

Dear Colleagues

**SHAIK & Others v PILLAY & Others**  
**[2007] JOL 20893 (N)**  
**Natal Provincial Division**  
**Judgment date: 4/9/2007**

*The judgment is summarised here because it serves as an alert to pitfalls practitioners may encounter when dealing with contracts for the sale of member's interest relating to immovable property.*

**The aggrieved purchaser's version of the facts:**

Whilst vacationing in Durban, P approached a well-known estate agent (X) and advised that he was interested in purchasing a beachfront property. X undertook to be on the look-out for suitable properties. Later on X contacted P and advised that developer Y would be erecting beachfront sectional title units. The units were going to be owned in close corporations and purchasers would buy the membership interest in a corporation. P viewed the plans and was eager to acquire a unit. He signed the standard 'agreement' (an offer to purchase, essentially since it was only signed by the purchaser) that X had provided and then faxed this back to X. P thereupon duly paid a deposit to Y's Attorneys. (Although it was not specifically stated in the judgment, it would appear that the 'agreement' was sent to the conveyancers by X.)

Shortly thereafter, P was contacted by Y's conveyancers to attend to some details of the transaction – he was asked to obtain witness signatures to the 'agreement' and to furnish his identity document & marriage certificate. Some 6 months later, P received a letter from the conveyancers placing him in *mora* and requesting a formal bank guarantee for the balance purchase price within 14 days. P complied and furnished the guarantee timeously. (It is not certain from the judgment when building commenced and/or units were completed, but this is not relevant to the discussion.)

A further two months later, P received a letter from the Conveyancer advising that Y did not accept his offer.

Q, a purchaser of member's interest relating to another unit in the same development, had a similar experience and therefore the matters of P and Q were joined when the trial commenced.

**The developers'(Y's) version of the facts**

Y (and his business partners in the venture) testified that they were developers. Their mandate to the agent X had been to market the properties, locate buyers and once the standard 'agreements' were signed, to present these to them (Y) for consideration. At one of Y and X's subsequent meetings, Y realised that 2 of its units had not yet been sold. At this time, Y had received some papers from X relating to the 'agreement' that P had signed, but they had no documents or other information concerning the 'agreement' that Q had signed. Y also claimed that they had *no* knowledge of the correspondence between his conveyancers and P & Q. At this same meeting, X then advised Y that they indeed have purchasers (P & Q) for the 2 units and requested Y to sign the 'agreements' that P & Q had signed. Y refused, partly because the 'agreement' with P "was in a mess" and partly (it would appear) because Y was unhappy with the purchase price offered. (It appears that initially the units had all been sold for a relatively low price since the developers, Y, needed to raise R 14 million upon which ABSA undertook to finance the project. At the time that Y was presented with the 'agreements' signed by P & Q, more than was needed had already been raised and Y's threshold was met and it was open to increase the purchase price on sales of remaining units.)

The conveyancers confirmed Y's version that their mandate included the opening of a sectional title register and the transfer of members' interest to the close corporation to the purchasers. It

did *not* include contracting on behalf of Y, but they confirmed that their duty involved dealing with purchasers and advising purchasers with regard to the status of the transaction. (The judgment does not mention who had sent the 'agreements' to the conveyancers, but it appears that it was the agent X that sent them off together with the instruction to attend to the transfer. Furthermore, the judgment is silent on the question whether the conveyancers noticed that the 'agreements' had not been signed by the seller; or assuming that they had noticed, why they did not take steps to address this issue. But it is clear that the two 'agreements' were not signed by Y.)

### **Question before the court and the court's answers**

The court had to determine whether the documents signed by P and Q respectively were binding agreements. In other words, did the documents signed by P & Q respectively (but not by Y, the seller) constitute a valid and binding agreement between the seller and the purchaser? The court addressed the question as follows:

- In terms of the Close Corporation Act, 69 of 1984, **the sale of a member's interest need not be in writing, even if it does relate to immovable property**. The only formalities relating to a disposition of a member's interest are those set out in section 37 of the Act, namely:

“Every disposition by a member of a corporation of his interest, or a portion thereof, in the corporation, other than a disposition provided for in section 34, section 35 or section 36, whether to the corporation, any other member or any other person qualifying for membership in terms of section 29, shall be done-

- a) in accordance with the association agreement (if any); or
- b) with the consent of every other member of the corporation.”

(The other sections referred to in the preamble above addresses further instances where membership interests are disposed of and need not be quoted here in full. However, for the sake of setting the context, note that section 34 deals with the disposal of a member's interest of an insolvent member; section 35 with the disposal of the member's interest of a deceased member and section 36 with cessation of membership by virtue of a Court Order.)

- Generally, **contracting parties may however bind themselves to the observance of certain formalities** in the framing of a contract. Contracting parties may, for example, determine that there will be no binding contract between them before their oral agreement is reduced to writing.
- In the present matter however, the evidence indicated that there was never any direct discussion between the seller and the purchasers. It is therefore not a case where parties came to an oral agreement and determined that the agreement was to be reduced to writing and signed, to be valid.
- The question arises that if there was no oral agreement, was an agreement concluded when the purchasers signed the “standard” agreement to purchase? The court held that it depends on the **intention of the parties**: Was it the intention that there would be an agreement when the purchasers signed or was it intended that both parties sign the agreement before a binding agreement was constituted? (In other words, did the purchaser's signature on the document constitute an offer to buy on the terms set out in the document.)
- On investigation of the evidence the court held that both P & Q understood that the respective 'agreements' had to be signed by both parties in order to be valid. The court came to this conclusion by examining the provisions of the standard-type contract that P

and Q had signed. Below are listed some of the details found in certain clauses of the 'agreement' that swayed the court to come to this conclusion:

- ❖ The payment of 'a deposit ... shall be paid to the Attorneys within 7 days of *signature hereof by the parties* to this agreement' (writer's italics) – signature by both parties is clearly understood from the phrase.
- ❖ Another clause provides that 'no waiver by either party of any such party's right under this agreement shall be binding on such party unless such waiver is reduced to writing and signed by the party effecting such waiver'. This clause fortifies the view that no agreement came into force until it was signed by both parties.
- ❖ Also, the clause 'any dispute arising from this contract ... may be referred to the magistrate's court ....and by their signatures hereto the *parties give their consent in writing* to submit to the jurisdiction of the magistrate's court' (the court's italics). These italicised words make it clear that signature was a prerequisite of the binding effect of the agreement.
- ❖ A further clause provides that 'this agreement constitutes the sole and exclusive memorial of the agreement between the seller and the purchaser and no alteration, variation, deletion or consensual cancellation hereof shall be binding on either the seller or the purchaser unless reduced to writing and signed by both parties.'
- ❖ There is provision at the end of the document for signature by both parties and witnesses and the date, with appropriate lines for the position of such signatures.

Based on the facts the court accordingly held that, since it was clear the intention was that both parties were to sign as a prerequisite for validity of the agreement, and since Y had not signed, no valid agreement came into existence .

#### **Comments on the case :**

One tends to sympathise with P and Q. Where an individual instructs an agent (in this instance a reputable estate agency) with the view to purchasing a property, receives an agreement from this agent, signs same, pays a deposit timeously, furnishes guarantees to the seller's Conveyancers on the due dates as well as relevant documentation on request, he/she should reasonably be able to assume that everything was in order and that the transaction would result in transfer of the member's interest. It always appears 'unfair' where reasonable expectations are thumped. But legal certainty requires that the letter of the law be followed.

Some might argue that fairness will be achieved should P & Q succeed in a claim against the agents and/or Conveyancing firm for professional negligence.

There are lessons in this case for attorneys, conveyancers, estate agents and purchasers: Amongst others:

- Estate agents should not instruct attorneys to transfer property (or cede shares in property owning entities) until they are certain that agreement has indeed been reached between seller and purchaser. (In case of a sale of immovable property the agreement *must* be in writing; in case of cession of shares/member' interest, if the agreement is not in writing, or if only one party had signed a relevant document, written confirmation should ideally be obtained from the other party confirming the agreement and the terms thereof).
- Conveyancers/attorneys should always check signature clauses in agreements, and should follow up if any uncertainty exists. No conveyancing/cession process should be initiated until it is clear that an agreement exists, and the terms of this agreement should be known.
- Potential purchasers should, after making an offer, never assume acceptance even if an agent confirms that the seller accepted. There should always be insistence on obtaining

- a copy of the signed agreement, or if a verbal agreement, on written confirmation of acceptance (or at least on verbal confirmation in the presence of reliable witnesses) of acceptance by the seller.
- Conveyancers sometimes tend to treat cession of share/members' interest agreements as if they are mere variations of 'ordinary' property transfers. This is not a good practice. Instead,
    - one should always remember that section 2 of the Alienation of Land Act (obliging a written agreement) does not apply to sales of shares/members' interest, and that there are subtle, but vital, differences between the legal structuring of the two types of transactions.
    - Although the legal objective is similar in both types of transactions (namely to vest ownership of the property in the purchaser/purchaser's entity) the legal process to be followed in the case of a cession of shares/members' interest, differ markedly from the process of a formal transfer of immovable property.

The comments above are made in the luxurious context of hindsight wisdom. In practice, it is often very difficult to adhere strictly to the formalities and requirements attendant upon a particular transaction. In order to minimize the risk of being found negligent, it is best to cultivate a working method where sound business habits and practices repeat themselves automatically.

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