REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

20/03/2025

DATE SIGNATURE

Case Number: **2021/55896**

In the matter between:

REDPATH AFRICA LIMITED	Applicant
and	
SIYAKHULA SONKE EMPOWERMENT COROPORATION PROPRIETARY LIMITED	First Respondent
REDPATH MINING (SOUTH AFRICA) PROPRIETARY LIMITED	Second Respondent
FREDERICK SAM ARENDSE	Third Respondent

Neutral Citation:

Delivered: *By transmission to the parties via email and uploading onto CaseLines the Judgment is deemed to be delivered.*

JUDGMENT

SENYATSI J

Introduction

[1] This application concerns the survival of a company which is beset by cash flow challenges. Redpath Mining South Africa Pty Ltd("RMSA"), the second respondent in this litigation is the subject matter of various litigations on which I have handed down several judgments. The applications were all case managed and heard at the same time for several weeks and various reliefs which are not necessary to repeat in this judgment were ordered through the various judgments handed down. There are as I recall, two pending litigations, the application which is the subject of this judgment and the action proceedings.

[2] The first respondent, is Siyakhula Sonke Empowerment Corporation Proprietary Limited ("SSC") and third respondent, Mr. Frederick Sam Arendse ("Arendse") ,who are a Black Economic Empowerment parties, resist the application chiefly on the ground that the applicant, Redpath Africa Mining Ltd("RAL"), a Mauritius registered company, has been trying to force SSC to exit its investment in the second respondent even though it has been a shareholder since 2006.

[3] This application concerns the application in terms of which the following reliefs are sought:

Declaring that:

2.1 SSC repudiated the sale of shares and shareholders agreement binding RAL and SSC (“the agreement”) through the following conduct:

2.1.1 In sending a letter to the applicant on 31 December 2021 in which the SSC conveyed an intention not to pay the purchase price envisaged by clause 4.1 of the agreement;

2.1.2 In failing to pay the purchase price envisaged by clause 4.1 of the agreement on the due date or at all.

2.2 As a consequence of the declaration in paragraph 2.1 above, RAL validly cancelled the agreement by virtue of its letter dated 10 February 2022.

[3] In the alternative to the relief sought above, so prays RAL:

3.1 It seeks an order declaring that-

3.1.1 SSC is deemed to have offered its entire shareholding ("Sonke shares") in RMSA for sale to RAL;

3.1.2 SSC’s offer is deemed to have been made on 16 April 2021;

3.1.3 RAL accepted the offer on 8 October 2021;

3.1.4 The purchase consideration ("purchase price") payable by RAL

to SSC in respect of the offer is R1.

3.2 Ordering that RAL shall pay the purchase price to the SSC within 5 days of this order.

3.3 Compelling Arendse or any authorised representative of SSC, within 10 days of this order and against compliance by the applicant with the provisions of paragraph 3.2 above, to sign and deliver the share transfer form in respect of the Sonke shares to the applicant.

3.4 Ordering that, failing the signing and delivery of the share transfer form by Arendse or any authorised representatives of the first respondent within the time prescribed in paragraph 3.3 above, the Sheriff of the High Court is authorised to sign and deliver to RAL the share transfer form in respect of the Sonke shares.

3.5 Ordering that SSC (and any other respondent in the event of opposition) must pay the costs of the application.

[4] The reliefs sought as set out above were as a result of the amendment of the notice of motion and leave to amend the original notice of motion which sought only a declaratory order that SSC had been deemed to have offered its shares to RAL due to various grounds of breaches set forth in this judgment. However, following the lapse of the 15 years period of payment for the shares and the alleged failure to SSC to pay the purchase price, the failure became a trigger event for repudiation which resulted in the applicant amending its original notice of motion. The leave to amend the original notice of motion was granted.

[5] SSC and Arendse, contend that the applicant and the second respondent had been involved in what the first and second respondent call an unlawful conduct which caused the third respondent write various letters to different stakeholders and complained about the conduct of the applicant and the second respondent. They furthermore argued that they were prepared to pay the R630 000 as required by the shareholders agreement and that the second respondent failed to provide the bank details to them. They contend,

furthermore, that on those grounds, the application should be dismissed with costs.

[6] SSC and Arendse also brought a recusal application against the presiding judge on the basis that he used in his judgment if the 18 November 2024 the heads of arguments submitted on behalf of the second respondent and the application was refused. The application for postponement was also refused and the matter was argued

Background

[7] The applicant and SSC were shareholders in the second respondent with 74% and 26 % equity respectively since 1 January 2007. Arendse is one of the directors of SSC and was also a director of the second respondent until his removal by an order of this court. In terms of the shareholders agreement ("the agreement"), the purchase price of the 26% equity in the second respondent was in the sum of R630 000 payment of which was deferred for a period of 15 years from the effective date of the agreement in terms of clause 4.2.5 of the agreement. Furthermore, the purchase price was also to be immediately payable if the first respondent breached any provision of the agreement.

[8] Clause 12 on Deemed Offer states as follows:

> "12.1 Sonke shall be deemed to have offered its entire shareholding in the company ('the Sonke shares') for sale to DHI GmbH (which is the original name of the applicant prior to the changing its name to the current name) on the happening of any one of the following events: -
>
> 12.1.1 Sonke being placed into liquidation or judicial management, whether provisionally or finally;
>
> 12.1.2 Sonke committing a breach of this agreement and the provisions of 14.2 becoming applicable.

12.2. The offer referred to in 12.1 will be deemed to have been made on the day preceding the happening of the relevant event and will be subject to the following terms: -

12.2.1 the purchase consideration payable for the Sonke shares shall be the appropriate percentage of the net asset value of the company as determined by the auditors on the last day of the month preceding that in which the deemed offer is made in terms of 12.2 above;

12.2.2 the purchase price owing by DHI GmbH to Sonke shall be set off against any amount owing by Sonke to DHI GmbH in respect of the purchase price of the sale of shares referred to in 4.2. Any balance shall be paid by either party to the other within 6(six) months from the date of acceptance of the offer.

12.3 DHI GmbH shall be entitled within a period of 30(thirty) days after the purchase consideration of the Sonke shares has been determined to accept the deemed offer by notice in writing to Sonke.

12.4 The directors shall use their best endeavours to procure the determination of the purchase price of the Sonke shares in terms 12.2.1 is made within a period of 60 (sixty) days of the happening pf the relevant event referred to in 12.1.

12.5 The auditors are hereby irrevocably authorised by Sonke to deliver the share certificates in respect of the Sonke shares together with the share transfer declarations signed by Sonke to DHI GmbH pursuant to the provisions of 4.3 above."

Clause 12 shows precisely how the parties agreed to deal with the deemed offer and the events that could lead to the deemed offer being made.

[9] The breach conditions are regulated by clause 14 of the agreement which provides as follows: -

"14.1 The parties agree that the cancellation of this agreement in the event of a breach would be an inappropriate and insufficient remedy and that irreparable damage would occur if the provisions of this agreement were not complied with. It is

accordingly agreed that in the event of a breach, the aggrieved party shall be entitled (without prejudice to any rights which it may have in law, save for the right to cancel the agreement) to an order for specific performance and to recover any damage which it may have suffered.

14.2 Should the relevant breach be incapable of being remedied or an order for specific performance be refused by a court of competent jurisdiction, the provisions of this clause 14 shall apply in respect of the shareholder in breach."

[10] At the start of the investment by SSC, the latter was paid what the applicant calls a monthly stipend by the second respondent, which would increase from time to time. This was so even though the second respondent was operating at loss. I must state at this juncture that although in the pending action SSC and Arense aver that the losses amount to asset stripping, Arense as a director of the second respondent, signed off the annual financial statements of the second respondent diligently as part of the board members.

[11] Following the legal advice given to the second respondent that the stipend would be regarded as a dividend, the stipend was stopped and SSC and Arense were upset by the cancellation of the payment. The cancellation triggered a campaign by SSC and Arense the led to withdrawal of shareholder funding by the applicant through the main holding company in Canada. The withdrawal of the funding resulted in operational cash flow challenge.

Case of RAL

[12] The applicant avers that SSC and Arendse have breached the agreement which triggered the cancellation of the agreement in as set out below after being upsent with the cancellation of payment of stipend.

RMSA letter February 2021

[13] On 15 February 2021, SSC addressed a letter to RMSA in which it allegedly wrongfully advanced false and highly prejudicial allegations concerning, amongst others, the alleged unethical business practices, racism, and fraud on the part of RAL and RMSA. SSC allegedly, threatened to disseminate the unlawful allegations to all the clients of RMSA and to take appropriate legal steps, and if required, involving all affected parties, such as the current clients, auditors, contractors, suppliers, etc. SSC, furthermore, intimated that it would be requesting all RMSA clients to set aside agreements concluded with RMSA, which, SSC asserted, were concluded unlawfully. The threat was indeed conducted as shown below in this judgment.

The Dentons/HSBC letter April 2021

[14] On 16 April 2021, SSC addressed a letter to Dentons Canada LLP("Dentons"), attorneys of the international ban HSBC, in which SSC allegedly wrongfully and inappropriately(notwithstanding its knowledge at the time that negotiations between the entities within Redpath Group(including RMSA) and HSBC were ongoing) objected to a resolution which had been passed by RMSA which pertained to the obtaining by RMSA, together with other Redpath Group entities, of credit facility with HSBC.

[15] The conduct complained of was despite SSC's knowledge that RMSA stood to benefit under the facility agreement as RMSA would be advanced

credit lines which were critical for RMSA to conduct its business. SSC, furthermore, so avers RAL, advanced further baseless allegations, concerning the alleged unethical business practices, racism and fraud on the part of, inter alia, RAL and RMSA, to support the unlawful objection to the resolution. SSC, furthermore, informed Dentons that it urged Dentons as the legal representative of HSBC, a highly reputable financial institution and the largest funder to the Redpath Group of companies to take appropriate action as required by Dentons as legal practitioners.

[16] RAL contends that the conduct by SSC and Arense is designed to constrain RMSA's ability to raise funding for its operations. RAL states that the conduct is in violation of clause 13.2.5 of the agreement which precludes the parties from taking steps encourage or entice or incite or persuade or induce any prescribed supplier or prescribed customer to terminate its relationship with the RMSA.

The Deloitte and Touche letter May 2021

[17] RAL avers that on 17 May 2021, Arendse addressed an email to the board of RMSA and copied in the same email, Mr. A Munitich who is the audit partner responsible for RMSA's account employed at Deloitte and Touche ("Deloitte"). In the email SSC and Arendse accused Deloitte of being complicit in an alleged false attempt by RMSA to block Arendse's right to information and threatened to report Deloitte to the auditing authority.

[18] On the 16 August 2021, SSC addressed a letter to Deloitte and persisted in making false and defamatory allegations concerning the unethical business practices, racism and fraud by RAL and RMSA. SSC informed Deloitte that it had filed a complaint with the B-BBEE Commission and alleged fronting practices on the part of RMSA. In the letter, SSC stated that it was considering approaching courts to set aside the intercompany agreements that were concluded without board approval and contracts that were awarded based on fraudulent resolutions. SSC, furthermore, stated that it was considering approaching the Department of Mineral Resources and Energy with regards to the conduct of RMSA.

[19] RAL states that Deloitte issued a report, which was meant to be presented at a meeting of the board of directors of RMSA on 24 August 2021, in which it addressed the issues raised by SSC and Arendse. Notwithstanding all the Deloitte related complaints raised by SSC and Arendse, Deloitte issued an unqualified audit opinion on 5 October 2021 on the annual financial statements of RMSA.

[20] On 23 August 2021, SSC addressed a letter to RAL in which it demanded, inter alia, that all the intercompany agreements be cancelled forthwith and that the RMSA executive provide the RMSA board with the alternative proposals.

The African Rainbow Mineral letter August 2021

[21] As an attempt to induce RMSA customers to terminate their relationship with RMSA, SSC addressed a letter to African Rainbow Minerals("ARM") on 26 August 2021. It cited, again through a letter on 7 September 2021 to ARM, serious allegations against RMSA and recorded that the allegations would impact the business relationship with ARM going forward. In the letter, SSC paddled, so avers RAL, multiple false allegations and prejudicial allegations of inter alia, unethical business practices, racism and fraud on the part of, inter alia, RAL and RMSA. RMSA responded to ARM who had inquired about the allegations and denied the allegations made against it by SSC and Arendse.

The Northern Zondereinde letter September 2021

[23] RAL avers, furthermore that on 7 September 2021, Northern Zondereinde ("Northam"), a customer of RMSA for 30 years, addressed a letter to RMSA in which it recorded that it received a complaint from Arendse citing inter alia, alleged unethical business practices. RMSA responded to Northam in terms of which it recorded that the allegations by SSC and Arendse started after RMSA legitimately decided in 2021 to stop the payment of the monthly stipend. RMSA denied any wrongdoing.

The Anglo American South Africa letter October 2021

[24] RAL, furthermore, states that on 21 October 2021, RMSA was contacted by a key customer, Anglo American South Africa(“Anglo”). Anglo stated that it had been contacted by Arendse who provided it with the copy of its complaint to the B-BBEE Commission. RMSA responded to Anglo and disputed the allegations by SSC and Arendse. Anglo responded to RMSA and stated that it appoints an independent SANAS accredited verification agent namely, Honeycomb to investigate the allegations and complaints by SSC and Arendse. The letter by SSC and Arendse to Anglo was intended, so avers RAL, to induce Anglo to terminate its more than 30 years of business relationship with RMSA.

The Mpower letter September 2021

[25] RAL also states that SSC and Arendse sought to undermine the legitimacy of RMSA’s B-BBEE verification agency, which is one of RMSA’s supplier by urging Mpower Ratings (Pty) Ltd (“Mpower”) on 6 September 2021 to withdraw RMSA’s B-BBEE certificate. Mpower responded to SSC’s letter on 15 September 2021 and confirmed the validity of RMSA’s B-BBEE certificate. SSC responded on 22 September 2021 and insisted to Mpower withdraw RMSA’s B-BBEE certificate and threatened to lodge a complaint against Mpower to the SANAS, a regulatory body for the affairs of B-BBEE verification agencies.

Repudiation of the agreement

[26] RAL avers that SSC was notified on 31 December 2021 through its attorneys of record that the purchase price for the 26% equity by SSC in RMSA had been determined by PricewaterhouseCoopers to be R630 000 and that it was due for payment on 1 January 2022.

[26] In response to the letter, SSC stated that rather than paying the purchase price to RAL, it has decided to pay the amount into the trust account of its attorneys of record Cliffe Dekker Hoffmeyer ("CDH"). SSC had already been provided with the bank details of RAL for payment of the purchase price of the shares, which information had been given on 24 December 2021. For the payment to be effected, SSC required regulatory approval as payment was made to a foreign entity and the process was expected to take several weeks.

[27] It was not until 10 February 2022, that RAL through its attorneys of record, Werksmans, addressed a letter to SSC through CDH and reminded SSC that payment for the purchase price of the shares in RMSA which was due on 1 January 2022, had not been made. The letter recorded that the unilateral decision by SSC to pay the purchase price into the trust account of CDH instead of RAL constituted a unilateral amendment of the agreement and repudiation. The letter furthermore recorded that the fact that SSC was involved in other court proceedings did not relieve SSC from

its obligations to make payment in accordance with the agreement. Consequently, so avers RAL, it notified SSC through CDH of RAL to cancel the agreement.

Case of SSC

[28] SSC opposes the application and issued a counter -application that the application be stayed pending the final determination of the action proceedings which it has instituted against the RAL and RMSA. For completeness, the action by SSC was dismissed on 20 November under a case number 51107/2021. Consequently, the counter-application in this application has become mood on the matter of simple summons.

[29] In the alternative, SSC requires the applications stands as simple summons and alternatively that a declaratory order that it is not in breach of clause 13.2 of the agreement referred to in this judgment. SSC further alternatively requires a declaration that the way RAL enforces clause 13.2 of the agreement is unconstitutional and /or contra-bones mores and withholding of specific performance from RAL and directing to claim and prove “id quod” interest. SSC further prays that RAL be ordered to pay the costs at punitive scale between attorney and client.

[30] SSC does not deny that it sent various letters to the various stakeholders and now bringing this counter-application was due to its legitimate concerns about the alleged unlawful conduct by RMSA and RAL. It

contends that its own (SSC) chief operating officer performed the evaluation of RMSA and raised concerns during April 2019 and May 2019 it was unhappy that RMSA was not declaring dividend and furthermore that large overheads such as management fees and other over heads line items were of concern to SSC. SSC avers that after the letters were sent to RMSA, RMSA continued to exclude it from financially benefitting from its investment in RMSA by not declaring dividend.

[30] The matters came to head, so contends SSC, when it was advised in January 2021 that its monthly payment would be terminated because of the legal advice that it would be regarded as distribution. SSC did not agree with this as it felt it was adding value to the business of RMSA as a shareholder. SSC avers that its letter of 21 February 2021 was an attempt to show that RMSA sought it to exit its investment in RMSA to shield its alleged unlawful conduct and not permitting SSC to render services to RMSA.

[31] SSC avers that it reported RMSA to Anton GmbH("Anton"), a German company and RAL ultimate shareholder about the alleged wrongdoing during July 2019. Anton instructed Bowman Gilfillan to investigate the allegations. SSC contends that the copy of the report was not shared by Anton with it. SSC concluded that the refusal to share the content of the report with it suggested that there could merit in its complaints.

[31] SSC contends that since 2006, RAL had been paid management fees of R83 million whereas SSC had been paid only R17 million for the period. It contends that it rejected RMSA's attempt to unilaterally terminate the management fees in January 2021. SSC contends that its board representative to RMSA have added value to RMSA. SSC contends that despite generating a revenue of R11 billion since 2006, it never declared dividend. SSC states that after its various concerns could not be addressed, it decided to inform the various third-party stakeholders including the B-BBEE Commission. It is not clear from the papers as to what the status of the B-BBEE Commission complaint is.

[32] SSC contends that significant amounts of value were extracted from RMSA through the Redpath group of companies between 2014 to 2020 to be the sum of over R 571 million through what SSC refers to as over inflated lease agreements of equipment to RMSA. SSC admits that it raised various issues with the third parties identified in the founding affidavit.

Issues for determination

[33] The first issue for determination is whether RAL has established the repudiation of the agreement and if I find that there was no repudiation of the agreement by SSC and Arendse to trigger cancellation of the agreement, whether the deemed offer provision in the agreement should be triggered.

[34] The second issue for determining relates to the counter-application of SSC relating to its claim that RMSA had deliberately embarked on a strategy to force it to exit its investment in RMSA by embarking on the alleged unlawful conduct.

[35] I will deal with the main relief sought by RAL for cancellation of the agreement based on repudiation and the related prayers in the alternative.

[36] Thereafter, I will deal with the counter-application's alternative reliefs sought by SSC.

The Legal Principles.

Repudiation

[37] Repudiation, a form of anticipatory breach,[1] occurs when a party indicates by words or positive conduct that he does not intend to perform or fully perform, be bound or be fully bound by the contract.[2]

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[1] Or breach of contract *in anticipando*. The other form is prevention of performance. In *Tuckers Land and Development Corporation v Hovis* 1980 1 SA 645 (A), the court identified repudiation as the most typical but not only form of anticipatory breach: "It should therefore be accepted that in our law anticipatory breach is constituted by the violation of an obligation *ex lege*, flowing from the requirement of *bona fide* which underlies our law of contract" (652). See also Christie and Bradfield *Christie's The Law of Contract* 6 ed (2011) 538 ff.

[2] Repudiation may occur prior to performance being due but may also take place where performance is due, for example by insistence on the fulfilment of a term that does not form part of the contract (Christie and Bradfield (2011) 539). Interestingly, repudiation was a form of breach of contract, received by South African law through English Law (its *locus classicus* being the 1853 case of *Albert Holchester v Edward Frederick de la Tour* (1853) 2 El and Bl 678) as Roman-Dutch Law did not recognise it as a form of breach of contract. The creditor would have to rely on remedies for *mora* or positive malperformance. Accordingly, if the debtor repudiated prior the date for performance, the creditor had to wait for that date to arrive and either claim performance or cancellation and damages (Joubert 1987 210). The following from *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A) 22 is an apt description: "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

[38] The fact that repudiation entails positive conduct distinguishes it from *mora*.[3] Further, our courts have held that a requirement for repudiation is wrongful conduct.[4] The test for wrongfulness is objective and the enquiry would be whether it is reasonable to conclude that performance will not take place or defective performance will take place in the future. The courts have repeatedly stated that the test for repudiation is not subjective but objective.[5]

[39] Repudiation is demonstrated by a party indicating by words or by conduct that he or she does not intend to honour all their obligations in terms of the contract. For example, he or she may deny the existence of the contract,[6] try without justification to withdraw from the contract,[7] give notice that they cannot or will not perform;[8] or may indicate that they do

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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".

[3] LAWSA para 322.

[4] *Culverwell v Brown* 1988 2 SA 468 (C) 477A and Van der Merwe *et al*. 2012 308.

[5] In *Schlinkman v Van der Walt* 1947 2 SA 900 (E), the court held that the debtor must have the intention to repudiate as the courts have held that the debtor's real or subjective intention is not relevant to the question of wrongfulness. Cf also *Ponisammy and another v Versailles Estates (Pty) Ltd* 1973 1 SA 372 (A) 387, *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (A) 953, *Van Rooyen v Minster van Openbare Werkeen Gemeenskapsbou* 1978 2 SA 835 (A) 845-6, *Tuckers Land and Development v Hovis* 1980 1 SA 645 (A) 653, *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and another* 1993 3 SA 471 (A) 480-1, *Highveld 7 Properties (Pty) Ltd and other v Bailes1* 1999 4 SA 107 (A) 1315ffn and *Metamil (Pty) Ltd v AECI Explosives and Chemcials Ltd* 1994 3 SA 673 (A) 684-5. Per Nienaber in *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 1 ALL SA 581 (A) 591: "Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intention at the time. 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 inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach."

[6] *Wood v Oxendale and Co* 1906 23 SC 674, *Machanick v Bernstein* 1920 CPD 380, *Cohen v Orlowski* 1930 SWA 125 and *Strachan and Co Ltd v Natal Milling Co (Pty) Ltd* 1936 NPD 327.

[7] *Dettmann v Goldfain* 1975 3 SA 385 (A) and *Walker v Minier and Cie (Pty) Ltd* 1979 2 SA 474 (W).

[8] *Ullman Bros Ltd v Kroonstad Produce Co* 1923 AD 449 at 449: "Where a contract for the sale of goods has been entered into between two parties the seller may, although the sale be on credit, protect himself where before delivery the buyer has manifested an inability to pay." Cf the comments of Lord Esher in *Johnstone v Milling* 55 LJQB 162: "When one party refuses by anticipation to perform the contract, that is equivalent to a declaration by him, that he thereby rescinds the contract as far as he can. But he cannot rescind it by himself. He says, I will not perform the contract; but that is not a rescission of the contract. By doing that wrongfully, he entitles the other party, if he pleases, to agree to its rescission, subject to this that at the same time he can bring

not intend to honour all of the obligations, for example by tendering defective or incomplete performance as proper performance.[9]

[40] In Discovery *Life v Hogan*[10], the case referred to by both Advocate Blou SC and Advocate Wickins SC the SCA summed up the law on repudiation as follows: -

> "This Court has consistently said that the test for repudiation is not subjective but objective.[11] The emphasis is not on the repudiating party's state of mind, on what she subjectively intended, but on what someone in the position of the innocent party would think she 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 inferred intention as manifested by objective external conduct accordingly serves as the criterion for determining the nature of the threatened actual breach.[12]

[41] For completeness's sake, I now consider the submission that because there are conflicts of facts in the papers, the application should be dismissed. The

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an action for the wrongful rescission. The other party may elect to adopt it as a rescission, by acting upon it, and by treating the contract as at an end, except for the purposes of bringing an action upon it as if it has been rescinded".

[9] *Cilliers v Papenfus and Rooth* 1904 TS 7, *Tuckers Land and Development Corporation (Pty) Ltd v Aleco Investments* 1981 1 SA 852 (T), *Janowsky v Payne* 1989 2 SA 562 (C) and Havenga et al. 1995 114. In *Executors of Alfred Winter Evans v John William Stranack* 1890 11 NLR 12, the court held that the attempt to add conditions to a contract, which had previously not been contemplated by the parties, amounted to repudiation of the contract: "[When] one party to a contract, endeavour[s] to force upon the other party a term not compromised in the contract. There, I should say, that though the other side may have a right to insist on the contract's being performed according to its terms, yet that he has also a right to say to the other side, as you refuse to perform the contract without addition material in its nature, I elect to rescind the contract; I am not obliged either to submit to your terms, or to bring an action to compel you to submit to mine; and I elect to break off from the contract, and to be done, with you. […] If a party to a contract insists on a new term's being added to the contract, the case, is analogous to a repudiating or abandoning by such party of the original contract, as he will not abide by it."

[10] ZASCA 79; 2021 (5) SA 466 (SCA) at para 17

[11] See *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 A at 387A-C; [1973] 1 All SA 540 (A)*Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 A at 953E-F.

[12] See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A).

law on the approach to dispute of facts is also not controversial. In *Wightman t/a JW Construction v Headfour (Pty) Ltd*[13] , the Supreme Court of Appeal held that:

> "[A]n applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine, or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

[42] The Court will only grant an applicant final relief on motion if the facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.[14]

[43] In my judgment, the issues relating to the letters written by SSC to various stakeholders, are not controversial and chiefly what the letters related to as far as the prejudice of RAL is clear for everyone to see. SSC's contentions that the dispute arises because the letters were simply an attempt to address its legitimate concerns on the alleged unlawful conduct of RMSA is not supported by facts. I say so because once the monthly payment to SSC was terminated, SSC embarked on a campaign "bare knuckle" bruising.

[44] In my view, it cannot be in the interest of RMSA to induce its customers to terminate the business relationship on the false allegation of fraud and racism by SSC. The allegations have the potential to bring RMSA to is knees. This not only embarrassed it, but it had to fend off the allegations

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[13] 2008 (3) SA 371 (SCA) par 12 referring with approval to *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) 634E-635C and *Ripoli-Dausa v Middleton*2005 (3) SA 141 (C) 151A-153C

[14] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) 634H

by having to answer to each of its stakeholder. As if that was not enough, to make similar allegations to the HSBC the facility provider of Redpath Group of companies of which RMSA was a member, to its auditors Deloitte and of course to its ultimate shareholder Anton, was in my view serious enough to as a breach of the agreement. This is so because SSC had board representative in RMSA. To persist about the alleged legitimacy of concerns by putting pressure to bear on Mpower to withdraw its B-BBEE certificate from RMSA, was clearly designed to harm RMSA and that was a clear violation of clause 13.2 of the agreement.

[45] I cannot see it any other way. As I see it, there is just no factual basis to make such allegations, especially that Arendse had been a board member of RMSA and has over the years signed off RMSA's annual financial statements and as a director, had access to all its records including the lease of equipment which SSC now contends are suddenly overpriced. I am not persuaded that by paddling the same false information at various for a make suddenly turns the allegations into reality, especially without any factual basis.

[46] It should be noted that that SSC had tried in several ways to bring RMSA to knees, by inter alia bringing a business rescue application which was dismissed and all this because of the termination of the monthly payment. Accordingly, I hold the view that the conduct of SSC and Arendse evidenced by various letters to the third parties, were not a legitimate attempt to address its concerns. The true intentions of all the communications with the outside world was to twist the arm of RMSA into submission to reinstate the monthly payment. In its own words, SSC does say that it received over R17 million over the period of its investment whereas RAL through management fee agreement was paid over R83

million. It should be remembered that courts cannot and should force companies to declare dividends. That is the function of the board of directors to make recommendation to the shareholders in appropriate circumstances.

[47] I now deal with repudiation. Advocate Wickins SC, submitted on behalf of SSC, that the letter dated 31 December 2021 was not intended to resile from the agreement. To contextualise the letter, so he argued, the first two paragraphs of the letter state as follows:

> "1. We refer to the Sale of Shares and Shareholders Agreement in terms of which *inter alia* SSC purchased 26% of the entire ordinary issued share capital in RMSA for a purchase consideration equivalent to 26% of the fair value of RMSA as at 31 December 2005 ("the Shareholders Agreement").
>
> 2. The purchase consideration for SSC's shareholding was subsequently determined to be an amount of R630,000.00 (six hundred and thirty thousand rand) based on a valuation of RMSA prepared by Pricewaterhouse Coopers Inc, which according to our calculation is due on 1 January 2022 ("the purchase price")."

[48] He furthermore submitted that the letter starts by referring to the Agreement; records the purchase consideration for SSC's Twenty-six percent shareholding was determined by PricewaterhouseCoopers Inc; and records that according to CDH's calculation the purchase consideration "*is due on 1 January 2022*".

[49] Thus, the opening portions of the letter expressly acknowledge the existence of the Agreement;

49.1 SSC's obligation to pay the purchase consideration for its 26% shareholding; and

49.2 the terms of SSC's obligation i.e. that the purchase consideration is an amount of R630,000 and that the purchase consideration is due on 1 January 2022.

[50] The acknowledgment of the Agreement and SSC's obligations, so the submission goes, are self-evidently inconsistent with an "deliberate and unequivocal intention" to no longer be bound by the Agreement.

[51] The third paragraph of the letter states as follows: "3 We confirm that our client has made payment of the purchase consideration into our Trust Account to be held in trust for, *inter alia*, the following reasons—

3.1 Our client was only furnished with the official bank confirmation letter from Redpath on Friday, 24 December 2021;

3.2 Having regard to the fact that the purchase consideration is due to a foreign entity, our client requires approval from the South African Reserve Bank which is anticipated to take several weeks especially when regard is had to the festive period;

3.3 The parties are currently involved in 3 (three) court processes, one of which your client is seeking to invoke the deemed offer provision contemplated in clause 12 of the Shareholders Agreement."

[52] Thus, the leading part of paragraph 3 expressly acknowledges that:

52.1 SSC had made payment of the purchase consideration into CDH's trust account; and

52.2 The purchase consideration was to be "*held in trust*." According to the submission made, it is suggested that payment was to be made once the litigation in pending matters was finalized.

[53] SSC contended that it attempted to make payment of the purchase price to RAL through its attorneys, Werkmans on 15 February 2022, which was rejected. SSC contends that RAL had changed its mind on accepting the payment in February 2022. I do not agree with the proposition. Firstly, the agreement itself was never amended to cater for what SSC was envisaging in its letter to RAL of 31 December 2021. This is so because the agreement itself provides for the standard non-variation clause and secondly, because RAL through Werkmans had already on the 24 December 2021 reminded SSC that payment was due on 1 January 2022. Thirdly, there is no explanation on what the reasons were for not meeting the deadline. Fourthly, if the intention were truly to honour the payment deadline why was there not proposal prior to the 10 February 2022 that payment should be made to Werkmans'trust account for the benefit of RAL.

[54] The suggestion in the 31 December 2021 from CHD that because it was a foreign entity that was going to be the recipient of R630 000 and that Reserve Bank approval might take time, is illogical because the amount could have simply been paid into Werkmans account and they would on behalf of RAL deal with the regulatory side of the funds for final disbursement to RAL. Consequently, in my view, RAL was entitled to accept the repudiation on 10 February 2022 and communicate its decision to cancel the agreement which was appropriate under the circumstances. The submission on the convoluted interpretation of the letter by SSC through CDH dated 31 December 2021 is therefore without merit. This is so because there is no suggestion that RAL waived its right to cancel the

agreement. This has not been SSC's case in its opposition to the application and its heads of arguments.

[55] The counter-application was not pursued because the main action related to the similar issues raised by SSC had been dismissed during November 2024. In my view, RAL has succeeded to make out a case for cancellation of the agreement based on repudiation by SSC.

Order

[56] Having considered the papers and the submissions made on behalf of the parties the following order is made:

56. 1 It is declared that:

56.1.1 The first respondent repudiated the sale of shares and shareholders agreement binding the applicant and first respondent ("the agreement") through the following conduct:

56.1.1.1 In sending a letter to the applicant on 31 December 2021 in which the first respondent conveyed an intention not to pay to the applicant the purchase price envisaged by clause 4.1 of the agreement;

56. 1.1.2 In failing to pay the purchase price envisaged by clause 4.1 of the agreement on the due date or at all.

56.2 As a consequence of the declaration in paragraph 56.1.1 above, the applicant validly cancelled the agreement by virtue of its letter dated 10 February 2022.

56.3 SSC and Arendse are ordered to pay the costs of this application including the costs of senior counsel.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 18 November 2024

DATE JUDGMENT HANDED DOWN: 20 March 2025

APPEARANCES

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Counsel for the First Respondent: Adv G Wickins SC
Instructed by: Kampel Kaufmann Attorneys

Counsel for the Second Respondent: Adv J Blou SC Adv A Friedman

Instructed by: Werksmans Attorneys