THE HIGH COURT OF SWAZILAND

KATHLEEN JUNE TAMAN

Plaintiff

And

M & R ENTERPRISES (PTY) LTD

Defendant

Civil Case No. 2280/2004

Coram: S.B. MAPHALALA – J

For the Plaintiff: Advocate R. WISE S.C. (Instructed by Robinson Bertram)

For the Defendant: Advocate P. FLYNN (Instructed by P. R. Dunseith)

JUDGMENT
(9th March 2006)

Introduction

[1] The primary issue for determination is whether there is a contract between the Plaintiff and the Defendant for the sale by latter to the former for El, 200, 000-00 of certain portion 35 (a portion of Portion7) of Farm No.51 situate in the district of Hhohho, Swaziland, measuring 8, 0318 hectares.

[2] The contract is alleged to arise from two letters, the operative parts it is convenient to set out in full.

[3] The first letter, dated 10th November 2003, on the letterhead "Swazi Lizkhar Warmblood Stud" was

as follows:

10 November 2003

M & R Enterprises (Pry) Ltd
Attention: Mr. Robin Dibden
LOBAMBA

Dear Robin

PURCHASE OF PTN 35 OF FARM 51

With reference to recent conversations with you, and further to the Memorandum of Agreement between us dated 14 September 2003, I hereby exercise the option granted to me to purchase the above property and confirm that I, or my nominee, will purchase the property as follows:

1. The purchase price will be El 200, 000-00 (one million two hundred thousand Emalangeni only).
2. It is understood that it is the property that is being purchased from your company M & R Enterprises, and not the shares in this company. I am therefore arranging for a company to be set up to purchase the property.
3. It is understood that existing pumps, machinery etcetera necessary to provide existing essential services are to remain on the property in good working order, and that no existing fixtures to the buildings will be removed
4. It is understood that we will be given free access to the property, including all buildings, at times suitable to you, to enable planning of renovation and development of the property to proceed as from date of signature of the Deed of Sale.
5. It has been agreed that we will request Mr. Stanley Mnisi of Robinson Bertram to draw up a Deed of sale as soon as possible, and to serve as the conveyancer for this transaction. It is suggested that the Deed of Sale includes payment by us of a forfeitable deposit of 10% of the purchase price upon signature of the Deed of sale. With payment of the balance being due upon transfer of the property into the name of the purchaser.
6. You have requested to remain in occupation of the workshop on the property for six months following the sale of the property, to enable production there to continue uninterrupted until such time as you can move comfortably to a new facility. We have also understood from you that it would suit you to move out of the other buildings on the property by end January. May I therefore suggest that the Deed of Sale provides for the following.

a) Occupation by us of the buildings on the property excluding the workshop within 30 days of us lodging a bank guarantee for the balance of the purchase price.

b) Occupation by you of the workshop on the property until 30 June 2004 during normal working hours at no charge, but subject to controlled access along an agreed direct route by persons to be identified by you, who will be those employed directly in workshop production only. These persons will abide by the security and conservation rules that apply on the adjoining Swazi-Lizkhar property, and will be subject to the control of Swazi-Lizkhar security staff in all matters excluding your work within the workshop. You will be responsible for ensuring that the present condition of the workshop is maintained.

c) Your permission for us to proceed with the eradication of exotic vegetation on the lower portion of the property which was originally allocated to Mr. Mike Slater and which is demarcated by a fence line, from date of signature of the Deed of Sale.

7. As agreed the Deed of Sale will require that the bank guarantee for the balance of the purchase price is produced by 31 December. Your vacating of the property, excluding the workshop, can therefore be anticipated to have taken place by 30 January.

Please advise by return if you have any material comment on the above or any additional consideration for inclusion in the Deed of Sale.

With kind regards and best wishes, Yours sincerely

K.J. TAMAN (signed)

[4] The above letter is referred to in the proceedings as annexure "B".

[5] The second letter was referred to in the proceedings as annexure "C" is undated and reads as follows:

"Sigugi Arts and Crafts
Sigugiart @ realnet.co.sz P. O.
Box 279 Lobamba Swaziland
Telefax: (09268) 4162264

Dear Kate,

Thank you for your letter confirming sale of property. Would you please instruct Mr. Mnisi to proceed with drawing up Deed of Sale and I would be quite happy if we could sign these documents on the 24lh November. I would like to ask you to change January 30th to February Is' day on which I

would hand over the keys

Yours truly,

Robin D. Dibden
(signed)

[6] The Memorandum of Agreement was entered into the evidence as annexure "A" and reads in *extenso* as follows:

MEMORANDUM OF AGREEMENT

Entered into between

M & R ENTERPRISES (PTY) LTD
(hereinafter referred to as the "Seller") duly
represented herein by Robin Dibden

And

KATHLEEN JUNE TA**VI**AN **or her nominee**
(hereinafter referred to as the "Purchaser")

WHEREAS

1. The Seller warrants that it is the owner of land believed to be Portion 35 of Farm 51, being land identified as located adjacent to Swazi-Lizkhar Warmblood Stud, approximately 20 acres in size, and a pointed out to the Purchaser by the said ROBIN DIBDEN (full Title Deed description to be obtained); and

2. The Seller is entitled to and wishes to sell land to the Purchaser and the Purchaser wishes to purchase the said land from the Seller.

NOW THEREFORE the parties agree as follows:

1. The Purchaser has first option to purchase said land, valid for a period of two months from date of signature of this agreement.

2. The purchase price suggested by the Seller is El, 200 000-00 (one million two hundred thousand Emalangeni), which is subject to evaluation of the said land by the Purchaser's bankers valuator and to a final agreement as to the purchase price.

3. The Seller shall allow the Purchaser's bankers' valuator unrestricted access to the said land for the purpose of the said valuation.

4. In the event of the parties concluding Deed of Sale, the Seller undertakes to lawfully terminate any leases that the said land is currently burdened with.

DATED at .....this the .....day of September 2003

Signature on behalf of Seller (Signed)

Signature of Purchaser (Signed)

NAME OF SELLER'S AUTHORISED REPRESENTATIVE

(Signed)

Signature of Witness 1 (Signed)

Signature of Witness 2

(Signed)

[7] This matter falls to be decided on these documents, more particularly annexure "B" and "C" *supra*.

[8] The Plaintiff is an adult businesswoman of full capacity, she being married to Lee Taman by antenuptial contract out of community of property and with the exclusion of the marital power. The Plaintiff resides at portion 30, Farm 264, Sterkstroom, Manzini.

[9] The Defendant is a company having a share capital with limited liability which is duly incorporated and registered in accordance with the company laws of the Kingdom of Swaziland.

[10] The Defendant is now and at all material times hereto has been the registered owner of portion 35 (a portion of portion 7) of Farm No. 51 situate in the district of Hhohho, Swaziland, measuring 8,0318 hectares (hereinafter referred to as **"the property").** The Dependant owns the property as registered owner under and by virtue of Deed of Transfer No. 122 of 1992. This property is the subject-matter of this case.

The Plaintiffs case.

[11] According to the Plaintiff in her Particulars of Claim on or about the 14th September 2003, at Lobamba, Swaziland, the Plaintiff acting personally and the Defendant duly represented by Robin Dibden concluded a written agreement which purported to grant an option to the Plaintiff to purchase the property. A copy of the said agreement is marked "A" as referred to earlier on in this judgment. When entering into the said agreement, the Defendant intended to grant a valid option to Plaintiff to purchase the said property. When entering into the said agreement, the Plaintiff intended (a) to acquire a valid option to purchase the property and (b) that upon the exercise thereof a valid sale would come into being.

[12] By letter dated 10th November 2003 written by the Plaintiff to the Defendant, die Plaintiff notified the Defendant that she exercised the said option and in addition, that she confirmed that she or her nominee would purchase the said property on the terms stated therein. A copy of the said letter is annexure "B" reproduced in paragraph [3] *supra.* According to the Plaintiff the said letter was delivered to and received by the Defendant on the same day. The Plaintiff wrote the said letter with the intention that it should give rise to a valid and binding agreement of purchase and sale of the property.

[13] Pursuant to annexure "B" and in response thereto, the Defendant duly represented by the said Robin Dibden wrote a letter in reply. The said letter is marked annexure "C" found in paragraph [5] *supra.*

[14] According to the Plaintiff annexure "C" which she received shortly after the 10th November 2003, was written by the Defendant with the intention of creating and bringing a valid and binding agreement of sale of property into being. In the premises and in the circumstances the Plaintiff avers that a valid and binding agreement of sale came into existence and continues to subsist, which agreement is on the material terms set out in annexures "B" and "C" thereto. Subsequent to the afore-going, the Defendant refused to recognise the existence of a valid and binding agreement of purchase and sale of the property, and denied that any such valid and binding agreement had come into existence.

The Defence.

[15] The Defendant has filed a plea to the above-cited claims and in the main denies the allegations found in the Plaintiffs Particulars of Claim. Defendant admits that annexure "B" and "C" were written

by or on behalf of the Plaintiff and Defendant respectively. However, the Defendant denies the Plaintiffs contentions. Firstly, that the said the letter was written with the intention of creating and bringing a valid and binding agreement into being. Secondly, that the letter, annexure "C" was written in response to annexure "B" and thirdly, that a valid and binding agreement of sale of the property came into existence on the basis of the two letters or at all.

[16] According to the Defendant annexure "C" was written by the said Dibden pursuant to discussions which had taken place in November between himself and the Plaintiff in terms whereof she had requested him to write to her in order to enable her to instruct her attorney, Mr. S. Mnisi to draw up a Deed of Sale. Elizabeth Ann Rcilly undertook that if Robin Dibden delivered the letter the following day, which he did, she would hand him a response thereto confirming that she intended to go ahead with the purchase of the property on the basis of the terms which had been orally stipulated by Robin Dibden and which had been agreed upon between him and Elizabeth Ann Reilly, namely:

- The purchase price was El, 200, 000-00;
- That bank guarantees would be delivered immediately after signature of the Deed of Sale to be prepared by her afore-said attorney;
- That transfer would be effected by not later than 31st December 2003;
- That the Defendant would be afforded six months rent free occupation of the workshop on the property, commencing 1st January 2004.

[17] According to the Defendant it was never the intention of the respective parties at that or any other stage that an exchange of letter would constitute a binding written agreement as required by law in respect of the sale of fixed property.

[18] The Defendant avers at paragraph (f), (g) and (h) of his plea that at the request of the said Reilly, Defendant had agreed to an extension until 24th November 2003, for the Deed of Sale to be prepared by Plaintiffs attorneys Mr. S. Mnisi which would incorporate the terms stipulated by Robin Dibden and orally agreed to between him and Elizabeth Ann Reilly. The said Deed of Sale was delivered by Elizabeth Ann Reilly to Robin Dibden on the 24lh November 2003, but was incorrect in a number of respects and in particular, it omitted to incorporate therein all the material terms stipulated and agreed

upon as set out in the plea. Robin Dibden accordingly refused to sign the said Deed of Sale as it failed to record correctly the terms of the oral agreement. Consequently no written agreement as required by law was entered into either by exchange of letters or otherwise.

[19] The above are essential averments by the parties in this matter. **The chronicle**

of the evidence.

[20] For the Plaintiff four witnesses were called. PW1 Elizabeth Ann Reilly, PW2 Mr. Drinkwater, the Plaintiff PW3 Kathleen Taman and Mrs Maseko who gave evidence in rebuttal of certain points. Only one witness for the Defendant being Robin Dibden was led.

[21] For purposes of this judgment I shall only summarize the evidence of each witness as it pertains to the salient points to be decided in this case.

[22] PW1 Elizabeth Reilly is the mother to the Plaintiff Kathleen Taman. She deposed that the property where she lives is adjacent to the property under examination in this case. She testified that in February 2003, she received a telephone call on her cell phone from Mr. Dibden who told her that he wished to sell property and he said as they were neighbours he would like to give her the first opportunity of purchasing the properly[7]. She told iiim that they were definitely interested in purchasing the property. She then asked Mr. Dibden whether it would be suitable for him to wait for her return from Namibia sometime in March. Mr. Dibden agreed to this arrangement.

[23] On her return from Namibia she met Mr. Dibden on the issue and a lot of discussion took place and Mr. Dibden gave her the impression that he was entirely certain about selling. She also told Mr. Dibden that they were very keen to purchase the property. Mr. Dibden has also offered the property to an estate agent known as Pam Goldings.

[24] PW1 testified that she together with her daughter (the Plaintiff) met Mr. Dibden on a couple of occasions with the intent of drawing up an option to purchase which they would then use to secure finances for the property. At that point Mr. Dibden was requiring a sum of El, 2million for the property. Then on the 14th September they acquired an option to purchase from Mr. Dibden. Thereafter other

people were interested in the property through the estate agents Pam Goldings. Then on the 10lh November they wrote annexure "B" to the Defendant. This letter was handed to Mr. Dibden by her. Upon handing the letter to Mr. Dibden she required Mr. Dibden to let them have acknowledgment of the said letter and also to have confirmation of the sale and the contents of the letter of the 10(h November. She said to him that she would be happy to collect and spend a lot of time reading it to be sure that they were all happy with it. She told him that she would call around again to collect the acknowledgement and he said to her he would deliver it to the shop.

[25] Not long after the letter of the 10th November (annexure "B") Mr. Dibden wrote an undated letter (annexure "C") which he delivered to the shop that the witness have at the Gables. PW1 collected it from there. PW1 testified that what she understood by this letter (annexure "C") was that it was a confirmation of the sale. She understood that the signing that happened on the 24 November corresponded with Mr. Dibden's comment to her that his mandate with Pam Goldings expired on the 22 November which was on a Saturday and therefore he will be prepared to sign on the 24 November. The Plaintiff with PW1 were happy about this. PW1 further testified that the Deed of Sale was merely a formality as they had already reached an agreement with Mr. Dibden for the Defendant on the basis of annexure "B" and "C".

[26] Thereafter followed a period where Mr. Dibden did not want to meet the Plaintiff and her mother. However, they spoke to him over the phone. Thereafter on the 9th December they went to see Mr. Dibden to ask what was happening. Mr. Dibden told them that the Deed of Sale had been taken to Mr. Peter Dunseith as he wanted to go through it before he signed it. Two days after they met a certain Archie Mbhilibhi Van Wyk who told them of certain work to be done on the property. PW1 then told Mr. Van Wyk their position and he said he would have nothing more to do about it and he drove away.

[27] On the 15lh December 2003, they discovered that there has been a double sale. In fact, when they went to see Mr. Dibden on Tuesday the 9th December 2003, he had already made that without telling them. Then on the 15lh December 2003, they wrote a letter to Mr. Dibden to the effect that they had ascertained that Mr. Dibden has now entered into a Deed of Sale concerning the same property with a third party, Mr. Zonke Magagula and that money had joined hands. They said further: **"We have consulted extensively on the matter and are fully convinced that any Deed of Sale involving a**

third party is null and void because you are already legally bound and committed to selling your property to me based on the documentation we **hold".** Mr. Dibden did not reply to this letter. Shortly thereafter the Plaintiff filed an application for an interdict before this court.

[28] PW1 was cross-examined at great length by *Mr. Flynn* for the Defendant and I shall revert to her replies which are pertinent to the case in due course.

[29] The court then heard the evidence of PW2 Mr. Drinkwater who is employed as an estate agent by a company called Pam Goldings Properties. In his evidence he confirmed that his company was mandated by Mr. Dibden to sell a property owned by M & R (Pty) Ltd. On the 22nd August 2003, the mandate expired. The witness further deposed that he received a telephone call from the Plaintiff telling him that they will like to buy from Mr. Dibden himself without Pam Goldings. She indicated that she knew of the property prior to him getting the mandate. This witness was cross-examined briefly by *Mr. Flynn.* I shall revert to PW2"s replies in due course.

[30] The third witness was PW3 Kathleen Taman the Plaintiff herself. Her evidence is similar to that of PW1 her mother in all material respects. She testified that her mother PW1 was more active of the two of them in the negotiations of acquiring this property. She told the court that she and her mother prepared annexure "B" and it was delivered by her mother to Mr. Dibden. Thereafter, Mr. Dibden wrote annexure "C". She was also cross-examined at length by *Mr. Flynn* for the Defendant and I shall revert to her replies later on in the course of this judgment.

[31] The only witness for the Defendant was Mr. Dibden who gave lengthy evidence in-chief and cross-examination by *Mr. Wise.* He told the court that in the property there was a workshop where Sigugi Arts and Crafts is situated. This business is run by M & R Enterprises. M & R Enterprises is also the owner of portion 35. He testified that most of the products were intended for export to South Africa, or Europe or to North America. Mr. Dibden then explained at length how the company obtain markets overseas. Towards the end of June 2003, he telephoned Mrs Reilly who was in Namibia at the time informing her that he was considering selling either half of his property or even the whole property. He needed to raise money for his business. PW1 was interested and they met towards the end of June 2003. She was with her daughter PW3. He told the court that he approached them first because they

were his neighbours with other properties in the area. He also took the property to Pam Goldings after he felt some reservations with the Reillys. This happened about 4 - 5 weeks after his discussions with the Reillys. He then signed the mandate with the estate agents.

[32] On the 7th September 2003, he had a meeting with the Plaintiff and her mother where he explained to them that he had given Mr. Drinkwater a mandate. The Reillys asked him if he would give them first option and he agreed. He told them that he wanted to have the property sold within 90 days. At that time he was planning exhibitions abroad. He had a deadline of three months in order to meet his obligations with the international exhibition in Birmingham and the United States of America. Their deadline was the 31st December 2003. He wanted to have the property sold and the money in the bank by that date. At that time the Reillys told him that they will drop a document for his perusal and this was a Memorandum of Agreement. He agreed to this arrangement. They then signed the agreement on the 14th September 2003. In the agreement a number of facts were included like the purchase price of a El, 2million. Over the course of a month or so, or even six weeks the Reillys visited his property on a regular basis. This happened on a number of occasions.

[33] On the 24lh October 2003, he telephoned Mrs Reilly (PW1) to tell her that Mr. Drinkwater had communicated with him that he had a buyer for the property. It was Mr. Zonke Magagula, an attorney from Manzini, who had agreed to meet his terms and conditions and was willing to sign a written agreement immediately. In this agreement Defendant was also granted a rent-free occupation of the workshop for six months. Later on in the course of the negotiations Mr. Magagula even agreed to offer him more than a year rent-free. He then proceeded to phone Mrs Reilly to tell her that Mr. Drinkwater of Pam Goldings have found a buyer. Mrs Reilly told him that she would make a bigger offer than Mr. Magagula. This was on the 28th October 2003. He told them that if they wished to purchase the property then they would have to match Mr. Magagula's offer which was the least that he expected. PW1 agreed to his terms and conditions. These being a purchase price of El, 2million, to take transfer of the property by the 31st December 2003, to allow him six months rent-free on the workshop and thai he would vacate the house one month later on the 30th January

2004. They then agreed that Mr. Stanley Mnisi draw the Deed of Sale. It was agreed that the agreement would be ready for signature within one week of that meeting.

[34] The Defendant then went to his bank where he obtained an overdraft on the basis of the prospective Deed of Sale from the Plaintiff. A week elapsed without the Deed of Sale from Mr. Mnisi. He then telephoned PW1 to enquire what had happened to the Deed of Sale. She told him that she had consulted Mr. Mnisi and that he had been busy and she wanted him to first put this in writing so that she can go ahead and instruct Mr. Mnisi of Robinson Bertram to draw up the Deed of Sale. She also told him that she was busy drafting her own letter confirming the sale and that she would hand over this letter to him the next morning. That when Defendant hand her his letter she would then hand him her letter. The letter which Defendant had written is annexure "C". He told the court that he wrote the letter on the 6th November 2003. The next morning he went to deliver this letter at PW1 's offices at the Gables. He testified that on the letter when he said, **"Thank you for your letter confirming the sale of property"** he wrote this in anticipation of receiving a letter from her the following day. He had not received any letter when he wrote annexure "C". He wrote annexure "C" in anticipation of the letter from Plaintiff (annexure "B"). Thereafter followed a long period after annexure "C" had been delivered to the Plaintiff. The Defendant had not received annexure "B" which was delivered in the late afternoon of the 10lh November 2003. He then called PW1 and told her that she had read the letter and was in broad agreement with its contents except paragraph 7 which did not meet the terms of the agreement at all. Their agreement was that the guarantee would be pledged on the signing of the Deed of Sale.

[35] Later on in his evidence he deposed in relation to a disagreement he had with the Plaintiff who told him that she had exercised her option that she had an option and that it was a contract. He disagreed with her that they had a contract of sale. He told her that if the Deed of Sale did not reflect the agreement they had on the 28th October 2003, he was not going to sign the Deed of Sale. The Plaintiff insisted that they had a contract with the Defendant. The Deed of Sale was never signed by the parties. Defendant maintained that the Deed of Sale was not a formality. He testified that he did noi intend to bring about a sale by writing a letter (annexure "'C") to her when he had not yet seen her letter (annexure '"B"j. He told the court ihal the reason he wroie

(annexure "C") was because PW1 wanted her instructing attorney to proceed to draw up a Deed of Sale and to attend to the conveyancing thereafter.

[36] Defendant was cross-examined at great length by *Mr. Wise* where the cross-examination runs from page 243 to 406 of the typed record.

The arguments.

[37] The submissions by the parties in this case were equally long covering 102 pages from page 503 to 602 of the typed record. I shall therefore summarize the arguments advanced by Counsel for the record. The broad argument advanced by *Mr. Wise* for the Plaintiff is that the exchange of letters being annexure "B" and "C" constituted a binding agreement between the parties in this case. He took the court through the pleadings at great length in this respect **from** page 521 to page 538 of the typed record. Arguments are advanced by *Mr. Wise* on the evidence adduced in this case that of the Plaintiff, her mother, Mr. Drinkwater and Mrs Maseko for the Plaintiff and the evidence adduced by the Defendant. From pages 539 to 545 arguments are advanced on the legal principles governing this case.

[38] *Mr. Flynn* appearing for the Defendant advanced argument *au contraire* to the general argument that the sequence of the letters is not as submitted by the Plaintiff that annexure "C" followed annexure "B" but that annexure "C" was handed over to the Plaintiff way before annexure "B" was even written and therefore on the basis of this fact there was no valid sale as alleged. *Mr. Flynn* further referred me to a plethora of decided cases in South Africa and abroad including *Hatting vs Van Rensburg 1964 (I) S.A. 578, Aris Enterprises vs Waterberg Koelkamers 1977 (2) S.A. 425* and *Scheeppers vs Vermeulen 1984 (4) S.A. 844. Mr. Flynn's* argument start from page 545 to 581 of the typed record.

The court's analysis and the conclusions thereon.

[39] The legal position in this case is found in **my** considered view in the Australian case cited by *Mr. Wise* thai of *iiauikJiam iiiiis Private Hospital (Ply) Ltd vs G.R. Securities (Pty) Ltd and others 1986 Supreme Court* page *622.* In this case it was held, *inter alia,* whether the exchange of letters constituted a binding informal contract for the sale of a hospital depended on whether, by that exchange of letters, the parties mutually communicated their respective assents to being legally bound by terms capable of having contractual effect. The learned Judge in this case McLelland J dealt with numerous other cases in Australia on the principles of law in this regard. **That there is a binding contract, if, and only if by the exchange of letters the parties mutually communicated their respective assents to be legally bound by terms capable of having contractual effect. That there are three questions which it is**

often useful to consider in such a context as the present, namely: "did the parties arrive at a consensus? **(if they did) was it** such a consensus as **was capable of forming a binding contract? And (if it was) did the parties intend that the consensus at which they arrived should constitute a binding contract?"** The learned Judge also cited a relevant speech by Lord Loreburn in the case of *Love Steward vs SInstone & Co. (1917) 33 T.L.R 475* at *476* where His Lordship said that:

> **"It was quite lawful to make a bargain containing certain terms which one was content with, dealing with the one regarded as essentials, and at the same time to say that one would have a** forma! document drawn up **with the full expectation that one would by consent insert In" it a number of terms. If that were to intention of the parties, then a bargain had been made, none the less that both parties felt quite sure that the formal document comprise more than was contained in the preliminary bargain".**

[40] The above is the legal framework in which this case is to be decided and I do appreciate that the above is an Australian authority and only the legal reasoning propounded therein has been adopted in *casu.* The case for the Plaintiff in view of this reasoning is that annexure "B" and "C" contained the bargain dealing with the essential elements and the Deed of Agreement later on was drawn by the parties to constitute a formal agreement incorporating further terms between the contracting parties. The position of the Defendant on the other hand is that the sequence of the two letters is not as submitted by the Plaintiff that annexure "C" followed annexure "B" but that annexure "C" was handed over to the Plaintiff way before annexure "B" was even written.

[41J Thcrcloi'c on die basis oi the above submission die iirst i.->suc *io* be dealt wilii in the present case is the sequence of the letters being annexure "B" and "C". If in this exercise I find that the Defendant is correct that annexure "C" came before annexure "B" I ought to immediately rule in favour of the Defendant. If on the other hand I find as a matter of fact that annexure "C" followed annexure "B" I then have to consider whether a contract was reached by the parties. I will then have to look at the evidence advanced by both parties and their witnesses. It would appear me after assessing the evidence in the present case that annexure "C" followed annexure "B". When the Plaintiff wrote annexure "B" therein she requested confirmation of its contents in writing. This was confirmed by Defendant in his undated letter marked as annexure "C". I have no hesitation at all on the evidence that as a matter of fact annexure "C" followed annexure "B" and not otherwise.

[42] Having considered the issue of the sequence of the two letters it now behoves me to consider the gravamen of this case whether on the evidence the said annexure "B" and "C" constituted a valid contract and that the Deed of Sale was only prepared as a matter of formality as contended by the Plaintiff. It is my considered view after hearing the evidence in its totality that in *casu* the exchange of the two letters constituted a binding agreement. I say so, for a number of reasons that I shall outline hereunder. Firstly, on a simple reading of annexure "B" and "C" it becomes abundantly clear that annexure "C" was an answer to annexure "B" and there is no doubt about that. Annexure "B" clearly set out as follows: **"With reference to recent conversations with you, and further to the Memorandum of Agreement between us dated 14 September 2003,1 hereby exercise the option granted to me to purchase the above property and confirm that I, or my nominee, will purchase the property as follows...".** In reply thereto Mr. Dibden for the Defendant replies crisply as follows: **"Thank you for your letter confirming the sale of property** There is no doubt at all in my mind that annexure "C" was in answer to annexure "B" which was a clear exercise of an option to purchase the property in question.

[43] Secondly, what is contained in the body of annexure "B" by the Plaintiff are the material terms of a valid contract of sale of land being (i) the parties to the contract being the Plaintiff and the Defendant (ii) the description of the property and (iii) the purchase price that of CI, 2iiui!ion in paragraph i of annexure "B". The Deed of Sale, it appears to me was to be the inevitable consequence of the agreement of saie already reached in armexures "B" and "C", with the additional material terms to be inserted by the conveyancing attorney. Thirdly, it is trite law that the parties may of course agree that their contract will not be binding until reduced into writing and signed, and if so agree that there will be no contract between them until that has been done. In the instant case there was no agreement in annexure "B" and "C" that the contract between the parties will come into effect when it has been reduced to writing and signed.

[44] Fourthly, it became clear to me that the Plaintiff and her mother PW1 gave clear evidence pertaining to the issues I have outlined above and any variation in their evidence was minor and did not go to the root of the Plaintiffs case. As for the Defendant I find that he was not a good witness. He was evasive and at times prone to make speeches about other things not connected with the issues in *casu.*

[45] In the result, for the above reasons the following order is accordingly recorded:

1. An order declaring annexures "B" and "C" hereto to constitute a valid and binding agreement of purchase and sale of Portion 35 (a portion of Portion 7) of Farm No. 51 situate in the district of Hhohho, Swaziland, measuring 8, 0318 (eight comma zero three one eight) hectares.
2. An order directing the Defendant to comply with and give effect to the said agreement and, in particular, to cause the said property to be transferred to and registered in the name of the Plaintiff or her nominee which shall include the obligation to sign a power of attorney in favour of the conveyancer to pass transfer.
3. An order that in the event of the Defendant failing to comply fully and promptly with prayer 2 hereof within ten days of having been called upon to do so, the Sheriff or Deputy Sheriff for the district of Hhohho be and is hereby authorised and directed

   3.1. To sign a power of attorney on behalf of the Defendant in favour of the conveyancer authorizing such conveyancer to effect transfer of Portion 35 (a portion of Portion 7) of Farm 51 situated in the district of Hhohho into the name of the Plaintiff, and

   3.2. To sign and all other documents on behalf of the Defendant as may be required or necessary to give effect to paragraph 2 hereof.

4. An order that the Defendant pay the costs of suit including the certified costs of counsel.

5. Further and/or alternative relief.

S.B. MAPHALALA
JUDGE