<u>REPORTABLE</u>

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 5452/2014

In the matter between:

VENALEX (PTY) LIMITED **APPLICANT**

and

VIGRAHA PROPERTY CC **FIRST RESPONDENT**

NEDBANK LIMITED **SECOND RESPONDENT**

REGISTRAR OF DEEDS **THIRD RESPONDENT**

JUDGMENT

Delivered on: Tuesday, 10 March 2015

OLSEN J

[1] This case concerns the enforceability of a written agreement in terms of which the applicant contends it purchased immovable property from the first respondent. The applicant seeks orders declaring the agreement binding, directing the first respondent to do all things necessary on its part to bring about transfer of the property to the applicant, and for costs. The first respondent resists these claims; and in a counter-application seeks an order ejecting the applicant from the property, the applicant already having taken occupation of it. The parties are agreed that if the application is granted then

the counter-application must be dismissed; and that the counter-application must be granted if the application is dismissed.

[2] On 21 and 22 January 2014 a document headed "Agreement of Sale and Purchase", which described the property at issue in this case, was signed on behalf of the first respondent as seller and by three men who shared business interests, Messrs Betts, Morgan and Glasspool. These three are the directors of the applicant. They are also the directors of a company called Betts Construction (Pty) Limited which, according to the founding papers, is a substantial construction company. The three decided that a property should be acquired and let to their construction company in order to accommodate its head office. Their plan was to house the property in a separate company. That is what led to the execution of the document to which I have referred on 21/22 January 2014. For the sake of convenience I will refer to this document as the "original agreement". There is no dispute about the fact that in its original form it was valid and binding.

[3] Clause 3 of the original agreement is headed "The Purchaser/s". Adjacent to this heading the words "Pty/Ltd to be formed: Directors" are inserted in manuscript. Beneath the heading in sub-clauses 3.1, 3.2 and 3.3 are the full names of Betts, Morgan and Glasspool and their identity numbers. These are inserted in manuscript. The original blank printed form simply contained the heading and provided two of the three sub-clause numbers, and space for the insertion of the identity numbers of two purchasers. (Manuscript alterations made similar provision for the insertion of the third purchaser's name and identity number.)

[4] Clause 17 of the original agreement is headed "Capacity of Purchaser". Sub-clause 17.1 reads as follows.

> "Should the PURCHASER sign this agreement in their [sic] capacity as a Director/Member/Trustee for a Company or Close Corporation to be formed, then the PURCHASER shall be personally liable in terms of this Agreement should the Company, Close Corporation not be

> formed within a period of thirty (30) days of the date of signature hereof or if the Company or Close Corporation fails to ratify and adopt this Agreement within a period of seven days of date of registration or incorporation."

Sub-clause 17.2 goes on to provide that the purchasers bind themselves as sureties:

> "with the Company, Close Corporation or Trust for the due fulfilment of all the obligations of the Company, Close Corporation or Trust in terms of this Agreement".

Sub-clauses 17.1 and 17.2 are not models of clarity. It is not clear why a trust features in sub-clause 17.2, but nothing seems to turn on that.

[5] After the original agreement was signed the three businessmen consulted their accountant who pointed out that the registration of a new company would take time; and advised that a better course would be to use a shelf company; that is to say one already incorporated and available off the shelf as a juristic entity which had not yet at any stage entered into any business. This advice was accepted and the applicant is the shelf company. Its shares were acquired and the three businessmen became its directors.

[6] The original agreement provided that the date of occupation would be agreed with the seller. The sole member of the seller, Vigraha Property CC, was a Dr Mahabeer. The three businessmen wanted access to the property in advance of transfer and this was discussed with Dr Mahabeer who was willing to accede to it. As a result, and presumably at the request of the three businessmen, the appointed conveyancers prepared an addendum to the original agreement. At the same time two other documents were prepared,

(a) a document headed "Nomination and Acceptance" which was executed by Messrs Betts, Glasspool and Morgan in terms of which they nominated the applicant as the purchaser of the property; and

(b) a resolution of the applicant which recorded its acceptance of its nomination and its decision to buy the property and to ratify the agreement which had been concluded by its directors on 21/22 January 2014.

[7] The addendum to the original agreement dealt with the subject of occupation. It appears to have been sent unsigned to the first respondent as Dr Mahabeer signed a different printed version of the document to the one signed on behalf of the applicant. Of importance is the fact that the addendum describes the applicant as the purchaser.

[8] The addendum was signed on behalf of the first respondent on 4 February 2014. The document nominating the applicant as purchaser, the resolution of the applicant to which I have referred, and the other copy of the addendum were signed on 5 February 2014. The first two documents were signed by Messrs Betts, Glasspool and Morgan as nominators in the one case and as directors in the other; and they also signed the addendum which indicated that they were signing "for Venalex (Pty) Limited" (i.e. the applicant).

[9] When Dr Mahabeer signed the addendum on behalf of the first respondent he made a manuscript insertion in clause 3 of the document. Presumably because they were unaware that he had done so, the directors of the applicant did not make a similar manuscript addition to the form of the addendum which they signed. This gave rise to a subsidiary issue in the case, as to whether the addendum was valid.

[10] The applicant took occupation of the property. The price was secured, and transfer of the property ought to have taken place. But for some reason which, un-contradicted by the first respondent, the applicant puts down to "seller's remorse", the first respondent did not wish to proceed with the sale. It accordingly adopted the view that there was no binding agreement with the applicant because it was a company already in existence when the original agreement was signed. The first respondent's argument goes as follows, and

is the principal issue in the case. The signatories for the "purchaser" had not purported to represent the applicant, an existing company. They had sought to conclude a pre-incorporation contract as contemplated by s 21 of the Companies Act, 2008. As the applicant was already at the time incorporated it did not qualify as a company entitled to ratify the agreement and take on the rights and obligations of purchaser under it. In addition the first respondent contended that the demand by the applicant for transfer amounted to a repudiation of the original agreement and it was stated that the repudiation was accepted. (As will be seen, given the view I take of this case, there is no need for me to deal with the question as to whether there has been a repudiation. I merely mention that, as I read the contract, if the main issue were to be resolved in favour of the first respondent, then the applicant's three directors in their personal capacities are the purchasers of the property. They are not personally parties to this litigation; and the issue as to whether they personally have repudiated their obligations under the contract was not canvassed on the papers).

[11] I turn to the main issue between the parties. In doing so I will ignore for the time being the implications of the addendum to the original agreement and the dispute over whether the addendum was in any event valid.

[12] The applicant approaches the court on the basis that, whilst it is correct that it was intended that a company would be "formed", and that it would take on the mantle of purchaser, and receive transfer of the property, there is no reason to jump to the conclusion, as the first respondent has, that the relevant contractual provisions contemplated the engagement and implementation of the provisions of s 21 of the Companies Act, 2008. The applicant argues that upon a fair and proper construction of the provisions of the contract what was contemplated was a *stipulatio alteri* which envisaged the rights and obligations of the purchaser being taken up either by a company already incorporated or by one not yet incorporated.

[13] For the first respondent it is argued that the words "to be formed", where they appear in the insertion in clause 3, indicate that the company

which may as of right take up the rights and obligations of purchaser under the original agreement had to be one not yet incorporated at the date of conclusion of the original agreement.

[14] Before examining the original agreement it is instructive to take note of the quality of the distinction which the first respondent seeks to draw between a newly incorporated company and a shelf company. In the former case, immediately upon incorporation the company will be an entity which has not previously participated in any business. Its nominal share capital aside, its balance sheet would be a clean slate. In the case of a shelf company precisely the same condition would obtain. If one ascribes to the first respondent an intention only to allow such a "clean" company to take on the rights and obligations of purchaser under the agreement, then it makes no difference whether the company is newly incorporated or taken off the shelf. This distinction without a difference was noted in a different context in *Offit Enterprises (Pty) Ltd & Another v Coega Development Corporation & Others* 2010 (4) SA 242 (SCA). In the context of a dispute over whether certain land could be expropriated on behalf of a juristic person, the question arose as to whether the Coega Development Corporation was a juristic person "established by or under any law for the promotion of any matter of public importance". It was argued that, as the Corporation had been "established" as a mere property owning company, it could not have been "established" for the requisite matter of public importance. In that context the court said the following at para 20.

> "However, that is an artificial meaning to give to the notion of establishment. It can surely make no difference whether a company is formed specifically for a particular purpose, or is acquired as an "off the shelf" company from a firm of auditors, or is acquired from its existing shareholders as a dormant entity and its memorandum and objects altered to fit its new purpose, as happened in the present case."

[15] Of course, in the case of both a newly incorporated company and a shelf company, where, as here, a contracting party such as the first respondent does not place any constraints upon the "clean" company participating in any business in advance of payment of the price, there is no guarantee that the directors of either type of entity will leave the purchasing company in the unsullied condition in which the company concerned undertakes to meet the obligations under a contract such as the one in issue here. But that risk is the same in each case.

[16] The conclusion must be that on either party's understanding of the contract the first respondent factually got what it bargained for by way of the quality of the substituted purchaser. Given that the applicant contends that, within the context of the present transaction, there is no difference between a newly incorporated company and a shelf company, and given that the first respondent does not identify any difference save for the date of incorporation of the company, it seems clear that if at the time of contracting the parties had considered the question as to whether the company had to be incorporated after the agreement, or whether a shelf company could be used, the answer would have been that either would do.

[17] The essential difference between the opposing contentions of the parties concerning the proper construction of the agreement lies between:

(a) the first respondent's contention that the three businessmen acted only as agents, and as such only for a non-existent principal; and

(b) the applicant's contention that the three businessmen were not merely agents, but acted in their individual capacities stipulating for the role of "purchaser" to be taken as of right by a company to be formed.

[18] The predecessor once removed of s 21 of the Companies Act, 2008 was s 71 of the Companies Act, 1926 (1926 Act). The purpose of s 71 of the 1926 Act was discussed in *Ex Parte Vickerman and Others* 1935 CPD 429. In that case the registrar of deeds had refused to register a transfer of

property to a company incorporated after the contract for the sale of the property had been concluded because the requirement of s 71 of the 1926 Act, that the memorandum of the company should contain as one of its objects the adoption or ratification of the contract, had not been satisfied. The question was whether the transfer could nevertheless take place. Watermeyer J referred to *McCullogh v Fernwood Estate Ltd* 1920 AD 204 which held that a company could by adoption or ratification take up a contract made on its behalf before it existed where the contract had been made by a person acting personally and not as agent. The learned Judge held at 430 that s 71 "was not intended to curtail the right of a company to adopt a contract made for its benefit, but to extend that right to cover the case where the person acting for the company about to be formed was acting as agent and not individually." As the strict requirements of s 71 had not been followed, the question which had to be answered was whether the persons who contracted for the rights and obligations of buyer did so individually or as agents for a company to be formed. Watermeyer J decided at 431 that they "acted in their individual capacities, but stipulating for a company about to be formed". He continued as follows.

> "The only difficulty is the heading of the contract, in which the purchasers are described as purchasers for and on behalf of a limited liability company about to be formed. That, *prima facie*, looks as if they were acting as agents for the company about to be formed. But from the terms of the contract it appears that the purchasers agreed personally to pay £500 on the signing of the contract and agreed personally to take possession of the property, and personally to pay transfer duty to the Government and to pay rates and taxes, and personally undertook, should the company not be registered by the time transfer had to be taken, to take transfer in their respective names jointly; and undertook to pay the sum of £2,200 in cash against registration of transfer as referred to in paragraph 8. All these things show that they were acting as principals and undertaking personal liabilities, and not merely contracting as agents for a company about to be formed. That being the case, it seems to me that the company, independently of <u>sec. 71</u> of the Companies Act, could adopt and ratify

> this contract, and consequently it seems to me that the applicants are entitled to an order directing the Registrar of Deeds to register transfer."

[19] In *McCullogh v Fernwood Estate Ltd* the court was concerned with a contract in terms of which a natural person had contracted "acting as trustee for and on behalf of the limited liability company in the course of formation". The contract was to the effect that a new company would have the opportunity of purchasing the property by a fixed date for a fixed price. But if the date passed without the company coming into being or not adopting the contract then the natural person would be the buyer of the property. Innes CJ described that arrangement as follows (at 209).

> "Clearly he was acting personally and not as an agent, in order to secure for the benefit of the company in the first instance, or alternatively for himself, what he considered a favourable bargain."

[20] The first thing to be noticed about the present contract is that it does not record that the three businessmen are acting as "trustees" for a company to be formed (as in *McCullogh*); or that they are acting "for and on behalf of" a company to be formed (as in *Vickerman*). Looking then at clause 3 (to which I have already referred), the printed form is designed to have the names of multiple purchasers inserted in sub-clauses. The names which appear in those sub-clauses are those of the three businessmen. The words "Pty/Ltd to be formed: Directors" are inserted adjacent to the heading of clause 3 in what the designer of the form intended to be vacant space on the page. Counsel for the applicant described the introduction of the concept of a company to be formed as somewhat cryptic in the circumstances. That observation is correct. Nothing said in clause 3 discloses that the three businessmen are acting only as agents, although one is driven to the conclusion (which is accepted on both sides) that they were stipulating at least for a right on the part of a company to be formed to take up the mantle of purchaser.

[21] The signatures of the three businessmen appear on the last page of the document. They signed on 21 January 2014. They signed above the printed word "PURCHASER/S". Their signatures are unqualified. No representative capacity is apparent on that page.

[22] In the structure of the agreement there are marked similarities to features of the contract considered in *Vickerman*. In terms of clause 17.1 (referred to earlier) the businessmen bound themselves to be personally liable if a company was not formed within 30 days of the date of signature of the agreement. The deposit of R1 000 000 (on account of the purchase price of R2 250 000) had to be paid by 4 February 2014, well before the lapse of the 30 day period. As to the balance of the purchase price, if it did not become the subject of an approved mortgage bond by 11 February 2014, it had to be paid to the conveyancers no later than 18 February 2014; again in advance of the 30 day period referred to in clause 17.

[23] Judged by the standards set in *McCullogh* and *Vickerman* the three businessmen in this matter acted in their individual capacities, but stipulated for the substitution of a company in their place if that could be achieved by a fixed date. As a matter of law the question as to whether the company was one which existed or did not exist at the time of conclusion of the contract is therefore irrelevant. The remaining question is whether the contract itself rendered it relevant; with the result that only a company incorporated after the conclusion of the original agreement could take on the rights and obligations of purchaser under the agreement.

[24] The answer to that question turns on the meaning of the words "Pty/Ltd to be formed: Directors" appearing adjacent to the heading of clause 3 of the agreement. Counsel for the applicant call in aid of their argument the widely quoted paragraph 18 of the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). Counsel argue that the word "formed", where used in this context, does not have a precise meaning. It is argued that at best for the first respondent the word is used to convey an intention that the company stepping into the shoes of the purchaser should

have a clean balance sheet of the type shared by newly incorporated companies and shelf companies. As part of the context, it is argued that one should take into account that there is in fact no difference between those two types of companies. As discussed earlier, if the parties applied their minds they would have said that either would do. That would have been business-like and sensible. Why would the parties concluding the contract intend to allow one type of company to take up the role of purchaser, but not the other, to no advantage for either of them? If there is a difference then it is the advantage the accountant saw in using a shelf company, that it would avoid delay. The provisions governing payment of the purchase price illustrate a common intention to achieve certainty without delay as to performance of the purchaser's obligation to pay the price.

[25] In answer to the applicant's reliance on the case of *Natal Joint Municipal Pension Fund* counsel for the first respondent refer to the passage in paragraph 18 of the judgment where it is stated that "[w]hatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; …". Accepting that invitation one notes immediately that the first respondent's argument would have been that much easier to advance if the word "incorporated" had been used in place of the word "formed".

[26] In my view the word "formed", where it appears adjacent to the heading of clause 3 of the original agreement, does not have a specific and narrow meaning equivalent to the word "incorporated". In explaining that view, I borrow first from the words of the introduction written by R C Williams to Vol 4 Part 1 of *Lawsa* (2ed) which deals with companies.

> "Generally, "company" means an association of persons formed for a common, usually commercial, purpose. The word came to connote a commercial association with a large, continuously altering membership, thereby reflecting something of the origins and development of company law. But, outside of statutory definition, the word "company" has no precise legal content, and in particular it does

> not necessarily connote an entity that has been incorporated by the persons who are associated in the enterprise. Outside of the statutory definition, "company" is thus a concept that is in some respects wider and in other respects narrower than the scope of this title."

[27] With that in mind it is instructive in my view to see that even within the statutory context of the Companies Act, 1973, the word "formed" was not consistently regarded as conveying the same thing as the word "incorporated". Section 32 of that Act read as follows.

> "Any seven or more persons or, where the company to be formed is a private company, any two or more persons associated for any lawful purpose or, where the company to be formed is to be a private company with a single member, any one person for any lawful purpose, may form a company having a share capital or a company limited by a guarantee and secure its incorporation by complying with the requirements of this Act in respect of the registration of the memorandum and articles."

[28] If, as recently as the commencement of the Companies Act, 2008 in May 2011, our statutory law recognised that the "formation" of a company was not necessarily to be equated to its incorporation with limited liability under a statute, there seems to be no reason at all to ascribe to ordinary persons of business, making a manuscript insertion on a printed form, an intention to bind themselves to the technical meaning of the word "incorporated" as it is used in s 13 of the Companies Act, 2008, when they actually used the word "formed". I can see no reason why the acquisition of a shelf company could not legitimately be employed as a means to achieve the intended incorporated status of a company "formed" by and amongst the three businessmen who signed the original agreement. That does no offence to the word "formed" where it appears in clause 3 of the original agreement.

[29] I conclude that the principal issue in this case must be decided in favour of the applicant.

[30] I turn briefly to the question of the addendum to the original agreement which, it will be recalled, recorded the applicant as the purchaser. Counsel for the first respondent resisted the conclusion that the addendum recorded in writing the first respondent's acceptance of the applicant as purchaser on two bases.

(a) Firstly, it was argued that the addendum does not in its provisions record an intention to amend the agreement by substituting the applicant as purchaser.

(b) Secondly, it was argued that the addendum is of no force and effect in the light of the provisions of the Alienation of Land Act, 1981 because the manuscript insertions made by the first respondent on the version of the addendum signed on its behalf were not counter-signed by those who purported to sign on behalf of the applicant.

[31] Whilst it is correct that the addendum does not contain a clause recording in express terms the substitution of the applicant as purchaser, the addendum does nevertheless record implicitly an intention to allow the applicant to be substituted as purchaser. The names of the three businessmen who signed the original agreement do not appear in the text of the addendum. The addendum is headed "Addendum to Deed of Sale dated 21 January 2014". The relationship between it and the original agreement cannot be challenged. Under the heading to the document it is recorded that it is entered into between Vigraha Property CC as seller and "Venalex (Pty) Limited (hereinafter referred to as the "purchaser")". As already noted the provision for signature of the purchaser is made above the words "for Venalex (Pty) Limited". There are five numbered clauses in the document. The "purchaser", defined by the addendum itself as the applicant, is mentioned in four of them. The clauses are thus to the effect that the applicant would take occupation of the property on 5 February 2014; that the applicant's occupation would be given for purposes of cosmetic renovations only; that the applicant would not have to pay occupational interest but would have to pay other outgoings in respect of the property (a subject I will revert to); and that in the

event of the sale being cancelled for any reason the applicant would be obliged to return the property to its original condition at the time of sale. Of course, throughout the applicant is referred to as the "purchaser".

[32] The fifth clause of the agreement is to the effect that in all other respects the sale agreement remains unchanged. It is impossible to resist the conclusion in those circumstances that the substitution of the applicant as purchaser was acknowledged and agreed in writing by the conclusion of the addendum. And it should be noted that whilst in the answering papers the first respondent railed against the quality and relevance of the addendum, it is not said that the first respondent was misled in any respect with regard to the addendum, or that the fact that the applicant had been identified as the purchaser in the addendum had been overlooked by the first respondent (or, more correctly, by Dr Mahabeer acting for the first respondent).

[33] In my view there is also no merit in the contention that the addendum is of no force and effect because the manuscript insertion made in it, when it was signed on behalf of the first respondent, was not replicated in the form of addendum signed on behalf of the applicant. Clause 3 of the addendum contains the addition. Clause 3 records in its printed words that occupational interest would not be payable for the limited form of occupation to be afforded to the applicant in advance of transfer. The printed form records that the purchaser would nevertheless pay for all utilities consumed on the property from the date of occupation and that the accounts would be furnished by the seller to the purchaser and would be paid on presentation. The manuscript insertion appears in parenthesis after the printed version of the clause and reads as follows.

> "(Rates, electricity, water and general maintenance of the property.)"

[34] Electricity and water are part and parcel of utilities consumed on the property and in that respect the manuscript insertion added nothing to the printed text of clause 3. The inclusion of "rates" in clause 3 by way of the manuscript insertion on the addendum simply clarified the effect of clause 9 of

the schedule to the original agreement, which was to the effect that the monthly rates would be paid by the purchaser if occupation was taken (by agreement with the seller pursuant to clause 8 of the schedule) in advance of transfer. Clause 4.3 of the conditions of contract obliged the purchaser, from the date of occupation, to "keep and maintain the property in the same good order and condition as it was in on the occupation date". I can see no difference that matters between that obligation and the obligation to attend to "general maintenance of the property" mentioned in the manuscript addition to clause 3 of the addendum.

[35] The first respondent's argument is in essence that the offer and the acceptance in respect of the addendum do not coincide as a result of which the addendum is not valid and binding. In my view, for the reasons stated above, the argument is based upon an incorrect factual premise as the manuscript additions to clause 3 neither added nor subtracted anything to or from the rights and obligations which were already established. As was stated in *Hutchinson v Hylton Holdings and Another* 1993 (2) SA 405 (T) at 413F, the rule that offer and acceptance should coincide is not formalistic.

> "Immaterial alterations do not breach the rule that offer and acceptance must be identical. Substance is to be looked at, not form. What is required is *consensus ad idem* and that was present."

Here also the required consensus is evident and was established.

[36] Accordingly, the orders sought by the applicant must follow either because the main issue in this case has been decided in its favour, or because, in any event, an addendum to the original agreement brought about the applicant's substitution as purchaser under the agreement.

I accordingly make the following order.

1. **It is declared that the applicant is the purchaser of the immovable property known as Rem of Portion 1 of Erf 197 Rouken Glen and Portion 2 of Erf 197 Rouken Glen situate at 1 and 1A Waterloo Road, Westville in terms of the agreement of sale concluded on 21 and 22 January 2014 with the first respondent, and in terms of the addendum to that agreement signed on 4 and 5 February 2014.**

2. **The first respondent is directed to do all things necessary on its part, including the signature of all requisite documents, to cause transfer of the property to the applicant to be effected.**

3. **The first respondent's counter-application is dismissed.**

4. **The first respondent is ordered to pay the costs of the application and the counter-application, including the costs of two counsel.**

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OLSEN J

Date of Hearing:	FRIDAY, 30 JANUARY 2015
Date of Judgment:	TUESDAY, 10 MARCH 2015
For the Applicant:	MR M PILLEMER SC MR G HARRISON
Instructed by:	V CHETTY & COMPANY SUITE 3, RYDALL VALE OFFICE PARK DOUGLAS SAUNDERS DRIVE LA LUCIA RIDGE DURBAN (Ref.: Mr Chetty/MC/B9958)) (Tel No.: 031 – 566 1900/23/33) c/o THE DOCUMENT EXCHANGE
For the First Respondent:	MR A K KISSOON SINGH SC MR A D COLLINGWOOD
Instructed by:	G H ISMAIL & ASSOCIATES 543 RIDGE ROAD DURBAN (Ref.: Mr Hussain/Ylesia/V165) (Tel.: 031 – 207 8180)