THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 498/08

ROCKBREAKERS AND PARTS (PTY) LTD Appellant

and

ROLAG PROPERTY TRADING (PTY) LTD Respondent

Neutral citation: *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd*. (498/08) [2009] ZASCA 102 (18 September 2009)

Coram: HEHER, PONNAN JJA, HURT, TSHIQI *et* WALLIS AJJA
Heard: 25 AUGUST 2009
Delivered: 18 SEPTEMBER 2009

Summary: Alienation of land – party accepting offer adding a suspensive condition amounting to a counter offer – other party not signing the amendment – contract unenforceable for non-compliance with s 2(1) of Alienation of Land Act 68 of 1981.

ORDER

On appeal from: Johannesburg High Court (Van Oosten J sitting as court of first instance).

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and substituted as follows:

2.1 The application is dismissed with costs.

JUDGMENT

TSHIQI AJA (HEHER and PONNAN JJA and HURT and WALLIS AJJA concurring):

[1] This appeal concerns the validity of a purchase and sale agreement in respect of immovable property, owned by the appellant, Rockbreakers and Parts (Pty) Ltd, and known to both parties as 'Portion 54 of the Farm Roodekop No 139 IR measuring 49408m²'. A written offer to purchase the property was signed on behalf of the respondent, Rolag Property Trading (Pty) Ltd, on 20 October 2005 and by a representative of the appellant on 25 October 2005. This case arises because in so doing he added the following words in manuscript:

'This offer is accepted subject to the seller obtaining registration of the subdivision of the property.'

The manuscript insertion was neither initialled nor countersigned by the respondent. Apart from the manuscript insertion there is no reference to a subdivision of the property in the agreement, although the evidence shows that both parties were aware of the need for the property to be subdivided in order to give effect to the sale.

[2] The requisite deposit was paid by the respondent and the necessary guarantees were furnished for the payment of the balance of the purchase price. A conveyancer was nominated to attend to the subdivision and transfer of the property. The application for subdivision was approved by the local authority and the property to be sub-divided was then described as 'Portion 124 (a portion of 29) of the Farm Roodekop No 139 IR' now measuring 37507m². The letter of approval was dated 16 May 2006 and imposed certain conditions. The one that gave rise to controversy is contained in paragraph 3 and states:

'That a township be established on proposed Portion 54 and that no development of any nature whatsoever takes place on the property before the township has been promulgated.'

The appellant did not thereafter proceed with further steps to ensure finality to the registration and transfer process. From the correspondence exchanged between the parties it became clear that the appellant took the stance that the quoted condition imposed burdensome obligations and 'the offer to purchase which was signed on 20 October 2005, was not accepted unconditionally by the sellers, Rockbreakers and Parts (Pty) Ltd on 25 October 2005 as the acceptance was made subject to the seller obtaining registration of the subdivision of the property'[1]. That clearly conveyed the appellant's intention not to regard itself as bound by the agreement.

[3] When the attitude of the appellant became clear to the respondent, it applied to the Johannesburg High Court for an order for specific performance of the agreement. The appellant opposed the application raising four defences which were all rejected by the court below. The appeal is brought with the leave of that court. For the reasons that will become apparent it is only necessary to deal with one of the defences.

[4] This defence is that the manuscript insertion was material to any agreement and constituted a counter-offer which had to be in writing and signed by or on behalf of the parties in compliance with s 2(1) of the Alienation of Land Act 68 of 1981 ('the Act'), and that the failure by the respondent to accept it or signal its acceptance in writing rendered the contract unenforceable. The respondent disputes that the manuscript insertion amounted to a counter-offer and contends that it was surplusage amounting to no more than what was the common intention of the parties. The basis for this contention is that both parties knew that the property had to be subdivided in order to give effect to the agreement.

[5] Section 2(1) of the Act reads:

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[1] Letter dated 10 May 2007 from J C Smit Inc De Kock & Visser; Attorneys and Conveyancers acting on the instructions of the appellant.

'No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

[6] In *Johnston v Leal*[2] Corbett JA summed up the legal effect of the predecessor to s 2(1) which was materially the same terms as follows:

'It has been held — and in my opinion correctly so — that what s 1(1), or its predecessors, require is that the whole contract of sale, or at any rate all the material terms thereof, be reduced to writing (see *Joubert v Steenkamp* 1909 TS 169 at 171; *Coronel v Kaufman* 1920 TPD 207 at 209, 210; *Veenstra v Collins* 1938 TPD 458 at 460; *King v Potgieter* 1950 (3) SA 7 (T) at 10 and 14 and the cases there cited; *Jammine v Lowrie* 1958 (2) SA 430 (T) at 431; *Meyer v Kirner* 1974 (4) SA 90 (N) at 97G-98D). It is not necessary that the terms of the contract be all contained in one document, but, if there are more than one document, these documents, read together, must fully record the contract (see *Coronel v Kaufman* (*supra* at 209); *Meyer v Kirner* (*supra* at 97E-F)). The material terms of the contract are not confined to those prescribing the *essentialia* of a contract of sale, viz the parties to the contract, the *merx* and the *pretium*, but include, in addition, all other material terms (see *King v Potgieter* (*supra* at 14C); *Meyer v Kirner* (*supra* at 97-9)). It is not easy to define what constitutes a material term. Nor is it necessary in the present case to do so since clause 11, upon which the dispute turns and which has the effect (if operative) of suspending the whole contract pending fulfilment of a condition as to the procurement of a loan on the security of a first mortgage bond to be passed over the property sold and also of causing the contract to be "automatically cancelled" in the event of such a loan not being obtained, would clearly constitute a material term of the contract. It is also not necessary in this case to consider at any length the degree of precision with which the writing must set forth the terms of the contract, particularly the *essentialia*, in order to comply with s 1 (1), since this is not an issue which arises here. Generally speaking these terms — and especially the *essentialia* — must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identity of the subject-matter of the contract, as also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral *consensus* between the parties (see *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989-990, 995-

[2] 1980 (3) SA 927 (A) at 937G-H; 938B-C.

6; *King v Potgieter* (*supra* at 14D-E); *Magwaza v Heenan* 1979 (2) SA 1019 (A) at 1023C-G and the authorities there cited).'

[7] In *Van Leeuwen Pipe and Tube (Pty) Ltd v Mulroy*[3] Nienaber J said:
'The sale is an alienation of land. To be valid its terms must be in writing and signed. That means that every term that is conceived by the parties to form part of the sale must comply with the prescribed statutory formalities. If any particular term does not so comply, the term itself is void and so is the sale as a whole – at any rate if the offending term is a material one that cannot be severed from the enforceable portion of the contract. ... A term that relates to the performance and thus to the obligations of any of the respective parties, such as a term incorporating a suspensive or resolutive condition, would be a material term.'

[8] In order to determine whether the defence raised can be sustained it is necessary to determine the effect of the manuscript insertion on the rights and obligations of both parties. It follows from the authorities cited above that if the manuscript insertion embodied a material alteration to the contractual terms and thus constituted a counter-offer that was never accepted in writing, then the contract would be unenforceable.

[9] The contract as initially signed by the respondent made no mention of subdivision. In the absence of the subdivision, foreshadowed by the manuscript insertion, the property described as 'Portion 54 of the Farm Roodekop No 139 IR' would not be separated from the rest of the farm and consequently could not be transferred to the respondent. This would affect the material obligations of the appellant, which would still be obliged to make good its part of the bargain. The insertion of the clause in manuscript therefore served to protect the appellant from an action for damages in the event that the subdivision did not materialise. There is therefore no doubt in the circumstances of this case that the manuscript insertion is material and amounted to a counter-offer.[4]

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[3] 1985 (3) SA 396 (D) at 400F-I.
[4] *Admin Estate Agents (Pty) Limited t/a Larry Lambrou v Brennan* 1997 (2) SA 922 (E) at 928G-H.

[10] We have been referred to the case of *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd*[5] to support a submission that, because both parties knew that the subdivision was a precondition to the transfer of the property, the manuscript insertion is of no moment. However this case is distinguishable from the case of *Stalwo* (supra) because 'the proposed subdivision' in that case was expressly incorporated into the agreement and it was agreed that a suspensive condition, although omitted from the written agreement, was indeed a term of the agreement between the parties.

[11] It therefore follows that the manuscript insertion constituted a counter-offer that required acceptance in writing by both parties. In light of the fact that the counter-offer was not accepted by the respondent, it follows that no binding agreement was concluded between the parties. This conclusion disposes of the appeal and it is thus not necessary to deal with the other issues considered by the court below.

[12] Reference was made in argument to correspondence from the respondent, referring the appellant to BOE Bank regarding the issue of guarantees, and a letter to BOE Bank requesting a guarantee. Even if the letters could be read, and, to the extent of their relevance, incorporated into the agreement, both deal with separate issues pertaining to the purchase and sale agreement and are silent on the issue of the subdivision. They cannot be of assistance to respondent, in so far as the acceptance of the counter-offer is concerned. The status of the letters can best be described as in *Jackson v Weilbach's Executrix*[6] where Innes CJ said, in relation to an attempt to use subsequent documentation to overcome an absence of writing:

'But do these declarations of purchaser and seller constitute such a contract? In form they certainly do not; the declaration of the seller is not an offer, and the declaration of the purchaser is not an acceptance. Nor is there anything to show that the parties, when they signed these declarations, intended to enter into any contract. The declarations were signed for revenue purposes, and they purport not to embody a

[5] 2008 (1) SA 654 (SCA) at paras 8-12.
[6] 1907 TS 212 at 216-217.

contract constituted in terms of the documents themselves, but to record that a prior contract had been entered into at a date therein mentioned. . . It comes, then, to this – that these declarations do not purport to contain a contract: they were not intended by the parties to do so, and if they constituted a contract there would be two contracts in this case instead of one. In my view the two parties did not enter into the written contract which sec. 30 of Proclamation 8 of 1902 requires, and their verbal agreement was null and void.'

[13] I would therefore make the following order:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and substituted as follows:

2.1 The application is dismissed with costs.

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Z L L TSHIQI
ACTING JUDGE OF APPEAL

WALLIS AJA (HEHER JA concurring)

[14] I have had the advantage of reading the judgment of my colleague Tshiqi AJA and I concur with her reasoning and her conclusion. I write separately because in one respect my reasoning goes further than hers.

[15] It is correctly accepted by the parties that the additional clause added to the draft offer, by Mr Esprey, is a suspensive condition. The effect of that is to create 'a very real and definite contractual relationship' between the parties.[7] Pending fulfilment of the suspensive condition the exigible content of the contract is suspended.[8] On fulfilment of the condition the contract

[7] *Corondimas v Badat* 1946 AD 548 at 551, 558-559; *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 887.
[8] *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) at 665-667.

becomes of full force and effect and enforceable by the parties in accordance with its terms. None of this is contentious.

[16] In a contract not subject to the condition inserted by Mr Esprey, as my colleague points out, Rockbreakers would have been obliged to procure the subdivision of the property and its transfer to Rolag. This is in accordance with the rule enunciated by Pothier in the following terms:

'The seller is bound to deliver the thing to the buyer if it is not already in his possession; and as a necessary consequence of this obligation, to do, at his own expense, whatever may be necessary to enable him to perform it.'[9]

[17] The contrast between the contract being subject to the suspensive condition, inserted by Mr Esprey, and a situation where it was not subject to any such condition is apparent from these brief descriptions of the differing legal consequences flowing from the two different situations. In order to circumvent the problem this poses to the enforcement of the contract Rolag contended, and this was upheld by the court below, that in the absence of the additional clause the offer, and hence any contract concluded as a result of its unequivocal acceptance, would in any event have been subject to a suspensive condition, precisely the same as that inserted in manuscript by Mr Esprey, when he purported to accept the offer. In forming that conclusion the court below relied on the decision of this Court in *Stalwo*.[10]

[18] The issue in *Stalwo* was whether an agreement failed to comply with the requirements of the Alienation of Land Act, because the parties had omitted to incorporate expressly in the written document a suspensive condition making the sale subject to sub-division of the land sold from a larger property. There was no dispute between the parties that their agreement was subject to such a suspensive condition, but it was contended that the failure to incorporate it expressly in the written document meant that there had been non-compliance with the requirement of writing in the statute, resulting in the

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[9] *Contract of Sale* 2.1.42 (Cushing's translation 26); *Sauerlander v Townsend* 1930 CPD 55 at 63; *Abdullah v Long* 1931 CPD 305 at 308.
[10] *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 (1) SA 654 (SCA) at paras 8-12.

contract being void and unenforceable. This Court rejected that contention on the basis that in consequence of the parties' agreement on the suspensive condition, taken in conjunction with the express reference to a sub-division in the description of the property sold, the contract was subject to a tacit term embodying such suspensive condition and as 'a tacit term, once found to exist, is simply read or blended into the contract: as such it is "contained" in the written deed. Not being an adjunct to but an integrated part of the contract, a tacit term does not … fall foul of … the [Alienation of Land] Act.'[11]

[19] In reaching that conclusion the court applied the well-established principles governing the circumstances in which a tacit term is implied into a contract as laid down in a number of decisions of this Court.[12] Those principles are equally applicable to the contention in this case that the offer as submitted would, if accepted without qualification, have resulted in a contract subject to a suspensive condition by virtue of a tacit term to that effect, with the result that the additional clause was mere surplusage. In considering that question the only background fact external to the agreement relied on by Rolag is that both parties were aware at all times that it would be necessary to effect a sub-division in order for Rockbreakers to give transfer of the property that was the subject of the sale.

[20] In *Wilkins v Voges*[13] Nienaber JA said that:

'A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one.'

Any tacit term in the present case must fall within the second category because, apart from the fact that the parties both knew that sub-division was necessary, there is no evidence that they in fact addressed their minds to the

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[11] *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 144C-D.
[12] *Alfred McAlpine & Son (Pty) Ltd vTransvaal Provincial Administration 1974 (3) SA 506 (A) at 532G-533C; Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A) at 827B-828B; *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H-137D.
[13] At 136H-I.

matter before the offer was submitted or gave any consideration to what was to happen if sub-division could not be effected. That serves to distinguish the case from *Stalwo* where the parties had agreed that their contract would be subject to a suspensive condition and had therefore addressed their minds to the issue but not declared their assent.

[21] Logically it is difficult to speak of imputing a term into a contract until one has reached the conclusion that a binding contract exists. In considering the contention on behalf of Rolag one must necessarily approach the matter on the basis of a consideration of the agreement that would have resulted if, instead of inserting the suspensive condition, Mr Esprey had simply accepted the offer as it stood, thereby bringing into existence a contract that, in its written manifestation, did not contain the suspensive condition. One must then ask whether, on a consideration of the express terms of that contract in the light of admissible evidence of surrounding circumstances, a tacit term should be imputed to the parties that their agreement would be 'subject to the seller obtaining registration of the subdivision of the property.'

[22] Whilst it would not be uncommon in ordinary commercial practice for a matter such as the sub-division in this case to be the subject of a suspensive condition, the mere fact that it might, or even would, be reasonable to include such a provision in the contract is not a basis for imputing a tacit suspensive condition to the parties. The property had been marketed for a number of years as a separate sub-division and reference to the plan shows that it is bounded on three sides by public roads and is separated from the balance of the property by a railway line. A sub-divisional diagram had been drawn up in 1967 and submitted to the local authority but, for reasons not explained in the papers, that had not been taken further. There is no indication that the parties foresaw any possible problems in obtaining sub-divisional approval or, until Mr Esprey inserted the additional clause, that they contemplated the possibility that such approval might not be forthcoming. In those circumstances it is not possible to draw the inference that if the matter had been raised at the outset they would have agreed that in the event of sub-division not being procured the contract would simply have fallen away. Whilst Rolag was clearly eager,

as its conduct shows, to pursue the contract once sub-divisional approval had been obtained, that cannot be taken as indicating retrospectively that it would have been agreeable from the outset to walk away from the transaction if approval was not forthcoming. It might have insisted on the contract being unconditional and Rockbreakers might have been willing to accept this, because it did not foresee any difficulty in obtaining sub-divisional approval. Alternatively, Rolag could have suggested a suspensive condition in different terms or demanded some compensation for out-of-pocket expenses in planning the development of the property. Other possibilities are conceivable. Nothing suggests that the necessary response of both parties to the question posed by the hypothetical bystander would have been to say: 'Of course our agreement is subject to sub-division being obtained. That is too obvious for us to need to say it.' Indeed, had they said that, it is by no means clear that they would have meant by this statement that the contract was subject to a suspensive condition. It is capable of meaning simply that they knew that a failure to obtain sub-division would render performance impossible, without necessarily exempting Rockbreakers from a liability to pay damages for non-performance of their obligation to transfer the property to Rolag.

[23] A further relevant factor is that the offer was embodied in a written document in a form conventionally used for transactions of this type, which specifically caters in clause 18 thereof for the eventuality that the parties might wish to make their agreement subject to a suspensive condition. As the cases demonstrate a tacit term is not lightly to be imputed to parties who have chosen to embody their agreement in writing. The reason is that one infers, from the fact that they have chosen to adopt that course, that they have thought about its terms and the document reflects those terms.

[24] Those considerations suffice to support the conclusion that by adding the suspensive condition Mr Esprey, on behalf of Rockbreakers, was proposing to contract on materially different terms from those offered by Rolag and hence that he made a counter-offer. That conclusion finds support in

cases, not only in this country but also in England,[14] from which our courts have obtained much guidance in the field of tacit conditions. It also renders it unnecessary to consider whether or in what circumstances it is ever possible by way of a tacit condition to render a written contract, unconditional on its face, conditional or whether the imputation of such a condition would be inconsistent with the written terms and hence amount to an impermissible amendment therof. Other than *Stalwo*, which depends upon the unusual situation where the parties had in fact agreed on a suspensive condition and then not incorporated it in the written contract, I have found no South African case where that has been done. My researches in the English cases have only unearthed a single case where that was the result and that in an *ex tempore* judgment where the basic principles were not canvassed.[15] Fortunately, it is unnecessary to express a final view on that question as it raises important issues of principle on which we have not had the benefit of full argument.

[25] For those additional reasons and those contained in her judgment I concur in the order proposed by Tshiqi AJA.

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M J D WALLIS
ACTING JUDGE OF APPEAL

[14] *Charles H Windschuegl Ltd v Alexander Pickering & Co Ltd* [1950] 84 Lloyd's L Rep 89 (KB) at 93; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497 (CA),

[15] *Bentworth Finance Ltd v Lubert* [1967] 2 All ER 810 (CA). Such a contention was argued but the point of principle was not decided in *K C Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51 (CA).

Appearances:

Counsel for Appellant:	A Horwitz SC J L Kaplan Instructed by M H Cirota Attorney, Johannesburg Lovius-Block, Bloemfontein
Counsel for Respondent:	M W Verster Instructed by BMV Attorneys, Johannesburg Peyper Attorneys Inc, Bloemfontein