CASES / VONNISSE

AUCTION SALES "SUBJECT TO CONFIRMATION" AND FORMATION OF CONTRACTS

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

1 Background

The Supreme Court of Appeal's judgment in *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* (2009 2 SA 504 (SCA) ("*Withok*")) raises two important issues for property practitioners, the one relating to auction sales and the other to the formation of contracts. The dispute arose largely because of a badly drafted agreement of sale document, but the import of the judgment is such that it may be prudent for practitioners to revisit even their well-drafted standard form sale and lease documents. The facts were straightforward. Certain properties owned by the first and second appellants ("the sellers") were put up for sale at a public auction on 13 June 2006. The respondent, represented by one A, put in the highest bid, which the auctioneer accepted. Both A and the auctioneer signed a document entitled "Agreement and Conditions of Sale" ("the conditions of sale"), which set out the conditions relating to the auction. Clause 1 read 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."

Clause 20 read as follows:

> "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 thereof at the foot of this agreement. The seller, however, shall sign the conditions only upon confirmation of the sale."

The final page of the document signed by A and the auctioneer contained a confirmation clause worded as follows:

"I/we _____ in my/our capacity as the Seller:

HEREBY CONFIRM THE SALE ON THE CONDITIONS AS HEREIN SET OUT.

DATED AT _____ ON THIS _____ DAY OF _____ 2006

AS WITNESS:

1. .....
2. .....

_____

SELLER

SELLER'S TELEPHONE NUMBER: .....

SELLER'S FAX NUMBER: ....."

On 20 June 2006 the sellers' representative confirmed the sale in writing by adding his signature in the allotted space on the final page of the document. However, the confirmation of the sale was not communicated to the respondent within the time contemplated in clause 1. In fact, the respondent did not receive notice of the confirmation until some time early in July 2006.

The respondent did not wish to be bound by the sale and in due course applied for an order declaring the agreement to be of no force and effect. Its case was that the confirmation of the sale had not been communicated to it within the seven-day period contemplated in clause 1 of the conditions of sale, with the result that no agreement came into existence. The sellers, in turn, contended that the conditions of sale signed by the respondent and the auctioneer at the time of the auction constituted an agreement of sale subject to a suspensive condition, namely the confirmation of the sale by the sellers; the condition was fulfilled immediately upon the confirmation of the sale and without any need for it to be communicated to the respondent.

The only issue in dispute was whether or not the confirmation of the sale had to be communicated to the respondent within the seven-day period.

2 Judgment of the High Court and the Supreme Court of Appeal

The High Court (Rabie J) rejected the sellers' argument on the basis that the conditions of sale merely constituted an offer, which was open for acceptance by the sellers by the "confirmation" thereof. The court held that there was nothing in the offer expressly or impliedly indicating a mode of acceptance other than that required by common law, namely that the acceptance be communicated to the offeror. Accordingly, no sale came into existence since the sellers' acceptance had not been communicated to the offeror (respondent) within the seven-day period. The judge found support for his view in the second sentence of clause 20, which he interpreted to mean that it allowed for confirmation of the sale in another manner than by signing the agreement. In other words, confirmation of the sale and signing the agreement were not necessarily the same act: the sellers could confirm the sale in any manner they wished, but once they had done that they had to sign the agreement.

An appeal to the Supreme Court of Appeal followed.

The SCA (Scott JA, Lewis JA and Griesel AJA concurring) held, on the facts, that a valid sale had come into existence when the sale was confirmed by the sellers on 20 June 2006. The reasoning was as follows:

- The document in question had been poorly drafted. The language used in clause 1 was suggestive of a sale subject to a suspensive condition, stating as it did that the properties were "provisionally" sold "subject to confirmation by the seller". However, our law draws a distinction between a pure and a mixed potestative condition (*Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) 186F-J). A pure potestative condition (*eg*, "I will pay you R500 if I wish to do so") is invalid because its fulfilment depends entirely upon the unfettered will of the promissory. In the present case the alleged suspensive condition ("subject to confirmation") reserved to the sellers an unlimited choice whether or not to sell and gave rise to no obligation on their part whatsoever. In the circumstances no sale agreement came into existence at the time of the auction.
- The respondent had bound itself to keep its bid open for a period of seven days, and to that limited extent a binding contract (other than a sale agreement) had come into existence. The true nature of that contract was an option granted by the respondent to the sellers to sell the property on the terms and conditions set out in the conditions of sale. The expression "confirmation of the sale" in the conditions of sale therefore had to be construed as referring to the acceptance of an offer.
- At common law, unless the contrary is established, a contract comes into being when acceptance of the offer is brought to the notice of the offeror. However, an offer may expressly or impliedly indicate a specific mode of acceptance by which a *vinculum juris* will be established. In cases of

doubt it is presumed that the contract is completed only when the acceptance of the offer is communicated to the offeror. In each case it will be necessary to consider the terms of the offer to determine the mode of acceptance required. In the present case the confirmation clause on the final page of the offer constituted "the clearest indication" that the mode of acceptance was to be the signature of the sellers. It conveyed that upon signature by the sellers the document would serve as a recordal of the date and place of the "confirmation". There was nothing else in the conditions of sale suggesting that the acceptance had to be communicated to the respondent. In the circumstances a valid sale came into existence when the offer document was signed on behalf of the sellers on 20 June 2006, which was within the seven-day period referred to in clause 1.

- Rabie J had misconstrued the last sentence of clause 20. The sentence had to be read in context. The first sentence stipulated when the bidder was to sign, namely "immediately after the sale". The second sentence determined when the seller was to sign. It said in effect that he would sign only when he confirmed the sale (*ie*, accepted the offer), not before. The implication was therefore clear: the sale would 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 contemplated that their contract would be understood.

In arriving at its decision the court made the following observation:

> "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."

The court relied on the judgment of Grosskopf AJ (as he then was) in *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* (1976 3 SA 134 (C)), where the following was said:

> "Selfs waar skrif egter nie 'n noodsaaklike vormvereiste is nie, is skriftelike kontrakte alledaagse verskynsels in ons handelsverkeer. Die doel van skriftelike verlyding (hetsy vrywillig, hetsy as statutêre vormvereiste) is gewoonlik om sekerheid en gerief van bewys te bevorder (vergelyk, bv, *Woods v Walters* 1921 AD 303; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A)). Dit is vermoedelik om dieselfde rede dat die datum en plek van ondertekening normaalweg in geskrewe kontrakte aangedui word. Ondertekening van 'n geskrewe kontrak is die gewone manier waarop die partye hul instemming daartoe aandui en sekerheid omtrent die plek en datum van kontraksluiting kan van ewe groot belang vir die partye wees as sekerheid omtrent die inhoud van die kontrak.
>
> Dit is gevolglik inherent onwaarskynlik dat enige van die partye tot so 'n kontrak sou bedoel dat die tyd en plek van kontraksluiting nie bepaalbaar uit die stuk self sou wees nie, maar deur getuienis *aliunde* bewys sou moet word."

Scott JA endorsed these views and found them to accord "with common sense and commercial practicalities". The judge of appeal expressed his opinion as follows:

> "(I)f 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."

The judgment of the Supreme Court of Appeal cannot be faulted. It is appropriate, however, to place in context the court's observations regarding auction sales "subject to confirmation" ("STC"), and to comment on the decision in so far as it relates to the acceptance of an offer.

3 The nature of an auction sale "subject to confirmation"

An auction has been described as a "form of competitive bargaining with the object of a contract of sale resulting carried out in accordance with certain rules" (*Estate Francis v Land Sales (Pty) Ltd* 1940 NPD 441; and *Frank R Thorold (Pty) Ltd v Estate Late Beit* 1996 4 SA 705 (A)). The "rules" are the conditions of sale, framed by the seller to represent the terms upon which he is prepared to submit his property to competition (*Estate Francis v Land Sales (Pty) Ltd supra*; and *Frank R Thorold (Pty) Ltd v Estate Late Beit supra*). The conditions of sale bind the seller, auctioneer and bidders (*Frank R Thorold (Pty) Ltd v Estate Late Beit supra*; and *Springfield Omnibus Service Durban v Peter Maskell Auction* 2006 4 SA 186 192A-F).

Generally, auctions are classified as being with or without reserve. A "with reserve" auction is usually (but not always) defined as an auction where the seller has set an undisclosed reserve amount on the property, with the result that the auctioneer may not accept any bid unless it meets or exceeds the reserve (http://www.aucor.com/default.asp?SCR=19). It is also sometimes described as an auction "where property may be withdrawn from the auction up to the point in time where the auctioneer has accepted a high bid and declared it to be sold" (http://vcpm-usa.com/auctioneer_Q&A.html). A "without reserve" auction (also known as an "absolute auction") is an auction where the auctioneer is bound to accept the bid made by the highest bidder provided the latter acted in good faith (*Shandel v Jacobs* 1949 1 SA 320 (N)). A STC auction is usually defined as an auction where the conditions of sale stipulate that the seller has the right within a stated period to confirm (accept or reject) the highest bid accepted by the auctioneer at the auction (http://www.bonnetteauctions.com/faqs.php). It has been described as a "nifty way of selling" especially where the seller is not quite sure of the value of the property (http://www.aucor.com/default.asp?SCR=19).

Whether there is a substantive difference between an auction with reserve and a STC auction appears to be not entirely settled. From a business perspective both afford the seller an opportunity to escape from selling the auctioned property to the highest bidder. In the case of a "with reserve"

auction there will be no sale if the highest bid does not match the seller's reserve, while in the case of a STC auction the seller can walk away from the sale by simply not confirming the highest bid for whatever reason. The National Auctioneers Association (an association representing the interests of almost 5 000 auctioneers in the United States, Canada and across the world) sees no difference between the two at all. It defines a "reserve auction" as follows:

> "An auction in which the seller retains the right to establish a minimum price, to accept or decline any and all bids or to withdraw the property at any time prior to the announcement of the completion of the sale by the auctioneer (also known as 'auction with reserve' and 'auction subject to confirmation')."

Based on this definition it has been said that "there is no meaningful difference between selling real estate at an auction with a reserve or selling it at an auction subject to confirmation" since both these auctions are known as "reserve auctions": Bachman and Burkhardt "Auction types (Absolute, Sealed Bid, Reserved)" 2008 *Auctioneer* (special edition) 11. On the other hand, it has also been stated that when a property is sold subject to confirmation "this is not a reserve, but merely a formality to protect sellers and creditors from having secured assets being sold well below their market value" (http://www.alliancebusinessbrokers.co.za/auction/education/faq.php). Another view is that a STC auction is simply a derivative of a "with reserve" auction, the main difference being that in the case of a "with reserve" auction the auctioneer is not obliged to accept any bid, while in the case of a STC auction the auctioneer does accept a bid but the seller is entitled to accept or reject the bid within the confirmation period (see http://vcpm-usa.com /auctioneer_Q&A.html).

It is submitted that a clear distinction ought to be drawn between the two types of auctions. The essential differences are the following:

(a) In the case of an auction with reserve the auctioneer is neither entitled nor obliged to accept the highest bid if it fails to match the seller's reserve. On the other hand, in the case of a STC auction the auctioneer is bound to accept the highest bid (subject to the conditions of sale), which must then be submitted to the seller for "confirmation".

(b) Unless the conditions of sale state otherwise, acceptance of the highest bid in the case of an auction with reserve results in the conclusion of a sale agreement since the bid matches or exceeds the seller's reserve price. However, there is no sale upon acceptance of the highest bid in the case of a STC auction until the seller has confirmed the sale.

Seen in this context an auction can thus be both "with reserve" and "subject to confirmation", that is, the conditions of sale may stipulate that:

(a) the auctioneer may refuse any bid (including the highest) and may without giving any reason withdraw the property from the sale either before or after it has been put up for auction; and

(b) any bid accepted by the auctioneer is subject to confirmation by the seller.

(See http://www.skyproperties.co.za/conditions_auctions.html). The practical effect of such an auction is that the auctioneer will accept no bid unless it matches or exceeds the seller's reserve price. No bidder has any chance of acquiring the property unless the bid equals or beats the reserve price. If a bid is accepted, the bidder knows that at least the minimum price required by the seller has been met. Still, there is no sale on the fall of the hammer. The seller has an opportunity to reconsider or evaluate the proposed sale and may refuse to go ahead with the transaction for whatever reason. There will only be a sale if the seller confirms the sale within the period stipulated in the conditions of sale.

At an auction each bid constitutes an offer open for acceptance by the auctioneer, such acceptance being signified by the fall of the hammer (*Springfield Omnibus Service Durban v Peter Maskell Auction supra* 192). In terms of section 3 of the Alienation of Land Act 68 of 1981 the sale of land at an auction need not be in writing to be valid, with the result that, in the case of an auction sale of land with or without reserve a sale will ordinarily be concluded when the auctioneer accepts a bid, unless the conditions of sale state otherwise. The amount of the bid constitutes the purchase price and the terms of the sale are those contained in the conditions of sale. However, applying the approach adopted in *Withok* the same does not apply to STC auctions since the condition stating that the sale is subject to the seller's confirmation is a pure potestative condition, that is, its fulfilment depends entirely on the unfettered will of the seller. This requires closer examination. Although the distinction between a potestative and mixed condition may not always be easy to draw in practice there can be no doubt that there is no sale agreement if the "sale" is subject to the condition that the seller will decide whether or not to sell (*Benlo Properties (Pty) Ltd v Vector Graphics (Pty) Ltd supra* 186F-G). A distinction is nevertheless drawn between mere volition and a discretion, the exercise of which does not depend entirely upon the will of a party: Van der Merwe *et al* (*Kontraktereg* 3ed (2007) par 8.4). The rule that the determination of a party's performance may not be left to one of the parties should be confined to the situation where the determination depends entirely upon the unfettered will of that party (*Benlo Properties (Pty) Ltd v Vector Graphics (Pty) Ltd supra*). A sale "subject to confirmation" does not entail the exercise of a discretion not depending entirely upon the will of a party: whether or not the sale will be confirmed depends entirely upon the unfettered will of the party who is to decide whether or not to confirm. The approach in *Withok* is therefore clearly correct, namely that where an auctioneer accepts a bid at a STC auction this does not constitute a sale agreement subject to a suspensive condition. There is no sale agreement at all; there will only be a sale once the seller accepts (confirms) the bid.

This begs the question: what is the nature of a STC auction? In *Withok* the conditions of sale stipulated that the buyer was bound to his bid for

seven days, and based on that the Supreme Court of Appeal held the bid to constitute an option granted by the bidder to the seller to sell on the terms set out in the conditions of sale and at the amount of the bid. This approach cannot be faulted. An option granted by a purchaser to a seller comprises two offers: the offer to purchase (described by Van Rensburg and Treisman *The Practitioner's Guide to the Alienation of Land Act* 2ed 1984 as the "substantive offer"), coupled with an offer to keep the substantive offer open for a stated period. The option comes into existence if the seller or his agent accepts the second offer. Accordingly, in the case of a STC auction where the conditions of sale oblige a bidder to keep his bid open for a stated period, no sale agreement is concluded when the auctioneer accepts a bid. What the auctioneer accepts is the offer to keep the bid open, and upon such acceptance an option contract comes into existence. The sale agreement is only concluded if and when the seller exercises the option by confirming the sale within the agreed period and in the manner stipulated in the conditions of sale.

Withok affords an easy explanation for STC auctions where bidders are bound to keep their bids open for a stated period. It is difficult to imagine a STC auction where the conditions of sale would not impose such an obligation on bidders: it would defeat the very object of a STC auction if a bidder would be allowed to revoke his offer to purchase (the substantive offer) freely at any time prior to confirmation by the seller. In the rare situation where this would be permitted in terms of the conditions of sale, it is submitted that a bid accepted by the auctioneer would amount to no more than an undertaking by the auctioneer to submit the bid to the seller. Acceptance of the bid would not constitute a sale agreement for the reasons mentioned earlier, and would not constitute an option since the bidder has not undertaken to keep his bid open for a stated period.

4 Notification of acceptance

As stated in *Withok*, it is a trite principle of 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. An offeror may indicate expressly or impliedly a different mode of acceptance, and in cases of doubt it is presumed that a contract is completed only when the acceptance of the offer is communicated to the offeror. Case law offers some examples:

(a) In *Driftwood Properties (Pty) Ltd v McLean* (1971 3 SA 591 (A)) an offer to purchase contained a clause reading 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". Given this wording the Appellate Division (as it was then known) held that a binding sale agreement had been concluded when the offeree signed the acceptance (this had been done before 17 May 1969) and that there was no need for this to be communicated to the offeror.

(b) In *Reid v Jeffreys Bay Property Holdings (Pty) Ltd (supra)* the agreement of sale stipulated that a deposit would be payable "on the signing of these presence" and the balance "within 20 years from date of signature hereof". The seller was empowered to transfer the property to the purchaser "on the signature hereof if a mortgage bond could be arranged for the balance". Interest was payable on the purchase price "from the date of signing hereof" and possession of the property was given to the purchaser "from the date of the signing of these presence". The court held that these clauses taken together conveyed that a binding contract would be concluded the moment the offeree signed his acceptance and not when notice of the acceptance reached the offeror. In arriving at its decision the court pointed out that where the date and place of a party's signature are stated in a written document the purpose thereof is to have certainty as to the place and date of the conclusion of the contract (see the relevant passage quoted above).

Withok, it seems, takes the matter one step further. The SCA expressly held that where an offer takes the form of a written contract signed by the offeror, the inference will more readily arise that the mode of acceptance required is no more than the offeree's signature, unless there are indications to the contrary. According to the court, this is particularly so where the written contract contains a space for the offeree to specify the date on which he or she signs. The tenor of the judgment is that in all instances where a written offer document signed by the offeror contains a space for the offeree to state the date on which he signs the acceptance, the normal rule would be that the offer is accepted upon signature by the offeree; the common law will only apply if there are indications in the offer document that the parties intended it to apply.

Although *Withok* dealt with the formation of a sale agreement pursuant to a STC auction, the judgment is not confined to auction sales but applies to all written contracts containing spaces for the date when the offeree signs. Standard form sale documents used by property practitioners in the property industry invariably contain spaces for signatures and dates, and the procedure normally followed is for the buyer to sign and date the offer to purchase, upon which the document is presented to the seller for consideration. If the seller wishes to accept the offer he does so by signing the document and inserting the date upon which this is done. On the approach in *Withok*, sales brought about in this fashion are concluded immediately when the seller signs, unless there are indications in the agreement that the common law is to apply, namely that the contract would come into existence only when the buyer is notified of the acceptance.

The judgment in *Withok* was materially informed by the decision in *Reid v Jeffreys Bay Property Holdings (Pty) Ltd (supra).* The latter judgment, however, has not escaped judicial criticism. In *Hawkins v Contract Design Centre (Cape Division)* (1983 4 SA 296 (T)) Flemming J, in a minority judgment, had the following to say about *Reid*:

> "It seems to me that this reasoning (in *Reid*) would apply to any written contract with an execution clause. If so, it is difficult to see why in any such a case the appropriate conclusion would not be that communication of acceptance is not necessary. However, in the absence of proof that an execution clause was inserted with the intention that that in itself should prove the date and place of conclusion of the contract, such an intention may not, I believe, be presumed. Apart from the possibility that such clauses, similar to the reservatory clause in wills, is a left-over of times of more formal practices, I think that most practitioners would regard such a clause simply as an unnecessary aspect but at the same time one of good and proper form. It may sometimes or frequently be intended to facilitate proof of the fact of signature. However, from a clause which does not profess to deal with the question as to when the document becomes a binding contract but merely with the different question of where the signature was appended, I do not think it should be inferred that it is in fact dealing with the question about the time and place of the document obtaining a binding effect. That the time and place of signature or of conclusion of the contract can possibly be of equal importance as certainty about the contents of the contract, seems to me an unacceptable basis on which to conclude, without evidence to that effect, that the parties in fact intended their statements to be conclusive so as to negate the ordinary principles of assessing the time and place of conclusion of the contract. Perhaps it is improbable that the parties intended extraneous evidence as to the time and place of signature of the document but that remains a distinct question from the time and place of conclusion of the contract."

Not everyone would necessarily agree with the view that execution clauses in standard form sale agreements are "a left-over of times of more formal practices". True, it may be difficult to be convinced that a purchaser of immovable property, by inserting a space in the offer document for the seller to record the date of his acceptance, thereby expresses an intention to forego the common law right to be notified of the acceptance of the offer. But why would the purchaser require the seller to date his signature if the date of conclusion of the contract is intended to be the date when the buyer is notified of the acceptance? What purpose would it serve to know on what date the seller signed the document, if the intention was not that the date of the seller's signature constitutes the date of conclusion of the agreement?

It is submitted that *Reid* was correctly decided. However, it is also submitted that the court's reasoning in that case was not entirely convincing. The court did not consider it a "serious irregularity" for a purchaser to be contractually bound to the sale before he receives notice of the acceptance of his offer. Grosskopf AJ (as he then was) pointed out that agreements are often concluded *inter absentes* in a manner whereby one party only finds out later that the agreement has in fact been concluded, and that where an agreement comes into existence upon the seller signing his acceptance, the purchaser would have a "legitimate expectation" that he would be notified of this without undue delay. Grosskopf AJ reasoned that the seller would do this normally since it would be in his (seller's) interest to enforce the buyer's obligations as soon as possible. This may well be true in some instances, but not all. Sellers are not necessarily always and in all instances keen to notify the buyer that the contract had been concluded. It is an unfortunate fact that not all sellers of immovable property are persons of integrity and an unscrupulous seller wishing to buy time to see if the property can be sold at a higher price may sign the acceptance of the offer but then not notify the

buyer until it becomes clear that a higher offer will not materialise. This may have serious implications for the buyer where the agreement of sale imposes certain duties on the buyer to be performed within a certain period after acceptance of the offer. Take the case where the agreement of sale stipulates that the buyer is to furnish guarantees within 30 days after conclusion of the contract. The seller signs the acceptance but only notifies the buyer of this 20 days later, with the result that the buyer now has ten days to furnish guarantees, failing which he would be in breach of contract. Depending on how the contract is worded, this may entitle the seller to cancel and claim damages.

An offeree (seller) would obviously find it convenient not to be burdened with the duty of notifying the offeror (buyer) that the offer had been accepted. It must be kept in mind, however, that where a contract comes into existence upon the date when the seller signs the acceptance, the practical implication is that when the seller signs only he or she, and not the buyer, knows that a binding agreement has been concluded. Accordingly, where an agreement of sale is concluded upon mere signature by the seller, a buyer who has not been notified of the acceptance at the expiry date of the offer would be well advised to make enquiries about the outcome of the offer since failure to do so may put him or her at risk. His duty to perform may have arisen without him or her knowing about it.

The practical outcome of *Withok* is that in cases of all written contracts containing a space for the date of the offeree's signature, an offeror wishing to be notified of the acceptance as a requirement for the formation of the contract should include a clause to this effect in the agreement. Common law prescribes no specific formalities for the manner in which the offeror is to be notified of the acceptance. Theoretically, a telephone call would suffice. However, from a business practice point of view the best approach would be to stipulate in the agreement that notification has to be done by way of submitting to the offeror a copy of the signed agreement as accepted by the offeree, on or before a certain date, failing which there would be no sale.

Withok raises a further issue, relating to the date of the offeree's signature. Where an offer document signed by the purchaser (offeror) contains a date for the seller's acceptance, the date of the seller's signature becomes significantly important. As was stated by Scott JA, the very purpose of allocating a space in a written contract for the date of the seller's acceptance is to avoid disputes as to the date upon which the offer was accepted. Disputes will be avoided only if the seller inserts the date of his signature, and does so correctly. In practice, however, especially in the case of residential sales handled by estate agents, sellers often sign their acceptance but forget to insert the date, or insert the wrong date. In terms of the Alienation of Land Act the seller's signature is an essential requirement for the formation of an agreement of sale of land, but it is not a requirement that the date be inserted into the agreement unless the date is a material term of the contract. Based on what was said in *Reid v Jeffreys Bay Property Holdings (Pty) Ltd (supra)* (and confirmed in *Withok*), namely that "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", it may be argued that when an offeror leaves a space for the date of the offeree's signature, the offeror thereby indicates that the date of the seller's signature is material to the agreement since the date of the signature is the date when the contract comes into existence. In other words, by leaving a space for the offeree's signature and date thereof, the offeror in effect conveys that he or she wishes to have certainty about the date upon which the contract is concluded. This begs the question: what happens if the date of the signature was left blank by the seller, or a wrong date was filled in? These issues were not debated in *Withok*, but will undoubtedly require the attention of the courts in due course.

5 Conclusion

From a practitioner's point of view the impact of *Withok* may be summarised as follows:

1 The standard pre-printed execution clause in offer to purchase documents used for the conclusion of property sales and leases in practice is now to be construed as meaning that the contract is concluded when the seller signs his acceptance, and not when the buyer is notified of the acceptance, unless the contract contains a clear indication to the contrary.

2 It is not clear what the position would be if the seller signs the acceptance but omits to fill in the date, or fills in the wrong date. To avoid disputes it would be advisable to make sure that the date is in all instances inserted at the time when the seller signs.

3 Where the contract is concluded upon signature by the seller the onus would be on the purchaser to make enquiries as to whether or not his or her offer has been accepted. Failure to do so would expose the purchaser to the risk that he or she is contractually bound to render certain performances within a stated period after the seller's signature, while not knowing that the contract has in fact come into existence.

4 In cases where it is considered prudent that the contract should come into being only when the offeror is notified of the acceptance, it would be best to include a clearly worded clause to this effect in the offer, for example stating that the offer lapses unless the offeror is given a copy of the offer signed and dated by the seller on or before a certain date.

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