FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3981/2012

In the matter between:-

LARRINGTON PHENDULE GUSHMAN N.O.	1st Applicant
MPOYANA LAZARUS LEDWABA N.O.	2nd Applicant

and

LOUIS JONAS TRAUT N.O.	1st Respondent
WALTER SCHULTZE N.O.	2nd Respondent
CENTREPOINT DEVELOPMENTS (PTY) LTD	3rd Respondent

JUDGMENT BY: DAFFUE, J

HEARD ON: 18 OCTOBER 2012

DELIVERED ON: 22 NOVEMBER 2012

INTRODUCTION

[1] Applicants, being the two trustees of the Gushman Family Trust, launched this application on an urgent basis. The first two respondents are the trustees of the Erf 4120 Trust. Third respondent is Centrepoint Developments (Pty) Ltd. 49% of third respondent's shares are held by the applicants on behalf of the Gushman Family Trust and 51% by first

and second respondents on behalf of the Erf 4120 Trust. For the sake of convenience first and second respondents will be referred to herein as “respondents” and third respondent as “Centrepoint”.

[2] Applicants firstly seek rectification of a written cession agreement entered into between them and the respondents, secondly, confirmation that this written cession agreement and an associated oral agreement have been terminated by them and thirdly, that respondents be ordered to transfer their 51% shares in Centrepoint to applicants against payment of the amount of R6 968 506,65.

THE ISSUES

[3] The application was brought on the basis of alleged urgency. Urgency was put in contention by respondents. I must mention that it should have become evident to applicants in June or early July 2012 already that a deadlock has arisen. Notwithstanding this they waited till 24 August 2012 to issue their letter of demand. Instead of

responding immediately to respondents' reply of 30 August 2012, they failed to communicate their election to cancel forthwith, but did so only about three weeks later. I indicated to counsel representing the parties, adv Vorster SC on behalf of applicants and adv Reinders on behalf of respondents, that I shall entertain the application and adjudicate the merits insofar as the parties fully canvassed the relevant issues in the affidavits and the heads of argument contained thorough argument on the merits. Mr Reinders also conceded that there was no further evidence available to respondents that needed to be placed on record and he had sufficient opportunity to prepare proper argument. Prayer 1 of the notice of motion is therefore granted.

[4] The next issue, being the application for rectification of the written cession agreement is not contested. Respondents indicated there was no need to launch an application to obtain this relief as they would have agreed thereto if requested. As the merits of the matter are conceded, prayer 2 of the notice of motion should be granted.

[5] The nub of the dispute is whether applicants are entitled to confirmation of their cancellation of the written cession agreement and associated oral agreement and if so, whether restitution should be ordered on the basis contained in prayer 4 of the notice of motion. Applicants aver that respondents repudiated these agreements, entitling them to confirmation of their cancellation thereof. Alternatively applicants rely on respondents' breach of contract and their subsequent cancellation once respondents were placed in *mora* and failed to rectify their breach. Consequently they allege that they are entitled to restitution, i.e. that the parties must return what they have received, the effect being that respondents must transfer their 51% shares in Centrepoint which they have received from applicants against payment of the amount of R6 968 506,65.

SUMMARY OF THE FACTS

[6] The following is a summary of the facts as averred by the parties:

<u>On behalf of applicants:</u>

(i) Initially Mr Gushman, the first applicant, held 26% of the shares in Centrepoint and the Gushman Family Trust 74%.

(ii) The Mbhashe Municipality invited tenders for the development of affordable housing in a development known as Mzam-omhle. Centrepoint's bid was accepted and following that three agreements were entered into by Centrepoint with the municipality during the period August 2009 to June 2010, to wit a land availability agreement, a development agreement and finally a deed of sale.

(iii) Centrepoint was required to provide full services within the township at its own costs. A total number of 1 300 residential units would be developed.

(iv) Prior to the conclusion of the deed of sale first applicant on behalf of Centrepoint conducted negotiations with first respondent in his personal capacity which negotiations culminated in an oral agreement being concluded between the Gushman Family Trust and the Erf 4120 Trust. In terms hereof the Gushman Family Trust would transfer 51% of the shares in Centrepoint to Erf 4120 Trust and in return the last mentioned trust would act as financier of Centrepoint in respect of the aforesaid development until outside funding is sourced and for the latter purpose to provide security.

(v) It was also agreed that first respondent in his personal capacity would be appointed as director of Centrepoint and would act as chairman of the board of directors. First respondent also had to approve a viable development project budget and authorise all payments due and payable by third respondent.

(vi) It is applicants' case that first respondent was appointed as director and chairman of Centrepoint's board of directors, that several meetings took place thereafter and that Centrepoint approved the budget for township development and the costs of the professional team.

(vii) On 7 September 2010 a written cession agreement was concluded in terms whereof 51% shares in

Centrepoint held by the Gushman Family Trust were ceded to Erf 4120 Trust.

(viii) Although the development came of the ground it appeared in May/June 2012 that first respondent was dissatisfied with a number of aspects of the project and he made it clear that no further payments would be made for and on behalf of Centrepoint until the problems within the company were solved.

(ix) Creditors and in particular members of Centrepoint's professional team were not prepared to wait for payment and indicated that they would proceed with legal action. Consequently applicants forwarded a letter of demand dated 24 August 2012 to respondents who did not adhere to the demands for reasons contained in their written reply of 30 August 2012. Nineteen days later applicants communicated their cancellation of the contracts to respondents due to their persistent repudiation thereof.

Facts relied on by respondents:

(x) It is denied that an associated oral agreement existed between the parties as alleged by applicants as the oral agreement was superseded by the written cession agreement. In this regard respondents rely on clauses 9.2 and 9.4 of the written cession agreement which read as follows:

> "9.2 No provision of this cession may be amended, substituted or otherwise varied, and no provision may be added to or incorporated in this cession, accept by an agreement in writing, signed by the duly authorised representatives of the parties.
>
> 9.4 This agreement supersedes all prior representations, communications, negotiations and understandings between the parties concerning the subject matter of this cession."

(xi) It is alleged that the written cession agreement is on a proper interpretation thereof a contract for the benefit of a third party, being Centrepoint. It was Centrepoint that intended to develop and who needed financing. It is also averred that the applicants were not entitled to cancel the agreement. In any event Centrepoint who received the benefits was not cited as an applicant in the application.

(xii) It is denied that respondents repudiated the agreement or are in breach thereof and that applicants had any reason to cancel it. It is respondents' case that disputes have arisen as a result of management problems within Centrepoint insofar as first applicant took several decisions with financial repercussions on behalf of the company without any authorisation and expected respondents to settle the expenses without questioning.

(xiii) The loan account of Centrepoint is not the amount of R6 959 660,62 (the amount stated in the notice of motion which was amended during argument to R6 968 506,65 at the request of Mr Vorster with Mr Reinders' consent), but R10 553 063,92.

(xiv) First applicant is accused of taking decisions on behalf of Centrepoint without authorisation and the knowledge or consent of first respondent and several examples are quoted. It is specifically alleged that Centrepoint's directors did not approve the budget for the development reflected in annexure “FA 12.1 on 16 January 2012.

(xv) First respondent is *inter alia* dissatisfied with the appointment of a third party (DLR) as building contractor to assist HBT, the appointed contractor insofar as his consent was not sought and Centrepoint has not taken any decision in this regard. Furthermore the number of residential units has been decreased from 1 300 to 1 000, which will have a negative impact on profit, without a proper resolution being taken. Added to this, the costs of the development increased to more than double the amount initially budgeted.

(xvi) It is respondents’ viewpoint that the directors of Centrepoint urgently need to take proper resolutions pertaining to the project and that this application should fail for the reasons advanced.

(xvii) It is alleged that the value of the development has increased tremendously and consequently, the shares in Centrepoint became substantially more valuable due to respondents’ financial contributions.

Finally it is respondents' case that financial assistance should be given in a responsible manner and in accordance with proper resolutions taken by Centrepoint and it cannot be expected of them to finance a project or to pay for faulty work or settle expenses which were never agreed upon by Centrepoint.

FINDINGS OF FACTS

[7] No proper resolutions of Centrepoint's board of directors have been placed before the court as proof of respondents' obligations to make the payments which are due and payable as alleged.

[8] No amounts have been paid by respondents in their capacities as trustees of the Erf 4120 Trust to applicants in their capacities as the trustees of the Gushman Family Trust or to their duly authorised agents, either in terms of the written cession agreement or the alleged associated oral agreement.

[9] The payments that were made by respondents have been paid over to third parties for and on behalf of Centrepoint and these payments are indicated in the Erf 4120 Trust's loan account with Centrepoint.

[10] Respondents refused to make any further payments since the meeting in June 2012, the reason being that they were dissatisfied with the manner in which transactions were being concluded without resolutions being adopted by Centrepoint's board of directors.

[11] Respondents are prepared to continue with the project, but want to be safe-guarded. The only way to ensure this is to rectify the dispute pertaining to Centrepoint's management. Although first respondent is the chairman of the board of directors of the company and representative of the majority shareholder, it is evident from the minutes of the meeting of 4 May 2012 in particular that first applicant regards himself as managing director and the person who may act on behalf of the company. The dispute between the parties is clearly a management problem.

LEGAL ARGUMENT OF THE PARTIES

[12] Mr Vorster argued on behalf of applicants that the communications by and on behalf of Erf 4120 Trust constituted a repudiation by the Trust of the oral agreement between the parties and to the extent necessary, the written cession agreement. He correctly pointed out that a subjective intention to repudiate is not a requirement, but the test is whether, objectively considered, the conduct complained of "fairly interpreted *(it)* exhibits a deliberate and unequivocal intention no longer to be bound" with reference to **VAN ROOYEN v MINISTER VAN OPENBARE WERKE EN GEMEENSKAPSBOU** 1978 (2) SA 835 (A) at 845A – B.

[13] He submitted that, apart from repudiation, the Erf 4120 Trust was placed *in mora* and given a notice of rescission to which it did not respond positively and consequently applicants duly cancelled the agreements.

[14] Mr Vorster argued further that as a result of the termination of the agreement between the parties they, as a matter of law, must effect restitution of what they received. He relied on **BAKER v PROBERT** 1985 (3) SA 429 (A) at 438G – 439C. Upon my enquiries Mr Vorster indicated that his clients did not have the amount of R6 968 506,65 which they tendered immediately available, but that they needed to obtain financial assistance and required four weeks from date of my order, should I find in their favour, and the order should provide accordingly.

[15] Mr Vorster conceded that the remedies of the Companies Act, 71 of 2008 and sections 163, 165 or 166 in particular could have been opted for by the dissatisfied shareholders and director of Centrepoint, but he argued that the available relief is discretionary in nature and that it would serve the interest of applicants better to apply for contractual relief based on repudiation or breach of contract.

[16] Pertaining to respondents' viewpoint that the oral agreement between the parties has been superseded by the written cession agreement, Mr Vorster argued that

clause 9.4 of this agreement was not wide enough for such a construction in that it relates to "the subject matter of this cession" only. He submitted that the duty to cede arose from the oral obligationary agreement and the counter performance which Erf 4120 Trust had to make for receiving the shares was to provide funding in respect of the development until alternative funding was sourced. As such the obligation to render counter performance did not concern the subject matter of the cession and therefore the oral agreement has not been superseded.

[17] In the alternative Mr Vorster argued, based on **VEENSTRA_v COLLINS** 1938 TPD 458, that where an oral agreement induced one of the parties to enter into the main agreement, the oral agreement might be proved. He also submitted that no reason exists why parties may not make two agreements, one written and one oral, dealing with closely connected subjects. Consequently he submitted that the oral agreement co-existed with the written cession agreement and that it was not superseded by it.

[18] Mr Vorster responded to the allegation on behalf of respondents that the cession was a contract for the benefit of a third party by submitting that it is trite law that the *stipulator* drops out of the arrangement after the third party has accepted the promise and that the written cession agreement cannot be interpreted in this manner as the Gushman Family Trust did not fall out of the picture or intended to do so.

[19] Mr Reinders submitted that the written cession agreement is a contract for the benefit of a third party in terms whereof respondents agreed to finance Centrepoint. He relied on **SAGE LIFE LTD v VAN DER MERWE** 2001 (2) SA 166 (W) to bolster his argument that in the case of a contract for the benefit of a third party one of the parties to the contract does not necessarily fall out of the picture.

[20] Mr Reinders emphasised that Centrepoint is not an applicant in the application and that it, as a party thereto, did not cancel any agreements with respondents. He submitted that it is Centrepoint's prerogative to take action

against respondents for failing to supply it with financing allegedly agreed upon.

[21] Mr Reinders submitted further that the application had to be considered in accordance with the **PLASCON-EVANS**-rule and with that in mind, there is at least serious factual disputes pertaining to the nature of the contractual relationship between the parties, whether repudiation or breach of contract occurred and the amount which was paid on behalf of Centrepoint. He urged me to find that there was no repudiation or breach of contract and that the respondents merely made it clear that they were not prepared to pay for expenses not resolved by Centrepoint.

LEGAL PRINCIPLES

DEED OF SALE

[22] Two essential elements must be present for a contract of sale to exist, to wit the thing sold and the price agreed upon. There must be agreement in respect of these requirements. See **LAWSA**, Vol 24, par 1. Save for these

essentialia, parties commonly agree on further terms and obligations from time to time. It is important to establish the nature of the agreement *in casu* and its terms in order to continue with a further investigation as to whether or not respondents repudiated or breached the agreement(s) as alleged by applicants.

REPUDIATION

In **INRYBELANGE (EDMS) BPK v PRETORIUS** 1966 (2) SA 416 (A) at 427 and **VAN ROOYEN v MINISTER VAN OPENBARE WERKE EN GEMEENSKAPSBOU**, *loc cit*, the Appellate Division (as it then was) approved of the following *dictum* by Williamson J in **STREET v DUBLIN** 1961 (2) SA 4 (W) at 10:

> "The test as to whether conduct amounts to such a repudiation (as justifies cancellation) is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound;"

Rabie JA put it as follows in **VAN ROOYEN**, *loc cit*, at 845 – 846:

> "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 repudiëring, van die ooreenkoms kon neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom."

REMEDIES IN RESPECT OF REPUDIATION OR BREACH OF CONTRACT

[23] The innocent party has several remedies, *inter alia* the right to cancel and to claim restitution. According to Christie, **The Law of Contract in South Africa**, 6th Edition, p 561, restitution by either or both parties should be ordered only to the extent necessary to avoid unjust enrichment although he sounded a word of caution with reference to the following *dictum* of Botha JA in **BAKER v PROBERT** *loc cit* at 438J:

> "a claim for restitution of performance following on cancellation of a contract for breach is not a *condictio*."

There is a distinction between a restitutionary claim and one in enrichment. The following *dictum* of Botha JA at 438H, is also apposite:

> "It is not open to doubt that a purchaser, who has validly cancelled a contract of sale on the ground of the seller's breach of it, is entitled in principle to claim repayment of the purchase price, paid to the seller in terms of the contract prior to its cancellation. The purchaser's right to claim repayment obviously exists also where payment of the purchase price was made, not to the seller in person, but to his duly authorised agent, since payment to an agent is equivalent in law to payment to the principal."

CESSION

[24] Mr Vorster opted to differentiate between the oral agreement entered into between the parties and the written cession agreement. In order to deal with his argument later it is necessary to briefly deal with the authorities in this regard. As Nienaber put it in **LAWSA**, 2nd Edition, Part 2, par 8, bilateral consensual juristic acts can be classified as a) obligationary agreements whereby one or more

obligations are created such as contracts of sale, b) absolving agreements whereby obligations are discharged such as payment and c) real agreements whereby rights are bilaterally transferred such as the delivery of corporeal or the assignment of immaterial property. The right to cession is created in the obligationary agreement whilst the real agreement is the actual transfer agreement or simply called the cession. The undertaking to cede and the actual cession often co-incide and are consolidated in a single document causing the distinction between the obligationary agreement and the actual cession to become blurred.

[25] Cession, being an act of transfer and not an agreement creating obligations, is not capable of termination in the ordinary sense. If the underlying obligationary agreement is cancelled, the cessionary may become obliged to re-cede the right if the cession has been implemented. See **LAWSA**, *loc cit*, par 57.

<u>CONTRACT FOR THE BENEFIT OF A THIRD PARTY</u>

[26] Unlike as argued by Mr Reinders, the court did not find in **<u>SAGE LIFE LTD</u>**, *loc cit*, that once the third party has

accepted the benefit and stepped in, one of the original parties does not necessarily fall out of the picture. The aspect was specifically left open. See p 168H of the judgment. Kerr, **The Principles of the Law of Contract**, 6th Edition, at p 89 refers to two kinds of contracts for the benefit of a third person, i.e. simple and complex contracts. In the first instance, the contract between the two parties imposes on the one party only one obligation, namely to keep open the offer for acceptance by the third party, which is the subject matter of the contract. Once the third party accepts the offer, a new contract comes into being between such third party and the other party and the old contract between the two original parties ceases to exist. In the complex form the contract imposes a number of obligations on the one party of which at least one is to keep open the contract for acceptance by the third party and if it is accepted, a contract comes into being between the other and the third party whilst the original contract between the original parties still exists. See also **MPAKATHI v KGHOTSO DEVELOPMENT CC AND OTHERS** 2003 (3) SA 429 (W) at 434 – 436. According to Christie, *loc cit* at 278 with reference to **NEW**

CONSORT GOLD MINES LTD v KRITZINGER 1930 TPD 251 at 260, when it is doubtful whether a contract is intended to be for the benefit of a third party, the fact that the contract confers powers on the promisee will point against such a conclusion.

THE STATUS OF THE ORAL AGREEMENT

[27] Where parties decided to embody their agreement in a written document or in instances where a contract is by law required to be in writing, the document itself becomes the sole memorial of the terms of the transaction which it was intended to record. In the absence of a claim for rectification extrinsic evidence as to the terms of the agreement or the intention of the parties is generally irrelevant and inadmissible. A collateral oral agreement not inconsistent with a written contract entered into between the parties may be proved as long as that oral agreement does not alter, add to or vary the written contract. See **DE VILLIERS v McKAY NO AND ANOTHER** 2008 (4) SA 161 (SCA) at para [4] of the judgment with reference to a clause

similar to clause 9.4 *in casu* and also the following *dictum* in **DU PLESSIS v NEL** 1952 (1) SA 513 (A) at 538A:

> "If you wish to prove that anything less or more than that which is promised in the written contract was promised in an oral contract prior to or simultaneously with the execution of the former, you seek to contradict, vary, add to or subtract from the terms of the instrument, if words mean anything, and if that were permissible, the rule may as well be cast overboard since it would have become a delusion."

See also in general Christie, *loc cit*, p 200 – 212.

INTERPRETATION OF CONTRACTS

[28] The Supreme Court of Appeal recently summarised the approach to be followed in the interpretation of written instruments such as contracts and I quote the following from the judgment of Wallis JA:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the

> material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

See **NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY** 2012 (4) SA 593 (SCA) at 603F. Refer also to the following *dictum* of Conradie JA in **LLOYDS OF LONDON v SKILYA PROPERTY INVESTMENTS (PTY) LTD** [2004] 1 ALL SA 386 (SCA) at para [14]:

> "Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by [the provision in their agreement]. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by [that] provision."

This *dictum* found approval in **TRUSTEES, BUS INDUSTRY RESTRUCTURING FUND v BREAK THROUGH INVESTMENTS CC AND OTHERS** 2008 (1)

SA 67 (SCA) at para [14] and the *dictum* by Brand JA in this judgment at para [21] to the effect that if an alternative interpretation is available, a court will not accept a meaning which would lead to absurd practical and commercial consequences.

THE COMPANIES ACT 71 OF 2008

[29] A shareholder or director of a company may apply to the court for relief from oppressive or prejudicial conduct or abuse of separate juristic personality of a company. Section 163 of the Companies Act provides protection in this regard. The powers of the court are very wide and it may make any order "it considers fit". See section 163(2). Although not specifically mentioned in section 163(2), a court could, e.g. order that the majority purchase the shares of the minority or that the majority sell their shares to the minority. See **Henochsberg on the Companies Act**, 71 of 2008, Vol 1, p 573 and **MULLER v LILLY VALLEY (PTY) LTD** [2012] 1 ALL SA 187 (GSJ) at 199e.

[30] It is also possible for a shareholder or director of a company to utilise the statutory derivative action procedure of section 165 of the Companies Act in order to obtain leave from the court to bring proceedings in the company's name. Section 166 introduced a brand new form of alternative dispute resolution and could be utilised *in casu.*

<u>APPLICATION OF THE LAW TO THE FACTS</u>

[31] It is not the applicants' case on the papers that they sold 51% of their shares in Centrepoint to respondents. In any event, no consideration has been agreed upon, either in the alleged oral agreement or the written cession agreement. Insofar as no consideration has been agreed upon, no sale could have been effected. The total amount to be paid by respondents in financial assistance of Centrepoint was also not agreed to when the parties entered into their agreements and was also not objectively determinable. Would it be applicants' case that a sale of shares was entered into with respondents, such transaction would have been null and void and unenforceable in that one of the *essentialia* of a sale has not been agreed upon.

[32] It is trite that first applicant negotiated also on behalf of Centrepoint pertaining to the financial assistance required by Centrepoint, but when the alleged oral agreement was entered into, on his version, he merely acted on behalf of his trust, whilst first respondent acted on behalf of his trust. Centrepoint is not referred to at all at that stage as being represented by either of the parties. However, respondents admitted the oral agreement although it is their case that this agreement was superseded by the written cession agreement and that applicants could not rely on a repudiation or breach of that agreement and cancellation thereof. Insofar as the oral agreement was entered into to provide financial assistance to Centrepoint (who was not a party thereto), the oral agreement could well be defined to be a *stipulatio alteri* or a contract for the benefit of a third party.

[33] Insofar as first respondent and/or his trust promised to provide financial assistance to Centrepoint in the oral agreement, the entering into of the written cession

agreement could be regarded as Centrepoint's acceptance of the benefits contractually agreed upon for and on its behalf earlier. Both trusts and Centrepoint are parties to the written cession agreement.

[34] I do not agree with Mr Vorster's argument that the oral agreement should be seen as the obligationary agreement and the written cession agreement as the act of transfer. It is apparent from the written cession agreement that it was not only an act of transfer, as he conceded, but deals with the obligations of the parties as well. It must also be remembered that first respondent was indeed appointed as director pursuant to the oral agreement and consequently it was not necessary to deal with issues pertaining to directorship again in the written cession agreement. I also do not agree with Mr Vorster that the oral agreement induced one of the parties to enter into the so-called main agreement, i.e. the written cession agreement and that the oral agreement may therefore be proved. It is clear that the parties agreed that the written cession agreement would embody all terms and obligations pertaining to the cession

of shares and the financial assistance to be given to Centrepoint and clause 9.4 thereof prohibits evidence pertaining to the prior or collateral oral agreement.

[35] Even if I am wrong in this regard, it is apparent from the oral agreement that first respondent personally had to approve a viable development project budget and authorise all payments due and payable by third respondent. The effect hereof is that the initial budget as well as later amendments had to be approved by first respondent. It also means that third respondent had to resolve which commitments and contractual obligations should be incurred as third respondent could not become liable for payment of any amounts to third parties unless it contractually agreed to accept liability. Applicants have not proven that the revised budget has been approved by first respondent and that third respondent resolved to accept it. Third respondent did not resolve to appoint a joint venture consisting of HBT and DLR as building contractors. This is to name just two issues. In fact first respondent and his trust as majority shareholder in Centrepoint has been

sidelined. Having read through the May and June 2012 minutes relied upon by applicants, and although the correctness thereof are disputed by respondents, it is apparent that first applicant has played a major role in dealing with the professional team and building contractors. In fact, first applicant is described as the managing director in the minutes of 4 May 2012 with the right to certify payments, totally contrary to the oral agreement that applicants so heavily rely on. First applicant is recorded in clause 3.2.1 of these minutes to have said the following:

> "PG (first applicant) provided the meeting with his understanding of the responsibilities of the members of Centrepoint and indicated that he was of the opinion that he was in certain areas restricted to perform his duties as managing director. A discussion followed whereby LT (first respondent) indicated that he would still require and had the authority to approve payments."

I quote the following from paragraph 3.2 of the same minutes:

> "JJ will check the same (schedules for payments) and present the approved payments together with all the individual invoices to PG for certification and payment by Centrepoint."

At clause 3.4 the following is minuted:

> "It was confirmed that PG (first applicant) is the implementation director of Centrepoint and LT (first respondent) will be copied with all relevant correspondence and information regarding payment to the contractors..."

In the minutes of 8 June 2012 the correctness which is also in dispute the following is minuted:

> "4.4 LT explained that he the first trustee of 4120 Trust and he is responsible for the risk which is taken. He also has the responsibility towards the trust and that he cannot make decisions without the second trustee which is Mr Schultze.
>
> 4.5 LT also stated that he has 51% shareholder in Centrepoint had no part in the discussions where it was decided that DLR will take over the contract from HBT."

[36] In an e-mail by first respondent to first applicant dated 21 June 2012 first applicant was informed that "DLR must remover their stuff from the site because I cannot and will not sign any contract with them". DLR is the contractor appointed for the project to be entering into a joint venture with HBT, the initial contractor, but whose appointment has never been agreed to by either Centrepoint or respondents as the majority shareholders of Centrepoint. In a letter in response to the letter of demand respondents' attorneys wrote the following:

> "6. Under these circumstances, our clients cannot be expected to proceed with the development, as it would mean giving carte blanche to your client and the architect and our clients must foot the bill.
>
> We really want to suggest that your client put on the table an acceptable proposition with acceptable timetables. Another look must also be taken to put out fresh tenders to obtain the services of a building contractors firm."

I do not intend to repeat the facts relied upon by respondents, as indicated above and which are indicative of respondents' unhappiness with the way that Centrepoint and respondents were effectively cut out from being involved in the project, save insofar as respondents must proceed with financing of Centrepoint and the development.

[37] After consideration of the facts presented by the parties, together with the terms and conditions of the agreements relied upon by applicants, I am not persuaded that respondents repudiated either or both agreements or breached any of the terms of either or both agreements to such an extent that it warranted applicants to cancel the agreements. Respondents acted within their rights to withhold further financing pending resolution of Centrepoint's internal problems. Their actions cannot be interpreted to indicate a deliberate and unequivocal intention no longer to be bound. Third respondent has a management problem as vividly explained by respondents which has to be sorted out internally and if applicants as minority shareholders are dissatisfied with the outcome of meetings to be held in this regard, they would be fully

entitled to utilise the appropriate procedures in the Companies Act referred to above.

[38] Even if I am wrong and repudiation or breach of contract has been proven, Centrepoint as the financier's beneficiary, and not applicants, had the prerogative to cancel the agreement(s) if the written cession agreement is interpreted in order to ensure businesslike results and looking at it from the point of view of commercial interest the parties tried to achieve. Applicants are also not entitled to restitution on the basis as claimed in prayer 4 of the notice of motion. Centrepoint, or any of the third parties that received payment, were never appointed as applicants' agents and it is clear that no amounts were paid by respondents to applicants directly. There is nothing that applicants are legally entitled to pay back and the facts *in casu* are totally distinguishable from the facts in **BAKER v PROBERT**, *loc cit*. The amounts paid on behalf of Centrepoint were paid for the benefit of Centrepoint as developer. Applicants relinquished 51% of the shares in the company, probably in the belief that they would eventually gain substantially in

the future and once the project is completed successfully with the assistance of the financier.

[39] Applicants referred in the letter of demand to respondents' failure and/or refusal to sign documents pertaining to a loan granted by Nedbank to Centrepoint. However, no evidence whatsoever was placed on record in the founding affidavit and no case has been made out that they repudiated any agreements or are in breach of any agreements based on failure in this regard as well. There is no indication who applied for the loan, the amount that has been granted and applicable conditions.

[40] To sum up, I have come to the conclusion that no deed of sale in respect of the shares in Centrepoint was entered into between the parties and that no reciprocal rights and obligations were agreed upon between applicants and respondents. No repudiation or breach of contract has been proven and applicants were not entitled to cancellation. In any event Centrepoint, and not applicants, had the prerogative to cancel and claim relief. Restitution

should not be ordered and applicants are not entitled to re-cession of the 51% shares in Centrepoint against payment of the amount paid out by respondents for and on behalf of Centrepoint. The conflict between the parties should be dealt with within the company structures of Centrepoint and if the differences cannot be solved, the procedures of the Companies Act may be utilised. The mere fact that applicants are not granted relief herein as requested, does not mean that they are without any recourse whatsoever as an alternative remedy or remedies are available.

RELIEF

[41] As indicated above, applicants are entitled to rectification and prayer 2 of the notice of motion should be granted. For the reasons advanced herein, applicants cannot succeed with the relief claimed in prayers 3 and 4 of the notice of motion.

COSTS

[42] Respondents made it clear that it was not necessary to approach the court on an urgent basis or at all to obtain

rectification as they would accede to a request in this regard. Although applicants obtained partial success, it is, based on the allegations made by respondents apparent that the application could be prevented, was it not for the fact that applicants insisted throughout that they were entitled to confirmation of their cancellation of the agreements and restitution. There is no reason why applicants should not bear the costs of the application.

ORDER

[43] The following orders do issue:

43.1 The written cession agreement entered into between the parties is rectified in accordance with prayer 2 of the notice of motion.

43.2 Save for the above, the application is dismissed with costs.

J. P. DAFFUE, J

On behalf of applicants: Adv J P Vorster SC
Instructed by:
Naudes

BLOEMFONTEIN

On behalf of respondents:	Adv S J Reinders Instructed by: Rosendorff Reitz Barry BLOEMFONTEIN

/eb/sp