

## CASES / VONNISSE

### NOTIFICATION OF ACCEPTANCE AND THE CONCLUSION OF A CONTRACT

**Withok Small Farms (Pty) Ltd v Amber Sunrise  
Properties 5 (Pty) Ltd 2009 2 SA 504 (SCA)**

#### 1 Introduction

It is a long-standing principle in our law that generally a contract is only concluded when the offeree notifies the offeror of acceptance and, consequently no contract arises if there is no notification of acceptance. This general rule is derived from the will theory, which requires not only coinciding expressions of intention (usually styled “offer” and “acceptance”), but also knowledge of the offeree’s acceptance by the offeror so that conscious agreement exists between the parties (*consensus ad idem*) (see Joubert *General Principles of the Law of Contract* (1987) 36-37; Christie *The Law of Contract in South Africa* 5ed (2006) 68; compare *eg, Bloom v The American Swiss Watch Co* 1915 AD 100; and *Hersch v Nel* 1948 3 SA 686 (A)). However, the offeror may expressly or impliedly dispense with this requirement, since the offeror may prescribe the method by which his offer may be accepted by the offeree (see *eg, Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 597D; *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 573E-F; see further Christie 68; and Ismail “Contentious Issues Arising from Payments made in Full and Final Settlement” 2008 *PER* 154 171-172 and 176). It also seems that where there is doubt, “the presumption that the contract will be completed when the offeror comes to hear of the offeree’s acceptance, should prevail” (*Driftwood Properties (Pty) Ltd v McLean supra* 597D-E). In the recent matter of *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* (2009 2 SA 504 (SCA)) the Supreme Court of Appeal had to decide the very issue of whether the offeror had dispensed with notification of acceptance by the offeree. The context in which the court had to decide this issue and the approach adopted raise some interesting issues for discussion.

#### 2 Facts

This case deals with the sale of immovable property by way of auction (it should be noted that in such instances the formalities prescribed by the Alienation of Land Act 68 of 1981 do not apply – s 3). The purchaser’s

(offeror's) representative, one Adam, attended an auction on 13 June 2006 and his bid for the property was accepted by the auctioneer. At the conclusion of the auction, Adam signed an agreement of sale containing the conditions to which the auction was subject, as was done by the auctioneer. Clause 1 of the agreement provided as follows (par 2):

"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 offeror's signature) one Van Rensburg, acting on behalf of the sellers (offerees), completed their details in writing and signed the agreement of sale. It was common cause that the signing of the sale document by the offerees was not communicated to the offeror within the time contemplated in clause 1, and only occurred some time early in July 2006. Because notification of the offerees' signatures did not reach the offeror within the stipulated time period, the offeror instituted application proceedings to have the agreement set aside. The offerees brought a counter-application for the agreement to be declared of full force and effect (par 1-3).

### 3 Decision

The crisp issue was whether the offerees needed to notify the offeror of the acceptance within the seven-day period stipulated in clause 1. If notification was required within this time period, then the offerees' failure to do so entitled the offeror to the relief sought in the application. If, however, notification was not required, and the court found that the contract was concluded upon signature of the agreement of sale on behalf of the offerees, then the offeror would fail in his/her application and the counter-application would succeed. In deciding this issue, the court *a quo* found in favour of the offeror and the Supreme Court of Appeal in favour of the offerees.

Both the court *a quo* and the Supreme Court of Appeal agreed that the phrase "confirmation of the sale" in clause 1 should be interpreted to relate to the acceptance of the offeror's signed offer (*Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd supra* 507H-I and 508F). However, both courts differed on the mode of acceptance intended by the use of the word "confirmation" in this clause. In examining the terms of the sale agreement, the court *a quo* concluded that these were insufficient to indicate that the general rule pertaining to notification should not apply. On the contrary, the Supreme Court of Appeal held that the general rule did not apply and that the offeror had dispensed with being notified of the acceptance. Thereafter this court per Scott JA stated (with reference to *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 3 SA 134 (C) 137D-G) that in the case of a contractual document accompanied by a signed offer an inference will more readily be made, and in the absence of any indication to the contrary, that the mode of acceptance required is no more than the

offeree's signature (509B). Scott JA further supported this stance by reasoning that it accorded with "common sense and commercial practicalities" (509F).

In examining the terms of the agreement of sale to establish whether the offeror dispensed with being notified of acceptance, Scott JA firstly determined that the word "confirmation" in clause 1 related to the acceptance of the offer (508F). Secondly, he found that the phrase "confirmation of the sale" in the same clause signified that the mode of acceptance would be by way of signature by the offerees and that no notification was required (510A). In further support of this conclusion Scott JA referred to several other clauses in the agreement which seemingly strengthened the notion that upon signing of the document by the offerees the contract would be concluded (507C-F and 510A-F; compare further *Reid v Jeffreys Bay Property Holdings (Pty) Ltd supra* 137; and *Sharrock Business Transactions Law 7ed* (2007) 70). Although the court concluded that the word "confirmation" required the offerees' timely signature (510A and 510E), it is apt to mention that from the outset while the court was in the process of setting out the facts of the case, it prematurely assumed that the offerees had already confirmed the sale (par 2-5), which implied that a valid acceptance was already in place prior to any further adjudication on the matter.

## 4 Commentary

### 4.1 *Applicable principles*

As previously alluded to, although the general rule is that a contract is only concluded once the offeree has notified the offeror of acceptance, the offeror may expressly or impliedly dispense with this requirement (compare further *R v Nel* 1921 AD 339 344 and 352; and *Mckenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 22). However, where there is doubt, it seems that the general rule should prevail (*Driftwood Properties (Pty) Ltd v McLean supra* 597D-E). Even though the court expressly acknowledged these guidelines, its actual approach in adjudicating the case appears to have moved in a different direction. For one thing Scott JA emphasised that the agreement of sale was poorly drafted (par 7), which seems to suggest that there was doubt as to the meaning of clause 1, particularly the expression "confirmation of the sale." It also seems as if it were unclear as to whether this clause amounted to a suspensive condition or option, although the court eventually opted for the latter (507-508). Yet instead of finding that in the circumstances notification was required for a valid contract to come into being, as the court *a quo* did (para 6), he found that the offeror had dispensed with notification (510A-F) (compare generally Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles 3ed* (2007) 67-68).

Furthermore, although Scott JA expressly noted 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" (508G), he proceeded to adjudicate the case on a different assumption, and stated as follows (509B-C):

"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."

Given that the courts have frequently affirmed that actual agreement is the primary basis of contractual liability (see *eg*, *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 993E-F; and *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) 78G-H), the question may be asked whether such an inference by Scott JA is justified, even in the particular circumstances of the case. In the absence of an express waiver of notification, and where there is doubt, surely a court should be cautious to infer that the signature of the offeree would suffice for a contract to arise if effect is to be given to the consensual approach to contractual liability? Otherwise, if mere signature is sufficient, then by implication the contract rests on a generally objective basis as opposed to *consensus ad idem*. There is further clear authority for the proposition that an assumption such as the one made by the court should not lightly be undertaken since it runs contrary to the general rule that notification is required for a contract to arise (see *eg*, Kerr *The Principles of the Law of Contract* 6ed (2002) 115; Van der Merwe *et al* 67-68; and *cf* De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol 1 5ed (1992) 39 fn 132). In *Hawkins v Contract Design Centre (Cape Town) (Pty) Ltd* (1983 4 SA 296 (TPD) 307E-F) Flemming J (dissenting) noted:

"All the considerations must of course be considered jointly. It is impossible in doing so to accord specific weight to each consideration. Having weighed all the considerations, my view is that the respondent did not succeed in establishing that it was actually intended that mere signature would constitute the conclusion of the contract. It has furthermore not succeeded in removing a doubt which must exist in this case as to whether appellant, in making the offer, either simultaneously or thereafter, agreed to appoint some other means than communication as the fact which elevates the document to a contract. The enquiry, according to law, is directed to the actual formation of such an intention, expressed or implied and irrespective of whether proof is obtained by inferences or by other means, and a judicial view of what may be feasible, fair or more practical is not a permissible alternative yardstick" (see also *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd* 1988 1 SA 583 (ZSC) 587G-J).

Furthermore, the fact that provision is made in a contractual document for the offeree to specify the date on which he or she signs the contract, should not be decisive in drawing an inference that for a contract to arise no more is required than the offeree's signature (*Hawkins v Contract Design Centre supra* 304-305; *cf* *Hersch v Nel* 1948 3 SA 686 (A) 702-703; *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd supra*; and Christie 221). Such information in a document may not necessarily dispense with notification (*cf* Kerr 112-115). In this vein Van der Merwe *et al* (67-68) note

that “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”.

It appears that although the court was careful to confirm the consensual elements of contract formation, it was prepared to deviate from them in a manner suggestive of a general principle: in instances where the offer takes the form of a written contractual document signed by the offeror, the inference arises, in the absence of any indication to the contrary, that the mode of acceptance is merely the offeree’s signature. Since the decision was delivered at the elevated level of the Supreme Court of Appeal the question which arises is how courts will in future interpret and apply this proposition.

#### 4.2 Construction

A corollary to the will theory is that in construing a contract a court should attempt to give effect to the common intention of the parties (Van der Merwe *et al* 303; Christie 192; and Kerr 386). Bearing this in mind, the manner in which the court interpreted the contract in *Withok* raises some interesting issues. To support its finding that the mode of acceptance applicable was the offeree’s signature, the court relied heavily on the fact that the agreement of sale document made provision for the recordal of the offeree’s signature, as well as the date and place the offeree signed the document (the recordal clause). In this regard Scott JA noted (510A):

“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.”

Although the approach of the court in this regard certainly is not unique (see similarly *Reid v Jeffreys Bay Property Holdings (Pty) Ltd supra* 137D-G which was referred to and applied in *Withok*), there are instances wherein the existence of a recordal clause may not result in the conclusion of a contract pursuant to mere signature by the offeree (compare *eg, Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd supra*; see further the dissenting judgment of Flemming J in *Hawkins v Contract Design Centre supra* 297-308; *cf Hersch v Nel supra* 702-703; and *Remini v Basson* 1993 3 SA 204 (N)). It seems rather hasty to accept that a recordal clause, executed by the offeree, should in itself be decisive in the absence of a clear intention to waive notification by the offeror. As acknowledged by Scott JA (509B), the relevant terms of the offer must be considered to establish the mode of acceptance that is required, but the weight accorded the recordal clause in isolation does appear to have been excessive. Deviation from the general rule regarding communication of acceptance seems questionable when such a clause is silent on the issue of dispensing with notification (see *Hawkins v Contract Design Centre supra* 304-305; and generally *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd supra*; and Kerr 114-115). It should also be noted that the onus lies with the offeree to establish that the offeror

has waived notification (*Hawkins v Contract Design Centre supra* 306H-307A), and if *consensus ad idem* is to have any practical effect in the conclusion of a contract, this onus should not lightly be discharged.

Furthermore, in *Hawkins v Contract Design Centre (supra* 303G) Fleming J aptly pointed out that in a commercial contract the offeror “generally has an interest in knowing whether or not he is contractually bound” (compare also *Remini v Basson supra* 212B). This is indeed a relevant consideration as an agreement of sale for immovable property usually has obligations for the offeror to comply with upon conclusion of the contract. For example, there may be prescriptive clauses dealing with the payment of a deposit and furnishing of a bank guarantee within specific time limits. Ordinarily it seems improbable that an offeror would intend not to be informed of the acceptance of his offer and run the risk of being in breach, or failing to comply with certain suspensive conditions, in the contract (*cf Hawkins v Contract Design Centre supra* 306A-D). In fact, in *Withok* the offeror only received notice of acceptance some two weeks after the offerees had signed the agreement, which for instance, could have negatively impacted on the offeror’s duty to furnish a bank guarantee timeously (see par 5 of the decision), all of which suggests that an inference contrary to the general rule regarding communication of acceptance should be approached with caution when interpreting the terms of a written document (contrast *Reid v Jeffreys Bay Property Holdings (Pty) Ltd supra* 137; and see further Sharrock 70). In *Robophone Facilities Ltd v Blank* ([1966] 3 All ER 128 (CA) 1311-132C) Lord Denning MR alluded to problems which may arise if the requirement of notification is too easily dispensed with (cited with approval in *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd supra* 587G-J):

“The general rule undoubtedly is that, when an offer is made, it is necessary, in order to make a binding contract, not only that it should be accepted, but that *the acceptance should be notified* ... [The contract] does not dispense with the necessity of notification. Signing without notification is not enough. It would be deplorable if it were. The [offerees] would be able to keep the form in their office unsigned, and then play fast and loose as they pleased. The [offeror] would not know whether or not there was a contract binding them to supply or him to take. Just as mental acceptance is not enough ... nor is internal acceptance within the [offerees’] office. In this very case we know that the [offerees] signed it some time or other (for it was produced at the trial complete with signature), but we do not know when the [offerees] signed it. No evidence was given on the point. In the circumstances I think that, until the [offerees] notified the [offeror] of their acceptance, the agreement was not complete. It was in the words of the [offeror] himself, provisional.”

It has been suggested that where an offer does not unequivocally prescribe a method of acceptance, an equitable interpretation equally advantageous to the offeror should be adopted (Christie 65). Moreover, where the wording of a contract is ambiguous the courts will not, “unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other” (Wessels *The Law of Contract in South Africa Vol 1 2ed* (1951) par 1974, quoted with approval in *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 331; see further *Ferox Investments (Pty) Ltd v Blue Dot Nursery CC t/a Jasmine Plant*

& *Bird Centre* [2006] 1 All SA 17 (O) 20-23; and Christie 219). It is submitted that within the circumstances of *Withok*, interpreting a recordal clause in isolation so as to dispense with communication of acceptance, may well provide the offeree with an unfair or unreasonable advantage, simply because said clause was silent on the issue of notification and probably also ambiguous. Even if ambiguity is absent in such instances, it is preferable that an equitable interpretation should prevail in the light of the Constitution of the Republic of South Africa, 1996 (see further *Ferox Investments (Pty) Ltd v Blue Dot Nursery CC supra* 23a-b; Cornelius *Principles of the Interpretation of Contracts in South Africa* 2ed (2007) 130-131). Since in *Withok* the recordal clause was silent regarding waiver of notification, it further seems rather strained to find that the offeror dispensed with notification of acceptance, considering that the contractual document was not drafted by the offeror, but by the auctioneers representing the offerees. Within the context of the recordal clause itself, there clearly was doubt as to whether notification had been dispensed with and, consequently, there were fairly strong indications that the general rule should have applied (*cf Dietrichsen v Dietrichsen* 1911 TPD 486 494; *Driftwood Properties (Pty) Ltd v McLean supra* 597C-G; *Remini v Basson supra* 211G-212D; Christie 69; and Van der Merwe *et al* 67-68).

### 4.3 Policy considerations

Despite the anomalies pointed out above, the approach of the court, in determining the issue of whether notification of acceptance was required in the circumstances, is not without reason. In this respect Scott JA referred to the sentiments of Grosskopf AJ (as he then was) in *Reid v Jeffreys Bay Property Holdings (Pty) Ltd (supra* 137D-G) (509C-F):

“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; and *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 is 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*” (Scott JA’s translation).

Scott JA approved of this view in the following manner (509F-G):

“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.”

In essence then Scott JA justified his approach on the basis that it accorded with common sense and commercial practicalities, and promoted certainty and deterred litigation. These are indeed legitimate concerns of the law of contract and are derivatives of the one branch of "market-individualism", an ideology central to the modern concept of contract (see generally Adams and Brownsword *Understanding Contract Law* 4ed (2004) 189-194; and Pretorius "The Basis of Contractual Liability (1): Ideologies and Approaches" 2005 *THRHR* 253 258-261). Of particular interest for present purposes is that according to market theory the function of contract law is to facilitate competitive exchange by establishing the ground rules within which commerce can be conducted. This theory advocates that, aside from matters concerning procedural fairness in the conclusion of a contract, bargains should be adhered to and parties should be allowed to contract with minimal intervention and regulation (see Hawthorne "The Principle of Equality in the Law of Contract" 1995 *THRHR* 157 164-166; and *cf* Eiselen "Kontrakteer-vryheid, Kontraktuele Geregtigheid en die Ekonomiese Liberalisme" 1989 *THRHR* 516 526-529).

Market ideology further promotes the following values and principles: First, the security of transactions must be protected. When a party reasonably assumes that he has entered into a contract, then the law should defend that assumption. An objective approach to contractual intention reflects a concern for the security of transactions. Second, the ground rules of contract law must be clear to enable parties to plan their private transactions with the necessary circumspection. Thus certainty is of primary importance. Third, since contract law is essentially concerned with the facilitation of market transactions, the law should accommodate commercial practice. Therefore the rules of contract should not fall out of line with commercial practice. Fourth, many of the rules concerning contract formation are based on convenience, simply because contract is concerned with avoiding market inconvenience (Adams and Brownsword 189-191; and see generally Feinman "Critical Approaches to Contract Law" 1983 *UCLA LR* 829 839-840; Cockrell "Substance and Form in the South African Law of Contract" 1992 *SALJ* 40 41; and Atiyah *The Rise and Fall of Freedom of Contract* (1979) 402-404).

It is quite apparent that several of the market theory ideals mentioned above are consonant with the approach adopted by Scott JA. His judgment evidences a practical approach to solving the dilemma that arises when the parties have signed a contractual document *inter absentes* and the offeror relies on a lack of communication of acceptance to escape liability. A further consideration which possibly influenced the court's decision is that generally a party should not be permitted to indicate assent to, and then on a whim withdraw from an agreement, on the basis of what can amount to a technicality. At times the courts have been prepared to go to great lengths to hold a party to a contractual document which they have signed and apparently assented, but problems have arisen in regard to the technicalities of contract formation (*cf* Kahn "Some Mysteries of Offer and Acceptance" 1955 *SALJ* 246; and Pretorius "The Acceptance of an Offer Within the



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Context of the Alienation of Land Act: *Manna v Lotter* 2007 4 SA 315 (C)" 2009 *THRHR* 519).

It is also not uncommon for the courts to resort to entirely practical solutions to facilitate contract formation when problems arise regarding notification of acceptance. The general rule that a contract only arises once the offeror has been informed that his offer has been accepted by the offeree is encapsulated within the information theory, a further corollary to the will theory (Van der Merwe *et al* 55; Christie 68; Kerr 111; Joubert 45; and De Wet and Van Wyk 31). Probably the most infamous exception to the information theory is the expedition theory, which provides that where the offer and acceptance are sent by post, the contract arises at the place and moment of posting of the acceptance. This approach was adopted under the influence of English law in *Cape Explosive Works Ltd v South African Oil & Fat Industries Ltd* (1921 CPD 244) and confirmed in *Kerguelen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue* (1939 AD 487). Although in *Cape Explosive Works* the court acknowledged that theoretically the information theory accorded with the consensual approach to contractual liability, the expedition theory was the most satisfactory pragmatic way of determining the time and place of conclusion of postal contracts.

Whatever misgivings there may be regarding the expedition theory (see Van der Merwe *et al* 69-73; Christie 70-75; Kerr 118-122; Joubert 47-49; and Smith *Contract Theory* (2004) 188-192), it is suggested that it is based on practical convenience in the sense that it provides a clear answer (in the form of a default or supplementary rule) to difficulties that may arise on a rigorous application of the will theory to postal contracts (see generally regarding default rules Hawthorne "Contract Law's Hidden Architecture: The Hidden Role of Default Rules" 2009 *THRHR* 599). This theory plausibly translates into an objective approach to the conclusion of such contracts to promote certainty and efficiency (Adams and Brownsword 190; *cf* Cooke and Oughton *The Common Law of Obligations* 3ed (2000) 31; and De Wet and Van Wyk 39 fn 135). Similar considerations seem to underlie the approach adopted in *Withok*. Since the parties objectively indicated assent to a contract (by signing it *inter absentes*) the court was reluctant at a later stage to find that in fact no contract came into being when one party attempted to withdraw from the bargain. Possibly also underlying such an approach is the notion that 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 (*cf* Adams and Brownsword 195-196; *Turgin v Atlantic Clothing Manufacturers* 1954 3 SA 527 (T) 532; and Ismail 2008 *PER* 172).

## 5 Conclusion

The *Withok* decision deals with a situation that presents itself not that infrequently in positive law; namely where the parties respectively sign a contractual document *inter absentes* and there is no communication of acceptance by the offeree to the offeror. In tune with what is considered to be the primary basis of contractual liability, the will theory, contractual liability will only lie once acceptance has been communicated to the offeror and

conscious agreement exists, although the offeror may waive such notification. In the absence of an express waiver to that effect, all indications are that waiver should not lightly be inferred and that in the case of doubt the general rule should prevail. In *Withok* the court held that where the offer took the form of a written contractual document, which had been signed by the offeror, the inference would more readily arise in the absence of a contrary indication that the required mode of acceptance was the offeree's mere signature. In so doing the court opted for a generally objective approach to contract formation in such circumstances at the expense of the will theory, for apparently entirely practical reasons.

No doubt, from conceptual and interpretative viewpoints, some might be critical of such an approach, while others may be keen to point out that the conclusion reached in the circumstances was justified on the facts and does not entail a general statement of principle. It is suggested, however, that there is a strong possibility that this case will provide a convenient precedent when similar circumstances arise in future, and more recently in *Pillay v Shaik* (2009 4 SA 74 (SCA) 84E-F), the Supreme Court of Appeal referred to *Withok* seemingly with approval. Viewed from the perspective of the will theory and aspects of contractual interpretation, *Withok* probably makes little sense, but when considered in light of the court's concerns regarding commercial practicalities, certainty as to contractual terms and the avoidance of disputes, the decision reflects an objective approach to contract formation with strong affinities to market theory. Much the same as the expedition theory as applied within the context of postal contracts, it is suggested that the court effectively fashioned a rule that provides a resolution to circumstances where conscious agreement is lacking, but clearly both parties objectively have indicated assent (*inter absentes*) to the contract in question. Although of course the facts of every case will be decisive, *Withok* provides a clear solution to a conceptual and practical dilemma; and while such supplementary contractual rules may not always be fair from all angles, they are often designed for the specific purpose of resolving a problem, which the parties have not adequately catered for, to counteract uncertainty. Security and certainty are prominent concerns in contractual relations, and seen from this perspective, the approach suggested by *Withok* may not seem entirely fair or technically correct, but it does make sense.

On a final note, it appears that the court did not make a distinction between the acceptance of the offer and conclusion of the contract. At various intervals it referred to the issue of acceptance but never directly discussed conclusion of the contract when addressing the merits of the case. The trial court appropriately separated the issues of acceptance and communication of acceptance. In contrast, although the Supreme Court of Appeal commenced its enquiry in similar fashion, it focused materially on whether the offer was accepted within a prescribed time period and the issue of whether or not the offerees had accepted the offer by signing it (which incidentally also perhaps justifies the inference that from the outset the court anticipated waiver of notification before actually reaching such a finding). It therefore followed from the court's approach that once the offer was

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timeously accepted, the contract would simultaneously be concluded. Nevertheless, when a case of this nature presents itself, it is suggested that, from the perspective of conscious agreement, ideally the underlying enquiry should be whether a contract has been concluded and not just whether an offer has been accepted. The distinction between the manifestation of acceptance and its communication should be borne in mind. In light of the objective approach adopted by the court, however, the effective conflation of the elements of acceptance and notification is hardly surprising.

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*University of South Africa (UNISA)*