



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
10 February 2025 DATE _____ SIGNATURE	

CASE NO: A2024-025012

In the matter between:

CHRISTOPHER HOWE COLE

Appellant

and

TALACAR HOLDING PTY LTD

Respondent

JUDGMENT

WINDELL, J:

Introduction

[1] This is an appeal against an order made by Mia J, in which the court granted relief against the appellant, Mr Cole, for specific performance of a written “Offer to Purchase” (the offer or agreement). The offer was for the acquisition of immovable property in the affluent suburb of Sandhurst, Johannesburg which belonged to the respondent, Talacar Holding (Pty) Ltd. The court a quo found that the appellant repudiated the agreement and ordered the appellant to complete all necessary steps

to transfer and register the property and to pay the respondent the purchase consideration in the amount of R135 million. The appeal is with leave from the Supreme Court of Appeal.

[2] The salient facts that led to the order are the following. The respondent, represented by Mr David King, mandated Pam Golding Properties to sell the property on behalf of the respondent for an amount of R150 million. Ms Anastasia Rossen of Pam Golding Properties was the agent.

[3] Rossen introduced the appellant to the property and he signed the offer on 16 November 2021, after viewing it from the outside and inside on 15 and 16 November 2021. The offer was for R135 million and included a condition in clause 20.2 ('the clause') at the appellant's request:

'The Purchaser at his own expense will conduct an inspection of the home within (14) fourteen days of acceptance of the offer. Should there be structural defects or defects that are unacceptable to the Purchaser then the Purchaser can at his discretion elect to cancel this agreement.'

[4] The offer was accepted by the respondent and returned to the appellant on 17 November 2021. On 18 November 2021, the appellant's attorney, Smiedt and Associates (Smiedt), asked Rossen for a recommendation for a valuator and a town planner, and she was informed that a structural engineer will inspect the property as provided for in the clause. Although Rossen pointed out that valuation was not a condition of the offer, two valuers were appointed by the appellant to value the property. On 22 November 2021, Rossen, her assistant, the structural engineer and two valuers attended at the property.

[5] On 25 November 2021, the appellant cancelled the agreement. In an email from Smiedt to Rossen the respondent was informed that *'unfortunately after conducting due diligence, the purchaser hereby elects to cancel the agreement... Good luck with the sale'*. Shortly after, Smiedt sent a letter to the respondent (King) in which he advised that there were defects which in the appellant's view were unacceptable. Several emails were exchanged on the same night between Smiedt and King on which the appellant relies. These emails will be dealt with in more detail later in the judgment.

[6] On 6 December 2021 a demand was sent to the appellant to make payment of the purchase price in full, failing which the respondent would proceed with an application for specific performance of the agreement. Between 20 and 24 December 2021, further correspondence was exchanged between Rossen and Smiedt. Rossen was informed that the appellant was still interested in the property, but that he was unhappy with the purchase price and felt that the offer he made was too high. He wanted a 'fair price' for the property and requested her to prepare a report addressing the alleged discrepancy between the purchase price in the offer and the valuations prepared for him by the two valuers. (The two valuations conducted by Investec Bank and Sage (Pty) Ltd placed valuations on the property lower than the purchase price recorded in the offer).

[7] Rossen rejected the valuations from the two valuers to which the appellant suggested that another independent valuator be appointed which 'will be more favourable to him as purchaser'. Mr Van Niekerk from Spectrum Valuations and Asset Solutions were appointed. His valuation was due on 14 January 2022.

[8] The appellant requested another viewing of the property. Thus, on 15 January 2022, the appellant, his friend and his wife, and Rossen viewed the property. The appellant requested Rossen to arrange for an architect to inspect the property to determine whether he would be able to install an elevator and he requested Rossen to arrange for him to meet with the architect and an interior designer.

[9] On or about 15 January 2022 the appellant informed Rossen that he intended to make a new offer on the property and requested Rossen to send a blank offer to purchase to Smiedt. On 19 January 2022, the appellant met with the architect to discuss the alterations he wanted to make to the property to meet his particular needs, style and tastes.

[10] On 20 January 2022 Rossen received a new offer to purchase. It was for an amount of R100 million (i.e R35 million less than what was previously agreed). It also differed from the previous offer in that it provided for a deposit in the amount of R30 million and the balance of the proposed purchase price to be secured by way of a mortgage bond with Investec Bank. A meeting was requested by the appellant to conclude on the amended offer. The meeting did not take place and on 21 January 2022, Rossen was informed that the appellant would no longer be placing an offer. The respondent launched the application against the appellant on 11 March 2022.

[11] The appellant contends that the court a quo should have dismissed the respondent's application on one or more of the following grounds: One, on the respondent's own version in its founding affidavit, the agreement upon which the claim for specific performance was founded, is void for want of consensus on a material aspect thereof (the first defence). Two, to the extent that a valid agreement was concluded, the appellant terminated that agreement, which termination was accepted

by the respondent and whereafter the parties attempted to negotiate a new agreement to replace the offer. The respondent was thus precluded from seeking a claim for specific performance on the basis of the offer (the second defence). Three, in any event, the agreement was lawfully terminated by the appellant on its terms (the third defence).

[12] From the outset the appellant raised an issue with the replying affidavit of King, arguing that it amounts to hearsay as there is no confirmatory affidavit from Rossen. Referring to the case of *Drift Supersand*,¹ it is submitted that there is no meaningful affidavit from the respondent which dispute the facts in the answering affidavit.

[13] There is no need to determine this issue, as the complaint does not advance the matter. The relevant facts are already established in the founding affidavit, which includes a confirmatory affidavit from Rossen, as well as the answering affidavit. These documents clearly set out the issues between the parties and are not disputed. Therefore, even if certain portions of the replying affidavit are disregarded due to a lack of confirmation from Rossen, the appellant's defences can still be assessed.

The first defence: The agreement is void

[14] The clause envisages two distinct grounds entitling the appellant to cancel the agreement, namely: 'structural defects' (the first ground); and 'defects that are unacceptable to the Purchaser' (the second ground). The appellant contends that there was no consensus between the parties in respect of the second ground.

¹ *Drift Supersand (Pty) Limited v Mogale City Local Municipality and Another* (1185/2016) [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) (22 September 2017) at [48].

[15] Christie *The law of contract*,² states that, in determining whether a contract exists, one must first look for the true agreement between two or more parties. Since such agreement can only be established through external manifestations, the approach must necessarily be objective, focusing on evidence of the parties' outward expressions rather than their internal thoughts.

[16] The outward manifestations relied upon by the appellant are two emails (underlined hereunder) sent by King to Smiedt on 25 November 2021 in response to the cancellation. However, to put the emails in context it is necessary to quote the bulk off the correspondence exchanged between the parties:

20h05 (**Schmidt to King**): *'We refer to the mail below and the offer to purchase contained herein. Please note that in terms of the agreement, specifically clause 20.2, the Purchaser hereby elects to cancel the agreement. Put simply, the Purchaser believes that there are defects which in the Purchasers view are unacceptable to it. Whilst the notices clause does not provide an email address, we have been informed that is the correct address of the Seller. As such, in terms of clause 16.3 of the agreement, this notice should be deemed to be received by you at 30 the correct address. Could you please confirm the agreement is hereby cancelled.'*

20h14 (**King to Smiedt**): *'20.2 is not open-ended. I require a copy of the report to confirm that it is compliant under 20.2. The agreement remains binding subject to this confirmation'.*

20h40: (**Smiedt to King**) *'The Purchaser does not believe you have a right to request the information that you seek. The Purchaser believes that there are unacceptable defects. Such wording is subjective and the Purchaser is not beholden to the Seller to accept same. Furthermore, given the wording "at his discretion cancel the agreement", the discretion*

² R.H Christie *The Law of Contract* 8 ed (2022) at 55.

exercised must be that of the Purchaser, not the Seller. Your attorney (cc) will no doubt inform you that you believe the Purchaser has repudiated the agreement. As a result thereof, you may either elect to accept or reject the repudiation. Should you believe that this matter is worth litigating over, please be advised that my office will accept service of any summons. I trust this clarifies the position of the Purchaser'.

21h50 **(King to Smiedt)** 'You are wrong. The discretion is restricted to structural issues. If your client believes that his discretion has been properly applied then he will have no difficulty in disclosing the report. If he declines to do so then he bears the risk. 20.2 does not provide for the report to be secret.'

21h59: **(Smiedt to King)** 'Again this is an incorrect interpretation of the agreement. The wording in full reads: "Should there be structural defects or defects that are unacceptable to the purchaser then he purchaser can at his discretion elect to cancel the agreement". Given the prescriptive wording "or defects" which follows "structural defects", it can only be interpreted that should the Purchaser find any defect, he can, at his discretion elect to cancel the agreement. You will also note that the discretion rests with the Purchaser. Given that discretion was provided to the Purchaser, there exists an understanding that he need not first seek permission from the Seller and as such is not required to disclose anything other than his dissatisfaction, which he has done. By definition a "defect" means "an imperfection". Given that the Purchaser had the choice, for all intents and purposes, he could have decided that in his view, the colour of the grass was not perfect. Of course that is not the case, but it does illustrate the point. I do not wish to labour the point and as such, I believe that this clarifies the Purchasers position. I do wish you good luck with the sale.'

22h53: 'Your absurd example would only be relevant if the agreement allowed total discretion (which would effectively have given the purchaser a free option). That is not the case. It was specifically agreed (as reflected in the agreement) that the discretion only applies to structural defects (grass can never be a structural defect). I only agreed to that condition because of my

confidence that there will be no identified structural defects- which I believe is the actual position. The agreement remains valid unless and until your client demonstrates a genuine structural defect to which he applied his discretion. Clause 20.2 would make no sense otherwise'

[17] The appellant submits that it is clear from the emails underlined that the respondent did not agree to have the second ground of cancellation included in the agreement, as in its view, the true agreement only allowed one ground of cancellation (i.e. structural defects) to the exclusion of the second ground. With reference to *Kgopana v Matlala*³ it is submitted that there was thus no real consensus in respect of the second ground of cancellation and the agreement is thus void for mutual mistake.

[18] This argument is disputed by the respondent. In his affidavits King states that there was a meeting of the minds to include the clause and that he was not mistaken about what was agreed upon. He however differs from the appellant on the interpretation of the clause. In paragraphs 54 to 56 of the founding papers he explains as follows:

'54. Furthermore, clause 20.2 provides that should there be structural defects or defects in the home (i.e. the main dwelling) that are unacceptable to the Purchaser, then the Purchaser can, at his discretion, elect to cancel the Agreement. However I respectfully submit that given the parties' express agreement that the Property would be sold "voetstoots", the defects envisaged in clause 20.2 were limited to material defects as set out in paragraph 37.2 above, and not to any minor imperfection to the main dwelling- which, in any event, has not been demonstrated.

³ [2019] ZASCA 174 at para [11]

55. Furthermore, there was never an intention between the parties to give the Purchaser free reign to cancel the Agreement for any trivial reason that he could fathom; and Mr. Cole never expressed an intention to have such a right, which right I would in any event have rejected on behalf of the Seller if so requested by the Purchaser.

56. Mr. Cole's right to exercise his discretion to cancel the Agreement should the inspection uncover any structural defects or related material defects to the main dwelling that are unacceptable, is not absolute. Mr. Cole has an obligation to substantiate his election to purportedly cancel the Agreement by disclosing the defect and producing proof that there is as a matter of fact a material defect to the main dwelling'.

[19] Firstly, the pleadings make it clear, one, that the appellant's intent—to include a clause granting discretion to cancel the agreement if defects were present (whether structural or otherwise unacceptable to him)—was reflected in the agreement. Two, the clause, written in Rossen's handwriting, is not disputed by the respondent, who acknowledges that it grants the appellant a discretion to cancel in the event of defects. The respondent accepted the offer and does not want to resile from it.

[20] Secondly, the emails referenced above are the only factual evidence relied upon by the appellant. However, they are just one of many exchanged on the night of the cancellation and must be considered in context. They were sent after the contract had already been cancelled, in response to Smiedt's assertion that the appellant's discretion was so broad that he could cancel even if the colour of the grass was not perfect. The email does not form part of the pre-contractual negotiations and does not serve as an external manifestation of King's intent when he accepted the offer.

[21] In objectively considering the circumstances under which the emails were sent, known as the doctrine of quasi-mutual assent,⁴ I am mindful of what was stated by Davis J in *Irvin and Johnson (SA) Ltd v Kaplan*⁵ regarding the necessity of evaluating the evidence from this perspective:

'If this were not so, it is difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would become relevant and no party to any contract would be safe: the door would be opened wide to uncertainty and even to fraud'

[22] Judging by the external manifestations of the parties at the time of offer and acceptance, there are no facts to suggest that a true agreement was not concluded.⁶ However, from the parties' conduct on the day of cancellation, it is evident that Smiedt and King each had their own interpretation of the clause. Therefore, the only real dispute between them—both then and now—is a post-contractual disagreement over the interpretation of the clause. By the appellant's logic, any time parties differ on the meaning of contractual terms, consensus would be absent. That cannot be the case.

[23] On a conspectus of all the relevant facts, there is no basis to conclude that a mutual mistake occurred.

⁴ Christie *supra* at par 2.1.3 at page 35.

⁵ *Irvin and Johnson (SA) Ltd v Kaplan* 1940 CPD 647 at 651.

⁶ Watermeyer ACJ stated in *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241, that 'a binding contract is as a rule constituted by the acceptance of an offer. Van den Heever JA in *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A) at 532E remarked: 'Consensus is normally evidenced by offer and acceptance. But a contract may be concluded without offer and acceptance other than pure fictions imported into the transaction for doctrinal reasons. Nor does every accepted offer constitute a contract.'

The second defence: Respondent accepted the cancellation

[24] In *Segal v Mazzur*⁷ Watermeyer AJ explained the doctrine of election as follows:

‘Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses. He can either elect to take advantage of the event, or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election one way or the other he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way: this is, however, not a rule of law, but a necessary inference of fact from his conduct...’

[25] In determining whether a party has made an election an objective test is applied, *‘judged by its outward manifestations and adjudged from the perspective of the reasonable person standing in the shoes of the other party.’*⁸ Such outward manifestations can consist of words, or some other form of conduct from which the intention to waive is inferred.⁹

[26] The appellant contends that when he cancelled the agreement on 25 November 2021, in accordance with the provisions of the clause, the respondent initially disputed the appellant's entitlement to cancel the agreement (in particular during the period 25 November 2021 to December 2021). However, by 20 January 2022, the respondent had accepted that the agreement had ceased to exist, as Rossen sent a blank offer to purchase to Smiedt, so *‘that he could attend to any corrections or additions and/or*

⁷ *Segal v Mazzur* 1920 CPD 634

⁸ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 CC at [113]

⁹ *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at [118].

selections to the standard PG Properties' document. It is argued that the very process of negotiating a new agreement, between the same parties in respect of the same merx, is inconsistent with the existence of the agreement.

[27] In the correspondence exchanged between the parties, the respondent expressly rejected the cancellation and enforced the agreement. There are no objective facts on any reading of the pleadings indicating that the respondent changed his position in January. To suggest that because the respondent was open to renegotiation or receiving a new offer (which ultimately did not materialize), he had somehow abandoned the contract, is opportunistic and disingenuous.

Third defence: Cancellation was lawful

[28] At the heart of this defence lies the interpretation of the clause. The parties accept that there is no ambiguity, contradiction or uncertainty in respect of the words used in the offer: The appellant was entitled to cancel the agreement on two grounds: structural defects or defects deemed unacceptable to him. However, what cannot be disputed is that a defect must exist—without a defect, cancellation would not be justified.

[29] No defects were disclosed at the time of cancellation or in the months that followed. While he claimed in the email that the defects were unacceptable to him, he neither identified any specific defect nor provided any indication of their nature. In fact, he refused to share copies of reports from experts, including the structural engineer, on the grounds that the respondent was not entitled to them.

[30] It was only in his answering affidavit—five months after the agreement was concluded—that the appellant claimed to have observed various cracks on the property's walls during the inspection on 18 November 2021. Additionally, he raised

other concerns, including a desire to lay new paving at the front door, widen the driveway entrance or construct a second entrance and driveway, remodel the kitchen, install an elevator to access all three levels of the property, and build a ramp from the garage to the front entrance.

[31] The appellant contends that on a proper interpretation of the agreement, he had unfettered discretion to determine whether there was a defect. He argues that this discretion extends to any 'imperfection' affecting the entire property, not just the main dwelling, and that he was entitled to cancel the agreement without disclosing the nature of the alleged 'imperfection' to the respondent.

[32] The law on interpretation has now been well established by our Courts. In *University of Johannesburg*,¹⁰ the Constitutional Court summarized the principles governing the interpretation of documents with reference to *Endumeni*¹¹ and *Novartis*.¹² The Court emphasized that the approach to interpretation requires that from the outset one considers the context and the language together, with neither predominating over the other. This is a unitary exercise which means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

[33] In *NBS Boland Bank*¹³ the court affirmed the common law position that unless a contractual discretionary power was clearly intended to be unfettered, an exercise

¹⁰ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 CC at [113] with reference to *Chisuse v Director-General, Department of Home Affairs* 2020 (6) SA 14 (CC) at [52]. See also *Capitec Bank Holdings v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA).

¹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

¹² *Novartis SA Pty Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA).

¹³ *NBS Boland Bank v One Berg River Drive CC* 1999 (4) SA 928 (SCA).

of such a discretion must be made *arbitrio boni viri* (the decision of a good man or a reasonable decision¹⁴). Christie states that in accordance with the principle *ut res magis valeat quam pereat* (advancing the validity of a contract rather than the invalidity) the courts will not be astute to interpret a contract as reserving an unlimited option to the promisor.¹⁵ Thus words such as 'to your satisfaction' will, in the absence of clear language showing that the satisfaction was intended to be personal, be interpreted as meaning to the satisfaction of a reasonable person, the *arbitrium boni viri*.¹⁶ When it comes to a discretionary determination, the standard had always been that of reasonableness.¹⁷

[34] The meaning of the word 'defect' is objectively ascertainable, requiring no extrinsic evidence. If structural defects or any other defect exist, the appellant has a discretion to decide whether to cancel the agreement. However, the wording of the clause cannot be interpreted to give him unfettered discretion to determine what constitutes a defect. The existence of a defect must be established objectively—only then does the appellant's discretion come into play.

[35] The ordinary meaning of a defect is an 'abnormal quality or attribute' of the property sold that 'destroys or substantially impairs' its 'utility or effectiveness' for the purpose for which it is generally used or unfit for the special purpose for which it was

¹⁴ See *Erasmus v Senwes Ltd* 2006 (3) SA 529 (T) at 537-8.

¹⁵ With reference to *Machanik v Simon* 1920 CPD 333 at 337-338; *Belville-Inry Edms Bpk v Continental China Pty Ltd* 1976 3 ALL SA 625; *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A).

¹⁶ Christie *supra*. Chapter 2 page 129.

¹⁷ *Erasmus supra* at 538E-F. In *Inwe Aviation Pty Ltd v Petroleum Oil and Gas Corp'n of South Africa (Pty) Ltd (No 1)* 2012 (6) SA 96 (WCC) at [28] the standard of reasonableness was extended to encompass both reasonableness and honesty.

intended to be used by the purchaser.¹⁸ The appellant's subjective interpretation is irrelevant; the test is objective. Every so-called defect cited by the appellant pertains to personal taste and preference rather than an actual defect. The court a quo addressed this issue in detail, providing a useful analysis, and cannot be faulted.

[36] The appellant's claim that he is entitled to withdraw from the agreement based on any minor 'imperfection' in the property, because it does not fulfil his personal needs—at his sole discretion and without proof—is thus unsustainable. This interpretation stretches the meaning of 'defect' to the point of triviality. Under the appellant's reasoning, any defect, whether latent or patent, material or inconsequential, would grant him the right to cancel the agreement. Such an approach is inconsistent with basic common sense and is not reasonable.

[37] The purported cancellation of the offer was motivated by ulterior factors, primarily buyer's remorse and an attempt to pressure the respondent into accepting a reduced purchase price. The appellant's actions amounted to a repudiation of the offer, which was rightfully rejected. The court a quo was therefore correct in dismissing the appellant's defences and granting the requested relief.

[38] In the result the following order is made:

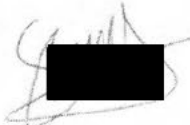
1. The appeal is dismissed.
2. Costs, including the costs of senior counsel, to be paid by the appellant on an attorney client scale, as provided for in the agreement.

¹⁸ *The Law of South Africa (LAWSA), Sale (Volume 36 - Third Edition), Sellers' Common-Law Obligations, Quality of the Property Sold*, para 286. The Oxford Dictionary describes defect as an imperfection or shortcoming,


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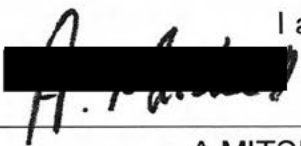
I agree




S D J WILSON

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree



A MITCHELL

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 February 2025.

APPEARANCES

For the Appellant:

H. Epstein SC and S. Tshikila

instructed by Smiedt & Associates

For the respondent:

A. Subel SC instructed by
by Di Siena Attorneys

Date of hearing:

30 October 2024

Date of judgment:

10 February 2025