REPORTABLE

IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO. 319/98

In the matter between:

HIGHVELD 7 PROPERTIES (PROPRIETARY) LIMITED
1st Appellant
E G CHAPMAN EXECUTIVE HOLDINGS LIMITED
2nd Appellant
YABEING INVESTMENT HOLDING COMPANY LIMITED
3rd Appellant
KROON & SONS (PROPRIETARY) LIMITED **4th Appellant**

and

TIMOTHY LUKE BAILES
Respondent

Coram: HEFER, STREICHER JJA and MPATI AJA
Heard: 6 SEPTEMBER 1999
Delivered: 27 SEPTEMBER 1999

Repudiation - invalid amendment of contract - mistaken insistence that amended contract valid and binding

J U D G M E N T

STREICHER JA

[1] The issue to be decided in this case is whether the respondent repudiated an agreement of sale concluded between him and the first appellant.

[2] In terms of the agreement of sale ("the original agreement"), which was concluded on 7 December 1996, the respondent sold more or less 186,4 ha of land depicted on a sketch plan ("the property") to the first appellant. The property was purchased for the purpose of developing a golf course residential estate thereon. The shares in the first appellant were held by the second, third and fourth appellants who bound themselves as sureties in respect of the obligations undertaken by the first appellant.

[3] The agreed purchase price was R126 073 per hectare and was payable in 4 instalments, the first of which was payable against transfer of the property. Clause 4 of the original agreement provided that if upon survey the area of the property was found to be more or less than 186,4 ha the purchase price and also the final instalment had to be adjusted at the rate of R126 073 per hectare. In terms of clause 20.1 the first appellant had to engage at its cost the services of F. Pohl and Partners, a firm of town planners, to prepare a development plan in accordance with the provisions of the Hillcrest 2 Town Planning Scheme to enable a Mr Levitt to apply for and obtain town planning approval of the proposed golf course estate .

[4] In terms of clause 20.3 the first appellant appointed Levitt in consultation with F Pohl and Partners to apply for town planning approval of its development plan and "for any town planning special consent which may be required in pursuance of the development plan". All necessary information sufficient to enable Levitt to apply for the said approval had, in terms of clause 20.2 to be lodged by the first appellant with him within 60 days after signature of the original agreement. The 60 day period was subsequently extended by the respondent to 26 February 1997.

[5] At a meeting held on 11 February 1997 certain adjustments to the boundaries of the property were discussed. The adjustments consisted of the addition of three additional pieces of land which came to be known as the sausage, the small triangle and the side triangle, and the deduction of a piece of land which came to be known as the big triangle. No agreement on the price payable in respect of the additional land could be reached. Levitt, who at all relevant times during the negotiations acted on behalf of the respondent, stated that the price for the additions had to be R180 000 per hectare whereas the

deductions had to be priced at R126 073 per hectare. Mr Kroon, who represented the first appellant, suggested a price of R126 073 per hectare for the additions. According to Levitt, who deposed to the founding affidavit filed by the respondent, Kroon, acting on behalf of the first appellant, agreed to his terms during a subsequent telephone conversation. Kroon denies that he agreed on a price of R180 000 per hectare for the additional land.

[6] On 14 February 1997 the respondent wrote to the first appellant as follows ("annexure 'L'"):

> "**SALE OF LAND AT HILLCREST**
>
> With regard to Mr R E Levitt's verbal discussions with Mr H Kroon I confirm that subject to what follows I am prepared at your request to enter into an addendum to our agreement to provide for:
>
> 1. The sale to you of three pieces of land measured by F Pohl and Partners and depicted on a plan handed to Mr Levitt, said to be 5.4750 ha in extent, at R180 000 per hectare: R985 500.
> 2. The deduction of one piece of land from the property measured and depicted as stated above, being estimated 2.2 ha at R126 073 per hectare: R277 360.
> 3. A net addition to the purchase price of R708 140 (R985 500 - R277 360) plus V.A.T.
>
> My agreement to this variation is subject to the following conditions:
>
> a. The additional purchase price will be added pro rata to the sums set out in clauses 3.1.1, 3.1.2, 3.1.3 and 3.1.4 of our agreement.
> b. Clause 4 will be amended so as to provide for any variation in the area of the additional land now sold to be adjusted at R180 000 per hectare.
> c. Apart from the necessary adjustments to clauses 3 and 4 all other stipulations in the agreement remain unaltered and of full force and effect.
>
> Upon receipt of your written confirmation of these proposals I will arrange for the addendum to be prepared for signature."

Levitt alleges that this letter confirmed the verbal agreement which he had reached with Kroon. This is denied by Kroon.

[7] In another letter of the same date to Mr Swemmer, the chief executive officer of the second appellant, the respondent expressed concern about proposals by the first appellant that the number of dwelling units in the development be increased from 550 to 800. Still on 14 February 1997 Swemmer, in a letter to the respondent ("annexure 'N'"), said: "We do not accept that you expect us to agree to increase the footprint of the site to be purchased but not agree that the number of stands be increased." He made no mention of the price payable for the additions.

[8] In the minute of a meeting held on 18 February 1997 and attended by representatives of the first appellant and the respondent, it was recorded: "Mr Herman Kroon referred to a letter dated 14 February 1997 regarding amendments to the sale agreement, and mentioned that the relevant clause (sale agreement) regarding the total area and cost of the property has to be amended accordingly and signed". According to Kroon there was no question at the meeting of the first appellant having confirmed or accepted any particular price which had been put forward by the respondent. The minute was drafted by Mr Brandt a partner in F Pohl and Partners. According to him there was a dispute as to what the price should be and no agreement was reached thereanent. Kroon had merely referred to the letter of 14 February 1997 and said that if agreement was reached on the price, it would have to be reduced to writing and signed.

[9] Application was made for the approval of a development plan in respect of the property with the additions and deduction to which I have referred ("the enlarged property") and for the rezoning thereof. Copies of the draft advertisements for the applications and of the report in motivation of the application for rezoning were sent to Mr Pohl for comment. Pohl was acting on behalf of the first appellant. On 1 March 1997 Levitt also sent two copies of the applications to Kroon. No amendments were suggested by either Kroon or Pohl.

[10] In a letter dated 4 March 1997 the respondent contended that the first appellant had agreed that the agreement of sale be amended as set out in the above-quoted letter of 14 February 1997 but indicated his willingness to reduce the purchase price from R25 365 622 to R24 932 315. The offer was not accepted by the first appellant. Instead, Kroon suggested that the purchase price required by the respondent be further reduced by an amount of R315 000. The suggestion was rejected.

[11] The respondent, in a letter dated 25 March 1997, again claimed that the first appellant had agreed that the original agreement be amended as set out in the above-quoted letter of 14 February 1997 (annexure “L”) and repeated his willingness to reduce the purchase price. He added that if the offer was not accepted the matter would have to proceed according to the agreement of sale as amended by the first appellant’s acceptance of the proposals set out in his letter dated 14 February 1997 (“the disputed agreement”). The offer was still not accepted. In his reply to the respondent’s letter, on 27 March 1997, Kroon stated that it would appear that the parties were unable to reach agreement on the price per hectare to be applied to the land added to the land originally sold. He suggested that negotiations be discontinued and said that a new application for "use rights" would have to be submitted. The respondent’s response is contained in a letter dated 2 April 1997. He claimed that a firm agreement had been reached on the price per hectare of land added or deducted and added: “The present applications for rezoning and for approval of your Development Plan are correctly based upon the land which you

have bought. These applications must proceed to their final conclusion. Any action by you which delays or adversely affects the prospects for the approval of the applications would be a breach of our agreement." On 18 April 1997 and in a letter to the first appellant marked for the attention of Swemmer, Levitt reiterated on behalf of the respondent that he was adamant that the original agreement had been amended and stated that guarantees for the full purchase price would be required in the near future. Kroon replied on 29 April 1997 that in view of the fact that the parties had not reached an agreement concerning the land added to the property, the application for rezoning should be amended without further delay as the appellants were not prepared to run the risk of having the application considered and dealt with on the basis of an incorrect property description. He suggested an urgent meeting between the parties in a final endeavour to resolve what appeared to have become an impasse. He stated that it was imperative that the plans forming part of the zoning application be rectified without delay and that for that reason the meeting had to take place without delay. In yet another letter to the first appellant, dated 9 May 1997, Levitt,

on behalf of the respondent, again claimed that the original agreement had been amended and requested the first appellant to deliver guarantees for the four instalments payable in terms of the disputed agreement within 7 days from the date of the letter. On 13 May 1997, in a letter marked personal and addressed to Swemmer, Levitt threatened that his client, the respondent, would institute proceedings against the first appellant for the immediate payment of the full amount of the purchase price (as amended) in the event of the guarantees not being delivered in terms of the disputed agreement. He also stated that he believed that the claim for damages flowing from the breach would be substantial.

[12] The first appellant thereupon cancelled the original agreement. In the letter of cancellation, dated 15 May 1997 its attorneys said:

> "2. We acknowledge receipt on behalf of Highveld 7 and E G Chapman Executive Holdings Limited of the letters written by your attorney, Mr R E Levitt, to those parties and dated, respectively, 9 May 1997 and 13 May 1997.
>
> 3. Our instructions are that Highveld 7 has stated on a number of occasions that no agreement to amend the contract of 7 December 1996 has been reached by the parties to that

> contract. Highveld 7 has also stated, more than once, that it is quite willing and able to comply with the contract of 7 December 1996, and that it regards itself, and you, as bound thereby. However, you have over the past few months, and especially in your attorney's abovementioned letter of 9 May 1997, made it quite clear that you have no intention whatsoever of complying with the contract of 7 December 1996 and that you require Highveld 7 to comply with the terms of a new contract which you allege the parties entered into. You have, consequently, clearly and unequivocally repudiated the contract of 7 December 1996. Highveld 7 has decided to accept your repudiation and we hereby accept it on its behalf. The contract of 7 December 1996 is hereby cancelled."

[13] Levitt promptly responded by letter dated 16 May 1997. He denied that the respondent had repudiated the original agreement. He contended that the first appellant's proper course was to tender delivery of the guarantees covering the purchase price stipulated in the original agreement and reiterated that consensus

had been reached on the purchase price of the three additional pieces of land and the deduction of the fourth piece.

[14] The respondent thereupon instituted proceedings in the court *a quo* in terms of which he asked for an order declaring that the original agreement as amended by annexure "L" and the first appellant's letter of the same date (annexure "N") was of full force and effect and binding as between him and the first appellant. In the alternative he asked for an order declaring that the original agreement was binding and of full force and effect.

[15] The court *a quo* held that no amendment of the original agreement had been proved. It held further that the respondent's conduct did not amount to a repudiation entitling the first appellant to cancel the original agreement. In the result it declared that the original agreement was binding and of full force and effect but granted leave to the appellants to appeal to this court.

[16] In this court counsel for the respondent conceded, as he had to do, that the first appellant never agreed in writing to an amendment of the original agreement and that in the light of the formalities prescribed by s 2 of the Alienation of Land Act 68 of 1981 no legally binding agreement to amend the original agreement had been entered into by the parties. He submitted, however, that the respondent and the first appellant orally reached consensus on

the terms of an amendment to the original agreement; that the first appellant never placed in issue the validity of the disputed agreement on the basis of non-compliance with the statutory formalities; that although the respondent required the first appellant to perform in terms of such consensus it cannot be said that the respondent would have insisted on performance in terms of the disputed agreement had the first appellant denied the existence of an agreement because of a failure to comply with the statutory formalities; that the respondent had not breached any term of the original agreement and had not indicated that it intended to do so; and that the respondent's demand that the first appellant perform in terms of the disputed agreement could in the circumstances not be construed as a repudiation.

[17] It is apparent from the aforegoing that there is a dispute between the parties as to whether oral consensus was reached in respect of the price payable in respect of the three additional pieces of land. The evidence of Kroon and Brandt that no consensus was reached at the meeting held on 18 February 1997 cannot be rejected on the papers. The confirmation in annexure "L"

by the respondent that he was prepared to enter into an addendum to provide for the sale of the three additional pieces of land and the deduction of another piece at the price mentioned may simply have been a confirmation of the prices required by the respondent and not of a consensus reached with Kroon. It is somewhat unlikely that the first appellant would have allowed the applications for the approval of the development plan and for the rezoning of the enlarged property to proceed before consensus in respect of the price payable was reached. However, I am not satisfied that there is no real and genuine dispute of the facts in question or that the appellants' allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers or that oral evidence would not disturb the balance of probabilities appearing from the affidavits. None of the parties required the matter to be referred to evidence. The matter therefore has to be decided on the basis of the appellants' version that no consensus in regard to the price payable in respect of the additions had been reached (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C).

[18] In any event the respondent's attitude was that the first appellant and he were contractually bound to one another in terms of the disputed agreement and no longer in terms of the original agreement. It is on this basis:

1 That he said in his letter of 25 March 1997 that if his offer to reduce the purchase price was not accepted the matter would have to proceed according to the disputed agreement.

2 That, after Kroon had stated that the parties seemed to be unable to reach agreement on the price per hectare to be applied to the land added to or deducted, he said in his letter dated 2 April 1997 that a firm agreement had been reached; that the applications for rezoning and for approval of the development plan were correctly based upon the land bought; and that any action which could delay or adversely affect the prospects for the approval of the applications would be a breach of the agreement.

3 That Levitt stated in his letter of 18 April 1997 that he was adamant that the original agreement had been amended and that guarantees for the full purchase price would be required in the near future.

4 That, after Kroon had suggested that the application for rezoning be amended as a matter of urgency and that an urgent meeting between the parties should be held to resolve what appeared to have become an impasse, he claimed that the agreement had been amended and that guarantees in terms of the amended agreement should be delivered within 7 days.

5 That Levitt stated in his letter dated 13 May 1997 that the respondent would institute proceedings against the first appellant for the immediate payment of the full amount of the purchase price (as amended) and for damages in the event of the guarantees not being delivered in terms of the disputed agreement.

[19] The question to be decided is whether this attitude

adopted by the respondent constituted a repudiation. The test to determine whether conduct amounts to a repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound (see *O K Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd* 1993 (3) SA 471 (A) at 480I - 481A).

[20] The court *a quo* held that the respondent had not evinced a deliberate and unequivocal intention not to be bound by the original agreement. Nicholson J stated that the modified contract was a relatively small addition and subtraction from the original and that it was illogical to regard the respondent's insistence on the modified contract as a repudiation of the original contract. He added that there was no suggestion that the respondent wanted the modified deal or no deal at all. In this regard he referred to the letter written by Levitt the day after the cancellation in which he denied that the respondent had repudiated the original agreement. He said that the first appellant should have tendered delivery of the guarantees covering the purchase price stipulated in the original agreement whereupon the validity of the arrangements for the four pieces of land in issue could have been tested by appropriate litigation. The court *a quo's* judgment has been reported (*Bailes v Highveld 7 Properties (Pty)Ltd & Others* 1998 (4) 42 (N)).

[21] Apart from the fact that it is a question of law, to be decided by the court, whether the respondent's conduct constituted a repudiation, the test which has to be applied to determine whether the original agreement was repudiated, is an objective one. It follows that even a bona fide, subjective intention not to repudiate the agreement would not assist the respondent if he acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the original agreement. In *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) Howie JA and Mahomed AJA said at 684I - 685C:

> "It is probably correct to say that respondent was bona fide in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not,

however, preclude the conclusion that its conduct constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however bona fide it might have been in its belief that it was not. As was stated by Lord Wright in the case of Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60 (HL) at 72B:

> ' I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and not in any other way.'

The objective conduct of respondent in this case, in our view, entitled appellant to cancel the contract on the grounds that respondent had repudiated it even if respondent believed that it was abiding by the contract."

[22] Counsel for the respondent submitted that unless it could be found that the respondent indicated that he would not be prepared to comply with his obligations under the original agreement, if for any reason the amendments proved to be ineffective, his conduct did not constitute a repudiation.

[23] In this regard the respondent relies on two English

cases namely *Spettabile Consorzio Veneziano Di Armamento e Navigazione v Northumberland Shipbuilding Company Limited* (1919) 121 LT 628 and *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571 (HL). In *Spettabile* it was held that when one party to a contract asks the court to declare whether or not he is bound by a contract he does not thereby repudiate the contract. Atkin LJ, in an appeal from the Queen's Bench Division, said at 635:

> "The writ takes the form of asking for a declaration as to the rights of the parties. I agree that it asks for alternative declarations, and it asks for relief in addition to declarations. But the substance of it appears to me to be this: that the plaintiffs in the action are asking the court to declare whether or not they are any longer bound by the contracts. It appears to me that that is an entirely different state of facts altogether from an intimation by the plaintiffs, apart from the courts of law, that they in any event are not going to perform the contracts. It is something quite different from a repudiation."

[24] In *Woodar* Lord Wilberforce stated that in considering whether there had been a repudiation by one party, it was necessary to look at his conduct as a whole (574c). In that case *Wimpey* gave a notice of rescission of a contract to *Woodar. Wimpey* was not

entitled to do so but it was accepted that *Wimpey* honestly believed that it was entitled to rescind. Before service of the notice of recission the parties discussed the matter. *Wimpey* contended that it was entitled to rescind the contract. *Woodar* contended the contrary. The upshot of the discussion was that Wimpey would serve a notice to rescind and that Woodar would not regard it as a hostile act but would take Wimpey to court and let the judge decide whether the contract could be rescinded or not (574j - 575a). The assumption was that both sides would abide the decision of the court (575e). The House of Lords (Lord Salmon and Lord Russell dissenting) held that *Wimpey's* conduct did not amount to a repudiation of the contract.

[25] Lord Wilberforce considered the notice of rescission to be a neutral act consistent either with an intention to preserve, or with an intention to abandon, the contract (574d). He was of the view that the facts referred to above indicated that, objectively considered, Wimpey had no intention of abandoning the contract. It is against this background that he said (at 576c-d):

> "(I)t would be a regrettable development of the law of contract to hold that a party who bona fide relies on

> an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations."

[26] Lord Keith was also of the view that Wimpey had not repudiated the agreement, mainly because Wimpey served the notice of rescission in the expectation that Woodar would initiate legal proceedings in order to test its validity, without indicating in any way that it would refuse performance in the event of a judicial determination that its belief that it was entitled to do so, was erroneous (587f-h). He stated in general at 588b-d:

> "The doctrine of repudiatory breach is largely founded on considerations of convenience and the opportunities which it affords for mitigating loss, as observed by Cockburn CJ in *Frost v Knight* (1872) LR 7 Exh 111 at 114. It enables one party to a contract, when faced with a clear indication by the other that he does not intend to perform his obligations under it when the time for performance arrives, to treat the contract, if he so chooses, as there and then at an end and to claim damages as for actual breach. Where one party, honestly but erroneously, intimates to the other reliance on a term of a contract which, if properly applicable, would entitle him lawfully to rescind the contract, in circumstances which do not and are not reasonably understood to

> infer that he will refuse to perform his obligations even if it should be established that he is not so entitled, legal proceedings to decide that issue being in contemplation, I do not consider it in accordance with ordinary concepts of justice that the other party should be allowed to treat such conduct as a repudiation. Nor, in my opinion, are there any considerations of convenience which favour that course."

[27] Lord Scarman stated that the law required that not only the party's conduct but also, objectively considered, its impact on the other party be assessed (590b). In this case Wimpey believed that it was acting pursuant to the contract and Woodar never thought that if Wimpey was held not to be entitled to give a notice of rescission it would refuse to perform the contract (590d-e).

[28] In *Wimpey* the notice of rescission was given on the basis that its validity would be tested in a court and that Wimpey would perform in terms of the contract should the court decide against it. The present case is quite different. Unlike in *Wimpey* the respondent's attitude was not adopted on the basis that it was subject to correction. He was quite adamant even after it must have become clear to him that there was a dispute as to whether the original agreement had been amended or not. Clause 3.3 of the

original agreement required the first appellant to deliver to the respondent guarantees for the payment of the four instalments payable in terms of the agreement of sale within 7 days “after the fulfilment of the condition contained in 20". The condition referred to was the approval of the development plan and the rezoning applications. The first of the instalments was payable against registration of transfer of the property into the name of the first appellant. The development plan in respect of the enlarged property was approved on 16 April 1997 and the first appellant was advised of the approval on 18 April 1997. No development plan in respect of the property was approved. The respondent nevertheless insisted that guarantees be delivered in respect of the amended purchase price, the first of which was to be payable against registration of the land sold in terms of the “amended agreement of sale”.

[29] In my view, the respondent’s insistence that guarantees be delivered in terms of the disputed agreement and his threats to approach the court in order to compel the first appellant to deliver such guarantees and to claim damages suffered as a result of the first appellant having breached the disputed agreement by failing to

deliver such guarantees, would have led a reasonable person in the position of the first appellant to the conclusion:

1. That it would serve no purpose to apply for the approval of a development plan and a rezoning in respect of the land sold in terms of the original agreement;
2. That it would serve no purpose to deliver guarantees for the payment of the purchase price payable in terms of the original agreement against transfer of the property.
3. That the respondent would not transfer the land sold in terms of the original agreement against performance by the first appellant of its obligations in terms of that agreement.

[30] The respondent therefore unequivocally and

deliberately made it clear that he considered himself to be bound by the terms of the disputed agreement and not by the original agreement which was in fact binding on him. The agreements differed materially from one another both in respect of the property sold and the purchase price. The respondent therefore repudiated the original agreement.

[31] Counsel for the respondent submitted that if we were to find that the first appellant repudiated the original agreement, no party could safely make a demand or seek to enforce a contract as amended, without running the risk that if its contentions regarding the amendment proved incorrect, the entire contract could be cancelled even though it was perfectly willing to perform under the contract as unamended and had never suggested that it would not do so. The result contended for does not follow from the finding that the respondent repudiated the original agreement. Firstly, the finding is based on the prior finding that the respondent indicated that he was not willing to perform under the original agreement. Secondly, each case has to be decided in the light of its particular circumstances. An important consideration in the present case is

that the respondent persisted in his claim that the disputed agreement and not the original agreement was binding on the parties. He did so even after it must have become clear to him that the dispute in this regard could not be resolved by the parties themselves, and without qualifying his claim by making it subject to correction by a court or in any other way. When a party fails to perform an obligation in terms of an agreement he breaches that agreement and it is no excuse for him to say that he, because of some or other misapprehension on his part, thought that the obligation was not due and that, had a court ruled against him, he would have performed the obligation. There is no reason why the position should be different where a party's conduct exhibits a deliberate and unequivocal intention no longer to be bound by an agreement (see *Federal Commerce Navigation Co Ltd v Molena Alpha Inc* [1978] 3 All ER 1066 at 1082).

[32] The court *a quo* should therefore have dismissed the respondent's application. The appellants contended that they were entitled to the costs of two counsel in this court as well as in the court *a quo*. In my view neither the appeal nor the application in the court *a quo* required the services of two counsel.

The following order is made:

1. The appeal is upheld with costs.

2. The order made by the court *a quo* is set aside and the following order is substituted therefor:

"The application is dismissed with costs."

P E STREICHER
JUDGE OF APPEAL

Concur:

HEFER JA
MPATI AJA