Antoinette -

IN THE HIGH COURT OF CAPE TOWN
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A396/12

In the matter between:

RAPIPROP 31 (PTY) LIMITED **Appellant**

and

NIGEL HUGO WAKEFORD IRONSIDE **First respondent**
BARBARA IRONSIDE **Second respondent**

JUDGMENT DELIVERED ON 28 AUGUST 2012

BLIGNAULT J:

[1] This is an appeal from a judgment of a single judge of this court. Appellant, Rapiprop 31 (Pty) Ltd (first defendant in the court below), was ordered to pay an amount of R150 000,00 plus interest and costs to first and second respondents, Mr Nigel Ironside and Ms Barbara Ironside. They were first and second plaintiffs in the court below. The judge also dismissed a counterclaim brought by appellant. I shall refer to the parties herein as Rapiprop, Mr Ironside, Ms Ironside and, where applicable, to the Ironsides.

The pleadings

[2] The Ironsides claimed damages from Rapiprop in the amount of R277 752,01. The claim arose from the sale on 20 December 2003 by Rapiprop to the Ironsides of Units A4 and A6 in a sectional title scheme then in the course of development, known as Cape Sands, Beach Road, Strand. A separate written agreement was concluded in respect of each unit. The terms and conditions of the two agreements are substantially the same. In each agreement it is stated that the property had not been constructed yet. The purchase price for Unit 4 was R2 300 000,00 and for Unit 6 R2 415 000,00.

[3] The Ironsides alleged that they had performed their obligations in terms of the agreements and paid the purchase price for each unit. Rapiprop had passed transfer of the properties to them subject to an undertaking by Rapiprop's attorney to retain an amount of R200 000 ,00 in his trust account as security for the completion of the properties by Rapiprop and the rectification of defects therein.

[4] According to the Ironsides various defects existed in the units at the time of transfer which arose from defective and incomplete building work by Rapiprop. The defects are set out in a report of architect Adri Beukes of the firm LBV Consulting, annexed to the particulars of claim.

[5] The Ironsides stated that despite demand Rapiprops failed to rectify the defects. As a result of this breach of contract on the part of Rapiprops, they suffered damage in the sum of R277 752,01, being the costs of repairing the defects and completing the work. The Ironsides claimed, in the alternative, that they are entitled to a reduction of the purchase price by R277 752,01 and the repayment thereof to them.

[6] The Ironsides later joined Rapiprop's attorneys, the firm of Leon Frank and Partners, as a second defendant by reason of any interest that it might have in the litigation as a result of the sum of R200 000,00 retained by it. Leon Frank and Partners did not participate in the proceedings and it is not a party to this appeal.

[7] In Rapiprop's plea was pleaded, *inter alia*, that it was agreed that Leon Frank and Partners, would retain R200 000,00 of the purchase price to be held in trust until such time as any incomplete or defective work on the properties had been completed or remedied by Rapiprop.

[8] Rapiprop pleaded further that the defective or incomplete work had been rectified to the extent that it was capable of doing it. The defects, it stated, were minor defects or snags which it would have remedied at its own cost but was prevented from doing so because the Ironsides barred

the building contractors from entering the two units and employed independent contractors in July 2006 to rectify and complete the work.

[9] Rapiprop instituted a counterclaim against the Ironsides for payment to it of the amounts of R200 000,00 (claim A) and R118 520,88 (claim B). It alleged in para 10 of the counterclaim that the sum of R200 000,00 (claim A) was retained by its attorneys in terms of a verbal agreement between the parties, concluded on or about 7 July 2006, until all the outstanding or defective work had been completed or remedied. Rapiprop alleged that it had completed or remedied the bulk of the outstanding work but was precluded from completing it because the Ironsides employed independent contractors in August 2006 to do the work. Rapiprop alleged that the value of the work done by it since the date of transfer, exceeded the sum of R200 000,00.

[10] The amount of R118 520,88 (claim B) was claimed by Rapiprop as occupational interest in terms of the provisions of the sales agreements. The Ironsides, it alleged, were given occupation of the properties on 12 April 2006. Registration of transfer of the properties was effected on 8 July 2006. Calculated in accordance with the prime interest rate charged by Absa Bank, interest over the period in question amounted to R118 520,88.

[11] The Ironsides filed a plea to the counterclaim. They pleaded, *inter alia*, that occupational interest would only have become due once the property could have been fully utilised as a residence.

[12] The Ironsides pleaded further that the terms of the verbal agreement of 7 July 2006, referred to by Rapiprop in its counterclaim, were embodied in a letter, dated 6 July 2006, written by their attorneys to Rapiprop's attorney and accepted by him. A copy of this letter was annexed to the plea. One of the terms of the agreement is that there were outstanding and/or defective works and that Rapiprop would be afforded an opportunity to complete such works by 14 July 2006, failing which the Ironsides would be entitled to employ a third party to complete the works and to offset the costs thereof against the sum retained by Rapiprop's attorneys.

[13] The Ironsides pleaded that Rapiprop failed to complete or rectify any of the defective and incomplete works by 14 July 2006. After 14 July 2006 the Ironsides employed contractors to carry out such work.

[14] Rapiprop filed a replication to the Ironsides' plea to its counterclaim. Rapiprop denied that an agreement was concluded on the basis of the terms set out in the Ironsides' attorney's letter of 6 July 2006. In the alternative it pleaded that the alleged agreement offended

against the provisions of clause 15 of the agreements of sale which provided that no modification, variation or alteration of the agreement would be valid unless in writing and signed by both parties. The alleged agreement, according to it, is therefore void.

The Ironsides' Evidence

[15] Mr Ironside testified that he lived in Germany and that he and his wife, Ms Ironside, became interested in the flats whilst they were holidaying in South Africa. They went to Rapiprop's agents' sales office and after viewing brochures and specifications of the project they decided to purchase the two units. On 9 December 2003 they signed the agreements of sale for the two units.

[16] Towards the end of 2005, on a visit to South Africa, he found that the buildings, which were still under construction, contained a variety of defects. On 4 November 2005 he walked through the flats with Mr Monty Jordaan, the chief executive officer of Multi Projects, Rapiprop's agent for the project. He prepared a detailed list of all the defects and sub-standard items of work which he had found in each flat and he provided all interested parties with copies thereof. He had meanwhile prepared a list of variations that had been agreed upon. The architect costed them at R49 240,00. He thought that the cost was excessive and

he discussed it with Mr Jan Woestyn, the developer's son, who agreed with him and reduced the cost of these variations by agreement to R25 000,00.

[17] In December 2005 Mr Ironside instructed an attorney, Mr Athol Gordon, to protect his interests. He also appointed Mr John Gray to act as project manager on his behalf. On 7 March 2006 he was advised by Rapiprop's attorneys that it was confident that the building should be finished within the next three weeks. On 7 April 2006 the City of Cape Town issued occupational certificates. The effect of this, counsel for Mr Ironside explained, was that the units were safe for human occupation. On 11 April 2006 Rapiprop's attorney wrote a letter to Mr Ironside's attorney informing him that he had been instructed that the building has been completed and would be inspected by the architects during the course of the week with a view to issuing the necessary occupation certificates.

[18] According to Mr Ironside he never received a certificate of *beneficial occupation*. He saw a *certificate of completion* only in 2007. As far as he was concerned the latter had nothing to do with him. It was a matter between the developer and the contractor. On 12 May 2006 Rapiprop's attorney issued invoices for the purchase prices which

included amounts for extras. Rapiprop, however, later abandoned the claims for extras.

[19] Mr Ironside testified that he had an informal meeting with Mr Woestyn towards the end of June. A number of e-mail communications had passed between the parties. A list of defects had been conveyed to Woestyn as well as Mr Ironside's calculation of the costs to repair them. Those came to R151 333,62 for unit A6 and R148 975,00 for unit A4. He (Mr Ironside) offered to pay the purchase prices immediately against transfer provided that an amount of R300 000,00 be retained in trust pending the repair of the defective work. Mr Woestyn telephoned him later and at his (Mr Woestyn's) request he agreed to reduce the amount of R300 000,00 to R200 000,00. He also agreed that this amount could be paid into Rapiprop's attorney's trust account rather than retained by Rapiprop. This arrangement was conveyed in writing by Mr Ironside's attorney to Rapiprop's attorney.

[20] On 5 July 2006 Mr Ironside's attorney furnished, at Rapiprop's attorney's request, a breakdown of the amounts which he sought to deduct from the purchase prices upon transfer. The letter was accompanied by detailed spreadsheets.

[21] On 6 July 2006 a meeting by conference call took place. He was calling from Germany and his attorney, Mr Gordon, was in his office and Ms Michelle Marais, the attorney representing Rapiprop at the time and Mr W Woestyn were in Ms Marais' office. They were discussing a fifth draft of a proposed agreement which had already been the subject matter of negotiations for a few days. By the end of the meeting all relevant aspects had been agreed upon.

[22] On 6 July 2006 Mr Ironside's attorney wrote a letter addressed to Ms Michelle Marais. This letter became the subject matter of the principal dispute between the parties. The introductory part of the letter refers to various telephonic conversations between the respective attorneys on the previous day and that day. It proceeds with the following paragraph:

> *'We confirm that it is proposed to resolve the questions of retention of a portion of the purchase price in respect of the property sales as also the question of completion of outstanding works required to the properties on the following basis: ..."*

[23] The letter of 6 July 2006 then proceeds with 10 numbered paragraphs. Paras 1 to 8 are relevant. I quote them in full:

> *"1. Against registration of transfer of the properties in our clients' names at the deeds registry office tomorrow we shall hand to you*

our trust cheques in the respective sums of R2 048 975,56 (in respect of unit A4) and R2 151 333,63 (in respect of unit A6) ("the funds").

2. *There are outstanding and/or defective works ("the works") required to be completed in respect of the properties. Your client shall be afforded an opportunity to complete such works by 14 July 2006. The completion or otherwise of the works shall be determined jointly by your clients architect and our clients' appointed architect ("the architects").*

3. *Your firm undertakes to retain an amount of R200 000,00 of the funds in your trust account on the terms and conditions set out below.*

4. *The sum of R200 000,00 will be retained by you in trust until 14 July 2006 upon which date such sum certified by the architects and the Co-Signator, Mr Athol Gordon, refer §7, to be due to our clients shall be paid back to us.*

5. *Whether or not the works have been completed shall be determined by the architects who shall, on 14 July 2006, conduct a joint inspection of the properties and prepare the certificates envisaged in paragraph 3 above.*

6. *You will not be entitled to pay any portion of the sum of R200 000,00 to your client unless such sum is jointly certified by the architects to be due to it and the writer has authorised such payment in writing.*

7. *In the event that your client does not make available units A4 and A6 for certification on or before 14 July 2006 by reason of the*

work required to be done thereto not being complete then our client shall be entitled to retain the services of a third party contractor from that date to complete the works and to offset the costs of such third party contractor against the sums retained in trust by you without affecting any existing Building contractors' guarantees.

8. *Such interest as shall accrue on the sum of R200 000,00 until 14 July 2006 shall be for your client's benefit."*

[24] The letter ends as follows:

"Kindly confirm that your client accepts this proposal in writing whereupon we shall arrange for our cheques to be handed to you at the deeds office tomorrow once registration of the properties has been effected in our clients' names".

[25] On 7 July 2006 the Ironsides' attorney sent two trust cheques for R2 151 million and R2 048 million respectively to Rapiprop's attorney. In the covering letter it was stated that these cheques *"have been handed (and accepted) by you on the terms set in our telefax to you dated 6 July 2006"*. Neither Mr Ironside nor his attorney received any communication from Rapiprop or its representatives in regard to the contents of this letter. Transfer of the apartments was passed on 7 July 2006 against the delivery of the cheques.

[26] Mr Ironside appointed Ms Adri Beukes as his architect to act as envisaged in para 5 of the agreement of 6 July 2006. On 14 July 2006, the agreed date for the completion of the work, Mr Ironside wrote to respondent's attorney informing him that Rapiprop's architect had refused to meet his own architect on site. It was therefore impossible for the architects to reach agreement on the outstanding work.

[27] Neither he nor his representatives received any communication from Rapiprop in response to this letter at that time. The Ironsides then appointed Ms Beukes to take over the project. She produced her own snag list for each unit after inspecting them with Mr Gray. Not one of Rapiprop's representatives came onto the premises after 6 July 2006. Nor did Rapiprop tender to complete any of the outstanding work. On 25 July 2006 Ms Beukes sent him a quality report and the repair work suggested by her. They gave her a budget of R200 000,00 which included her fee. Mr Ironside's attorney sent a few letters to Rapiprop's attorneys claiming payment of the sum of R200 000,00 held by them in trust. Rapiprop's attorneys did not respond to the merits of his claim.

[28] The work was then done by outside contractors. It did not commence before 14 August 2006. They did not touch any of the plumbing or electrical work in order not to interfere with the sub-contractors. The work was done according to specifications drawn up by

Ms Beukes. The Ironsides moved into the flats on 15 September 2006. Rapiprop's snag team completed their task only in November 2008.

[29] Mr Ironside explained how the sum of R277 752,00 was arrived at. It included Ms Beukes' management fee in an amount of R56 000,00, as well as amounts paid to Mr Gray and his attorney for the services rendered by them. The total amount included expenses that were incurred but not claimed by them. On the calculation provided by him the total cost amounted to R212 088,47. That included Ms Beukes' fee of R56 000,00. Mr Ironside testified that he never received a certificate from the architect purporting to be a certificate of the completion date or a certificate that the property was ready for beneficial occupation.

[30] Under cross-examination Mr Ironside agreed that the list of defects that formed the subject matter of the discussions on 6 July 2006 was drafted by John Gray on 30 May 2006. He testified that many of the small items listed on Ms Beukes' audit list were not carried out.

[31] Ms Anneri le Roux gave evidence on behalf of the Ironsides. In 2006 she was an architect's assistant with L B V Consulting Architects, a firm owned by Ms Adri Beukes. She came on site shortly before 25 July 2006. She studied the defect lists which had been compiled by Ms Beukes and Mr Gray and she checked every defect in the apartments

against these lists. She later compiled a progress report dated 30 August 2006 that was checked by Ms Beukes.

[32] She testified that when she came on site she saw that the flats were very badly finished. She provided a summary of the defects noted by her at that time. Some of these were also pointed out by her on photographs taken at the time. The defects mentioned by her included damaged fittings and doors; some tiling finishes and wall finishes were badly done; some of the ironmongery was dented and scratched and painted over; cornices that were not neatly finished; there were paint drippings all over the cornices; different colours of grout had been used in the same room; in unit A4 the bedrooms were not tiled; in some instances the skirting was done before the tiling, thereby exposing cut lines that were not neat; the walls were plastered badly leaving plaster bumps at some places; skimming was coming of the plastered walls, indicating, at one point, a wall with dampness coming from outside; the quality of the paint was inferior; the internal doors did not comply with the specifications, they were hollow core doors that were much cheaper than the Lotus Amuretti doors which had been specified; the shower drains were badly finished off; the shower floors were skew and damaged; the shower handles were too high, a person of average height could not use them; many of the walls were skew as a result of which

tiling on them was also skew; several outside windows could not open fully; some of the tiles were laid unevenly, in some cases there was some about half a centimetre between adjoining tiles (uneven tiles had to be chopped out and replaced); door frames had been damaged and then painted over; one drain point was too high, water would not drain away; the hole for the microwave oven was too big.

[33] Ms le Roux dealt next with the progress report dated 30 August 2006 compiled by LBV Consulting Architects. She testified that she had compiled the report and that she and Ms Beukes went through it. Ms Beukes approved it. It contains a description of the remedial work to be done to the two flats. She was on site every day managing the project and she bought most of the materials that they needed. She had been given a budget of R150 000 for both units by Mr Ironside. She also received a project management fee of R50 000,00. She supervised the work and she purchased items such as the doors and the ironmongery from Builders' Warehouse and reputable suppliers. Ms Beukes sourced the labour using her contacts from previous jobs. Ms Beukes interviewed a few contractors before appointing one of them. His charges appeared to her and Ms Beukes to be reasonable.

[34] Ms le Roux had compiled a detailed schedule of the costs incurred in effecting the completion of units A4 and A6. The items of material

purchased by her were accompanied by invoices of the suppliers. She paid for them and claimed them back from L B V Consulting. Ms le Roux testified that L B V Consulting did similar work in respect of units A8 and F8. She verified that the labour costs and the payments thereof were made by Ms Beukes.

[35] Ms le Roux testified under cross-examination that it took about five weeks to complete the work on Unit A6 and about three weeks to complete the work on unit A4. There were on average about six to seven labourers on site at any time. She provided details of the work done by them and the order in which it was done.

[36] Ms le Roux was asked why it was necessary to replace twelve door frames when only one or two were skew. She said that it was necessary so that all could match. It took about three weeks to replace all the frames. The labour was provided by a company called PHD. They quoted R7 500,00 per week for three weeks. Counsel for Rapiprop questioned Ms le Roux at length on the question whether it was necessary to carry out all the work. She was also questioned about the batch of invoices produced by her. She could not remember what some were for. Some items were not backed up by invoices. She replied that there would have been invoices for all the items but she might have lost them. She was also questioned about certain credit notes.

[37] After lengthy cross-examination on this topic the parties agreed that a total amount of R150 000,00 had actually been spent by LBV Consulting in respect of work done to units A4 and A6. This amount included the architect's fees. This agreement did not cover the issue whether the expenses were reasonably and necessarily incurred.

[38] Rapiprop called Mr Bartel Viljoen to give evidence of an expert nature on its behalf. He is a qualified architect and has been practising as such since 1990. In 2006 he was the principal of the firm Albertyn Viljoen Nortjé Architects. His firm was from the outset involved in the design and execution of the Cape Sands project. He was appointed by Rapiprop and had no contractual duties *vis-à-vis* the purchasers of units.

[39] Mr Viljoen described the nature and effect of the certificates in question. On 12 April 2006 he issued a *practical completion certificate* in terms of the provisions of the Joint Building Contracts Committee Incorporated ("JBCC") contract. Such a certificate means that the building is fit for human habitation. In order to certify *practical completion* the architect would look at matters such as electricity, water, security lights, ventilation and fire protection.

[40] Mr Viljoen was asked to define the term *beneficial occupation*. It is not found in the JBCC contract. It is encountered, he said, in the context

of big projects such as shopping centres. It refers to the date upon which an individual shop is delivered to a tenant who is then able to start fitting out the interior of the shop. That concept does not apply to a residential unit. In his view *beneficial occupation* in a residential building would require that the owner can inhabit the building in a normal way. He must be able, for example, to prepare food, sleep and take a bath. He did not in this case issue any *beneficial occupation* certificate. He was not asked to issue one.

[41] Mr Viljoen testified that the JBCC contract provides for three phases of completion. The first phase is practical completion. It comprises the completion of water supply, electricity, security lights, ventilation and fire security. The second phase of completion in terms of the JBCC building contract, he said, is *works completion*. This entails the correction of the finer items such as paint that has been incorrectly applied, cupboards with scratch marks and the final finishing of floor tiles and the like. At the conclusion of that stage the architect would issue a *works completion* certificate. In the present case, Mr Viljoen said, the stage of *works completion* had not been reached by July 2006.

[42] Mr Viljoen was shown a set of photographs, taken in August 2006, of certain defects in the two units. He described them as finishing defects. These are defects, he said, which are supposed to be repaired

before a *works completion* certificate is issued by the architect. Mr Viljoen was asked to state when the stage of beneficial occupation had been reached in this case. He indicated again that he was not familiar with the meaning of the concept of beneficial occupation in the context of the construction of residential property.

[43] Mr Jaco Voges also testified as an expert on behalf of Rapiprop. He obtained a National Diploma in Architectural Technology in 1993. From 1994 he worked in the architectural field. He was the architect for the Cape Sands development. He started there two months after the project commenced and he left the firm in 2006.

[44] Mr Voges testified that he was of the view that in an apartment building *practical completion* would amount to *beneficial occupation* for the owner. On that date you get a certificate from the municipality that the building is safe and in working order so that people can occupy it. On the date of *practical completion* units A4 and A6 were practically ready for people to move in, although there were still snags, ie items that were not 100% up to standard.

[45] Mr Voges commented on some of the items that appeared on the snag lists. He disputed the Ironsides' evidence that the front doors were not fire doors. They were solid timber doors, as specified. The defects

on the internal door frames, he said, could have been remedied without removing the frames and replacing it. The replacement of twelve door frames would have taken about two weeks.

[46] Mr Voges said that it would probably have taken the contractor a period of three to six months to repair the snags in the two units. He agreed that as the buildings were constructed, there was a general lowering of the quality of the work, compared to the original standard. He confirmed that he and Mr Gray compiled a consolidated snag list on 30 May 2006.

[47] Ms Melanie Ipser appeared on behalf of Rapiprop on appeal. Her submissions were based on five grounds of appeal, namely:

(1) The Ironsides were not entitled to rely upon the agreement of 6 July 2006 because they had not pleaded it as their cause of action.

(2) The Ironsides did not prove that the agreement of 6 July 2006 was in fact concluded.

(3) The agreement of 6 July 2006 was void because it offended against a clause in the parties' sales agreements which

required that all variations of the agreements had to be in writing and signed by the parties.

(4) The Ironsides failed to prove that the costs incurred by them in repairing the defects were necessary and reasonable.

(5) Rapiprop proved that it was entitled to occupational interest which formed the subject matter of its counterclaim.

I propose to deal with each of these grounds of appeal in turn.

Was the agreement of 6 July 2006 adequately pleaded?

[48] Rapiprops' first ground of appeal is that the Ironsides did not plead the agreement of 6 July 2006 as their cause of action. Ms Ipser submitted that the court below accordingly erred in allowing them to rely upon it in proving their claim against Rapiprop. Rapiprop was prejudiced by the manner in which the Ironsides pleaded their case as it was deprived of the opportunity to dispute the existence of the agreement of 6 July 2006 or to raise any defence in answer to the Ironsides' claims.

[49] In *Robinson v Randfontein Estates G M Co Ltd* 1925 AD 173 at 198 the Appellate Division described the circumstances in which a party

will be held bound by the precise term of his pleading. The relevant passage reads as follows:

> *'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings.'*

This statement is still regarded as authoritative. See *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd* 2010 (2) SA 1 (SCA) para [42]:

> *'Parties should, of course, define the issues in their pleadings so that they each know what case they have to meet and should, therefore, be limited to such pleadings. However, it is equally trite that since pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the parties, and provided no possible prejudice can be caused to either, to decide the case on those real issues.*

[50] In order to consider the validity of this ground of appeal it is necessary to look at the pleadings as a whole. They were summed up above. In the Ironsides' particulars of claim they rely in the first place on the two agreements of sale. It is apparent, however, that the Ironsides' particulars of claim are not exclusively based on these two agreements

of sale. Although not referring explicitly to the agreement of 6 July 2006, they contain allegations which, upon analysis, flow from that agreement.

[51] Rapiprop apparently had no difficulty in pleading to the particulars of claim. Its principal defence was that the alleged defects were minor defects or snags which Rapiprop would have remedied at its own cost had the Ironsides not prevented them from doing so by employing independent contractors to complete the works. It pleaded specifically, however, that there was a further agreement in terms of which its attorney would retain R200 000,00 in trust. In para 10 of Rapiprop's counterclaim, summarised above, the allegation regarding a further agreement was repeated. In substance it does not differ much from the Ironsides' version of that agreement.

[52] In the Ironsides' plea to the counterclaim they pleaded that the verbal agreement relied upon by Rapiprop was embodied in the letter of 6 July 2006. In Rapiprop's replication this allegation was denied. Rapiprop pleaded, in the alternative, that in the event of a finding that there was a putative agreement in the terms set out in the letter of 6 July 2006, such agreement was void by reason of a clause in the building contracts that no variation would be valid unless in writing and signed by both parties. In reply to a request for trial particulars Rapiprop admitted that its attorneys received the letter of 6 July 2006. Rapiprop also

admitted that the agreement pleaded by it in support of claim A of its counterclaim, was a telephonic oral agreement concluded on 6 July 2006 between the parties' respective attorneys.

[53] In my view this analysis of the pleadings shows that Rapiprop knew that the contents of the agreement embodied in the letter of 6 July 2006 would play a vital role in proving the claim of the Ironsides. Rapiprop also knew that claim A of its counterclaim could not succeed unless its version of the agreement of 6 July 2006 could be established. As was to be expected the agreement of 6 July 2006 then also played a central role in the evidence. Mr Ironside testified about the agreement and he was cross-examined about it.

[54] In the circumstances I am of the view that the issues regarding the conclusion and the terms of the letter of 6 July 2006 were sufficiently raised on the pleadings. They were in any event ventilated and canvassed in the evidence. Rapiprop's first ground of appeal is accordingly without merit.

Was the agreement of 6 July 2006 in fact concluded?

[55] Ms Ipser pointed to the final paragraph of the letter of 6 July 2006 which reads as follows:

"Kindly confirm that your client accepts this proposal in writing whereupon we shall arrange for our cheques to be handed to you at the deeds office tomorrow once registration of the properties has been effected in our clients' names".

[56] Rapiprop admitted in its trial particulars that its attorney received the letter but the Ironsides were unable to prove that he signed it. He elected not to give evidence. Transfer of the properties was, however, registered and the cheques were handed to Rapiprop's attorney on 7 July 2006. Payment of R200 000,00 was made to Rapiprop's attorney.

[57] The legal effect of a party's failure to respond to an allegation in a letter that a contract was concluded was described as follows in *McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A)* at 10E-H:

'I accept that 'quiescence is not necessarily acquiescence' (see Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more

readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion. (See Benefit Cycle Works v Atmore 1927 TPD 524 at 530 - 532; Seedat v Tucker's Shoe Co 1952 (3) SA 513 (T) at 517 - 8; Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd 1960 (1) SA 531 (D) at 541; and of Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A) at 642A - G.)'

[58] The letter of 6 July 2006 was not sprung out of the blue on Rapiprop. It purported to record an agreement that was concluded that very day. The letter, moreover, contained a detailed description of the various points agreed upon. It was preceded by lengthy negotiations between the parties. Rapiprop's attorney did not only fail to respond to the letter of 6 July 2006 at all, he gave immediate effect to the terms of the letter by transferring the two units to the Ironsides, accepting the cheques delivered to him and retaining the amount of R200 000,00 in his trust account. Rapiprop did not call any witness to explain why its attorney did not respond to the letter.

[59] In the circumstances I am satisfied that Rapiprop's conduct cannot be explained on any basis other than an acceptance of the terms of the letter. The Ironsides accordingly proved that an agreement was concluded between the parties on the terms set out in their attorney's letter of 6 July 2006.

The non-variation unless in writing clause

[60] Ms Ipser submitted in the alternative that the agreement of 6 July 2006 was void for non-compliance with the provisions of clause 15 of the building contracts which reads as follows:

> *'15.* ***ENTIRE AGREEMENT; NO VARIATION***
>
> *This Deed of Sale constitutes the entire agreement between the parties and no other conditions, stipulations, warranties or representations whatsoever have been made by the Seller or its agent other than those contained herein. No modification, variation or alteration hereto shall be valid unless in writing and signed by both parties. No indulgence which the Seller may grant to the Purchaser shall constitute a waiver of any of the rights of the Seller, who shall not be precluded from exercising any such rights against the Purchaser'.*

[61] She relied in this regard on the judgment in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) in which it was decided that a stipulation in a written contract which provided that *'any variations in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect'* was valid and enforceable.

[62] In my view there are various answers to this non-variation clause defence. The context in which the agreement of 6 July 2006 was

concluded is important. The parties were locked in a dispute. Rapiprop was claiming urgent payment of the purchase prices, maintaining that it had sufficiently complied with its contractual obligations under the agreements of sale to complete the building works. The Ironsides, on the other hand, insisted that the works had not yet been properly completed. For that reason they were withholding payment of the purchase prices.

[63] The agreement of 6 July 2006 was indeed a compromise of the parties' opposing claims. It provided for the immediate payment of the purchase prices to Rapiprop, subject to the retention of the sum of R200 000,00 by Rapiprop's attorneys. At the same time it provided a mechanism for the completion of the works by Rapiprop within a defined period of time, failing which the Ironsides would be entitled to complete the works. The retention of the sum of R200 000,00 by Rapiprop's attorneys served as security for the Ironsides potential claim.

[64] Rapiprop has breached the agreement but it is retaining the Ironsides' prestation under the agreement of 6 July 2006, ie the purchase prices received by it, but it adopts the attitude that it is not bound by the agreement because it is void. In my view there are five answers to Rapiprop's defence.

[65] The first answer to the defence is that the agreement of 6 July 2006 was a compromise of the parties' outstanding obligations under the agreements. In *Hawken v Olympic Pools (Pty) Ltd* 1979 (3) SA 224 (TPD) a contractor entered into an agreement with the owner in terms of which he would build a tennis court for him. The contract contained a non-variation unless in writing clause. Some three years later damage occurred to the swimming pool. The contractor undertook verbally to repair the damage to the condition in which it would have been had there not been a breach of the agreement. The court held that the contractor's undertaking did not vary the original agreement. It purported to settle the owner's claim in consequence of the agreement.

[66] In my view the facts in this case are substantially similar to those in the *Hawken* case. By 6 July 2006 a dispute had arisen between the parties in regard to their respective remaining obligations under the original agreement of sale. The agreement of 6 July 2006 did not vary the original agreements of sale. It purported to settle the parties' claims arising from the execution of the agreements of sale. It does not, accordingly, fall within the ambit of the non-variation clause.

[67] A second answer to Rapiprop's defence is that it did not return or offer to return to the Ironsides what it received in terms of the agreement, namely the purchase prices. A person claiming restitution

on the grounds that he is not bound by an agreement as it is void or invalid, is bound to return, or to offer to return, what he received under the agreement. See *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 700GH:

> *'The object of the [restitutio in integrum] rule is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations. Hence, generally a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the representee is able and willing to restore completely everything that he has received under the contract. The reason is that otherwise, although the representor has been fraudulent, the representee would nevertheless be unjustly enriched by recovering what he had parted with and keeping or not restoring what he had in turn received, and the representor would correspondingly be unjustly impoverished to the latter extent...'*

[68] Although the *Feinstein* case dealt with the cancellation of a contract by reason of fraud, the rule applies to all types of cases where restitution is claimed after a contract has been rescinded, including by reason of invalidity. See *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd en Andere* 1974 (1) SA 414 (NC) at 425A-F. The judgment cites *Bushney v Joliffe* 1953 (4) SA 273 (W) at 276H-277A as an example of restitution following such invalidity.

[69] In the present case the Ironsides paid and Rapiprop received and retained payment of the purchase prices of the two units. Although it now contends that the contract is void, Rapiprop did not repay the benefit of such payment to the Ironsides, nor did it offer to do so. In these circumstances Rapiprop is in my view not entitled to invoke the non-variation clause as a defence to the Ironsides' claim.

[70] The third answer to the non-variation defence is that Rapiprop made an election to abide by the agreement of 6 July 2006. In *Du Plessis and Another NNO v Rolfes Ltd* 1997 (2) SA 354 (A) Zulman AJA discussed the doctrine of election and referred with approval, at 364G - 365A, to the following passage in the judgment of Watermeyer AJ in *Segal v Mazzur* 1920 CPD 634 at 644 - 645:

> *'Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind. . . . Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct'.*

[71] The judgment of the Supreme Court of Appeal in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) is directly in point. In paras [12] and [13] Harms JA dealt with the effect of the doctrine of election on the enforceability of a non-variation clause. In discussing the application of this principle by an arbitrator, he said the following:

> *'...the [Shifren] principle does not create an unreasonable straitjacket because the general principles of the law of contract still apply, and these may release a party from its workings. One of these would, for instance, be the rule that a party may not approbate and reprobate. This would mean, as Telkom correctly accepted during argument, that a party may not rely on a non-compliant variation (for instance, in its pleadings) and subsequently invoke the non-variation term in order to avoid the effect of the amendment.*
>
> *[13] To this the arbitrator added:*
>
> > *"My own provisional view, expressed with all due diffidence, would be that the position may be very different in a case where the evidence shows that A and B have orally agreed on a mode of performance by B of his contractual obligation to A different from that originally specified in the contract, where that different mode of performance was agreed upon for the mutual benefit of both parties, and where B has, to the knowledge and with the acquiescence of A, done the work and/or laid out the necessary resources in pursuance of that different mode of performance. In such a case it would be, to say the least, most surprising if the law was that A, when presented with the results of B's substituted*

performance, could simply refuse to accept it on the ground that the agreement to such substituted performance was not concluded in writing or otherwise memorialised in accordance with the requirements of a No Oral Variation Clause. I was shown a number of authorities which strongly suggest that such is, indeed, not the law"'

[72] In the present case Rapiprop was faced with an election. It could either abide by the original agreements of sale or it could give effect to the oral agreement of 6 July 2006. Having elected to abide by the oral agreement Rapiprop is not permitted to adopt the stance that the agreement of 6 July 2006 is invalid. Although this answer was not pleaded in terms by the Ironsides, the surrounding facts were in my view fully ventilated in the evidence. The same applies, I may point out, to the fourth and fifth answers discussed hereunder.

[73] The fourth answer to the non-variation clause defence lies in the application of the doctrine of estoppel. *In Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) at 219DE the doctrine of estoppel was defined as follows:

'The essence of the doctrine of estoppel by representation is that a person is precluded, ie estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his

prejudice…. The representation may be made in words, ie expressly, or it may be made by conduct, including silence or inaction, ie tacitly…'

[74] In the present case Rapiprop's acceptance of the purchase prices against transfer of the properties amounted to a tacit representation that it was giving effect to the agreement of 6 July 2006. The Ironsides acted on the strength of this representation by making payment of the purchase prices to Rapiprop. They would obviously be prejudiced if they were to be prevented from relying on Rapiprop's representation. The application of the doctrine of estoppel with regard to a non-variation clause has been discussed in a number of judgments.

[75] In *Phillips and Another v Miller and Another (2)* 1976 (4) SA 88 (W) Margo J said the following, at 93D-F:

'This reasoning has its counterpart in our law where estoppel is an aspect of the exceptio doli. A subsequent agreement which alters the time for or mode of performance, or which substitutes the performance stipulated in the earlier agreement, would almost always constitute a variation of the earlier agreement. But even where the subsequent agreement is per se unenforceable (e.g., because it is an oral variation of a written agreement which by law or by a clause therein can only be validly altered in writing), a practical modification of the earlier agreement may nevertheless take place if the stipulatee has acted on the subsequent agreement to his prejudice, and if it would be a quasi - fraud in the circumstances for the stipulator to enforce his rights on the basis that the strict provisions of the earlier agreement were not

observed by the stipulatee. Such a situation would be no different in principle from the case of Garlick Ltd. v Phillips, 1949 (1) SA 121 (AD), where WATERMEYER, C.J., said at pp. 130 - 131:

> *'Whether the legal principle involved in the modification of contractual rights and duties by a long continued course of conduct, consisting of defective performance by one party acquiesced in by the other, be given the name of waiver or acquiescence or of estoppel, there is no doubt that modification by conduct of the obligations under an executory contract can occur.'*

[76] In *Minnitt v Stewart Wrightson (Pty) Ltd and Another* 1979 (4) SA 151 (C) the respondent was bound by a restraint agreement with a non-variation clause. In proceedings to enforce the restraint the respondent sought to raise a defence based upon oral consent given by the respondent to act in breach thereof. A full bench of this court decided that, depending on the oral evidence to be adduced, the respondent could rely on various defences, including estoppel. The court said this, at 155CD:

> *'...the alleged consent may constitute a basis for an estoppel as being in effect a representation by respondents by reason of which appellant changed his position to his prejudice by resigning from his employment and incurring the expense of commencing to operate as an insurance broker. (See in this regard Williston on Contracts 2nd ed s 595 and compare the judgment of MARGO J in the case of Phillips and Another v Miller and Another (2) 1976 (4) SA 88 (W).'*

[77] In *Barnett v van der Merwe* 1980 (3) SA 606 (T), at 612E-H, Coetzee J described the following scenario as an example where estoppel can be raised as an answer to a non-variation clause:

> *'Estoppel kan moontlik op 'n feitekompleks soos die volgende van toepassing wees. Byvoorbeeld, die eiser in casu stem mondelings in om die dak waterdig te maak op voorwaarde dat die verweerder besondere materiaal daarvoor aankoop maar waarvoor die eiser hom sal vergoed, wat verweerder dan ook koop en aan die eiser aflewer. Wanneer eiser dan aangespreek word vir die betaling van die bedrag wat die verweerder spandeer het om daardie vereiste materiaal aan te koop, en hy pleit dat hulle ooreenkoms nietig is deurdat dit nie op skrif was nie, kan sy pleit moontlik (afgesien van ander alternatiewes) ontsenu word met die repliek dat hy deur sy gedrag die verweerder onder die indruk gebring het dat hy hom gebonde sou ag ten spyte van die skrifvereiste as gevolg waarvan die verweerder toe sy regsposisie tot sy nadeel verander het deur sekere uitgawes te maak. Deur die eiser se eie optrede word sy mond toegestop wanneer hy probeer om te beweer dat daardie ooreenkoms ingevolge waarvan die materiaal aangekoop is nie op skrif is nie.'*

[78] In *Volker v Maree* 1981 (4) SA 651 (N) Milne J held that a defence of estoppel could be raised in the following circumstances: A written contract of the sale of land provided that the purchaser was not entitled to effect any useful improvements to the property without the prior written consent of the seller, but that, should the purchaser effect such improvements with such consent, he would be entitled at the termination

of the contract to reasonable compensation. The contract contained a non-variation clause. When the seller cancelled the contract and the purchaser vacated the property, the purchaser claimed for necessary and useful improvements effected to the property. The seller pleaded that such improvements had been done without his prior written consent. In his replication the purchaser pleaded that the seller had represented to him that he was entitled to effect the improvements without his prior written consent; that such representation had misled him into bona fide, but wrongly, believing that such representation was true and that he had acted thereon to his detriment; and, accordingly, that the seller was estopped from alleging that he was not entitled to effect the improvements without his prior written consent.

[79] In my view these authorities provide ample support for a finding that Rapiprop is estopped from relying on the non-variation clause as a defence to the Ironsides' claim.

[80] The fifth answer to the non-variation clause defence is that it would be against public policy to uphold in the circumstances of this case. This principle was applied in two comparable cases. In *Bank v Grusd* 1939 TPD 286 a building owner was not permitted to rely on a non-variation clause against a builder who claimed for extras completed under an oral agreement. In *Nyandeni Municipality v Hlazo* 2010 (4) SA 261 (ECM) a

municipal manager participated in disciplinary proceedings which led to his dismissal. The disciplinary process did not follow the prescribed procedures in terms of his employment contract. He was not allowed on grounds of public policy to challenge his dismissal on the basis of a non-variation clause.

Proof of damage

[81] Rapriprop's next ground of appeal is that the Ironsides failed to prove that the costs incurred by them for the repair of the defects were reasonable and necessary. Ms Ipser submitted that the best evidence available to the Ironsides for this purpose was that of Ms Beukes. She was, however, not called as a witness. She pointed out that Ms le Roux conceded that various items on her report contained unnecessary items, double invoicing, amounts for which there no invoices and items of which she had no knowledge or could not explain. She also drew attention to Voges' testimony that it was not necessary to replace all the door frames; to the fact that the architects were given R200 000,00 to work with instead of being asked to provide a detailed quotation; and the fact that the Ironsides were compelled to concede that R62 000,00 of the amended claim was unsustainable.

[82] In judging the question whether the Ironsides provided adequate proof of their damage there are in my view a number of material considerations to be borne in mind. It is relevant that it was Rapiprop's unexplained breach of the agreement of 6 July 2006 that created the Ironsides' predicament and loss. The agreement envisaged that the parties' architects would meet and provide a joint certificate. That would have been a practical, efficient and inexpensive method. Disputes, if any, would have been solved there and then whilst the work was still fresh, visible and measurable.

[83] Rapiprop, for reasons that were never disclosed, decided to repudiate this agreement. The Ironsides were obliged to employ a new project manager, purchase material and hire labour. They were compelled to measure the costs to them through a process that was less practical, less efficient and more expensive than it would have been had the parties worked together. In these circumstances, so it seems to me, it would be unfair to expect precise proof of each and every item of their damage.

[84] The Ironsides employed two persons from an architectural firm. They were independent professionals. Ms le Roux personally purchased the material at standard retail prices. Ms Beukes hired the labour after a process of investigation and the consideration of

quotations. The execution of the work was carefully supervised. There is no reason to suspect that they were not acting in the best interests of their client.

[85] Insofar as Ms le Roux' evidence differed from that of Mr Voges, for example on the question whether it was prudent to replace all the internal frames, one must bear in mind that she was dealing with the project on a daily basis. He was testifying about his impressions at a previous stage when there was no particular reason him to concentrate on the item in question.

[86] In all the circumstances I am not persuaded that the judge below erred in awarding damages to the Ironsides in the amount of R150 000,00.

The Counterclaim

[87] Rapiprop did not persist in argument with claim A of the counterclaim. In claim B it claims occupational interest. This is dealt with in clause 6 of the agreements of sale which reads as follows:

> *'In the event of registration of transfer taking place after the Occupation Date, the Purchaser shall pay occupational interest to the Seller, calculated monthly in advance on the full purchase price from the Occupation Date to the day prior to date of registration of transfer, at the*

rate equal to the prime lending rate of ABSA Bank as at the Occupation Date'.

[88] Clause 30 of the sales agreements contains definitions. The following are relevant:

> *'30.1.5 "the Completion Date" means the date upon which the section to be used for accommodation is available for beneficial occupation, as determined by the Architect, acting as an expert and not as an arbitrator;*
>
> *... ...*
>
> *30.1.10 "the Occupation Date" shall mean the Completion Date or the date on which the Purchaser takes de facto occupation of the Property (or part thereof), whichever the earlier;'*

[89] Sub-clause 4.3 of the agreements of sale reads as follows:-

> *'4.3 A certificate signed by the Architect that the Property is available for beneficial occupation shall be binding on both parties. Should the Purchaser choose not to take physical occupation or refuses or fails to accept the keys to his/her section, such action shall not affect the Occupation Date, which shall remain as defined herein'.*

[90] It is common cause that the architect did not issue a certificate of beneficial occupation. Ms Ipser submitted, however, that this is not decisive. The architect was only required to make a finding in respect of the date that the unit was available for beneficial occupation and that

would have been the completion date. The architects called by Rapiprop were agreed, she argued, that the practical completion date would have been 12 April 2002.

[91] Although the set of definitions referred to above does not constitute a model of clarity, it seems clear that occupational interest would accrue from the date of *beneficial occupation*. This term is not defined in the agreements of sale nor, according to the evidence, in standard building contracts. The architects called by Rapiprop were not familiar with it. According to the ordinary principles of the interpretation of contracts it must therefore bear its ordinary meaning, namely residential occupation which is fit for normal human habitation.

[92] In regard to the question of *beneficial occupation* Mr Ironside testified that, apart from all the other defects, he could not shower in the one unit and in the other no carpets had been laid. I also agree with the following remarks of the judge below:

> *'I do not believe that it could be expected of the purchaser of luxury accommodation such as the ones under consideration to beneficially occupy it while a team of workers is in the process of rectifying building defects.'*

[93] Rapiprop's alternative contention is that the handing of the keys to Mr Gray on 34 May 2006 constituted the handing over of beneficial occupation. I do not agree. In some circumstances the retention of a key to a building may be regarded as a symbol of possession. In the present case the keys were handed over merely in order to facilitate access to the buildings. Given the condition of the units at that time this fact cannot be regarded as a transfer of beneficial occupation.

[94] In the result, I would order that the appeal be dismissed and that the judgment of the court below be confirmed.

A P BLIGNAULT

BOZALEK J: **I agree.**

L BOZALEK

GOLIATH J: **I agree.**

obo **P GOLIATH**