

RELIANCE, FORMALITIES AND THE MODE OF ACCEPTANCE OF AN OFFER

Pillay v Shaik 2009 4 SA 74 (SCA)

1 Introduction

In *Pillay v Shaik* (2009 4 SA 74 (SCA)), the Supreme Court of Appeal was confronted with a situation which tends to feature in the law reports more frequently than one would expect, and that is where a party to a transaction involving the sale of immovable property reneges on an apparent agreement by invoking some form of technicality (*in casu* the lack of a signature on a contractual document) as a bar to the proper conclusion of the contract. Usually, where immovable property is sold directly to a purchaser, section 2(1) of the Alienation of Land Act 68 of 1981 applies and provides that no alienation of land will be of any force or effect unless contained in a deed of alienation signed by the parties, or by their agents acting on their written authority. Failure to comply with this provision renders an alienation of land void (*cf Wilken v Kohler* 1913 AD 135 141-143; *Johnston v Leal* 1980 3 SA 927 (A) 939; and *Fairoaks Investment Holdings (Pty) Ltd v Oliver* 2008 4 SA 302 (SCA) par 21). Where, however, immovable property is held in the name of a close corporation or private company merely the members' interests or shares are transferred to the purchaser, but the purchaser still indirectly gains control over the property owned by the juridical entity. The present matter dealt with the latter type of situation and the legal question was whether the sellers had accepted a signed, written offer made by the purchasers despite the fact that the sellers had not in turn signed the contractual documents. The Natal Provincial Division (*Shaik v Pillay* 2008 3 SA 59 (N)) found that contractual liability did not lie for want of compliance with a party-imposed signature formality, whereas the Supreme Court of Appeal applied the reliance theory to reach the opposite conclusion in the circumstances. The respective approaches of these two courts are diametrically opposed giving rise to some interesting issues on doctrinal as well as policy levels.

2 Facts

The first to sixth respondents marketed to the public interests in a sectional title property development. Each unit in the development was to be owned by a close corporation and it was the members' interests in each of the close corporations that was offered for sale by the respondents ("the sellers"). One Pillay and one Motlanthe ("the purchasers") sought to invest in the development and each signed standard form contractual documents for the purchase of the members' interests in a close corporation that would own an apartment in the

development. The standard form contractual documents were drafted on behalf of the sellers, who were represented at all times by one Blake (sixth respondent). Subsequently, Motlanthe was required to re-sign the contractual document and, similarly, Pillay received replacement pages for initialing.

More than one year after the purchasers had signed their respective contractual documents, a dispute arose when Blake indicated that the sellers were not contractually bound because he had not signed the documents on behalf of the sellers. This came as a surprise to the purchasers because between the time they had signed the offers and this stance taken by Blake, the sellers' attorneys had called for and received deposits, called for guarantees, allocated close corporations to particular units in the development, called for copies of identity documents and marriage certificates, requested additional payments relating to the finishes in the units, and even given notice threatening cancellation in accordance with a clause of the contractual document. These actions were directed at either Pillay or Motlanthe, or both, at various intervals.

The reason for the denial of the existence of contracts is apparent from a letter written by the sellers' attorneys to the estate agents who brokered the agreements, advising that if the purchasers were willing to increase their offers the sellers would be prepared to reconsider. In other words, this was a case of "seller's remorse": the sellers simply reneged on the agreements because they believed that they could secure higher prices, no doubt in an escalating property market. Both Pillay and Motlanthe instituted separate application proceedings against the sellers seeking amongst other things orders declaring that valid contracts had been concluded. Eventually these applications were consolidated in the same trial which commenced in the Durban High Court. Thereafter, the matter was heard on appeal before a full bench of the Natal Provincial Division, with the final appeal coming before the Supreme Court of Appeal.

3 Decisions by the courts

3 1 Trial court

In the trial court Balton J found that the purchasers and sellers were not required to comply with the formalities prescribed by section 2(1) of the Alienation of Land Act 68 of 1981 for the alienation of land. Both the Natal Provincial Division and the Supreme Court of Appeal agreed with the trial court on this point, confirming that in accordance with the Close Corporations Act 69 of 1984 it is not mandatory for the sale of the members' interests in a close corporation to be in writing and signed by the parties, even if the close corporation only owns immovable property (see also *Rhodesian Business and Property Sales (Pvt) Ltd v Henning* 1973 1 SA 214 (R) 217-218; and *cf* Christie *The Law of Contract in South Africa* 5ed (2006) 113).

Balton J ruled in favour of Pillay and Motlanthe, the basis of her decision being the doctrine of quasi-mutual assent (with reference to the formulation of this principle in the seminal English matter of *Smith v Hughes* (1871) LR 6 QB 597 607; and see further regarding its reception in South African law Christie 24-28; Pretorius "The Basis of Contractual Liability in South African Law (1)"

2004 *THRHR* 179 188-192): the conduct of the sellers (through their representatives) led the purchasers to reasonably believe that valid agreements had been entered into.

3 2 *Natal Provincial Division*

On appeal, in delivering the unanimous judgment of the full bench of the Natal Provincial Division, Nicholson J proceeded to determine whether the sellers and purchasers had created their own formality, by intending their agreements only to be binding once signed by both parties. He found that such an intention did exist in the circumstances and upheld the appeal of the sellers (with reference to *Meter Motors (Pty) Ltd v Cohen* 1966 2 SA 735 (T) 736C-737G). In reaching this conclusion Nicholson J emphasized the “form of contract” presented to the purchasers by the sellers’ estate agents (65I) and the fact that several clauses of the contractual document related to signature requirements by the parties (66A-I). He also noted that if it appeared from a document that the parties intended the document to embody the very agreement between them, then that document had to be signed for validity (67I). In light of this finding it was not necessary to consider the application of the doctrine of quasi-mutual assent in the circumstances.

3 3 *Supreme Court of Appeal*

Farlam JA delivered the unanimous judgment of the Supreme Court of Appeal and, in contradistinction to the Natal full bench, found that the parties had not agreed to prescribe a signature formality for the validity of the contracts (par 50-52). By appending their signatures to the contractual documents the purchasers had extended offers to the sellers, and the signatures of the sellers were only required to comply with the prescribed mode of acceptance of the offers (par 52). Furthermore, he reasoned that the reliance theory could be applied in such circumstances and so had to decide (in the absence of the sellers’ signatures) whether the purchasers were led to reasonably believe that their offers had been accepted in accordance with the prescribed mode (par 53). Based on the conduct of Blake and the legal representatives of the sellers, he found that such a belief existed on the part of the purchasers and, therefore, that contracts had been concluded by the parties in accordance with the doctrine of quasi-mutual assent (85-86). The appeal of the purchasers was thus upheld.

4 **Critical commentary**

4 1 *Formalities*

Based on South African law, in the absence of a prescribed statutory formality, a formality is also created when the parties negotiating a contract agree that their agreement will only be binding if it is reduced to writing and signed by both parties. In such a case no contract comes into existence unless the formality has been complied with (*Golblatt v Freemantle* 1920 AD 123 129; *Woods v Walters* 1921 AD 303 305; and *SA Sentrale Ko-op Graanmaatskappy Bpk v*

Shifren 1964 4 SA 760 (A) 766). Although Farlam JA overruled Nicholson J's finding that a party-imposed signature formality existed in the circumstances, the latter's ruling is consistent with some case law. In *First National Bank Ltd v Avtjoglou* (2000 1 SA 989 (C) 995I-996A), for instance, the court reasoned:

"In my opinion, defendant's insistence on a signed copy, plaintiff's admission regarding the reduction to writing of a compromise agreement and mention of the need for plaintiff's signature in these clauses all seem to suggest quite clearly that it was always necessary for both parties to sign any agreement relating to the defendant's indebtedness. Accordingly, the balance of probabilities favours defendant in this regard. I conclude, therefore, that it had been the intention of the parties that the agreement should be binding once signed by both parties."

In essence, since both parties were aware that they needed to sign the contractual documents, the court ruled in *Avtjoglou* that it was their intention only to be bound once the signatures had been effected (*cf* Christie 106). Similarly, in the present matter Nicholson J found that the purchasers "understood that the agreement had to be signed by both parties" (65H), which seemingly was consistent with the understanding of the sellers' representative (Blake) (63-64). This common understanding, together with the signature clauses contained in the documents, apparently formed a strong foundation for the finding of the Natal Provincial Division that a signature formality existed for the conclusion of the contracts (compare also *Meter Motors (Pty) Ltd v Cohen supra* 737, where the court interpreted similar signature clauses as creating a formality, aspects of which were not accepted by Farlam JA (par 52)).

The existence of a formality within the circumstances of *Pillay* also tends to be consistent with "common sense and commercial practicalities" (*Withok Small Farms (Pty) Ltd v Amber Sunrise Properties (Pty) Ltd* 2009 2 SA 504 (SCA) 509F-G), in that it simply makes sense for parties to utilize and sign written contractual documents when entering into transactions relating in some or other way to the sale of immovable property (*cf* Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* 3ed (1988) 206-207). Although a transaction for the sale of the members' interests in a close corporation owning immovable property is not considered directly to be an alienation of land in terms of the Alienation of Land Act 68 of 1981, indirectly such a transaction appears to be exactly that. In any event, immovable property is essentially sought to be purchased and sold, and in practice it is rare – if not almost unheard of – for transactions of this nature to be concluded without being reduced to writing and signed by the parties. Consequently, it is suggested that in *Pillay* a formality requirement would certainly have been consistent with common sense and commercial practice, and the promotion of certainty between the parties. Accordingly, whether one agrees with the outcome or not, the approach of the Natal Provincial Division is certainly not without merit. However, the finding by the Supreme Court of Appeal that no formality existed ultimately paved the way for a fair and reasonable outcome on a completely different basis, which will be considered next.

4.2 *Prescribed method of acceptance and the doctrine of quasi-mutual assent*

Both the trial court and the Supreme Court of Appeal adjudicated the matter on the basis of the doctrine of quasi-mutual assent, or rather reliance theory (see generally Van der Merwe and Van Huyssteen "Reasonable Reliance on Consensus, Iustus Error and the Creation of Contractual Obligations" 1994 *SALJ* 679; and Reinecke "Toepassing van die Vertrouwensteorie by Kontraksluiting" 1994 *TSAR* 372). In this regard Farlam JA expressed himself as follows (par 53):

"This raises the question as to whether the doctrine of quasi-mutual assent can be applied in circumstances where acceptance does not take place in accordance with a prescribed mode but the conduct of the offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the considerations underlying the application of the reliance theory apply as strongly in a case such as the present as they do in cases where no mode of acceptance is prescribed and the misrepresentation by the offeree relates solely to the fact that there is consensus."

The application of reliance in this case alludes to some interesting issues, one of which is that Farlam JA was mindful to construe the signature requirement as merely pertaining to the mode of acceptance of the purchasers' offers, as opposed to constituting a formal requirement for the contracts to arise, probably with a view to employing reliance. Presently, it seems unclear whether the reliance theory can ground contractual liability where a statutory or party-imposed contractual formality has not been complied with. This decision suggests that it cannot.

If one considers the doctrine of estoppel by representation an analogous picture emerges. It is clear that generally reliance on this doctrine must be permissible in law and historically the maintaining of an impression by means of estoppel cannot result in a situation prohibited by statute or common law (Rabie and Sonnekus *The Law of Estoppel in South Africa* 2ed (2000) 167-168; and Visser and Potgieter *Estoppel: Cases and Materials* (1994) 307). Aside from a questionable exception in the case of discounted hire-purchase agreements (see generally Nienaber "Iets oor Verdiskontering, Estoppel en Borgtog" 1964 *THRHR* 262; Nienaber "Nogmaals Verdiskontering en Estoppel" 1966 *THRHR* 51; and Selvan "Discounting, Estoppel and Suretyship – A Divergent View" 1965 *THRHR* 231), this proposition generally remains true. Transposed onto a contractual setting implies that estoppel cannot be invoked to uphold the fiction of a contract where there is noncompliance with a statutory formality, or evidently even where the parties themselves have set formal requirements for the conclusion of a contract (see generally Rabie and Sonnekus 172-173). Similarly, the courts have approached the question whether estoppel can be used to defeat noncompliance with a formality set by the parties for the variation of their contract with noticeable caution (see Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 3ed (2007) 158; Pretorius "General Principles of the Law of Contract" 2007 *Annual Survey* 469 523; and generally Hutchison "Non-variation Clauses in Contract: Any Escape From the

Shifren Straightjacket?" 2001 SALJ 720).

Considering that the reliance theory evolved from estoppel by representation (Christie 27; and Pretorius 2004 *THRHR* 190-191) it seems hardly surprising that Farlam JA perhaps intuitively felt that similar considerations would apply in the case of the former and, consequently, opted for a construction of the signature requirement in the contractual documents that paved the way for a less contentious application of the doctrine of quasi-mutual assent. Nevertheless, it is suggested that such a conclusion is not foregone and there may indeed be instances where, at least by exception, the reliance theory could trump noncompliance with constitutive formalities. This would particularly be the case where, as in the present matter, an overriding issue of public interest seems to be absent and the contract denier has exploited the situation to his or her advantage in a clearly calculating and unconscionable manner (compare also a constitutional argument for the relaxation of this traditional stricture on estoppel within the sphere of *ultra vires* acts performed by statutory bodies by Rabie and Daniels "Estoppel" in 9 *LAWSA* (2005) par 675; and *cf* Visser and Potgieter 307). Such an approach certainly seems worth considering and could, for instance, also provide a *rationale* for the informal revival of agreements subject to the Alienation of Land Act 68 of 1981 (compare *eg*, *Sewpersadh v Dookie* 2008 2 SA 526 (D) par 28-29 – overturned on appeal in *Sewpersadh v Dookie* 2009 6 SA 611 (SCA), unfortunately without due consideration of the question of reliance).

Generally, the application of quasi-mutual assent within the circumstances of this case appears to be justifiable. This corrective doctrine is activated by dissensus or material mistake between the parties (Van der Merwe *et al* 38; and Hutchison and Pretorius *The Law of Contract in South Africa* (2009) 95) and grounds contractual liability on a reasonable belief in the existence of consensus on the part of the contract enforcer induced by the contract denier's misrepresentation of intention (the *locus classicus* in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A) 239I-240B). Usually the misrepresentation of the contract denier creates the impression that he or she has assented to the contract in question (for instance by affixing his or her signature to a contractual document, as in *eg Cecil Nurse (Pty) Ltd v Nkola* 2008 2 SA 441 (SCA); and *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 2 SA 599 (SCA)), but notionally there seems to be no compelling reason why it may not extend to compliance with more specific requirements for a contract to arise, such as a particular mode of acceptance of an offer, as in the present matter.

Technically the sellers did not allege that there was dissensus, but rather that contracts had not arisen for noncompliance with a formality (signature). However, the issues of noncompliance, whether in the form of a specific mode of acceptance of an offer or otherwise, and dissensus tend to conflate within the circumstances: by not signing the contractual documents the sellers apparently had mental reservations about committing to the agreements (suggesting dissensus), while at the same time they led the purchasers to believe that their offers had been duly accepted (indicating reliance). De Wet and Van Wyk (*Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol 1 5ed (1992) 11) explain the phenomenon of *reservatio mentalis* as follows:

“Met *reservatio mentalis* of innerlike voorbehoud het mens te doen waar iemand doelbewus 'n ander onder die indruk bring dat hy dit en dat wil, terwyl hy dit inderdaad nie wil nie. Mens het hier te doen met 'n dwaling by B ten opsigte van wat A wil, welke dwaling opsetlik deur A by B verwek is.”

Aside from the fact that the reference to intent (*opset*) is a bit strong, since this form of fault requires knowledge of wrongfulness (Neethling, Potgieter and Visser *Law of Delict* 6ed (2010) 126; and Van der Walt and Midgley *Principles of Delict* 3ed (2005) 157) and the conduct of the misleading party may not necessarily be unlawful, this description is apt for present purposes. It seems that the sellers deliberately led the purchasers to believe that their offers had been accepted and that enforceable contracts had been concluded, while tacitly reserving the option not to be contractually bound by not signing the contractual documents. Consequently, it would be fair to say that the purchasers in all probability laboured under an essential mistake as to the existence of contracts (unilateral mistake), while the sellers were under no such illusion and probably were aware of the purchasers' misapprehension in the circumstances (*cf* Joubert *General Principles of the Law of Contract* (1987) 86-87; Van der Merwe *et al* 28 30; and Hutchison and Pretorius 90). Ultimately then, the matter related to dissensus caused by the sellers, who triggered the doctrine of quasi-mutual assent. In applying this doctrine in the circumstances the question merely seems to be whether the sellers created the reasonable impression that they had assented to the contracts in question, including that any prescribed technicalities – such as a particular mode of acceptance – had been complied with. It is perfectly clear that the sellers, through their representatives, did just that and were justifiably held liable in terms of the reliance theory.

In practice the distinction between a signature requirement entailing a constitutive formality set by the parties (or a party) on the one hand and a mode of acceptance of an offer on the other, may be so fine as to be illusory. Furthermore, as rather lucidly remarked by Van der Merwe *et al* (67-68), “it seems problematic to draw inferences as to the probable intention of the offeror concerning the mode of acceptance from the terms of a badly drawn document, or of a printed standard contract form”. And that is precisely why it is suggested that within the circumstances of a case such as this the reliance theory should in any event prevail. It seems that it is usually the offeror, as initiator of the contracting process, who may prescribe a specific mode of acceptance (Hutchison and Pretorius 56) and there is authority to the effect that where this is the case no other form of acceptance will suffice (*see eg* *Laws v Rutherford* 1924 AD 261 262; *Inrybelange (Edms) Bpk v Pretorius* 1966 2 SA 416 (A) 423; *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 597; and further Van der Merwe *et al* 67; and Christie 65). Although *in casu* the sellers were regarded as offerees and the terms of the contractual documents were prescribed by them, nothing much seems to turn on this aspect. Quite simply the sellers were only prepared to entertain offers on the terms contained in the documents drafted on their behalf. Clearly, however, the trial court and Supreme Court of Appeal were not prepared to permit them to manipulate the process of contracting by leading the purchasers to believe that their offers had been duly accepted and then denying the existence of the very same contracts on a whim apparently prompted by avarice (*cf* *Senekal v Home Sites (Pty) Ltd* 1950 1 SA 139 (W) 150; and Lubbe and Murray 206).

Theoretically an offeror is within his rights to waive any formality pertaining to the mode of acceptance laid down by him (Van der Merwe *et al* 67 fn90). The invocation of waiver within the context of the conclusion of a contract is not without conceptual difficulties (see Pretorius “The Acceptance of a Lapsed Offer Within the Context of the Alienation of Land Act” 2009 *THRHR* 519 522-523; and *cf* Cockrell “Reliance and Private Law” 1993 *Stell LR* 41 46-47), but it has, for instance, been employed as a means to binding a party to a contract when formal prescriptions have not been complied with and there are clear indications of reasonable reliance on the part of the contract enforcer (compare *eg*, *Manna v Lotter* 2007 4 SA 315 (C); and see further Pretorius 2009 *THRHR* 523ff). Although seemingly at odds with some authoritative case law (see previous paragraph) for sanctioning noncompliance with a prescribed method of acceptance of an offer, Farlam JA’s judgment nevertheless is commendable for extending the application of the reliance theory to the circumstances in question rather than invoking less convincing constructs such as waiver to effect justice between the parties. Whether, however, the courts will be prepared to broaden further the reach of reliance to situations concerning noncompliance with formal prescriptions for contractual validity, statutory or otherwise, is of course doubtful at this stage, but at least this decision portends a willingness on the part of the judiciary to extend the doctrine of quasi-mutual assent to novel situations (see also Pretorius “*Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA): Reliance, Reasonableness and Novel Contracts” 2006 *De Jure* 205).

4 3 *Judicial technique and policy*

The decisions of the Natal Provincial Division and the Supreme Court of Appeal (and trial court) contrast quite markedly on the question of judicial technique and underlying policy considerations (see generally Adams and Brownsword *Understanding Contract Law* 4ed (2004) 35-45; Van Aswegen “The Future of South African Contract Law” 1994 *THRHR* 448 455-458 459; *cf* Herdegen “The Activist Judge in a Positivistic Environment – European Experiences” 1990 *Stell LR* 336; Hoexter “Judicial Policy in South Africa” 1986 *SALJ* 436; and Corbett “Aspects of the Role of Policy in the Evolution of our Common Law” 1987 *SALJ* 52). Legal development, or the lack thereof, often hinges on judicial method or rather the manner in which a court approaches a contractual problem. In broad terms this relates to whether the court will be inclined to apply the strict letter of the law irrespective of the outcome (a tendency toward formalism), or search for a fair outcome based on a preference for open-ended standards that allow for purposive adjudication (a tendency toward realism) (see further Cockrell “Substance and Form in the South African Law of Contract” 1992 *SALJ* 40 42-45; and Pretorius “The Basis of Contractual Liability (1): Ideologies and Approaches” 2005 *THRHR* 253 267-270). Adams and Brownsword (37) explain this notion as follows:

“According to one approach, let us call it the ‘formalist’ approach, judges will see their role in terms of unpacking the materials in the rule-book. Crucially, the rule-book will be treated as decisive even where the results are for some reason hard on one party. By contrast, according to the alternative approach, which we will call the ‘realist’ approach, judges will proceed in a result-orientated fashion,

irrespective of the dictates of the rule book.”

Applied to the present situation it is suggested that the approach of the Natal Provincial Division displays rather strong formalist tendencies. The court paid a great deal of attention to the form of the contractual document in question (in contrast to the relative reasonableness of the conduct of the parties) in determining whether it would be binding only when signed by the sellers (par 35-45), and concluded that this was indeed the case. On a fairly strict interpretation of the document and the fact that in essence the transaction actually related to immovable property (albeit in an indirect fashion) the decision seems justifiable, but very unfair. The court was prepared to reach such a conclusion no matter how harsh on the purchasers and despite obvious duplicity on the part of the sellers. The court seemed to be really only concerned with the application of a clear rule that suited the facts: if it appears that the parties intended a document to be the very agreement between them, then that document had to be signed (671). The actual result of the application of this rule in the circumstances did not seem to attract the court's attention. Such an approach tends to value predictability and certainty above fairness, and is consonant with the notion that the function of courts is merely to apply the law, leaving little room for judicial discretion (*cf* Cockrell 1992 *SALJ* 42-43; Pretorius 2005 *THRHR* 264 269).

In contradistinction, the decision of the Supreme Court of Appeal shows a definite inclination toward a result-orientated realist approach and further displays a preference for adjudicating the matter on the basis of an open-ended standard or principle (the reliance theory) (*cf* Cockrell 1992 *SALJ* 48; and Pretorius 2005 *THRHR* 267-268). One senses that the court was not prepared to apply the rule on which the Natal Provincial Division based its decision because it felt that the conduct of the sellers, although perhaps not unlawful in a delictual sense, nevertheless was improper and not deserving of judicial sanction: they led the purchasers, deliberately it seems, to believe that valid contracts had been concluded, only to withdraw on a technicality evidently set up by themselves when the market favoured higher asking prices (compare par 56-59). In contrast the conduct of the purchasers was largely without blemish: they had complied with all requests and demands made by the sellers' representatives to ensure that valid contracts had arisen, and were entitled to assume that this was indeed the case. Put slightly differently, given the situation that arose as a result of the sellers' conduct it would be unfair or even unconscionable to permit the sellers to go back on the impression they created that the purchasers' offers had been duly accepted and valid contracts had arisen (*cf* Collins *The Law of Contract* 4ed (2003) 83-85; Adams and Brownsword 195-196; and Pretorius "The Basis of Contractual Liability (3): Theories of Contract (Consideration, Reliance and Fairness)" 2005 *THRHR* 575 587-588).

In colloquial terms, the sellers could not "have their cake and eat it too"; in legal terms, the Supreme Court of Appeal required a principle to give expression to the equities of the case, which the reliance theory appropriately provided. The decision of this court seems just and fair and inclines toward substantive reasoning as opposed to the rather formal reasoning adopted by the Natal Provincial Division. It is further commendable for reflecting how the reliance theory can be adapted and applied as the need arises. Consequently, it

is fair to say that the judgments of the Natal Provincial Division and Supreme Court of Appeal stand in rather stark contrast to each other. It is suggested that both are justifiable in terms of the dimensions of judicial technique and policy which they respectively tend to reflect, but that the decision of the latter court is preferable.

5 Conclusion

The decision of the Supreme Court of Appeal ties in with a growing body of case law dealing with the situation where one of the parties to a transaction relating (directly or indirectly) to immovable property leads the other party to believe that a contract has been concluded, only to grasp at some technical excuse to renege on the agreement when fluctuations in the market favour the striking of a more lucrative bargain elsewhere. Where the courts have come to the aid of the contract enforcer the underlying notion seems to be one of not blowing “hot and cold”: a party should not be permitted to approbate to a contract and then later reprobate from the contract on what may be an entirely technical point (see also Pretorius and Ismail “Notification of Acceptance and the Conclusion of a Contract” 2010 *Obiter* 177 185; and Ismail “Contentious Issues Arising from Payments made in Full and Final Settlement” 2008 *PER* 154 172). The courts have sought refuge in several avenues to give effect to this concept, such as waiver (*eg Manna v Lotter* 2007 4 SA 315 (C)); dispensing with notification of acceptance where the offer takes the form of a written contractual document signed by the offeror and, subsequently, by the offeree (*eg Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd supra* 504); and the reliance theory, as in the present matter. It is, however, suggested that the reliance theory generally provides the most suitable vehicle to give expression to this underlying notion (*cf Adams and Brownsword* 195-196), and facts permitting should be employed and developed to effect justice even where a party-imposed or statutory formality has not been complied with and there is no overriding aspect of legal policy dictating otherwise.

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