

COUNTER-OFFER IS THE RAIN ON A COMMISSION CLAIM PARADE

J Space (Pty) Ltd v O-Yes Auctions CC (38603/2021) [2024] ZAGPJHC 32 (15 January 2024)

The heading gives away the outcome in this judgment that ordered the auctioneer to return the commission payment that the proposed purchaser had deposited with it, after the seller's counter-offer was never formally accepted. Of particular interest is the auctioneer's argument that the (apparently) negligible amendments constituting the counter-offer were so insignificant in the context that they did not nullify the existing consensus on the material terms of the agreement.

The Judgment can be viewed [here](#)

FACTS

J SPACE (Pty) Ltd ('J SPACE') attended an auction of a property and its bid in the amount of R1 850 000 was not exceeded.

Therefore, subsequent to the auction, J SPACE submitted a written offer to purchase the property for that amount to the seller, via the auctioneer, O-YES AUCTIONS CC ('the auctioneer'). The following provisions of the auctioneer's (template) offer to purchase, are relevant to this matter:

- The purchaser had to make a "payment which is made up of 3.5% on the Purchase Price, 10% of the Purchase Price for Buyer's Premium and 15% VAT on the Buyer's Premium" on the date of signing the offer. J SPACE accordingly paid R277 500 to the auctioneer on that date. (The "buyer's premium" appears to constitute the commission payable to the auctioneer.)
- Should the seller not accept the offer, the auctioneer would refund any deposit paid by the purchaser, exclusive of interest.
- The "Buyer's Premium shall be deemed to be earned by the auctioneer and shall be immediately payable on the Confirmation Date and O-YES Auctions shall be entitled to claim and retain the Buyer's Premium for its own account on that date."
- The "Confirmation Date" was defined to refer to the date of acceptance of the offer by the seller.
- The offer was subject to "...Confirmation by the Seller ... or O-YES Auctions on behalf of the Seller within 3(three) days (the Confirmation Period) from date of signature hereof by the Purchaser during which period the offer cannot be withdrawn by the Purchaser."

In response to J SPACE's offer, the sellers indicated that they would accept an offer of R1 950 000. J SPACE responded by submitting a second offer with an increased purchase price of R1 900 000, otherwise on the same terms and conditions of the initial offer.

Shortly thereafter J SPACE received a purported acceptance of the second offer. However, certain amendments were effected thereto and as the parties could not agree on these altered terms, negotiations discontinued and the sellers sold the property to another buyer.

The auctioneer refused to pay the full R277 500 back to J SPACE, arguing that a valid agreement had come into place in respect of the second offer and that it was accordingly entitled to retain the "buyer's premium" portion of the deposit. In this regard, they argued that the changes effected on the second offer were not material as they related to:

- (i) A change in the identity of the party who is to receive the occupational rent payments; and

(ii) The deletion of the clauses stipulating that the seller would provide a gas, electric fence and electric installation compliance certificate to the purchaser.

J SPACE's response hereto was that no agreement had come into existence.

The crisp issue for determination by the Court was whether a valid sale agreement had come into existence.

HELD

The law

- In our law, no contract comes into existence unless an offer is accepted in full. The acceptance must be clear and unambiguous and in order to be effective, the acceptance should correspond with the terms set out in the offer.
- In principle, anything more or less than an unqualified acceptance of the entire offer amounts to a counter-offer and constitutes a rejection of the original offer.
- A conditional acceptance of an offer amounts to a rejection thereof or at most a counter-offer, but does not constitute the conclusion of a contract. Our courts have stated as follows in such circumstances: "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."

Applied to the facts

- J SPACE had made a bid for R1 850 000.00 at the auction and submitted the first written offer in that amount to the purchaser. The offer was made conditional upon receipt of acceptance by the seller within three days. If accepted, it would constitute an agreement of sale.
- The seller's indication that he would accept an offer of R1950 000 in response to the first offer to purchase, amounts to a counter-offer and constitutes a rejection of the first offer. This offer accordingly lapsed.
- The second written offer to purchase for an amount of R 1 900 000 was then submitted. This too was never accepted. The amendments that the sellers had made (by the change of the details regarding receipt of the occupational rent and the compliance certificates) were material and in favour of the sellers and were not accepted by the purchaser. Therefore any purported acceptance of the second offer by the sellers was no more than a counter-offer, constituting a rejection of the second offer.
- Therefore no agreement came into being.

CONCLUSION

The claim succeeded and the auctioneers were ordered to pay back the full amount of the deposit to J SPACE.