

SOUTH AFRICA / JUDGMENT

W & A Le Roux Slaghuis (Pty) Ltd and Another v Van Niekerk (A554/17) [2019] ZAGPPHC 577; [2020] 1 All SA 902 (GP); 2020 (2) SA 624 (GP) (4 December 2019) [2019] ZAGPPHC 577

COURT

North Gauteng High Court, Pretoria

BEFORE

P.M. Mabuse, E.M. Kubushi, N. Janse van
Nieuwenhuizen

CASE / FILE NUMBER

A554/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES / NO

(3)

REVISED

CASE NUMBER: A554/17

DATE:

4 December 2019

W &

A LE ROUX SLAGHUIS (PTY)

LTD

First Appellant

VAN's

AUCTIONEERS GAUTENG

CC

Second Appellant

V

CJL

VAN NIEKERK

Respondent

JUDGMENT

MABUSE J: (Kubushi & Janse van Nieuwenhuizen JJ concurring)

[1] This is an appeal against the judgment and order of J du Plessis AJ, made on 7 November 2016 in which he:

1.1 ruled that the Applicant then, now the Respondent, cancelled an agreement in respect of the property at 554 Souter Street, Pretoria West, dated 14 May 2015 properly and lawfully;

1.2 ordered the First and Second Respondents then, now the First and Second Appellants, to pay the Applicant then, now the Respondent, the amount of R612,150.00, within 14 days from the date of the order, the one paying and the other to be absolved; and,

1.3 ordered the First and Second Respondents then, now the First and Second Appellants, to pay the Applicant's, now the Respondent's, costs jointly and severally, the one paying and the other to be absolved.

[2] When this appeal came before us, counsel were ad idem that the only issues that the Court had to adjudicate upon were:

2.1 whether an auctioneer, who acts as an agent, can be held personally liable for obligations of his principle;

2.2 whether a party who makes an irrevocable offer may withdraw the offer whilst it is still open for acceptance; and,

2.3 whether an agreement can be repudiated before it comes into existence.

[3] The Second Appellant in this appeal is Van's Afslalers (Auctioneers) Gauteng CC, with its business address situated at 1006 Jan Shoba Street, Brooklyn, Pretoria. In the court a quo it was the Second Respondent:

3.1 the First Respondent in the court a quo was W&A Le Roux Slaghuis (Pty) Ltd, with its registered address located at 321 Alpine Way, Lynnwood, Pretoria, it is the First Appellant in this appeal;

3.2 the Applicant in the court a quo, now the Respondent in this appeal, was a certain Cornelius Lourens Jacobus van Niekerk ("Van Niekerk"), an adult male businessman of Plot 189, Kameeldrift West, Pretoria.

[4] In terms of the Agreement and Conditions of Sale in Respect of Immovable Property ("the Agreement"), the Second Appellant was, at all material times hereto, acting on the instructions of the owner, the First Appellant, the Seller to sell, by public auction or private treaty, the property known as the Remaining Extent of Erf 1743, Pretoria, Registration Division JR, Gauteng, better known as 554 Souter Street, Pretoria West.

OVERVIEW

- [6] On 14 May 2015, the Second Appellant conducted a public auction at which it sold Lot 1, as set out in annexure “C” of the founding papers. “Lot 1 consisted of a double storey building with offices, butchery with cold room and freezer rooms, storage rooms, bakery, cell phone tower with rental income, staff changing/restrooms, parking for customers and more.”

The Second Appellant’s note read as follows:

“Well established butchery, ideal opportunity to purchase a fully operational and equipped butchery and bakery.”

In annexure “C” to the founding affidavit the property was described as:

“the Remaining Extent of Portion 1 of Erf 1743, Registration Division JR, Gauteng.”

- [7] At the said public auction the Respondent made a bid for the said Lot 1 in the sum of R3,300,000.00.
- [8] On 14 May 2015, the Respondent signed the Agreement personally. Now clause 2.1 of the said Agreement stated that:

“The property will be sold without reserve, to the highest bidder (herein referred to as the Purchaser), but subject to confirmation by the Seller, which confirmation may be given or refused by the Seller without furnishing reasons therefore. This document constitutes an Offer to Purchase by the Purchaser, and the Purchaser is unconditionally and irrevocably bound to this offer for a period of 14 calendar days (the calculation of which excludes the date of signature hereof by the Purchaser) and Offer is open for Acceptance by the Seller at any time during this period. The onus will rest upon the Purchaser to establish whether its bid was confirmed, or not.”

Therefore, the bid by the Respondent on 11 May 2015 constituted an Offer, subject to be accepted by the First Appellant who was obliged to do so within 14 days of 14 May 2015. In terms of the said clause 2.1 of the Agreement the said offer was said to be unconditional and irrevocable.

- [9] On 14 May 2015 and, as required by the provisions of clause 9.2 of the said Agreement, the Respondent paid to the Second Appellant, a sum of R612,150.00 made up as follows:

- 9.1 10% of the purchase price of R330,000.00;
- 9.2 7.5% of the purchase price as commission, R247,500.00;
- 9.3 14% VAT on commission, R34,650.00;
- 9.4 total, R612,150.00.

Having paid the said amount, the Respondent left the auction to continue with his normal daily activities. He did not attend the next stage of the auction during which certain loose assets were auctioned.

- [10] On 18 May 2015 it came to the attention of the Respondent that the two cool rooms and freezer room, forming part of Lot 1, were almost fully demolished and that a certain Rupert was busy removing parts of the cool rooms and freezer room, as well as the rails and hooks by which animal carcasses were hooked and transported. The Respondent describes these rails and hooks as specialised equipment which were fixed fixations to the building. According to him, they were permanently fixed to the roof of the building above to the ceiling by means of special equipment. They could only be attached or removed by means of intensive labour and the use of heavy tools. These rails and hooks are made of hot drip galvanised steel built to carry heavy weight. He regarded the fastening of the rails to the roof as a specialised job.
- [11] He immediately, on 18 May 2015, informed a certain Mr Harding, who was the Auctioneer on behalf of the Second Appellant, that he, Mr Harding, had auctioned the cool rooms and the freezer room, parts of Lot 1 again, after Lot 2 and Lot 3 had been auctioned. The full names of Mr Harding are Gerhard Harding. He was an adult male Auctioneer and a member of the Second Appellant.
- [12] On Monday 19 May 2015, the Respondent's attorneys, LT Pretorius ("Pretorius Attorneys") wrote a letter to the Second Appellant and informed the Second Appellant, inter alia, that:
- "15.1 the cool rooms and freezer room were part of Lot 1;*
- 15.2 that I put in a bid of R3,3 million in respect of Lot 1;
- 15.3 that the deposit of R612,150.00 was paid on 14 May 2015;
- 15.4 that I signed the "standard" agreement also on 14 May 2015;
- 15.5 that I was unaware whether the agreement was accepted by the Seller;
- 15.6 that the removal of the cool rooms and freezer room were contrary to Lot 1 in respect of which I put a bid of R3,3 million;
- 15.7 that damages were done to the property, the cool rooms and freezer room in the process of removing parts and equipment;
- 15.8 that I put in a bid in respect of Lot 1 and what was left of Lot 1, was not what I bid for;
- 15.9 that in view of the fact that what remained of Lot 1 is no longer the Lot 1 for which I put in a bid, I was not prepared to continue with the transaction;
- 15.10 that the deposit of R612,150.00 must be paid back into the trust account of my attorneys of record."
- On 20 May 2015 the Second Appellant replied by email to the Respondent's attorneys' letter. They informed the Respondent's attorney in the said email that they would forward their letter to attorneys Thys Cronje Incorporated ("Cronje Attorneys").

[16] On 28 May 2015 Cronje Attorneys replied in writing to the Respondent's letter dated 19 May 2015 that was sent to the Second Appellant. In their said reply Cronje Attorneys stated, inter alia, as follows:

"17.1 Thys Cronje Incorporated represents both Respondents;

17.2 the offer of R3,3 million was accepted;

17.3 the fixed property was restored to the position in which it was when I had made the bid;

17.4 that the Respondents were not prepared to pay back the deposit but that they would retain the deposit as damages or the deposit will be kept in trust until the Respondents' damages have been determined."

[17] The First Appellant accepted the Respondent's bid or offer on 27 May 2015, a day before the said bid or offer would have lapsed.

[18] In response to Cronje Attorney's letter dated 28 May 2015, Pretorius Attorneys wrote back a letter and stated, inter alia, as follows:

"20.1 The Respondents repudiated the agreement by the removal/demolishing of the cool rooms and freezer room;

20.2 The Respondents were already informed on 19 May 2015 that I did not continue with the transaction in view of the action/conduct of the Respondents;

20.3 That I terminated the agreement on the strength of the Respondents' repudiation;

20.4 That the deposit in the amount of R612,150.00 must be paid into the trust account of my attorneys of record."

[19] On 7 July 2015 the Respondent inspected the property in the presence of his experts and legal representatives. The purpose of the inspection was to determine the extent of the damage to the said property or to Lot 1. The damage to Lot 1 was as follows:

"21.1 Damages to the rails in the amount of R358,500.00, excluding VAT, R408,690.00 including VAT (see quotation as Annexure "J")

to repair the damages);

21.2 Removal of the air conditioning units and damage to the air conditioner in the amount of R91,613.50 excluding VAT, R104,439.39 including VAT. (See quotation at Annexure "J");

21.3 Damages to the electricity in the amount of R6,000.00 excluding VAT, R6,840.00 including VAT (see quotation at Annexure "L");

21.4 Damages to the door of the bigger cool room when it was apparently endeavour to remove it, it was repaired with silicone which is only patch work and totally inadequate;

21.5 General damages in and on the property which was sustained during the removal of fixtures, fittings, and other movables and appliances.

22 The damages to the property are depicted in the photos at Annexures “M1 to M11”.

[20] In a letter dated 4 August 2015 by Cronje Attorneys to Pretorius Attorneys, it was stated that:

“23.1 The cool rooms and freezer room were restored to the position it was during the auction;

23.2 It is denied that the Respondents repudiated the agreement.”

In response to the aforesaid letter Pretorius Attorneys responded on 7 August 2015. They informed Cronje Attorneys that:

“1. U skrywe van 4 Augustus 2015 verwys.

2. Ons volstaan met ons skrywe van 30 June 2015.
3. Die feit dat ons nie op ‘n voormelde skrywe volledig reageer nie, moet nie vertolk word dat ons instem tot die inhoud van die skrywe nie.
4. In die lig daarvan dat u nie die deposito terug betaal het nie, is ons instruksies om oor te gaan tot litigasie.”

They were therefore persistent with the contents of their letter dated 30 June 2015, Annexure “J” to the founding affidavit, in which Pretorius Attorneys had stated that:

“1. U skrywe van 28 Mei 2015 verwys.

2. U kliënte het die ooreenkoms gerepudieer deur verwydering/afbreek van die koelkamers/stoorkamer/s en/of vrieskamers.
3. U is reeds in ons skrywe van 19 Mei 2015 in kennis gestel da tons kliënt in die lig van die optrede van u kliënt nie voorgaan met die transaksie nie.
4. Die bewering in die skrywe van 28 Mei 2015 dat ons kliënt repudieer is feitelik verkeerd. Ons kliënt het die ooreenkoms getermineer op grond van u kliënte se repudiasie.
5. U kliënt is verder in ons voormelde skrywe van 19 Mei 2015 in kennis gestel dat die deposito van R612,150.00 deur ons kliënt betaal, terugbetaal moet word en inbetaal moet word in ons trust rekening.
6. U kliënt het nie die terugbetaling gedoen nie en u kliënte word hiermee finaal in kennis gestel om die terugbetaling voor sluit van besigheid “16h30” op Donderdag, 2 Julie 2015 te doen.
7. Ons verneem dienooreenkomstig van u.”

On 7 August 2015 Cronje Attorneys informed Pretorius Attorneys that the Seller, in other words the First Appellant, had accepted the Respondent's repudiation that he had cancelled the contract. They informed the Respondent furthermore that they would proceed to arrange a further auction of Lot 1.

[21] The Respondent alleged that the Appellants refused to refund the sum of R612,150.00. He contends that he was entitled to cancel the bid he had made and that he withdrew his offer properly and lawfully and that he was entitled to cancel the Agreement due to repudiation of the same Agreement by the Appellants. According to him, the Appellants repudiated the Agreement by their actions and conduct due to, inter alia, the subsequent sale and consequent removal of the equipment or parts of Lot 1 on which he had made a bid and the damage caused by the removal of the equipment or parts. He elected to terminate the Agreement signed by him. His termination of the Agreement document signed by him was communicated in writing to the Appellants on 29 May 2015.

[22] The Respondent had stated, in the alternative, that in the event of it being found that the Appellants did not repudiate the Agreement, in that event the Appellants had breached the Agreement and that he was entitled to cancel it by reason of the fact that:

22.1 the Appellants were in breach of the Agreement document signed by him;

22.2 the breach was material;

22.3 he had the accrued right to cancel the Agreement;

22.4 he had informed the Appellants accordingly in writing about the cancellation of the Agreement.

WHETHER AN AUCTIONEER WHO ACTS AS AN AGENT CAN BE HELD PERSONALLY LIABLE FOR THE OBLIGATIONS OF HIS PRINCIPLE

[23] Adv J Vorster, counsel for the Second Appellant, approached this question from the point of view of Agency. The stance taken by him was that an Auctioneer who acts as an agent on behalf of the Seller, who is his principal, does not become personally liable for performing on behalf of his principle. It was argued, furthermore, by Mr Vorster that an Auctioneer does not act in his own capacity but sells goods as an agent on behalf of third parties. The Second Appellant then submitted that an agent cannot become personally liable when acting in a representative capacity. As such, an Auctioneer such as the Second Appellant, cannot be held jointly liable to repay the amounts paid by the Respondent to him.

[24] In support of the submission advanced by the Second Appellant, the Court was referred to the case of *Springfield Omnibus Service Durban CC v Peter Maskell Auction and Another* 2006 (4) SA 186 N at page 191 [8] to 192 H which was a decision of the Full Court where the Court had the following to say:

“[8] The crisp question to be answered is then whether the appellant was entitled to cancel the contract of sale as against the auctioneer and claim from it return of the purchase price. The answer to this question entails an examination of the contract between the appellant as purchaser and the first respondent as auctioneer. It will be necessary to consider the role of the auctioneer and determine in what circumstances he incurs liability as against the purchaser.

[9] A good starting point is the remarks of Innes J in *Marcus v Stamper and Zoutendijk* 1910 AD 58 at 82:

‘(A)gency is, after all, the fundamental idea which governs the position of any auctioneer. He is a person who sells publicly by auction for another.’

See further *Marais v Perks* (supra):

‘An auctioneer is simply an agent and he incurs personal liability only in those circumstances in which any agent would be personally

liable.’

(At 806.) A sale by auction involves the conclusion of three contracts. The one is between the seller (the principal) and the auctioneer. It is purely one of agency in terms of which the auctioneer is mandated to sell movable or immovable property for the seller to the highest bidder at the auction, normally for cash. A reserve price may be stipulated by the seller. The second is a contract of sale between the purchaser and the principal through its agent, the auctioneer. The third is between the purchaser and the auctioneer personally. The terms of the second and third agreement are normally contained in the conditions of sale issued by the auctioneer. Terms may also be contained in the notice of sale or advertisement and, as in this case, a document issued to buyers at the sale term ‘buyer’s card’. In *Frank R Thorold (Pty) Ltd v Estate Late Beit* [1996] ZASCA 79; 1996 (4) SA 705 (A), Corbett CJ, quoting extracts from two Natal decisions, said the following (at 729E-H):

‘Central to this question are *Stephan Welz & Co’s* “conditions of business”. It is common cause that in conducting the sale *Stephan Welz & Co*, represented by *Welz*, acted as the duly authorised agent of *Sir Alfred Beit* and that the purchase and sale of lots at the auction were subject to the aforementioned “conditions of business”. The role of such conditions was aptly described by *Broome J* in *Estate Frances v Land Sales (Pty) Ltd and Others* 1940 NPD 441 as follows (at 457):

“An auction is a form of competitive bargaining with the object of a contract of sale resulting carried out in accordance with certain

rules. These rules are the conditions of sale. They are framed by the seller to represent the terms upon which he is prepared to submit his property to competition. They are, so to speak, the rules of the game and they bind all the players.”

Commenting on this dictum in the subsequent case of *Shandel v Jacobs and Another* 1949 (1) SA 320 (N), *Carlisle J* stated (at 325):

“The question then arises, who are the players who are so bound? The conditions of sale are agreed upon in the first instance between the seller and the auctioneer and between these two they rest upon a contractual basis. When goods are offered for sale pursuant to them, they form the basis of the bargaining carried on between the auctioneer and the bidders. That the bidders are, as Broome J put it, players, I have no doubt ...”

- [10] An auctioneer will be liable to perform only one of the seller's obligations (in the present case, to effect delivery) if, on a proper construction of the documents making up the contract between him and the bidder, he undertook to do so. (See *SWA Amalgameerde Afslaers (Edms) Bpk v Louw* 1956 (1) SA 346 (A) at 355C and, by way of analogy, *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T), where the Sheriff, in conditions of sale issued at a sale in execution, was held to have contractually bound himself to ensure that the buyer obtained vacant possession.) At the auction, each bid constitutes an offer, open for acceptance by the auctioneer, such acceptance normally being signified by the fall of the hammer. It is said that the auctioneer incurs personal liability where he acts for an undisclosed principal or even when he is known to act for a principal, but does not disclose his name.

(*Warrington v Vigne & Rorke* 2 HCG 204; *Vigne v Lee* 9 HCG 196; *McKeurtan Sale of Goods in South Africa* at 248 -cited earlier- and *Allen v Du Preez* 1950 (1) SA 410 (W). In *Marais v Perks* (supra) at 807F it is said that there may be a presumption that an auctioneer undertakes personal liability where he does not name his principal.

- [11] I have difficulty with these notions. As indicated above, an auctioneer is, by virtue of his occupation, known to be an agent, and the agent of a seller. The doctrine of the undisclosed principal (which I agree with the authors of Joubert (ed) *The law of South Africa* vol 1 in para 148 is odd, anomalous, unsound and inconsistent with principle) is applicable only where the one contracting party, in this case the bidder at the auction, is unaware that the auctioneer is acting for a principal and believes the auctioneer is the seller in own name. A person attending an auction sale knows that the auctioneer is selling on behalf of several owners and can be under no illusion that he is buying the auctioneer's property – particularly when, as in invariably is the case (and is so in the instant case), the conditions of sale stipulate that the purchaser will be liable for commission on the sale.”

- [25] Still relying on the *Springfield Omnibus Service* case, Mr Vorster argued that the relationship between the Respondent and the Second Appellant was governed by the conditions of sale; and that such conditions constituted part of the pamphlet distributed before the auction got underway on 14 May 2015. Under these circumstances, so he submitted, the court a quo incorrectly held the Auctioneer jointly liable with its principal, the First Appellant, to refund the money paid by the Respondent.

- [26] When he started his argument, Adv CA da Silva (SC), who was on this occasion assisted by Adv SA Visser, argued that the Respondent relied for this case on the conduct of the Second Appellant for repudiation. Mr da Silva supported the judgment of the court a quo. He

referred the Court to three paragraphs in the judgment of the court a quo in which three instances of repudiation committed by the Second Appellant were dealt with by the court a quo. He submitted on those bases that the court a quo dealt extensively with the repudiation by both the Appellants:

26.1 First repudiation

In paragraph 20 of the judgment of the court a quo the court stated that:

“That conduct was repudiation of the first auction.”

The selling of the doors of the cold and freezer rooms and fixed rails in the second auction were regarded by the court a quo as repudiation.

26.2 Second repudiation

The court a quo referred to the damage caused before the acceptance of the Respondent's offer by the First Appellant as the second instance of repudiation of the Agreement by the Seller, the First Appellant. In paragraph [23] of its judgment this is what the court a quo stated:

“Irrespective of the subjective belief of the Respondent subsequent to the first auction, after the first auction declared that they do not have any intention to deliver the butchery to the applicant in the condition it was sold.”

26.3 Third repudiation

The court a quo said the following about the third instance of repudiation of the Agreement by the Appellants:

“Even after being alerted to the conduct described as repudiation (auction of the cold and freezer rooms in the second auction), the Respondents' tender to perform was unequivocally less than is due.”

Extensive damage to the merx was done to Lot 1 in that it was not the same merx that the Respondent had bought from the Seller, the First Appellant and the Second Appellant on 14 May 2015. The rails which were fixed to the inside of the butchery and which the court a quo had found to be fixed property had been removed. For these reasons the Respondent was entitled to withdraw or cancel his offer before it was accepted. I will deal extensively with the withdrawal or cancellation of the offer later in the judgment.

[27]

27.1 It will be recalled that the centrepiece of the Second Appellant's appeal is that the Second Appellant could not be held jointly liable as it acted only as an agent. Contrary to that submission, the Second Appellant was a party to the contract, in other words, the Agreement, so it was argued by Mr da Silva, because the Second Appellant signed the Agreement with the Respondent.

27.2 The Respondent paid the sum of R612,150.00 to the Second Appellant. Seeing that the offer was withdrawn before it could be accepted by the First Appellant, the only person that the Respondent could claim refund of the money from was the Second Appellant. Furthermore, the Respondent was never informed that the said money had already been paid over to the First Appellant. The assumption was therefore that the money was still in the possession of the Second Appellant. So where the offer was withdrawn before it could be accepted by the Seller; where no evidence exists to prove that any money paid by the offeror has been paid over to the offeree, the auctioneer may be sued jointly with the Seller.

27.3 In terms of *Springfield Omnibus Service Durban CC v Peter Maskell Auction CC*, a contract had come into being between the Second Appellant and the Respondent. It was held, in the said case, that a sale by public auction entails the conclusion of three contracts, namely, one between the Seller and the Auctioneer (as principal and agent, respectively), one between the Purchaser and the Seller, and one between the Purchaser and the Auctioneer. See in this regard pages 191J to 192B of the said judgment.

27.4 Clause 3.3 of the Agreement stated that:

“The person signing this contract will nevertheless be held personally liable for the fulfilment of all the terms hereof, even though he acts on behalf of the principal or spouse.”

The Second Appellant was such a person who had, in terms of clause 3.3 of the Agreement, signed the Agreement, he had waived any right not to be held personally responsible for any conduct performed on behalf of the principal.

27.5 Mr Harding admitted that he was in charge of the auction of the immovable property on 14 May 2015. He also admitted that the sale of the cold and freezer rooms took place as a result of his error in the auctioneer’s pamphlet. It was his negligent conduct that led to the demolition of the cold and freezer rooms. It was not conduct that could be attributed to the First Appellant. Hence Mr Harding, in his personal capacity, made contact with the persons who had purchased the cold and freezer rooms and offered to buy those items back from them. He, and not the First Appellant, offered to pay them an additional R10,000.00 per item. As a result, he paid out of his own pocket the sum of R53,660.00. This amount was not paid by the First Appellant.

27.6 He thereafter contacted a professional company “Tshwane Cooling System” to re-install the cold rooms and freezer room. Again these arrangements were made not by the First Appellant but by the Second Appellant in his personal capacity.

27.7 Finally, he paid Tshwane Cooling System R20,960.00 of his own money. There is no evidence that he paid this money from any money held on behalf of the First Appellant.

[28] Accordingly, the submission by Mr Harding that he cannot become personally liable when acting in a representative capacity is flawed. The court a quo was correct in finding that the Second Appellant was jointly liable with its principal to refund the sum of R612,150.00. Consequently, an auctioneer may be held jointly liable with the Seller under the circumstances but not in paragraphs 27 supra.

WHETHER A PARTY WHO MAKES AN IRREVOCABLE OFFER MAY WITHDRAW THE OFFER
WHILST IT IS STILL OPEN FOR ACCEPTANCE

[29] The next question that I turn my attention to is whether a party who makes an irrevocable offer, as the Respondent did in casu, may withdraw such an offer whilst it is still open for acceptance by, in this casu, the First Appellant. The genesis of this question is the provisions of clause 2.1 of the Agreement which state, inter alia, that:

“This document constitutes an offer to purchase by the Purchaser, and the Purchaser is unconditionally and irrevocably bound to this offer for a period of 14 calendar days and the offer is open for acceptance by the Seller at any time during this period”, and the fact furthermore that as stated again in his letter dated 19 May 2019, the Respondent gave notice to the Appellants that he was withdrawing his offer.

[30] The attitude of the Appellants to the Respondent’s withdrawal of his offer was that such a withdrawal by the Respondent was ineffective by reason of the fact that clause 2.1 of the Agreement provided that the offer was irrevocable. Contrary to what they stated as set out in the preceding sentence, the Appellants state that by the time the alleged repudiation took place, the Respondent’s offer had not been accepted and therefore no binding agreement that was capable of being repudiated had come into being. They are wrong and I will demonstrate below why I say so. The last statement that the Appellants made arises from the Appellants’ inability to distinguish between an option as an agreement and an agreement of sale. In that statement the Appellants stated that:

“There was no binding agreement that was capable of being repudiated has come into being.”

They incorrectly referred to an agreement of sale. I will deal with option as an agreement later in this judgment where it will become clear that the conclusion of an Agreement of Sale would have been preceded by an option.

[31] The court a quo found that the phrase “the offer is open for acceptance by the Seller at any time during this period wherever it appears in the irrevocability clause could only mean that the offer remains open for as long as the Seller acts in accordance with the agreement (my own underlining).”

The implication of “for as long as the Seller acts in accordance with the agreement” means the following:

31.1 that the offer which has by now evolved into an option, an agreement on its own, will hold steadfast provided that the Seller does nothing to change the character of the merx or commodity;

31.2 that there is an implied duty imposed on the Seller to preserve the merx;

31.3 that his violation of the terms of the option or any conduct by the Seller which results in the damage to the merx or change in the character of the merx may constitute a repudiation of the option by the Purchaser. Such repudiation shall entitle the Purchaser to withdraw his offer whether or not the offer was said to be irrevocable.

[32] The fact that an offer is said to be irrevocable does not make it irrevocable simply because it is said to be irrevocable. Whether or not an offer is irrevocable will depend on the conduct of the parties. An innocent party is entitled to withdraw the offer on any of the recognised grounds on which an Agreement may be repudiated even if it is said to be irrevocable.

[33] In Christie's Law of Contract in South Africa, 7th Edition, the learned author states that:

"The general rule is that the offeror may withdraw or revoke (the word 'repudiate' has also been used) the offer at any time before it has been accepted. The withdrawal or revocation becomes effective from the time it comes to the notice of the offeree."

See in this regard Yeats v Dalton EDL 127. But Christie seems to cling to the view that an offer that is irrevocable cannot be withdrawn. He criticises the approach

adopted by Coetzee J in Anglo Carpets (Pty) Ltd v Snyman 1978 (3) SA 582 (T) at 585G where the Court had the following to say:

"It is trite law that an offer can at any time before acceptance thereof be revoked and that the mere statement that it is irrevocable or not revocable for a certain period is ineffective. The only way in which this result can be achieved is if there is indeed a binding agreement on this aspect. Such an agreement is usually referred to as an option or a pactum de contrahendo."

Christie relied in this respect on Boyd v Nel 1922 AD 414; Hersch v Nel 1948 (3) SA 686 (A) and De Wet and Yeats Kontraktereg 3rd Edition at page 30.

[34] Christie opines that the approach that Coetzee J adopted is by no means trite law and is incorrect. I doubt if he would criticise Coetzee J's approach if he had attended the auction in question on 14 May 2015; had seen the Respondent bid for Lot 1 and had on 18 May 2015 found the Second Respondent having sold parts of Lot 1 in a second auction and had found Rupert removing from Lot 1 parts of what the Respondent had offered to buy, whether he would certainly stand in the Respondent's corner and support him for revoking his offer in circumstances where the Second Appellant had destroyed or damaged the property the Respondent offered to purchase. The offeror cannot be forced to keep the offer open even after the auctioneer has caused massive damage to the commodity simply because the offer is said to be irrevocable. I do not agree with Christie that merely because an offer was said to be irrevocable, no matter the circumstances, it cannot be revoked. I agree with the approach adopted by Coetzee J in the said matter. It is the correct one and shows that an offer that is said to be irrevocable can be withdrawn if circumstances, as in the current one, favour such a withdrawal.

[35] In Willie and Millin's Mercantile Law of South Africa, 7th Edition, the authors had the following to say at page 14:

"A further area of doubt with regards to the revocability of an offer exists in relation to offers containing a statement that such offer will remain open for acceptance until a stated time", such as in the current one. The authors have discussed two dramatically opposed views. The first view they discussed was that:

"One view is that, such an offer, being a unilateral act, cannot be made irrevocable even if it is stated to be so, unless it amounts to an option which has been accepted. Where on a true construction a time has been fixed after which the offeror cannot be made liable by acceptance, and this has been solely in the interest of the offeror, he may revoke the offer before such time is reached. But where the true construction is that such time was fixed solely in the interest of the offeror, he may revoke the offer before such time is reached. But where the true construction is that such time was fixed solely in the interest of the offeree, so as to give him time to consider the offer and make any necessary arrangements before acceptance, or as in the joint interest of both parties, practical business considerations seem to require that the strict and mechanical view that this is a unilateral act not being applied."

[36] On page 744 of Willie's Principles of South African Law, 9th Edition, the learned authors state that:

"Since no contract is constituted unless and until the offer is accepted, the offeror may "accept as stated directly" revoke or withdraw the offer at any time before it has been accepted."

In this regard they rely on, inter alia, *Gouws v Van der Hoff* 1903 20 SC p 237, *Wissekake v Wissekake* 1970 (2) SA 556 (A) at 557; and *Phillips v Aida Real Estate (Pty) Ltd* 1975 (3) SA 198 (A) at p 207. What is of paramount importance with the learned authors' approach is that they draw no distinction between an offer that is made subject to irrevocability and the one that does not contain such a provision. Accordingly, irrespective of whether an offer is irrevocable, according to them, it can be withdrawn. It is accepted that, at that stage, there is no contract. The question is: has the offer being accepted, if not, can it be withdrawn?

[37] I now turn to the approach of the Second Appellant as set out by Mr Vorster. Quite clearly Mr Vorster's argument was predicated on the provisions of clause 2.1 of the Agreement. He argued that it was an express condition of the auction on 14 May 2015 that bids placed by those who attended the auction would be subject to the terms and conditions specified in the brochure and that clause 2.1 constituted part of such brochure. He developed his argument and stated that the Second Appellant submits that the Respondent's bid was subject to the terms and conditions pertaining to the auction and was, consequently, irrevocable for a period of 14 days from 14 May 2015. In this regard he relies on the case of *Building Material Manufacturers Ltd v Marais* 1990 (1) SA 243 (O) at p. 248 to 249, where the Court held that: "an offer stated to be irrevocable was, from the outset, irrevocable because the parties never contemplated that acceptance of irrevocability was necessary." This statement will only apply where it was never in the contemplation of the parties that one of them would repudiate the option.

[38] I agree entirely with what the Court a quo stated in paragraphs 37 and 38 of its judgment. I quote these paragraphs below:

“37.

The Respondents rely on the Forfeiture Clause to retain the monies paid by the Applicant. I do not agree with this conclusion, the Forfeiture Clause do not apply where it is not the Purchaser/Applicant who fail to perform but the Respondents who failed to perform in terms of the Agreement and/or conducts themselves in a manner that constitutes repudiation. To give the wording of paragraph 13.3 any meaning would enable the wrongdoer to profit from his own wrongdoing by committing a breach and damaging the property against the wishes of an innocent party.

38.

The reliance on Clause 2.1 rendering the Agreement irrevocable can for the same reason not disqualify the Applicant from the relying on the repudiation of the First and Second Respondents. To give the wording of paragraph 2.1 any other meaning would enable the First and Second Respondents to act in a manner that would constitute a repudiation but nevertheless to enable them to profit from their own wrongdoing to the detriment of the innocent party, the Purchaser. The phrase “the offer is open for acceptance by the Seller at any time during the period” where it appears in the irrevocability Clause could only mean that the offer remains open for as long as the Seller acts in accordance with the Agreement. It is no carte blanche for the Seller to act in a manner that might be regarded as anticipatory breach or a breach justifying cancelation, but at the same time entitling the Seller to accept the offer, despite his conduct.”

[39] In particular it is of paramount importance to emphasise the following in the above paragraph 38:

“The phrase “the offer is open for acceptance by the Seller at any time during this period” where it appears in the irrevocability

clause could only mean that the offer remains open for as long as the Seller acts in accordance with the Agreement.”

In my view, this statement has captured the nub of the answer required by Mr Vorster. Of paramount importance in Mr da Silva’s

argument is the following statement:

The Seller is compelled to ensure that the subject matter is preserved until the offer is accepted or rejected. This responsibility

lies at the heart of an auction and bid.”

This statement speaks volumes. To summarise:

39.1 once an offer, such as the current one is made, an option Agreement, an agreement on its own, there is a duty on the Seller and the Auctioneer, to preserve the commodity the Offeror has offered to purchase;

39.2 should the Seller or Auctioneer auction the commodity in respect of which the Offeror has already made a bid for it or cause damage to such a commodity or change its character, the Seller or Auctioneer or both repudiate the option agreement for the commodity is no longer the commodity for which the Offeror made an offer;

39.3 where the commodity that the Purchaser offered to purchase is materially damaged, the Purchaser or Offeror is entitled to revoke the offer even if it was said to be irrevocable. The answer to Mr Vorster's question above is yes, an offeror may revoke an offer that is said to be irrevocable whilst it is still open for acceptance by the offeree. In this regard, I find support in *Anglo Plats (Pty) Ltd v Marais supra*, which is a judgment of the full bench of this Court. I am bound by the said judgment. I agree with the finding of the court a quo that the offer would remain open for acceptance as long as the Seller and Auctioneer acted in accordance with the Agreement.

Furthermore, I agree with Mr da Silva that once an offer is made to purchase a certain commodity, a duty is imposed on the Seller or Auctioneer, in this case the Seller and Auctioneer, to preserve such a commodity.

WHETHER AN AGREEMENT CAN BE REPUDIATED BEFORE IT COMES INTO EXISTENCE

[40] Whether an Agreement can be repudiated before it comes into existence the court a quo dealt with this aspect in paragraph 17 and 18 of its judgment. In paragraph 17 it had the following to say:

"The Purchaser became obliged to honour the Agreement that the Offer to purchase remain open for acceptance by the Seller, for a period of 14 days and submitted himself to the consequences of the Forfeiture Clause already referred to above. A valid and binding Offer to purchase and/or Agreement therefore came into existence between the Purchaser/Bidder on the one hand and the Seller and Auctioneer on the other hand. This agreement created rights and obligations. Although it is so that the Offer to Purchase still had to be accepted, the Offer to Purchase became a valid and binding agreement when the Applicant paid the commission, paid the deposit and the VAT as prescribed in paragraph 9.2 of the Agreement. I find that this agreement between the parties was an agreement susceptible to repudiation."

[41] "An offer is not intended to stand forever. It lapses if it is not accepted within the time stipulated or if it is revoked by the Offeror at any time before acceptance. As I have pointed out somewhere supra, an offer may be revoked even if it was said to be irrevocable. Now, an offer once made, creates some form of rights and obligations for the Offeror and the Offeree."

In the first place the Respondent, in making the offer to the Purchaser to purchase Lot 1, had agree to keep the offer open for a

period of 14 days. “Such an agreement is called an option. An option is itself a contract from which legal results flow before it is overturned by acceptance into a contract of some other description, e.g. contract of sale.” See in this regard page 744 of Willie’s Principles of South African law. See also Christie’s Law of Contract in South Africa page 66 paragraph 2.2.10 where he had the following to say:

“An offer cannot be withdrawn if the Offeror has bound itself by contract with the Offeree not to withdraw it. Such a contract is usually described as an option and although this word is most frequently used to describe an option to buy, there can equally be an option to sell or to enter into any other contract.”

To understand the true nature of an option it is best to analyse it in two parts –

an offer to enter into the main contract together with a concluded subsidiary contract (the contract of option) binding the Offeror to keep that offer open for a certain period.

On this analysis it is easy to see that the Offeror is contractually bound to keep his offer open, and if he breaks his contract of option by disabling himself from performing it or by expressly or impliedly repudiating it he would be liable for damages for breach of contract.” See *Boyd v Nel* where the Court had the following to say:

“Where one person gives to another an option for a fixed period to purchase property, and during that period either breaks the agreement by disabling himself from fulfilling it or expressly repudiates it, he will be liable in damages to the person to whom he has given the option even though the latter has not exercised it.”

[42] In *Venter v Birchholtz* 1972 (1) SA 276 (AA) at page 283 the Appellate Division quoted with approval the following passage from *Brandt v Spies* 1960(4) SA 14 (O.K.) at p 16F-17C:

“It is implicit in these decisions that an option is comprised of two distinct parts – one is an offer to sell the property; and the other is to keep that offer open for a certain period.”

Through the option the grantee acquires the right to accept the offer to sell at any time during the stipulated period; and if this right is exercised a contract of purchase and sale is immediately brought into being. It follows that the offer must be one which is capable of resulting in a valid contract of sale from the fact of acceptance by the person to whom the offer is made ... it is clear that when a party relies upon a contract flowing from the acceptance of an offer, and the law prescribes that writing is essential to the validity of a particular contract, it must be shown that both the offer and acceptance are in writing. If the offer is not in writing there is nothing which the offeree can accept so as to create a *vinculum juris* between himself and the Offeror. An undertaking to keep open an offer which is incapable of forming the basis of a valid contract can in itself confer no right upon a grantee - for in law there is nothing to keep it open.”

See *v Hersch v Nel* 1948(3) SA 686 A at 694:

As demonstrated by *Hirshowitz v Moolman and Others* 1985 (3) SA 739 AD at 763, the option may even be sold and transferred or ceded to third parties:

“It is to be noted that in this case the granters of the right of pre-emption (First and Second Respondents) have not sold the farm to a third party in this regard as the Applicant’s rights as the holder of the right of pre-emptions; they have merely granted to a third party the option to purchase the farm. Now, the grant by an owner of property of an option to purchase the property amounts in law to an offer to the grantee of an option to sell the property to him and the agreement to keep that offer open for a certain period. The grantee acquires the right to accept the offer at any time during the stipulated period and, if he does so, a contract of purchase and sale comes about.”

Hersch v Nel supra deals with the cession of an option at p.695. It states as follows:

“I shall deal first with the question of whether an option can be ceded. An option has been analysed into an offer to sell,

together with an agreement to keep that offer open for a certain time – *Boyd v Nel* (1922, AD 414 at p 421) and numerous other cases. But perhaps a better way is to look at it simply as an agreement between the giver and the holder of an option by which the giver has bound himself to sell a certain thing to the holder at a certain price if the holder shall require him to do so within the time fixed by the option; by this agreement the giver grants a holder who acquires a right to buy.

The matter is often obscured by speaking of an option as a unilateral contract, which becomes a bilateral contract of sale on its

acceptance (*Boyd v Nel* (supra) and again numerous other cases). This is correct if by “unilateral” is meant a contract by which one party is bound to do something and the other is not bound to do anything.” Quite clearly an option can in terms of the decision be ceded.

[43] The legal consequences of an option are firstly that an Offeror may not withdraw the offer until the date of its acceptance has expired, unless he has valid grounds to revoke it. Such an option places the Offeror under an obligation to preserve the commodity intact, in the same conditions it was when the Offeror inspected it and decided to make an offer to purchase it, until the offer is accepted. Before the Offeree accepts the offer, he is tacitly bound by the terms of the option not to do or suffer to do anything to the merx or harm or destroy or damage it. If he should destroy it or damage it in any manner whatsoever, it changes the character of the commodity. The Offeror may regard that as a repudiation of the option and he may, on that basis only, be entitled to revoke the offer, even if it was agreed that the offer was irrevocable. In the same measures if the offer is accepted before the expiry of the time agreed upon, a contract is concluded. See in this regard *Van Pletzen v Henning* 1913 AD 82 at 98; *Fourie v De Bruyn* 1914 AD 374, if the Grantor before the lapse of time puts it out of his own power to fulfil the offer, the Offeree is entitled to claim damages from him. In this regard see *Boyd v Nel* and *Summers v Wilding* [1984] ZASCA 53; 1984 (3) SA 647 A.

[44] It was argued by Mr da Silva that if an offer is open for an expressed period of time such an option is in itself a contract for which legal results flow before it is turned by acceptance in a contract of some other description. He found support for this principle of South African Law and *Hirschowitz v Moolman supra*. It is also the view expressed by Christie at pages 66 to 67 as quoted somewhere *supra*.

[45] Accordingly, when the court a quo referred to the Agreement that is susceptible to repudiation in paragraph 17 of its judgment, and when the court a quo referred to the Agreement that had created rights and obligations, it referred to an Option. I am of the view that it is clear that an option is a contract on its own and that it can be repudiated. It must therefore be clear to Mr Vorster that when the Respondent complained that the Appellants have repudiated an Agreement, he meant the Option and not the Agreement of Sale for that had not been concluded. Perhaps the question posed was not properly phrased. This, in my view, answers the

question posed by Mr Vorster. In my view, the appeal cannot succeed and ought to be dismissed.

[46] Accordingly, we make the following order:

“The appeal is dismissed with costs which costs shall include the costs consequent upon the employment of two counsel.”

P.M. MABUSE

JUDGE OF THE HIGH COURT

E.M. KUBUSHI

N. JANSE VAN NIEUWENHUIZEN

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Date Heard:

13 November 2019

Date of Judgment:

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December 2019

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Prepared on 11 October 2026 · Esheria