THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 664/07

In the matter between:

WITHOK SMALL FARMS (PTY) LTD **1ST APPELLANT**
BOULEIGH 113 (PTY) LTD **2ND APPELLANT**
AUCOR SANDTON (PTY) LTD **3RD APPELLANT**

and

AMBER SUNRISE PROPERTIES 5 (PTY) LTD **RESPONDENT**

Neutral citation: *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties Ltd* (664/07) [2008] ZASCA 131 (21 November 2008)

Coram **SCOTT, LEWIS JJA *et* GRIESEL AJA**
Date of hearing : **7 NOVEMBER 2008**
Date of delivery : **21 NOVEMBER 2008**

Summary: Sale by public auction – 'Agreement and Conditions of Sale' signed by purchaser – seller given 7 days to 'confirm' sale – not a sale subject to a condition but an offer to purchase open for 7 days – 'Agreement and Conditions of Sale' making provision for seller to sign on date to be specified – contract coming into existence when seller signs – no need for acceptance to be communicated to purchaser.

ORDER

On appeal from: the High Court, Pretoria (RABIE J sitting as court of first instance):

The following order is made:

[A] The appeal is upheld. The respondent is to pay the costs of appeal of the first and second appellants and those of the third appellant.

[B] The order of the court a quo is set aside and the following substituted in its place:

'(a) The application is dismissed with costs.

(b) The counter application is upheld and the following order is made:

1 The agreement and conditions of sale, signed by the applicant on 13 June 2006 and the first and second respondents on 20 June 2006, in terms of which the applicant purchased Holdings 380, 381 and 387 Withok Estates Agricultural Holdings from the first and second respondents respectively, is declared to be of full force and effect;

2 The applicant is ordered to furnish the first and second respondents with a bank guarantee or such other irrevocable guarantee acceptable to the first and second respondents for the balance of the purchase price within 30 (thirty) days of the granting of this order or alternatively to pay such balance to the first and second respondents' conveyancers as identified in the agreement within 30 (thirty) days of the granting of this order, such amount to be held in trust by the said conveyancers pending transfer of the properties as provided for in paragraph 3 below;

3 The first and second respondents are ordered, through their conveyancers as appointed in the agreement, to effect transfer of the properties to the applicant upon receipt of payment from the applicant of all costs and amounts referred to in clauses 9, 10 and 12 of the agreement and the rendering of a guarantee or alternatively payment as referred to in paragraph 2 hereinabove;

4 The applicant is ordered to pay interest *a tempore morae* to the first and second respondents on the amount of R3 550 010,00 at a rate of 15,5% calculated from 20 June 2006 to the date of payment and to pay any collection charges on the amounts stipulated herein and in paragraphs 2 and 3 above duly levied by the first and second respondents' conveyancers in accordance with the applicable guidelines and rules;

5 The applicant is ordered to pay the costs of this counter application on a scale as between attorney and client.'

JUDGMENT

SCOTT JA (Lewis JA and Griesel AJA concurring):

[1] The first and second appellants are the registered owners of certain immovable property situated in Gauteng ('the Withoek properties'). The third appellant is Aucor Sandton (Pty) Ltd, which carries on business as auctioneers in Johannesburg. On 13 June 2006 the Withoek properties were put up for sale at a public auction held by Aucor. The auction was attended by Dr Mohamed Adam who represented the respondent. His bid for the properties, being the highest, was accepted by Aucor. At the conclusion of the auction, Adam signed the 'Agreement and Conditions of Sale' to which the

auction was subject, as did Mr Paul Winterstein on behalf of Aucor. I shall refer to this document as 'the conditions of sale', as the parties have done, although strictly speaking the provisions for the most part constitute terms and not conditions.

[2] Clause 1 reads as follows:

'The Properties shall be provisionally sold to the highest bidder subject to confirmation of the sale by the Seller within seven (7) days and the highest bidder shall be bound by his bid for seven (7) days from date of signature of these conditions by the Purchaser.'

On the morning of 20 June 2006 (being a date within seven days of the date of the respondent's signature) Mr Marthinus van Rensburg, acting for and on behalf of the first and second appellants (to whom I shall refer as 'the sellers') completed the latter's details and confirmed the sale in writing by adding his signature, as depicted on the final page of the conditions of sale. It is common cause that the confirmation of the sale was not communicated to the respondent within the time contemplated in clause 1. It appears that the respondent did not receive notice of the confirmation until some time early in July 2006.

[3] The respondent subsequently applied in the High Court, Pretoria, for an order declaring the agreement to be of no force and effect and for the repayment of the deposit of R454 290 which it had paid to Aucor, together with interest and costs. The sellers and Aucor – the latter had been cited as the third respondent – opposed the application and contended that notwithstanding the failure to communicate the confirmation of the sale to the respondent within the seven-day period, the agreement nonetheless became of full force and effect on 20 June 2006 when it was confirmed by Van Rensburg. In addition, the sellers – but not Aucor – brought a counter application for an order declaring the agreement to be of full force and effect and for an order directing the respondent to pay the balance of the purchase price and to take various steps to enable transfer to be given. The matter came before Rabie J who upheld the respondent's application and dismissed the counter application, with costs. The appeal is with the leave of the court a

quo.

[4] It was common cause between the parties in this court, as it was in the court below, that the only issue in dispute was whether the 'confirmation' of the sale had to be communicated to the respondent within the seven-day period.

[5] I have previously quoted clause 1 of the conditions of sale. It is necessary to refer to certain other provisions. Clause 11 requires the purchaser to pay a deposit and provides further that:

'the Purchaser shall within thirty days after confirmation of these conditions by the Seller furnish the Seller with a bank guarantee . . . .'

and that:

'In the event of the sale not being confirmed by the Seller, the amount paid by the Purchaser will be refunded . . . .'

Clause 12 renders the purchaser liable for the auctioneer's commission and affords the auctioneer:

'the right, on confirmation, to deduct such commission (plus VAT) and costs from the deposit paid in terms hereof . . . .'

Clause 16 reads:

'In the event of the Seller declining to sign these conditions of sale, he/they shall not be called upon to furnish reasons therefor.'

Clause 20 reads:

'The highest bidder shall, immediately after the sale, sign these conditions and if the Purchaser purchases on behalf of a principal, he shall divulge the name of such principal upon signature hereof at the foot of this agreement. The Seller however, shall sign the conditions only upon confirmation of the sale.'

[6] It was contended on behalf of the sellers and Aucor, both in this court and the court below, that the conditions of sale, signed by the respondent and Aucor at the time of the auction, constituted an agreement of sale subject to a suspensive condition, being the confirmation of the sale by the sellers, and that the condition was fulfilled immediately upon the confirmation and without the need for it to be communicated to the respondent. The contention was rejected by Rabie J who held that no

agreement of sale was concluded at the time of the auction and that the only consequence of the agreement concluded at that stage was to bind the respondent to its bid for a period of seven days. The learned judge held that the reference in the conditions of sale to the 'confirmation' of the sale accordingly had to be construed as a reference to the acceptance of an offer. The judge proceeded to examine the provisions of the conditions of sale (which he construed as being an offer) to determine whether it expressly or impliedly indicated a mode of acceptance other than that required by common law, namely that it be communicated to the offeror. He found that there was insufficient to indicate that the common law rule was not to apply and, as the sellers' acceptance had not been communicated to the respondent within the seven-day period, the respondent had to succeed and the counter application be dismissed.

[7] The document is poorly drafted. It is couched in language suggestive of a sale subject to a suspensive condition. Thus, clause 1 speaks of the properties being 'provisionally' sold 'subject to confirmation by the seller'. There are numerous other references to the sellers being required to 'confirm' the sale. But as pointed out by this court in *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at 186F-J a distinction is drawn in our law between a pure and a mixed potestative condition. The former is invalid because its fulfilment depends entirely upon the unfettered will of the promissor. A typical example, and the one given in the *Benlou* case, is: 'I will pay you R500 if I wish to do so'. In the present case, the conditions of sale reserved to the sellers an unlimited choice whether to sell or not. It gave rise to no obligation on their part whatsoever and accordingly no agreement of sale came into existence at the time of the auction.

[8] I interpose that by reason of the provisions of s 3 of the Alienation of Land Act 68 of 1981 the sale of the properties in the present case was not required to be in writing and signed by the parties. The mere fact that the sellers were to sign at some later date would not on that account have precluded a contract of sale from coming into existence.

[9] In terms of clause 1 of the conditions of sale the respondent bound itself to keep its bid open for a period of seven days. To that limited extent a binding contract came into existence. The true nature of that contract was an option granted by the respondent to the sellers to sell the properties on the terms and conditions set out in the document. I accordingly agree with the court a quo that on a proper construction the reference in the conditions of sale to the confirmation of the sale had to be construed as a reference to the acceptance of an offer.

[10] I turn now to the question whether the offer was accepted within the seven-day period. It is a trite principle of the common law that, unless the contrary is established, a contract comes into being when the acceptance of the offer is brought to the notice of the offeror. It is also trite that an offeror may indicate, whether expressly or impliedly, the mode of acceptance by which a *vinculum juris* will be created. If there is doubt it will be presumed that the contract will be completed only when the acceptance of the offer is communicated to the offeror. See *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) at 597C-G. This was a case in which the court was similarly concerned with an offer that was open for a limited period. The contract, which took the form of an offer to purchase, contained a clause that read:

'7 That this offer is open and binding upon both parties until signature by both parties on or before the 17th May 1969, failing which it shall lapse if only signed by one party.'

The unsigned offer was presented to the seller who signed it and thus became the offeror. The court concluded that although clause 7 was badly phrased it prescribed the manner in which the contract was to be concluded. It was accordingly enough that the purchaser had signed before 17 May 1969 and there was no need for that fact to be communicated to the seller.

[11] In each case it will be necessary to consider the terms of the offer to determine the mode of acceptance required. Where, however, the offer takes the form of a written contract signed by the offeror, the inference will more readily arise in the absence of any indication to the contrary that the mode of

acceptance required is no more than the offeree's signature. This is particularly so where provision is made in the written contract for the offeree to specify the date on which he or she signs the contract. In *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 (3) SA 134 (C) at 137D-G E M Grosskopf AJ (as he then was) said the following (my translation):

'However, even when writing is not a formal requirement, written contracts are an everyday occurrence in the commercial world. The object of reducing a contract to writing (whether voluntarily or required by statute) is normally to achieve certainty and to facilitate proof (cf, eg, *Woods v Walters*, 1921 AD 303, *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A)). It is presumably for the same reason that the date and place of signature is normally specified in written contracts. The signing of a written contract is the usual manner in which parties indicate their agreement to its terms and certainty as to the place and date of the conclusion of the contract can be equally as important for the parties to the contract as certainty as to its content. Consequently it is inherently improbable that any of the parties to such a contract would intend that the time and place of the conclusion of the contract would be determined not from the document itself but by way of evidence *aliunde*.'

I readily endorse the views expressed by the learned judge which accord with common sense and commercial practicalities. Indeed, if the position were otherwise, the consequence would be to defeat the very object of reducing the contract to writing. Quite apart from certainty as to the terms of the contract, that object in a case such as the present would be to avoid disputes as to the date upon which the offer was accepted.

[12] I return to the facts of the present case. When Adam signed the conditions of sale, the final page of that document (which had not yet been completed and signed by the sellers) would have read:

'I/we

_____

in my/our capacity as the Seller:

HEREBY CONFIRM THIS SALE ON THE CONDITIONS AS HEREIN SET OUT DATED AT _____ ON THIS _____ DAY OF _____ 2006

AS WITNESSES:

1._____

2. _____

_____

SELLER

SELLERS TELEPHONE NUMBER: _____

SELLERS FAX NUMBER _____'

Once completed and signed by the sellers, the document would have served as a recordal of the date and place of the 'confirmation'. This to my mind constitutes the clearest indication that the mode of acceptance was to be the signature of the sellers.

[13] Some reliance was placed on the second sentence in clause 20 (quoted in para 5 above) in support of a contrary construction. It reads:

'The Seller, however, shall sign the conditions only upon confirmation of the sale.'

Commenting on the clause, Rabie J said:

'In my view, the proper interpretation of this last sentence of the clause is that it allows for confirmation of the sale in another manner than by signing the agreement. In other words that the seller can confirm the sale but once he has done that, he must sign the agreement.'

Based on this construction of clause 20 the learned judge reasoned that the sellers' signature could not be equated with the acceptance of the offer; that the agreement was silent on the manner in which the sellers were to accept the offer and accordingly the ordinary common law rule that requires the offeror to be notified of the acceptance had to be applied.

[14] With respect to the judge, I think he reads into the clause what is not there. The second sentence in clause 20 must be read in context. The first sentence provides for when the bidder is to sign the conditions of sale, namely 'immediately after the sale'. The second sentence provides for when the seller is to sign. It says in effect that he will sign only when he confirms the sale (ie accepts the offer), not before. The implication is clear: the sale will be confirmed when he signs. Anyone reading the contract would see that it was 'confirmed' on 20 June 2006 and that is how the parties would have known

the contract would be understood. It is also of some significance that clause 16 deals with the consequences of the seller 'declining to sign these conditions'. The implication is that failing to sign is the equivalent of failing to confirm.

[15] It was not in dispute that Van Rensburg signed the conditions of sale on the morning of 20 June 2006, ie within the seven-day period referred to in clause 1. It follows that in my view a valid sale came into existence on that date and that the appeal must succeed.

[16] The following order is made:

[A] The appeal is upheld. The respondent is to pay the costs of appeal of the first and second appellants and those of the third appellant.

[B] The order of the court a quo is set aside and the following substituted in its place:

'(a) The application is dismissed with costs.
(b) The counter application is upheld and the following order is made:

1 The agreement and conditions of sale, signed by the applicant on 13 June 2006 and the first and second respondents on 20 June 2006, in terms of which the applicant purchased Holdings 380, 381 and 387 Withok Estates Agricultural Holdings from the first and second respondents respectively, is declared to be of full force and effect;

2 The applicant is ordered to furnish the first and second respondents with a bank guarantee or such other irrevocable guarantee acceptable to the first and second respondents for the balance of the purchase price within 30 (thirty) days of the granting of this order or alternatively to pay such balance to the first and second respondents' conveyancers as identified in the agreement within 30 (thirty) days of the granting of this order, such amount to be held in trust by the said conveyancers pending transfer of the properties

as provided for in paragraph 3 below;

3 The first and second respondents are ordered, through their conveyancers as appointed in the agreement, to effect transfer of the properties to the applicant upon receipt of payment from the applicant of all costs and amounts referred to in clauses 9, 10 and 12 of the agreement and the rendering of a guarantee or alternatively payment as referred to in paragraph 2 hereinabove;

4 The applicant be ordered to pay interest *a tempore morae* to the first and second respondents on the amount of R3 550 010,00 at a rate of 15,5% calculated from 20 June 2006 to the date of payment and to pay any collection charges on the amounts stipulated herein and in paragraphs 2 and 3 above duly levied by the first and second respondents' conveyancers in accordance with the applicable guidelines and rules;

5 The applicant be ordered to pay the costs of this counter application on a scale as between attorney and client.'

_____

D G SCOTT

JUDGE OF APPEAL

Appearances:

For First and Second Appellant:	JC Uys
For Third Appellant:	KW Lüderitz
Instructed by:	
For 1st and 2nd Appellant:	Van Rensburg Schoon & Cronjé Inc, Pretoria
	Naudes, Bloemfontein
For 3rd Appellant:	Cyril Ziman Attorneys c/o Jacobson & Levy, Pretoria
	E G Cooper & Sons Inc, Bloemfontein
For Respondent:	F H Terblanche SC H R Fourie
Instructed by:	Solomon Nicolson Attorneys, Pretoria
	Hill McHardy & Herbst Inc, Bloemfontein