IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 236/13

In the matter between:

SIX- A – PROPERTY INVESTMENTS (PTY) LTD Appellant

and

CORNELUS JOHANNES ANDRIES FERREIRA First Respondent
SK HEIRISS INC ATTORNEYS Second Respondent

JUDGMENT

Vahed J:

[1] Some years ago it was popular for certain investment advisers within the financial community to express the view that it was unwise for a professional person in private practice to tie the fortunes of his or her professional practice to the providences of his or her investments. The facts underlying this appeal are suggestive of perhaps why that might have been sound advice.

[2] The first respondent is an attorney who, at the times material to the facts in this appeal, was in private practice. During October 1981 he entered into partnership with five other attorneys, namely Louis McEwan Halse, Robert Frederich Havemann, Johannes Jochemis Lloyd, Lester Schoeman and Thomas Ian Askew. That

partnership practised as attorneys, notaries and conveyancers, in Durban under the name Halse, Haveman and Partners and in Pinetown, initially under the name Halse Haveman and Lloyd (Incorporating CJA Ferreira) and subsequently under the name Halse, Haveman, Lloyd and Ferreira. The partners decided to invest in property and the vehicle for that investment became the appellant. The appellant's name is plainly obvious, "Six – A" representing six attorneys. The principal object of the appellant was to invest in and develop property. The appellant then acquired immovable property at 47 Kings Road in Pinetown for a purchase price of R175 000.00. It intended developing the property, which was then vacant, by the construction thereon of a block of offices.

[3] The appellant's shareholders (the first respondent and his then partners) were unable to finance the cost of the development of the office block. To further its aims the appellant then secured the interest of Frank and Richard Verbaan, people closely associated with the construction industry through a company controlled by them, Verbaan Construction (Pty) Ltd. The Verbaan brothers acquired one half of the shareholding in the appellant. It was envisaged at the time that the appellant would be converted into a share block company but this was never done. The first respondent and his co-partners however continued to hold, in equal shares, the remaining fifty percent of the shareholding in the appellant.

[4] Finance was obtained from a financial institution against the security of a first mortgage bond over the appellant's property and in due course an office block, which became known as Media House, was constructed on the appellant's property. Upon completion, the Verbaan brothers, through Verbaan Construction (Pty) Ltd,

took occupation of the first floor of the office block and the partnership practice conducted by the first respondent and his then partners took occupation of the ground floor of the office block. This was with effect from 1st November 1985 and lease agreements between the two occupants and the appellant were concluded with regard to their respective occupation of the building. The occupants each paid rentals to the appellant.

[5] On 28 February 1986 the professional partnership terminated when Halse resigned as a partner. On 1 March 1986 a new partnership commenced and this time the partners were the first respondent, Havemann, Lloyd, Schoeman, Askew and two new additions, namely Paul Stephanus Robbertse and David Grindlay. This new partnership assumed the rights and obligations of the previous partnership under the agreement of lease relating to the occupation of the ground floor premises by the practice. This arrangement endured until 28 February 1988.

[6] This new partnership dissolved on 29 February 1988 when the first respondent resigned from the partnership. On 1 March 1988 the first respondent then proceeded to take occupation of a portion of the ground floor of the office block, that portion being described as Suite 3 Media House, together with two undercover and two open parking bays and part of a storeroom situated on the premises. He contended he had a right to do so in relation to his one sixth shareholding in the appellant. No agreement of lease was concluded between the first respondent and the appellant and neither was any rental or other occupational interest paid in respect of such occupation.

[7] By 1989 Askew ceased to be a shareholder in the appellant, his shares being transferred to Halse, Haveman and Lloyd. Sometime thereafter Schoeman disposed of his shares in the appellant to one P. S. Smit who in turn disposed of those shares to the Booysen Family Trust.

[8] Disputes in and amongst the shareholders arose and there were various attempts to resolve those disputes. They centered essentially around how the expenses relating to the office block were to be recovered and discharged and how and in what manner an income was to be derived from the occupation of the ground floor of the premises.

[9] Those disputes culminated in a meeting of the shareholders of the appellant held on 30 March 2004. I set out below the minutes of that meeting in their entirety. I indicate that the minute was prepared and typed in advance of the meeting and the italicized portion of the minute reproduced below represents manuscript insertions and additions made and agreed to at the meeting.

'MINUTES OF A MEETING OF THE SHAREHOLDERS OF SIX-A PROPERTY INVESTMENTS (PTY) LIMITED HELD IN THE KWAZULU-NATAL LAW SOCIETY LIBRARY BOARD ROOM ON 30TH MARCH 2004

PRESENT: Johannes Booysen (in his personal capacity)
Johannes Booysen N.O. (in his capacity as the authorized representative of the Booysen Family Trust)
L M Halse
R Haveman
J J Lloyd
(hereinafter collectively referred to as the Group "A" shareholders)
and
C J A Ferreira

RESOLVED:

1. That C J A Ferreira continue to occupy the portion of the premises on the ground floor of Media House currently occupied by him without paying any consideration therefor *other than the monthly expenditure referred to in 3 below without deduction or demand as determined by the Company's Auditors from time to time.*

2. That the Group A shareholders are entitled to occupy the balance of the ground floor of Media House on the same basis as C J A Ferreira as set forth in resolution 1 above *mutatis mutandis*

3. That the shareholders of the company pay the expenses of the company according to their respective shareholdings.

4. That the shareholders are entitled to sub-let their respective portions of the ground floor of Media House, should they wish to do so, to any other person or entity and the company hereby consents to such sub-letting.

5. That with immediate effect all business of the company will be dealt with by the company's auditors, Leibenberg Fraser, who shall attend to all secretarial work on behalf of the company *in conjunction with the Smart Accounts.*

6. That the company give effect to the transfer of the shares and loan account held by the Booysen Family Trust to Messrs J J Lloyd, R Havemann and L M Halse on a pro rata basis subject to the conditions of sale.

7. That the company give effect to the transfer of the share held by J Booysen to Mr L M Halse on before 27th February 2005 subject to the conditions of sale.

8. That the meeting of members set down for 14th April 2004 for the purpose of seeking to remove C J A Ferreira as a director of the company is cancelled.

9. *It is recorded that any monies due to the Company by ~~CJA Ferreira~~ any party prior to the date of this meeting is not dealt with herein.*'

[10] Subsequent to 30 March 2004 financial statements appear to have been prepared on a regular basis for the appellant. Almost invariably the first respondent took issue with those financial statements and sought clarification on a number of

issues recorded in them. None of those are directly material to the issues in this appeal, save in one respect which I will deal with hereunder.

[11] The animosity and the enmity amongst the shareholders continued and in the interim Halse has since died. Also in the interim the first respondent sought, unsuccessfully to wind-up the appellant. That matter came as an opposed motion before Motala AJ in 2010 and he dismissed same.

[12] Following upon the unsuccessful attempt at placing the appellant in winding-up the appellant sought to renew efforts to recover from the first respondent his share of the appellant's expenses "according to [his] shareholding". This was resisted by the first respondent essentially because of his dissatisfaction with the financial statements from time to time and more particularly because he said that the resolutions recorded in the minute of the meeting of 30 March 2004 had not been fully and competently implemented.

[13] The appellant elected to treat the first respondent's refusal to make payment of those expenses as a repudiation of the agreement recorded in that minute and sought to cancel the agreement and the first respondent's resultant occupation of the portion of the premises in Media House occupied by him.

[14] I pause to mention that the first respondent had let the portion of the premises formerly occupied by him to the second respondent. Nothing turns on that for the purposes of this appeal.

[15] When no payment was forthcoming from the first respondent and when it was clear that he was not going to hand back vacant possession of the portion of the premises occupied by him to the appellant the appellant instituted motion proceedings in the court *a quo* for the eviction of the first respondent and all those who occupied under or through him from the premises.

[16] The matter came before Mnguni J in the court *a quo* who, in terms of a judgment delivered on 27 August 2012 dismissed the application with costs. During those proceedings the first respondent counter-applied for an order declaring him to be entitled to occupy the subject premises and certain ancillary relief. Mnguni J upheld that counter-application.

[17] The appellant appeals against the whole of Mnguni J's judgment and Orders and the present appeal serves before us by way of leave granted by the Supreme Court of Appeal, Mnguni J having earlier refused leave to appeal.

[18] The central question in the appeal is whether the appellant was entitled to the relief it sought in the court *a quo* and pivotal in that regard is an examination as to whether the first respondent's conduct indeed amounted to a repudiation entitling the appellant to cancel the agreement.

[19] The following passage from *Christie's The Law of Contract in South Africa*, 6th Ed., R H Christie and G B Bradfield, Lexis Nexis, 2011, at page 538 *et seq* is instructive (footnotes omitted) :-

'In *Schlinkmann v Van der Walt* 1947 2 SA 900 (E) 919 Lewis J said:

> "Repudiation is in the main a question of the intention of the party alleged to have repudiated. As was said by Lord Coleridge LCJ in *Freeth v Burr* (1874) LR 9 CP at p 214:

> 'the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract',

a test which was approved by the House of Lords in *Mersey Steel Co v Naylor* (1884) 9 AC 434. In *Re Rubel Bronze and Metal Co and Vos* [1918] 1 KB at p 322 McCardie J said as follows:

> 'The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not as a rule be deemed to amount to repudiation . . . But, as already indicated, a deliberate breach of a single provision in a contract may under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain . . . In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case.'

To this I would add only that the *onus* of proving that the one party has repudiated the contract is on the other party who asserts it."

In *Inrybelange (Edms) Bpk v Pretorius* 1966 2 SA 416 (A) 427 and *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 (A) 844–846 the Appellate Division approved of this passage, together with the short test enunciated by Williamson J in *Street v Dublin* 1961 2 SA 4 (W) 10:

> "The test as to whether conduct amounts to such a repudiation [as justifies cancellation] is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound."

In *Van Rooyen* at 845–846 Rabie JA added:

> "Om 'n ooreenkoms te repudieer, hoef daar nie, soos in die aangehaalde woorde uit *Freeth v Burr* te kenne gegee word, 'n subjektiewe bedoeling te wees om 'n einde aan die ooreenkoms te maak nie. Waar 'n party, bv, weier om 'n belangrike bepaling van 'n ooreenkoms na te kom, sou sy optrede regtens op 'n repudiëring van die ooreenkoms kon neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom. (Kyk De Wet en Yeats *Kontraktereg en Handelsreg* 3de uitg op 117.)" '

[20] *Christie* goes on at page 539 *et seq* to say (footnotes omitted):-

'In many cases the repudiating party may have a *bona fide* belief that his interpretation of the contract is correct, and may subjectively intend to be bound by it, but the test that must be applied is whether he acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. In the words of Nienaber JA in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294:

> "Repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. . . .
>
> The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is a 'serious matter' . . . requiring anxious

consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed." '

[21] Having set out those observations on the law with regard to repudiation I proceed to examine some of the underlying facts in closer detail.

[22] As indicated above the resolution was adopted on 30 March 2004. The minutes of the annual general meeting of the appellant held on 17 March 2005 reveal that a letter from the first respondent dated 9 March 2005 objecting to the appellant's financial statements was tabled and noted. At the annual general meeting on 19 April 2006 the first respondent again voted against and rejected the adoption of the financial statements.

[23] The minutes of the annual general meeting of the appellant held on 14 July 2008 revealed the following:-

'The chairman advised that in response to the Notice of Meeting having been received by CJA Ferreira, he addressed a letter dated the 30th of June 2008 wherein his objections to the financial statements are set out … which, according to him, had not yet been resolved.

…

CJA Ferreira advised that according to his calculations he had made a larger contribution towards the expenses of The Company then (sic) should have been made by him and that the overpaid amount should be refunded to him.'

[24] Those minutes also record further aspects of dissatisfaction on the part of the first respondent with the financial statements of the appellant.

[25] At the annual general meeting of the appellant held on 25 June 2010 it was noted that the first respondent had addressed a letter dated 14 June 2010 wherein his objection to the financial statements were set out.

[26] Another note from the minutes of the meeting of the annual general meeting of the appellant held on 14 July 2008 is telling. The following is stated:-

'RF Havemann abstained from voting on the adoption of the Financial Statements on the basis that he agreed with CJA Ferreira on the issue that there had never been any lease agreements in existence between The Company and the occupiers of the premises at any given point in time in that each of the initial 6 shareholders had been allocated a right of occupation proportionate to its shareholding, which right of occupation is not based on a lease agreement.

The Chairman enquired as to what the causa of payments made by the occupiers of the property to The Company for such occupation could conceivably be other than rental and how such payments should then be reflected in the financial statements other than as rental payments, to which none of the shareholders had an answer.

CJA Ferreira suggested the matter can be resolved very simply by the Auditors compiling a statement showing the total expenses paid by The Company and a schedule recording the contributions made by each shareholder towards such expenses. It was noted that this would be a simply (sic) exercise which should clarify the issue once and for all. CJA Ferreira advised that he would have a discussion with the Auditors in this regard and report back to the other shareholders.'

[27] There are many more examples of the first respondent's recording, from time to time, of his dissatisfaction with the manner in which the appellant's accounts were drafted but the few I have referred to above suffice for present purposes. They demonstrate a consistent approach on behalf of the first respondent, not evidencing an intention not to be bound by the agreement recorded in the minute of 30 March 2004, but instead a persistent contention that all was not well with the first respondent's accounts and that until that was sorted out no payments could be made by him.

[28] In my view, while it might be contended that the first respondent bore some kind of moral obligation to ensure that the appellant's expenses were discharged, his

conduct is not consistent with the concept of repudiation as it is known in our law. It was ill conceived, in my view, for the appellant to have adopted that attitude.

[29] If I am wrong in that regard it is necessary to look at the terms of the contract itself as recorded in the minute of 30 March 2004. On a fair reading of those terms it seems to me that it is eminently arguable that what was intended by the manuscript addition to paragraph 1 of that minute was that from time to time the appellant's auditors would make a determination of the appellant's expenses and apportion those *pro-rata* to each of the shareholders, upon which the obligation to pay would then flow. It is clear from the papers that served before Mnguni J in the opposed application, apart from preparing financial statements from time to time, no such determination was actually made by the appellant's auditors.

[30] Shortly before the date of hearing of this appeal the first respondent applied, supported by affidavit, to adduce further evidence at the hearing of this appeal. That application was opposed by the appellant. The further evidence sought to be adduced related to correspondence exchanged between attorneys representing the appellant and attorneys representing the first respondent wherein demand was made of the first respondent that he pay his pro-rata share of the expenses in terms of a determination made by the appellant subsequent to Mnguni J's judgment. In applying to adduce that further evidence the first respondent indicated that in making that determination and that demand the appellant was engaging in conduct that actually supported the first respondent's case in the court a quo and that it was inconsistent with an intention to prosecute the appeal. I am not entirely certain that that approach is correct but, given the view I take on the question of repudiation itself, it is

unnecessary to deal with that application. In the result I am of the view that the conclusion reached by Mnguni J was, with respect, correct.

[31] I make the following order:-

a) The appeal is dismissed with costs, such costs to include those consequent upon the employment by the first respondent of senior counsel.

b) The application to lead further evidence on appeal is refused and no order as to costs is made with regard to that application.

_____
Vahed J

I agree

_____
K. Pillay J

I agree

_____
Ploos van Amstel J

Appearances:

Attorney for the appellant:	EJB Lingenfelder Lingenfelder Attorneys 5 Gillitts Office Park 2 Roger Place Gillitts Tel no.: 031 767 0059
Counsel for the First respondent:	A. De Beer, SC
Instructed by:	Louis Podbielski 1008 Sangro House 417 Smith Street Durban
Date of Hearing:	17 February 2014
Date of Judgment:	28 February 2014