IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5363/2006

In the case between:-

SAMUEL GATRI	First Applicant
MATSELANE ELISA GATRI	Second Applicant

and

BADUMELLENG BRADY MELK	First Respondent
MOTLAGOMANG MAGGIE MELK	Second Respondent

JUDGMENT BY: C.J. MUSI J

HEARD ON: 29 MARCH 2007

DELIVERED ON: 26 APRIL 2007

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[1] The applicants seek the following order:

> "1. That the Respondents be ordered and directed, to sign any and all necessary transfer documents, in order to effect transfer of Erf 3410, Ashbury Extension 6, district Bloemfontein, Free State Province."
>
> 2. In the event, of the Respondents failing to sign the aforesaid documents, that within 10 days after the

granting of this order, that the Registrar of this Honourable Court, be directed and authorized to sign any and all documents necessary, to effect transfer of the said erf.

3. That the Respondents be ordered to pay the costs of this application."

[2] Before dealing with the merits I pause to record that the respondents applied for condonation for the late filing of their opposing affidavits. They filed it two days late. They also tendered the cost of the application. The application for condonation was not opposed. Condonation was granted with costs.

[3] It is common cause that the respondents are the owners of the property mentioned in paragraph one above.

[4] The applicants aver that they entered into a written agreement to buy the said property from the respondents. The applicants attached the purported agreement to their application. The respondents denied that they were party to the agreement. They specifically deny that they signed the agreement.

[5] Ms Eloff, on behalf of the respondents, also challenged the validity and enforceability of the said agreement on various grounds. Mr. Grobler, on behalf of the applicants, argued that the contract is valid and enforceable.

[6] Although the respondents deny signing the document I will for the purposes of this judgment accept, without deciding, that they indeed signed the document. Having disposed of that issue the main issue that falls to be decided is whether the agreement is of any force or effect.

[7] Section 2(1) of the Alienation of Land Act, 68 of 1981, reads as follows:

> "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."

The purpose of the legislature – as is clear from the authorities – is to achieve certainty in transactions of considerable value and importance in regard to terms and

conditions agreed upon which are often intricate and complex. This reduces the risk of perjury, fraud and unnecessary litigation. **WILKEN v KOHLER** 1913 AD 135; **CLEMENTS v SIMPSON** 1971 (3) SA 1 (A) at p.7; **RAVEN ESTATES V MILLER** 1984 (1) SA 251 (W) at p. 255 D – E.

[8] In **JOHNSTON v LEAL** 1980 (3) SA 927 (AD) the Court dealt with one of the predecessors of Act 68 of 1981 *viz* section 1(1) of Act 71 of 1969 which is in essence the same as the current section. In **JOHNSTON v LEAL**, *supra* at 939 Corbett JA, as he then was, said:

> "One of the consequences of the application of s 1 (1) is that where the parties have entered into a written contract for the sale of land, but it appears ex facie the writing that a material term has been left inchoate, as, for example, where the writing expressly states that the term is to be agreed upon later by the parties, the contract by itself is of no force or effect and cannot sustain a cause of action."

[9] Ms Eloff argued that the agreement *in casu* is inchoate because the identity of the parties is not clear or they are not identifiable, the *merx* is not properly described and the mode

of payment is undetermined. Mr. Grobler condeded that the description of the *merx* and the identity of the parties were not properly dealt with in the document. He, however, submitted that the parties are identifiable and that there can be no uncertainty in relation to the *merx* because Erf 3410 sufficiently describes the property. He argued that extrinsic evidence is in any event admissible to show that the parties are identifiable. Likewise, so he argued, extrinsic evidence is admissible to show that the parties agreed on a particular mode of payment, being a mortgage bond.

[10] In **JOHNSTON v LEAL**, *supra* at 938 B – C it was said that:

> "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 ..."

Recourse to oral consensus and extrinsic evidence can be taken in certain limited circumstances. In **JOHNSTON v**

LEAL, *supra* the Court considered one of the limited circumstances in which recourse to evidence could be taken. The general rule is that a party to a contract which has been integrated into a single and complete written memorial may not contradict, add, amend or modify the contract by reference to extrinsic evidence and in that way redefine the terms of the contract. See **JOHNSTON v LEAL**, *supra* at 943 B – C. In **JOHNSTON v LEAL**, *supra* it was decided that evidence could be adduced to explain an overt lack of completeness in the document and to determine what has been integrated with a view to deciding upon the validity of the document as it stands. See p. 943 F. The extrinsic evidence as to why particular clauses on a printed contract were left open was allowed. It was not allowed to amend, redefine or modify the contract but to ascertain why certain clauses were left blank. Mr. Grobler's contention that extrinsic evidence is admissible to prove material terms of the contract is patently wrong.

[11] In my view this whole matter can and should be decided on one point only. I hasten to deal with that point. Clause 2 of the contract reads as follows:

"2. PURCHASE PRICE

The purchase price is the sum of R350 000-00 (exclusive* inclusive* of the Value Added Tax) Payable by the Purchaser to the Seller as follows:

THE PURCHASER WILL INFORM THE SELLER ON THE EIGHTH DAY FROM THE DATE OF THE SIGNATURE ABOUT FURTHER TRANSACTION ..."

Clause 12 which deals with mortgage bond reads as follows:

"12. MORTGAGE BOND

12.1 This Agreement is subject to the suspensive condition that a loan of R ..... secured by a Mortgage to be registered over the property is obtained by the Purchaser or the Seller on his behalf on the normal terms and conditions of any Registered Commercial Bank within a period of fourteen (14) days from the 1st date of signature hereof or such extended period as the parties may agree in writing."

[12] The mode of payment of the purchase price is not stipulated in the agreement. Christie RH : **The Law of Contract in South Africa** 5th Ed at 122 stats that:

> "The method of payment of the price is also an essential or at least a material term, so a written contract that leaves the method of payment vague or leaves it over for further negotiation is void and therefore cannot be rectified, ..."

This view is in sync with a long line of cases. In **DU PLESSIS v VAN DEVENTER** 1960 (2) SA 544 (A) at 551 A it was said:

> "Volgens art. 1 (1) van Wet 68 van 1957 is skrif by 'n verkoopkontrak ten opsigte van grond 'n geldigheidsvereiste, en volgens *Kuper v Bolleurs*, 1913 T.P.D. 334, en *van der Berg v Leggelo*, 1935 T.P.D. 304, val 'n voorsiening betreffende die wyse van betaling van die koopprys onder die bedinge wat op skrif gestel moet word."

See also **PATEL v ADAM** 1977 (2) SA 653 (AD) at 666 A. In **ENGELBRECHT v NEL** 1991 (2) SA 549 (W) at 552 A it was held that:

> "The method of payment is a material term of the agreement which cannot be postponed for later negotiation. Hence the agreement would be void for uncertainty."

[13] If one has regard to clause 2 of the agreement in this matter it is difficult if not impossible to discern what the parties contemplated. It is not clear what the further transaction is that the purchaser will inform the seller about. It is not clear whether the purchase price will be paid in cash or by other means. It is not clear when the purchase price will be paid. The matter is further compounded by the fact that clause 12 which deals with mortgage bond is blank. Evidence to show that the agreed mode of payment was cash is inadmissible. See Christie RH, *supra* at 122 and the cases cited therein. In any event

> "When, on the facts, the parties cannot be said to have contemplated payment in cash, their failure properly to reduce to writing the mode of payment which they did in fact contemplate will render the contract invalid"

per Page J in **DOLD v BESTER** 1984 (1) SA 365 (D & CLD) at 369 D – E.

[14] The method of payment was clearly left to be negotiated at a future date. It is clear that the essential particulars in respect

of method of payment was not yet agreed upon and was left open for future agreement between the parties. This is, in my view, for the reasons stated above, not a valid and enforceable contract. That said I do not deem it necessary to deal with Ms Eloff's other interesting and relevant arguments in relation to the invalidity of the agreement. The application ought to be dismissed.

[15] There is no reason why the costs should not follow the event. The respondents were successful and are entitled to their costs.

[16] **Consequently I make the following order:**

The application is dismissed with costs.

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C.J. MUSI, J

On behalf of the applicants: Adv. S. Grobler
Instructed by:
Azar & Havenga Attorneys
BLOEMFONTEIN

On behalf of the respondents:	Adv. Z. Eloff Instructed by: Matshidiso Attorneys PRETORIA c/o Saffy & Associates BLOEMFONTEIN

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