

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 28566/2007

DATE: 29/04/2011

REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

DONALD AND RICHARD CURRIE (PTY) LTD

Plaintiff

and

GROWTHPOINT PROPERTIES (PTY) LTD

Defendant

AND

CASE NO: 28568/2007

In the matter between:

RICHARD ANTHONY JOHN CURRIE

Plaintiff

and

GROWTHPOINT PROPERTIES LIMITED

Defendant

J U D G M E N T

MBHA, J:

[1] The plaintiffs, Richard Anthony John Currie and Donald Currie (“Currie”) and Richard Currie (Pty) Ltd (“*the company*”) sued the defendant separately, *inter alia* for an order:

- 1.1 declaring a contract between the respective parties (“*the acceptance form*”) to be *pro non scripto* and a legal nullity,
- 1.2 declaring that the plaintiffs are deemed to have elected to receive 264 505 and 85 450 Growthpoint linked units (“*the linked units*”) respectively, and
- 1.3 for specific performance directing the defendant to deliver certificates reflecting the plaintiffs’ ownership of the said linked units and to pay the plaintiffs amounts equivalent to the aggregate value of all dividends declared that would have been paid to the plaintiffs had they been the duly registered holders of the said linked units.

[2] A consent order was granted by this Court in terms of which the plaintiffs' separate actions under Case Nos 28566/2007 and 28568/2007 were consolidated.

[3] It is common cause that the plaintiffs are the registered proprietors of 264 505 and 85 450 respectively, fully paid linked units of one ordinary share of 10 cents each linked with one variable rate unsecured. A debenture of 456 cents each in Paramount Property Fund Ltd.

[4] On 18 December 2007 the defendant, by way of a document entitled "*CIRCULAR TO PARAMOUNT LINKED UNIT HOLDERS AND B-DEBENTURE HOLDERS*" (*"the offer document"*) addressed a written mandatory offer to all certified Paramount linked unit holders and B debenture holders of Paramount, which was open from 18 December 2006 to 26 January 2007.

[5] In terms of the said offer, the defendant offered to acquire all of Paramount linked units and/or B debentures held by the certified owners and which it does not already own "*... for one of the following alternate forms of the offer consideration:*

for acceptance by Paramount linked unit holders:

- *a linked unit consideration of 1 new Growthpoint linked unit for every 1.44 Paramount linked unit held, rounded to the nearest whole number; or alternatively*

- *a cash consideration of R6,71 for every 1 Paramount linked unit held; and*
- *for acceptance by B debenture holders:*
 - *A B debenture consideration of 1 new Growthpoint linked unit for every 1,44 2007 B debentures held and a new Growthpoint linked unit for every 1,58 2008 B debentures held rounded to the nearest whole number; or alternatively*
 - *A cash consideration of R6,71 for every 2007 B debenture held and a cash consideration of R6,07 for every 2008 B debenture held.”*

[6] The offer document was accompanied by a “*FORM OF ACCEPTANCE SURRENDER AND TRANSFER*” (“*the acceptance form*”) which was stipulated to be the specified mode by which certificated Paramount linked unit holders were required to signify their acceptance of the offer by electing either to receive linked Growthpoint units or a cash consideration as stipulated in the offer. The duly completed acceptance form had to be received by the defendant (offeree) by not later than 12h00 on the closing date.

[7] The offer document further stipulated that Paramount offerees who did not wish to accept the offer, were not required to take any action, and would be deemed to have declined the offer, subject to the defendant’s entitlement in terms of section 440K of the Companies Act 61 of 1973.

[8] It is common cause that the plaintiffs reacted to the offer and that Currie completed the acceptance forms for both himself and the company.

[9] The plaintiffs aver that it was at all material times the *bona fide* intention of the plaintiffs to accept and elect the linked unit consideration offer and not the cash consideration but that when Currie completed the acceptance forms on behalf of the plaintiffs, he committed the following errors:

- 9.1 Under Part A entitled “*Election of Offer Consideration*” he erroneously entered the numbers 264 505 and 85 450 as B debentures in the block entitled “*Number of B-debentures in respect of which the linked unit consideration is elected*” and subsequently deleted the entry;
- 9.2 He thereupon erroneously and in conflict with the plaintiffs’ *bona fide* intention, completed the adjacent box entitled “*Number of Paramount linked units in respect of which the cash consideration is elected*”;
- 9.3 He failed to comply with the mandatory stipulation required by the defendant as set out in paragraph 8 of the accompanying instruction of the offer, to sign any alterations in full;
- 9.4 At the foot of the offer document he mistakenly signed in the space designated for B debenture holders which the plaintiff most certainly were not and not Paramount linked unit holders;
and

9.5 In the case of the company, the resolution dated 12 January 2007 which purportedly accompanied the acceptance form, erroneously described the 264 505 linked units as B debentures. The plaintiffs submit that this misdirection in the resolution highlights the confusion that existed as it clearly does not authorise the cash consideration option.

[10] The plaintiffs aver that their intention not to elect a cash consideration is confirmed by the following material facts:

10.1 In the space provided for banking details in the acceptance form, for purposes of giving effect to the cash consideration, the entry by the plaintiffs “N/A” signifies that the plaintiffs were not in quest of a cash payment;

10.2 the covering letter under which the acceptance form and resolution, in respect of the company was forwarded, makes no reference to “*cash consideration*”; and

10.3 the substantially higher value of the linked unit option at that time (26 January 2007) namely R13,30 per unit compared with R6,71 per unit for the cash consideration offer, resulting in an aggregate value difference between the two options of R215

833,00, rendered the cash consideration election markedly less probable.

[11] The plaintiffs allege that the defendant had a duty through Computershare, its appointed agent/transfer secretaries, to *inter alia* carefully scrutinise the acceptance form and accompanying documentation submitted by the plaintiffs, ensure that the plaintiff's intention was unequivocally conveyed in such documentation and if need be seek the plaintiffs' clarification in the event of any uncertainty or ambiguity reflected in the documentation.

[12] The plaintiffs allege further, that Computershare "*erroneously interpreted the manifestly confused response*" in the acceptance forms as constituting acceptance by the plaintiffs of the cash consideration.

[13] The defendant pleaded that the acceptance forms completed and returned by the plaintiffs reflected an election for the cash consideration rather than the conversion of the linked units, and that the plaintiffs unambiguously accepted the cash consideration by filling in the block "*Number of Paramount link units in respect of which the cash consideration is elected*" the written figures "264 505" and "85 450" respectively, and leaving the block "*Number of Paramount linked units in respect of which the linked unit consideration is accepted*" blank.

[14] The defendant submits that the plaintiffs accordingly accepted the offer and elected to accept the cash consideration in the manner stipulated in the

offer document, thereby binding themselves and the defendant to settlement of the plaintiffs' acceptance of the cash consideration as directed in the offer document.

[15] The defendant accordingly denies any error with respect to the election reflected in the acceptance forms and that any error that may have caused the plaintiffs from making the election as specified in the offer document has any relevance to the extent to which the plaintiffs are bound by the unambiguously exercised election according to the terms of the offer document.

[16] Before considering the merits, I need to briefly deal and dispose of what I would for the sake of convenience call a "*preliminary*" point raised by the defendant.

[17] The defendant asserts that the plaintiffs' case in each set of particulars of claim is that the acceptance form contained a "*manifestly confused response*", that Computershare realised or should reasonably have realised that the completion of the block in respect of the cash consideration was a mistake by the plaintiff, and that in the premises, the parties lacked consensus *ad idem* and the contract is "*void ab initio*". The defendant then complains that the plaintiffs' case, as refined in its further particulars and as presented during the entire trial, was instead based on "*justus error*".

[18] The thrust of the complaint, essentially, is that whilst the plaintiffs' identification of their case was one of voidness for vagueness, this was materially deviated from the case presented by the plaintiffs in opening and in the course of evidence, and was instead based on "*justus error*".

[19] In my view, the defendant's aforesaid complaint is without any basis. I say so for the following reasons:

19.1 Paragraph 14 of the particulars of claim sets out all the errors allegedly committed by Currie when he completed the acceptance forms;

19.2 Paragraph 18 of the particulars of claim specifically state that the plaintiffs' intention not to elect a cash consideration "*is confirmed*" by the three reasons that were thereafter listed. The contents of this paragraph need to be read with what has been stated in paragraph 14 where all the errors committed by Currie in completing the acceptance forms are listed;

19.3 Paragraph 21 of the particulars of claim specifically alleges that:

"Having regard to the specific and cumulative factors described above the defendant and/or Computershare realised or should reasonably have realised that the completion of the block in respect of the cash consideration was a mistake by the plaintiff."

[20] In my view the plaintiffs' identification of their case as that of error, *justus* or otherwise, is sufficiently covered in their respective particulars of claim.

[21] In any event, it is trite law that pleadings are for the court and not the court for the pleadings. This principle was laid down authoritatively as long ago as 1937 in the case of *Shill v Milner* 1937 AD 101, at 105 where de Villiers JA said:

"This preliminary portion of Mr Ramsbottom's argument consists largely of an examination of the ipsissima verba of the pleadings. While listening to him however, I could not but ask myself what the substantial issue was between the parties in the court below. The importance of pleadings should not be unduly magnified. 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been.' Robinson v Randfontein Estates GM Co. Ltd (1925, AD 198). In another case, Wynberg Municipality v Dreyer (1920, AD 443), an attempt was made to confine the issue on appeal strictly to the pleadings, but it was pointed out by Innes, C.J., that the issue had been widened in the court below, by both parties. 'The position should have been regularised of course', said he, 'by an amendment of the pleadings'; but the defendant cannot now claim to confine the issue within limits which he assisted to enlarge". (my emphasis)

[22] This trial lasted over a number of days and the defendant led witnesses rebutting the plaintiffs' case that there was *justus error* on the part of Currie when he completed the acceptance forms. At no stage did Mr Snyckers,

appearing for the defendant, complain that the defendant was in any way prejudiced or that any postponement would be sought to enable the defendant to adequately prepare in order to resist the plaintiffs' claim for *justus error*. As I have stated above, the defendant also pleaded that there was no error on the part of Currie when he completed the acceptance forms and that plaintiffs' election of a cash consideration was unambiguous.

[23] I am accordingly satisfied that the plaintiffs' case has been properly identified and located in the realm of "*justus error*". I now turn to consider the merits of this case.

[24] The plaintiffs submit that they had desired and intended to acquire the Growthpoint linked units and not the cash consideration but that they, through Currie, made mistakes when completing the acceptance forms.

[25] The plaintiffs submit that the defendant, in its quest for certainty in the election process issued strict instructions regulating the completion of the acceptance forms that were clear, detailed, descriptive and peremptory and thus demanded a high standard of clear legal precision in the election process. Some of the instructions *inter alia*, were that any alteration to the form had to be signed in full and not initialled, in the case of a juristic entity as in the case of the company a resolution authorising the signing of the form had to be submitted, any person with doubts as to how to complete the form was encouraged to immediately consult a professional advisor, and so forth. The plaintiffs submit that Computershare, the defendant's authorised agent

and/or transfer secretaries failed to live up to such high standard of clerical precision demanded by the defendant when it accepted and processed the plaintiffs' election forms.

[26] The plaintiffs also submit that the defendant issued a series of instructions regulating the completion of the acceptance forms that were clear, detailed, descriptive and similarly peremptory which were aimed at eliminating any confusion and ensuring that the relevant data and intention of the offeree was accurately recorded. In the circumstances Computershare in its capacity as the defendant's agent and/or transfer secretaries, was bound to apply a high standard of care and skill when it accepted and processed the plaintiffs' election forms but failed to do so.

[27] The plaintiffs aver further that the mistakes they made in completing the acceptance forms amounted to such conflicting entries that the plaintiffs' true intention was not discernible *ex facie* the documents and that in such circumstances Computershare ought to have:

27.1 sought supplementary clarification from the plaintiffs; or

27.2 considered the completed elections to be so confusing as to amount to a mistake and thus *pro non scripto* with the result that both plaintiffs would by automatic "*default*", have been awarded the linked unit consideration which, plaintiffs claim, coincidentally would have accorded with their true intention.

[28] The errors which the plaintiffs allege were made as Currie completed acceptance forms are specifically set out in paragraph [9] above.

[29] The plaintiffs relied on the evidence of Ms Sharon Hubner who testified that the five or six data capturers known as processors who are employed by Computershare to scrutinise the election forms were not highly qualified personnel and that they are essentially clerical functionaries with a matric and that their primary role is data processing. Furthermore, when scrutinising the election form, they would only focus on whether there was an election, whether the form was signed and that there were any attachments, for example share certificates and resolutions accompanying the form.

[30] Reliance was also placed on Ms Hubner's testimony that within Computershare it was market practice that election forms would be processed even though alterations were not initialled or signed. It was submitted that this was in direct conflict with the defendant's express directive that any alteration "*must be signed in full and not initialled*". Reliance was placed on Ms Hubner's concession that an unsigned alteration on the election form ought to have caused any processor to take a step back and be careful.

[31] The plaintiffs also criticised the processors for their treatment of the inscription "*N/A*" appearing in the bank account details box on the acceptance forms. It was submitted that this particular inscription was wrongly interpreted by the processors as meaning that a cheque was required. The processors concerned were particularly criticized as plaintiffs felt that notwithstanding the

huge value of the linked units involved in the transaction, the processors gave no thought to:

31.1 the postal risks associated with cheques;

31.2 the delay in clearing a cheque; and

31.3 the safer EFT payment method.

It was then submitted that the commercially inconvenient and unsafe requisition for a cheque should have reached cautionary concern for the processors but that it seemingly did not.

[32] The issues that have to be determined in this case are:

32.1 Whether or not Currie made mistakes in completing the acceptance forms;

32.2 Whether or not such mistake was "*justus*" or reasonable; and

32.3 If so, whether or not the defendant through Computershare, ought reasonably to have realised that there is a real possibility of a mistake and accordingly had a duty to speak and to acquire whether the plaintiffs' expressed intention as reflected in the acceptance forms was the actual intention.

[33] Before I can consider these issues, it is appropriate that I first deal with the fundamental principles applicable to the facts and particular circumstances of this case.

[34] It is important to bear in mind that what primarily is at issue in this case is a contract in the form of the acceptance form that was concluded between each plaintiff and the defendant which arose out of a mass offer that was issued by the defendant by means of a circular, with respect to a share transaction on the Johannesburg Securities Exchange comprising an “*affected transaction*” as envisaged in section 440K of the Companies Act 61 of 1973.

[35] The circular stipulated a method of acceptance of the offer in question, as follows:

“If you are a certified Paramount linked unit holder or B debenture holder and you wish to accept the offer contained in this circular, you must complete and return the form of acceptance, surrender and transfer (blue) attached hereto in accordance with the instructions therein and lodge it with, or post it to, the transfer secretaries, Computershare Investor Services ... which form, in order to constitute a valid acceptance, must be received no later than 12h00 on the closing date.”

[36] It is common cause that both plaintiffs were certificated Paramount linked unit holders and accordingly offerees who were advised in the circular that, to accept the offer, they “*must complete the attached form of acceptance, surrender and transfer (blue) and return the same as soon as*

possible to the transfer secretaries ... together with the documents of title, so as to be received by the transfer secretaries by no later than 12h00 on the closing date”.

[37] The relevant part of the defendant’s offer was to acquire the relevant Paramount linked unit from the offerees, and gave the offerees an election with respect to the consideration accepted by them in accepting the offer, namely that they could accept either linked units in the defendant at a stipulated ratio of one new Growthpoint linked unit for every 1,44 Paramount linked unit held or a stipulated cash consideration of R6,71 for every one Paramount linked unit held.

[38] As can be seen from the offer, the only steps that an offeree such as the plaintiffs was required to take to indicate his or its election in this regard was to enter the number of linked units that he wished to surrender for cash in the box on the form of acceptance, surrender and transfer headed “*Number of Paramount linked units in respect of which the cash consideration is elected*”, and to enter the number of linked units that he or it wished to surrender for linked units in the box on the form headed “*Number of Paramount linked units in respect of which the linked unit consideration is elected*”. Other than this, no other steps were required or relevant to indicate the election of the consideration desired for the surrendered unit.

[39] *Ex facie* the acceptance forms, each plaintiff accepted the offer by the stipulated method, and each indicated an election by performing the stipulated step for doing so. Each plaintiff filled in the correct number of linked unit held by it in the box on the form headed “*Number of Paramount linked units in respect of which the cash consideration is elected*”.

[40] Currie, the plaintiffs’ main witness, conceded that it was quite clear that each form reflects an election to accept the cash consideration. Furthermore, Currie caused each acceptance form thus filled in to be delivered by hand to the defendant’s transfer secretaries on 15 January 2007 which was before the closing date of the offer on 26 January 2007.

[41] As I have pointed out above, the plaintiffs’ case is that the acceptance forms contained a “*manifestly confused response*”, and that Computershare realised or should have reasonably realised that the completion of the block in respect of the cash consideration was a mistake by the plaintiffs, that in the premises the parties lacked consensus *ad idem* and the contract is void *ab initio*.

[42] Based on the facts set out above, a contract clearly came into being between the defendant as offeror, and each plaintiff as offeree, when and immediately upon compliance by each plaintiff with the stipulated method of acceptance specified in the offer contained in the circular. This contract was concluded by the performance of a specified act of acceptance by each plaintiff.

[43] On the conclusion of a contract as aforesaid, there is no further room for the application of principles such as “*mistakes*”, *justus* or otherwise that is applicable to the sphere of formation of the contract.

[44] The apposite legal principles are those applicable to the coming into being of contract when there is a stipulated method of acceptance in the offer as in this case.

[45] The relevant contract in such cases is firmly and finally concluded the moment the stipulated method of acceptance is performed.

[46] In *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) an offer in respect of the sale of immovable property had stipulated as follows:

“This offer is irrevocable and binding upon both parties until signature by both parties on or before 17 May 1969, failing which it shall lapse if only signed by one party.”

[47] One party signed the offer on 30 April 1969 and the other signed it on 17 May 1969. The party who signed last posted the accepted deed to the other party on 18 May 1969. The other party never received the accepted deed. It was argued that the normal principles of acceptance had to apply, namely that no acceptance was effective until it had been effectively communicated to the counterparty, and that, accordingly, as the acceptance had never been effectively communicated to the offeror within the specified time or at all, there was no contract.

[48] The Appellate Division disagreed holding that there was a clear stipulated mode of acceptance, namely the mere act of signing, which, without more, immediately created a binding contract, whether communicated or not.

At 597D-G, Van Blerk JA said the following:

“It is trite that an offeror can indicate the mode of acceptance whereby a vinculum juris 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, de Jure Pacis ac Belli, Bk. 2, chap. 11. para. 15, cited with approval in Dietrichsen v Dietrichsen, 1911 T.S. 486 at p. 494, namely:

‘... 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 of your acceptance. And if there is a doubt upon the matter, we must always presume that the second was the case...’

The contract, however, does not admit of such doubt. It does not contain the ordinary offer which is silent as to the mode of acceptance. The manner in which the contract was to be concluded was prescribed and not left to be governed by the legal principles applicable to acceptance.”

[49] In *Driftwood* a binding contract came into being the moment the deed was signed, despite the fact that the offeror was unaware of this, and despite the fact that the acceptance of the offer was never communicated to the offeror. The moment the stipulated method of acceptance was employed, the act of contracting was over, and a binding contract was in place. Clearly, there was no further room for any principles to apply relating to the formation of the contract, offer, acceptance, consensus and dissensus. After that, all

the offeror could do was to interpret the already binding contract for himself. However, his interpretation could not alter its terms or affect the question whether there was a contract or not.

[50] The principle is clear that where a stipulated method of acceptance of the offer is employed in the offer, then, as soon as that method is employed there is a binding contract. Not only does this supersede the principles of offer and acceptance that would otherwise apply but it also renders inapplicable the principles relating to the formation of a contract, such as a mistake, after the contract had already been concluded.

[51] In the instant case, the above principle is aligned to its application in cases of mass offers made to the public, where there is in fact at no stage any negotiation at all between the parties, and any number of persons may create binding contracts with the offeror merely by performing the act stipulated as the act of acceptance. In such cases, specifically where an offer has been made to a large class of persons in the public such as all the Paramount linked unit holders and B debenture holders in this case, there is no interaction between the contracting parties other than the issue of the offer and the performance of the stipulated act of acceptance by those who wish to create a binding contractual relationship.

[52] In all these cases, once anyone of the public offerees like the Paramount linked unit holders similar to the plaintiffs, performs the stipulated act of acceptance, there is immediately a binding contract, binding on the offeree and on the offeror. This occurs even if the offeror is unaware of the fact that its offer has been accepted, or how many offerees accepted it. No further act of communication is required to create the contract. Thereafter, all that is left is to interpret its terms. There is no room thereafter for the operation of the doctrine of mistake, which operates with respect to the formation of a contract.

[53] In *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA), the company issued an advertisement in which it offered to pay £100 to anyone using its product but still contracting influenza. Bowen LJ said, at p 286:

“It was also said that the contract is made with all the world - that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition?”

Christie in *The Law of Contract in South Africa* 5th edition at p 30 stated:

“This was obviously correct, and there is no doubt that by our law a firm offer may be made to the public or to indeterminate persons by advertisement or by any other method, which will ripen into a contract with anybody who accepts by the appropriate method.”

[54] It is trite law that the moment any offeree performs the stipulated act of acceptance, there is a binding contract. Applied to the facts of this case, the moment the stipulated mode of acceptance and election of cash or linked unit consideration was exercised by each plaintiff, by filling in the block for cash consideration, and delivering the acceptance form to the transfer secretaries before the closing date, there was a binding contract between each plaintiff and the defendant, and there was no room for any further acts of contracting, irrespective of whether the defendant or Computershare had yet become aware of the fact that these contracts had been concluded with it.

[55] In such cases there is no room for mistake to operate after the contract is concluded, as the private mental reservations of the offeree who employs the stipulated method of acceptance cannot alter the fact that the binding contract came into being the moment the stipulated method is employed. Nor can any act of interpreting and/or processing the results on the part of the defendant or Computershare alter the binding contracts, which has already been concluded.

[56] In my view this situation can be likened to that applicable in an auction in a sale in execution under the court rules where the sale occurs “*upon the fall of the hammer*”, and there is no discretion on the part of the Sheriff accordingly “... *Because of the lack of a discretion on the part of the Sheriff in such circumstances, the scope of a justus error in the context of a sale in execution consequently becomes extremely narrow*” (per Revelas J in *McCreath v Wolmarans NO and Others* 2009 (5) SA 451 (ECG) at para [27].

[57] The reason there is still some very limited scope for the operation of the doctrine of mistake in auctions is simply because the stipulated act of acceptance still carries with it an act of communication which is in the form of a nod, or a hand raising by the person making a bid, which is capable, during the act of concluding a contract, of being reasonably known to be mistaken, so that the principles of *justus error* could still operate before the contract is finally concluded. *Maritz v Pratley* [1894] 11 SC 345 is a case in point. Maritz was conducting an auction sale and when he came to lot 1208, a mantelpiece, Pratley was the successful bidder. Subsequently Pratley refused to pay because he thought he had bought the mantelpiece together with a mirror which was standing on it. It turned out that the mirror was in fact a separate lot 1209. The court held that Pratley's mistake was reasonable (*justus*) so there was no contract.

[58] However, in a case like in the present where the stipulated method of acceptance does not require any communication such room for the operation of the doctrine of mistake simply does not exist.

[59] Each plaintiff in this case employed the stipulated method of acceptance and by so doing acted in such a way as to represent to the defendant that they were consenting to the terms of the contract on those terms, irrespective of any private intentions. This in my view, falls foursquare within the theory of "*quasi-mutual assent*" or "*reliance theory*" that was stated by Harms AJA in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (E) at 238-239 as follows:

“The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract. South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704 at 715-16. However, in the case of an alleged dissensus the law does have regard to other considerations: it is said that, in order to determine whether a contract has come into being, resort must be had to the reliance theory.”

The learned Judge then went on to quote 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?”

[60] As can be seen from Harms AJA's *dicta*, the doctrine of mistake only operates during the formation of the contract. It accordingly follows that where the parties do not negotiate with each other at all such as in this case, and where the stipulated method of acceptance does not include any need for communication, then the sole question to be asked is did the party to whom the offer was made perform the act required for acceptance, viewed objectively? If so, he and the offeror are bound immediately, irrespective of intentions.

[61] The case of a mass offer as in this case can be contrasted with the facts in *Sonap* where there were direct negotiations between only two contracting parties, and the court held there actually to have been discussions about the possibility of a mistake before the contract was finally concluded. The question in *Sonap* was whether the respondent, who was presented with an addendum to a lease containing the mistake, knew or ought to have known there was a mistake in the act of accepting the offer. Harms AJA disbelieved the respondent and felt that the respondent was “*snapping up ... a bargain*” when he purported to accept the mistaken deed. The case has distinguishable from the present and has nothing to do with contracts that are concluded by the performance of a stipulated act of acceptance that does not entail any communication or interaction between offeror and offeree other than lodging of the signed document by the offeree with the agent of the offeror to complete the contract, such as in this case. The plaintiffs’ reliance on *Sonap* is accordingly misplaced.

[62] The plaintiffs’ reliance on various cases for example *Pillay, Steyn v LSA Motors* to which I was referred to is also, similar to the *Sonap* case, misconceived. These cases are distinguishable and do not involve mass offers as in the present case.

[63] Based on what I have stated above, I am of the view that it is simply wrong to ask questions about dissensus and consensus with respect to the processing of the forms on the part of Computershare after the contract had already been concluded. The question of mistake, *justus* or otherwise, simply

has no place and ought not to even be raised in this case. On this basis alone the plaintiffs' claim must fail.

[64] In any event even if I were to find that the doctrine of *justus error* could be applicable in this case even with respect to the period after the contract had been finally concluded, it is clear that on the facts, it could not be heard that the reasonable reader of the acceptance form namely the processors employed at Computershare, would have realised that there was a mistake.

[65] I say so because each plaintiff filled in the acceptance form and entered, in the block headed "*Number of Paramount linked units in respect of which the cash consideration is elected*", a number corresponding to all the Paramount linked unit held by each plaintiff. In the case of Currie this was 85 450 units whilst in that of the company it was 264 505 units.

[66] It is common cause that the particular election in each case was clear and unambiguous and as I already mentioned, Currie in his testimony conceded that each acceptance form clearly reflected an election for the cash consideration.

[67] This election for cash was the only election on each form that related to a holder of Paramount linked unit such as each plaintiff was. Furthermore, this election was consistent with:

67.1 the accompanying scrip of linked units that was surrendered by each plaintiff;

67.2 the filling in of the correct number of linked units held by each plaintiff in the last part of Part A of each acceptance form, together with the correct certificate number; and

67.3 the fact, verified on the Computershare system during the processing of the forms, that each plaintiff held this number of Paramount linked units.

[68] The plaintiffs sought to suggest various sources of “*confusion*” or “*contradiction*” resulting in a mistake with respect to the election, to suggest that the reader of the election should have seen that there had been a mistake in the election. Firstly, the plaintiffs invoked the fact that a number had initially been entered in the block meant for the holder of B debentures and had then been deleted. In my view this can hardly serve as proof that Currie was confused or committed an error when he initially entered a number in the block meant for the holder of B debentures and thereafter deleted it. The deleted entry on each form relates to someone surrendering B-debentures. Since each plaintiff submitted only linked units together with the form, and since each plaintiff was the certificated holder of only linked units and no B debentures, there was no chance that the deleted entry could possibly be a potentially correct election. This must also be viewed against the backdrop that when Currie made the initial entry was not in possession of

the scrip certificates reflecting that the plaintiffs only possessed linked units, his testimony was to the effect that after he had made initial entries, and when the actual scrip certificates were brought by his messenger he correctly deleted the initial entries relating to B debentures and then made fresh entries on the blocks meant for the exercise of the cash option.

[69] Most importantly, Currie conceded, quite correctly in my view, that the deletion was irrelevant in the form, as to understanding what the election had to be because the plaintiffs did not have B debentures at the time.

[70] Lastly, a cursory look at the deletion reveals that it was very thoroughly done and in my view this makes it clear that the person who made the entry and thereafter deleted it, did not want to make this election, and strengthens the entry that was not deleted as a deliberate choice.

[71] The plaintiffs criticised the processors over the fact that they overlooked or ignored the fact that the deletion had not been initialled or signed while the circular directed that alterations had to be signed in full. This criticism is misconceived as it was never suggested that the defendant ought to have ignored the deletion and tried to give effect to the deleted election, as if the plaintiffs held B debentures. In fact Currie conceded that this was untenable. In any event clause 8 on page 75 of the circular stipulates that *“any alteration may not be accepted by the offeror”*, and the circular expressly reserves the right on the offeror to condone, in its sole discretion, the non-observance by any Paramount offeree of any of the terms of the offer.

[72] As the evidence led by the defendant shows, the important fact remained that if the deletion gave any scope for pause, verification by reference to the scrip certificates submitted together with the forms and by reference to the system, would have indicated beyond a shadow of doubt that, as neither plaintiff had any B debentures, there was no danger of any confusion as to whether the deleted election ought to have been given effect to.

[73] The plaintiffs' contention that the fact that each form was signed on the dotted line meant for B debenture holders instead of the line meant for linked unit holders was a significant error does not hold water. I say so because as neither plaintiff was a B debenture holder, there could be no room for error and accordingly, the location of the signature is not important.

[74] The plaintiffs invoke the fact that the block headed "*Submission of banking details in respect of linked unit holders wishing payment of the cash consideration to be made by way of electronic transfer of funds*" was entered as "N/A", as somehow indicating an error. However, Currie conceded in cross-examination that marking this box "N/A" could as easily be an appropriate choice for someone who wanted cash paid by cheque and not by EF transfer. Furthermore, the form specifically stated that "*Payment to certificated linked unit holders and B debenture holders that do not have an existing bank mandate with the transfer secretaries will be made by cheque posted at offeree's own risk*". It is trite that the plaintiffs did not have an existing bank mandate with Computershare and there was accordingly, no

error or contradiction at all in respect of the cash election and the designation “N/A” in the box in question.

[75] The plaintiffs’ criticism of Computershare processors in this regard as being incompetent is without justification. The criticism is that the processors gave no thought to the postal risks associated with cheques, the delay in clearing cheques and the safer EFT payment method. Ms Hubner’s evidence that in the industry payment of large amount of monies by cheque is the norm was neither contradicted nor disputed.

[76] The plaintiffs contend that the resolution adopted on 12 January 2007 was submitted together with the acceptance forms and that this document should have detracted from the clear election for the cash consideration found on the acceptance form itself. The plaintiffs further submit that this resolution required careful scrutiny by the processors and that it was negligent of them to overlook its contents which expressly authorised the acquisition of Growthpoint linked units. The plaintiffs then submit that the contents of the resolution should have detracted from the cash consideration found on the acceptance form itself.

[77] In my view the plaintiffs’ reliance on the resolution as aforesaid cannot succeed and I say so for the following reasons:

77.1 Ms Hubner the defendant's witness who represents Computershare, testified that there was no resolution in the file and that all documents submitted by the offerees were kept in the processing file of each. In her view, there is no considerable reason to think a document that did form part of the documents submitted would have gone missing. She tendered evidence of the procedures followed for recording all documents submitted together with acceptance forms in a logbook upon receipt which was to the effect that had the resolution accompanied the forms, it would have been recorded therein. This evidence was not effectively challenged;

77.2 The covering letter dated 15 January 2007 by Currie, which makes specific reference to what was included in the documents being submitted to Computershare, and which specifically requested confirmation of "*receipt of the above*", did not, significantly, mention the resolution at all. Significantly, Currie conceded that the reason why the covering letter listed the contents submitted with it and specifically sought confirmation of "*receipt of the above*", was precisely due to the anxiety that the recipient sign for receipt of the documents referred to in the covering letter.

77.3 In my view, it is highly unlikely that the resolution would have accompanied the forms but would not have been featured as a document in a covering letter.

77.4 The resolution in any event was irrelevant to the acceptance and election in issue, because it related to a resolution that the company accept the offer to convert 264 505 B debentures in Paramount Property Fund. As the company had no B debentures at the time the offer was accepted, this resolution was clearly incapable of being accorded meaning in the election even if it were to be expected to go outside of the stipulated method of electing by filling in the correct box. Curry conceded under cross-examination that the resolution was irrelevant to anybody who did not have B debentures like the company and the resolution was therefore an ineffective document when it came to the exercise of the option Currie wanted to exercise. The focus of the resolution was to convert B debentures. In my view this adds to the unlikelihood that the resolution would have been included in the rest of the documentation that was forwarded to Computershare. Significantly, Currie testified that by the time the acceptance forms were lodged, he was fully aware of the fact that the company did not own B debentures and he was at the time accordingly aware that the resolution relating to converting B debentures would have been incorrect.

77.5 Curry testified that he was in a hurry and under pressure on the day he completed the acceptance forms and that he did not apply his mind properly to the task at hand when he filled in the wrong box in making his election. In my view, this confusion of absentmindedness on the day makes it even more likely that he was mistaken about whether the resolution accompanied the forms that were submitted.

77.6 Even if the resolution had in fact accompanied the forms, the only function could have served was to indicate whether the person completing and signing the acceptance form was authorised to sign the acceptance form. The resolution did indeed authorise Currie to sign the form and so even if it had accompanied the forms and even if it had been considered, it would have been seen to have fulfilled its function of indicating Currie's authority to sign.

[78] In the light of what I have stated above, I am of the view that the resolution cannot play any meaningful part in interpreting the clear election that was made by the plaintiffs.

[79] The acceptance form in each case clearly reflected an election to accept the cash consideration, and there was nothing about the form or the accompanying documentation to detract from this clear employment of the stipulated method of indicating the election.

[80] In their quest to show the inefficiency of Computershare's personnel in accepting acceptance forms generally, the plaintiffs led the evidence of Sarah Miller whose evidence was in my view hardly of assistance to the plaintiffs' case.

[81] In *Miller's* case, this offeree had both B debentures and linked units and, in indicating her election, she:

81.1 merely ticked each box indicating an election to receive linked unit consideration both for debentures and for linked unit, without indicating the number of debentures or units at issue;

81.2 filled in the banking details relevant to a person who elected to receive the cash consideration; and

81.3 neglected to fill in the details as to the number of units or debentures being surrendered and the certificate numbers.

[82] In the circumstances it was clear, as Ms Miller herself indicated, that had her form materially contradicted itself in that she ticked – without indicating the numbers – an election for the linked unit consideration, but furnished banking details relevant only to those who elected to receive cash. In my view Ms Miller's case is not comparable to that of the plaintiffs at all.

[83] The plaintiffs submit that the wisdom of accepting the cash consideration was so questionable as to indicate a “*mistake*” when this was done. In my view this defies common sense and logic. I say so because there was clearly an election to be made between cash and shares and one can hardly invoke the mere wisdom of one of the elections as a reason to suggest it could never have been accepted when what falls to be interpreted is precisely the choice between these two alternatives.

[84] In any event, people have many reasons why they may choose cash over something as uncertain as a share. Currie conceded that the value of the shares at issue fluctuated depending on the fate of the offer and that if the offer was a disaster for Growthpoint, the value could “*nosedive*”. Currie’s suggestion that a person wishing to have cash rather than an uncertain share value could simply sell all his shares in the open market at market value completely ignored the fact that to achieve this, one would first need to find a buyer willing to buy all one’s shares and if a number of sellers tried this this would immediately put downward pressure on the price due to the law of supply and demand, and one might end up getting much less for the shares as a result.

[85] Mr Isaacs who testified on behalf of the defendant, pointed out that share prices were a matter of great uncertainty, as the global events of 2008 demonstrated, and that there were many different reasons why offerees might prefer to take cash even where the linked unit consideration on the day was valued higher than the cash consideration. In any event, other offerees,

including one significant batch of 41 000 shares, also accepted a cash consideration. Mr Kerr who also testified on behalf of the defendant, stated that there were always, in offers that had an election, some choices that were surprising. Thus the mere fact that one of the election options appeared with hindsight to have yielded a smaller value can hardly mean every person who made that election must have been taken to have made a mistake, which is really what the plaintiffs' submissions in this regard amount to.

[86] Accordingly, the plaintiffs in each case simply cannot rely on a private intention conflicting with the clearly expressed intention, which expression of intention led the defendant's agent reasonably to believe that the intention was as reflected which was to accept the cash consideration.

[87] The court noted that Currie testified, quite tellingly saying "*It is incredible that I could make a mistake like that*". This means that Currie himself who made the alleged mistake regarded this mistake on his part as "*incredible*". It follows firstly that:

87.1 the mistake can never be reasonable or *justus* on the part of the plaintiffs if it was "*incredible*". I refer in this instance to the authoritative case of *National and Overseas Distributors Corporation Ltd v Potato Board* 1958 (2) SA 473 (AD) where Schreiner JA said, at 479H:

"At least the mistake (error) would have to be reasonable."

87.2 if it was incredible even to Currie himself it can hardly be said that the other party ought to have known of a mistake that was inconceivable.

[88] Ms Hubner of Computershare testified that the processing team was instructed to look for an election in the relevant box, to check the correct scrip surrender forms, to see that the acceptance form was signed, and to validate the surrendered scrip against the system. In my view this was quite reasonable considering that this was a high level exercise given the bulk and limited time available for processing so many forms. There is nothing that suggests that the processing teams fell short in carrying out those instructions.

[89] As I have already pointed out, the contracts between the plaintiffs and the defendant were already concluded by the time the processing team processed the acceptance forms. The processors were not concluding contracts on behalf of the defendant. The plaintiffs as offerees had already concluded the contracts by lodging their completed acceptance forms as the stipulated mode of acceptance. It follows then that how the processing team fulfilled their processing role was accordingly irrelevant to what the contract was between the parties.

[90] The high watermark of the plaintiffs' case in this regard was the fact that Ms Hubner conceded that, if she herself scrutinised the forms, she might possibly have stepped back to check further on that acceptance. In my view

this was as far as the evidence went and when asked whether if she had taken a step back and analysed the deletions on the forms, she would have been able to action any election on that form that related to the deleted option, Ms Hubner confirmed she would not have, as the deleted option related to B debentures which the plaintiffs simply did not have. Clearly, no amount of pausing and stepping back would have yielded the conclusion that the deleted option ought to have been accepted, or could possibly have been the option desired as that option was incapable of applying to the plaintiffs. It is clear that the only election on the form that was in fact capable of being implemented was the one for cash as this was the only one that had not been deleted and the only one that actually related to the correct security, namely linked units and not B debentures, and the correct number of units corresponding to the correct scrip certificate numbers.

[91] The plaintiffs attempted to suggest that there was confusion as to who held B debentures and who held linked unit. However, Mr Rowan appearing for the plaintiffs, conceded that it could not be seriously suggested that Currie was confused at the time he submitted the forms whether he or the company held B debentures or linked units. Clearly, Currie was at the relevant time fully aware that he and the company only held linked units.

[92] In the light of all that I have stated above, I find that there was no basis upon which the defendant could in the circumstances, reasonably have been expected to have acted in any other way than to accept the binding election

which the plaintiffs themselves conceded they had made clearly on their acceptance forms which was opting for the cash consideration.

[93] The relief claimed by plaintiffs, especially specific performance that they be provided with linked units – without a claim for damages in the alternative, has no legal basis at all and is not capable of any implementation.

I say so because:

93.1 The plaintiffs contend that the acceptance forms must be treated as *pro non scripto* and a legal nullity;

93.2 This means that on the plaintiffs' version, the plaintiffs never accepted the offer at all;

93.3 If there is no contract at all, it defies logic how the plaintiffs can accordingly claim any entitlement to delivery of the linked units.

The plaintiffs have not advanced any basis in fact or in law for the relief they seek.

[94] I accordingly make the following order:

The plaintiffs' claims are dismissed with costs.

**B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

COUNSEL FOR PLAINTIFF

INSTRUCTED BY

COUNSEL FOR DEFENDANT

INSTRUCTED BY

DATE OF HEARING

DATE OF JUDGMENT