JUDGMENT SUMMARY

African Zaibatsu Corporation v Industrial Development Corporation

Contracts – Repudiation loan agreements – what constitutes – test for repudiation objective and not subjective – meaning to be ascribed to conduct complained of – *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A) restated.

To succeed with a claim for repudiation, a plaintiff must prove: (a) an act of repudiation evincing a deliberate and unequivocal intention no longer to be bound; and (b) the act of the adversary, 'accepting' and thus completing the breach.

Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to 'repudiate' the contract. Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated. The test for repudiation is not subjective but objective. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; 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 a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming.

The plaintiffs (AZC and Mr Kotane) in *casu* seek to hold the Industrial Development Corporation of South Africa ('IDC') liable for alleged repudiation of a loan agreement entered to secure the purchase by the plaintiffs of a division of Jasco electrical business, a publicly listed company ('loan agreement'). Securing funding of the purchase price from IDC was a material condition of the sale agreement between the plaintiffs and Jasco ('sale agreement').

The loan agreement was subject to a several conditions precedent. Importantly, it recorded that the IDC was not obliged to advance the loan or permit the draw down on the facility until the conditions were fulfilled, deferred, or waived. A further condition for the draw down of loan funds, was that no "Material Adverse Event" would have occurred. Before the funds could be dispensed, the IDC decided to "review" the Jasco business and informed the plaintiffs so. It is common cause before the IDC communicated the results of the review, Jasco cancelled the sale of business agreement.

The plaintiffs allege the IDC repudiated the loan, alternatively acted negligently and/or by an omission caused Jasco to cancel the sale. The averment is that the IDC knew or ought to have known that stopping the registration of the Special Notarial Bond ('SNB'), which was one of the conditions of the loan agreement, would frustrate the implementation and coming into force of the sale of the business agreement with Jasco. They claim the IDC failed to act in accordance with the duty it owed to AZC.

The IDC resists the repudiation claim and avers although it conducted a due diligence of the Jasco business, the impact of Covid-19 and the non-trading due to the national lockdown resulted in a substantial change in the business, which would significantly impact AZC's ability to discharge its obligation to repay the loan. It denies it acted negligently in asking its attorneys to delay the registration of the SNB, given the pending review.

The issue before the court is whether the plaintiffs have established that the IDC repudiated the loan agreement.

Held: *Datacolor* finds application. The conduct complained of must be interpreted in context having regard to the relevant circumstances known to the parties at the time. The loan agreement is not a standalone agreement. The IDC is not a registered bank but a development finance institution. The loan agreement and the relationship exhibit other features beyond those of an arms-length funder and lender. The additional feature is that the IDC as the funder had acquired an equity interest in the funded entity, AZC. The conduct complained of, and the loan agreement must not only be interpreted holistically having regard to these factors but must be given a commercially sensible meaning. Whether AZC was entitled to resile from the agreement depends on the nature and the degree of the impending non or malperformance.

Held: as enunciated in *Datacolor*, the conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation 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. In *casu*, before the registration of the SNB and before the funds could be disbursed, Mr Kotane sought a “payment holiday” and presented financial information and cash flow forecast which indicated that the first plaintiff would not meet its payment obligations due to adverse change in trading circumstances. Mr Kotane’s continued engagement with the IDC and Jasco after agreeing to the IDC’s review and valuation of Jasco’s business and when registration of the SNB was held over is inconsistent with a reasonable belief that the IDC’s conduct constituted acts of repudiation of the loan agreement. On the conspectus of the facts, delaying the registration of the SNB while the review and valuation was underway was not unreasonable or on unlawful grounds. It had impact on the asserts to be registered under the SNB.

Held: Objective evidence before the court demonstrates that Jasco’s trading circumstances had changed. It would not be a commercially sound, sensible and reasonable to compel the IDC provide AZC with funds that were more than the value of the business to be acquired. It was clear AZC would not be able to meet the repayment obligations stipulated in the loan agreement. The evidence showed that the IDC intended to proceed with the loan albeit on a revised loan amount.

Found: the court is unable to agree with the plaintiffs that there was a repudiation of the loan agreement.