THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 324/06

Reportable

In the matter between :

JUST NAMES PROPERTIES 11 CC	First Appellant
ALEXANDER BALADAKIS	Second Appellant

and

NICOLAAS JACOBUS FOURIE	First Respondent
ANNIE SUSAN FOURIE	Second Respondent
CHARTRADE 247 CC	Third Respondent
SPIROS KOUTROUMANOS	Fourth Respondent
KLEANTHIS MAOURIS	Fifth Respondent
PLATINUM MILE INVESTMENTS 218 (PTY) LTD	Sixth Respondent
THE REGISTRAR OF DEEDS, PRETORIA	Seventh Respondent

BEFORE:	**BRAND, HEHER JJA and MHLANTLA AJA**
HEARD:	**14 SEPTEMBER 2007**
DELIVERED:	**28 SEPTEMBER 2007**
SUMMARY:	**Written agreement of an immovable property, whether the sale agreement complied with the requirements set out in section 2(1) of the Alienation of Land Act 68 of 1981, in circumstances where offer signed and delivered by offeree in incomplete form.**
NEUTRAL CITATION:	**This judgment may be referred to as *Just Names Properties v Fourie* [2007] SCA 126 (RSA)**

MHLANTLA AJA

MHLANTLA AJA:

[1] The appellants appeal, with the leave of the court a quo, against a judgment of the Johannesburg High Court (Jajbhay J), dismissing the appellants' claims with costs. The court a quo found that the written agreement of sale of immovable property sought to be enforced by the appellants was invalid as it did not comply with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981 ('the Act').

[2] Apart from the first, second and seventh respondents, the parties in this matter are involved in the business of trading. On the one hand, the appellants (together with the second appellant's family) operate three Pick 'n Pay Family Supermarkets in Kempton Park, and on the other, the third to sixth respondents run a supermarket called Glen Acres Spar in the vicinity of the appellants' businesses. They also own other businesses in the area. The fourth and fifth respondents are members of the third respondent and directors of the sixth respondent. The first and the second respondents ('the Fouries') are husband and wife. They jointly own the immovable property described as Holding 26, Kempton Park Agricultural Holdings ('the property').

[3] The second appellant ('Baladakis'), acting on behalf of the first appellant, wanted to establish a fourth supermarket in the same area and offered to purchase the property from the Fouries. His offer which was contained in a written document signed by him was presented to the Fouries on 17 January 2003 by an estate agent, Ms Julie Oosthuizen ('Oosthuizen'). Baladakis offered to buy the property for R1.8 m. What happened, according to the testimony of the Fouries, was that Oosthuizen read the document to them clause by clause. It *inter alia* contained a clause 4.2 which required them to pay occupational rent in the amount of

R10 000 per month, after transfer of the property into the purchaser's name. Oosthuizen also assured them that they would have the entire purchase price 'in their pockets' in three months' time.

[4] The Fouries rejected the clause that required them to pay occupational rent, contending that they could easily find cheaper accommodation elsewhere. In order to avoid the collapse of the negotiations, Oosthuizen left the room to telephone Baladakis for instructions to change the controversial clause. Meanwhile having made their point, the Fouries who were otherwise satisfied with the offer, signed and initialled each page.

[5] The proposed agreement was subject to a suspensive condition that within six completed calendar months from the first day of the month succeeding acceptance of the offer, the purchaser would be able to obtain approval in principle to the establishment of a township on the property with a specific business zoning.

[6] Oosthuizen informed the Fouries upon her return that Baladakis had agreed that the offer be amended by deleting the clause in question. She told them that such an amendment would be effected by replacing the page with a new page which would omit the clause. To facilitate the amendment she asked them to initial two blank sheets of papers, which, they did. Oosthuizen took the signed sheets and offer with her when she left them. On the following day she returned to the Fouries' house and gave them a sealed envelope containing the amended document on which the appellants have based their claims in the present case. Without showing any interest in its contents the Fouries put the envelope aside still unopened. It is common cause that page 3 of the agreement relied

upon by the appellants, which contains the amended clause 4.2, is in a different font and that it reflects the true agreement between the parties.

[7] After the expiry of about three months the Fouries were unhappy that the sale had stalled and that they had still not received the promised purchase price. They were unhappy with Oosthuizen's explanation for the delay and upon investigation discovered that she had lied to them about the lodging of a rezoning application to the municipality.

[8] On 13 May 2003 the Fouries sold the same property to the third respondent for R1.9 m. On 28 May 2003 an attorney, Nel, representing the Fouries, purported to cancel the agreement by sending a registered notice to Baladakis. On 29 May 2003 the property was transferred into the name of the third respondent and a mortgage bond was registered over the property in favour of the sixth respondent, securing an indebtedness of the third respondent. It is these events which prompted the institution of the action by the appellants against the respondents. Broadly stated they sought an order setting aside the transfer and the mortgage bond registered over the property and for transfer of the property in their names. For present purposes the respondents raised two defences in the alternative: that the agreement was invalid for non-compliance with s 2(1) of the Act; alternatively, that the Fouries had cancelled the agreement because of Oosthuizen's fraud relating to the suspensive condition.

[9] By agreement between the parties the court below ordered a separation of the issues. The issues to be determined at the initial stage were whether the agreement between the appellants and the Fouries complied with s 2(1) of the Act and if so, whether the Fouries were entitled to repudiate it on the basis that it was induced by fraud.

[10] The first defence raised two issues: firstly, the issue of fact, whether page 3 had indeed been signed in blank and, secondly, the issue of law, whether that would render the agreement invalid in terms of s 2(1). Jajbhay J decided both these issues in favour of the respondent. Thus the first defence was upheld. In consequence, it was not necessary to address the second defence.

[11] I shall first deal with the factual issue, that is, whether the Fouries signed the document or part of it in blank. In my view the Fouries' version that they were not satisfied with the offer presented and that Oosthuizen telephoned Baladakis and told him about their concerns has to be accepted. Baladakis authorised Oosthuizen to change the clause in accordance with the Fouries' request. Baladakis also confirmed this when he testified. It was never put to the Fouries that they had signed page 3 after Oosthuizen had typed it.

[12] Even if the Fouries were as untrustworthy with regard to their evidence in general as counsel for the appellants contended, their version on the issue under consideration is a simple one and there is nothing to gainsay it because Oosthuizen was not called to testify by the appellants. This is despite the fact that she was available and had consulted with the appellants' legal representatives. It is common cause that the Fouries are unsophisticated people who tend to sign whatever is presented to them without first reading it. Why would they lie about the issue of signing a blank piece of paper? Furthermore, how would they know about the legality and consequences of signing in blank? These questions remained unanswered, save for the speculation by counsel for the appellant on the possible conduct of the Fouries.

[13] In my view there is nothing improbable in their version and it is accordingly not necessary to deal with credibility findings. In the result all that the court knows is that the Fouries signed two blank pieces of paper which were completed subsequently. It is obvious that page 3 was prepared separately, as the typeface and font differs from that of the other pages.

[14] I turn now to consider the issue of law. Section 2(1) of the Act provides:

'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 both parties thereto or by their agents acting on their written authority.'

[15] The appellants' argument that, even if the Fouries signed page 3 in blank, the agreement still complied with these statutory provisions, was primarily founded on the construction that the amendment of page 3 rendered the document a counter-offer made by the Fouries as offerors which was accepted by Baladakis as offeree. On this construction, counsel for the appellants submitted, it did not matter that the document had been incomplete at the time of signature by the offeror as long as it was completed in accordance with the offeror's intention at the time of acceptance by the offeree.

[16] It is clear that this whole argument is rooted in the decision of *Jurgens and others v Volkskas Bank Ltd.*[1] *Jurgens* must in turn be read in

[1] 1993 (1) SA 214 (A).

the light of *Fourlamel (Pty) Ltd v Maddison*[2] Both these cases concerned deeds of suretyship. In construing a provision similarly worded to s 2(1) of the Act, but pertaining to deeds of suretyships, Miller JA said in *Fourlamel*:[3]

'The plain, grammatical meaning of the words used in sec 6 appears to be clear. The section presupposes that an agreement of suretyship had been reached – "contract of suretyship entered into" – and it provides thereafter that such an agreement shall not be valid "unless the terms thereof are embodied in a written document signed on behalf of the surety".

What is it that requires to be signed by the surety? It is surely the written document containing the terms of the agreement . . . .

In the case of an agreement which is not by law required to be in writing, it may be that a document signed by a party before the terms of the agreement had been embodied therein would be binding upon him in the absence of fraud or error in connection with the recording of the terms and subsequent to his signature. . . . But, where the terms of a contract are required by statute to be embodied in a document and signed by a particular party as a manifestation of his assent to such terms, there are considerable difficulties, both notionally and practically, in the way of acceptance that insertion by another of the terms of the agreement after the party has appended his signature to a blank piece of paper, constitutes compliance with such statute.'

[17] In *Jurgens*, the sureties, relying on *Fourlamel*, raised the defence that when they signed the deeds, the documents contained blank spaces which were only filled in by their secretaries after signature. It was common cause that all these suretyships were returned to the bank (the creditor) after they had been completed on behalf of the sureties. In the light of these facts, this court held that *Fourlamel* was distinguishable. The distinction appears from the following statement by Hoexter JA:[4]

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[2] 1977 (1) SA 333 (A).
[3] At 341H - 342B.
[4] At 218J - 219B.

'Suretyship is a bilateral jural act. . . . It is a contract which arises from agreement between creditor and surety and it involves the acceptance of an offer. An offer is a manifestation of the offeror's willingness to contract, made with the intention that it shall become binding as soon as it is accepted by the offeree. It is trite that an offer cannot be accepted unless and until it has been brought to the attention of the offeree. It need hardly be said that there is a fundamental difference between, on the one hand, the situation in which after a surety has signed and delivered a blank form to the creditor, the latter unilaterally completes the blank form by filling in some of the contractual terms, [ie the *Fourlamel* situation] and, on the other hand, the situation in which the surety has signed a blank form which is then filled in, by or for and on behalf of the surety, before the document so completed is delivered to the creditor.'

[18] As I have said, it is therefore crucial to the appellants' whole argument, based on *Jurgens*, that it was the Fouries and not Baladakis who made the (counter) offer. In the event, the simple answer to the argument is, in my view, that Baladakis remained the offeror throughout. The construction of a counter-offer finds no support in the evidence. A counter-offer arises when an offeree rejects the original offer as a whole or in part. A mere request during negotiations to modify a term does not amount to a counter-offer. The critical issue in this matter is the telephone call which was made by Oosthuizen. It is common cause that Baladakis received a call from Oosthuizen while she was at the Fouries' home and that after the telephonic discussion, Baladakis instructed her to change the relevant clause.

[19] The counter-offer argument was also contradicted by Baladakis when he testified. He stated that, when he received the document, he intended to regularise the contract so that it appeared on the face of it to be a single composite document signed by him as offeror. The replacement page was also initialled by the same witness to his signature

who had initialled the other pages. He conceded that he had initialled the replacement page so that it would appear the same as all the other pages.

[20] It seems to me that a counter-offer would have arisen if the Fouries had rejected the offer and changed the clause in writing without contacting Baladakis. A classic example of a counter-offer can be found in the case of *Pretoria East Builders CC and Another v Basson*[5].

[21] On a proper construction of the Act, the offer had to be complete when the Fouries accepted and signed it or at least had to be signed by them in its completed form before they released it for delivery to the other party (cf *Standard Bank of SA v Jaap de Villiers Beleggings*[6]. The fact that they signed two blank pieces of paper is fatal to the whole agreement. As Van Winsen J explained in *Van Rooyen v Hume Melville Motors (Edms) Bpk*[7]:

'What defendant signed was not an agreement but a piece of paper. It is true that the placing on such piece of paper of a number of terms not embodied therein in writing at the time that the defendant signed the paper might in form turn the piece of paper into an agreement but it was certainly not an agreement when the defendant signed it and accordingly it cannot be regarded as an agreement having force and effect.'

[22] The invalidity of the agreement cannot be cured by the fact that the amended clause reflected the intention of the parties. The Fouries' signature did not perform the function which the provisions of the Act required them to perform, namely, to signify that the written offer to which the signatures pertained, met with their agreement.

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[5] 2004 (6) SA 15 (SCA).
[6] 1978 (3) SA 955 (W) at 958A-E.
[7] 1964 (2) SA 68 (C) at 71C-E.

[23] It follows therefore that the court a quo was correct when it held that the first sale agreement did not comply with the requirements of s 2(1) of the Act and was accordingly void and of no force and effect.

[24] In view of my conclusion it is not necessary to consider the second defence. The appeal accordingly fails.

[25] In the result the appeal is dismissed with costs.

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N Z MHLANTLA
ACTING JUDGE OF APPEAL

CONCUR:

BRAND JA)

HEHER JA)