



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 3518/2023

In the matter between:

K2021765242 (SOUTH AFRICA) (PTY) LTD

Applicant

and

THIBAUT INVESTMENTS (PTY) LTD

First respondent

ABRAHAMS AND GROSS

Second respondent

ATLANTIC SEABOARD PROPERTIES (PTY) LTD

Third respondent

REGISTRAR OF DEEDS, CAPE TOWN

Fourth respondent

**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL
DELIVERED ON 6 JUNE 2023**

VAN ZYL AJ:

The issues

1. I delivered the main judgment in this matter on 25 April 2023. For the reasons set out in that judgment, I dismissed the applicant's application, with costs.

2. In the course of the subsequent application for leave to appeal, the same issues were raised (as grounds of appeal) as had been submitted in support of the grant of the main application. I do not intend to discuss these aspects in any detail. The reasons set out in the main judgment suffice. I make brief remarks:

2.1. As to whether the first respondent in fact opposed the application: The first respondent delivered a notice of intention to oppose. It was the only respondent to do so. It appointed attorneys for that purpose and relied on Mr Hayes to depose to the answering affidavit. That is the end of the matter. It is – contrary to the applicant’s argument – a typical *Ganes v Telecom Namibia Ltd*¹ situation: “...*In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised....*”

2.2. Mr Hayes, the deponent to the answering affidavit, states expressly that he deposes to the affidavit in opposition to the application. Since only the first respondent opposed the application, the Hayes affidavit could only have been delivered in support of such opposition, that is, on the first respondent’s behalf.

2.3. In any event, Mr Grant Elliot, who deposed to a confirmatory affidavit in relation to the main answering affidavit, is in fact the representative of and chief operating officer for the first respondent. This appears from the sale agreements attached to the founding affidavit as well as to the answering affidavit. He signed the sale agreement on the first respondent’s behalf.

2.4. As to whether the first respondent (as opposed to the second respondent) regarded the 6 February 2023 email as a repudiation: Mr Karrim addressed Mr Elliot when he sent that email (and the subsequent ones). He

¹ [2004] 2 All SA 609 (SCA) at para [19].

sent it to, amongst others, the conveyancers (represented by Mr Hayes), to the first respondent (represented by Mr Elliot), and the estate agents (represented by Mr Harris). Mr Elliot – and thus the first respondent - was aware of what was transpiring.

2.5. From the sale agreement it is clear that the firm of attorneys undertaking the conveyancing is also the first respondent's attorney. When Mr Hayes therefore refers to "*our client*" and states that "*our instructions are*" to accept the repudiation, it is logical to accept that his instructions came from the first respondent. As he states in his affidavit: "*...I replied informing [Mr Karrim] that Thibault Investments accepted the company's repudiation. I also confirmed my instructions that our client will hold the company liable for all wasted costs...*"

2.6. As to Mr Karrim's authority: The resolutions are framed in wide terms. Mr Karrim was authorised to "*act on behalf of and to make decisions on behalf of the company*". This would entail any decision in relation to the transactions, and if a decision so taken amounts to a repudiation, then the company has (through its duly authorised representative) repudiated.

2.7. Mr Karrim's co-director was, moreover, copied in on the impugned email and the subsequent ones, and therefore knew what the state of affairs was. He did not raise any protest in relation to the communications at the time.

2.8. As to the conveyancers' duties: The applicant argues that context is everything. Mr Karrim's email was simply an expression of his frustration with the delays in the transfer process; thus, the conveyancers should have pacified him, and advised him as to the consequences of his actions.

2.9. The problem for the applicant is that context does not exist only in relation to one party to a transaction. The first respondent's situation forms part of the context, and the 6 February 2023 email should be regarded objectively within the context as a whole. Conveyancers, despite having

certain legal duties towards both parties, are not contractual babysitters. If one party's conduct (whether done in frustration or not) amounts to a repudiation, then it is up to the other contract party to elect whether to accept or reject such repudiation. The conveyancer has a duty to convey the message. It is not a conveyancer's duty to cajole a party out of the consequences of its actions.

2.10. If the applicant is of the view that the second respondent acted in breach of any legal duty owed to the applicant, then it has to take such action against the second respondent as it deems fit. The matter of *Bruwer and another v Pocock & Bailey Ingelyf and another*,² upon which the applicant relies, involves a claim for damages against a conveyancer based upon the breach of a legal duty. The facts are, however, totally different from those in the present case.

2.11. As to whether the first respondent should have given the applicant notice to remedy its breach in terms of the breach clause included in the sale agreement: Judicial precedent, including authority from the Supreme Court of Appeal (see, for example, *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd*),³ says otherwise. The applicant has not suggested that the case law relied upon was incorrectly decided.

3. A new issue was raised for the first time during argument of the application for leave to appeal. This was that, because the guarantees issued by Investec were irrevocable, Mr Karrim could in fact not have repudiated the sale agreement. Repudiation was impossible. Also, since the deposit, transfer fees and other transfer costs had been paid, the applicant had performed fully and thus no repudiation could take place.

4. A reading of the 6 February 2023 email, however, makes it clear that Mr Karrim does not only refer to his threatened attempt at cancelling the guarantees. He demands return of "*all fees, Deposits and transfer costs paid*". He also demands

² [2009] ZAWCHC 167 (23 September 2009).

³ 1994 (3) SA 673 (A) at 683H-I.

the repayment of fees paid to Anuva Investments (Pty) Ltd (represented by Mr Erasmus, addressed directly in the email), who was the party involved in the structuring of the transaction.

5. Objectively viewed, this is an indication of the applicant's intention not to proceed with the transaction, in other words, and at that stage of the transaction, not to accept transfer when it is offered to it. Accepting transfer when it is offered is part of performance (see, for example, *Legator McKenna INC and another v Shea and others*,⁴ and see *Van der Merwe et al Contract: General Principles*.⁵ "If a debtor has already performed he may nevertheless commit anticipatory breach in respect of a duty, which he may have in his capacity as creditor, to co-operate towards receiving counter-performance from his co-contractant.").

6. If one demands, prior to transfer, the refund of everything paid in terms of the sale agreement, and threatens to cancel guarantees, then it is logical objectively to infer that transfer will not be accepted when it is offered. The fact that the guarantees are irrevocable does not make any difference. It is the objective perception created by the email, reasonably viewed, that renders Mr Karrim's conduct a repudiation of the sale agreement.

Conclusion

7. In these circumstances, I am not of the view that, on any of the issues raised in the application for leave to appeal, there is a reasonable prospect that another court would come to a different conclusion (section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 ("the Act")), or that there are other compelling reasons as contemplated in section 17(1)(a)(ii) of the Act why leave to appeal should be granted. The issues between the parties as they appear from the relief sought in the notice of motion have been determined by this Court, and for that reason section 17(1)(c) of the Act is not applicable.

Order

⁴ 2010 (1) SA 35 (SCA) at para [22].

⁵ 4ed, Juta, 2012 at p 308.

8. In the premises, **the application for leave to appeal is dismissed, with costs.**

P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the applicant:

Instructed by

M. Nowitz and C. S. Barclay-Beuthin,
Dirk Kotze Inc.

For the first respondent:

Instructed by

P-S Bothma,
Abrahams & Gross Inc.