THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No:006/08

SELVIN PILLAY First Appellant
MAKGALA SOLOMON MOTLANTHE Second Appellant

and

IQBAL SHAIK First Respondent
EDWARD JOHN HAMMOND Second Respondent
MAURICE LESLIE WENHAM Third Respondent
LUCA GIOVANNI LIVIERO Fourth Respondent
AHMED SAEED VAWDA Fifth Respondent
MICHAEL HUGH BLAKE Sixth Respondent
SWALEDALE 9 INVESTMENTS CC Seventh Respondent
MTR TRADING CC Eighth Respondent
MOONEY FORD ATTORNEYS Ninth Respondent
DUSKY DOLPHINS
SHAREBLOCK (PTY) LTD Tenth Respondent
THE REGISTRAR OF COMPANIES AND
CLOSE CORPORATIONS, PRETORIA Eleventh Respondent
THE REGISTRAR OF DEEDS,
PIETERMARITZBURG Twelfth Respondent

Neutral citation: *Pillay v Shaik* (006/08) [2008] ZASCA 159 (27 November 2008)

Coram: FARLAM, LEWIS, JAFTA, MAYA JJA et KGOMO AJA

Heard: 3 NOVEMBER 2008
Delivered: 27 November 2008

Summary: Contract – formalities – whether agreements of sale between parties invalid because prospective seller did not sign – application of doctrine of quasi-mutual assent.

ORDER

On appeal from: the Pietermaritzburg High Court (Nicholson, K Pillay and Madondo JJ sitting on appeal from a judgment of the Durban High Court (Balton J))

The following order is made:

A The appeal against the order of the court *a quo* is upheld with costs including the costs of two counsel.

B The order of the court *a quo* is set aside and replaced by an order in the following terms:

'1 Subject to the order made in paragraph 2, the appeal is dismissed with costs, including the costs of two counsel.

2 The order made in the court *a quo* is set aside and replaced by an order in the following terms:

"(a) The following order is made in case no 690/2004:

1. An order is granted declaring the agreement between the first to sixth defendants ("the sellers") and the plaintiff ("the purchaser") for the purchase of the entire members' interest in and to the seventh defendant to be of full force and effect and binding between the parties, with terms as set out in the document annexed as annexure "A" to the plaintiff's declaration with the seventh defendant being reflected as the close corporation referred to in that document, the sellers' acceptance of the agreement having taken place by conduct, instead of signature.

2 An order is granted directing the sellers to comply with their obligations under the sale agreements and in particular, they are ordered and

directed to deliver and hand over to Mooney Ford Attorneys in trust, the documents set out in paragraphs 8.1.1.1 to 8.1.5 (inclusive) of the sale agreement in respect of the seventh defendant.

3 An order directing the sellers to bring about the state of affairs warranted in clauses 9.1 to 9.6 (inclusive) of the sale agreement (in particular by ensuring that the sectional title unit referred to in the sale agreement is owned by the seventh defendant at the date of transfer of the members' interest to the purchaser).

4 In the event of the sellers' failing to comply with the order contained in paragraphs 2 and 3 hereof, or any one of those paragraphs, then the purchaser is given leave to deliver an application to this court, on the same papers, supplemented in so far as may be necessary, for an order:

(a) declaring the sellers to be in contempt of court;

(b) for their committal to prison for contempt of court.

5 In addition, in the event of the sellers' failing to comply with paragraphs 2 and 3 of this order, the Sheriff of Durban is authorised to do all things necessary, in so far as the sellers are concerned, to cause the actions contained therein to be fulfilled.

6 In the event of the sellers' failing to comply with the orders contained in paragraphs 2 and 3 hereof, and the purchaser's failing to obtain the transfer contemplated in paragraph 5 hereof within a reasonable period of time from the granting of this order, then the sellers shall be liable, jointly and severally, the one paying the other to be absolved, on application by the purchaser, on the same papers supplemented in so far as may be necessary, to pay damages in an amount to be determined by the court, together with return of the deposit paid by the purchaser together with interest thereon at the legal rate of 15.5% *per annum* from due date to date of payment.

7. The sellers are ordered to pay the purchaser's costs of suit.

(b) The following order is made in case no 19979/04:

1 An order is granted declaring the agreement between the first to sixth defendants ("the sellers") and the plaintiff ("the purchaser") for the purchase of the entire members' interest in and to the seventh defendant to be of full force and effect and binding between the parties, with terms as set out in the document annexed as annexure MM2 in the application papers (in the form referred to in the Plaintiff's replying affidavit) with the seventh defendant being reflected as the close corporation referred to in that document, the sellers' acceptance of the agreement having taken place by conduct, instead of signature.

2 An order is granted directing the sellers to comply with their obligations under the sale agreements and in particular, they are ordered and directed to deliver and hand over to the eighth defendant in trust, the documents set out in paragraphs 8.1.1.1 to 8.1.5 (inclusive) of the sale agreement in respect of the seventh defendant.

3 An order directing the sellers to bring about the state of affairs warranted in clauses 9.1 to 9.6 (inclusive) of the sale agreement (in particular by ensuring that the sectional title unit referred to in the sale agreement is owned by the seventh defendant at the date of transfer of the members' interest to the purchaser).

4 In the event of the sellers' failing to comply with the order contained in paragraphs 2 and 3 hereof, or any one of those paragraphs, then the purchaser is given leave to deliver an application to this court, on the same papers, supplemented in so far as may be necessary, for an order:

(a) declaring the sellers to be in contempt of court;

(b) for their committal to prison for contempt of court.

5 In addition, in the event of the sellers' failing to comply with paragraphs 2 and 3 of this order, the Sheriff of Durban is authorised to do all things necessary, in so far as the sellers are concerned, to cause the actions contained therein to be fulfilled.

6 In the event of the sellers' failing to comply with the orders contained in paragraphs 2 and 3 hereof, and the purchaser's failing to obtain the transfer contemplated in paragraph 5 hereof within a reasonable period of time from the granting of this order, then the sellers shall be liable, jointly and severally, the one paying the other to be absolved, on application by the purchaser, on the same papers supplemented in so far as may be necessary, to pay damages in an amount to be determined by the court, together with return of the deposit paid by the purchaser together with interest thereon at the legal rate of 15.5% *per annum* from due date to date of payment.

7 The sellers are ordered to pay the purchaser's costs of suit.'"

JUDGMENT

FARLAM JA (Lewis, Jafta,Maya JJA et Kgomo AJA concurring)

[1] During 2002 the first to sixth respondents, Messrs Shaik, Hammond, Wenham, Liviero, Bowda and Blake (whom I shall call in what follows 'the developers'), marketed to members of the public interests in a sectional title property development, known as the Lazy Lizard, situated at Umdloti on the North Coast of KwaZulu-Natal. Each unit in the development was to be owned by a close corporation. The member's interests in each of these close corporations were offered for sale. The developers caused standard form documents to be drawn up for completion by prospective buyers and they also prepared a schedule setting forth the prices at which the interest in each close corporation was to be sold. The prices fixed varied, depending on the unit which each

close corporation was to own. Although all six developers were to be parties to the contracts of sale, the first to fifth respondents were at all times represented by the sixth respondent, Mr Michael Hugh Blake.

[2] Goldprop Umhlanga CC, a firm of estate agents trading as Pam Golding Properties, were appointed together with another firm of estate agents to market the development. The ninth respondent, Mooney Ford, a firm of attorneys, acted at all times as the developers' attorneys. (Although Mooney Ford was cited as a respondent in the applications which were referred for trial no relief was given against it and it did not participate in the appeals to the full bench or to this court.)

[3] The first appellant, Mr Selvin Pillay, and the second appellant, Dr Makgala Solomon Motlanthe, decided to buy into the development. On 18 June 2002 Mr Pillay signed one of the standard form agreements and offered to buy for R699 000 the member's interest in the close corporation to which unit 402 was to be allocated. On 22 April 2002 Dr Motlanthe signed a standard form agreement and offered to buy for R709 000 the member's interest in the close corporation to which unit 502 was to be allocated.

[4] Subsequently, after unit 402 had been allocated to the seventh respondent, Swaledale Investments CC, and unit 502 to the eighth respondent, MTR Trading CC, disputes arose between the developers and Mr Pillay and Dr Motlanthe as to whether the

offers made by them had been accepted on behalf of the developers.

[5] On 26 January 2004 Mr Pillay brought an application against the developers, Swaledale Investments CC, Mooney Ford, the eleventh respondent (the Registrar of Companies and Close Corporations) and the twelfth respondent (the Registrar of Deeds, Pietermaritzburg). In this application he sought orders, *inter alia,* interdicting and restraining the registration and/or transfer of the membership interest in and to Swaledale Investments CC to any person and/or entity apart from himself, interdicting and restraining the transfer of unit 402 in the development to any person and/or entity apart from himself or Swaledale Investments CC, and declaring that the agreement allegedly concluded between the developers (as sellers) and himself (as purchaser) for the purchase of the entire member's interest in and to Swaledale Investments CC to be of full force and effect.

[6] On 28 January 2004 an interim order was granted interdicting and restraining the respondents from transferring any membership interest in Swaledale Investments CC and from registering transfer of proposed unit 402 to any person or entity pending the final determination of the application. Thereafter an opposing affidavit was filed on behalf of the developers and Swaledale Investments CC and a replying affidavit on behalf of Mr Pillay.

[7] On 31 May 2004 the matter was referred to trial on a date to

be arranged with the registrar and it was ordered that the interim order granted on 28 January 2004 was to remain operative *pendente lite.* It was further ordered that the application was to stand as the summons and the opposing affidavit as the appearance to defend. Mr Pillay was directed to file a declaration within a certain period and the developers directed to file a plea within a further period after service of the declaration. The order also provided that the pleadings would be deemed to be closed if Mr Pillay failed to file a replication within a certain period after service of the plea.

[8] In December 2004 an application similar to that brought earlier by Mr Pillay was brought by Dr Motlanthe against the developers, MTR Trading CC, Mooney Ford, the registrars who had been cited in Mr Pillay's application and the tenth respondent, Dusky Dolphin Shareblock (Pty) Ltd, the owner of the land on which the Lazy Lizard scheme was being developed. This application related to the member's interest in MTR Trading CC, which Dr Motlanthe alleged had been sold to him by the developers, and unit no 502.

[9] An interim interdict was granted on 22 December 2004. Thereafter an answering affidavit was filed on behalf of the developers and MTR Trading CC and a replying affidavit on behalf of Dr Motlanthe. Subsequently an order was made by consent referring the matter to trial, providing that the founding papers were to stand as a single summons and directing that a declaration, plea and replication should be filed within certain periods, that a Rule

37 conference be held on a fixed date and that the parties make discovery by a date 15 days thereafter.

[10] The applications brought by Mr Pillay and Dr Motlanthe were consolidated and the consolidated trial proceeded before Balton J in the Durban High Court. She gave judgment in favour of Mr Pillay and Dr Motlanthe. There is an error in her judgment because after stating that she was granting judgment in their favour she proceeded in the paragraphs following to make orders only in respect of the relief sought by Mr Pillay and made no orders relating to the relief sought by Dr Motlanthe.

[11] No relief was granted against Dusky Dolphins Shareblock (Pty) Ltd, the Registrar of Companies and Close Corporations, and the Registrar of Deeds, Pietermaritzburg, and they also did not participate in the appeals to the full bench or to this court.

[12] The developers and the two close corporations appealed to the Full Bench of the Pietermaritzburg High Court which allowed the appeal, with costs and made certain ancillary orders relating to costs which it is unnecessary to detail. The judgment of the full bench was delivered by Nicholson J, with whom K Pillay and Madondo JJ concurred. The learned judge found that as the alleged agreements of sale on which Mr Pillay and Dr Motlanthe relied were not signed on behalf of the alleged sellers, the developers, they were not binding. He came to this conclusion because he found that it was the intention of the parties that the agreements would be binding only when signed by the sellers. This

finding rendered it unnecessary for him to consider the question on which the judgment of Balton J was based, namely whether on the application of the doctrine of quasi-mutual assent the agreements in question were binding.

[13] The present appeal is before us with special leave granted by order of this court.

[14] During the course of the trial it became clear that the material facts are not in dispute and I shall endeavour to summarise them as briefly as possible.

[15] The copies of the standard form agreement signed by Mr Pillay and Dr Motlanthe were handed to representatives of Pam Golding Properties. In July 2002 Mr Pillay arranged, with the consent of Mooney Ford, for his deposit of R104 850 to be paid to them by a firm of attorneys in Pretoria who were handling another property transaction for him. By letter dated 19 November 2002 Mooney Ford acknowledged receipt of the deposit. Dr Motlanthe's deposit of R106 350 was paid into Mooney Ford's trust account on 23 April 2002, the day after he signed the standard form agreement.

[16] The standard form agreement, which as I have said was drawn up for the developers, was headed 'Agreement for the Purchase of a member's interest in a Close Corporation (owning a sectional Title Unit).'

[17] Clause 5.1 provided for the deposit to be paid to Mooney Ford within seven days 'of signature hereof by the parties to this agreement'.

[18] Clause 8 provided that the sellers would as soon as reasonably possible 'after the date of signature of this Agreement' deliver to Mooney Ford in trust, pending fulfilment by the purchaser of his obligations to pay the full purchase price, certain documents.

[19] Clause 15 provided as follows:

'15.1 This agreement constitutes the sole and exclusive memorial of the agreement between the Seller and the Purchaser and no alteration, variation, deletion or consensual cancellation hereof shall be binding on either the Seller or the Purchaser unless reduced to writing and signed by both parties;

15.2 No waiver by either party of any of such party's rights under this agreement shall be binding on such party unless such waiver is reduced to writing and signed by the party effecting such waiver;

15.3.1 Any dispute arising from this contract notwithstanding that the amount of the dispute may exceed the jurisdiction of the Magistrates' Court may be referred to the Magistrates' Court having jurisdiction over the parties and by their signature hereto the parties give their consent in writing to submit to the jurisdiction of the Magistrates' Court.'

[20] At the end of the document there was provision for the parties and their witnesses to sign, separate demarcated positions being made available for the signatures of the purchaser and the seller.

[21] On 24 April 2002, that is the day after Dr Motlanthe paid his

deposit, Pam Golding Properties wrote to him stating that they had pleasure in enclosing for his records a copy of the agreement of sale in respect of unit 502, confirming receipt of his deposit, calling for guarantees for the balance of the purchase price and thanking him for purchasing the property.

[22] On 26 April 2002 Mooney Ford wrote to Dr Motlanthe confirming that they held the deposit of R106 350 which would be invested in an interest bearing account on his behalf and requesting him to arrange a guarantee in their favour for R359 000 for the balance of the purchase price.

[23] As the signed offer which Dr Motlanthe had sent by telefacsimile transmission to Pam Golding Properties was illegible (because their fax machine was malfunctioning) he re-signed the agreement on 30 April 2002 and sent it by telefacsimile transmission to Mooney Ford, who wrote to him on 12 May 2002 confirming that they had received the re-signed agreement and requesting a guarantee for the balance of the purchase price.

[24] On 15 May 2002 Mooney Ford wrote to the sixth respondent, Mr Blake, attaching a copy of the latest schedule reflecting details of the purchasers of member's interests in close corporations to which units were to be allocated and confirming that the funds held by them by way of deposits paid by the purchasers totalled R1 933 102. The schedule reflected the name of Dr Motlanthe as a purchaser who had paid his deposit and indicated that the guarantee was still outstanding.

[25] On 28 June 2002 Mooney Ford wrote to Mr Pillay forwarding two pages of the agreement as replacement pagesfor initialling and return.

[26] On 16 July 2002 Mooney Ford sent Mr Blake a copy of a letter under cover of which they sent ABSA Bank Limited, the financiers of the development, an updated schedule of sales. The attached schedule listed, *inter alia,* unit 402 as having been sold to Mr Pillay and unit 502 as having been sold to Dr Motlanthe.

[27] On 24 July 2002 Mooney Ford wrote to Mr Pillay, confirming having requested him to fax a copy of the agreement signed by him and confirming that he would let them have payment of the deposit of R104 850.

[28] On 13 August 2002 Mooney Ford wrote a letter to Mr Pillay and advised him that Swaledale 9 Investments CC, the seventh respondent, was the close corporation to which his unit had been allocated.

[29] On 29 November 2002 Mooney Ford wrote to Dr Motlanthe confirming that they were in receipt of 'a copy of the signed agreement' and acknowledging receipt of his deposit of R106 350, which had been invested. They also stated that they had received confirmation from his investment advisers that they held funds sufficient to cover the balance of the purchase price. He was asked to provide copies of his identity document and marriage certificate.

These documents were clearly required, as the heading to the letter indicated, for the opening of the sectional title register of the development and the transfer of the member's interest in MTR Trading CC, the eighth respondent (to which unit 502 had been allocated), from the developers to him.

[30] On 6 January 2003 Mooney Ford wrote to Mr Blake attaching 'the latest schedule': this schedule included the sales to Mr Pillay and Dr Motlanthe, with details given of the purchase prices, the units, the close corporations to which they had been allocated and the deposits received.

[31] Copies of further schedules reflecting sales to Mr Pillay and Dr Motlanthe were sent to Mr Blake on 23 January 2003 and 3 February 2003.

[32] On 24 June 2003 Mooney Ford wrote to Dr Motlanthe stating that in terms of the contract signed by him the developers had requested them to address him in relation to the finishes of the fittings in unit 502 and that the provisional sum had been adjusted, based on the final prices received by the suppliers. They requested him to make arrangements for payment of the sum of R23 530 directly into their trust account.

[33] On 17 July 2003 Mooney Ford wrote to Dr Motlanthe confirming that they required a guarantee in the sum of R602 650 with the guarantee to be expressed as payable upon registration of the opening of the sectional title register and transfer of the

member's interest concerned to Dr Motlanthe.

[34] Two days later, on 19 July 2003 Mooney Ford wrote again to Dr Motlanthe referring him to 'clause 13 of the agreement of sale entered into by you' and calling upon him to furnish guarantees within 14 days, failing which 'the seller shall be entitled to cancel the agreement without further notice to you'. A copy of this letter was sent to Mr Blake.

[35] On 21 July 2003 Dr Motlanthe's bankers, the Standard Bank Ltd, sent the requisite guarantee to Mooney Ford's bankers, First National Bank Ltd.

[36] On the same day, at a meeting attended by the attorney acting for Mr Pillay and Dr Motlanthe, the estate agents concerned and Mr Blake, Mr Blake indicated that the developers were not bound by the purported agreements between them and Mr Pillay and Dr Motlanthe. He had not signed the offers signed by Mr Pillay and Dr Motlanthe and when asked by the estate agents to sign he refused.

[37] On 23 July 2003 Mooney Ford wrote a letter to Pam Golding Properties which read as follows:

'It has become apparent, following on from the meeting that was held at Mr Blake's offices on Monday that the offers to purchase units 402 and 502 Lazy Lizard, which were submitted . . . by your office, have not been accepted.
In the circumstances, our client has decided that it will not accept these offers by Mr S Pillay and Dr Motlanthe respectively. If they are interested in increasing the offering price, our client may be prepared to consider their offers.
We are making arrangements for the deposits to be refunded to these two purchasers together with the interest which has accrued thereon.'

[38] On 4 August 2003 Mooney Ford wrote to Dr Motlanthe advising him that his offer to purchase unit 502 had not been accepted by the seller and that they were making arrangements for the deposit paid by him to be refunded to him, with interest. On 5 August 2003 a similarly worded letter was sent by Mooney Ford to Mr Pillay.

[39] A dispute then arose between Mr Pillay and Dr Motlanthe on one hand and the developers on the other as to whether valid agreements of sale had been concluded in terms of which the member's interest in Swaledale 9 Investments CC had been sold to Mr Pillay and the member's interest in MTR Trading CC had been sold to Dr Motlanthe.

[40] As I have said, Balton J gave judgment in favour of Mr Pillay and Dr Motlanthe. Following the decision of Goldin J in *Rhodesian Business and Property Sales (Pvt) Ltd v Henning* 1973 (1) SA 214 (R) at 217H where it was held that the sale of shares in a company, even if the company owns only land and the shares are purchased for that reason only, is not a sale of land, the learned judge came to the conclusion that the agreements in question in this case did not have to be in writing and that s 2(1) of the Alienation of Land Act 68 of 1981 did not apply.

[41] She held that Mr Pillay and Dr Motlanthe had succeeded in proving that the conduct of the developers had led them to believe that valid agreements had been entered into with them and that

the agreements were binding and of full force and effect between the parties.

[42] Her judgment on this part of the case was based squarely on the doctrine of quasi-mutual assent. In this regard she relied on the well-known statement of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607, which is quoted in para 55 below and which has been frequently cited with approval in this court and in other courts in South Africa (see, eg, *Sonap Petroleum (SA) Pty Ltd v Pappadogianis* 1992 (3) SA 324 (A) at 239F-H, where references are given to some of the other cases).

[43] On appeal to the full bench, as indicated earlier, the court found it unnecessary to deal with the quasi-mutual assent point because it held that the parties' intention had been that there would be no binding agreements between them unless they were signed by or on behalf of the buyers and the sellers. It is important to stress that it accepted, as counsel on both sides had accepted, that '(t)he Close Corporations Act 69 of 1984 does not require the sale of a member's interest to be in writing even if it relates to immovable property.' Reference was made to the *Rhodesian Business and Property Sales* case on which Balton J had relied. I take it that by the phrase 'even if it [ie, the sale of the member's interest] relates to immovable property' the learned judge meant 'even if the close corporation in which the interest was sold only owns immovable property and the interest was purchased for that reason only', to adapt the dictum of Goldin J to which I referred earlier.

[44] In coming to the conclusion to which he did, Nicholson J endeavoured to apply the law as set out in a series of decisions of which the leading one is *Goldblatt v Fremantle* 1920 AD 123. The passage cited by him in his judgment appears at pp 128-9 of the report and reads as follows:

'Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (*Grotius* 3.14.26 etc.) At the same time it is always open to parties to agree that the contract shall be a written one (see *Voet* 5.1.73. *V. Leeuwen* 4.2., sec. 2, *Decker's* note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction. In the present instance the learned Judge, after considerable hesitation, dealt with the matter on the basis that the parties were bound by their verbal agreement, but that it was a condition of that agreement that it should be executed in writing within a reasonable time by both of them. Such a condition he regarded as a concurrent one, which there was a reciprocal obligation to perform. The point of construction is not easy; but in my opinion the better view is that there was no contract until its terms had been confirmed by both parties in writing. For it was definitely agreed that the particulars arranged would be reduced to writing by Fremantle, and should be confirmed in writing by Goldblatt. The former was to formulate under his own signature what he considered to be the result of the interview, and the latter was to confirm in writing, also under his signature, the result thus submitted. That amounted, in my opinion, to an agreement that the contract should be concluded not verbally, but in writing. And a written contract involved the signature of both. Such a contract, in the words of Maasdorp J (*Richmond v Crofton* 15 SC at page 189) "cannot be said to have been fully executed until the consent of the parties has been expressed by the signature upon the document or documents constituting the written contract."'

[45] Nicholson J was influenced in coming to the conclusion he did by what he called 'the form of the contract' presented to the prospective purchasers by Pam Golding Properties. He pointed to its heading (which I have quoted in para 16 above), the references to signature in clause 5.1 (quoted in para 17 above), clause 8 (quoted in para 18 above) and clause 15 (quoted in para 19 above), and the fact that there was provision at the conclusion of the document for the signatures of the parties.

[46] He also found support for his views in a passage in the judgment of Snyman J in *Meter Motors (Pty) Ltd v Cohen* 1966 (2) SA 735 (T) at 736C-737G. That case was an action brought against a person who had signed as surety for the obligations of a company which was allegedly liable as purchaser under a hire purchase agreement. Exception was taken to the declaration on the ground that the hire purchase agreement sued on, which was annexed to the declaration, was not signed by the seller, although it was clear from the document that the parties thereto had intended it to be the only agreement between the parties and that it had to be signed to be binding. The court, however, came to the conclusion that the document had been signed on behalf of the seller and the exception was dismissed.

[47] In the passage in *Meter Motors,* quoted extensively by Nicholson J in the court a *quo,* despite its being obiter, Snyman J considered, as a result of a reading of clauses in the document, that for a contract to be concluded in that case, a document had to be signed by both parties. The key sentence in this part of his judgment appears at 737 B where the following was said:

'. . . if *on this document* it appears that the parties intended the document to be the very agreement between the parties, then that document must be signed.' (The emphasis is mine.)

[48] This statement was made after references to Wessels, *The Law of Contract in South Africa,* 2 ed, vol 1, and part of the extract from *Goldblatt v Freemantle* quoted above.

[49] After quoting from the *Meter Motors* case, Nicholson J said

that it seemed to him that in the present case there were even more features which pointed to the fact that the agreement was to be binding on the parties only when both had signed.

[50] I do not agree with the court *a quo's* conclusion that there could be no binding contracts between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from *Goldblatt v Freemantle, supra,* and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence. That this is so is clear, for example, from C W Decker's annotation on Van Leeuwen's *Roman Dutch Law* 4.2 sec 1 (not sec 2 as Innes CJ says at 129) where he pointed out (Kotzé's translation, 2 ed, vol 2, p 12) that we no longer uphold the distinction drawn in Roman law between real, verbal, literal and consensual contracts because all contracts with us are made with consent. With regard to written contracts he referred to an observation by Samuel Strykius (*Modern Pandect* 2.14.7) as follows:

'. . . we must regard the *written* contracts as distinct, in so far as we should bear in mind that although the writing does not constitute the essentiality of the contract, which is contained in the mutual consent of the parties, they may nevertheless agree that their verbal agreement shall be of no effect until reduced to writing, in which case the agreement cannot before signature have any binding force, although there exists

mutual consent; and it cannot be said that the writing served not in perfecting the transaction, but only as proof thereof . . ., since here it is agreed that the consent should not operate without the writing, which must be observed as a legitimate condition.'

[51] The passage in *Wessels* cited in the judgment in the *Meter Motors* judgment supports this approach. The learned author refers to *Institutes* 3.23. pr, and says that '[t]he plain meaning of this passage seems to be that if the parties agree to have their contract of sale in writing, then until a document is drawn up there is no *vinculum juris* and therefore no actionable contract. This is the interpretation which Voet (18.1.3) gives to this passage and it seems difficult to justify any other.'

[52] In the present case there were clearly no agreements between the parties that the mutual consent between them would not operate in the absence of a document embodying its terms signed by both buyer and seller. There were in fact no negotiations between the parties before Mr Pillay and Dr Motlanthe signed their offers. It follows that I am satisfied that the basis on which the case was decided by the full bench cannot be upheld. It follows also that the passage in the *Meter Motors* case on which Nicholson J relied, in so far as it is inconsistent with what I have said, is incorrect. I think that it is more correct to say on the facts of the present case that these offers prescribed a particular form of acceptance (*cf Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) at 597 D), *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties Ltd* (664/07) [2008] ZASCA 131 (21 November 2008) and E Allan Farnsworth, *Contracts,* 2ed, 53.13, pages 151-2).

[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.

[54] It is now necessary to consider whether on the application of the doctrine of quasi-mutual assent Mr Pillay and Dr Motlanthe have established their entitlement to the relief sought.

[55] The approach to be adopted in a case such as this was set out in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis, supra,* at 239F to 240 B, as follows:

'If regard is had to the authorities referred to by the learned Judges (see *Logan v Beit* 7 SC 197 at 215; *I Pieters and Company v Salomon* 1911 AD 121 at 137; *Hodgson Bros v South African Railways* 1928 CPD 257 at 261; *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417 at 422-4; *Irvin & Johnson (SA) Ltd v Kaplan* 1940 CPD 647 and, one could add, *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 430-1), I venture to suggest that what they did was to adapt, for the purposes of the facts in their respective cases, the well-known *dictum* of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607, namely:
"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."
In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed,

lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? Compare Corbin on *Contracts* (one volume edition) (1952) at 157. To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? See also *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) at 906C-G; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 316I-317B. The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 984D-H, 985G-H.'

[56] The answers to the questions set out in that passage, when applied to the facts of this case, are clear: the party whose actual intention did not conform to the common intention expressed (ie, that there were contracts on the terms set forth on the standard form) was Mr Blake, acting for himself and the other developers. He led Mr Pillay and Dr Motlanthe, as reasonable men, to believe that the declared intention represented his actual intention. With regard to the three-fold enquiry: (a) there was a misrepresentation as to his intention; (b) made by his agents (in the various letters sent by Mooney Ford to Mr Pillay and Dr Motlanthe which unmistakably represented that the offers had been accepted and binding contracts had come into existence); and (c) Mr Pillay and Dr Motlanthe were actually misled as reasonable men in their position would have been.

[57] It is clear on the evidence that Mooney Ford had authority to call for and receive deposits paid under contracts for the sale of member's interests in the close corporation to which units were to be allocated; to call for guarantees under the contracts; to allocate close corporations, from the list made available to them by Mr Blake's accountants, to particular units; to call for copies of identity documents and marriage certificates so as to be able to open the

sectional title register and transfer member's interests; to write to the buyers regarding the finishes of the units and to ask for additional payments occasioned by changes thereto; and to give notices under clause 13 of the standard form contracts threatening cancellation.

[58] All these acts, which they were authorised to perform on behalf of Mr Blake and his fellow developers, amounted in my view to a clear representation that the offers made by Mr Pillay and Dr Motlanthe had been duly accepted.

[59] Although the acceptance by the developers of the Pillay and Motlanthe offers did not comply with the prescribed mode of acceptance they conducted themselves in such a manner as to induce the reasonable belief on the part of Mr Pillay and Dr Motlanthe that the developers were accepting the offers according to the prescribed mode.

[60] It follows in my view that Balton J correctly held, on the basis of the doctrine of quasi-mutual assent, that the developers were bound by the agreements in respect of units 402 and 502.

[61] The following order is made:

A The appeal against the order of the court *a quo* is upheld with costs including the costs of two counsel.

B The order of the court *a quo* is set aside and replaced by an order in the following terms:

'1 Subject to the order made in paragraph 2, the appeal is dismissed with costs, including the costs of two counsel.

2 The order made in the court *a quo* is set aside and replaced by an order in the following terms:

"(a) The following order is made in case no 690/2004:

1. An order is granted declaring the agreement between the first to sixth defendants ("the sellers") and the plaintiff ("the purchaser") for the purchase of the entire members' interest in and to the seventh defendant to be of full force and effect and binding between the parties, with terms as set out in the document annexed as annexure "A" to the plaintiff's declaration with the seventh defendant being reflected as the close corporation referred to in that document, the sellers' acceptance of the agreement having taken place by conduct, instead of signature.

2 An order is granted directing the sellers to comply with their obligations under the sale agreement and in particular, they are ordered and directed to deliver and hand over to Mooney Ford Attorneys in trust, the documents set out in paragraphs 8.1.1.1 to 8.1.5 (inclusive) of the sale agreement in respect of the seventh defendant.

3 An order directing the sellers to bring about the state of affairs warranted in clauses 9.1 to 9.6 (inclusive) of the sale agreement (in particular by ensuring that the sectional title unit referred to in the sale agreement is owned by the seventh defendant at the date of transfer of the members' interest to the purchaser).

4 In the event of the sellers' failing to comply with the order contained in paragraphs 2 and 3 hereof, or any one of those paragraphs, then the purchaser is given leave to deliver an application to this court, on the same papers, supplemented in so far as may be necessary, for an order:

(a) declaring the sellers to be in contempt of court;

(b) for their committal to prison for contempt of ourt.

5 In addition, in the event of the sellers' failing to comply with paragraphs 2 and 3 of this order, the Sheriff of Durban is authorised to do all things necessary, in so far as the sellers are concerned, to cause the actions contained therein to be fulfilled.

6 In the event of the sellers' failing to comply with the orders contained in paragraphs 2 and 3 hereof, and the purchaser's failing to obtain the transfer contemplated in paragraph 5 hereof within a reasonable period of time from the granting of this order, then the sellers shall be liable, jointly and severally, the one paying the other to be absolved, on application by the purchaser, on the same papers supplemented in so far as may be necessary, to pay damages in an amount to be determined by the court, together with return of the deposit paid by the purchaser together with interest thereon at the legal rate of 15.5% *per annum* from due date to date of payment.

7 The sellers are ordered to pay the purchaser's costs of suit.

(b) The following order is made in case no 19979/04:

1. An order is granted declaring the agreement between the first to sixth defendants ("the sellers") and the plaintiff ("the purchaser") for the purchase of the entire members' interest in and to the seventh defendant to be of full force and effect and binding between the parties, with terms as set out in the document annexed as annexure MM2 in the application papers (in the form referred to in the Plaintiff's replying affidavit) with the seventh defendant being reflected as the close corporation referred to in that document, the sellers' acceptance of the agreement having taken place by conduct, instead of signature.

2. An order is granted directing the sellers to comply with their obligations under the sale agreement and in particular, they are ordered and

directed to deliver and hand over to the eighth defendant in trust, the documents set out in paragraphs 8.1.1.1 to 8.1.5 (inclusive) of the sale agreement in respect of the seventh defendant.

3 An order directing the sellers to bring about the state of affairs warranted in clauses 9.1 to 9.6 (inclusive) of the sale agreement (in particular by ensuring that the sectional title unit referred to in the sale agreement is owned by the seventh defendant at the date of transfer of the members' interest to the purchaser).

4 In the event of the sellers' failing to comply with the order contained in paragraphs 2 and 3 hereof, or any one of those paragraphs, then the purchaser is given leave to deliver an application to this court, on the same papers, supplemented in so far as may be necessary, for an order:

(a) declaring the sellers to be in contempt of court;

(b) for their committal to prison for contempt of court.

5 In addition, in the event of the sellers' failing to comply with paragraphs 2 and 3 of this order, the Sheriff of Durban is authorised to do all things necessary, in so far as the sellers are concerned, to cause the actions contained therein to be fulfilled.

6 In the event of the sellers' failing to comply with the orders contained in paragraphs 2 and 3 hereof, and the purchaser's failing to obtain the transfer contemplated in paragraph 5 hereof within a reasonable period of time from the granting of this order, then the sellers shall be liable, jointly and severally, the one paying the other to be absolved, on application by the purchaser, on the same papers supplemented in so far as may be necessary, to pay damages in an amount to be determined by the court, together with return of the deposit paid by the purchaser together with interest thereon at the legal rate of 15.5% *per annum* from due date to date of payment.

7 The sellers are ordered to pay the purchaser's costs of suit.'"

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IG FARLAM
JUDGE OF APPEAL

APPEARANCES:

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