

IRREVOCABLE OFFER CLAUSE

Can a purchaser or seller be bound to a contract of sale of immovable property accepted out of time?

It is an established legal principle that a purchaser cannot be held to an agreement accepted by the seller *out of time* unless the purchaser elects to proceed with the sale. See *Manna v Lotter and Another* (9708/040 [2007]). There the court held that because this is a condition that is imposed by a purchaser, it is his/hers, to waive.

This question was again dealt with in the Supreme Court of Appeal in *Hannes Geldenhuys NO v Daniels* (20848/14) [2016] wherein the facts were as follows:

On 11 January 2008, the Hannes Geldenhuys Trust made a written offer to purchase certain property from Mrs. Daniels. Clause 15 of the offer read:

15. Offer Lapses:

This offer is irrevocable until 24h00 on 18 January 2008 and is binding upon acceptance at any time prior hereto, irrespective of notification of acceptance to the purchaser.

Mrs. Daniels then accepted the offer on **29 January 2008** (11 days later) by signing it and notifying the Trust of her acceptance. The Trust then took occupation of the property; paid occupational interest; commenced major structural renovations; signed the transfer documents and paid the *pro forma* bill of the transfer costs.

When the transferring attorneys sought to obtain rates clearance certificate, they learnt that there were problems with the building plans of the property (a braai area constructed thereon, was 300mm over the building line).

After instructing architects to deal with the relaxation of the building line from the municipality, Mrs. Daniels was informed that the relaxation sought, would take about 2 months. At this point the Trust had lost enthusiasm to proceed with the transfer of the property. The Trust then repudiated the agreement (i.e., simply decided to walk away) which repudiation was accepted by Mrs. Daniels. She then proceeded to institute action for damages representing the difference between price at which the property was sold to a third party and that which the Trust had agreed to pay.

The matter was initially heard in the Local Division of the High Court in Durban where judgment was granted in favour of Mrs. Daniels in the amount of R328 835.00.

The Trustees of the Trust sought to overturn the decision of the High Court and brought the matter on appeal to the Supreme Court of Appeal. The Trust argued that no binding agreement was concluded because the offer had already lapsed when Mrs. Daniels accepted it 29 January 2008 past the “expiry date” of 18 January 2008. The Trust argued further that the acceptance of the offer by Mrs. Daniels on 29 January 2008 was in fact a *counteroffer to the Trust*, a counteroffer which, the Trust contends, was not accepted.

The Supreme Court dismissed the appeal by the Trust and found that the *irrevocable offer* by the Trust, became a *revocable offer* after 18 January 2008. The Court noted that clause 15, albeit titled ‘**Offer lapses**’ did not actually stipulate what would occur if the offer was not accepted by midnight on 18 January 2008, as many such clauses provide that the offer will lapse in the event of non-acceptance.

The Court relied on the decision in *Sentinel Mining Industry Retirement Fund & Another v Waz Props (Pty) Ltd & Another* [2012 ZASCA 124;2013 (3) SA at paragraph 10 where the principle that ‘*where the heading of a clause and its body are inconsistent with each other, the body of the contract must prevail because the parties’ intention is more likely to appear from the provisions they have spelt out than from an abbreviation they have chosen to identify the effect of those provision*’.

On reading the written offer, the Court found that the agreement conveyed no meaning other than that the offer made by the Trust was irrevocable until midnight on 18 January 2008. The Trust, as purchaser, was held to the agreement because it did not revoke the offer. In fact, after the late acceptance by the seller, the *Trust took occupation, paid occupational interest, made structural renovations to the property, signed transfer documents, and paid the pro forma invoice*.

Interestingly, in the case of *Manna v Lotter and Another* heard in the Western Cape High Court, the seller (Lotter) was held to the agreement she accepted “*out of time*” because the purchaser elected to accept the late acceptance by the Seller.

These cases serve as a succinct reminder of the importance of including the words “**failing which this offer will lapse**” or “**whereafter it shall lapse and be of no further force and effect**” in the clause dealing with Offer and Acceptance.