SUPREME COURT OF SWAZILAND

APPEAL CASE NO.

14/2006

In the matter between:

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M & R ENTERPRISES (PTY) LTD **APPELLANT**

VS

KATHLEEN JUNE TAMAN **RESPONDENT**

CORAM **BROWDE JA**
TEBBUTTJA
RAMODIBEDIJA

FOR THE APPELLANT **ADVOCATE FLYNN**
FOR THE RESPONDENT **ADVOCATE R.M.**
WISE SC

JUDGMENT

TebbuttJA

The crisp issue in this appeal is whether an interchange of letters between the parties gave rise to a valid contract for the sale of land in compliance with Section 31 of the Transfer Duty Act of 1902 which requires that sales of fixed property must be in writing.

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In a trial before him in the High Court, Maphalala J held that they did hence this appeal, the appellant contending that the learned Judge erred in deciding as he did.

The salient facts are largely common cause. They may be set out as follows:
In 2003 the appellant was the registered owner of a farm property described as "Portion 35 (a portion of Portion 7) of Farm No. 51 situate in the district of Hhohho, Swaziland, measuring 8, 0318 hectares". The appellant is a company of which the principal shareholder is one Robin Dibden (hereinafter referred to simply as Dibden). The farm property adjacent to the appellants' property is owned by a company called Swazi Lizkhar (Pty) Ltd of which the respondent and her mother Elizabeth Ann Reilly, are members and on which they conduct a business known as the Swazi Lizkhar Warmblood Stud.

During the early part of 2003, Dibden, who at all material times represented the appellant, decided that he wanted to sell the property and he telephoned Mrs. Reilly (as I shall refer herein to the respondent's mother) to tell her of this and to enquire whether she might want to buy it. Mrs. Reilly said she or the respondent or their company would very much like to buy it. I shall briefly refer to Dibden's reason for wanting to sell the property later herein. Suffice to say at this stage that he wanted the property to be sold by 31st December 2003 and on 22nd August 2003 he gave a written mandate to a firm of estate agents, Pam Golding Estates, represented by one Drinkwater, to find a buyer for the property for El, 2 million. The mandate expired on 22nd November 2003.

On 7th September 2003, the respondent and Mrs. Reilly inspected the farm and on 14th September 2003 the respondent and the appellant, represented by Dibden, signed a Memorandum of Agreement in which the respondent was given a "first option", valid for two months, to purchase the property. I shall refer in more detail later to events that occurred between the signing of the said Memorandum of Agreement - many of which are not common cause - and 10th November 2003, which is the date of the first of the letters which form the crux of this appeal.

It is convenient now to set out, ***in extenso,*** the contents of the three documents, germane to this appeal. Firstly, the Memorandum of Agreement. The relevant portion of it reads thus:

> ***"The parties agree as follows:***
>
> 1. ***The Purchaser (respondent) has first option to purchase said land (appellant's property) valid for a period of two months from date of signature of this Agreement.***
> 2. ***The purchase price suggested by the seller (appellant) is E120 000-000 (one million two hundred thousand Emalangeni) which is subject to evaluation of the said land by the Purchaser's bankers' valuator and is 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 a Deed of Sale, the seller undertakes to lawfully terminate any leases that the said land is currently burdened with".***

The contents of the letter dated 10th November 2003 are the following. It is addressed to "Dear Robin" i.e. to Dibden and is headed "Purchase of Portion 35 of Farm 51" and reads thus:

> ***"With reference to recent conversations with you, and further to the Memorandum of Agreement between us dated 14th September2003, I hereby exercise the option granted to me to purchase the 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 etc. 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-Uzkhar properly 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 30January.

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

The letter is signed "K.J. TAMAN" which is the name of appellant i.e. KATHLEEN JUNE TAMAN, or as she is also known, KATE TAMAN.

The other germane letter is an undated letter written by Dibden and addressed to "Dear Kate" i.e. the appellant. It reads as follows:

"Thank you for your letter confirming sale of property. Wouldyou please instruct Air. Mnisi to proceed with drawing up deed of sale and I would be quite happy if we could sign these documents on the 24th November. I would like to ask you to change January 30th to February 1st the day on which I would hand over the keys".

I turn at this stage to a narration of those events which are not common cause and which are important to an understanding of how the two letters set out above came to be written and to their significance in deciding the fate of this appeal.

The factual descriptions of those events are to be found in the oral evidence given before Maphalala J by the witnesses at the trial of this matter. Two witnesses viz the respondent and Mrs. Reilly testified on behalf of the plaintiff and Dibden and Drinkwater on behalf of the

defendant in the court ***a quo,*** now the appellant in this Court. There was also a witness called on behalf of the plaintiff in rebuttal of portions of Dibden's evidence.
Inspite what is really within a narrow compass in the dispute between the parties in this matter, the record of the trial is voluminous, running to over 850 pages. Of those pages, 654 consist of the evidence and of those, again, 345 are taken up with the evidence of Dibden. His cross-examination runs to 262 pages most of which relates to a side aspect and one largely irrelevant to the main issue in the case. It was, in the main, directed to the reason given by Dibden for wanting to sell the property, which I said earlier herein I would set out later. It is convenient to do so now.

Appellant company carried on a weaving business under the name of "*Sigugu Arts and Crafts*"'from a workshop on the property, the subject of this case. Dibden said that it exported handmade carpets, tapestries and jerseys and that it also desired to exhibit its products at exhibitions in Europe, New York and the United Kingdom, one being the Birmingham Spring Fair. The company required funds to enable it to do so and he decided to sell the property to raise such funds. To meet the deadlines for participation in the various exhibitions, he wished the sale to be completed and transfer and payment effected by 31st December 2003. Dibden said that when the respondent and Mrs. Reilly visited the farm on 7th September 2003 he told them so.

It is not necessary for me to refer in any detail to the inordinately lengthy cross-examination of Dibden on this aspect. It has relevance only on the question of Dibden's credibility as a witness. I shall deal with this in due ***course.***

The question of the credibility of the various witnesses plays an essential part in one of the important aspects of this matter and that is when and how the two letters which are vital to this appeal, viz the

respondent's letter of 10th November 2003 and Dibden's undated letter, came to be written.

One of the events that occurred prior to the respondent's writing of her letter of 10th November 2003 is that the estate agent, Drinkwater, on 24th October 2003 told Dibden that he had a buyer for the property who was prepared to meet Dibden's terms and conditions viz an attorney from Manzini, Zonke Magagula. Apart from agreeing to pay El,2 million, Magagula said he had the necessary bank guarantees in place and was willing to take transfer and ownership immediately. A factor was that Dibden wanted to continue to occupy his workshop on the property for six months while he found alternative premises for it. Magagula said he was prepared to allow Dibden to do so, rent free.

Dibden said he telephoned Mrs. Reilly and told her of this on the same day i.e. on 24th October 2004. Mrs. Reilly under cross-examination said she did not remember the telephone call or Magagula's name being mentioned but she did recall Dibden's saying that he had another potential buyer who was prepared to give him six months continued occupancy of his workshop.

It is common cause that a meeting between the respondent, Mrs. Reilly and Dibden took place on 28th October 2003 and that at that meeting there were discussions as to the purchase price of El,2 million and as to Dibden's being able to continue in occupation of the workshop rent-free for six additional months.
What is in dispute is whether a bank guarantee for the full purchase price was to be furnished on the signing of a written agreement of sale and that transfer would be effected into the name of the respondent not later than 31st December 2003. Dibden says it was; Mrs. Reilly and the respondent say it was not. In the light of what follows hereafter, no firm finding need be made on this conflict. At that meeting, according to Dibden he suggested that Drinkwater should draw up a deed of

sale. Mrs. Reilly said Drinkwater's name was never mentioned in this regard. She wanted her attorney Mr. Mnisi, to draw up a deed of sale and, she said, Dibden agreed to that.

The evidence of the respondent and of Mrs. Reilly was that on 28th October 2003 the parties were still in negotiation as to the sale of the property. They were, however, aware of the existence of other potential buyers and, so said Mrs. Reilly, she and the respondent together drafted the letter of 10th November 2003 and the respondent i.e. her daughter Kate, signed it. The opening words of that letter viz ***"with reference to recent conversations with you"*** 'referred to the discussions on 28th October 2003.

Mrs. Reilly said that she personally handed the letter of 10th November 2003 to Dibden at his home. She asked him to let them (i.e. her and the respondent) to have an acknowledgement of the letter ***"and also to have confirmation of the sale and the contents of the letter".*** She said she would call around again at his house to collect the acknowledgement and Dibden said he would deliver it to a shop that she and the respondent ran at the Gables Shopping Centre. Mrs. Reilly said that not long after 10th November Dibden delivered the undated letter addressed to ***"Kate"*** and signed by him, at the shop.
Mrs. Reilly said that Dibden had said to her that his mandate to Pam Golding Estates expired on 22nd November 2003, and, that to avoid paying commission, he was prepared to sign the deed of sale on 24th November 2003 i.e. after the mandate had expired. What was contained in his undated letter, she said, corresponded with that.

Mrs. Reilly said she and the respondent felt that the deed of sale would be a formality.

After receiving Dibden's letter she instructed Mnisi to draw up a deed of sale which she hand delivered to Dibden a few days before 24th November 2003.

Mrs. Reilly said she tried to contact Dibden on several occasions after 24th November but without success. She and the respondent were becoming very worried about the delay and on 9th December 2003 they went to Dibden's house, where they found him, and asked him what was happening to the deed of sale. Dibden said he had taken it to his lawyer, Mr. Peter Dunseith, as he wanted the latter to go through it before he signed it. He would revert to them within two days. When he had not done so by 15th December 2003 they again went to his house to see him. They could not find him there and as they were leaving his property they met a vehicle entering the property, driven by a friend of theirs, one Archie van Wyk. They conversed and in the course of the conversation vanWyk told them that Dibden had sold the property to a lawyer in Manzini.

They immediately compiled a letter to Dibden, which is dated 15th December 2003, and hand delivered it to him on that day. Dibden endorsed the letter that he had received it at his home at 20.35hours on 15th December 2003.

The letter is signed by ***"K.J. Taman"i.e.*** the respondent. After setting out the history that I have narrated above viz the giving of an option to purchase to the respondent; her letter of 10th November 2003; his undated letter; the delivery of the deed of sale to him; Dibden's saying that he wanted his lawyer to screen it; and his not having reverted to them, the letter goes on to say,

> ***"We have today ascertained beyond doubt that you have now entered into a deed of sale concerning the above property with a***

third party, Air. Zonke Magagula, and that money has changed hands. 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 legally bound and committed to selling your property to me based on the documentation we hold".

The respondent called on Dibden to ***"honour your commitment to me"*** *by* signing the deed of sale as he said he would and warned that ***"we will stop at nothing to obtain what is rightfully ours".***

It is undisputed that Dibden never replied to this letter.

Dibden's version of how the letters of lOthNovember 2003 and his undated letter came to be written differs from that of the respondent and her mother ***toto caelo.***

He said that on 24th October 2003 he telephoned Mrs. Reilly to tell her that Magagula was prepared to buy the property on his terms and conditions and was willing to sign a written agreement immediately. He was also prepared to give him, rent-free, additional occupation of the workshop for six months.

Dibden agreed that he and the respondent and Mrs. Reilly had met on 28th October 2003. He again told them of Magagula's offer and said that he had a deadline by which the property had to be sold and if they wished to purchase it, they would have to match Magagula's offer. He said Mrs. Reilly agreed to his terms and conditions and they shook hands on them.

They were the purchase price of El,2 million; their guarantees would be provided and transfer taken by 31st December 2003; he would be allowed six months rent-free occupation of the workshop starting on

1st January to 30th June 2003; and that he would vacate the property on 30th January 2003.

Having agreed on these terms he told the respondent and Mrs. Reilly that he would the next day get Drinkwater to prepare the deed of sale. Mrs. Reilly, however, wanted Mr. Mnisi to do so and he agreed to it provided the deed of sale was drawn up correctly and set out the terms and conditions they had agreed to and had shaken hands on it. She promised, said Dibden, that the deed of sale would be ready within one week and would be accurate and correct and ready for signature.

Dibden said that on the next day he went to see his bank manager. He was busy manufacturing samples for exhibition at the Birmingham Spring Fair and needed extra money and asked the bank manager for an overdraft for that purpose. He said he told the bank manager of the sale of his property to Mrs. Reilly and that the deed of sale would be ready within one week. The bank was willing to grant him an unsecured overdraft on condition the deed of sale was produced within one week.

A week later the bank manager telephoned him to find out where the deed of sale was. Dibden said he then immediately telephoned Mrs. Reilly to enquire as to what had happened to the deed of sale. She said Mr. Mnisi had been busy.

Dibden then went on to say the following:

> ***"Mrs. Reilly asked me to put in writing to confirm that we were going ahead with the sale of the property and I understood the***

express purpose of this letter was to authorise Mr. Mnisi to draw up the deed of sale and that he was also going to be the conveyancer".

Dibden said Mrs. Reilly wanted this letter the next day. He said she told him she was busy drafting her own letter confirming that he was going ahead with the sale, that she would have this letter ready by the next morning and that when he gave her his letter she would give her letter to him.

Dibden said he then wrote his undated letter. This was, he said, on 6th November 2003. On that day, Dibden said, Mrs. Reilly told him she was busy with her letter, which would confirm the terms of the sale agreed upon and would include in it the right of access to the property to clear the exotic vegetation and other matters such as pumps and fixtures and fittings. She said she would have the letter typed and would have it ready when he delivered his letter to her.

Dibden said further that Mrs. Reilly said she had been busy registering her company but this was taking longer than anticipated and he then agreed to give her an extension of ten days from 14th November 2003, when the option expired to 24th November 2003, which is why he put in his letter that he would be prepared to ***"sign the documents on the 24th November".*** He had also on 28th October 2003 agreed to vacate the property on 30th January 2004. Drinkwater had suggested that that would not be a convenient date to relocate and that 1st February would be better. That was why he put this in his undated letter.

Dibden said that on Friday 7th November he delivered his letter at Mrs. Reilly's office at the Gables. She was not there at the time. On Monday 10th November 2003, Mrs. Reilly telephoned him to ask where his letter was. He told her that he had delivered it on Friday 7th November and that he was waiting for her letter which he had been to collect at her office but without success. He said that late on the afternoon of 10th November 2003 Mrs. Reilly called at his house and delivered the

letter dated 10th November 2003, leaving immediately after doing so without giving him a chance to read the letter or discuss it with him. On the next day he telephoned her and said that he was in broad agreement with the contents of the letter save that paragraph 7 did not meet the terms of their agreement as to the furnishing of the guarantees or effecting transfer.

Dibden said that he and Mrs. Reilly had an acrimonious argument over the telephone on this aspect. She maintained that she had a contract of sale. He disagreed and told her that if the deed of sale did not reflect what they had agreed to on 28th October 2003, he would not sign it. He reminded her of Magagula's interest in buying the property and told her that the latter had increased his offer.
Dibden said that on 23rd November 2003 Mrs. Reilly delivered the deed of sale to him. On the next day he telephoned her and remonstrated that the deed of sale was ***"incorrect in every respect".*** There was no mention of occupation of the workshop or of the date of occupation of the house on the property. They had not agreed on the pledging of the guarantees 60 days from signature of the agreement and there had never been any agreement of a deposit of any kind, forfeitable or not. Mrs. Reilly ***"didn't respond veryposin'veIy***"*but* started quarrelling with him, insisting that she had a contract. The question of occupation of the workshop could be dealt with in a separate agreement. He was not interested in that.

Dibden said he told her that he would not sign the deed of sale unless it was amended. It was not and he had therefore not signed it.

Dibden said that he had ***"almost given up hope with Mrs. Reilly".*** He and his wife then decided that they no longer wanted to sell the whole property but would subdivide it and sell half of it. Magagula was interested in buying half and on 6th December 2003 he, on behalf of

the appellant company, and Magagula entered into a deed of sale for a purchase price of E400 000 of which El00 000 was paid by Magagula by cheque on 8th December 2003.

Dibden said that there was no agreement between him and the respondent. The deed of sale would be the contract and as this had not been signed by him, there was no contract.

Dibden agreed that the respondent and Mrs. Reilly had called at his house on 9th December 2003 and were trying to put pressure on him to sign the deed of sale but he told them he was not prepared to sign it in its present form. It was ***"not true" that*** he had said that the deed of sale was being referred to his attorney for the purpose of ***going*** through it before he signed it.

Dibden's version that his undated letter was written prior to the respondent's letter of 10th November 2003 and in anticipation of his receiving the latter was put to both the respondent and Mrs. Reilly in cross-examination. Both denied emphatically that that was what occurred or that it was the correct version. I need not set out that cross-examination and their replies in any detail herein.

It remains to record that the appellant and Magagula agreed to cancel their sale, Magagula saying that he did not want to become involved in a court battle which he, as an attorney, realized might drag on for a long time.

It will be appreciated that there is a serious conflict between the parties as to how and when the two letters i.e. of 10th November 2003 and Dibden's undated one came to be written, which it was necessary for the court ***a quo*** to resolve before being able to determine whether their interchange gave rise to a written contract in satisfaction of the provisions of Section 31 of the Transfer Duty Act. This, in turn,

required an assessment of the credibility of the witnesses who testified.

The learned trial Judge found that the respondent and her mother gave clear evidence on the issues raised in this conflict and any variation in their evidence was minor and did not go to the root of their case. As for Dibden he found that he was not a good witness. He was, the Judge said, ***" evasive and at times prone to make speeches about other things but not connected with the issues*** in casu". Drinkwater's evidence i.e. merely confirmed that Dibden had given him a mandate for two months to sell the farm. His evidence is not material to a determination of this case and I need not refer to it again.

The learned trial Judge found that, after assessing the evidence, the undated letter followed the letter of 10th November 2003. He thus rejected Dibden's version that he had written his undated letter (according to him on 6th November 2003) in anticipation of receiving the respondent's letter of 10th November 2003.

Was the learned trial Judge correct in these findings?

In my view the learned Judge's credibility finding against Dibden and his rejection of his version of the sequence of the letters, is correct.

It will be recalled that Dibden said that Mrs. Reilly asked him to write his letter and in it to confirm that he said of the property was going ahead for the ***"express purpose . . . to authorise Mr. Mnisi to draw up the deed of sale and that he was also going to be the conveyancer".*** This seems to me to be a most improbable statement. I can conceive of no reason why she would want such a letter. She would have been quite capable of herself authorizing her own attorney without the suggested letter.

After learning that the appellant had sold the property to Magagula which, as I have stated, prompted the respondent to write her letter of 15th November 2003 calling on Dibden to honour his obligation to her, a letter to which Dibden failed to reply, the respondent launched an urgent application in the High Court claiming an interdict restraining the appellant from proceeding with the sale to Magagula. Trie application was opposed and an answering affidavit by Dibden was filed. The application was never argued.

In his answering affidavit in that application, however, Dibden made certain factual statements. One of these was that he had never received the respondent's letter of 10th November 2003. He later testified that this was an error, caused by the affidavit having to be prepared in haste. I find this explanation spurious. Even if there was some haste in drawing up the affidavit, one of the crucial aspects that had to be answered were the contents of the letter of 10th November 2003. Dibden knew it had been handed to him by Mrs. Reilly - indeed on his version in his evidence he said he was waiting for it as a response to his undated letter. His evidence that his statement under oath that he never received the letter, was an error, is incapable of belief and I do not believe him.

Moreover, it was put to him that when Mrs. Reilly delivered the letter to him, she requested him in writing to acknowledge receipt of the letter and to confirm the sale. Dibden replied:-

> ***"My Lord I deny that and I will call a witness who was present when the letter was delivered to testify in that regard".***

No such witness was called by the appellant prior to its closing its case. This gives rise to the inference that the witness would not have

supported Dibden (see e.g. **ELGIN FIRECLAYS LTD v WEBB 1947(4) SA 744 (A.D.)**

Dibden also denied telling the respondent and Mrs. Reilly when they saw him on 9th December 2003 that he had given the deed of sale to his attorney, Mr. P. Dunseith, to advise him on it before he signed it. The respondent and Mrs. Reilly set this out clearly in their letter of 15th
December 2003 and, as I have stated, Dibden never replied to it or challenged its contents. One can therefore infer that what they said was correct, (see **BENEFIT CYCLE WORKS v ATMORE 1927 TPD 524)**

Again, I find Dibden to have been singularly sparing with the truth in this regard. One immediately asks how the respondent and Mrs. Reilly would have known that Mr. Dunseith was Dibden's attorney unless he told them so and I believe them when they say that. But more important, Dibden knew on 9th December that he had signed a deed of sale with Magagula on 6th December 2003 and had received El00 000 from Magagula in respect of that sale on the previous day, i.e. 8th December 2003. It is, once more, incomprehensible why he did not come clean and tell the respondent and his mother about this and that he was, accordingly, not going to sign any deed of sale with them, instead of saying that their deed of sale was with his attorney, which was a deliberate lie.

I have earlier referred to the lengthy cross-examination of Dibden as to the appellant's arrangements that had been made to participate in international trade affairs. From a reading of that evidence I agree with the learned trial Judge that Dibden was frequently evasive and, moreover, in its essentials was in conflict with and denied by the independent evidence of Mrs. Jane Maseko, the Senior Trade Promotion Officer in the Trade Promotions Unit in the Ministry of

Foreign Affairs and Trade, who said that no such arrangements had been made.

Dibden's credibility is therefore open to serious criticism and his evidence where it conflicts with that of respondent and Mrs. Reilly can, in my view, not be accepted. They were found by the trial court to be credible witnesses. It is well-established that a court on appeal will be slow to interfere with findings of credibility by a trial court unless it is satisfied that such findings are clearly and manifestly wrong. I am not so satisfied ***in casu.*** Indeed on a careful reading of their testimony I find the learned Judge's findings to be justified.

The contents of the two crucial letters also persuade me that their version of events is to be preferred to that of Dibden.

In the first place Dibden said that he wrote his undated letter in anticipation of receiving a letter from Mrs. Reilly. If that were so, it is inexplicable that he should have addressed his letter to ***"Dear Kate".*** It was submitted by his counsel that he considered the respondent, Kate Taman, to be the purchaser, hence addressing his letter to ***"Dear Kate***"*but* that again conflicts with his statement that the ***"express purpose"*** for his letter was to authorise Mrs. Reilly to instruct her attorney, Mr. Mnisi, to draw up the deed of sale. The letter of 10th November 2003 was signed by Kate Taman and the probabilities are overwhelming that Dibden was responding to that letter when he wrote ***"DearKate. Thank you for your letter...."***

Furthermore, in her letter of 10th November the respondent wrote ***"I.... confirm that I, or my nominee, will purchase the property".*** In his letter Dibden wrote: ***"Thank you for your letter confirming sale of property".***
It is obvious from this that the latter followed the former. If, as Dibden says, he wrote his first letter before receiving the letter of 10th

November, how would he have known that the respondent would write as she did?

Then again, if Dibden had written his letter first and had asked the respondent to ***"instruct Mr. Mnisi to proceed with the drawing up of the deed of sale",*** how would he have known what terms and conditions the respondent would have instructed Mr. Mnisi to include in the deed of sale? Yet, he said he would ***"be quite happy to sign these documents on the 24th November". "These documents"*** would obviously include the deed of sale. Dibden would therefore have had to have had complete trust in the respondent and her mother.

Moreover, in paragraph 7 of her letter the respondent stated that ***"as agreed the Deed of Sale will require that the bank guarantee for the balance of the purchase price is produced by 31st December. Your vacating of the property, excluding the workshop, can therefore be anticipated to have taken place 30th January".*** In his letter Dibden asked the respondent ***"to change January 30th to February 1st".*** Again one asks how he would have known of the 30th January in respondent's letter if his had been written first? In his evidence Dibden said that 30th January, as the date for his vacating the property, was agreed to at the meeting of 30th October 2003. He anticipated, so he said, that Mrs. Reilly would include that in her letter. As that letter would be written, as he said, after his, he wanted her to change 30th January to 1st February. Two questions immediately spring to mind: (a) how would Dibden have anticipated her including 30th January in her letter when he did not know what she was going to say in it?; and (b) the respondent's paragraph 7 links the date of vacating the property on 30th January with the provision of the bank guarantee on 31st December. That, said Dibden, was not agreed to. Why then should she link the two as her statement ***"your vacating of the property can <u>therefore</u> be <u>anticipated</u>"****on* 30th January not, ***"as we agreed"*** shows? Finally, on this aspect

accepting Dibden's version would mean accepting his evidence which, I have already found, the court ***a quo*** was correct in not doing.
From the aforegoing I find that the decision of the learned trial Judge that Dibden's undated letter followed, and was in response to the respondent's letter of 10th November 2003, was correct and must be upheld.

Do the two letters give rise to a valid written contract of sale of land as required by Section 31 of the Transfer Duty Act?

The learned Judge ***a quo*** held that they did. Was he correct in so deciding?

The learned Judge placed much reliance on an Australian case cited to him in argument viz **BAULKHAM HILLS PRIVATE HOSPITAL (PTY) LTD v G.R. SECURITIES (PTY) LTD AND OTHERS, 40 NSWLR 622,** where the question arose, as in the present case, whether by an exchange of letters between parties a binding agreement between them could come into existence. McLelland J, from whose judgment in that case Maphalala J quoted, held that a binding contract would come into existence if, and only if, by the exchange of letters the parties mutually communicated their respective assents to be legally bound by terms having a contractual effect. There were three questions which it was often useful to consider viz 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.

In her letter of 10th November 2003, which is headed ***"Purchase of Portion 35 of Farm 5", the respondent stated that I, or my nominee, will purchase the property as follows"*** (my emphasis).
The letter then went on to set out the price viz El ,2 million in paragraph 1 and in paragraph 2 that the respondent was arranging for

a company to purchase the company. This was obviously her **"*nominee*".** I shall return to this aspect later.

Paragraphs 3 and 4 deal with matters ancillary to the sale. In paragraph 5, apart from recording that, as agreed, Mr. Mnisi would draw up the deed of sale, the respondent **"*suggested*"** *what* the deed of sale should contain as to the method of payment of the purchase price. Paragraph 6 dealt with Dibden's remaining in occupation of the workshop after the sale of the property and with the eradication of exotic vegetation on the property and, as set out above, paragraph 7 set out what the respondent said had been agreed in regard to the provision of the bank guarantee and the date of vacation of the property by Dibden. The letter went on to invite Dibden to advise by return if he had any material comment on any of the above or any additional consideration for inclusion in the deed of sale.

Dibden's response in his undated letter was to thank the respondent for her letter **"*confirming sale of property*".** He asked her to instruct Mr. Mnisi to proceed with the drawing up of the deed of sale. He did not respond to the respondent's invitation to comment on her proposals or to ask anything additional to be included in the deed of sale.

By saying that she was **"*willing to purchase*"** meant and was intended to mean, in my view, that she was making an offer to purchase the property and from the terms of his letter in reply the inference is irresistible that Dibden, on behalf of the appellant, was accepting her offer and agreeing to its terms and conditions. It seems to me that in accordance with the ***dictum*** of M^{c}Lelland J in the Buckham case supra the parties, by their exchange of letters, had mutually communicated their respective assents to be bound by terms capable of having contractual effect and that the three questions that he suggested should be considered, should all be answered in the affirmative.

Mr. Flynn for the appellant pointed to a passage in Mrs. Reilly's evidence in which she said the following:

> ***"My Lord we had an agreement, we recorded in writing, we had confirmation verbally and in writing with Mr. Dibden and what was to be put in the deed of sale would be based on that. Yes, by mutual agreement there are certain things which needed to be added, we had no objection to that".***

Mr. Flynn cited that passage as support for a submission by him that the exchange of letters did not give rise to a completed agreement. In the Buckham case, supra, McLelland J referred to a passage in the speech of Lord Loreburn in the House of Lords in **LOVE STEWARD v S INSTONE AND COMPANY (1917) 33 T.L.R. 475** at 476 where he made the following remarks, which I feel are particularly apposite in the present case:

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

Mr. Flynn also submitted that the use of the words ***"it is suggested"*** by the respondent showed that the terms of the agreement had not been finalized but were still open to discussion and debate between the parties. I do not agree. It must be remembered that the letter was drafted by lay persons, i.e. the respondent and her mother, and not by

a lawyer. Where a document has been written by a person with a clear intention that it should have a commercial operation, the court should not lightly hold it to be ineffective, even if it does not have the precision of language that might be expected if it had been drafted by a lawyer. Inelegance, clumsy draftsmanship or the loose use of language in such a document, purporting to have contractual validity, will not impair that validity so long as there can be found therein, with reasonable certainty, the terms necessary to constitute a valid contract (cf. per Colman J in **BURROUGHS MACHINES (PTY) LTD v CHENILLE CORPORATION OF SOUTH AFRICA (PTY) LTD 1964 (1) SA 669 (W)** at **670E-H.** In my view, in her letter the respondent clearly intended to set out the terms of an offer which she wished to form the basis of an agreement with the appellant. In any event, the short answer to Mr. Flynn's submission is that Dibden never attempted, despite being invited to do so, to discuss or debate the respondent's terms or ask that they be added to.

Mr. Flynn, however, contended that the exchange of letters did not constitute a compliance with Section 31 of the Transfer Duty Act. This provides that:

> ***"No contract of sale of fixed property shall be of any force and effect unless it is in writing and signed by the parties thereto or by their agents authorized in writing".***

The South African courts have held that the aim of a section similar to Section 31 was, as far as possible, to do away with uncertainty and disputes about the contents of contracts of sale of land and to avoid possible malpractices. The Legislature could, however, hardly have intended that all uncertainty, and disputes were likely to be avoided but that did not detract from the aim of the legislation (see

NEETHLING v KLOPPER EN ANDERE 1967(4) SA 459 (A) at 464E-G; **CLEMENTS v SIMPSON 1971(3) SA 1 (A)** at 7A-B).

The contract need not necessarily be contained in one document but the documents, if, more than one, when read together must constitute the contract and state what the terms are. It must be the whole contract and embody all those material terms which the law did not imply as necessarily flowing from a contract of sale (see **MEYER v KIRNER 1974(4) SA 90 (N)** at 97-98; **JOHNSTON v LEAL 1980(3) SA 927 (A)** at 937G-H.

The judgment of Corbett JA (as he then was) in Johnston v Leal is perhaps the ***locus classicus*** on the topic of the need for writing in the case of sales of land, having been quoted and applied.

In it, Corbett JA referred again to the need for all the material terms of the contract to be in writing and stated that the material terms were not confined to those prescribing the ***essentialia*** of a contract of sale viz the parties to the contract, a description of the property and the purchase price but include, in addition all material terms. The learned Judge of Appeal opined that it was not easy to define what constitutes a material term. He stated, however, at 938B-E that generally speaking those terms and especially the ***essentialia -*** must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identify of the subject matter, as also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral consensus between the parties.

In the present case the letter of the respondent of 10th November 2003 sets out with accuracy and particularity the subject matter of the property involved viz portion (PTN) of Farm 51; the purchase price viz **E**1,2 million; and the identity of the parties viz ***"I or my nominee"*** which nominee she identified as a ***"company to be set up".*** This description of

the purchaser has been held, in a case where almost similar words were used, to be a sufficient identification of the purchaser for the purpose of Section 1 of the South African Act requiring sales of land to be in writing which is in identical terms to Section 31 of the Swaziland Act (see **BERMAN v TEIMAN 1975(1) SA 756 (W)).** The remaining terms as to the method of payment of the purchase price, including a bank guarantee for portion thereof and how and why it is to be provided, and the date of occupation of the property and the appellant's vacation thereof after the sale, which are no doubt material terms, are in my view set out with sufficient accuracy, clarity and particularity as not to necessitate any recourse to oral evidence.

The other terms contained in paragraphs 3, 4 and 6 are, in my opinion, not material terms in the contract but if they could be said to be, they too, are set out with accuracy, clarity and particularity.

The respondent stated that she was going to request Mr. Mnisi to draw up a deed of sale in which he would include those terms.

By the contents of his undated letter Dibden, on behalf of the appellant, in which he thanked the respondent for her letter of 10th November 2003, **"*confirmed*"** the sale and asked her to instruct Mr. Mnisi to proceed with the drawing up of the deed of sale. Dibden clearly accepted those terms, apart from requiring a change in the date of his vacating the property.

Once again, in my view, no necessity arose for recourse to oral evidence to ascertain the consensus between the parties. The contract in all its material terms is sufficiently contained in the two letters. Dibden stated that paragraph 7 of the respondent's letter did not reflect what they had agreed to. He, however, chose not to seek to amend or add to it, despite being invited by the respondent to do so and can, in my view, not be heard to complain about it now. It does not

vitiate what I hold to be a contract valid for the purposes of Section 31.

It was contended by Mr. Flynn that the frequent references to a deed of sale in the respondent's letter showed that they did not intend the letters to be their contract but that such would only come into being with the signing of the deed of sale. I am unable to agree and I find support for my doing so in the passage from the speech of Lord Loreburn cited above viz

> ***"It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of terms.***

I accordingly hold that Maphalala J was correct in finding that a valid contract of sale had been concluded between the parties which conformed to the requirements of Section 31 of the Transfer Duty Act.

The appeal is accordingly dismissed with costs and the orders made by Maphalala J are confirmed.

F.H. TEBBUTT
Judge of Appeal

I AGREE

J. BROWDE
Judge of Appeal

I AGREE

M.M. RAMOD-IBEDI
Judge of Appeal

DELIVERED IN OPEN COURT ON THIS 15 'DAY OF NOVEMBER 2007.