THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 406/10

In the matter between:

BURGER & WALLACE CONSTRUCTION (PTY) LTD Appellant

and

BALLPROP TEN (PTY) LTD Respondent

Neutral citation: *Burger & Wallace Construction (Pty) Ltd v Ballprop Ten (Pty) Ltd* (406/10) [2011] ZASCA 136 (23 September 2011).

Coram: CLOETE and MALAN JJA, and MEER, PLASKET and PETSE AJJA

Heard: **25 AUGUST 2011**

Delivered: **23 SEPTEMBER 2011**

Summary: Contract: whether joint venture agreement, breach and entitlement to claim damages established on the facts.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Saldanha J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

CLOETE JA (MALAN JA and MEER, PLASKET and PETSE AJJA concurring):

[1] The appellant as the plaintiff sued the respondent as the defendant in the Western Cape High Court for payment of R461 335,25 in respect of services rendered. It is convenient to refer to the parties as they were in the court a quo. The defendant admitted the claim but counterclaimed for payment of damages for breach/repudiation of a joint venture agreement. The merits of the counterclaim were separated from the amount claimed in terms of rule 33(4) and were determined in favour of the defendant by Saldanha J, who granted leave to appeal to this court.

[2] The plaintiff is a company that provides civil engineering services in construction projects. The defendant is a property development company that buys and develops land and constructs and sells houses.

[3] It was the defendant's case that in or about April 2001 and in Cape Town the parties entered into a joint venture agreement to develop what came to be known during the trial as 'the Ogden erven'. For reasons which will become apparent it is necessary to quote paragraph 3 of the defendant's counterclaim:

'3. The relevant terms of the joint venture agreement between the Defendant and the Plaintiff were *inter alia* as follows:

3.1 the Defendant would attend to the rezoning, subdivision and other issues

concerning the development of the relevant erven with the intention to subdivide and develop approximately 600 erven in total and to sell these by plot and plan;

3.2 the Plaintiff would obtain and/or arrange the necessary finance for the project and furthermore see to the site services for each plot for which service the Plaintiff was to be paid a market-related fee for its services rendered;

3.3 the Defendant would act as building contractor and build the dwellings for the plot and plan purchasers;

3.4 the Defendant and the Plaintiff would each be entitled to half of the profit generated by the sale of these plots to purchasers;

3.5 the Defendant would be entitled to all profit for the building work done in accordance with the agreement of the parties;

3.6 the joint venture agreement would be undertaken in the name of a company to be nominated as the purchaser of the Ogden erven.'

[4] Three principal issues were raised on appeal, namely:

(a) Whether the defendant had proved a binding contract on the terms it alleged;

(b) whether the defendant had established that the contract had been breached in the manner alleged; and

(c) whether the defendant had suffered loss.

The plaintiff accepted the defendant's version for the purposes of argument on these three issues. In the alternative, the plaintiff submitted that the evidence of the principal witness called on behalf of the defendant, Mr Frederick Peter Carse, should not have been accepted. It is logical to determine the last question first and I shall accordingly do so.

[5] The judgment of the court a quo was comprehensive. After setting out the history of the relationship between the parties, the court devoted some 26 pages of the judgment to setting out the relevant facts in careful detail. It was not submitted that the court committed any factual misdirection. It is accordingly unnecessary to repeat the exercise. It suffices to say that this judgment should be read together with that part of the judgment of the court a quo.[1]

1 *Burger & Wallace v Ballprop Ten (Pty) Ltd* [2007] ZAWCHC 91.

[6] The court a quo found that a joint venture agreement between the parties had been established. In summary, the court accepted the evidence of Carse that after approaches to the Cape of Good Hope Bank and Absa for finance for the joint venture had not succeeded, he, with the assistance of Mr Izak Martin Burger and with the co-operation of Mr Terence James Wallace, the directors and shareholders of the plaintiff, had approached Mr Andrew David Ribbans. Ribbans agreed on behalf of a company (to which I shall refer as 'the Ribbans company') to finance the purchase of the Ogden erven by a 'shelf' company. The 'shelf' company used was Defacto Investments 12 (Pty) Ltd. Ribbans required that the shareholding in Defacto would be the Ribbans company as to 80 per cent and the defendant as to 20 per cent. Ribbans also required that the first R10 million of the anticipated profit to be made by Defacto in selling subdivided plots was to be split 80 per cent in favour of the Ribbans company (which would include the plaintiff's 50 per cent share of those proceeds in accordance with the joint venture) and 20 per cent in favour of the defendant; and this ratio was to be reversed in respect of the second R10 million of the anticipated profit ─ provided that if the development took more than four years but less than five years, the ratio was to be 70/30 and if the development took more than five years but less than six years, the ratio was to be 60/40. Ribbans, Burger and Carse were appointed directors of Defacto. The plaintiff's version, which the court a quo rejected, was that Ribbans was only prepared to commit his company to the purchase of the Ogden erven on the basis that that company would own the land, indirectly by means of a 100 per cent shareholding in a 'shelf' company; that Ribbans had not stipulated any payment ratios; and that the joint venture ─ if it existed at all (a point on which Wallace and Burger contradicted each other) ─ did not survive the refusal of the two banks to provide finance.

[7] The court a quo scrutinized and evaluated the evidence given by the witnesses in some detail and concluded that:

'Carse, although at times argumentative in cross-examination, cast a more favourable impression on the court as a witness than any of those for the plaintiff.'

On appeal it was contended that the court had erred in this regard. Notably, it was not suggested that the court's criticisms of the evidence of Wallace,

Burger and Ribbans was not justified. The submission, rather, was that the court had not properly evaluated Carse's evidence, which it was submitted was neither credible nor probable, for a number of reasons. I shall deal with the probabilities presently. Some of the reasons advanced against Carse's credibility do not warrant consideration. The others, which I shall now deal with, are without merit.

[8] It was submitted that there were contradictions between Carse's oral testimony and his affidavit resisting summary judgment, his version in the Rule 22(4) proceedings, the original claim in reconvention, and the amended claim in reconvention. It was also submitted that in terms of the Companies Act 61 of 1973 the agreements to which Carse testified had to be reflected in the defendant's annual financial statements, but they were not. It is unnecessary to discuss the alleged contradictions and omission as none of this was put to Carse in cross-examination and he was not given an opportunity of dealing with it.

[9] It was submitted that on his own version, Carse made no effort to bind Defacto, Ribbans or the defendant to the agreements to which he testified. It is true that no written agreements were concluded, but according to Carse, there was an agreement between the shareholders of Defacto and an agreement between the parties to the joint venture agreement, the workings and terms of which I shall deal with later in this judgment.

[10] It was submitted that it is telling that Carse did not raise the agreements referred to in the previous paragraph with Ribbans at any time after July 2001, and that he only raised a claim in respect of the Ogden properties by way of an attorney's letter in response to the plaintiff's application for summary judgment in January 2005. The submission concluded that this did not reflect the conduct of a man who genuinely believed that he had the rights of the kind and value for which the defendant contends. The submissions are not entirely accurate, nor do they reflect all of the facts. Carse sent a memorandum to the plaintiff dated 15 August 2002, the heading of which was 'Defacto ─ Sunrise Beach' in which he said, inter

alia:

'Although progress to date does not maybe reflect it, a tremendous amount of work and energy goes into this project. It would be appreciated if we could formalise the arrangement between the parties.'

In his evidence Carse explained the reasons behind this request as follows:

'U Edele [the defendant] sowel as myself, professionele mense het geweldige hoeveelheid tyd en ure ingesit in die projek en ek wou graag dat ons ooreenkoms, die ooreenkoms met Burger & Wallace en die deelname van Master Tyre Properties [a Ribbans company], dat dit meer formeel geskied. Ek wil hulle ook meer betrokke gehad het by die ontwikkeling omdat hulle vennote was, finansierders, en daar besluitneming in terme van baie goed geneem moet word.'

On 8 April 2003 Carse wrote to Ribbans. The heading of the letter was 'Defacto Investments 12 (Pty) Ltd'. In the letter, Carse said:

'I want to remind you that I have [on] various occasions suggested/requested that we have regular meetings to address matters relating to this joint venture. As the financing partners, it is in your interest to have such contact and communication.'

In February 2004 when Carse was asked by Ribbans to resign as a director of Defacto, he reacted, according to him, by saying:

'Maar wat van 'n aandeelhouding, julle kan mos nie net dit doen nie.'

In August 2004 Carse received a letter to attend a meeting for his removal as a director of Defacto and consulted an attorney, who advised him to prepare for litigation to enforce the defendant's claim. In January the following year Carse and his attorney, Mr Horak, attended a meeting with Wallace. During that meeting they attempted to raise the question of a claim by the defendant. Wallace abruptly terminated the meeting. Shortly thereafter, the plaintiff instituted its claim by summons dated 10 February 2005. It must be borne in mind that the defendant was facing expensive litigation with two potential adversaries which had far deeper pockets that it did ─ the Ribbans company, and the plaintiff. When all of these facts are borne in mind Carse's conduct does not suggest that the defendant's claim is mala fide or that he had no genuine belief in its existence or validity, and his conduct in putting up R850 000 in cash to be invested by the plaintiff's attorneys pending the outcome of the litigation as security for the plaintiff's costs, tends to indicate the contrary.

[11] Carse's evidence was supported by contemporaneous documents. The original memorandum compiled by him dated 15 May 2001 was addressed to the plaintiff. It was compiled to enable the plaintiff to approach the Cape of Good Hope Bank for finance, and it was used for that purpose. It makes it quite clear that the finance was required by a joint venture between the plaintiff and the defendant. Burger's denial that the parties had agreed to embark on a joint venture subject to finance being obtained, was untenable. Even Wallace was ultimately obliged to concede that there had been such an agreement.

[12] The other contemporaneous document which is of cardinal importance is Carse's recordal of what he says Burger had told him and Wallace after he (Carse) and Wallace had made a presentation to Ribbans in June 2001. It was not suggested to Carse that the document was a forgery. It reflects the percentage payments (80/20 or 70/30 or 60/40) referred to above which Carse says Burger told him were required by Ribbans. Wallace recalled that figures were 'bandied about' at the meeting attended by himself, Carse and Burger at which Burger reported back on Ribbans' reaction to the presentation. But those figures would have been irrelevant had Ribbans insisted on purchasing the Ogden erven without any obligation to develop them as agreed by the parties to the joint venture. Burger flatly denied that the figures were discussed at all. Ribbans said that he never gave such ratios to Burger. The evidence given by the witnesses called on behalf of the plaintiff is irreconcilable with the contents of the document and counsel for the plaintiff was unable on appeal to advance any explanation how the document might have come into existence, other than on the basis testified to by Carse.

[13] In the circumstances I am not surprised that the court a quo preferred the evidence of Carse to the evidence of the plaintiff's witnesses whose evidence, as I have said, it criticised for reasons not challenged on appeal. The court a quo also set out a number of probabilities which favour the defendant's version. These were relied on on appeal by the defendant. There was no attack on appeal by the plaintiff on this part of the judgment either. I shall accordingly not repeat the findings of the court a quo, but simply

emphasise some of the probabilities which favour the defendant's version. I shall then deal with the argument that there are probabilities in favour of the plaintiff, to demonstrate that there are not.

[14] Carse entered into the written contract for the purchase of the Ogden erven on behalf of the defendant on 4 May 2001. The contract contained a suspensive condition that made it subject to the defendant being able to obtain a loan equal to the purchase price of R4 115 400 from a bank or other financial institution upon the security of a first mortgage bond to be passed over the erven. The contract also entitled the defendant to nominate a purchaser in its place, in which case the defendant bound itself to the seller as surety and co-principal debtor *in solidum* for the due performance by the nominee of all the obligations of the nominee as purchaser arising under or by virtue of the contract, including payment of any damages which might be suffered by the seller by reason of the nominee failing to fulfil its obligations arising under or by virtue of the contract.

[15] On the plaintiff's version it is difficult to understand why the defendant would have exercised its option, as it did, to nominate a shelf company in which the Ribbans company would have held all the shares, thereby incurring liability as a surety to the seller of the Ogden properties. Nor would one have expected Ribbans to request Carse, as he did via Burger, to obtain the shelf company through Carse's attorney, Mr Shaer. The defendant was also required to waive the suspensive condition in the sale agreement and rely on the Ribbans company to provide finance. According to Ribbans, his company was not obliged to develop the Ogden erven as contemplated in the joint venture ─ indeed, his evidence was that he was unaware of a joint venture. How, one may ask, did any of this benefit the defendant? It might not even have received development fees and it is inconceivable that Carse would have agreed to this. The suggestion by Ribbans was that Carse really had no option but to agree to Ribbans' terms, as the defendant faced defaulting under the contract for the purchase of the Ogden erven. But that is not so. The defendant, as Carse testified, could simply have walked away from that contract, letting it lapse by reason of the non-fulfilment of the suspensive

condition. He said that it would have done so. In argument, it was submitted that Carse needed to get the Ogden erven into other hands as the owners were not prepared to assent to a rezoning application, the grant of which was in the defendant's interests as it was developing other properties in the area. But the evidence established quite clearly that although the consent of the owners of the Ogden erven to the rezoning would have been helpful to the defendant, it was by no means necessary for the rezoning to take place. And neither of these explanations provide an answer to the question why, on the plaintiff's version, a shelf company was to be used to purchase the property, instead of Carse nominating the Ribbans company. Nor do they explain why Carse refused to resign as a director of Defacto when asked to do so in July 2001: he would have had no reason to want to stay on as a director ─ he was paid no fees and, on the plaintiff's version, Ribbans was entitled to do what he liked with Defacto and the Ogden erven owned by it.

[16] It was submitted on behalf of the plaintiff that there were probabilities in favour of the plaintiff's case. Three were relied on. First, it was submitted that it is improbable that a civil engineering contractor such as the plaintiff would have been prepared to agree to the development of the Ogden erven simply on the strength of an oral agreement, particularly because of the risks involved; and that to conclude such an agreement orally would also have been inconsistent with the policy of the plaintiff company and its practice of concluding written agreements. It was said that this is borne out by the contract in respect of an earlier development, in respect of the Breakers. But that contract was not concluded before the plaintiff commenced work on it and it was never signed on behalf of the defendant. The plaintiff had had a successful professional relationship with Carse in the past and Burger and Wallace would obviously have trusted Ribbans, who was related to Burger by marriage and with whom Burger sat on the board of a large family company.

[17] The second probability contended for in favour of the plaintiff was that the plaintiff had no independent financing. But that is the very reason why it was a condition of the joint venture agreement that the financing for the joint venture had to be obtained from a third party. Then third, it was submitted that

developing properties was not the plaintiff's core business. That, however, did not prevent the plaintiff from embarking on just such a venture after Carse had been removed as a director of Defacto, as will appear from the section of the judgment below dealing with the breach/repudiation of the joint venture agreement.

[18] I therefore find no basis upon which the court a quo can be criticised for accepting the evidence of Carse, and rejecting that of the plaintiff's witnesses. It is now necessary to consider the arguments advanced on behalf of the plaintiff on the basis that this finding was correct. As I have said, they fall under three broad headings. The first is that the defendant did not prove that a binding joint venture agreement had been concluded on the terms pleaded. Two arguments were advanced in this regard:

(a) That it was common cause that 'from the outset' the plaintiff's participation in any venture was expressly subject to a bank providing 100 per cent of the requisite finance, and a bank had not done so; and

(b) that a further essential prerequisite for the anticipated joint venture was that the parties acquire the entire shareholding in Defacto, because until this happened the cornerstone of the joint venture was not in place.

[19] If regard is had to paragraph 3 of the defendant's counterclaim quoted above, it is plain that the defendant neither alleged that a bank had to provide 100 per cent of the finance nor that the parties had to acquire all of the shares in a company to serve as a vehicle for the joint venture. Certainly, that was what the parties contemplated in the memorandum of 15 May 2001. So far as finance is concerned, it was clear that neither party could provide it and that it had to be obtained from a third party. What the parties originally contemplated was that the finance would be provided by a bank. When this failed, finance was obtained from the Ribbans company ─ with the co-operation and direct involvement of Wallace and, particularly, Burger. It would therefore be more accurate to say that it was common cause that the parties' participation in any joint venture required 100 per cent financing and that at the outset (not from the outset) it was contemplated that this would be done by a bank. So far as Defacto is concerned, it was also initially contemplated by the parties that

there would be equal shareholding in such a company. But ultimately, the joint venture agreement was, as pleaded, 'undertaken in the name of a company to be nominated as the purchaser of the Ogden erven'. Defacto purchased the erven. And it was Defacto that would have contracted with the plaintiff to provide the civil engineering works for the development, that would have contracted with the defendant to attend to the rezoning and subdivision of the Ogden erven and that would have sold the plots to the purchasers for whom the defendant would have constructed houses. Nor, as a matter of principle, was it necessary for the parties to be the sole shareholders in Defacto. Before dealing with the argument in this regard, I would say that even if the defendant's pleadings were deficient in regard to either of the points raised (finance and shareholding), the defendant's version of how the joint venture was to operate after Ribbans had agreed to put up the finance and how Ribbans' requirements were to be accommodated, was fully ventilated in evidence. Carse testified on this aspect, and so did Burger, Wallace and Ribbans, and all were cross-examined. Any deficiency in the pleadings was accordingly cured by the evidence.

[20] I return to the question whether the joint venture parties had to be the sole, and equal, shareholders in Defacto. It was submitted in the plaintiff''s heads of argument that:

'The central pillar of the joint venture pleaded by Defendant, and an inescapable requirement for its implementation, was that it would be conducted using a corporate vehicle (Defacto), in which Plaintiff and Defendant would each own 50% of the shares.'

It was further submitted that Carse 'clearly recognised' that the plaintiff and the defendant would have to be the sole shareholders in Defacto and I shall deal with this submission presently.

[21] Both propositions in the passage just quoted were conceded in oral argument to be incorrect. The concessions were well made. As appears from paragraph 3 of the counterclaim quoted above, it was not in fact pleaded that the parties to the joint venture had to be equal shareholders in Defacto. Nor was this necessary for the operation of the joint venture. A distinction must be

drawn between the joint venture agreement and the agreement between the shareholders of Defacto. The joint venture agreement was between the plaintiff and the defendant. One of the terms of that agreement was that they would share equally in the profit generated by the sale of the plots to purchasers. The shareholders' agreement was between the Ribbans company that provided the finance, and the defendant. The evidence of Carse makes it clear that that agreement recognised the joint venture agreement and therefore the term of it to which I have just referred. The shareholders' agreement also provided that the profit made by the company would be divided up in a defined ratio (depending on the number of years the development took) giving more to the Ribbans company than to the defendant in respect of the first R10 million anticipated profit, and reversing the ratio in respect of the next R10 million. The plaintiff's share was to come out of the amount paid to the Ribbans company.

[22] There were three directors of the company which acquired the Ogden erven for the development, ie Defacto: Ribbans, who would protect the interests of his company that provided the finance; Burger, who would protect the interests of the plaintiff; and Carse, who would protect the interests of the defendant. All knew of the joint venture agreement and intended that it be performed. The fact that the plaintiff was not a shareholder of Defacto is of no moment — Burger would have looked to Ribbans to protect the plaintiff's interests and as I have said, Ribbans was related to him by marriage and he was a co-director with Ribbans in a large family company. Nor does it make any difference that the defendant was a minority shareholder in Defacto. Part of the agreement between the shareholders of Defacto, which the directors intended to implement, was that ultimately the plaintiff and the defendant would participate equally in the profits made by Defacto as provided for in the joint venture agreement. The defendant would have been entitled to enforce that part of the shareholders' agreement.

[23] As I have said, it was submitted that Carse 'clearly recognised' that the plaintiff and the defendant would have to be the sole shareholders in Defacto. That is certainly what the memorandum of 15 May 2001 contemplated. But

when Ribbans came on the scene, matters changed. Carse said in cross-examination:

'U Edele, die ooreenkoms was gewees tussen my en Burger & Wallace, dit het gegaan oor 'n 50% verdeling van winste op die ontwikkeling van grond. Die aandeelhouding [in Defacto] is nie 'n aanduiding van die ooreenkoms tussen my en Burger & Wallace nie; daar was praktiese reëlings gewees hoekom die aandeelhouding in Defacto verskil van 'n 50/50 aandeelhouding. My ooreenkoms was met Burger & Wallace en dit het gegaan oor, soos ek nou net gesê het, die verdeling van winste op die ontwikkeling van grond.

. . .

Die aandeelhouding [in Defacto] het niks gemaak aan my en Burger & Wallace se ooreenkoms nie.

. . .

And the interests of the parties in the development would be determined by their shareholding in the company. --- Edelagbare, dit is nie noodwendig die geval nie. Daar kan ooreenkomste buite die aandeelhouding wees. Ek verskil van mnr Myburgh [the plaintiff's then senior counsel to whose proposition Carse was replying] op daardie punt.'

[24] I therefore conclude that the joint venture agreement as testified to by Carse, was established. The next question is whether it was breached. The defendant's pleaded case in this regard is not well phrased. The allegation in question reads:

'Contrary to the joint venture agreement and in breach thereof, the Plaintiff reneged [on] the said agreement with the Defendant and contracted with third parties to do the development on the said erven, thereby failing to honour its commitment in terms of the joint venture agreement with the Defendant.'

But the allegations are wide enough to cover a repudiation: the word 'reneged' means (according to the *Concise Oxford English Dictionary* 10 ed) 'to go back on a promise, undertaking, or contract'. And for the reasons which follow, the evidence in my view establishes the very repudiation alleged. If the events relevant to this question are set out in chronological order, the conclusion reached by the trial court, which I shall quote in due course, is inevitable.

[25] On 19 July 2001 New Invest 212 (Pty) Ltd (the Ribbans company) was

registered as the sole shareholder in Defacto. That was not in accordance with Carse's agreement with Ribbans, and Carse said that he had no knowledge of it. I have to interrupt the chronology at this point to deal with the submission that Carse's evidence in this regard should be rejected. I see no reason to do so. Ms Kim Olivier, the employee of Shelf Company Warehouse who sold Defacto to the defendant's attorney, Mr Shaer, said that it was impossible that the CM42 security transfer form would have contained the identity of the transferee, New Invest, or the number of shares to be transferred, when it left their offices. Shaer said that he had not inserted this information and could not have done so, because it was typed in and he did not possess, nor had he ever possessed, a typewriter. He sent the form to Ribbans' auditors under cover of a letter and sent a copy to Ribbans, whose evidence was that when he received the copy attached to Shaer's letter the number of shares and the identity of the transferee had already been filled in. Counsel for the plaintiff submitted on appeal that we should accept this evidence because the letter Shaer wrote to Ribbans said:

'Attached please find copy of CM42 duly completed and signed by the existing shareholder . . . .'

This meant, said counsel, that the form had been completed in all its particulars. But the letter is equally capable of the interpretation that the form had been 'duly' completed by the existing shareholder to the extent that it was necessary for him to do so, and not that the form had been completed in full. And the probabilities favour this interpretation. It was no part of the function of Shelf Company Warehouse to fill in the identity of the transferee(s) and the number of shares to be transferred. An employee from that organisation was called to say that this was never done and, indeed, such information was none of its business. And the particulars of the issuer of the security as typed in on the form, ie Defacto, as well as the name of the transferor (the then holder) are in a different type face to the typed particulars of the transferee. There is no reason to reject the evidence of Mr Shaer that he could not have filled in the particulars of the transferee. The plaintiff's counsel emphasized that Carse had given no instruction to Shaer that the shares in Defacto were to be transferred to more than one person. The suggestion obviously was that had Carse agreed with Ribbans that the shareholding would be split 80 per

cent/20 per cent, he would have informed Shaer accordingly. This argument loses sight of the fact that it was not Shaer, but Ribbans' auditors who were to attend to the transfer. I therefore accept that when New Invest was registered as the sole shareholder in Defacto on 19 July 2001, Carse had no knowledge of this.

[26] I continue with the chronology of events relevant to determining whether the plaintiff repudiated the joint venture agreement. On 14 December 2002 the plaintiff acquired 50 per cent of New Invest's shares and thereby became an equal shareholder in Defacto with Ribbans' company, New Invest. In the middle of the following year, on 10 July 2003, the plaintiff's 50 per cent shareholding in Defacto was transferred to LA Burger Investment CC, which was a vehicle Wallace and Burger at that stage used to hold their assets. Carse was not told about either of these latter two changes in shareholding.

[27] On 11 February 2004 Carse was asked to resign as a director of Defacto. He refused and was subsequently removed at a general meeting of Defacto convened for that purpose on 25 August 2004.

[28] On 6 October 2004 a presentation was made by an entity called MSP about the potential for the development of the Ogden erven. The invitation to attend the presentation forming part of the record was addressed to Wallace. Burger, Wallace and Ribbans were amongst those who attended. In cross-examination Ribbans agreed with the proposition:

'Now in its proper context, when this presentation was made on 6 October, it was a presentation to Defacto and in effect therefore clearly also to its shareholders, being New Invest and LA Burger Investment CC.'

[29] On 5 May 2005 Defacto entered into what was termed a 'Land Availability Agreement' with Steenberg Station Development Company (Pty) Ltd. The effect of that agreement was summarised by Ribbans in his evidence-in-chief as follows:

'Well, effectively we [Defacto] were the owners of the land and we undertook in this document to make the land available to Steenberg Station Development Company

which was a separate development company which would develop . . . the land and effectively buy the land from us in stages . . . .'

He then went on to agree with the proposition put by the plaintiff's counsel that:

'They [Steenberg] had the right to develop the land and in effect it's a sort of a deferred Sale Agreement. At some point they acquire the land then sell it . . . .'

[30] Ribbans testified that over R7 million was made by Defacto from the sale of the land. He said that that amount was available for distribution between the shareholders of Defacto, ie Ribbans' company, New Invest, and Burger and Wallace's close corporation, LA Burger Investment CC. In addition, Ribbans' company and LA Investments were 50 per cent shareholders in an entity called Market Demand Trading that held one third of the shares in Steenberg. The shareholders in Steenberg executed a shareholders' agreement that gave equal rights and obligations to the three shareholders. Steenberg embarked on what the defendant's counsel described as 'a full blown residential development', a description with which Ribbans agreed. Ribbans said that this resulted in 'a good return on our [Steenberg's] investment'. The plaintiff did the civil engineering works for the development.

[31] In its original counterclaim delivered in March 2006, the defendant pleaded:

'Contrary to the joint venture agreement and in breach thereof, the Plaintiff contracted with third parties to do the necessary building on [sic] construction works and failed to honour its commitment with regards to the 50% or the half share of profits on the sale of the erven as specified herein above.'

It will be recalled that the counterclaim ultimately contained the allegation that 'the Plaintiff reneged [on] the said agreement with the Defendant [ie the joint venture agreement] and contracted with third parties to do the development on [the Ogden] erven'.

[32] The court a quo said:

'There was much debate during the trial about when exactly the breach of the joint

venture agreement occurred. It is therefore necessary to look at the conduct of the parties with regard to this question. The defendant claimed that the plaintiff had in collusion with Ribbans "hijacked" the development of the Ogden erven and which conduct on the part of the plaintiffs constituted a reneging of its obligations under the joint venture agreement. In this regard the conduct of Burger was significant by his deliberate failure to disclose to the defendant the plaintiff's purchase of the 50% shareholding in Defacto and its subsequent transfer to LA Burger Investment CC. Burger was simply unable to give any reason or explanation for his conduct which in turn supported the defendant's claim that the plaintiff had in fact colluded with Ribbans and its entities to "cut the defendant out" of any role in the development of the Ogden erven. The collusive behaviour is further evidenced by the conduct of both Wallace and Burger at the meeting in February 2004 when Carse was asked to resign as a director of Defacto.'[2]

The court subsequently concluded:

'I am of the view that the breach as claimed by defendant was evidenced by the collusive conduct between the plaintiff and Ribbans in which the plaintiff reneged on its obligation in the joint venture agreement and in collusion with other entities (such as Ribbans and others) indirectly became involved in the development of the Ogden erven to the exclusion of the defendant.'[3]

Save for pointing out that the defendant's case, properly interpreted, was that the plaintiff repudiated the agreement, I find no reason to differ from this conclusion.

[33] It is convenient at this stage to deal with the argument by the plaintiff's counsel that the plaintiff could not have repudiated (or breached) the joint venture agreement until the shares in Defacto had been transferred to it. The argument loses sight of the fact that on Carse's version, the plaintiff was not to become a shareholder in Defacto.

[34] I therefore conclude that the defendant did establish that the joint venture agreement had been repudiated by the plaintiff in the manner alleged in its pleadings. The last submission made on behalf of the plaintiff was that Defacto suffered no loss inasmuch as Carse said to Ribbans that he wanted a family trust (of which he was one of the trustees) to be the shareholder in

2 Para 95.
3 Para 97.

Defacto. The argument was that profits made by Defacto would then have gone to the family trust and not to the defendant. The argument is misconceived. Had the family trust been registered as a 20 per cent shareholder in Defacto, it would have made no difference to a claim by the defendant against the plaintiff flowing from the latter's repudiation of the joint venture agreement. By becoming a member of the company, the family trust would not have succeeded to the rights or undertaken the obligations of the defendant under that latter agreement. Nor did the rights of the parties to that agreement depend upon the identity of the shareholder(s) in Defacto. The joint venture agreement was between the plaintiff and the defendant, and it is the defendant that suffered any loss of profit it would have made from constructing houses, and any loss in respect of its share of the profits made by Defacto from the sale of the plots.

[35] The appeal is dismissed with costs, including the costs of two counsel.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	J G Dickerson SC (with him R J Howie) Instructed by Edward Nathan Sonnenbergs, Cape Town Lovius Block, Bloemfontein
RESPONDENTS:	J A le Roux SC (with him E S Grobbelaar) Instructed by Fourie Basson Veldtman, Parow Walkers Attorneys, Cape Town Naudes Attorneys, Bloemfontein