REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08/14261

DATE:15/09/2010

REPORTABLE

In the matter between:

XYNOS, ATHANASIOS	First Plaintiff
XYNOS, ANTONIOS	Second Plaintiff

and

PSALTIS, ARISTIDIS	First Defendant
FROMAN, MARK	Second Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The quest for wealth based on implicit trust can sometimes have unfortunate endings. The plaintiffs have instituted action against the defendants for the payment of the sum of R5 million, interest thereon and costs. The plaintiffs allege that the latter amount is based on the lawful cancellation of an agreement in terms of which the plaintiffs purchased a shareholding from the defendants in a company called Deslev Properties (Pty) Ltd ("*Deslev*") pursuant to the defendants' failure to perform under the agreement recording its terms ("*the Deslev transaction*"). This transaction is also variously referred to in evidence as the "*Durban development*".

[2] In the alternative, the plaintiffs' claim for restitution of the purchase price of R5million consequent upon what they call material misrepresentations on the part of the defendants in inducing the plaintiffs to enter into the agreement of sale. I shall set out more fully, later, the basis of this claim.

[3] It is common cause that the plaintiffs initially proceeded against the defendants by way of motion proceedings ("*the motion proceedings*"). The defendants opposed the motion proceedings. On 30 August 2008, Mailula J referred the motion proceedings to trial in terms of Rule 6(5)(g) of the Uniform Rules of Court. The costs of the motion proceedings were reserved. It is also common cause that the plaintiffs, as brothers, carried on their business transactions, including the transaction in the present matter, as a partnership at all material times. They had absolute trust in each other in their transactions to the extent that either of them could act on behalf of the other in

his absence on several occasions. The evidence will demonstrate the extent of the trust.

[4] For the sake of proper context, paras 1-21, and 28 of the declaration, which contain Claims A and B are hereby reproduced as follows:

> "*1. The first plaintiff is Athanasios Xynos (also known as Athos), an adult businessman, who resides at 23 Private Road, Linksfield Ridge, Linksfield, Johannesburg.*
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> *2. The second plaintiff is Antonios Xynos (also known as Tony), an adult businessman, who resides at 23 Private Road, Linksfield Ridge, Linksfield.*
>
> *3. At all times material hereto the first and the second plaintiffs carried on business in partnership with each other ('the partnership').*
>
> *4. The first defendant is Aristidis Psaltis, an adult male businessman, who resides at 9 Mundy Avenue, Morninghill, Johannesburg.*
>
> *5. The second defendant is Mark Froman, an adult male businessman, who resides at 2 Sandwood Hill, Dunkirk Estate, Umhlali, KwaZulu-Natal.*
>
> ***CLAIM A***
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> 6. *On or about the 23rd of November 2005, and at Johannesburg, the partnership, represented by the second plaintiff, and the first defendant, acting personally, alternatively the second defendant, represented by the first defendant, entered into a partly oral, partly written agreement ("the agreement").*
>
> 7. *The written part of the agreement is attached hereto as Annexure "D1" and "D2".*
>
> *8. The material express, alternatively tacit, further alternatively implied terms of the agreement were:*
>
> 8.1 *The partnership would purchase and the first, alternatively the second defendant would sell shares in a property-holding company called Deslev Properties (Pty) Limited ("Deslev") worth R6 million.*

8.2 The amount of R6 million payable by the partnership would be paid as follows:

8.2.1 R1 265 000,00 will be paid by the first respondent in respect of his admitted indebtedness to the partnership.

8.2.2 R3 735 000,00 will be paid by the partnership.

8.2.3 *R1 million would not immediately be paid by the partnership although the shares in respect thereof would be sold to the partnership. The partnership would pay R2 million when the shares which it acquired in Deslev had doubled in value.*

8.3 *The "private agreement" referred to in clause 1 of Annexure "D1" is the document attached hereto as Annexure 'D2'.*

9. *The partnership complied with all of its obligations in terms of the agreement and in particular has paid, and caused to be paid all amounts due by it.*

10. In breach of the agreement, which breaches were material, the first, alternatively the second defendant did not deliver the shares in Deslev to the partnership.

11. Notwithstanding demand, and the lapse of a reasonable time, the first, alternatively the second defendant has not remedied his breach of the agreement.

12. In the premises:

12.1 The partnership was entitled to cancel the agreement;

12.2 The partnership has cancelled the agreement;

12.3 The first, alternatively the second defendant is liable to pay to the partnership R5 million.

CLAIM B

13. Claim B is made in the alternative to Claim A and is made only if it is found that the partnership was not entitled to cancel the agreement as a result of the first, alternatively the second defendant's breach.

14. Prior to 23 November 2005 the first defendant acting personally, alternatively representing the second defendant, represented to

the partnership, which was from time to time represented by the first and the second plaintiffs, that:

14.1 *Deslev was a company which owned property on the North Coast of KwaZulu-Natal ("the Deslev property").*

14.2 Shares in Deslev could be acquired by the partnership.

14.3 *Any shares acquired by the partnership in Deslev would in due course be acquired by another company ("Devco") in exchange for redeemable preference shares in Devco and Devco would develop the Deslev property:*

("the representations").

15. The representations were material and made with the intention of inducing the partnership to act thereon and to enter into the agreement.

16. *Relying on the truth of the representations the partnership concluded the agreement set out in paragraph 6 above.*

17. *Pursuant to the conclusion of the agreement the partnership performed all of its obligations and in particular paid, and caused to be paid, all amounts due by it.*

18. The representations were false in that:

18.1 Shares in Deslev were not available for acquisition by the partnership; and

18.2 Devco did not issue, and did not intend to issue, redeemable preference shares in exchange for shares in Deslev.

19. *As a result of the representations, which are false, the partnership is entitled to cancel the agreement and claim back its performance.*

20. The partnership has cancelled the agreement, and tenders return of any ordinary shares in Devco registered in its name.

21. *In the premises the first, alternatively the second defendant is liable to pay to the partnership R5 million.*"

Paragraph 28 of the declaration reads as follows:

"*28. In the result the first and the second defendants, jointly and severally, are liable to pay to the partnership R5 million being the damages suffered by it in consequence of the false representations.*

WHEREFORE, the plaintiff's claim against the first, alternatively the second, further alternatively, the first and the second defendants jointly and severally:

1. Payment of R5 million.

2. *Interest on the aforesaid amount at the rate of 15,5% per annum a tempore morae to date of payment.*

3. Costs of suit.

4. *Further and/or alternative relief.*"

[5] Claim C, which is in the alternative to Claims A and B, was not pursued. The defendants, in their amended plea, essentially admit that an agreement was entered into between the parties as alleged by the plaintiffs in paras 6 and 7 of the declaration. Further that clause 1 of the agreement provides that payment of the purchase price would be "*as per private agreement*" ("*the private agreement*") with first defendant a copy of the private agreement is attached to the founding affidavit in the motion proceedings, marked "AX2". The defendants further plead that the express, alternatively implied, further alternatively, tacit terms of the agreement as read with the private agreement were that:

"*5.1 Plaintiffs' purchased portion of the First Defendant's consortium shares in Deslev for the consideration of R6 000 000.00;*

5.2 Various amounts in the private agreement in the total sum of R2 265 000.00 would be credited toward the purchase consortium of R6 000 000.00;

5.3 Of the said sum of R2 265 000.00, the sum of R1 000 000.00 was credited on the basis that a sum of R2 000 000.00 would be repaid as and when the shareholding purchased had doubled in value and was sold. The defendants further plead that subsequent to the agreement and during 2006 the parties concluded an oral variation of the agreement as read with the private agreement, in terms whereof plaintiffs would no longer purchase portion of the First Defendant's consortium shares in Deslev, but would purchase from First Defendant 6 000 000 ordinary shares in a company called Royal Palm Property Holdings Ltd ("Royal") for the purchase price consideration of R6 000 000.00. Further that pursuant to the varied agreement, as read with the private agreement;

5.4 6 000 000 ordinary shares in Royal were issued to the plaintiffs, in the name of the Second Plaintiff;

5.5 Plaintiffs were credited with the sum of R2 265 000.00 toward the purchase consideration of R6 000 000.00;

5.6 Plaintiffs effected payment of the sum of R3 269 000.00 toward the purchase consideration of R6 000 000.00;

5.7 That, notwithstanding demand, plaintiffs have failed to pay the balance of the purchase consideration remaining due, owing and payable in the sum of R466 000.00.

6. In the alternative, the defendants plead that in the event that it is found that the parties did not enter into an oral agreement varying the terms of the agreement concluded on the 23/11/2005 "the Deslev transaction", the defendants aver that:

6.1 On 15/2/2007, the First Plaintiff took delivery of the share certificate no. 119 certifying that the Second Plaintiff 'is the registered proprietor of full paid upshares … in the capital of … "Royal Palm Property Holdings Ltd"';

6.2 Also on the 15/2/2007 the First Plaintiff acknowledged receiving the original share certificate no. 119 referred to in paragraph 5.1 above recording that he did so 'on behalf of Antonios Xynos';

6.3 In acting as aforesaid, the First Plaintiff, acting on behalf of the partnership, accepted delivery of the share certificate no. 119 and ownership in the shares of Royal Palm Property Holdings Limited (A ordinary shares) in substitution of the shares referred to in paragraphs 7 and 8 of the plaintiffs' declaration."

Based on the averments in the plea, the defendants served and filed a counterclaim in terms of which the defendants claim from the plaintiffs' payment of the said sum of R466 000,00, the balance of the purchase consideration. However, at the commencement of the trial, senior counsel for the defendants, Mr Hoffman SC, conceded that the amount of the counterclaim should properly read R465 000,00.

[7] As stated earlier, reference in the documents to "*the partnership*" is in fact reference to the plaintiffs. It is also common cause that the reference to "*Athos*" and "*Tony*", is reference to the first plaintiff and the second plaintiff, respectively. On the other hand, reference to "*Ari*" and "*Mark*" is to the first defendant and the second defendant, respectively.

[8] Consequently, and based on the pleadings, and the motion proceedings, the main issues for determination in this trial are the following:

8.1 Whether the plaintiffs in the agreement purchased from the defendants cumulative preference shares in Deslev as they indeed contend, or;

8.2 Whether the plaintiffs purchased ordinary shares in Royal pursuant to the subsequent oral variation of the agreement as contended for by the defendants. In fact, the evidence adduced on behalf of the defendants, as shown later, contend that from

inception the plaintiffs knew that they were purchasing ordinary shares in Royal; or

8.3 Whether there was any misrepresentations on the part of the defendants which induced the plaintiffs to enter into the agreement; and/or, finally,

8.4 Whether the subsequent delivery by the defendants of 6 million ordinary shares in Royal to the plaintiffs on 15/2/2007, constituted delivery in compliance with the agreements.

[9] It is appropriate, in order to understand properly the relationship between the parties, especially that of the trust between the plaintiffs, on the one hand, and that of reciprocal trust between the plaintiffs and the first defendant, on the other hand, to briefly sketch some background. The plaintiffs and the first defendant emigrated from Greece. The first defendant, although of Greek origin, spent most of his formative years in South Africa. Whilst in Greece, the first defendant ran a sweet factory there where he met the plaintiffs. The latter wanted to buy shareholding in the sweet factory as they were impressed with the manner in which the defendant ran the business, but were discouraged by the first defendant on the ground that the sweet factory was not performing well, and that the first defendant intended to return to South Africa. In the late 1990's, the first defendant returned to South Africa and set up a sweet factory called Cartoon Candy in the Germiston area. Thereafter, and during 1999/2000, the plaintiffs, once in South Africa since

1971/2, met with the first defendant at Cartoon Candy. Soon thereafter the first defendant introduced the plaintiffs to his business partner, Mark, the second defendant. The plaintiffs had already set up their own business in South Africa from about 1973.

9.1 During February 2004 the plaintiffs purchased 2,5% worth of shares each in Cartoon Candy. Four months later, the plaintiffs again purchased further 1,6% each shares in Cartoon Candy. At the time, the plaintiffs ran their own business, a soft-drink concern called Nature Fruit Juices, also in the Germiston area. In early 2004, Mark, the second defendant, relocated to Durban, KZN, leaving the first defendant to manage Cartoon Candy. There were other business transactions entered into between the plaintiffs and the first defendant, such as a joint venture to purchase sweet-making equipment called the Chinese deal. In all the transactions, the plaintiffs made payment to the first defendant in cash and cheques drawn on Nature Fruit Juices' bank account. Most of the above background, and the chronology of events are common cause from the evidence of the parties. In spite of the above, I need to mention that at the time the Deslev transaction was entered into on 23/11/2005, the parties were in dispute as the plaintiffs were owed monies pursuant to the aforementioned various transactions which the first defendant refused to pay.

[10] I deal with the agreement. Both the plaintiffs, as well as the first defendant, testified extensively on the contents of the agreement and the true intention of the parties. The second defendant also testified, to an extent. It is common cause that the Deslev transaction was recorded in writing in two documents, a written agreement. The agreement was annexed as "AX1", pp 28-30 of the motion proceedings as well as a handwritten schedule of payments, Annexure "AX2" on p 32 of the motion proceedings. The latter annexure is the same as p 12 of the trial bundle. The agreement Annexure "AX1" is probably more contentious than the schedule of payments, Annexure "AX2". The agreement, which is headed, "*Mark Froman*", which is clear reference to the second defendant, is dated 30/8/2005, although only signed on 23/11/2005 on p 29. It provides as follows:

> "*This document serves to record the agreement between the investor and Mark Froman, either acting in his own capacity or as a nominee of a company.*
>
> 1. *A & A Xynos "the investor" agrees to invest the amount of R6,000,000 (6 Million Rand) into the property known as <u>DESLEV PROPERTIES (PTY) LTD</u> No 2004/022970/07. Payment will be as follows:*
>
>   *As per private agreement with Ari signed at every payment received.*
>
>   *The purchaser will be a pro-rata shareholder in the above property as per the original purchase price plus costs relating to the acquisition by Mark Froman, as per clause 4 below.*
>
> 2. *It is intended that in due course the immovable property shall by itself or together with other properties in the immediate vicinity be sold into a holding company to be formed "Devco" which will convert, re-zone, develop and sell stands within the group. Ownership by "Devco" will be either by acquiring shares in the relevant companies or the properties themselves.*

3. *The abovementioned property company and its shareholders will be party to the overall development of the proposed township under "Devco" and will participate on a pro-rata basis at its cost of the shares and loans in DESLEV PROPERTIES (PTY) LTD, relevant to the total costs of all the participating entities or properties as per the budget, (This being R249 000 000.00 in this Budget).*

4. *A shareholding pro-rata according to investment of 50% of the entire issued share capital while Mark Froman and or his nominees will own the other 50% in "Devco".*

5. *It is intended that the shares in each separate property will be exchanged for shares in "Devco" (pro-rata to total cost) and that your shares in the property will be acquired by "Devco" for redeemable cumulative preference shares in "Devco".*

6. *If it is in the best interests of yourselves and myself from a tax or other perspective the property will be transferred to "Devco" for shares and preference shares as per 5 above.*

7. *An agreement recording the above terms and other such terms as are normally incorporated in agreements of this nature will be entered into between ourselves.*

8. *Mark Froman shall have management control of the affairs of the individual property companies and Devco. In the event that for any reason he cannot exercise his duties Ari Psaltis will assume Mark Froman's responsibilities.*

9. *Furthermore, provided that any sale/s of any stand/s in the proposed township are at prices exceeding four times the "cost" of such stand/s, Mark Froman shall be authorized to conclude such sales on behalf of "Devco".*

SIGNED ANTONIOS XYNOS

DATE 23-11-2005

SIGNED ARI PSALTIS *SIGNED ANTONIOS XYNOS*

pp. MARK FROMAN *INVESTOR*"

It is common cause that the words in clause 1 of the agreement, "*A & A Xynos*" refer to the plaintiffs. It is equally common cause that the words, "*Ari*" in the sentence, "*as per private agreement with Ari signed at every payment received*", refer to the first defendant. The significant words in clause 2 of the agreement are, "*in due course*", "*shall*", "*company to be formed "Devco*"" and "*Devco will*". In clause 5 the words are, "*your shares in the property will be acquired by "Devco" for redeemable cumulative preference shares in "Devco*"". In clause 6, the significant words are, "*shares and preference shares as per 5 above*". Similarly, in clause 7, the words are, "*An agreement recording*". Clause 9 of the agreement, it is common cause, was scratched out by consent pursuant to dissatisfaction therewith expressed by the plaintiffs. The agreement was signed by the first defendant, acting on behalf of the second defendant, as well as the second plaintiff on behalf of the partnership, with the first plaintiff. The last page of the written agreement on p 80 of the trial bundle, is styled a "*précis to help each investor understand the total undertaking*". Paragraph 4 thereof provides:

> "*Each investor, because of the different time periods, was given a share of a particular farm for the security of his investment, pro-rata to the value of the farm.*"

[11] It is common cause that although the agreement mentions R6m as the purchase consideration, the plaintiffs paid only R5m but would be credited with the extra amount of R1m later. This explains the reason for the action being based on restoration of R5m. It was further common cause, and this accorded with the evidence of the second defendant, that the entity referred to

as "*Devco*", in the agreement, was never formed. In this regard, the second defendant testified that Devco was in fact Royal. Both the plaintiffs, on the other hand, testified that they never knew or were never told of Royal at the time of the agreement until much later. The plaintiffs also testified that since they trusted the first defendant implicitly, and that as the first defendant refused to refund the partnership the monies owing to them at that stage based on previous transactions, they thought that the only manner to access their money was to invest in the Durban development. They aver that they were in fact persuaded by the first defendant to enter into the Deslev transaction. However, the averment of persuasion was vociferously denied by the defendants. The plaintiffs further testified that in addition to the assurance that the partnership was contracting for redeemable cumulative preference shares in the Deslev transaction, they felt secured in the investment based on the acquisition of farms and immovable property as well as land in the Durban development. They were assured by the first defendant that the investment would treble or more in value in a few years time. This after both plaintiffs had travelled to Durban on separate occasions where they were hosted by the second defendant at his Ballito residence, and showed the extent of the Durban development. The plaintiffs' airfares to Durban were paid for by the defendants. This is common cause. In his evidence, the second defendant dealt extensively with the Durban development, as will be seen later.

[12] The terms of the payment are recorded on the handwritten schedule of payments, Annexure "AX2" p 32 of the motion proceedings, as well as p 12 of the trial bundle. These terms were largely confirmed as being common cause

in the motion proceedings, although a much better and reliable mechanism of recordal would have been expected from such seasoned business persons as the plaintiffs and the first defendant. However, once more, implicit trust in each other appears to have been the overriding factor. All the inscriptions are admittedly in the handwriting of the first defendant. Both the plaintiffs signed at the bottom of the page. The first defendant also signed. The parties also initialled together with the first defendant against every single payment made to the first defendant. The total purchase for the plaintiffs' shares in the Deslev transaction, as stated earlier, would be R6m. In para 18.6(a) of the answering affidavit in the motion proceedings, the first defendant stated:

> "*Applicants purchased portion of my consortium share in Deslev for the purchase price of R6million (Annexure "AX2") particularly refers to "purchase of Ari Consortium Share". There would be a pro rata shareholder in Deslev "as per original purchase price" plus costs relating to the acquisition by Second Applicant as per clause 4 therein. I point out that Annexure "AX2" refers to the percentage interest in the "Ari Consortium Share" as "± 1,2048".*"

Annexures "AX1" and "X2" are dated 23/11/2005, and contain common cause payments and dates made by the plaintiffs to the first defendant. The payments cover the period 25/11/2005 to approximately 20/5/2006. The annexure also contains various amounts credited by the first defendant to the plaintiffs in respect of the various transactions entered into prior to the Deslev transaction. In the middle of the page, the annexure has the following inscription, "*Agreement with Tony + Arthur concerning Durban 6 0000.000 purchase of Ari's Consortium Shares*". The first plaintiff is also known as Arthur. In the end, Annexure "AX2" shows that an amount of R1 265 000,00 was in settlement of amounts owed to the plaintiffs by the first defendant,

which amount constituted a credit towards settlement of the purchase consideration of the Deslev transaction. This was not in dispute. Based on the schedule of payments on Annexure “AX2”, the following was also not in dispute. An amount of R1m was to be credited to the plaintiffs until such time as the shares in the Deslev transaction had doubled in value, and were sold, at which point they would pay R2m. Annexure “AX2” shows a balance of R3 735 000,00 payable by the plaintiffs in terms of the share sale agreement. Of this amount, the sum of R3 270 000,00 was in fact paid by the plaintiffs and acknowledged by the first defendant on Annexure “AX2”. This left the balance of R465 000,00, which forms the basis of the defendants’ counterclaim.

[13] The evidence of the plaintiffs, where it conflicts directly with that of the defendants in regard to the Deslev transaction, ought to be evaluated in the light of several factors in order to establish the probabilities. These factors include that they had a long and ongoing business relationship with the first defendant. During this period, and leading up to the Deslev transaction, huge amounts of cash, accompanied by informal recordkeeping, exchanged hands. The plaintiffs knew the first defendant from Greece as a businessman. They had excessive trust in the first defendant. Their relationship was good until February 2007 when the plaintiffs became aware of the share certificate from Royal showing that they had in fact been issued with ordinary shares, as opposed to redeemable preference shares. The relationship worsened when there was a physical fight between the second plaintiff and the first defendant at the Annual General Meeting of Royal in Durban on 31 May 2007.

[14] The evidence of the plaintiffs must also be viewed in the light of what appears to be their limited command of the English language. Although astute and experienced businessman, they testified that their understanding and command of the English language was below that of the first defendant. In the trial, the plaintiff testified through the assistance of a Greek interpreter, which was not the case with the first defendant. There was also the undisputed evidence that during consultations with their legal team in preparation of the trial, the plaintiffs made use of the same Greek interpreter.

[15] The evidence of the plaintiffs as to how, why, and what was told to them by the first defendant, when they entered into the Deslev transaction, was complimentary and credible, although lacking in eloquence. The first plaintiff testified that the first defendant did not tell them that there were two different types of shares, i.e. original investors' shares, and consortium shares, in the Durban development. They were told that the investment was through Deslev which offered all the guarantees in property, farms and immovable property. They were told that Devco, mentioned in the agreement, would be the holding company. He, however, conceded that the consortium shares were valued at R249m, and the founder shares at R249m, giving a total value of the development at R498m. However, the first plaintiff testified that he was told by the first defendant that the partnership would acquire preference shares in Deslev which to him meant secured and founding shares, as opposed to ordinary shares, which carried less value. He understood, and accepted that the preference shares in Deslev will be exchanged for Devco shares in accordance with the written agreement.

When put to him in cross-examination that the first defendant's version would be that the words, "*no cap*", "*no int*", on p 12 of the trial bundle, the schedule of payments, meant "*no capital*" and "*no interest*", with reference to the first defendant's consortium shares, the first plaintiff replied that that was a subsequent allegation. He denied that the first defendant explained that the partnership purchase consideration of R6m equalled 1,2048% of the total Durban development. The first defendant was in a great hurry, and simply made him sign the document when payment of the two cheques was made on that particular occasion. The first plaintiff denied that the first defendant explained in detail, each and every clause of the agreement on pp 77, 78 and 79 of the trial bundle. In this regard, it is interesting that when he testified in cross-examination on this aspect, the first defendant was driven to concede that he did not in fact explain each and every clause. It is further significant that on several occasions when the plaintiffs made payment to the first defendant, it was the latter who wrote out the partnership cheques and completed the chequebook stub. I mention this simply to demonstrate, once more, the implicit trust the plaintiffs had in the first defendant.

[16] The first defendant testified that when he collected the share certificate from the auditors of the defendants in Johannesburg on 15 February 2007, the share certificate was in an envelope. He signed for the collection. He did not immediately open the envelope until much later. When he did open the envelope, he discovered two matters which caused him great dissatisfaction. First, was that the shares were ordinary shares in Royal, as opposed to preference shares in accordance with the agreement. The second was that

the shares were in the name of the second plaintiff only, and not in the name of the partnership (both plaintiffs), in terms of the agreement. He was cross-examined closely in this regard. He conceded quite readily that he did not immediately confront the receptionist where he collected the share certificate to query the discrepancy. Neither did he consult his accountant or legal adviser until about October 2007, which resulted in the present litigation. The 6 million ordinary shares were issued in Royal on 14 August 2006. The first plaintiff, however, remained adamant that he did not delay unduly in confronting the first defendant about the incorrect share certificate. Both the plaintiffs denied in evidence the version of the first defendant that subsequently the plaintiffs approached the first defendant to buy back the shares as they had financial problems. The version of the second plaintiff as to the events after the receipt of the ordinary share certificate, was that they constantly pestered the first defendant about their investment in the Durban deal. So much so that the first defendant invited him to the Annual General Meeting of Royal on 31 May 2007, in order for him to find out for himself as to what happened to the partnership investment. The second plaintiff denied in cross-examination that he attended the Annual General Meeting as a shareholder of Royal. It is common cause, as stated earlier in this judgment, that the second plaintiff had an altercation with the first defendant at the Annual General Meeting. In the view I take in this matter, the criticism levelled against the first plaintiff regarding his conduct after collecting the share certificate, was unwarranted. The horse had already bolted, resulting in prejudice to the plaintiffs. The rest of the version of the second plaintiff, especially regarding the Deslev transaction, accorded with that of the first

plaintiff. Both the plaintiffs also denied vehemently that the Deslev transaction was subsequently varied orally in terms of which they agreed to accept ordinary shares in Royal, as contended by the defendants. The plaintiffs said that they did not at any stage enter into an agreement with Royal. In fact, when examined on this aspect, the second plaintiff testified, "*This is a vast lie. How is it possible that I being engaged in business for so many years in this country, accept an oral agreement and accept to cancel my securities which I have with DESLEV and my shares, preferential shares, to get ordinary shares, in a company which offers me no security, whereas DESLEV was giving me security in a specific property?*"

[17] The first and the second defendants testified. The first defendant confirmed all the common cause issues alluded to earlier in this judgment. The plaintiffs pestered him to invest in the Durban development because the plaintiffs decided that the Durban deal sounded more exciting than Cartoon Candy, and that they wanted to make more money. The Durban development was divided into consortium shares, and investor shares, on a 50/50 basis. He telephoned the second defendant and asked him what document to give to the plaintiffs for investment purposes. The second defendant advised that the Deslev properties' document should be used, this led to the signing of the agreement with the plaintiffs reflected on pp 77, 78 and 79 of the trial bundle, on 23 November 2005. At that time the first defendant was a member of the Durban development but he held no shares in Royal. His shares were reflected in Deslev, and possibly other companies at the time, and he wanted the plaintiffs to be comfortable that they had something in hand. Devco was

just a name for the proposed holding company, and became Royal. Various farms and land were purchased by different companies, about 10 farms in fall. In the end, all the entities were incorporated into Royal and shares were issued. He denied that there was ever a question of Deslev shares or the issue thereof to the plaintiffs. The first defendant further testified that the plaintiffs knew from inception that they were purchasing shares in Royal, and the latter did not offer cumulative preference shares. On receipt of his shares from Royal, he instructed his auditors to transfer 6 million shares to the plaintiffs. The shares were issued in the name of the second plaintiff since he only signed the agreement. Thereafter, there was no complaint from the plaintiffs regarding their shares. He testified that, in fact, the plaintiffs subsequently approached him to buy back the shares, which he declined. The second plaintiff attended the Annual General Meeting in Durban on 31 May 2007, and knew fully that everything there concerned Royal. With regard to the defendants' counterclaim for R465 000,00, the first defendant conceded that the plaintiffs had in effect paid this amount. He had simply forgotten about the payment.

[18] The cross-examination of the first defendant produced a slightly different slant on his evidence-in-chief. This is that, although he was emphatic in evidence-in-chief that he took the trouble of explaining to the plaintiffs every single clause of the agreement, he was, however, compelled to concede that this did not happen. He was not a director of any of the companies in Durban. He did not know if Devco acquired properties or shares in Deslev. I observe that this must be so since the correspondence show that

the process of forming Devco was never undertaken. According to the evidence of both defendants, Devco was in fact Royal, which owned shares in Deslev in November 2005. The second defendant was a nominee shareholder in Deslev. The first defendant testified that it was immaterial to him whether the plaintiffs received shares in Deslev on the recommendation of the second defendant, or shares in Royal, as long as the plaintiffs were comfortable. They had secured investment provided by immovable property and land. He denied that he told the plaintiffs they would receive preference shares or that they would receive something out of the ordinary. The first defendant, could however, not explain satisfactorily why he forgot that the plaintiffs had in fact made to him payment of the amount of R465 000,00 forming the subject-matter of the counterclaim. Similarly, he could not provide a plausible explanation why he initially denied his handwriting on the cheques of the plaintiffs. In this regard, in my view, the evidence given later by his attorney of record, Mr Dunn Hirschowitz, did not take the matter any further in favour of the first defendant. When questioned as to which party he was contracting with regarding the sale of shares, the first defendant answered that the agreement was with both the plaintiffs. On further being questioned as to the reason why the share certificate was in the name of the second plaintiff only, the first defendant gave a rather wishy-washy response. In short, he said that the second plaintiff never approached him; that it was not his problem; that he could not change the shares etc. However, he conceded that if the share certificate was issued in error, he could have phoned the share transfer secretaries, and instructed them to rectify the matter. He was never told that the plaintiffs had a problem with the shares being in Royal, as

opposed to Deslev, until at Court.

[19] It was the evidence of the first defendant that at the time of the agreement, the second defendant was a nominee shareholder in Deslev, he was holding shares of all the companies, and had shares in Deslev. He was referred to his answering affidavit in the motion proceedings, at para 18.2, on p 80, where he alleged:

> "*Although Second Respondent was registered as the sole shareholder in the various companies, including Deslev, he was holding such shares as nominee for:*
>
> (a) *A consortium owning 50% of the shares of the various companies, including Deslev. I owned 25% of the consortium interest;*
>
> *(b) 50% of the shares of various companies was owned by investors.*"

The first defendant replied that it was his belief that the second defendant could transfer shares and do what he wanted in various companies on behalf of the first defendant and other shareholders. When it was pointed out to him that it was incorrect since the register of members share transfers, in respect of Deslev on p 102 of the trial bundle showed that it was Royal that was the sole shareholder of Deslev, in terms of a transfer transaction on 30/6/2005, some four months before the Deslev transaction, the first defendant agreed. He was compelled to concede that Royal had become the sole shareholder in Deslev, and that the second defendant was not registered as such.

[20] The second defendant testified in great detail about the origin and extent of the Durban development. He bought various farms and properties, sugarcane fields, and developed them into Palm Lake Estate, as shown on Exhibits “D1” and “D2” the maps. The development stretched North from Durban, along the coast, on the N2 highway, with the beach on the one side. It stretched about 10 km along the N2 highway. About 1 400-1 500 hectares of land was purchased, and investors were invited to invest. Approximately eleven companies were created, which held various pieces of immovable property. The agricultural land was to be placed in a holing company, and later rezoned into various portions, such as residential, commercial or educational etc. Thereafter, finished products, like apartments such as flats, would be sold. In this fashion, about 244 apartments were built. Once all the required land was acquired such land and companies were to be consolidated into what became known as Royal. The rest of the evidence of the second defendant on the development was not in dispute and therefore unnecessary to detail further. The total value of the shares was around R498 m.

20.1 He confirmed that he recommended to the first defendant that the plaintiffs should be given the Deslev agreement. He confirmed that he hosted the plaintiffs at his Ballito home, prior to the Deslev transaction, and showed them the development, which was in the formation stage. Deslev held three immovable properties purchased, of which two properties had been rezoned as part of the 620 hectares of rezoned land. He held shares in Deslev as nominee prior to the transfer to Royal in August 2005.

> He acquired Royal in 2003 which was previously known as Larbrad Property (Pty) Ltd. Devco was, in fact, Royal. The latter issued only ordinary shares, and not redeemable preference shares. He said that if approached by the plaintiffs with the request, he would have been able to procure the transfer of Deslev shares from Royal to them. The immovable property in Deslev has been transferred to Royal as part of the consolidation. The plaintiffs knew of Royal prior to the Deslev transaction. In cross-examination, and as in the case of the first defendant, the witness was referred to the allegations in para 18.2 at p 80 of the motion proceedings, the answering affidavit. He denied that when the Deslev transaction was entered into, the shares in Deslev were already in Royal. In relation to the Deslev's members shares register transfers, p 102 of the trial bundle, he agreed that on 30/6/2005 he had transferred 100 ordinary shares to Royal. The rest of the cross-examination of the second defendant elicited somewhat unconvincing versions.

[21] Mr Dunn Hirschowitz, the defendants' attorney of record, was the final witness for the defendants. He gave evidence on a limited aspect only. I had previously in this judgment alluded to his evidence. It is unnecessary, for purposes of this judgment, to expand further on his evidence, save for the observation that his evidence, regrettably, does not advance in any meaningful manner the explanations of the first defendant as to why he initially denied his handwriting on the cheques written out of the chequebook

of the plaintiffs. I reserve for later comment the impressions made by the various witnesses in this trial, as well as the probabilities emerging from the evidence as a whole.

[22] I deal with the question whether the issuing of ordinary shares in Royal to the plaintiffs (second plaintiff only) by the defendants, even if assuming in favour of the defendants that the agreement was varied orally, constituted performance in terms of the agreement. It is trite that generally, contracts, properly entered, should be upheld, and that performance in terms thereof should be in accordance with the agreement. In *Van Diggelen v De Bruin and Another* 1954 (1) SA 188 (SWA), at p 192H, Claassen J, said:

> "*In coming to a decision in this case as to whether there must be performance "in forma specifica" or whether performance "per aequipollens" will suffice, it seems to me that I should proceed along the following lines.*
>
> *(1) The Court must gather from the surrounding circumstances what the parties contemplated. It must take into consideration everything which can give a clue to the intention of the parties. It must seek to find out what the parties would have wished if their minds had been specially directed to the question whether the condition was to be fulfilled "in forma specifica" or by an equivalent act. See Wessels para. 1335. Hanomag SA (Pty.) Ltd v Otto., 1940 C.P.D. 437 at p. 443; Robertson Municipality v Jansen, 1944 C.P.D. 526.*
>
> *(2) If however the circumstances afford no clue then there is a presumption that the condition must be performed "in forma specifica" (Wessels para. 1337. Pothier Oblig. 206). This presumption is rebuttable by the promisor, but it cannot be rebutted where it is clear from the terms of the contract and the surrounding circumstances that performance "in forma specifica" was stipulated in the contract. Wessels paras. 2638-9.*
>
> *(3) …*
>
> *(4) …*

> *(5) The Court's paramount concern is always, within the frame-work of the law, to do justice between man and man. It will be guided by the terms and circumstances of the contract under consideration. Thus in cases where the promisor has discharged the onus mentioned in (2) above, there may be circumstances falling short of impossibility, and even where there may have been some fault on the part of the promisor, and where the Court may nevertheless come to the conclusion that the promisor's performance or tendered performance amounted to substantial performance (Cheshire and Fifoot p. 352, 1st. Ed.), or is of such a nature that the promisee can be compensated in damages for any shortfall. (Strachan v Prinsloo, 1925 T.P.D. 709 at p. 717).*"

In the present matter, and based on the above legal principles, the issuing of ordinary shares to the partnership, as opposed to cumulative preference shares in Deslev, was clearly not performance in terms of the agreement. This is so, irrespective of what the defendants' version conveys. The agreement, and the surrounding circumstances support the version of the plaintiffs wholly on all probabilities. As shown later, there is a huge and marked difference between ordinary shares and cumulative preference shares in company law.

[23] However, in the present matter the defendants do not contend that it was impossible to perform strictly in terms of the agreement. Instead, they rely on an alleged subsequent oral agreement varying the terms of the Deslev transaction. In the alternative, the plaintiffs contend that the delivery of 6 million ordinary shares in Royal on 15/2/2007, and the acknowledgement of receipt thereof by the first plaintiff, on behalf of the second plaintiff, constituted an acceptance of the Royal shares in substitution of the shares purchased in terms of the Deslev transaction. The alleged oral variation of the agreement is capable of disposal with relative ease, in the next paragraph.

[24] Both plaintiffs, when they testified, denied vociferously that they ever agreed to orally vary the agreement. The second plaintiff gave cogent commercial reasons for such denial. In this regard, paras 5 and 6 of the defendants' plea read as follows:

> "*5. During 2006 and at Johannesburg, Plaintiffs acting personally, First Defendant acting personally and First Defendant on behalf of Second Defendant, concluded an oral variation of the agreement as read with the private agreement, in terms whereof Plaintiffs would not purchase portion of First Defendant's consortium share in Deslev Properties (Pty) Ltd, but would purchase from First Defendant 6 million ordinary shares in Royal Palm Property Holdings Ltd for the purchase consideration of R6 000 000,00.*
>
> *6. Pursuant to the agreement (as varied), as read with the private agreement:*
>
> *6.1 6 million ordinary shares in Royal Palm Property Holdings Ltd were issued to Plaintiffs (in the name of Second Plaintiff);*
>
> *6.2 Plaintiffs were credited with the sum of R2 265 000,00 toward the purchase consideration of R6 000 000,00;*
>
> 6.3 *Plaintiffs effected payment of the sum of R3 269 000,00 toward the purchase consideration of R6 000 000,00.*"

There is plainly no particularity of the time and place, and date of the alleged oral variation of the agreement. Similarly, on the same aspect, in para 18.7 of the answering affidavit in the motion proceedings, the defendants failed to provide details of the alleged oral variation. The plaintiffs' denial of such alleged oral variation was not seriously challenged. The defendants allege the oral variation and it was incumbent on them to prove such allegation, in the circumstances of the case. The alleged oral variation was important to the plaintiffs in that it purported to remove their rights under the agreement. In

Government v Thorne and Another NNO 1974 (2) SA 1 (A), at 8H, it was held that an implied variation of an important provision in an agreement, should not be lightly presumed. In the present matter, the allegation of an oral variation is highly improbable, not only on the evidence of the plaintiffs, but also based on the consistent manner in which the parties kept recordings, even though informally, of their various business transactions. I conclude therefore that there was no such oral variation.

[25] The allegation of the defendants that the acceptance by the plaintiffs of the ordinary shares in Royal constituted substituted performance was only introduced by way of an amendment. This was at the commencement of the trial. The amendment is clearly in conflict with the unambiguous provisions of clauses 5, 6 and 7 of the agreement. It will be recalled that clause 5 of the agreement states, *inter alia*, that: "*Your shares in the property will be acquired by "Devco" for redeemable cumulative preference shares in "Devco".*" On its turn, clause 6 states, "… *the property will be transferred to "Devco" for shares and preference shares as per 5 above*". This accords with the evidence of the plaintiffs. In *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA), at para [16], Mpati P said:

> "*[16] The principle that emerges from these decisions, and others not mentioned here, including decisions of this court, is that provided the obligations under a written agreement are to be complied with in full, performance of one of the obligations in a manner different from that stipulated in the written agreement, and accepted by the other party, would be considered as sufficient, or substantial, compliance and the obligation as having been discharged. And where the different manner of performance was at the request of one party, and orally (or tacitly) agreed to by the other, the fact of such performance, ie that the obligation has been discharged, may be proved by extrinsic evidence.*

The agreement for a different manner of performance does not have to be in writing."

See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). It is clear that in the absence of an agreed variation, altering the content of the performance contracted for, as found above, performance in a manner different from that stipulated in a written agreement, and accepted by the other party, must be performance of what was contracted for in full.

[26] Based on the above legal principles, and as found earlier in this judgment, the delivery of ordinary Royal shares was not acceptable performance. In terms of the agreement, in particular clauses 5, 6 and 7, the plaintiffs were clearly entitled to shares in Deslev, and later, in a written share swop agreement, they became entitled to redeemable cumulative preference shares in Royal, the company into which all the immovable properties, land and farms was consolidated. The manner of the performance by the defendants by delivering ordinary shares in Royal as they did, also constituted inadequate performance in terms of the agreement for other compelling reasons. These are that, the first plaintiff never became a shareholder even though he was part of the contracting parties. The Royal shares issued were in the name of the second plaintiff only. In addition, the second plaintiff was reduced to the ranks of an ordinary minority shareholder in Royal with no preferent rights whatsoever. Furthermore, the value of the rights the plaintiffs should have had in Deslev was never ascertained. Indeed, the second defendant testified that no valuation of Deslev's immovable property was carried out prior to the transfer of two out of three portions thereof to Royal.

This meant that the defendants were in no position to contend that the value of what should have been delivered to the plaintiffs, namely shares in Deslev, was substituted with rights of equal value in Royal. For that to have even been contended, the defendants would have had to have compared the value of the rezoned properties in Deslev at the time they were transferred, with the value of 1,2048% holding in Royal after the transfer. Both the defendants testified that they "*were not very specific about things*". They simply disregarded the plaintiffs' contractual rights. As stated earlier, both plaintiff were persistently unhappy with the ordinary shares in Royal after they received the share certificate, in spite of the defendants' contention to the contrary. However, the first defendant conceded that since he now knew what a preference share was, an ordinary share was not the same thing as a preference share. The denial of the defendants that the plaintiffs were unhappy with the ordinary shares issued, begs the question why there was a physical altercation between the first defendant and the second plaintiff at the Annual General Meeting of Royal in Durban on 31 May 2007. Furthermore, the subsequent unsuccessful contention of the defendants that the written agreement was varied orally, lends credence to the view that the issuing of the ordinary shares in Royal, was not in accordance with the agreement. In addition, it is trite that there is a vast difference between an ordinary share in a company and a redeemable preference share, especially if one has the right, as the plaintiffs had, to negotiate the terms pertaining to the redemption of the shares and the transfer of the preference they were to enjoy. (See *Henochsberg* on the Companies Act, Vol. 1, p 145.) Preference shares rank above ordinary shares (see *In re Powell Cotton's Re-Settlement*, *Henniker-*

Major and Others v Powell Cotton and Others [1957] 1 All ER 404). On the other hand, preference shares are cumulative, i.e. the shareholder has a contractual right in the absence of a dividend in any particular year that a dividend shall be paid out of subsequent profits before any other dividend is paid.

[27] In the present matter, the probabilities overwhelmingly favour the version of the plaintiffs. The conclusion that the defendants have not delivered what they were obliged to do in terms of the Deslev transaction, became irresistible.

[28] However, if I am incorrect in the determination of the plaintiffs' Claim A above, I believe that the plaintiffs should still succeed in Claim B, based on misrepresentations. I now deal briefly with the plaintiffs' Claim B. It is plainly unnecessary to repeat all the evidence in this regard. The pleaded misrepresentations are briefly that the shares in Deslev could be acquired by the partnership (the plaintiffs) by entering into the Deslev transaction. That any shares acquired by the partnership in Deslev would in due course be acquired by Devco (Royal) in exchange for redeemable cumulative preference shares in Royal. The plaintiffs' attorneys of record wrote numerous letters to various entities enquiring about their clients' shares in Deslev. One such letter was addressed to Mr Gareth Jones of Royal on 14 April 2008. On the same day an email was sent by Mr Gareth Jones, which read, *inter alia*, that, "*While I note your agreement says that Antonios Xynos* (second plaintiff) *will be issued shares first in Deslev and then those shares will be swopped for*

shares in Devco, I can confirm that this leg of the transaction never took place. … In my opinion the transaction mentioned in the contract has been carried out in full, all be it with certain intermediate steps omitted." (my insertion). This, in my view, shows once more, that the agreement, especially in regard to the Deslev transaction, was not adhered to by the defendants. The defendants denied these allegations and advanced defences pertinent only to the plaintiffs' Claim A. Indeed, on the defendants' own version, the second defendant was registered as a sole shareholder in Deslev and was holding the shares as a nominee. This is contained in para 18.2 of the answering affidavit in the motion proceedings, quoted earlier in this judgment. The phrase, "*purchase of Ari consortium shares*" plainly meant that the first defendant was the seller as the beneficial owner of "*his consortium share in Deslev*", and that the second defendant was a party to the agreement as nominee owner of the shareholding in Deslev. In this regard, para 18.4 of the answering affidavit alleged, "*Lengthy negotiations ensued between me and the applicants in regard to their acquiring a portion of my consortium share which eventually led to the conclusion of Annexures "AX1" and "AX2" to the founding affidavit. As appears therefrom, I signed Annexure "AX1" on behalf of Second Respondent, who was the party to the agreement because he was the nominee owner of the shareholding in Deslev. I was duly authorised to do so.*" The contention advanced on behalf of the defendants that the second defendant was not a party to the agreement, was therefore clearly without any merit.

[29] Both the plaintiffs testified that they were enticed to enter into the agreement by the first defendant who guaranteed them security and comfort. They were also assured that their investment in Deslev would treble or more in a relatively short space of time. However, the plaintiffs conceded in cross-examination that they had not had sight of any of the documents about the Deslev company, such as the memorandum of association or the articles. Further that the plaintiffs did not know who the directors of Deslev were. The plaintiffs also conceded that at the time, they were not in a position to know what was going on, which company was being purchased, which sold or whether there were any consolidations going on. They trusted the first defendant implicitly, as stated earlier. However, the truth of the matter was that some five months before the Deslev transaction the second defendant had transferred his shares in Deslev to Royal on 30/6/2005. This is borne out by the share transfer in Deslev, on p 101 of the trial bundle. This meant that at the time of the Deslev transaction, (23/11/2005), Royal was the 100% registered shareholder of Deslev. Accordingly, at the time of the transaction, the second defendant was not even a registered owner of shares in Royal. On the other hand, the first defendant had never been a registered owner of shares in Deslev. Neither could he have been the beneficial owner through the second defendant as he alleged. Furthermore, Royal did not issue, and did not intend to issue, redeemable cumulative preference shares. Preference shares were never part of its authorised share capital. This is confirmed by Royal's register of members shares transfers on p 104 of the trial bundle. It is supported by Royal's memorandum of association. The email from Mr Gareth Jones of 11 April 2008, quoted partly earlier in this judgment, once more

become relevant. It is on p 82 of the trial bundle. Paragraph 4 of this email read:

> "*Please note however that this agreement seems to be between Anthonios and Ari Psaltis. Ari Psaltis is a shareholder in Royal Palm Property but he is not a director or officer of either RPPH or Deslev. He is in no way able to bind either company in any transaction.*"

There is therefore no doubt from the evidence that the misrepresentations were made with the intention of inducing the somewhat gullible and unsuspecting plaintiffs to enter into the Deslev transaction. The second defendant produced the document on B77 of the trial bundle on which the Deslev transaction was based. On the version of the first defendant, with regard to the share sale agreement concluded with the plaintiffs (partnership), it is doubtful whether there was proper compliance with the provisions of sections 92 and 221(1) of the Companies Act 61 of 1973. The former section prohibits a company from allotting or issuing shares to a subscriber unless the full issue price or consideration for such shares had been paid to and received by the company. On the other hand, the latter provision prohibits a director from allotting or issuing shares without the prior approval of the company in a general meeting. In the present matter, it appears highly unlikely that Deslev in fact obtained such prior approval in general meeting. I conclude therefore that the plaintiffs were entitled to cancel the Deslev transaction and to claim payment of the purchase consideration of R5m against their tender to return the 6 million ordinary shares in Royal.

[30] The issue of the defence of non-payment of the sum of R465 000,00 being the balance of the purchase price, which formed the basis of the counterclaim, required brief discussion only. It was conceded during the trial, that the plaintiffs had in fact paid this amount. In fact the amount was overpaid when the first defendant wrote out two cheques totalling R500 000,00 from the partnership chequebook, and the first plaintiff signed the cheques. The first defendant also filled in the counterfoil. These cheques, of R330 000,00 and R170 000,00 respectively, were presented and honoured in September 2006, as was shown from the bank statements of the partnership business, Nature Fruit Juices CC. The counterclaim was served in November 2008. There was clearly no basis for such a counterclaim which remained unwithdrawn throughout the trial. The evidence of the first defendant, as supported by his attorney of record, Mr Hirschowitz, as to why he denied his handwriting on the cheques, was plainly untrustworthy. The evidence exposed the first defendant as unreliable and lacking integrity. He abused the trust that the plaintiffs had placed in him. It was only after the plaintiffs' attorneys of record had engaged the services of a handwriting expert who confirmed the first defendant's handwriting on the cheques, that the first defendant relented. His feeble evidence was that he had simply forgotten that the payment was made. This was highly improbable, especially that it was by far not an insignificant amount paid by cash cheques. It was more than plain that the first defendant was intend on conducting a *mala fide* defence in order to delay the plaintiffs' claim and cause unnecessary costs in the pursuit thereof. I have already previously in this judgment alluded to the unsatisfactory aspects of the first defendant's evidence on issues unrelated to

the counterclaim. There are, indeed several other unsatisfactory aspects to his evidence. These are all on record. It is also clear that the second defendant operated in cahoots with the first defendant throughout to prejudice the plaintiffs. He made common cause in the defence. On the other hand, the plaintiffs have both testified with candour. They gave consistent versions on all the material aspects of this somewhat difficult matter. The evidence of the plaintiffs, where necessary, is corroborated by the various documents, and I could find no reason not to accept their evidence. The criticism levelled against the plaintiffs by defendants' counsel, that they "*were shocking witnesses. They did not answer a single question in a simple way*", etc, was plainly without merit at all. This was certainly not the impression of the Court. In my view, where there was a delay in answering questions, this was clearly as a result of the services of the Greek interpreter. On several occasions during the trial, the interpreter requested permission from the Court to first consult her Greek dictionary prior to interpreting the evidence. The bottom-line was that the plaintiffs remained credible and consistent. They never contradicted themselves, or each other. The defendants' defences call to be rejected, and the plaintiffs must succeed for all the aforesaid reasons. The plaintiffs were entitled to cancel the agreement and tender return of the ordinary shares.

[31] I deal with the issue of costs. The costs ought to follow the result. However, counsel for the plaintiffs, Ms Cane, argued strenuously for a punitive costs order based on several grounds. These grounds include the defendants' conduct in alleging disputes of fact in the motion proceedings

which resulted in the present trial; the defendants' changing defences on the merits; the present defence of substituted performance in regard to the Deslev transaction, and the pursuance of the defendants to the end of a feeble counterclaim. I have given careful consideration to all these submissions. This is commonly a discretionary matter. I do not agree entirely with all the arguments advanced by the plaintiffs' counsel in this regard. I do, however, feel that a punitive costs order will be appropriate in regard to the counterclaim only in the circumstances of the case. See in this regard *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) para [31]. As stated earlier, the counterclaim has no merit at all. It should never have been brought in the first place.

[32] Prior to concluding, I need to mention one matter. That is the slight delay in handing down judgment. At the end of the trial, I informed the parties that I was due to go on long leave in April. The parties kindly agreed to have the record available to me in order to prepare judgment prior to my departure. The complete record came to my attention in the first week of June 2010 only, on my return to chambers. I did my utmost to finalise the judgment speedily thereafter. However, this was not made any easier by the current and continuing industrial action by employees of the court. The delay, if any, is regretted.

[33] In the result the following order is made:

(1) The first defendant and the second defendants are ordered, jointly and severally, the one paying the other, to be absolved, to pay the plaintiffs jointly, the sum of R5 000 000,00 (Five Million Rand), against the tender of the 6 million ordinary Royal shares.

(2) Interest on the aforesaid amount at the rate of 15,5% per annum *a tempore morae* to date of payment.

(3) Costs of suit.

(4) The counterclaim is dismissed with costs, payable jointly and severally the one paying the other to be absolved, on an attorney and client scale, including the reasonable costs of the handwriting expert as well as the costs reserved in the motion proceedings.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE PLAINTIFFS	J M A CANE
INSTRUCTED BY	ALAN ALLSCHWANG & ASSOCIATES INC
COUNSEL FOR THE DEFENDANTS	G I HOFFMAN SC ASSISTED BY S M WENTZEL
INSTRUCTED BY	HIRSCHOWITZ FLIONIS ATTORNEYS
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