**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, JOHANNESBURG**

**Reportable: No**
**Interest to other Judges: No**

**23 April 2024** [redacted]

**Appeal Case No: A5048/2022**
**Court a quo Case No: 27208/2020**

In the matter between:

**Agile Capital Holdings (Pty) Ltd** — **Appellant**
(Respondent in Court a quo)

And

**68 Melville Road Properties (Pty) Ltd** — **Respondent**
(Applicant in Court a quo)

---

**JUDGMENT**

---

**Vally, J**

Introduction

[1] The respondent in this appeal instituted ten separate claims, all sounding in money against ten different respondents in the court *a quo*. The appellant was one of the respondents in those cases, and it was agreed that the case against

it would be used as a proxy for the other cases as the issues were identical in all of the cases. The court *a quo* (Adams J) decided the matter in favour of the respondent. This is an appeal against that order. Leave to appeal was granted by the court *a quo*.

[2] The respondent is a property developer. It procured certain land for purposes of developing it as a mixed use commercial structure. It attended to all the necessities required to commence with the development. It chose to adopt a co-development business model to complete the development. The model involved concluding contracts with parties who purchased one or more of the developed units. The appellant was one such party. Together with the other parties it would acquire sectional title ownership of the property it purchased. The provisions of the Sectional Titles Act, 95 of 1986 applied to the entire development. The purchasers were investors in the development as well as owners of the property they purchased. Each of them became a shareholder – *pro rata* to the value of their respective investment - in a development company. To this end the parties concluded two agreements: a sale agreement and a shareholders' agreement.

[3] The respondent's case hinged entirely on the sale agreement. The sale agreement was very different from one that is normally concluded between purchasers and sellers of immovable property. As the purchasers were also investors in the development, they assumed some of the risk associated with the construction of the development. The parties agreed that the purchase price specified at the time of contracting would not be the final one. It would only be

determined once the construction of the development was finalised. They agreed on a formula to be applied to each purchase. By application of the formula the purchase price would be adjusted either upwards or downwards. The interpretation and application of the clause in the sale agreement dealing with the adjustment of the purchase price (clause 4) became the central focus of the litigation. Clause 4 reads:

"*4 Adjustment to the Purchase Price*

*4.1 It is recorded that the purchase price of the property shall, after registration of transfer, be adjusted to the amount equal to the final participation quota allocated to the section (as recorded on the sectional title plan of the Scheme once approved of by the Surveyor General) multiplied by the Total Base Development Cost after it has been finalised in terms of paragraph 4.3 hereof.*

*4.2 The amount referred to in the paragraph 1.5 of the Contract of Sale is therefore the actual purchase price of the property, which has been calculated by multiplying the anticipated Total Base Development Cost (as referred to in Annexure "E" hereto) by the anticipated participation quota if the Section (as referred to in Annexure "PQ" hereto).*

*4.3 Once registration of transfer has occurred and once the Total Base Development Cost has been finalised by the Quantity Surveyor (which shall occur as soon as possible after the Scheme is complete) the purchase price shall be adjusted to the amount as finally calculated in accordance with the aforesaid formula and where the purchase price of the Property is less than the amount reflected in Clause 1.5, the balance owing to the Purchaser shall be refunded through the Purchaser's shareholding in the Seller's entity.*

*4.4 If there is any dispute as to what the Total Base Development Cost of the property is, the decision of the Quantity Surveyor (acting in his capacity as an expert and not an arbiter) shall be final and binding on the parties."*

[4] A quantity surveyor, DHP Quantity Surveyors (DHP), determined the Total Base Development Cost on 14 September 2020, which is presented in a single page document, annexed to the founding affidavit as Annexure 'FA6' (FA6). The amount determined was higher than the actual price referred to in sub-clause 4.2. In consequence, the appellant became liable for the difference between the actual price and the Total Base Development Cost. The respondent sought payment from the appellant for the difference. The appellant refused to pay causing the respondent to approach the court *a quo* for relief. The matter was called in the court *a quo* on 24 November 2021. The appellant raised a number of defences, some of a more technical nature and others on the merits of the claim. The court *a quo* found that all of its defences were without merit and ordered it to pay the respondent the amount sought.

[5] In this appeal the appellant restricts its case to two issues: (i) the admissibility of FA6; and (ii) the lack of jurisdiction of the court to deal with the issue.

The admissibility of FA6

[6] FA6 is typed on a letterhead of DHP. It is made up of four columns – a description of the cost item, the fixed base costs of the item, the final base costs of the item and a comments column. These are appropriately filled and the fixed base costs and final base costs are eventually summed-up. Thereafter a basic arithmetical calculation is undertaken to establish the fixed base development costs and final base development costs per square metre. The final calculated amount, Total Base Development Cost, is used to adjust the purchase price.

[7] There is no indication on the document as to who the author of the document is. Nor is there a confirmatory affidavit from anyone from DHP confirming the authenticity of the document or the veracity of its contents. The failure to file a confirmatory affidavit from the author of the FA6 was raised in the answering affidavit. In reply, the respondent said that it was not necessary for it to file a confirmatory affidavit, as the 'determination speaks for itself, and its contents do not need to be confirmed. [The appellant's] allegations in this regard are tenuous, at best.'

[8] The lack of a confirmatory affidavit, according to the appellant, is fatal to the case of the respondent.

[9] The court *a quo* found that the appellant challenged only the admissibility of FA6. The court *a quo* understood this to mean that the veracity of the contents was not in dispute. The court *a quo* agreed with the submission that the document 'speaks for itself.' It accordingly found no merit to the appellant's claim that the document was inadmissible. This, the appellant says, constitutes a misdirection. It is so because a challenge to the admissibility of a document is 'by necessary implication' a challenge to the veracity of its contents. In my view, both the court *a quo* and the appellant are wrong. The fact that the appellant did not challenge the veracity of the contents does not automatically result in the document being admitted as evidence, as the court *a quo* found. At the same time, the fact that its admissibility is challenged does not automatically mean that the veracity of its contents is also challenged. The

latter challenge must be raised upfront, and the basis of the challenge must be carefully and comprehensively set out so that the respondent can (i) know what case it has to make or meet and (ii) make or meet the case, albeit in reply[1], as required. As the veracity was not challenged, the only controversy the court need concern itself with is its admissibility.

[10] FA6 is hearsay evidence: its value in proving the calculation of the Total Base Development Costs (probative value) depends on the author of FA6 and not on the deponent to the founding affidavit. In terms of s 3 of the Law of Evidence Amendment Act, 45 of 1988 (Act) it can only be admitted into evidence if it falls within one or more of the recognised grounds of admissibility. The provisions of the section read:

"***3. Hearsay evidence***

*(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—*

*(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
*(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
*(c) the court, having regard to—*
*(i) the nature of the proceedings;*
*(ii) the nature of the evidence;*
*(iii) the purpose for which the evidence is tendered;*
*(iv) the probative value of the evidence;*
*(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
*(vi) any prejudice to a party which the admission of such evidence might entail; and*

[1] The principle against making out a case in reply would not necessarily apply if the respondent, once informed of the exact challenge to the veracity of its contents, can show that it was entitled to reasonably assume that the veracity would not be challenged. There are many possible reasons as to why this assumption may be reasonable. They are, of course, not relevant for our present purposes.

*(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.*

*(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence."*

[11] In its oral submissions, the respondent claimed that as the reason for including FA6 was simply to demonstrate that the determination of the Total Base Development Costs was undertaken as per the sale agreement (the appellant challenged the determination on the ground that it was not undertaken by the Quantity Surveyor identified in the sale agreement, but abandoned that challenge), there is no need for a confirmatory affidavit. Again, this is wrong. Firstly, for the reason already mentioned, the author of FA6 needs to confirm that the determination was undertaken and, secondly, it was not introduced merely to show that the determination was undertaken, but to prove that the Total Base Development Cost was higher than the actual purchase price, thus justifying its monetary claim.

[12] However, it is within the power of the court in terms of subsection 3(1)(c) to admit the evidence in the interests of justice. The factors referred to in subsections (3)(1)(i),(ii),(iii) and (iv) of the Act which require a court's attention are straightforward in this case. These were motion proceedings dealing with the implementation of clause 4 of the sale agreement, which implementation really involved no more than an arithmetical calculation of the costs of items and services incurred in the course of construction of the development. The appellant accepted the validity of the clause. By not challenging the veracity of

the contents it accepted that the costs were incurred (this was challenged in the founding affidavit, but abandoned later), the amounts thereof and the consequent arithmetical calculation. And, by not challenging the veracity of the contents, the appellant cannot claim to be prejudiced by its admission, thus the requirement set out in subsection 3(1)(c)(vi) is also unproblematic. The reason as to why the evidence is not given by the person upon whose credibility the probative value depends - the requirement set out in subsection 3(1)(c)(v) – is not provided. The court is kept completely in the dark about this. While this should, in my view, tilt the scale in favour of refusing admission, it does not do so in this case, because the probative value of FA6 is not an issue. Accordingly, it would be in the interest of justice to admit it into evidence.

[13] For the first time, in this court, the appellant, by its supplementary heads of argument, raised the issue of FA6 constituting opinion evidence which fails to comply with the requirements for the admission of expert evidence, such as identifying who the expert is and what the expert's qualifications are. FA6 was compiled by a person or persons from DHP. DHP is a firm of quantity surveyors. It is assumed that it is compiled by some person(s) who is/are qualified quantity surveyors(s). A scrutiny of FA6 does not allow for any conclusion as to whether the expertise of a quantity surveyor(s) was essential to, and utilised in, the compilation of it. It is simply a listing of items and the amounts expended for those items during the construction process. Hence, it would be incorrect for any court to draw a conclusion that FA6 constitutes expert evidence. Thus, the challenge that it constitutes inadmissible expert evidence cannot hold.

[14] In any event, as this issue was not raised in the court *a quo*, it would be inappropriate for this court to entertain it on appeal. It is not simply a 'law point' which requires no factual evidence. Had it been raised properly in the answering affidavit it could have been dealt with by the respondent. The appellant cannot now be allowed, at this very late stage, to ambush the respondent. In any event, if the appellant had no problem with the veracity of the contents, it matters not as to whether the evidence is that of an expert or not.

[15] On this holding, it is necessary to consider the second challenge of the appellant, the lack of jurisdiction.

The lack of jurisdiction

[16] This issue is raised as 'the expert determination point.' The appellant contends that clause 4.4 provides that the quantity surveyor will make a determination on a dispute once it has arisen. Clause 4.4 is binding on the parties and should be implemented. This dispute should be referred to the quantity surveyor and not be adjudicated by the court.

[17] That sub-clause 4.4 is binding and operative is not denied by the respondent. The pertinent question is whether it is applicable in this case. The appellant refers to the role of the quantity surveyor in making a determination on a dispute, but that is not what the sub-clause says. It does not refer to, nor is it applicable to, any dispute, but rather to a specific dispute. It has to be a dispute as to 'what the Total Base Development Cost of the property is'. A dispute to

that effect clearly falls within the domain of the quantity surveyor. However, the dispute between the parties is not about what that particular cost is. The appellant raised numerous defences all of which it abandoned save for the admissibility of FA6 and the jurisdiction of the court. What it did not raise is a dispute about 'what the Total Base Development Cost is'. That, as mentioned above, involved no more than an arithmetical calculation, which is presented in the form of FA6. As the correctness thereof was not an issue, there can be no dispute that falls within the exclusive domain of the quantity surveyor. In addition, the appellant raised many defences in its answering affidavit. The Total Base Development Cost of the project is not one of them. These defences can only be determined by the High Court. But, even if the appellant had raised it as one of the issues to be determined by the court, the jurisdiction of the court would not have been ousted. In that case, as it was only one of the issues, it would be correct for the court to determine all the issues, including the one about what the Total Base Development Cost is, once and for all. It would not make sense to allow the court to determine all the other issues, such as, for example, the admissibility of FA6, and leave the issue of what the Total Base Development Cost is for the quantity surveyor. A splitting of the jurisdictions would not be prudent. The court which always retains jurisdiction in contractual disputes would be the correct forum to determine all of the disputes and bring finality to the matter.

Costs

[18] Both parties agree costs should follow the result. The parties had contractually agreed that costs should be on an attorney and client scale.

Order

[19] The following order is made:

(1) The appeal is dismissed.

(2) The appellant is to pay the costs of the appeal, including the costs of two counsel where two counsel were employed and which costs are to be taxed on an attorney and client scale.

**B. VALLY**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, JOHANNESBURG**

I agree,

**R. STRYDOM**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, JOHANNESBURG**

I agree,

**B. FORD**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, JOHANNESBURG**

| | |
|---|---|
| Heard on: | 13 March 2024 |
| Delivered on: | 23 April 2024 |
| Appearances: | |
| For the Appellant: | L. Morrison SC<br>with T. Njokwana<br>(Initial Heads of Argument were compiled by A. J. Troskie SC and supplementary Heads of Argument were compiled by L. Morrison SC and T. Njokwana) |
| Instructed by: | Claassen Incorporated |
| For the Respondent: | D. Mahon<br>with J. Brewer |
| Instructed by: | Boshoff Incorporated |