Sign on the dotted line – enough to conclude the contract or must acceptance be communicated to the other contracting party?

MARYNA BOTHA
STBB Smith Tabata Buchanan Boyes

A colleague was recently presented with a case of purchaser's remorse with a sting in the tail. It arose as follows: The deed of sale had already been signed by the seller at the colleague's office. A representative of the purchaser (a Trust) then collected the document from the offices for signature by its trustees. Later on the same day, the purchaser phoned the colleague to advise that it had signed the deed of sale and was in the process of faxing the signed document to the colleague's office. As it happened, the fax was incompletely transmitted, the last pages with the signatures of the parties, also missing. When, within half an hour later, the colleague phoned the purchaser to request that it re-sends the fax, the purchaser suddenly advised that it had a change of heart and no longer wished to continue with the purchase of the property.

The question that then arose was whether the purchaser can validly argue that no agreement came into existence because of the incomplete written acceptance.

The mode of acceptance: Common law position

Our law of contract is based on consensus, a meeting of the minds of the contractants. A contract can therefore only come into existence if the parties are agreed (*ad idem*) on creating rights and obligations between themselves, as well as on all the particulars thereof.

In order to determine whether there is agreement, it is necessary to look for an offer and an acceptance of that offer. Christie defines an **offer** as follows:

"A person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed."[1] **Acceptance** is, consequently, a declaration of will which indicates assent to the proposal contained in the offer. The acceptance must necessarily be unambiguous so that it is clear to the recipient using reason and knowledge associated with the reasonable person, that the offer was accepted as is and without more.

Communicating acceptance to the offeror: the information theory

In line with the consensus theory that underlies our law of contract, it is necessary that the acceptance of an offer must be communicated to the offeror and if not, no contract is constituted.[2]

In principle the intention to accept may be manifested in any form, either expressly or tacitly by conduct as long as it confirms an unequivocal inference of assent to the offer.

There are certain exceptions though. For example, where agreements are concluded by post or telegram and in the absence of an indication to the contrary, the contract is concluded the moment the letter of acceptance is posted.

An acceptance must moreover comply with any formalities prescribed by law for the contract which is envisaged by the offer. For example, in order to comply with section 2(1) of the Alienation of Land Act 68 of 1981, the contract resulting from the offer and acceptance relating to the sale of immovable property, must be in writing and signed by both parties. In the absence of statutory regulation, the offeror may otherwise also prescribe that acceptance should take a particular form or content or that it should be communicated in a particular way. In such instances, the acceptance must adhere to the prescribed mode in order to create a valid and binding agreement.

In *Driftwood Properties (Pty) Ltd v McLean* [1971] 3 All SA 558 (A), for example, the Supreme Court of Appeal was concerned with an offer that was open for a limited period. The contract, which took the form of an offer to purchase, contained a clause that read: "That this offer is open and binding upon both parties until signature by both parties on or before the 17^{th} May 1969, failing which it shall lapse if only signed by one party." The unsigned offer was presented to the seller who signed it and thus became the offeror. The court concluded that although the clause was badly phrased it prescribed the manner in which the contract was to be concluded. It was accordingly adequate that the purchaser had signed before 17 May 1969 and there was no need for that fact to be further communicated to the seller.

Driftwood is therefore authority for the proposition that where the agreement itself provides for the mode of acceptance, i.e. by signing it, then no additional conveyance of acceptance is required.

The *Withok Small Farms* judgment offer a pragmatic approach

In the recent judgment of *Withok Small Farms (Pty) Ltd and others v Amber Sunrise Properties 5 (Pty) Ltd* [2008] JOL 22802 (SCA), the Supreme Court of Appeal was faced with a dispute regarding the communication of the acceptance of an offer. The facts were that certain immovable properties owned by Withok Small Farms (Pty) Ltd ("Withok Farms") were sold at a public auction to Amber Sunrise Properties (Pty) Ltd ("Amber Properties"). The conditions of sale that Amber Properties signed determined that 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."

After the auction and within the seven day period, a director of Withok Small Farms signed the conditions of sale. This fact, which constituted confirmation of the sale, was however not immediately communicated to Amber Properties; the latter was only advised thereof some 2 weeks later, well after expiry of the initial seven day period.

Amber Properties thereupon applied to the High Court for an order directing Withok Small Farms to return the deposit it had paid and declaring the agreement to be of no force and effect. It based its action on the fact that no agreement had been concluded since acceptance of the offer was not communicated to it. Withok Small Farms defended the action and alleged that it was not required that the confirmation of acceptance be communicated to Amber Properties.

The Pretoria High Court (as it was then known) held that no agreement of sale was concluded on the date of the auction. The conditions of sale that Amber Properties signed at the auction, constituted an offer to Withok Farms in which the former bound itself to keep its offer open for seven days. The Court held further that a sale would only come into existence when Withok Farms' acceptance of this offer was communicated to Amber Properties. Withok Farms then appealed to the Supreme Court of Appeal ("SCA").

The Supreme Court of Appeal: common sense and commercial practicalities should prevail

The SCA agreed with the Pretoria High Court when it held that no agreement was concluded at the auction sale itself, but rather that an offer was formulated for presentation to the sellers. However, with regard to the question of the communication of acceptance, the court *a quo*'s finding was overturned.

The Court held that it was clear from the terms of the written contract that the sale was confirmed and an agreement came into existence at the moment that Withok Farms signed the conditions of sale. When Amber Properties signed the conditions of sale at the auction it bound itself to keep its bid open for a period of seven days. To this limited extent a binding contract came into existence, albeit not an agreement of sale as yet. The true nature of this initial contract was an option granted by Amber Properties to the sellers, Withok Farms, to sell the properties on the terms and conditions set out in the conditions of sale.

With regard to the question of communicating the acceptance, the Court held that in each case one will have to have regard to the terms of the offer to determine the mode of acceptance. *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 added that even when writing is not a formal requirement for a valid contract, written contracts are an everyday occurrence in the commercial world. It noted that the object of reducing a contract to writing (whether voluntarily or required by statute) is generally to achieve certainty and to facilitate proof and that 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 therefore constitutes the usual manner in which parties indicate their agreement to its terms*. Certainty as to the place and date of the conclusion of the contract is often equally important for the parties to the contract as certainty as to its content. The Court accordingly concluded that "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*."

The Court affirmed that such an approach is in accordance with common sense and commercial practicalities, because "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."

The "typical" agreement for the sale of immovable property

The signature clause in the conditions of sale in the *Withok Small Farms* judgment took the form typically seen in agreements for the sale of immovable property and read as follows:

"I/we ____

in my/our capacity as the Seller:

HEREBY CONFIRM THIS SALE ON THE CONDITIONS AS HEREIN SET OUT

DATED AT ____________________ ON THIS ____________ DAY OF ______________ 2006

AS WITNESSES: 1.__________________ 2. __________________

SELLER ______________

SELLERS TELEPHONE NUMBER: __________________________

SELLERS FAX NUMBER ________________________________

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

The Court concluded that on the facts, the signature of Withok Farms would have served as a recordal of the date and place of the "confirmation" and therefore the clearest indication that the mode of acceptance was to be the signature of the sellers. Hence the agreement came into effect on the date the conditions of sale were signed by Withok Farms and further communication was not necessary.

Conclusion

As a general rule then, the common law position that acceptance of the offer must be communicated to the offeror, stands as a prerequisite for reaching consensus. However, if *the agreement itself* provides for a mode of acceptance as in the *Withok* case, then no additional communication of acceptance is required.

From a practical point of view, this judgment is of utmost importance to practitioners because the format of the signature clause under discussion is so widely used in agreements for the purchase and sale of immovable property and otherwise. The judgment effectively confirms that where there is no indication to the contrary in the agreement itself, the mere signature by the offeree is adequate for conclusion of the contract.

To return to the colleague's dilemma, it remains to be considered what the position would be if an agreement is insufficiently clear on the mode of acceptance for the common law position to apply by default. Would the offeree's telephonic confirmation of acceptance and attempted fax confirmation then constitute sufficient communication of acceptance?

In the *Driftwood v McLean* judgment, where the mode of acceptance was dealt with, the Court held as follows:

"It is trite that an offeror can indicate the mode of acceptance whereby a *vinculum iuris* will be created. And he can do so expressly or impliedly. It was however, argued on behalf of the respondent, that the words used in the contract are obscure and that in the absence of clarity the presumption that the contract will be completed when the offeror comes to hear of the offeree's acceptance should prevail. That such a presumption in case of doubt exists appears from the following passage from Grotius in … *I may make an offer in two ways. I can either make an offer and say that the contract will be established by your mere acceptance; or I can make the offer and say that the contract will be completed when I come to hear and that therefore a valid agreement is constituted upon acceptance, whether or not I hear of your acceptance. And if there is doubt upon the matter, we must always presume that the second was the case …*"

Clearly unless the mode of acceptance was stipulated in the agreement, it is not necessary that the signed copy of the agreement must be received to constitute acceptance. However, if the agreement itself provides for a mode of acceptance as in the *Withok* case then no additional communication of acceptance is required. The telephonic confirmation and attempted fax would suffice.

FOOTNOTES

1. RH Christie *The Law of Contract in South Africa* (1991) at page 29.
2. Ibid, at page 743.