

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

CONDITIONAL ACCEPTANCE OF OFFER

Cooper v Clark (2015/31475) [2016] ZAGPJHC 79 (29 April 2016)

You as seller are 99% happy with an offer presented to you by a potential purchaser, but one or two things still bother you. To make sure the deal is not lost, you make your desired amendments to the offer and then sign it. A done deal ... or not? Such a scenario creates what is termed a counter-offer, requiring acceptance by the other party before a binding agreement can come into existence. See the facts of this matter for an illustration.

The Judgment can be viewed [here](#).

FACTS

On 5 June 2015 Cooper made a written offer to purchase a property belonging to Clark for the purchase price of R6,3 million. The offer was irrevocable until midnight, 10 June 2015.

Clause 14 of the offer, under the heading "Terms and/or Conditions", 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'.

On 10 June 2015 Clark purported to accept the offer by signing it as the seller. However, at the same time that she signed the acceptance, she effected certain amendments to the written offer by:

- 1) Deleting the following clause from the agreement:

'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'.

- 2) Adding the following wording to clause 14:

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

On 12 June 2015 Cooper paid the deposit and only thereafter received a copy of the offer, as signed and amended by Clark. Shortly after, Cooper advised Clark that she did not accept the changes.

Cooper took the view that she was entitled not to proceed with the sale and advised Clark accordingly on 22 June 2015. Cooper argued that Clark's insertion and amendment of the offer amounted to a counter-offer which she (Cooper) did not accept, with the result that no binding agreement came into existence. Cooper therefore instituted action for recovery of the deposit.

Clark opposed the application and argued that a binding agreement of sale did in fact come into being. This outcome was evidenced by the fact that Cooper paid the deposit and requested that an addendum to the sale agreement be prepared. Therefore, so Clark argued, she was entitled to retain part of the deposit in terms of the "agreement's" breach clause.

HELD:

Did Clark accept Cooper's offer to purchase, which resulted in the conclusion of a valid and binding agreement?

- The onus was on Clark to prove that Cooper had agreed to the written contract in its final form.
- Conditional acceptance of an offer amounts to a rejection of the offer and does not constitute conclusion of a contract.
- Conditional acceptance of an offer may however, in certain circumstances, constitute a counter-offer. Generally, 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.
- The SCA judgment in *Rockbreaker and Parts (Pty) Limited v Rolag Property Trading (Pty) Limited* is relevant here. In that matter one party added a written amendment to an offer to purchase before signing it. The amendment constituted a material alteration to the contractual terms and the court held that it was a counter-offer that had to be accepted before an agreement came into being. The contract was thus held to be unenforceable.

APPLYING THESE PRINCIPLES TO THE FACTS IN THIS MATTER

- On the facts in the present matter, it was clear that Clark's alteration to Cooper's offer materially altered the intended contractual terms. Her alterations thus amounted to a

counter-offer, which was not accepted by Cooper and this meant that no binding contract came into existence.

- This conclusion is borne out by the fact that Clark realized that clause 14 of Cooper's offer (i.e. 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, Clark inserted the addition to clause 14.
- In the circumstances, there was thus no doubt that the manuscript insertion by Clark was material and amounted to a counter-offer. This was never accepted by Cooper and no agreement came into existence.

Judgment was accordingly granted in favour of Cooper.

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