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THE DOCTRINE OF QUASI-MUTUAL ASSENT - HAS IT BECOME THE GENERAL RULE FOR THE FORMATION OF CONTRACTS? THE CASE OF *PILLAY v SHAIK* 2009 4 SA 74 (SCA)

P Thejane (Rankoane)*

1 Introduction

The doctrine of quasi-mutual assent is undoubtedly part of our law and has been affirmed and applied in a number of leading decisions.[1] Its necessity and significance has also been acknowledged by legal professionals. As one writer puts it:[2]

> …without it our law would be in a very sorry state, as it would be obliged to hold that whenever there was no true subjective agreement there was no contract, even if the one party had led the other reasonably to understand that they were in agreement.

The recognition by our courts is evident in the following statement made by Davis J in *Irvan and Johnson (SA) Ltd v Kaplaan*:[3]

> 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.[4]

The application of the doctrine of quasi-mutual assent in the case of *Pillay v Shaik*[5] prompted the writing of this note. This note questions the application of the doctrine of quasi-mutual assent to resolve the dispute in the *Pillay v Shaik* case and offers some recommendations firstly on how the Supreme Court of Appeal should have resolved the dispute, and secondly on what would possibly have justified the

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1 These include *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417*; George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A); *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A); *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A); and *HNR Properties CC v Standard Bank of SA Ltd* 2004 4 SA 471 (SCA).

2 See Christie *Law of Contract* 11-12.

3 *Irvan and Johnson (SA) Ltd v Kaplaan* 1940 CPD 647.

4 *Irvan and Johnson (SA) Ltd v Kaplaan* 1940 CPD 647 651.

5 *Pillay v Shaik* 2009 4 SA 74 (SCA).

application of the doctrine of quasi-mutual assent. A brief account of the doctrine of quasi-mutual assent is given as it lays a foundation for the main contentions made.

2 Background

The doctrine of quasi-mutual assent (hereinafter referred to as "the doctrine") is one of the three theories for the formation of contracts in our law, and a compromise between the other two, being the will and declaration theories.[6] Also known as the reliance theory, the doctrine has its origins in English law and can be traced to as far back as 1848. The doctrine was formulated in the English case of *Freeman v Cooke*,[7] but made popular by the following statement made by Blackburne J in *Smith v Hughes*:[8]

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[9]

The doctrine is meant to aid in resolving disputes on the existence of an agreement.[10] It firstly acknowledges that the general principle for the formation of valid contracts is that there must be a meeting of the minds of the parties or subjective consensus.[11] Thus, the primary basis of liability in contract law is the expressed will of the parties.[12] It further concedes that there are instances where confusion could arise as to whether there has been a meeting of the minds or not, because one of the parties may have an intention different from that of the other party, but fail to communicate this intention.[13] Its essence is, therefore, that since contractual liability is based on the parties' subjective intention, and since it can be difficult for the one party to read the other's mind, there should, in such instances, be an alternative basis for determining a party's liability. Consequently, where there is

6 Hutchison (ed) *Law of Contract* 16.
7 *Freeman v Cooke* (1848) 2 Ex 654.
8 *Smith v Hughes* (1871) LR 6 QB 597.
9 *Smith v Hughes* (1871) LR 6 QB 597 607.
10 See Du Bois (ed) *Wille's Principles* 737.
11 See Christie *Law of Contract* 24 and Kahn *Contract and Mercantile Law.*
12 Christie *Law of Contract* 11-12.
13 See Hutchison (ed) *Law of Contract* 90.

dissensus which is not readily apparent, the party that acted contrary to the subjective consensus should be held bound to the apparent agreement. The doctrine thus protects parties who would otherwise not be able to dispute the other contracting party's denial of their "true" intention, and who would as a result be left destitute.[14] This is because the doctrine refers to the surrounding circumstances to determine the disputing party's intention.

The decision of the Supreme Court of Appeal in *Pillay v Shaik* raises two very important issues which impinge on two principles of the law of contract. In the first place, it foregrounds the interplay between subjective consensus and the prescribed mode of acceptance of an offer and/or self-imposed formalities and the question of which should override, where the parties had clearly agreed on these for the valid formation of a contract but subsequently disregarded them. That is, it brings to the fore the question of whether the courts must give effect to the substance or form of the contract. The answer to this enquiry finds its justification in one of the fundamental principles of contract law, namely freedom of contract. Secondly, the judgment highlights the misconception of the role of the doctrine of quasi-mutual assent in our law.

The purpose in this analysis is to review the appropriateness of the Supreme Court of Appeal's application of the doctrine to the facts of *Pillay v Shaik*. The note starts by discussing the *Pillay v Shaik* case and then proceeds to a two-fold analysis of the Supreme Court of Appeal's judgment. It does this firstly by criticizing the Supreme Court of Appeal's decision to base its finding on the doctrine. Secondly, it criticises the court's factual finding itself on the grounds that it was based on the wrong application of the principle to the facts of the case. The note then goes on to propose the approach that the Supreme Court of Appeal should have followed in deciding the case.

14 *Irvan and Johnson (SA) Ltd v Kaplaan* 1940 CPD 647 651.

3 *Pillay v Shaik*

3.1 Case discussion

In this case the two buyers sought an order declaring that the agreements of sale they allegedly concluded with the sellers were of full force and effect. The alleged agreements were for the purchase of a member's interest in the close corporations which held ownership of certain units in a sectional title scheme developed by the sellers. The sellers had drawn up standard form agreements for completion by potential buyers. They had then appointed as their attorneys the ninth respondent, Mooney Ford, a firm of attorneys. When the buyers had decided to buy into the development they signed separately the standard form agreements, thereby making firm offers to purchase. Subsequently, with the consent of Mooney Ford, the buyers paid their deposits, the receipt of which was acknowledged. Later on Mooney Ford requested the buyers to furnish them with guarantees for the remainder of the purchase prices, which they did. All of the above acts took place without the buyers being aware that the sellers had not yet signed the purported agreements.

The sellers denied the existence of the alleged agreement on the basis that the alleged offers to purchase had not been signed on their behalf and the offers had therefore not been accepted. In support of their defence they relied among others on clauses 5.1 and 8 of the contract, which provided for the payment of deposits by the buyers to Mooney Ford and the provision by the sellers to Mooney Ford of certain documents in trust subsequent to the signing of the agreement by the parties. They further argued that they had not signed the execution clause of the written contracts.

The Durban High Court ruled in favour of the buyers. It applied the doctrine and found the agreement to be valid. The sellers then appealed against the decision to the Full Bench of the Pietermaritzburg High Court. The Full Bench found in favour of the sellers, and held that since the alleged agreements of sale had not been signed on behalf of the sellers they were not binding. In doing so the Full Bench interpreted the clauses in question as imposing the reduction of the agreement to writing as a formality without which the agreement could not come into existence. Consequently,

the Full Bench found it unnecessary to consider the question of whether, on the application of the doctrine, the alleged agreements could be said to be binding. The buyers appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal disagreed with the decision of the Full Bench that the parties had intended for the purported agreement to be valid and binding only when reduced to writing.[15] It stated that where an agreement does not in law have to be in writing, as was the situation in *Pillay v Shaik*, such an agreement will have binding force unless the parties agree beforehand that writing constitutes a formality. Finding that no such prior agreement had been concluded in this case, it stated that the finding of the Full Bench could not be upheld. The Supreme Court of Appeal held that the correct interpretation of the contract was that the offers prescribed a particular form of acceptance. Upon finding that the sellers had clearly not complied with the prescribed mode of acceptance,[16] the Supreme Court of Appeal went on to consider if there was an alternative basis on which it could declare the alleged agreement to be binding. This is evident from the following statement:[17]

> This raises the question as to whether the doctrine of quasi-mutual assent can be applied in circumstances where acceptance does not take place in accordance with a prescribed mode but the conduct of the offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the considerations underlying the application of the reliance theory apply as strongly in a case such as the present as they do in cases where no mode of acceptance is prescribed and the misrepresentation by the offeree relates solely to the fact that there is no consensus.

Having decided to invoke the doctrine, the Supreme Court of Appeal proceeded to consider its application to the facts. It stated that the critical question to ask is whether the party whose actual intention did not conform to the declared intention led the other party, as a reasonable man, to believe that his declared intention represented his actual intention.[18] The answer to this question, the court said, necessitates a three-fold enquiry, namely: firstly, was there a misrepresentation as to

15 *Pillay v Shaik* 2009 4 SA 74 (SCA) para 50.
16 *Pillay v Shaik* 2009 4 SA 74 (SCA) para 52.
17 *Pillay v Shaik* 2009 4 SA 74 (SCA) para 53.
18 *Pillay v Shaik* 2009 4 SA 74 (SCA) para 55.

the intention of one of the partyies; secondly, who made that representation; and thirdly, was the other party misled thereby? The last question, the court said, should be divided into two separate questions, namely: firstly, was the other party misled; and secondly, would a reasonable man (in his position) have been misled?

In applying this test to the facts of the case the court concluded that the sellers (whose actual intention did not conform to the declared intention) had, through their agent Mooney Ford, including their sending of the various letters to the buyers, misrepresented their actual intention and led the buyers, as reasonable men, to believe that their declared intention represented their actual intention; further, that these acts were a clear acceptance by the sellers of the buyers' offers.[19] The court accordingly held that the alleged agreements were valid and binding on the sellers and ordered them to effect transfer of the said units.

3.2 Analysis of the judgment in Pillay v Shaik

It is disagreed here with the decision of the Supreme Court of Appeal in two respects. The main contention is based on the court's employment of the doctrine in this case. In the second leg of the analysis the focus shifts to the application of the principle to the facts of the case.

3.2.1 Incorrect appeal to the doctrine of quasi mutual-assent

The main argument being put forward in this note is that the dispute in the case of *Pillay v Shaik* rested on compliance with the prescribed mode and/or formalities for acceptance. The court's logic to resolve this inquiry via the application of the doctrine was thus incorrect. In other words, the Supreme Court of Appeal should have resolved the case solely on the question of whether there had been compliance, without invoking the doctrine.

19 *Pillay v Shaik* 2009 4 SA 74 (SCA) para 58.

In order for a valid contract to come into existence, the parties thereto must reach consensus.[20] That is, there must be a meeting of the minds regarding the conclusion of a legally binding agreement between them.[21] The agreement must be expressed by the concerned parties and this can take any form. Thus, the expression can be made verbally, in writing or by conduct. Since it can be difficult to establish with certainty that such consensus has been reached, the law of contract requires that the expression of consensus be done through the process of offer and acceptance.

An offer is an invitation by one person (the offeror) to another person (the offeree) with the intention to create legally binding obligations between them.[22] An acceptance would then be the affirmative reply of the offeree to the offeror's offer with the intention to create legally binding obligations on the terms set out in the offer.[23]

Acceptance must also comply with certain requirements in order for it to be valid. Firstly, the acceptance must be made with *animus contrahendi* by the person to whom it was addressed (the offeree).[24] Secondly, it must correspond to the exact terms of the offer, failing which it becomes a counter-offer.[25] Thirdly, the acceptance must be communicated to the offeror.[26] The communication of acceptance can take any form, except where the offeror has prescribed a particular method of acceptance, in which case the acceptance must be made in the prescribed manner in order for an agreement to come into existence.[27] Lastly, to be effective it must take place before the offer terminates.[28]

20 See Bhana, Bonthuys and Nortje *Students' Guide* 24.
21 Bhana, Bonthuys and Nortje *Students' Guide* 24.
22 See Sharrock *Business Transactions Law* 53.
23 Van der Merwe *et al Contract* 54.
24 See *Bloom v American Swiss Watch Company* 1915 AD 100.
25 See *Lee v American Swiss Watch Company* 1914 AD 121; *JRM Furniture Holdings v Cowlin* 1983 4 SA 541 (W); and *Boerne v Harris* 1949 1 SA 793 (A).
26 Kahn *Contract and Mercantile Law* 111.
27 See in this regard *Bloom v American Swiss Watch Company* 1915 AD 100; *R v Nel* 1921 AD 339; *Mackenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16; *Laws v Rutherfurd* 1924 AD 261; and *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A).
28 Bhana, Bonthuys and Nortje *Students' Guide* 41 and *Bloom v American Swiss Watch Company* 1915 AD 100 105.

That the offers by the buyers were valid was not in dispute. The bone of contention was whether or not there had been a valid acceptance by the sellers, since they had not followed the stipulated method of acceptance, namely signature. It is submitted, therefore, that the dispute arose from the third requirement for a valid acceptance, namely the manner of acceptance.

It is a general rule that acceptance must be communicated or be brought to the knowledge of the offeror.[29] Nevertheless, the offeror can dispense with this rule by authorising or prescribing another method of acceptance.[30] The Supreme Court of Appeal in *Pillay v Shaik* interpreted the facts to mean that writing had been prescribed as a method of acceptance,[31] which interpretation I support, based on the reasons that follow. Although the court held that the buyers had prescribed signature as the method of acceptance, it nevertheless considered if, on the application of the doctrine, a valid agreement could be said to have come into existence. This creates the impression that there was a misunderstanding on the part of the court between prescribed and authorised methods of acceptance. A clear distinction is and must be drawn between these two concepts.

A "prescribed" method of acceptance constitutes the only method of acceptance which is capable of giving rise to an agreement. Thus, acceptance must take place in the prescribed manner in order for the agreement to come into existence.[32] The offeror can prescribe a method expressly or impliedly.[33] "Authorised", on the other hand, means that the method used by the offeror is preferred, but if the offeree uses a different method of acceptance the contract is valid provided this is brought to the attention of the offeror.[34]

29 Bhana, Bonthuys and Nortje *Students' Guide* 41.
30 See fn 29 above.
31 *Pillay v Shaik* 2009 4 SA 74 (SCA) para 52.
32 See in this regard *Bloom v American Swiss Watch Company* 1915 AD 100; *R v Nel* 1921 AD 339; *Mackenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16; *Laws v Rutherfurd* 1924 AD 261; and *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A).
33 *Bloom v American Swiss Company* 1915 AD 100 103.
34 See *Eliason v Henshaw* (1819) 4 Wheaton 225.

The question of whether the offeror intended to prescribe a specific method of acceptance must be determined by reference to all the facts of a case.[35] These include, amongst others, the existence of an execution clause, the declaration that the contract be concluded upon signature, the form and the commercial nature of the contract to be concluded and the geographical separation of the parties.[36]

In the case of *Pillay v Shaik* the factors to be taken into account are, firstly, the existence of the execution clause. This indicates that the sellers were meant to sign the form. Furthermore, clauses 5.1 and 8 provided for the payment of the deposits by the buyers to Mooney Ford and the delivery by the sellers of certain documents to Mooney Ford in trust pending the buyers' payment of the balance of the purchase price, respectively, within a certain period of time after the date of signature of the agreement by the parties. This can be construed as a clear declaration by the buyers that the agreements would be concluded only upon signature by both parties. This was clearly not the situation in this case as the sellers had not signed the purported agreement. Lastly, clause 15 (the whole agreement clause) indicates that the purported agreement was not intended to be of full force and effect unless signed by both parties. This argument finds support in Snyman J's statement to the effect that if on the purported agreement it appears that the parties intended the document to be the very agreement between them (that is, that the parties intended that writing should symbolise the agreement), then such a document must be signed for the agreement to come into existence.[37]

It has already been stated that the consequences of failing to comply with the prescribed method of acceptance is that no contract comes into existence. The cases in this area have been consistent in applying or affirming this principle. A few of these cases are briefly discussed below to illustrate the court's attitude in each.

35 See Van der Merwe *et al Contract* 54.
36 See Van der Merwe *et al Contract* 68.
37 *Meter Motors (Pty) Ltd v Coh*en 1966 2 SA 735 (T) 737B or 737H.

In *Driftwood Properties v Van Aswegen*[38] clause 7 of the offer read:

> …this offer is open and binding upon both parties until signature by both parties (on or) before 17 May, 1969, failing which it shall lapse if only signed by one party.

The court held that clause 7 clearly indicated that the offeror intended the contract to be concluded upon mere signature of the document by the offeree.[39] In other words, the offeror prescribed signature as the method of acceptance and dispensed with the need for communication of the acceptance to him.

The court held that the principle stands, unless there was doubt that a method of acceptance has been prescribed by the offeror, in which case there is a presumption that a contract will come into existence only when the offeror becomes aware of the offeree's acceptance.[40]

The same principle was upheld by the court in *Goldblatt v Freemantle*.[41] There the court held that writing had been prescribed as a formality for the formation of the contract and found the "contract" to be invalid due to failure by the offeror to sign. The court did not invoke the doctrine of quasi-mutual assent even though the offeror had already started to supply the goods which formed the subject matter of the contract.

In *Laws v Rutherfurd*[42] the court confirmed the principle that a prescribed method of compliance must be complied with for a valid agreement to come into existence, and said it stood unless evidence is furnished to establish the waiver of the prescribed manner by the offeror.[43] The most important aspect of this case lies in its similarity with the facts of *Pillay v Shaik,* in that in both cases certain acts were performed by the contract deniers before acceptance in the prescribed manner. It could be argued that these acts were misleading, and could be read as an indication that a contract had been created. However, this argument cannot validly be extended to the

38 *Driftwood Properties (Pty) Ltd v McLe*an 1971 3 SA 591 (A).
39 *Driftwood Properties (Pty) Ltd v McLe*an 1971 3 SA 591 (A) 598A.
40 *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 597.
41 *Goldblatt v Freemantle* 1920 AD 123.
42 *Laws v Rutherfurd* 1924 AD 261.
43 *Laws v Rutherfurd* 1924 AD 261 262.

scenarios in *Laws v Rutherfurd* and *Pillay v Shaik.* It is astounding, therefore, that the courts in these two cases arrived at different outcomes, *Laws v Rutherfurd* finding the various acts therein irrelevant and that no valid agreement had been formed, and *Pillay v Shaik* taking these into consideration and finding that a valid agreement had been created.

More importantly, the court stated that where parties deliberately entered into a contract on certain terms, they must be held to those contracts even if that led to hardship, and that the courts must not make new contracts for the parties.[44] This statement is broad enough to include an assertion that where parties have agreed on a prescribed method of acceptance and/or formalities they must be held to such even if the law does not require them for an agreement to come into existence. Moreover, the statement is in accordance with the principle in *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren*[45] and *Brisley v Drotsky.*[46] The general principle in these cases is that holding the parties to self-imposed formalities gives effect to the principle of freedom of contract and *pacta sunt servanda*. Although these two cases dealt with self-imposed formalities for the variation of agreements, it is argued that the underlying principle relating to the consequences of non-compliance applies in the same way in the context of self-imposed formalities and/or where a method of acceptance for the formation of contracts has been prescribed.

According to this underlying principle of our contract law, parties are free to choose if they want to contract, with whom and on what terms.[47] This accords with another founding principle of the law of contract, namely the doctrine of *pacta sunt servanda,* according to which contracts should be upheld and enforced by all means possible.[48] According to this principle, the courts should interfere only where contracts were not freely entered into, such as contracts induced by duress, misrepresentation, undue influence, or where the terms of a contract are immoral, illegal and contrary to public policy.

44 *Laws v Rutherfurd* 1924 AD 261 264.
45 *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A).
46 *Brisley v Drotsky* 2002 4 SA 1 (SCA).
47 Hutchison (ed) *Law of Contract* 23.
48 See *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A).

The principle of freedom of contract can thus be limited in appropriate circumstances. There are certain situations in which interference by the state, including the courts, is justified. For example, contracts must comply with the provisions of the *Constitution*,[49] while other state involvement in the form, for instance, of the *National Credit Act*[50] and the *Consumer Protection Act*[51] is warranted to some extent by the aim of protecting the vulnerable in contracts in which there are inequalities in the bargaining power. Nonetheless, it should be borne in mind that contract law still remains predominantly a branch of private law and freedom of contract a fundamental principle.

If the Supreme Court of Appeal had argued that the buyers had authorised and not prescribed writing, which as discussed above would mean that other ways of communicating the acceptance would be acceptable, their decision would have been justified. In such a case a reasonable interpretation would have been that the letters and acceptance of deposits, and the requests and receipts of guarantees constituted the sellers' communication of their acceptance in an acceptable manner other than the preferred manner. This would have then justified the court's decision to invoke the doctrine and thus its *ratio decidendi,* as the sellers would be said to have misrepresented their actual intention, which would have led the buyers reasonably, to believe that a contract had come into existence.

Based on the principle articulated in the cases discussed, the sellers were correct to deny the existence of the alleged agreement on the basis that they had not validly accepted the buyers' offers. Consequently, if it had interpreted "prescribed' correctly, the Supreme Court of Appeal in *Pillay v Shaik* should have dismissed the buyers' claim as was done in the case of *Laws v Rutherfurd*, and held that no agreement had come into existence because there had been no valid acceptance. It should not have ventured into the inquiry on the applicability of the doctrine.

The Supreme Court of Appeal in *Pillay v Shaik* extended the application of the doctrine to the form, and it is submitted that this extension was incorrect and

49 *Constitution of the Republic of South Africa*, 1996.
50 *National Credit Act* 34 of 2005.
51 *Consumer Protection Act* 68 of 2008.

unjustified. The doctrine makes sense in the case of subjective consensus but not for form. Because it is difficult to ascertain whether or not a party had a *reservation mentalis,* the doctrine should apply in such cases. Where it is just an issue of whether or not the acceptance takes the correct form, the contract assertor could easily ascertain it. In the case of *Pillay v Shaik* this was as easy as the buyers requesting copies of the agreement to ensure that the sellers had indeed signed and thus accepted the contract. The court's employment of the doctrine was, consequently, unnecessary. The doctrine applies by way of exception, not as the norm. It is meant as an aid and not as a general rule for the formation of contracts, as Christie seems to imply.[52]

Had it been a case where the buyers denied the existence of the agreement on the basis that the sellers had not complied with the prescribed manner, the court would have had to agree with them. One relevant authority in this regard is the case of *Eliason v Henshaw*,[53] where the offeree did not adhere to the method specified by the offeror and instead opted for a method which he thought would be quicker. The court re-affirmed the principle that a prescribed mode of acceptance must be observed, and held that the offeror could refuse to consider himself bound by the "agreement" in question, which he in fact did.[54]

3.2.2 Incorrect application of the principle (quasi-mutual assent) to the facts of the case

The ancillary contention relates to the court's application of the doctrine to the facts of the case. It is argued that the court set out the test appropriately, assigned the correct interpretation to the test, but incorrectly applied the test to the facts of the case before it. In particular, the note disputes the Supreme Court of appeal's application of the third leg of the test and its finding that the buyers had been misled, as reasonable men, to believe that a valid contract had come into being. The Supreme Court of Appeal held, with regards to the first leg of the test, that one of the sellers, who acted for himself and on behalf of the other sellers, had misrepresented

52 See Christie *Law of Contract* 11-12.
53 *Eliason v Henshaw* (1819) 4 Wheaton 225.
54 *Eliason v Henshaw* (1819) 4 Wheaton 225 para 28.

his intention.[55] In applying the second leg, the court held that the representation was made by his agents, Mooney Ford. With regards to the application of the last leg of the test the court stated that the various letters sent to the buyers by Mooney Ford "unmistakably" led the buyers as reasonable men to believe that their offers had been accepted and that binding contracts had come into being.

In this regard the decision of the Supreme Court of Appeal is a contradiction in terms in that the court conceded that writing had been prescribed as the method of acceptance, but its judgment does not mirror this position. It also serves to reinforce the argument that the Supreme Court of Appeal appears to have confused "prescribed" with "authorised" methods of acceptance. Admittedly, where no mode of acceptance had been specified, or at least where writing had been authorised, the court's finding in favour of the buyers would have been correct for the reasons already discussed. In this case, however, the decision was wrong because writing had been prescribed by the buyers themselves. According to the last leg of the test, it is not enough that the contract-assertor relied on an impression created by the conduct of the other party – the contract-denier. Such a party must also allege and prove that his reliance was reasonable in the circumstances.[56] In these circumstances courts make use of the reasonable person test and will find that such reliance was reasonable if a reasonable person, in the identical circumstances as those of the contract-assertor, would also have believed that there was subjective consensus.

According to the *Steyn v LSA Motors*[57] the overriding consideration seems to be if the reliance is reasonable when all the circumstances are taken into consideration, and not so much if particular, separate requirements pertaining to the parties' conduct have been met.[58] The court in *Steyn* considered the conduct of both parties, taking into account all of the surrounding circumstances, to arrive at its finding. On the contrary, the Supreme Court of Appeal in *Pillay v Shaik* appears to have looked only at the fact that the sellers' conduct was misleading. The court seems to have

55 *Pillay v Shaik* 2009 4 SA 74 (SCA) para 56.
56 See in this regard *National and Overseas Distributors v Potato Board* 1958 2 SA 473 (A); and *Steyn v LSA Motors* 1994 1 SA 49 (A).
57 *Steyn v LSA Motors* 1994 1 SA 49 (A).
58 Van der Merwe and Van Huyssteen 1994 *SALJ* 685.

disregarded the fact that the buyers had prescribed writing, which should have precluded reliance on the conduct of the sellers.

A possible argument can be made, based on the contents of the letter by Mooney Ford to the buyers,[59] that the buyers were led to believe that the sellers had signed the agreement, which possibly paved the way for the court to apply the doctrine. The implication of this would be that the sellers were rightly held liable on the basis that their mistake was caused by their own negligence.[60] This rule is, however, subject to the qualification that the guilty party will be allowed to resile from the contract where the other party ought, as a reasonable person, to have been aware of the mistake, and thus cannot claim to have been reasonably misled.[61] This kind of reasoning is nevertheless somewhat flawed in the context of the situation in *Pillay v Shaik.* The buyers, having prescribed writing, should have known that nothing but signature would be sufficient. It was therefore not reasonable for them to mistake any other conduct as signifying acceptance on the part of the sellers. As Kahn[62] puts it, where the offeror has expressly or tacitly stipulated some other form of acceptance, there can be no inference of acceptance from the offeree's conduct.[63] In other words, acceptance by conduct is limited to cases where no method of acceptance is stipulated.

4 Proposal of an alternative approach that the Supreme Court of Appeal should have followed to decide the case

As a prelude to this recommendation, it is important to reiterate the main submission in this note, which is that the Supreme Court of Appeal was wrong simply to have ignored the non-compliance with writing as a prescribed mode of acceptance in *Pillay v Shaik,* and to have invoked the doctrine of quasi-mutual assent. Where writing has been prescribed as a mode of acceptance of an offer, a valid agreement will come into existence only when acceptance has been effected in that manner. As per the principle in *Laws v Rutherfurd,* where a method of acceptance of an offer has

59 *Pillay v Shaik* 2009 4 SA 74 (SCA) para 29.
60 See *Brink v Humphries & Jewel (Pty) Ltd* 2005 2 SA 419 (SCA) para 8.
61 See *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W).
62 Kahn *Contract and Mercantile Law.*
63 Kahn *Contract and Mercantile Law* 121.

been prescribed, compliance therewith can be validly circumvented only by a successful argument of a tacit waiver of the prescribed method. It is from this premise that the recommended alternative approach is made.

It is submitted that had the Supreme Court of Appeal considered a tacit waiver of the requirement of writing – which it did not do - this would possibly have been a justified basis to invoke the doctrine. In other words, had the Supreme Court of appeal considered that the buyers had tacitly agreed to disregard writing as the basis for a valid formation of the contract, this would have paved a way for the Supreme Court of Appeal to validly invoke the doctrine and not to simply overlook or disregard the consequences of failure to comply with the prescribed method of acceptance. It is conceded that this submission could be understood as contradictory and thus confusing in that the judgment is criticised as wrong but appears to be saying the judgment may be correct after all. It should, however, be noted that tacit waiver was not pleaded in *Pillay v Shaik,* and that the proposal herein is thus an academic exercise. That is, the discussion centres on how the judgment could possibly have turned out if tacit waiver had been considered. It is to this discussion that the section below now turns.

According to *Laws v Rutherfurd,*[64] waiver is the deliberate abandonment, renunciation or surrender of an existing right by the right holder, acting in the full knowledge of the right. This can be done expressly or tacitly. Where the right holder acts contrary to an intention to enforce the right in question, then he will be said to have tacitly waived such a right. The person who alleges the waiver bears the onus to prove that the right holder, with full knowledge of his right, decided to abandon it.[65]

It is submitted that the possible reason for the Supreme Court of Appeal's failure to consider waiver as a possibility resulted from the fact that the court drew a distinction between writing as a prescribed mode of acceptance on the one hand and writing as a self-imposed formality for the formation of a contract on the other hand. It based this distinction on an assertion that for writing to constitute a formality there must be

64 *Laws v Rutherfurd* 1924 AD 261 263.
65 See *Laws v Rutherfurd* 1924 AD 261 263; and *Palmer v Poulter* 1983 4 SA 11 (T) 20d.

a preceding agreement between the parties, which it found not to have existed, resulting in its decision to invoke the doctrine. It seems that had the court interpreted writing as a formality, it would have upheld the decision of the Full Bench. This distinction can be criticised on two grounds, the distinction itself and the statement that there must always be a preceding agreement between the parties prescribing writing as a formality for writing to constitute a formality.

Firstly, it is argued that the distinction between the two is artificial. Prescribing writing as a method of acceptance is the same as imposing writing as a formality, as both go to the validity of a contract. That is, in both cases non-compliance results in the contract's being void. If writing is prescribed, writing has been imposed as a formality because unless an offer is accepted in that manner no contract comes into existence.

Secondly, it is argued that the formality of writing need not necessarily stem from a pre-existing agreement between the parties to a contract. There are at least two possible scenarios in which the formality of writing can arise. The first would be the typical scenario in *Goldblatt v Fremantle*, where the parties orally discuss the terms and agree that such terms will not be of any force or effect unless they are reduced to writing. This is the situation upon which the Supreme Court of Appeal made its distinction.

The second scenario is that analogous to the *Laws v Rutherfurd* situation, where one of the parties (in most cases the offeror), without having there been any prior oral agreement, makes an offer in writing and therein prescribes writing as a requirement for formation – a situation like that in *Pillay v Shaik*. It is argued that even in a case such as this, the requirement of writing could constitute a formality. In the case of *Pillay v Shaik* an alternative argument could be made that, because the standard form agreements were prepared by the sellers for interested buyers, these constituted offers by the sellers to potential buyers on the formalities. By signing the buyers were doing two things at the same time. In the first instance they were accepting the offer on the formalities. They were however also making an offer to the sellers for the purchase of the members' interest in the close corporations, which

would become a valid contract on signature by the sellers – a tacit agreement to have writing as a formality without which a valid contract cannot come into existence. It is upon this second situation that it is argued it was wrong for the Supreme Court of Appeal to find that writing did not constitute a formality. I disagree with the Supreme Court of Appeal's finding in this regard and instead support the finding of the Full Bench.

The buyers having prescribed writing and it being their right to do so, would then be said to have tacitly and unilaterally waived this requirement. A successful argument on waiver would then justify the application of the doctrine on the basis that, in the absence of any special requirements on how the offer should be accepted, it would be acceptable to hold the buyers liable to the apparent contract on the basis of all the letters written to the buyers by the sellers through their agents. It would be a clear case of subjective consensus on the substance of the contract which, as has been argued above, is the only valid ground for the application of the doctrine.

5 Conclusion

It is apparent from the cases evaluated that the Supreme Court of Appeal's application of the doctrine in the *Pillay v Shaik* case was incorrect. The first line of cases analysed were those in which the offerors had prescribed methods of acceptance. The findings in all of these cases were either that the contracts were valid where the acceptance occurred in the prescribed manner or void where the acceptance took place through other methods than those prescribed. The courts did not have regard to any other factors but limited their inquiry simply to whether or not there had been compliance with the prescribed methods. This proves the contention that the doctrine was incorporated into our law, not to change the existing principles, but only as an aid to the situation discussed in the background to this note. While the doctrine is undoubtedly crucial, we should be careful not to over-emphasise its importance. It is wrong to hold, as Christie does, that no dispute on the existence of an agreement can properly be resolved without calling the doctrine in aid. It is probably this attitude or understanding that led to the Supreme Court of Appeal's deciding the case as it did. It is very possible for any dispute about the existence of

an agreement to be resolved without invoking the doctrine. Failure to adhere to any of the requirements for a valid contract could render an alleged agreement invalid. The court in such a case should and must resolve that dispute based exclusively on such non-compliance with the requirements.

In as far as the argument that even the finding itself was wrong is concerned, it has been demonstrated that the Supreme Court of Appeal's application of the test for the doctrine was incorrect in that it found the buyers' reliance to be reasonable. Because the buyers prescribed the method of acceptance, their reliance upon any other factor would not have been reasonable.

It was also stated that the decision in *Pillay v Shaik* undermines the principle of freedom of contract. It is argued that none of the reasons for undermining freedom of contract were applicable in the *Pillay v Shaik* case. The parties were more or less on an equal footing to bargain. Imposing formalities or prescribing a method of acceptance of an offer is not immoral and is not something that the parties are usually coerced into. The court's intervention in the *Pillay v Shaik* case thus cannot be validly justified.

The conclusion drawn is that the buyers should not only have lost the case based on the principles of formation of contracts, but also on their failure to satisfy all of the requirements for the application of the test for the doctrine.

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List of abbreviations

SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg