THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 169/14

In the matter between:

CLIFTON DUNES INVESTMENT 100 LIMITED	**FIRST APPELLANT**
MIDNIGHT STORM INVESTMENTS 150 (PTY) LTD	**SECOND APPELLANT**

and

CITY CAPITAL SA PROPERTY HOLDINGS LIMITED	**RESPONDENT**

Neutral citation:	*Clifton Dunes v City Capital* (169/14) [2015] ZASCA 12 (16 March 2015)
Coram:	Lewis, Maya, Majiedt, Pillay and Zondi JJA
Heard:	**24 FEBRUARY 2015**
Delivered:	**16 MARCH 2015**
Summary:	Property syndication – how determination to be made in respect of loan amount due – high court's reliance on the appellants' audited financial statements in making such a determination correct – loan amount thus correctly determined – application by appellants to adduce further evidence on appeal – requirements not met.

ORDER

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

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

JUDGMENT

Majiedt JA (Lewis, Maya, Pillay and Zondi JJA concurring)

[1] Property syndication schemes have a chequered history in this country. Far too often they end up as civil or criminal cases in our courts. At issue in this appeal is the amount of a loan advanced by the first appellant, Clifton Dunes Investment 100 Limited (Clifton Dunes) to the second appellant, Midnight Storm Investments 150 (Pty) Ltd (Midnight Storm). This issue has a direct bearing on the amount due to the respondent, City Capital SA Property Holdings Limited (City Capital) as a minority shareholder in Midnight Storm. After hearing oral evidence, Griesel J in the Western Cape Division of the High Court, Cape Town, upheld the contentions advanced by City Capital (which was the applicant in the high court) and found the amount of the loan to be R20 321 248. This appeal is with the leave of the high court.

[2] Clifton Dunes and Midnight Storm are companies in a property syndication scheme (the syndication). City Capital is a 15 per cent shareholder of Midnight Storm. Clifton Dunes holds the balance of the shares. The syndication is part of some 77 property syndications involving about 160 companies in the Dividend Investment group of companies. These syndication schemes were all similarly structured in the form of either an 'Income Plan' or a 'Capital Growth Plan'. In the former instance investors in the syndication scheme would receive interest on their investment on a monthly basis, while in the 'Capital Growth Plan' investors would not receive interest, but would share in the capital profit when the property invested in is eventually sold. The rental income from the property would be utilised to settle the mortgage bond as soon as possible in order to secure a potential capital profit when the property is sold (referred to in the industry as 'gearing'). The present syndication falls into this latter category.

[3] The syndication was funded by investors who lent approximately R25 million to Clifton Dunes during 2005 to 2006. In return, investors acquired shares in Clifton Dunes from a company, Div-Vest (Pty) Ltd (Div-Vest) – which company was part of the Dividend Investment group – and the right to be repaid their investment plus any capital growth thereon. Clifton Dunes, as the holding company, then lent money to Midnight Storm, as the property-owning company, to purchase immovable property in Hatfield, Pretoria, known as the KPMG building (the property), during February 2005 in the sum of R34 305 748. The balance of the purchase price was financed through a Nedbank mortgage loan. Investors held 100 per cent of the shares in Clifton Dunes which, in return for its loan to Midnight Storm, acquired 85 per cent of the shares in the latter from Div-Vest, while Div-Vest Holdings (another company in the Dividend Investment group) held the remaining 15 per cent shareholding in Midnight Storm. City Capital later acquired this 15 per cent shareholding through a merger with the Dividend Investment group of companies.

[4] Midnight Storm utilised an amount of R20 321 248 from the approximately R25 million raised from investors in Clifton Dunes as part

payment on the purchase price of the property, which was registered in the name of Midnight Storm on 11 February 2005. On that same date, 85 shares in Midnight Storm were also transferred from Div-Vest to Clifton Dunes. The purchase consideration of these shares is one of the aspects which requires closer scrutiny since it impacts directly on the main issue. On 26 April 2012 the shareholders of Midnight Storm approved the sale of the property at a purchase price of R43.5 million and the deed of sale was concluded on 8 May 2012. This represented a return on investment of just over R9 million over a seven year period for Midnight Storm. It is common cause that subsequent to the sale of the property investors were repaid the sum of R30 million.

[5] The present dispute arose because City Capital alleged that the amount of the loan from Clifton Dunes to Midnight Storm (the Clifton Dunes loan) was R20 321 248, whereas the appellants contended it to be R25 million. City Capital applied to the high court for a declaratory order that the Clifton Dunes loan was in the above amount of R20 321 248 and for an order directing Midnight Storm to pay to it the sum of R3 160 608 in respect of the net proceeds of the sale, together with accrued interest. If the appellants' contentions are correct that the Clifton Dunes loan actually amounted to R25 million, a lesser amount would be due to City Capital. By agreement between the parties, the amount claimed by City Capital, R3 160 608, is presently being held in an interest bearing trust account by a firm of attorneys (the erstwhile third respondent in the high court who did not participate at all in those proceedings) in terms of s 78 of the Attorneys Act 53 of 1979.

[6] Due to the factual disputes on the papers, Smit AJ referred the following issues to oral evidence:

(a) the amount (if any) of the loan repayable to Clifton Dunes by Midnight Storm on 6 December 2012 pursuant to the contractual relations between the parties dealt with in the founding affidavit; and

(b) the amount (if any) payable by Midnight Storm to City Capital of the proceeds derived from Midnight Storm's sale of the property.

After hearing oral evidence from both sides, Griesel J found for City Capital and granted the relief sought.

[7] Before deliberating on the main issue, it is necessary to deal with a preliminary issue, namely the appellants' application for leave to adduce further evidence on appeal. We dismissed the application at the commencement of the hearing. These are the reasons for that order. The new evidence concerned City Capital's rights to claim what was in effect a dividend from Midnight Storm, based on its rights as a shareholder. The appellants contended that the new evidence suggests that City Capital was not a shareholder. The application was opposed broadly on the grounds that the new evidence could and should have been adduced at the trial, that it is neither material to nor dispositive of the issue on appeal and that there are no exceptional circumstances warranting its admission, nor do the interests of justice require its admission. The further evidence emanated from an enquiry held in terms of s 417, read with s 418 of the Companies Act 61 of 1973, during November 2014. The appellants claim that they were not aware of these new facts before they emerged at this enquiry. They say that the evidence at the enquiry shows that a 'resolutive condition' in the sale of shares agreement between Div-Vest Holdings and City Capital was never fulfilled, that consequently the agreement is void from its inception and that City Capital therefore never became a shareholder of Midnight Storm. Some background facts are necessary to place this aspect in its proper contextual setting.

[8] Div-Vest Holdings is part of the Dividend Investment group of companies. It was the holding company of all the property-owning companies in the group. On 28 September 2007 Div-Vest Holdings concluded a sale of shares agreement with City Capital in terms of which it sold all its shares in the property-owning companies (including Div-Vest) to City Capital for R32 169 751.76. The 'resolutive condition' under discussion appears in clause 5 which reads as follows:

'5. **RESOLUTIVE CONDITION**

5.1 This agreement is subject to the resolutive condition that a legally binding and valid agreement be entered into and be successfully and fully complied with between City Capital Investment Holdings (Proprietary) Limited (Registration

No. 2005/028522/07) and all the Shareholders of Div-Vest Holdings (Proprietary) Limited (Registration No. 1969/001986/07) as on the Signature Date in terms whereof City Capital Investment Holdings (Proprietary) Limited (Registration No. 2005/028522/07) shall purchase the entire shareholding of all the Shareholders of Div-Vest Holdings (Proprietary) Limited (Registration No. 1969/001986/07) held in Div-Vest Holdings (Proprietary) Limited (Registration No. 1969/001986/07) on the Signature Date.'

[9] In the high court, the litigation was conducted on the basis that this 'resolutive condition' had been fulfilled. The agreement also contains the standard non-variation and non-waiver clauses. At the enquiry Mr Jacobus Carstens, director and CEO of City Capital, and Mr Chris Blaauw, a broker who assisted the Dividend Investment group to source properties for syndication schemes, testified. According to them no agreement had ever been entered into between City Capital Investment Holdings (Pty) Ltd and Div-Vest Holdings (Pty) Ltd. The upshot of this, say the appellants, is that City Capital acquired no rights as a shareholder in Midnight Storm and consequently had in fact lacked the requisite *locus standi* to have brought the application in the high court.

[10] As is evident from clause 5.1 above, it was not the respondent company, but City Capital Investment Holdings (Pty) Ltd which had to conclude an agreement with all the shareholders of Div-Vest Holdings. I shall for the sake of clarity refer to this other company as 'City Capital Holdings'. The condition is described as 'resolutive' in clause 5.1. The appellants say that this is a misnomer and that the condition is in fact suspensive in nature. In R H Christie and G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 145, the distinction is drawn between these two conditions as follows:

'A condition precedent [ie a suspensive condition] suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, whereas a resolutive condition [sometimes referred to as a 'condition subsequent'] terminates all or some of the obligations flowing from the contract upon the occurrence of a future uncertain event.'

As the learned authors correctly point out (at 145-146), when such a condition applies to only part of a contract, it is not easily classifiable. The determination of the type of condition is a matter of construction. A court will not restrict itself to the designation that the parties afford the particular clause and the use of the words 'subject to' are usually (but not always) indicative of a suspensive condition – see *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 884E-G. A resolutive condition has the effect that upon the happening of a designated future event, the agreement itself is terminated. In terms of clause 5.1, if the agreement between City Capital Holdings and Div-Vest Holdings' shareholders came into being as envisaged, the entire sale agreement would terminate. On the common cause facts this agreement never came into existence. The agreement of sale thus never lapsed as contended by the appellants.

[11] The condition is, on its plain language and in its contextual setting, clearly resolutive in nature. And the parties conducted themselves throughout on this basis and not as if the condition was suspensive. The appellants made reference to and placed reliance on the agreement in a letter to investors by their director, Dr David Ferreira, and in their answering affidavit in this matter (deposed to by Dr Ferreira). The appellants cannot in law after the fact avoid the consequences of a contractual term, the meaning of which they had agreed upon with the respondent, and acted upon accordingly by both parties (see: *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA) para 25). The material prejudice to the respondent is self-evident – its *locus standi* is being subjected to attack at this late stage notwithstanding the plain meaning of the clause as a resolutive condition and despite the fact that both parties to the contract have acted throughout on this common understanding of what the clause entails. The application does not meet the well-established requirements for the adducing of new evidence on appeal. For these reasons we dismissed the application with costs, including the costs of two counsel.

[12] Reverting to the main issue – a convenient place to start in finding the answer to the divergent contentions is the series of tripartite agreements entered into between the investors, Clifton Dunes and Div-Vest. These

agreements form the genesis of the entire transaction. One such agreement, representative of all of the agreements signed by the investors, is an annexure to the appellants' answering affidavit. It is called a 'Property Capital Growth Plan agreement' and it is between an investor, Ms Maria Johanna Grobler (the investor), Div-Vest (the principal) and Clifton Dunes (the company). I shall for the sake of convenience refer to it simply as 'the tripartite agreement'. Its preamble records that the investor and Clifton Dunes had agreed to enter into a loan agreement in terms of which the investor would advance money to Clifton Dunes 'to enable it to purchase certain investments and make other investments in terms of paragraph 2'. It is recorded further that in return Clifton Dunes would pay the investor interest as set out in the agreement. Clause 2 is of decisive importance in this case. It reads as follows:

'**2. DUTIES AND OBLIGATIONS OF THE PARTIES TO THIS AGREEMENT:**

2.1 The Investor hereby undertakes to loan the Company upon signature of this agreement by all parties hereto the amount of R200,000.

2.2 The Company undertakes to:

2.2.1 Purchase immovable property described as Erf 748, Hatfield Township Registration Division J.R., Province of Gauteng; measuring 5 716 square metres and to nominate a newly formed unencumbered private Company as the purchaser thereof (hereinafter referred to as "the Property Company") *of which the Principal at its inception shall own all the issued share capital.*

2.2.2 loan an amount to the Property Company to be utilized towards a *portion of the purchase price of the immovable property* referred to in paragraph 2.2.1 above.

2.2.3 To raise a bond with a financial institution to finance the balance of the purchase price.

2.2.4 *to purchase 85% of the issued share capital of the Property Company from the Principal on date of registration of transfer* of the immovable property in the name of the Property Company.

2.2.5 Credit the investor in the books of the Company with a loan account reflecting the full value of the loan to the Company *and to repay such loan account first before any other payments are made* in the event of the immovable property of the Property Company being sold. (my emphasis)

[13] It is common cause that, save for clause 2.2.4 (which is the primary bone of contention), the parties have complied with their obligations set out in clause 2. The investors lent an amount of R25 million to Clifton Dunes (in terms of clause 2.1 of the various tripartite agreements), which utilized R20 321 248 thereof as a loan to Midnight Storm as part of the purchase price of the KPMG building (clauses 2.2.1 and 2.2.2). A loan, secured by a mortgage bond, was raised with Nedbank to pay the balance of the purchase price (clause 2.2.3). On the common cause facts the original loan amount was R23 million to make up for the shortfall in the investor contributions at the time of the acquisition of the property. These contributions increased from approximately R10.5 million at that time to the eventual total of R25 million. The Nedbank loan amount was then reduced to R14 million. It is lastly common cause that the investors were duly credited in Clifton Dunes' books with loan accounts reflecting the full value of their loans and that they were repaid a total of R30 million, ie an amount in excess of what they had initially invested, when the property was sold (clause 2.2.5). What remains then for consideration is the dispute concerning clause 2.2.4.

[14] On the common cause facts the amount of R4 678 752 (the disputed amount) was transferred from the trust account of attorneys Minde Schapiro and Smith (MSS), who had received all the investors' contributions, to Div-Vest. The appellants contend that this payment was irregular since it constitutes a 'syndication fee' or 'gross profit' to Div-Vest which falls outside the parties' agreement. City Capital on the other hand, avers that this amount constitutes the purchase consideration in respect of the 85 per cent shareholding in Midnight Storm in terms of clause 2.2.4 above. That amount was paid over a period in different sums to Div-Vest. The papers and the oral evidence hold the key to this dispute.

[15] City Capital placed strong reliance on the appellant companies' audited financial statements and the evidence of Mr Gerrit Nel, a director of Clifton Dunes, who had been centrally involved as in-house accountant in the preparation of the companies' books. The appellants relied primarily on the content of the share transfer form (the so-called 'CM42 form') reflecting the transfer of 85 shares in Midnight Storm to Clifton Dunes at a consideration of nil Rand. This, so the appellants contend, together with the absence of any documentary proof that there has been payment for the shareholding or that the information contained in the audited financial statements is factually correct, support their case that the disputed amount constitutes an irregular payment.

[16] The audited financial statements of Clifton Dunes for the 2007 financial year reflect the loan from Clifton Dunes to Midnight Storm as being

R20 321 248. They record the 'investment in subsidiary' as being R4 678 752 (ie the disputed amount). These entries are supported by the working papers prepared by Mr Nel for the auditors, Price Waterhouse Coopers (PWC). They were signed off by the companies' directors and they accord with the 2006 audited financial statements. In addition, in a letter to investors dated 23 March 2012, Dr Ferreira stated that the Clifton Dunes loan was in the same amount.

[17] I turn to a brief recital of the evidence germane to the dispute. Mr Louis Meyer is an attorney and conveyancer from MSS who was instructed by Div-Vest to attend to the transfer of immovable properties to property-owning companies in some of the Dividend Investment syndications, including the present one. He only rendered conveyancing services and his firm received the investors' contributions into its trust account. Mr Meyer was not involved at all in the details of the various property syndications. In the present matter he was aware of the existence of Midnight Storm as the property-owning company in whose name the property was to be transferred. But he was understandably unaware of the existence of the holding company, Clifton Dunes. The appellants' criticism of this aspect of his evidence is misplaced. Why, one might ask, would a conveyancer in Mr Meyer's position on the present facts, have had to be aware of the existence of a company which played no role whatsoever in the conveyancing and registration of transfer of the property? Mr Meyer's evidence was largely unchallenged, understandably so, because he played a peripheral role insofar as the main issue is concerned.

[18] Mr Nel gave direct evidence of how the property syndication was structured and how the contentious amounts reflected in the annual financial statements were arrived at. Div-Vest employed him as an accountant, responsible for attending to the investor contracts, liaison with MMS and the preparation of working papers for PWC in connection with all the property syndications. He was a director of Clifton Dunes. At the time when he gave evidence, Mr Nel was no longer in the employ of Div-Vest, or its successor, City Capital. He executed his tasks in the present matter by recording investors' investments in Clifton Dunes, he kept the accounts and financial records for its subsidiary, Midnight Storm, for the purposes of the audit and ensured that annual general meetings were held for both companies. He explained how the syndications were structured and implemented. In respect of what his duties entailed regarding the bookkeeping for Midnight Storm as the property owning company, Mr Nel testified as follows:

'That would be the rental invoices that goes out on a monthly basis, any expenses that have been paid during the year, VAT returns, reconciling the sales and the VAT and then confirming the loan accounts between the companies.'

And in respect of Clifton Dunes:

'That would basically be the working paper file on all the shareholders or all the investors, what their loans are, how many shares they have in the company to make sure that that corresponds to the actual share register of the company and then to confirm the balance of the loan to the property company as well as any other investments the holding company would have.'

[19] Mr Nel explained that in every Div-Vest property syndication, the holding company would buy 85 per cent from Div-Vest for the difference between the syndication value and the actual purchase price and in the Capital Growth Plan it would be the purchase price less the bond, which gives the net amount that investors had to put in and the difference between the net amount and the gross amount that they actually put in was the investment in shares. Transposed to the present instance, this means that the syndication value was R39 million (investors' contributions in the sum of R25 million plus the eventually reduced Nedbank loan of R14 million), the actual purchase price of the KPMG building was R34 305 748 and the net amount was R20 321 248. The difference between the gross amount that the investors contributed (R25 million) and the net amount (R20 321 248) is the actual investment of 85 per cent of the shareholding in the subsidiary (the disputed amount).

[20] In this court the thrust of the appellants' attack was based on two main interrelated grounds: First, that the CM42 form does not, as is to be expected if Mr Nel's explanation was correct, reflect the disputed amount, but nil Rand. Second, that there is no independent documentary proof supporting the entries in the PWC financial statements. Mr Nel explained that the entry on the CM42 form was a mistake. He was extensively cross-examined on this aspect and several other similar entries in other similar property syndications were pointed out to him. These, he said, were all mistakes. Before us the appellants' counsel argued with considerable vigour that this explanation is untenable. Counsel's argument went that the CM42 form here, and in all the

other instances, in fact correctly reflected the true position, namely that there was no consideration paid for the 85 per cent shareholding in Midnight Storm. Counsel submitted that the disputed amount was in fact misappropriated by Div-Vest as 'syndication fees'. When pressed, counsel expressly refrained from labelling Mr Nel a lying witness. But his evidence on these aspects (the purchase consideration for the 85 per cent shareholding, the CM42 form's contents and the information furnished to PWC for the audit in respect of the two disputed entries) falls to be rejected, so it was contended.

[21] Mr Tertius Bruwer, a chartered accountant and director at PWC, took over the appellant companies' audit as supervising external auditor from 30 June 2007. He testified that PWC had previously prepared the financial statements and the audits for the Dividend Investment group of companies. From 30 June 2006, however, the financial statements were prepared in-house and PWC was responsible for the audits only. Mr Nel played a central role in assisting PWC with the audits, since he was the *de facto* financial manager in charge of the companies' finances. PWC performed the audits (including the present ones) by examining Mr Nel's working papers, the source documents (where necessary) and by gaining a clear understanding of the entries in previous financial years. PWC's assessment of the working papers entailed an exercise of their professional discretion after taking into account all the documents, their instructions, the parties' intention in respect of the contracts, the context, previous financial statements and the way the property syndication worked. In the present instance he was satisfied that the 2006 audited financial statements correctly reflected the companies' financial

position and the intercompany transfers. On this basis he signed off the appellant companies' financial statements for the 2007 and 2008 financial years. Bruwer said he regarded CM42 forms as administrative documents which reflect the outcome of a share transaction only and which do not necessarily constitute conclusive proof thereof. According to him, auditors did not always retain the source documents inspected during the audit.

[22] Dr Ferreira testified on behalf of the appellants. In his view, investors had been deliberately misled by Div-Vest regarding their potential returns on investments. In his letter to investors, his reference to the Clifton Dunes loan as being R20 321 248 was based in good faith upon the audited financial statements. When he became involved between 2011 and 2012 as a director of a number of companies in the property syndications, including Clifton Dunes and Midnight Storm, he did so out of concern for their investments and he investigated matters as fully as he could. He contested the accuracy of the financial statements and alluded to the fact that he and the other directors had instructed PWC to correct the 2007 financial statements in respect of the two disputed entries, something which had not been done at that stage.

[23] There are a number of strongly persuasive factors which support City Capital's case. They are the audited financial statements, Dr Ferreira's letter to investors and the tripartite agreement itself. The only countervailing factor is the CM42 share transfer form. Can it be a genuine mistake, particularly in view of the similar entries in several other similar forms in respect of other similar transactions? For this court to find that it is not would, in my view,

require us to find that Mr Nel lied under oath and that he was part of an elaborate scam to, in colloquial terms, ‘cook the books’ to mislead investors. I have a number of grave difficulties in reaching such a drastic conclusion.

[24] First and foremost, it is imperative to emphasize at the outset that this case is not about fraudulent misrepresentation or the non-disclosure of material facts. The issues to be decided are crisp, as outlined in the order of Smit AJ referring the matter for oral evidence (see para 6 above). This aspect appears to have been obfuscated by the appellants’ case, both here and in the high court, an aspect commented on by Griesel J. Thus, for example, both Dr Ferreira and Prof Willem van der Walt, an accounting expert called by the appellants, primarily complained about investors having been deliberately misled. That is an aspect which must be investigated by the ongoing s 417 enquiry, referred to above. It is not for this court to determine.

[25] Second, Mr Nel is highly unlikely to have been complicit in such an elaborate, epic scam. As stated, he was no longer in the employ of Div-Vest when he testified. He held no shares in the Dividend Investment group, which was run by the Carstens brothers and Mrs Angela Carstens (Mr Etienne Carstens’ spouse). Mrs Carstens was a director of Clifton Dunes, together with Mr Nel. When asked why he was also appointed as a director, Mr Nel answered as follows:

‘It [Clifton Dunes] was a public company which required two directors and Mr [Etienne] and Mrs [Angela] Carstens asked me to be the other director’.

Mr Bruwer's evidence went largely unchallenged, correctly so. But the appellant's case is that PWC had drawn up the disputed financial statements on incorrect information from Mr Nel. An auditor, said Boshoff J in *Tonkwane Sawmill Co Ltd v Filmalter* 1975 (2) SA 453 (W) at 455C-D, is a watchdog, but not a bloodhound. In approving this dictum, Holmes JA described the duty of an auditor appointed under the Companies Act as follows in *Lipschitz and another NNO v Wolpert and Abrahams* 1977 (2) SA 732 (A) at 741G-H:

'An auditor appointed under the Companies Act is a professionally qualified person. He is a scrutineer with a critically enquiring mind. He maintains his independence at all times. He takes no instructions from directors, shareholders or creditors. He carries out his statutory prescribed duties with a reasonably high degree of skill and diligence in the circumstances and in the light of modern conditions and standards.'

In my view, Mr Bruwer and PWC had duly fulfilled their duties. It is evident from the papers that they queried numerous entries in the working papers with handwritten notes. And, where required, they issued modified audit reports. There is nothing untoward in the manner in which Mr Bruwer and PWC performed their functions. Of considerable importance is Mr Bruwer's evidence that a CM42 form is largely administrative proof of the result of a transaction and that it is not conclusive proof of the transaction itself.

[26] The third aspect, which relates primarily to Mr Nel's evidence, but also to that of Mr Bruwer's, is the manner in which they were cross-examined. It was never put to Mr Bruwer in cross-examination on what basis it was alleged that the Clifton Dunes loan amounted to R25 million and not as reflected in the financial statements, nor why PWC should have recorded the loan amount thus. And, even more importantly, it was never put to Mr Nel that his evidence

about the CM42 form contaminated his entire evidence and, in direct terms, that he was a liar and in what respects this was so. While the general tenor of the cross-examination was to the effect that the nil Rand entry on the form could not have been a mistake, this does not suffice. In the by now well-known dictum of the court in *President of the RSA and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at para 61, the duties of a cross-examiner were outlined as follows:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct'.

Mr Nel was never afforded an opportunity to deal directly with the contentions now being advanced on appeal, namely that he was part of a grand and elaborate scam to fleece unsuspecting investors of their moneys. This the law does not countenance. In any event, while the mistake may at first blush appear to be somewhat startling, one must not lose sight of the fact that Mr Nel, on his uncontested evidence, had signed reams of documents at that time. The extent of the Dividend Investment group's involvement in property syndications is evident from para 2 above.

[27] Mr Nel's evidence in general and his explanation of how the property syndication worked and how the figures are arrived at is consonant with the tripartite agreement, the structure of all the other property syndications and the audit papers. The tripartite agreement expressly stated in clause 2.2.4 that Clifton Dunes undertook to *purchase* 85 per cent of the issued share capital of Midnight Storm from Div-Vest on the date of registration of transfer of the KPMG building. It is beyond comprehension why Div-Vest would have been prepared to part with 85 per cent of the shares in Midnight Storm for no consideration whatsoever from the Clifton Dunes shareholders (the investors). This would amount to an unbusiness-like gratuitous donation. On a balance of probabilities, absent any proof by a party who alleges a donation, a court will be disinclined to presume that the other party would part with property for no consideration – see the general discussion in the title on 'Donations', 8(1) *LAWSA* (2 ed) para 315 by P R Owens.

[28] Much was made during argument by appellants' counsel of the fact that some of the disputed amount had been utilised by Div-Vest to pay sundry expenses such as broker commissions. The criticism is unfounded. As correctly pointed out by the learned judge in the high court during the course of Mr Nel's cross-examination, these funds were part of the proceeds of the sale by Div-Vest of the 85 per cent of Midnight Storm's shares to Clifton Dunes. Div-Vest was at liberty to do with those proceeds as it pleased. During the course of the exchange with Griesel J, appellant's counsel remarked that the appellant's difficulty was that Div-Vest 'talk[s] about a syndication price but that money is not there'. In this court argument for the appellants was

presented much along the same line. But this is a misunderstanding of how the transaction worked. So too is the oft repeated submission before us that the money (ie the disputed amount) could only have been used once – it could not have been used as a syndication fee as well as the purchase consideration for the shares. The obfuscation arose as a result of counsel's constant reference, particularly during the Mr Nel's cross-examination, to the disputed amount as being Div-Vest's 'syndication fee'. That it may well have been in the end, but in strictly legal technical terms that disputed amount was simply the purchase consideration paid by Clifton Dunes to Div-Vest for the 85 per cent shareholding in Midnight Storm in terms of clause 2.2.4 of the tripartite agreement. And, in strictly accounting technical terms, it was as correctly reflected in the audited financial statements of Clifton Dunes, an 'investment in the subsidiary'. Upon the purchasing of the 85 per cent shareholding, Midnight Storm became a subsidiary of Clifton Dunes (ie the latter owned a majority of the share capital of Midnight Storm). In marketing documents the disputed amount was at times referred to as the 'opportunity cost to the investor'. This simply meant, as Mr Nel explained, that the investor was able, through the syndication, to buy into a top grade commercial property for as little as R100 000 (the minimum investment amount).

[29] In summary and in conclusion: I am satisfied that the entry in the CM42 form relating to the present transaction was an honest mistake on the part of Mr Nel. The audited financial statements correctly reflect the Clifton Dunes loan as being R20 321 248. The disputed amount was similarly correctly reflected as an 'investment in subsidiary'. It follows that the high court was

correct in its findings in favour of City Capital on the two issues which were referred for oral evidence. The appeal must therefore fail.

[30] The following order is issued:

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

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S A Majiedt

Judge of Appeal

Appearances

For the Appellants: F Joubert SC (with him J de Vries)

Instructed by:

Lombard & Kriek Attorneys, Parow

Webbers Attorneys, Bloemfontein

For Respondent: A C Oosthuizen SC (with him R J Howie)

Instructed by:

Werksmans Attorneys, Cape Town

Rosendorff Reitz Barry Attorneys, Bloemfontein