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“The conditional acceptance of an offer amounts to rejection of same and not the conclusion of a contract, but may be a counter-offer.” (Extract from judgment below)

A good offer comes in for your property, so you accept it. But you're not happy with a few of the terms, so before you sign you make a few changes to the offer. Maybe they are big changes, maybe they seem inconsequential.

Either way, you are now effectively negotiating, not accepting the offer. You have in fact just rejected it. Unless the buyer now accepts your amendments in writing (by initialing or counter-signing against your alterations), you almost certainly have no valid sale.

Thinking that you have a valid sale when you don't is a common and easily-made mistake, and a recent High Court decision shows just how important it is for both seller and buyer to be aware of this danger.

The property auction, the counter-offer, and the commission claim

- A property on auction attracted a top bid of R1.85m and after some haggling the buyer put in a second offer of R1.9m.
- The seller accepted this second offer, but critically with amendments. The parties could not agree on these outstanding issues, with the result that the seller sold the property to another buyer without the auctioneers' involvement.
- At which stage the auctioneers sued the seller for commission, arguing that a sale had been concluded at R1.9m because the amendments to that offer were “not material” ones (in other words, they weren't important, significant or essential terms). The terms in question related to who was to receive the agreed occupational interest and to the issue of a gas compliance certificate. Neither amendment, argued the auctioneers, was material to the sale.
- The Court however disagreed, commenting that “In principle, anything more or less than an unqualified acceptance of the entire offer amounts to a counter-offer and constitutes a rejection of the original offer.” It accordingly dismissed the auctioneer's claim for commission on the basis that the seller's amendments were material and amounted to a counter-offer which the buyer had never accepted. In other words, no sale agreement had ever come into existence.



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So, do you have a binding sale agreement?

If the amendments to the offer have been accepted and signed by both buyer and seller, no problem – the counter-offer has been accepted and you have a binding sale agreement.

Otherwise, as our courts have put it: “When parties conclude an agreement while there are outstanding issues requiring further negotiation, two possibilities would follow: no contract formed because the acceptance was conditional upon consensus, or a contract formed with an understanding that the outstanding issues would be negotiated at a later stage.” Deciding which is which means trying to deduce the parties’ intentions from their conduct and other circumstances – a grey and specialist area requiring specific legal advice.

Bottom line

Making a counter-offer can be an excellent tactic for negotiating towards agreement, but be very careful with the concept of “conditional acceptance”. It is actually not an acceptance at all but a rejection of the offer and could well be a counter-offer requiring acceptance by the other party in order for there to be a valid sale. Avoid all doubt by making sure everything is signed and counter-signed.

As always, ask us before you sign anything!