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

Case number: 3518/2023

In the matter between:

K2021765242 (SOUTH AFRICA) (PTY) LTD Applicant

and

THIBAUT INVESTMENTS (PTY) LTD First respondent

ABRAHAMS AND GROSS Second respondent

ATLANTIC SEABOARD PROPERTIES (PTY) LTD Third respondent

REGISTRAR OF DEEDS, CAPE TOWN Fourth respondent

JUDGMENT DELIVERED ON 25 APRIL 2023

VAN ZYL AJ:

Introduction

1. This matter concerns the alleged repudiation of a contract. Only the first respondent opposes the application, the remaining respondents abiding the decision of the Court.

2. The applicant applies for the rectification and specific performance of an

agreement for the sale of immovable property ("the sale agreement") which was concluded between the applicant, as purchaser, and the first respondent ("Thibault"), as seller, on 5 October 2021.

3. Thibault contends that the sale agreement has been terminated due to the applicant's repudiation thereof on 6 February 2023. The alleged repudiation occurred by way of an email from one of the applicant's directors, Mr Yousuf Karrim. If this issue is determined in Thibault's favour, the balance of the relief sought falls away.

4. The applicant denies that it repudiated the sale agreement and thus seeks specific performance of the sale agreement. It alleges, at the outset, that the "*First and/or Second Respondent are not properly before Court, for reasons including inter alia the fact that the Second Respondent filed its Notice to abide, and the Deponent's lack of authority*".

5. The second respondent is the conveyancer appointed to handle the transfer process.

6. The applicant advances four reasons for the denial of the alleged repudiation:

6.1. Firstly, the applicant contends that, objectively interpreted, the email did not amount to a repudiation of the sale agreement. This is so because the email does not evidence an intention to resile from the sale agreement as it was never Mr Karrim's subjective intention to do so.

6.2. Secondly, the applicant contends that, even if Mr Karrim's conduct did amount to a repudiation, Thibault was required to put the applicant to terms before being accepting the repudiation.

6.3. Thirdly, the applicant contends that Mr Karrim never had the authority to repudiate the sale agreement on behalf of the applicant.

6.4. Fourthly, the second respondent has acted wrongfully and has

breached its fiduciary duty owing to the applicant as purchaser under the sale agreement.

Thibault's deponent's alleged lack of authority

7. The applicant states, by way of a point *in limine*, that Thibault is not properly before the Court. This is because a member of the second respondent firm deposed to the answering affidavit on Thibault's behalf, despite the second respondent having given notice of its intention to abide the decision of the Court. The applicant effectively argues that it is the second respondent, and not Thibault, that is opposing the application.

8. The point has no merit. The deponent to an affidavit need not be authorized by the party concerned (in this case, Thibault) to depose to the affidavit. It is the institution (or opposition) and prosecution of the application that should be authorized.¹

9. If, further, the applicant suspected that the second respondent had not been duly instructed by Thibault in opposing this application, then the applicant should have employed the provisions of Rule 7 to challenge the second respondent's authority to act on Thibault's behalf.² This it did not do.

10. In any event, the second respondent is described in the agreement of sale as the "*seller's attorneys/conveyancers*". There is no reason why the second respondent should not fulfil its role as Thibault's attorney of record in the present application.

The legal principles applicable to repudiation

11. Whether repudiation has been established must be considered objectively, in the context of what a reasonable person would have understood by the communication in question.

¹ *Ganes v Telecom Namibia Ltd* [2004] 2 All SA 609 (SCA) at para [19].

² *Ganes* *ibid*.

12. In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*,³ the Supreme Court of Appeal explained the concept as follows:

"[16] 'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . . '... this Court has repeatedly stated that the test for repudiation is not subjective but objective ... Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.

[17] ... As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the

³ 2001(2) SA 284 (SCA) at paras [16]-[19]. See also *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 653F: "The question is therefore: has the appellant acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract?"

impending non- or malperformance.

[18] The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation ... is 'a serious matter' ... requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.

[19] ... the approach is that a court, faced with the enquiry of whether a party's conduct amounted to a repudiation, must superimpose its own assessment of what the innocent party's reaction to the guilty party's action should reasonably have been.

[20] Consistent with that approach it further follows that a court in making its assessment must take into account all the background material and circumstances that should have weighed with the innocent party." [Emphasis added.]

13. The onus lies on the party who asserts repudiation to prove that the other party has repudiated the contract.⁴

14. It is only when the innocent party accepts the repudiation that the agreement is cancelled. As cancellation is a juristic act, the election to cancel has to be communicated to the repudiating party: see *Stewart Wrightson (Pty) Ltd v Thorpe*.⁵

"Clearly, the exercise of a right to terminate must, as a juristic act, require an expression of intent."

15. Until receipt of notice of acceptance of the repudiation (which notice is sufficient to serve as notice of cancellation) the repudiator may retract his

⁴ *Schlinkmann v Van der Walt* 1947 (2) SA 900 (E) at 919.

⁵ 1977 (2) SA 943 (A) at 954A.

repudiation.⁶

16. A forfeiture clause or breach clause entitling the innocent party to cancel for failure to perform after a specified period of notice does not apply to repudiation. The repudiating party is thus not entitled to reprobate and approbate by claiming that such clause permits the retraction of the repudiation until notice of default is given and the period in question expires.⁷

17. The question to be determined in the present matter is therefore whether the 6 February 2023 email would lead a reasonable person to conclude that the applicant no longer intended to proceed with the sale agreement.

Did the email of 6 February 2023 constitute a repudiation of the sale agreement?

18. On 6 February 2023 Mr Karrim sent an email in the following terms to the second respondent (as mentioned, the conveyancer handling the process of registration of transfer) as well as to various other persons, including representatives of Thibault:

"Hi All,

Please note that the last straw was drawn this morning and I don't have the patience for these inconsistencies and incorrect information being provided.

Please note that I have contact Investec to start the cancellation process.

@ Nicholas Hayes, please refund all fees, Deposits and transfer costs paid to the below bank account:

@ Albertus Erasmus, please do the same:

Account Holder: Mr Yousuf Karrim

Account number: [...] Bank:

INVESTEC BANK LTD

Branch: INVESTEC BANK GRAYSTON DRIVE SWIFT/BIC

⁶ *Vromolimnos (Pty) Ltd and another v Weichbold and another* 1991 (2) SA 157 (C) at 162F-G.

⁷ *Vromolimnos (Pty) Ltd and another v Weichbold and another supra* at 163C-D.

code:[...]

Branch code: [...]

Thanks."

19. Mr Karrim confirms in the email that he contacted Investec to commence the process to cancel the approval of guarantees. He demands a full refund of all fees, deposits and transfer costs paid to the conveyancing attorneys and to Anuva Investments (Pty) Ltd ("Anuva"), a party involved in the structuring of the transaction.

20. Thibault alleges that such conduct is only reconcilable with an intention not to proceed with the sale agreement. Whilst Mr Karrim disputes that his email is open to such an interpretation he does not offer any other possibility, save to say that it evidenced his frustration in the delay in the transfer process and that he did not intend it to be a true cancellation. As indicated earlier, however, Mr Karrim's subjective intention is not relevant:⁸ *"Om 'n ooreenkoms te repudieer, hoef daar nie ... 'n subjektiewe bedoeling te wees om 'n einde aan die ooreenkoms te maak nie. Waar 'n party, bv, weier om 'n belangrike bepaling van 'n ooreenkoms na te kom, sou sy optrede regtens op 'n repudiering van die ooreenkoms kon neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom."* [I translate: "To repudiate a contract there need not be a subjective intention to terminate the contract. Where a party, for example, refuses to perform a material term of a contract, his conduct could legally amount to a repudiation, even if he thought that he was properly performing his obligations".]

21. Nevertheless, Thibault says, Mr Karrim's intention to put an end to the agreement also appears from an email sent later that same day in which he takes issue with the applicant's proposed liability for wasted costs:

"Nicholas, I cannot accept this. Due to you and your company delaying the process you should be held liable for all the costs. The only reason for cancelation is because you have not done your job. It is not 5 months and still no

⁸ *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845H-846B.

transfer or movement on transfer. Please note that you will refund all costs!!! ... Please do what you must this will be taken further and I will get all my funds."

22. Thibault accordingly argues that, to the extent that it is relevant, it is not correct to state, as Mr Karrim does, that he never intended to resile from the sale agreement.

23. As indicated earlier, the applicant argues that the email was simply an expression of Mr Karrim's frustration with the process. This might have been the motive for the email, but that is not the only way in which the wording can be understood. The motive for Mr Karrim's email is irrelevant. It is clear from the email, considered objectively, that the applicant did not intend to proceed with the sale agreement and that it sought to cancel same. It indicated that it had given instructions for the revocation of the guarantees. This amounts to an unequivocal expression of an intention to not proceed with the sale agreement and constitutes repudiation.

Was Thibault obliged to put the applicant to terms?

24. The second basis of the applicant's denial of repudiation is that Thibault was required, after the repudiation of the sale agreement (assuming that Mr Karrim's email constituted a repudiation), to put the applicant to terms in terms of the breach clause contained in the sale agreement. As the applicant puts it: *"...the Agreement did not provide for unilateral cancellation, or termination for convenience, and thus, same was plainly not possible..."* and *"as provided for in terms of clause 16.1.3. of the Agreement, the First Respondent ought to have given the Applicant 48 hours Notice to remedy the breach (inter alia of clause 4.6 - i.e. purported withdrawal of the guarantees)"*. This breach, so the applicant contends, went to the root of the agreement. For that reason, the applicant argues, Thibault was required to give the applicant 48 hours to remedy the alleged breach.

25. The applicant argues that, had Thibault done so, it would have found that the guarantees were in fact never withdrawn. Thibault, however, failed to "take care" by placing the applicant on terms and cancelling the agreement correctly,

which in itself amounted to a repudiation of the agreement, not accepted by the applicant. The applicant's breach was capable of being remedied. The applicant refers to *Belet Cellular v MTN Service Provider*⁹ in support of these contentions. In that case, however, the Supreme Court of Appeal agreed with the High Court that the party (Belet) accused of repudiation had in fact not repudiated, and therefore it held that, if Belet had committed an ordinary breach of the agreement, such breach should have been dealt with in terms of the relevant breach clause in the agreement. *Belet* therefore does not support the applicant's argument.

26. Lastly, the applicant submits that one party's repudiation does not provide the innocent party with an open window to cease total compliance of its contractual obligations.

27. I agree with the submission by counsel for Thibault that these propositions are not correct in law. Repudiation is an anticipatory breach of contract, and not an actual breach contemplated in the agreement. As mentioned earlier, *Vromolimnos supra* confirmed that a "*repudiator is not entitled to be given an opportunity to retract his repudiation before it is accepted by the innocent party and he cannot rely, as in this case, on the provisions of a general forfeiture clause in the contract. He is not entitled to reprobate and approbate.*"¹⁰

28. In *Taggart v Green*¹¹ the position was stated as follows:

"After referring to certain authority, the magistrate said that the defendant could not 'have it both ways, ie repudiating the contract, but at the same time holding the other party bound by the rules prescribed by the repudiated contract'. I agree. It would be an exercise in futility and delay to expect the plaintiff to go through the procedure of telling the defendant of the details of his breach, and calling upon him to right his ways, failing which a cancellation would follow. ... It is clear that in our law repudiation is looked at objectively... and when faced by a clear

⁹ [2020] ZASCA 07 (15 January 2021) at paras [33] and [34].

¹⁰ See also *Discovery Life Ltd v Hogan and another* 2021 (5) SA 466 (SCA) at paras [16].

¹¹ 1991 (4) SA 1212 (W) at 125E-J.

repudiation, the party not in breach is entitled as of right to bring the contract to an end without more delay. Moreover the law is clear that in a case such as the present a party cannot, as the magistrate put it, have it both ways. As Nicholas AJA succinctly said in Culverwell and Another v Brown 1990 (1) SA 7 (A) at 17B-C:

'Plainly, where a party elects to terminate the contract (upon the other party's repudiation), he cannot thereafter change his mind: the contract is gone.'

29. It follows that the applicant's argument in this respect is without merit. For this reason, too, the applicant's reliance on the *contra proferentem* rule is misplaced.

Mr Karrim's authority to act on behalf of the applicant

30. The applicant contends, thirdly, that Mr Karrim's repudiation should not be imputed to the applicant because he was not authorised to repudiate.

31. It is trite that a juristic person acts through its directors. It is common cause that Mr Karrim is one of the two directors of the applicant. He was the duly authorized contact person in all correspondence between the conveyancers, Thibault and the applicant, and also signed the sale agreement on behalf of the applicant.

32. The sale agreement, in fact, contains a resolution by the applicant in the following terms:

"We the undersigned, being all the directors of the Company hereby pass the following resolutions and agree that the said resolutions shall for all purposes be as valid and effective as if the same had been passed at a meeting of the directors of the Company duly convened and held.

NOTE that:

In regard to the purchase of 2 units, 2015 and 2016 at One

Thibault Square in Cape Town CBD, allow and give full permission for Yousuf Karrim with ID number: 8404285193088 to act on behalf of and make decisions on behalf of the Company."

and

"It is hereby RESOLVED that:

1. *Yousuf Karrim is hereby APPROVED to act on behalf of the company.*

2. *Yousuf Karrim in his respective capacity as a director of the Company or, failing them, any director of the Company for the time being, be and is hereby authorised to negotiate, settle, execute and amend on behalf of the Company, all such documents, deeds, Instruments and agreements, or any amendment thereto, and generally to do all such things necessary, appropriate or desirable to give effect to aforementioned resolutions.*" [Emphasis added.]

33. The applicant argues that "*such cancellation/termination [was not] within the contemplation of the relevant Resolution*", for the following reasons:

33.1. Firstly, the resolution refers to the "*purchase*" of the property in question. Thus, the objective of the applicant and the purpose of the resolution were to enable Mr Karrim to purchase the property only, and not to resile from the agreement and "lose" the property. Mr Karrim was only ever authorised to "*negotiate, settle, execute and amend on behalf of the Company, all such documents, deeds, instruments and agreements, or any amendments thereto, and generally to do all such things necessary, appropriate or desirable to give effect to abovementioned resolutions*", that is, for the purchase of the units. Mr. Karrim's email of 6 February 2023 is completely contradictory to what was contemplated by the resolution.

33.2. Secondly, in the absence of a clause in the agreement that would allow for and permit unilateral cancellation or termination for convenience, a

further resolution by the applicant would be required for such “unilateral repudiation” to be binding.

34. On the facts, however, it is clear that Mr Karrim was authorised to act on behalf of the applicant in all of its dealings with Thibault in relation to the properties. The wording of the resolution is wide enough to encompass every aspect of the transaction. In other words, the applicant left the transaction, as a whole, in the hands of its director, Mr Karrim. He was the face of the applicant throughout the transaction, from signature of the agreement in 2021 to his email correspondence in February 2023. Mr Karrim's email of 6 February 2023 would therefore reasonably have been regarded by Thibault as having been authorized by the applicant, and not as a frolic of his (Mr Karrim's) own. In the circumstances, the email evidences an unequivocal intention on the part of the applicant not to proceed with the sale agreement, and constitutes a repudiation by the applicant.

35. The impugned emails, as well as the follow-up emails between the parties, were copied to Mr Karrim's business partner and co-director of the applicant, namely Mr Van der Westhuizen. The latter was fully aware of Mr Karrim's communications and how the situation unfolded. The repudiation was not retracted prior to Thibault's acceptance thereof.

36. This repudiation was accepted on behalf of Thibault later that same day and, as a result, the sale agreement was terminated. A clause in the agreement authorizing a “unilateral cancellation” would not be applicable to the situation for the same reason as to why a breach clause is not applicable.

The second respondent's role

37. The applicant refers to the fact that an alleged repudiation must be interpreted in a just and reasonable manner,¹² taking into consideration, amongst other factors, the nature of the agreement, the parties thereto, the circumstances surrounding the alleged repudiation, and the prejudice to be suffered by the

¹² *Re Rubel Bronze and Metal Co and Vos* (1918] 1 KB at p 3222.

applicant. For that reason, the second respondent's role in the dispute should be scrutinised.

38. The applicant argues that the second respondent acted wrongfully and in breach of its fiduciary duty to the applicant as purchaser. It argues that, having regard to the objective test to be applied, the second respondent and its representatives cannot be considered ordinary "reasonable persons", inasmuch as they are qualified attorneys and conveyancers, obliged to act with a certain degree of care, skill and knowledge. The applicant argues that the first and second respondents' conduct is opportunistic and both entities should not be permitted to profit from the situation.

39. A conveyancer has a duty to protect the rights of the both the seller and purchaser in the conveyancing process.¹³ As a result, the applicant submits that the second respondent acted recklessly and unreasonably in the circumstances, and failed to protect the rights enjoyed by the applicant. The second respondent breached its fiduciary duty and acted unlawfully in doing so.

40. Mr Karrim's frustrations were caused, so the applicant argues, as a result of the failure of the second respondent's representatives to carry out their duty with the requisite level of competence, resulting in delays and misinformation in the course of the transfer process. Consequently, the second respondent failed both parties, inasmuch as the second respondent failed to:

40.1. test the alleged repudiation by making further enquiries and verifying certain details;

40.2. not lightly presume that the applicant no longer considered itself bound by the agreement or that it would not perform in terms thereof, by virtue of Mr Karrim's words;

¹³ *Bruwer and another v Pocock & Bailey Ingelyf and another* [2009] ZAWCHC 167 (23 September 2009) at para [18].

- 40.3. have a full grasp and proper understanding of the agreement;
- 40.4. advise the applicant of the consequences of Mr Karrim's conduct;
- 40.5. advise Mr Karrim or the applicant to seek independent legal advice;
- 40.6. inform Thibault of the consequences of purporting to accept the alleged repudiation, in haste, without first having followed the procedure for cancellation of the agreement as set out in the breach clause.

41. I have indicated that Mr Karrim's motives for sending the email are irrelevant.¹⁴ I have also pointed out that the applicant's last point (cancellation in terms of the agreement) has no merit because of the nature of repudiation.

42. There is no evidence supporting the notion that the second respondent did not understand the agreement.

43. The wording of Mr Karrim's emails was clear: The email sent on the morning of 6 February 2023 indicated Mr Karrim had contacted Investec already to start the process for the cancellation of the guarantees. He demanded immediate repayment of the deposit and other costs paid pursuant to the conclusion of the agreement. He reiterated later in the day that the agreement was "*canceled*" and that the applicant would not take responsibility for any wasted costs. In my view, this exhibits a deliberate and unequivocal intention no longer to be bound by the agreement.¹⁵

44. The applicant's argument does not distinguish between the second respondent and Thibault. The second respondent is not the seller of the property, and it is unclear how it would "profit" from the repudiation. (In fact, there is no evidence as to how Thibault stands to profit from the repudiation, given that it has

¹⁴ See *Discovery Life Ltd v Hogan supra* at para [17].

¹⁵ See *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] All SA 295 (SCA) at para [32].

now lost the sale.) Mr Karrim sent his email of 6 February 2023 not only to the second respondent, but also to representatives of Thibault, as well as to his co-director. He did so in his capacity as the director authorized to deal with the transaction on the applicant's behalf.

45. The second respondent had a duty to convey Mr Karrim's messages to Thibault. It was not the second respondent that accepted the repudiation – Thibault did so. This is clear from the email sent later the same day from the second respondent to Mr Karrim (copying in Thibault's representatives and the applicant's co-director), to the effect that Thibault has given the second respondent instructions to accept the repudiation. In other words, the second respondent conveyed Thibault's acceptance of the repudiation to the applicant.

46. The second respondent's conduct in dealing with the transfer and Thibault's acceptance of the repudiation are two different matters. If the applicant is dissatisfied with the manner in which the second respondent conducted itself, it has other remedies at its disposal to pursue the matter. The applicant relies an excerpt from *Platinum Property Enterprise (Pty) Ltd v McShane and another*¹⁶ as an example as to how the conveyancer should have warned the applicant of the consequences of Mr Karrim's conduct. In that matter, however, the innocent party, the purchaser, did not accept the seller's repudiation and the agreement was therefore not cancelled. It was in that context that the correspondence referred to in the extract relied upon was exchanged.

Conclusion

47. In the circumstances, I am of the view that Mr Karrim's email constituted a repudiation of the sale agreement by the applicant. The repudiation was accepted by Thibault, and the sale agreement was accordingly cancelled. Thibault has discharged its onus in this regard.

48. It follows that the relief sought in the notice of motion is incompetent

¹⁶ [2022] ZAWCHC 261 (19 December 2022) at para [6].

as it seeks to enforce a terminated agreement.

Costs

49. No reason has been advanced why the general rule in relation to costs should not be followed.

Order

50. In the premises, **the application is dismissed, with costs.**

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

Appearances:

For the applicant: C. S. Barclay-Beuthin,
Instructed by Dirk Kotze Inc.

For the first respondent: P-S Bothma,
Instructed by Abrahams & Gross Inc.