

9708/04

1]In the matters between:

ENRICO PIETRO MANNA

Applicant

2]and

JANE MARY LOTTER

First Respondent

REGISTRAR OF DEEDS

Second Respondent

3]_____

JUDGMENT: DELIVERED 8 MARCH 2007

4]_____

5]GRIESEL J:

6]This is an application to enforce specific performance of an alleged deed of sale entered into between the applicant (*the buyer*) and the first respondent (*the seller*) during November 2003 in respect of erf 3649 Sedgefield (*the property*). The second respondent is the Registrar of Deeds, who played no active part in these proceedings.

Factual background

7]The seller, a *peregrinus* of the Republic who is permanently resident in Wales,

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is the owner of the property. During October 2003 she mandated an estate agent to find a buyer for the property. In due course, the agent procured a written offer from the present buyer to purchase the property for a price of R485 000. The offer to purchase was signed by the buyer in Pretoria on 6 November 2003 and was returned by fax to the agent in Sedgefield, where the seller's husband signed it on the same date. (It is common cause, however, that he was not a party to the transaction and that his signature is legally irrelevant.) After filling in various details which had until then been left blank in the offer – such as the identity of the seller, the name of the seller's conveyancers, and so on – the agent faxed the document to the respondent in Wales, who signed and returned it to the agent on 12 November 2003.

8]One of the blank items completed by the agent, was the expiry date in clause 10, which reads as follows (the underlined portion having been filled in by the agent in manuscript):

9]'10. *VALIDITY & ENTIRE CONTRACT*

This offer is irrevocable and expires at noon on the 8th November 2003 and on acceptance shall become a binding Agreement of Sale irrespective of whether the Purchaser has been notified of such acceptance or not. ...'

10]Notwithstanding the fact that the offer was only ‘accepted’ by the seller on 12 November, i.e. after it had lapsed, both parties initially believed that a valid and binding agreement had been concluded. When called upon by the conveyancers to sign the necessary transfer documents, however, the seller failed to respond to their repeated efforts to make contact with her and also failed to sign the documents that had been sent to her by the conveyancers. (Not without some justification, the buyer attributes the seller’s apparent change in attitude to what is colloquially known as ‘seller’s remorse’ in a rapidly escalating property market.)

11]Matters eventually came to a head when the present application was launched by the buyer more than a year later, after the necessary leave to sue by way of edictal citation had been obtained. In her answering affidavit (*jurat* 7 January 2005), the seller for the first time adopted the attitude that the deed of sale was void for two reasons: (a) she had accepted the offer only after it had lapsed; and (b) the suspensive condition regarding the buyer’s obtaining bond finance for the transaction had not been fulfilled. In addition, the seller argued *in limine* that, in the absence of an attachment of property *ad confirmandam jurisdictionem*, this court does not have jurisdiction to hear this matter in view of her status as a *peregrinus*.

Jurisdiction

12]Dealing with the last aspect first, the procedure of an attachment to confirm jurisdiction has its origin in the doctrine of effectiveness, which is described in *Sonia (Pty) Ltd v Wheeler*¹ as ‘the basic principle of jurisdiction’.² In other words, it is necessary in appropriate cases to attach property to confirm jurisdiction in order to render effective any judgment or order that the court may eventually make. It follows that, if the court can give an effective judgment without an attachment having taken place, such attachment would be unnecessary.³

13]The seller relied on two decisions of the erstwhile Appellate Division, viz *Thermo Radiant Oven Sales (Pty) Limited v Nelspruit Bakeries (Pty) Limited*⁴ and *Ewing MacDonald & Co Ltd v M & M Product Co*,⁵ in both of which it was held that attachment to confirm jurisdiction was a necessary prerequisite in proceedings against a *peregrinus*. Both those matters, however, dealt with claims sounding in money, whereas the present matter concerns a claim for the transfer of immovable property situated within the area of jurisdiction of this court. With regard to this

¹ 1958 (1) SA 555 (A) at 563C.

² See also *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 307A; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) at 888E–F.

³ Cf *Sonia (Pty) Ltd v Wheeler supra* at 563F–564C; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd supra* at 306F–H.

⁴ *Supra* at 300C–D and 311D–E.

⁵ 1991 (1) SA 252 (A) at 258D–F and 260E–F.

latter type of claim, different considerations apply. Generally speaking, in any claim relating to immovable property – whether *in rem* or *in personam* – the court within whose territorial jurisdiction the property is situated (the *forum rei sitae*) will *always* have jurisdiction to entertain such claims. In such cases, it is then irrelevant whether the defendant is an *incola* or a *peregrinus*. This principle has been accepted in this Division as long ago as 1848, in the old case of *Palm v Simpson*,⁶ where it was held that –

14]‘a claim to rescind a contract for the sale of immovable property can be effectively dealt with by the Courts of the State in which the property is situate. Such State has complete control over the property and can therefore effectively release a person from his obligation to transfer or to take transfer of the property. It follows that in an action in which a judgment rescinding a contract to transfer immovable property is claimed it is a sufficient basis for jurisdiction that the property is situate within the State in whose Court the action is brought.’

15]A similar conclusion was reached in *Jackaman and Others v Arkell*,⁷ where Roper J stated in unambiguous terms:

16]‘In my opinion the true position is that when the immovable

6 (1848) 3 M 565. See also Herbstein & Van Winsen *The Civil Practice of the Supreme Court of SA* (4ed 1997) at 70–1; Pollak *on Jurisdiction* (2ed 1993 by Pistorius) at 90–1.

7 1953 (3) SA 31 (T) at 34G.

property is situated within the Court's territory, the Court has jurisdiction wherever the defendant may be (see Pollak, Jurisdiction, pp 103 et seq.), and therefore it is not necessary to attach the property as well as to obtain leave to sue by edict.'

The learned judge proceeded as follows:⁸

17] 'It does not follow, however, that the applicants are not entitled to an attachment if they ask for it. The Dutch Courts made arrests of the person or property of a peregrinus not merely in order to vest themselves with jurisdiction, but also in order to protect the rights of the incola by putting pressure on the foreigner, and, in effect, by giving the incola security in advance for execution for his debt.'

18] In *Sonia (Pty) Ltd v Wheeler*,⁹ the court commented as follows on the above-quoted passage from *Palm's* case:

19] 'We were not referred to any case in which the decision in Palm's case was adopted and applied, but it has apparently never been queried or criticised and has stood as a correct exposition of the law for over a hundred years. It seems to me to be too late now to query the law as laid down in that case. Moreover the decision can be supported on grounds of principle, convenience and common sense.'

⁸ At 34H.

⁹ *Supra* at 562A.

20]Applying the law as articulated in these cases, it is clear that it was not necessary for the buyer in the present case to have applied for attachment of the seller's property in order to confirm the jurisdiction of this court. The property in question is situated within this court's area of jurisdiction, with the result that it is immaterial where the respondent may find herself.

21]In any event, bearing in mind that '(a) court's jurisdiction in respect of claims relating to property is largely a question of effectiveness',¹⁰ there is a further cogent reason why the seller's objection to the jurisdiction of this court cannot be upheld: As part of the order granting the buyer leave to sue by way of edictal citation,¹¹ an interim interdict was granted, 'restraining the [seller] from transferring [the property] ... to any person other than the [buyer]'. A rule *nisi* was issued at the same time, calling on the seller to show cause why the interim interdict should not be made final, pending finalisation of the present application. The rule *nisi* was duly confirmed on the return day. Even if it were to be held, therefore, that it was necessary for the buyer to have attached the seller's property in order to confirm this court's jurisdiction, I am satisfied that an attachment of the immovable property would not have made any eventual judgment of this court in favour of the buyer any more effective. To non-suit the applicant in these circum-

¹⁰ Harms *Civil Procedure in the Supreme Court* (1990, with loose-leaf updates, service issue 19) at D11.

¹¹ The order was issued by me on 16 November 2004 under case no 9707/04.

stances merely because he may have attached the wrong ‘label’ to his application by calling it an interim interdict instead of an attachment *ad confirmandam jurisdictionem*, would be to sacrifice substance on the altar of form. In the circumstances, I am satisfied that the objection as to jurisdiction cannot succeed.

Lapse of offer

22]I now turn to deal with the main defence relied on by the seller, namely that she had ‘accepted’ the offer some four days after it had lapsed, with the consequence that her purported ‘acceptance’ was a nullity. The argument on behalf of the seller is based on the proposition that ‘an offer lapses if it is not accepted within the prescribed time’.¹²

23]In my respectful opinion, however, this proposition is stated too widely and is potentially misleading. It correctly summarises the position where the offeror elects to *reject* the late ‘acceptance’ of an offer. The cases relied on by Kerr as well as by De Wet & Van Wyk for the above proposition all fall into this category.¹³ Clearly, the late acceptance of an offer cannot bind the offeror: it is a

trite principle of our law that, in order to bind the offeror, an acceptance must be

¹² Kerr *The Principles of the Law of Contract* (6ed 2002) at 74 and authorities referred to therein. To the same effect is De Wet & Van Wyk *Kontraktereg & Handelsreg* (5ed 1992) at 34 (with reference to options); Joubert *General Principles of the Law of Contract* (1987) at 43; and Van der Merwe *et al Contract – General Principles* (2ed 2003) at 54.

¹³ Viz *Laws v Rutherford* 1924 AD 261 at 262; *Bezuidenhout v Ferreira* 1967 (4) SA 417 (A); *Muttermeier v Skema Engineering (Pty) Limited* 1984 (1) SA 121 (A).

made before the expiry of the offer.¹⁴ The present case, however, is different: here, the offeror has elected to *accept* the late ‘acceptance’ and seeks to bind the offeree. The issue for determination is thus whether the offeree can avoid the agreement by relying on her own late ‘acceptance’ of the offer.

24]I have not been referred to any reported decision dealing directly with the point in issue, neither have I been able to find any relevant decided case. Several academic authors have, however, commented on the question. In his inaugural lecture as Professor of Law at the University of Witwatersrand (delivered on 30 May 1955), Prof Ellison Kahn described the matter as ‘*res integra* in South African law’.¹⁵ Notwithstanding the lapse of more than half a century since that time, this still appears to be the position.

25]In his lecture,¹⁶ Kahn discussed the position where the offeror has stipulated a specific form of acceptance (eg by letter), which the offeree does not comply with (eg by purporting to accept by telegram). Notwithstanding the irregular acceptance, the offeror is satisfied with the form of acceptance adopted by the offeree. In some countries (eg USA and Italy), the ‘irregular’ acceptance is regarded as a counter-offer which requires acceptance by the offeror. Kahn

¹⁴ Cf *Dietrichsen v Dietrichsen* 1911 TPD 486 at 496.

¹⁵ ‘Some mysteries of offer and acceptance’ (1955) 72 *SALJ* 247 at 268.

¹⁶ *Loc cit.*

suggests, however, that ‘the true rule is a simple one, namely that it does not lie in the mouth of the original offeree later to say that his purported acceptance was not an acceptance at all’.¹⁷

26]Dealing with the question whether the late acceptance of an offer should be treated in the same way, Kahn points out that, in German and Dutch law, late acceptance is considered to be a counter-offer, whereas the Italian Civil Code states that the offeror can consider a late acceptance as valid ‘provided he immediately gives notice to the other party’.¹⁸ Kahn suggests – ‘though without a great deal of confidence’¹⁹ – that it is open to the offeror to claim that the late acceptance is effectual, but not to the offeree.

27]Christie²⁰ relies on the above-mentioned views as authority for the following statement:

28]‘It is clear, therefore, that if the offeree purports to accept the offer after the fixed time has expired, the offeror is not bound to the contract. It seems equally clear that the proper way to interpret the late “acceptance” is as a counter-offer which the original offeror

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Op cit* at 269.

²⁰ *Law of Contract in SA* (5ed 2006) at 48 (footnotes omitted).

can accept or reject as he wishes. On this view the counter-offeror whose counter-offer has been accepted would not be entitled to change his mind and argue that his acceptance of the original offer was out of time’.

In contrast with Kahn’s diffidence on the question, however, Christie submits quite categorically that ‘there can be no room for doubt’ as to the correctness of the view that it is open to the offeror to claim that the late acceptance is effectual, but not to the offeree.²¹

29]In their ‘Source Book’ on contract and mercantile law,²² Kahn *et al* also discuss the issue of late acceptance of an offer, stating the following:

30]‘Certainly the offeror may treat the purported acceptance as ineffectual. But say he wishes to treat it as effectual. Possibly he may. In which event the court may treat it as a counter-offer.’

²¹ *Loc cit* footnote 143. See also Joubert *loc cit*.

²² Ellison Kahn, Carole Lewis & Coenraad Visser *Contract & Mercantile Law – A Source Book* (2ed 1988) Vol 1 at 158–9.

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The learned authors point out that this appears to be the position in German, French, Dutch and possibly United States law. They submit, however, that this construction is ‘artificial’ and that ‘additional or other rules’ have been adopted in various other legal systems to regulate the position. The conclusion reached by them is that the offeree who purports to accept after expiry of an offer ‘will not be heard to say that he did not accept timeously. It is for the offeror to raise the point, for he is not estopped from so doing. But say he wishes to treat an acceptance objectively out of time as effectual. It appears that the election lies with him.’

31]In his replying affidavit, the buyer relied (at least partially) on the construction of a counter-offer constituted by the seller’s late acceptance of his offer. Counsel for the buyer contended, however, that this construction presented a problem for his client inasmuch as acceptance of the counter-offer had to be in writing. Tacit acceptance, which would normally be inferred in circumstances like this, would thus not suffice. This is so, according to the argument, by virtue of s 2(1) of the Alienation of Land Act 68 of 1981, which requires any alienation of land to be contained in a ‘deed of alienation signed by the parties thereto or by their agents acting on their written authority’.

32]Counsel sought to overcome the perceived problem by finding proof of such written acceptance, first, in the signature by the buyer of the transfer documents and, secondly, in the signature of his founding affidavit in this application. Both these documents, which came into being after the seller's signature of the offer to purchase and before the 'counter-offer' had expired or had been withdrawn, clearly and unequivocally reflect the buyer's intention to be bound by the agreement, so the argument went.

33]In my view, however, the argument cannot avail the buyer, as he only became aware of the alleged counter-offer when the seller raised this point in her answering affidavit in these proceedings – long after signature by him of the transfer documents and the founding affidavit. As correctly submitted on behalf of the seller, the buyer could not validly have accepted a counter-offer of which he was unaware at the relevant time.²³

34]This argument on behalf of the buyer illustrates, in my view, the artificiality of a construction based on an alleged counter-offer, as pointed out by Kahn *et al* in the passages referred to above.

²³ Cf *Bloom v The American Swiss Watch Company* 1915 AD 100 at 105.

35]An alternative basis for liability relied on by the buyer in his replying affidavit, was the allegation that he had not authorised the seller's agent 'to limit the validity of [his] offer to purchase by completing paragraph 10 thereof on [his] behalf'. It follows, according to the buyer, that the agent 'had no authority to amend or qualify [his] offer in the manner that she did before submitting it to the [seller] for acceptance, ie by inserting the date of 8 November 2003 into clause 10 thereof'. The buyer accordingly submitted that this latter date should be regarded as *pro non scripto*.²⁴

36]The problem with this line of argument on behalf of the buyer is that it appears to be at odds with his own evidence. In his covering letter to the agent, accompanying his signed offer to purchase, he *inter alia* said the following:

37]'...Please note that we need to know within the next few days of the seller's acceptance, as we have an option on another property that requires our urgent answer to those sellers.

38]...Please ensure that you look after our interest when filling in the seller's information and or special requirements with regards to the time frames and or special conditions etc.

39]...Awaiting your urgent and speedy reply.'

²⁴ Compare in this regard *Ariefdien v Soeker* 1982 (2) SA 570 (C) at 577D–G.

40]It is abundantly clear from the foregoing that the buyer *did* in fact mandate the agent to fill in an expiry date, having regard to his situation and, in this way, to ‘look after (his) interest’. In these circumstances, I am not persuaded that the buyer can legitimately rely on the agent’s alleged lack of authority.

41]To my mind, a far more satisfactory approach to the problem would be – as suggested by the authors referred to above – to regard the expiry date inserted into the agreement as a stipulation for the exclusive benefit of the offeror, which benefit he can elect to waive – in the same way that he can waive the benefit of the traditional ‘bond clause’.²⁵ On this basis, it should be held that the offeror – but not the offeree – has an election to accept or reject an irregular ‘acceptance’ of his offer.²⁶ Obviously such election will have to be exercised and communicated to the offeree within a reasonable time, depending on the circumstances.²⁷

42]This is exactly the line originally adopted by the buyer in his founding affidavit, where he said the following:

43]‘I ...assume that [the seller] signed it on 8 November 2003 at the latest. In any event, or in the alternative, I am advised that the clause is there for the buyer’s protection and that should an offer be

²⁵ As to which, see the discussion in the following section of this judgment (para below).

²⁶ Compare *Ariefdien v Soeker supra* at 576H.

²⁷ Joubert (n *supra*) *loc cit*.

accepted after that date, then it is the buyer's choice whether or not to still proceed with the agreement. I have opted to proceed.'

44]This attitude on the part of the buyer finds support in the provisions of clause 10 of the agreement, in terms whereof the buyer waived the right to be informed of acceptance of his offer. This appears to indicate that the expiry date stipulated in clause 10 was not regarded by the buyer as being material, as long as acceptance took place 'within the next few days', as he put it. On the evidence, it is clear that this is what happened and, when the buyer was informed shortly after 12 November 2003 of the acceptance of his offer, he did not bother for one moment to enquire as to exactly *when* the offer had been accepted, but instead elected immediately to proceed with the transaction, regardless of the time of acceptance.

45]In the circumstances, I am satisfied that the buyer's election to treat the acceptance of the offer as effectual is legally sound and binding on the seller. I accordingly reject the seller's contentions to the contrary.

Failure to obtain bond approval

46]As a final alternative defence, the seller relied on the alleged non-fulfilment of the suspensive condition providing for the approval of a bond for the full purchase price from a bank, building society or financial institution. This point can be

disposed of briefly.

47] Clause 7.1 of the agreement contains the usual 'bond clause', making provision for the agreement to be 'subject to the suspensive condition that the purchaser obtains approval to the granting of a loan against security of the property for an amount of not less than R485 000 from a bank, building society or financial institution within 21 days of acceptance of this offer'. If the loan was not approved within the stipulated period, 'the period of approval shall automatically be extended for a period of 14 (fourteen) days' (in terms of clause 7.3).

48] It is common cause that the buyer's bank only approved finance in respect of 75% of the purchase price and not the full purchase price, as provided for in clause 7.1. It is settled law, however, that a bond clause like the one in question is for the exclusive benefit of the purchaser and is capable of unilateral waiver by him, provided that such waiver takes place before the date for fulfilment of the condition.²⁸

49] On a proper construction of the agreement in this case, the due date for fulfilment of the relevant suspensive condition was 35 days after the conclusion of the

²⁸ *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A) at 244G; *Phillips v Townsend* 1983 (3) SA 403 (C) at 409A–E; *Trans-Natal Steenkoolkorporasie Bpk v Lombaard & 'n Ander* 1988 (3) SA 625 (A) at 640B–C; *Westmore v Crestanello & Others* 1995 (2) SA 733 (W) at 735H–737J.

agreement; in other words, it was open to the buyer to waive the benefit of clause 7.1 at any time up to 17 December 2003.

50]The conduct of the buyer after being informed of his bank's decision leaves no doubt that he did indeed unequivocally and timeously waive the benefit of the suspensive condition. The decision of the bank as well as his election to proceed with the transaction was communicated by the buyer to the conveyancer on 27 November 2003. This decision was subsequently reaffirmed on numerous occasions by the buyer's conduct, *inter alia* by payment to the conveyancer on 4 December 2003 of the transfer costs in an amount of R34 335,65, as well as signature of the transfer documents on 12 December 2003.

51]Against this background, the seller argued, albeit somewhat tentatively, that any alleged waiver by the buyer had not been communicated to her. This argument is without substance, as it loses sight of the fact that the conveyancer appointed to attend to transfer of the property was in fact the seller's agent. The conveyancer – and hence the seller – was at all relevant times kept fully informed by the buyer of his election to waive the benefit of the suspensive condition.

Conclusion

52]For the reasons stated above, I am satisfied that the agreement between the
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parties is valid and enforceable. No other grounds having been advanced to deny the buyer's claim for specific performance of the agreement, the buyer is entitled to an order as claimed.

Costs

53] Three aspects relating to costs require brief mention. First, I was urged on behalf of the buyer to order the seller to pay costs on the attorney and client scale. In my considered opinion, there are not sufficient grounds on the facts of this case to justify a punitive costs order against the unsuccessful seller.

54]Secondly, this application was previously enrolled for hearing on 16 May 2006. The matter could not be heard on that day, so I am informed, as the court file was not in order. The case was accordingly postponed, with the wasted costs being ordered to stand over for later determination. In terms of Uniform Rule 62(4), it was incumbent on the buyer, as applicant, to ensure that the court file was in order in all respects not later than five days prior to the hearing. In the circumstances, it appears to me that the postponement of the matter on the previous occasion was necessitated by the buyer's failure to comply with his duties. In these circumstances, it would be fair to order the buyer to pay the wasted costs occasioned by the postponement.

55]Thirdly, the buyer has asked for an order that the transferring attorneys be authorised to retain an amount of R50 000 in trust from the proceeds of the sale of the property against which he (the buyer) may set off his taxed costs herein. In the light of the fact that the seller is a *peregrinus* of the Republic and that it is unknown whether she has any other assets in this country from which the costs order could be satisfied, I am prepared to accede to this request, bearing in mind the doctrine of effectiveness referred to above.²⁹

²⁹ See paras Dealing with the last aspect first, the procedure of an attachment to confirm jurisdiction has its origin in the doctrine of effectiveness, which is described in *Sonia (Pty) Ltd v Wheeler*¹ as 'the basic principle of jurisdiction'.² In other words, it is necessary in appropriate cases to attach property to confirm jurisdiction in order to render effective any judgment or order that the court may eventually make. It follows that, if the court can give an effective judgment without an attachment having taken place, such attachment would be unnecessary.³ and above.

56]In the circumstances, the following order is issued:

- 1. The respondent is ordered to sign all documents and take all steps necessary to effect the registration of transfer of the property known as Erf 3649 Sedgefield, Western Cape into the name of the applicant against payment by the applicant of the purchase price and transfer costs.**
- 2. Failing compliance by the respondent with the foregoing obligations within 10 (ten) days from the date of this order, the Sheriff of this court is authorised and directed to take such steps in her stead.**
- 3. The respondent is ordered to pay the costs of this application, provided that the wasted costs occasioned by the postponement of the application on 16 May 2006 shall be paid by the applicant.**
- 4. The transferring attorneys are authorised to retain an amount of R50 000 in trust from the proceeds of the sale of the property against which the applicant may set off his taxed costs.**

57]_____

58]**B M GRIESEL**
Judge