and the lapsing of the offer. It would have been enough to have said: this offer is open until 17 May 1969.

I would allow the appeal. The following order is proposed: The appeal is allowed with costs including those

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of two counsel and the order by the court a quo is altered to one granting the application with costs.

HOLMES J.A.

JANSEN J.A.) CONCURRED

MULLER J.A.

KOTZÉ A.J.A.

P.J. VAN BLERK.