

SALE SUBJECT TO “SUCCESSFUL SALE” OF PURCHASER’S HOME: WHAT DOES THIS MEAN AND MORE

Terry and Another v Solfafa and Others (2263/2019) [2019] ZAFSHC 143 (29 August 2019)

This is an interesting judgment that combines many grounds often raised by sellers as a way to escape the consequences of having accepted an offer to purchase: from the argument that it was not signed by both spouses in a marriage in community of property, to the argument that the suspensive condition relating to the ‘successful sale’ of the purchaser’s property actually required ‘registration of transfer’ of such property. The judgment provides a valuable reminder of the law’s application to different factual scenarios.

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

FACTS

In February 2019, Mrs Terry came across an advertisement of a residential property that was for sale for an amount of R 2,6 million. Mr and Mrs Terry, who are married in community of property to each other, immediately arranged to inspect the property and, having done so, decided to buy the property. Mr Terry therefore signed an Offer to Purchase for the amount of R 2,6 million. It is stated on the offer document that “this constitutes an agreement of sale upon acceptance by the Seller”.

The seller, Solfafa, was in Boksburg at the time. Her agent, one Leach, who is an attorney in Bloemfontein, took the offer to her in Boksburg, where she signed acceptance thereof. Solfafa, however, contended that she called Ms Leach approximately 30 minutes after she had signed the offer, instructing her to withdraw the agreement and terminating Ms Leach’s mandate at the same time. (This was denied by Ms Leach who testified that the call from Solfafa was merely to tell Ms Leach that she was considering cancelling the agreement. Ms Leach then advised her against such a cancellation.)

It so happened that Mrs Terry however only co-signed the offer to purchase after Solfafa signed, at the insistence of the bank where Mr and Mrs Terry went to obtain a loan for the purchase price of the property. On the following day the bank notified them that their application for a loan was approved. Notwithstanding, Solfafa rejected the signed offer to purchase and refused to cause the transfer of her property into the names of Mr and Mrs Terry. Hence the application to this Court for an order directing Solfafa to take all the necessary steps and to sign all the necessary documentation in order to effect the transfer of the property into their names.

Solfafa defended the matter and argued that:

- 1) No valid contract could have been concluded because it was only Mr Terry who signed the offer to purchase, whilst Mrs Terry only signed the document much later, after Solfafa had signed. Therefore, so Solfafa contended, the offer to purchase was not made in terms of the provisions of the Alienation of Land Act.
- 2) No valid contract could have been concluded because Ms Leach, Solfafa’s agent, acted in direct breach of her instructions when she communicated Solfafa’s acceptance and signature of the offer to purchase to Mr and Mrs Terry.
- 3) Mr and Mrs Terry failed to comply with the suspensive conditions contained in the written agreement, with the result that it had lapsed and was of no force and effect.

HELD

No valid contract due to only one purchaser initially signing the offer

- The position of spouses married in community of property is clearly regulated by relevant legislation.
- The Matrimonial Property Act 88 of 1984 leaves no doubt that the joint estate of such spouses is administered by both spouses concurrently, with the result that both husband and wife have equal capacity to perform juristic acts and equal powers to manage the joint estate, which powers can in most cases be exercised without the consent of the other spouse.
- Section 15(2) of the Act defines in which events the other spouse has to give written consent when a juristic act is performed. One of these events is where one of the spouses, as a purchaser, enters into “a contract” as specifically defined in the Alienation of Land Act 68 of 1981, and to which the provisions of that Act apply. “A contract” is defined in the Alienation of Land Act as a deed of alienation, where the purchase price is payable in more than two instalments over a period of more than one year. It is common cause that the present agreement (or contract) was not one of that kind, and that written consent by Mrs Terry was therefore not required. Mr Terry had full capacity to bind the joint estate by signing the offer to purchase without the written consent of Mrs Terry.

No valid contract because Ms Leach was not mandated to communicate acceptance of the offer

- In raising this defence, Solfafa relied on her telephone conversation with Leach after signing the offer, allegedly instructing her to withdraw the agreement and terminating the mandate of Ms Leach. On this basis, Solfafa contended that no agreement between her and Mr and Mrs Terry came into being because the acceptance of the offer was not supposed to have been communicated to the purchasers. (In this respect Solfafa relied on the common law principle that, unless the contrary is established, a contract comes into being when the acceptance of the offer is brought to the notice of the offeror.)
- The question was however whether that common law principle was applicable here. The Supreme Court of Appeal has provided valuable guidelines in this regard in the case of *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties*, where the following was stated: “(a) In each case it will be necessary to consider the terms of the offer to determine the mode of acceptance required. (b) Where the offer takes the form of a written contract signed by the offeror, the inference will more readily arise in the absence of any indication to the contrary that the mode of acceptance required is no more than the offeree’s signature.” In *Withok* the Court went on to state that it was improbable that any of the parties to a contract would intend that the time and place of the conclusion of the contract would be determined not from the document itself but by way of other evidence.
- In the present case, the offer carries the heading “Offer to Purchase (This constitutes an Agreement of Sale upon Acceptance by the Seller)”. It is further stated in the document that the offer is irrevocable and that “the Seller agrees to sell the immovable property, together with the improvements thereon, to the Purchaser whom purchases from the Seller on the terms and conditions as set out in this Agreement.” Underneath this sentence Solfafa signed as the Seller of the property.
- Thus, in the absence of any indication to the contrary, the inference was therefore unavoidable that it was the expressed intention of the parties that the mode of acceptance would be the signature of Solfafa, and nothing more. The common law principle of acceptance by notice to the offeror was clearly not applicable. In the premise, the question whether Ms Leach was instructed not to communicate the acceptance to Mr & Mrs Terry was irrelevant to the adjudication of this application. The defence under this heading could therefore not

succeed.

The contract has lapsed because the suspensive conditions were not fulfilled

- The written agreement contained two suspensive conditions. The first was that Mr and Mrs Terry should be able to raise a mortgage loan for the sum of R 2,6 million within a certain period. It was apparent from the facts that this condition was met timeously.
- The second suspensive condition required the “successful sale” of Mr and Mrs Terry’s current home for R 1,9 million within sixty days after the date on which the agreement was signed by Solfafa. It was again common cause that Mr and Mrs Terry concluded a written agreement of sale in respect of their current home within this period; transfer thereof was in the process of being finalised.
- Solfafa however argued that no “successful sale” of the property had taken place within the sixty days period because transfer had not yet occurred. She argued that there must be registration of transfer before it can be said that a sale was successful. What was significant, however, was that Mr and Mrs Terry alleged in their founding papers that the purchasers of their current home have duly complied with the terms of the agreement pertaining to that property.
- How should the phrase “successful sale” be interpreted? The judgment in *Koen v Punyer* is to the point. The facts in that case were basically the same as in the present case, in that there appeared a suspensive condition in a deed of sale to the effect that the sale was subject to the successful sale of the defendant’s property. It was held that the phrase in question was intended by the parties to mean the successful signing of the deed of sale, and not the completion of the transaction and the payment of the purchase price. As far as the present case is concerned, there was no indication whatsoever that the parties had the intention that the purchasers were to find a purchaser for the property, sign a deed of sale after a purchaser was found, that possible suspensive conditions in that deed had to be fulfilled, and that the registration of transfer into the purchasers name all had to take place within the limited period of only 60 days.
- The phrase “successful sale” in the present agreement means nothing more than the successful signing of a deed of sale, as was found in the *Koen* case. Therefore Solfafa’s defence that it meant otherwise also failed.

CONCLUSION

Judgment was accordingly granted in favour of Mr and Mrs Terry.