



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No: 2021/8337

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: NO

REVISED

7 October 2024 _____
DATE

SIGNATURE

IN THE MATTER BETWEEN:

**AFRICAN ZAIBATSU CORPORATION
LTD**

FIRST PLAINTIFF

**SIZWE JOSEPH MFUNDO
KGOROEADIRA KOTANE**

SECOND PLAINTIFF

And

**INDUSTRIAL DEVELOPMENT
CORPORATION OF SOUTH AFRICA
LTD**

RESPONDENT

JUDGMENT

SIWENDU, J

Introduction

[1] This action is premised on an alleged repudiation of a loan agreement. The first plaintiff is African Zaibatsu Corporation Limited (AZC) and the second plaintiff is Mr Sizwe Joseph Mfundo Kgoroadira Kotane (Mr Kotane). Mr Kotane is a director and majority shareholder in AZC.

[2] The defendant is the Industrial Development Corporation of South Africa (IDC), a national development finance institution established in terms of section 2 of the Industrial Development Corporation Act.¹ The IDC provides funding products to several industrial and manufacturing companies in the country.

[3] Mr Kotane incorporated AZC for the sole purpose of purchasing the electrical manufacturing business of a division of Jasco Electronic Holdings Limited (Jasco), a public company listed on the Johannesburg Stock Exchange (JSE). The Jasco electrical business manufactures components for the domestic appliance industry in South Africa.

[4] On 26 September 2019, AZC and Jasco concluded a sale agreement (the original sale agreement) in terms of which AZC acquired the electrical business as a going concern. One of the material conditions of the sale was that AZC would secure the necessary funding to pay the purchase price from the IDC by no later than 30 November 2019. The relevant clause reads:

“2.1 (7). by no later than 30 November 2019, the funding agreements between the Purchaser and the IDC in respect of the funding of the purchase of the Business are executed and become unconditional in accordance with their terms (save for any condition relating to the coming into effect of this Agreement)”

[5] The original sale agreement defined the “effective date” and “closing date” of the sale of the business. The sale would come into effect on:

¹ 22 of 1940.

“[t]he date falling on the last day of the month in which the last of the conditions precedent in clause 2 have been fulfilled or waived, as the case may be.”

On the other hand, the sale closing date would be subject to:

“the fulfilment or waiver of the conditions precedent in clause 2, the second business day *after the Purchase Price has been determined*, in accordance with the provisions of clause 5.1 and clause 5.3.” [emphasis added]

[6] The above separation meant AZC could effectively take over the management of the business on fulfilment of the conditions precedents before the determination of the purchase price. Importantly, the sale agreement did not stipulate a definitive purchase price. Instead, the parties agreed a formula based on (a) the aggregate value of the book debts; (b) fixed assets, (c) the intellectual property; and (d) stock, less the assumed liabilities.

[7] The method for determining the purchase price had a bearing on the closing date. A second consideration apart from stock taking, was that it would be based on “effective date financial statements.” The sale agreement defined these as “the financial statements as set out in the internal statutory reporting pack of the Seller in respect of the Business for the period from the date of the last audited financial statements and ending on the Effective Date, to be prepared in accordance with Clause 15.” Consequently, the purchase price could only be determined and confirmed later, once there were audited financial statements.

[8] The sale agreement stipulated for the payment of the purchase price in clause 6 as follows:

“6.1 Payment of the Purchase Price is subject to the Seller performing all its obligation under this Agreement required to be performed by it on the Closing Date as set out in clause 9 and will be discharged as follows:

(1) by the Purchaser paying to the Seller the Purchase Price (as calculated in accordance with clause 5) less R5 000 000.00 on the Closing Date (Closing Date Payment); and

(2) within 24 months after the Closing Date, by the Purchaser paying to the Seller R5 000 000.00 together with interest thereon at a rate of 5% per annum calculated from the Closing Date until the date of payment (Final Payment). A failure by the Purchaser to make the Final Payment on the due date will constitute a material breach of this Agreement.”

[9] Although in its plea, the IDC denied it was involved in the drafting of the terms of the sale agreement between Jasco and AZC, it correctly did not persist with the denial during the trial. Evidence showed that Jasco’s transaction advisor, Mr Kennedy, included the IDC in correspondence involving the drafting of the terms, solicited and took account of comments made by the IDC.

[10] The IDC performed its first due diligence of the Jasco business between 28 May 2019 to 31 May 2019. The culmination was a letter dated 24 July 2019 by Mr Thaver, then the Head of Machinery and Equipment, which welcomed AZC as a client. The IDC agreed to collaborate with AZC in the acquisition of the business as “a funding partner”. Mr Mpana, described as “a deal maker” at the IDC was assigned as the accounts manager.

[11] It bears emphasising once more that at the time of the acceptance of AZC as a client of the IDC, AZC and Jasco had not yet agreed on the purchase price. On 19 October 2019, in a first addendum to the original sale agreement, they agreed the purchase price would be capped to a price range of up to R 65 million.,

[12] Against the backdrop of the purchase of the Jasco business, which is the reason for the dispute about the repudiation of the loan agreement, it is convenient to first deal with the (a) loan agreement and its structure, (b) its conditions and (c) any other relevant material terms thereof, before turning to the plaintiffs’ cause of action.

The Loan Agreement

[13] On 27 February 2020, approximately seven months after accepting AZC as its client, the IDC agreed to provide funding for the acquisition of Jasco for an “aggregate loan amount equal to R 51 897 500.00” as a senior debt (referred to as Loan A) and a Subordinate Debt (referred to as Loan B) in the amount of R 8 000 000.00 In addition, the IDC agreed to provide AZC a business support grant of R 368 500.00.

[14] A material term of both loan agreements was that the IDC would raise an agreed capitalised interest over the agreed capitalisation period. The senior loan debt was payable in 54 (fifty four) equal monthly annuity instalments while the subordinate loan debt was payable in 21 (twenty one) months. Other material conditions for the loan were that the IDC would:

- i. Subscribe for and acquire 20% (twenty percent) of the aggregate shares in AZC for R 20.00 (twenty rand). AZC’s Memorandum of Incorporation (MoI) would be amended to reflect the position and the IDC and AZC would conclude a Shareholders Agreement to this effect.
- ii. Security agreements in the form of (a) a Cession and Pledge in Security Schedule; (b) a Cession in Security of Shareholders Loans and (c) a Guarantee Loan would be concluded; and
- iii. Mr Kotane would contribute an amount of R 2 million in AZC, take up a keyman policy in the amount of R 10 million to be ceded to the IDC.

[15] The security requirements underpinning the loan agreements, which were a precondition for the disbursement of the loan funds required the registration of:

- i. A General Notarial Bond (GNB) for a minimum amount of R 45 000 000.00 (forty-five million rand) plus an additional sum of 30% (thirty percent) over all the movable assets owned by the Jasco business; and

- ii. A Special Notarial Bond (SNB) for a minimum amount of R 18 000 000.00 (eighteen million rand) plus an additional sum of 30% (thirty percent) for ancillary costs and expenses registered or to be registered over certain identifiable movable assets of the business identified by the IDC.

[16] Importantly, the loan agreement recorded that the IDC was not obliged to advance the loan or grant or permit the draw down on the facility until the above conditions were fulfilled, deferred, or waived. A further condition for the draw down of loan funds, was that no “Material Adverse Event” would have occurred. I return to effect of this later in the judgment. In respect of the senior loan debt to be utilised for the payment of the purchase price, the IDC would furnish a letter of undertaking to Jasco Trading Limited, once the SNB was registered.

Cause of Action

[17] The plaintiffs alleged that on the eve of the registration of the SNB, the IDC instructed its attorneys, Tasneem Moosa Inc. to withhold the registration, which was the only remaining condition before the draw down of the loan funds and the payment of the purchase price to Jasco. The particulars of claim state that the IDC decided to “review” the Jasco business but failed to do so within the “three week period it had given itself”.

[18] They claim that as a direct result of the IDC's breach and repudiation, alternatively negligent conduct and/or omission, Jasco cancelled the sale of business on 22 June 2020. The averment is that the IDC knew or ought to have known that stopping the registration of the SNB, would frustrate the implementation and coming into force of the sale of the business agreement with Jasco. The plaintiffs allege that the IDC failed to act in accordance with the duty it owed to AZC.

[19] AZC seeks a payment of a sum of R 43 667,297.00 as damages for loss of income and Mr Kotane, as the second claim, a payment of R 7 500,000.00 as damages, plus interest a *temporae morae* at the rate of 10.5% per annum from date of demand to date of final payment. In addition, AZC seeks a payment of R 359,086.50 for the bond registration fees due to Tasneem Moosa Inc, associated with the preparation of the registration of the SNB.

[20] In resisting the claim, the IDC first raised a special plea, that the conditions precedent to the loan agreement regarding the registration of the SNB and (b) the confirmation of the transaction by the Competition Commission were not fulfilled.

[21] Its defence to the repudiation claim was that although it had conducted a due diligence of the Jasco Electrical the business, the future income of the business depended on a variety of factors, including but not limited to, the status of the economy, market demand, and management of the business. Its initial concern was whether there was sufficient security to secure the loan. The IDC's further defence was that when it proposed to review the business, Mr Kotane did not object to the review. The IDC acceded to a request by AZC and Mr Kotane to inform Jasco of the review.

[22] It pleaded further that the outcome of the review demonstrated a negative impact on income and nett asset value (NAV), caused by the impact of the Covid-19 pandemic and non-trading due to the Regulations in terms of the Disaster Management Act [57 of 2002], and the national lockdown. It averred that there was a substantial change in the business which would significantly impact AZC's ability to discharge the obligation to repay the loan. The IDC denied it acted negligently in asking the attorneys Tasneem Moosa Inc. to delay the registration of the SNB, given the pending review.

[23] In addition to the factors above, the IDC pleaded that the lapse of time between the conclusion of the original sale agreement in September 2019 between AZC and Jasco, the conclusion of the loan agreement in February 2020 with the IDC and the subsequent agreement on the definitive purchase price in May 2020 justified the review. In support of the denial of the repudiation, the IDC averred that on 24 June 2020, it advised AZC that it had reassessed purchase price of the business to R 40 205 338.00 (forty million two hundred and five hundred thousand three hundred and third eight rand). The IDC denied it was liable in delict or acted with malice or in bad faith.

[24] The IDC disputed the damages claim on the grounds that AZC had not pleaded how it computed the amount and did not provide sufficient particularity to allow it to plead meaningfully. It also disputed there was an agreement to employ Mr Kotane upon the implementation of the sale of the business and that he would earn a salary of R 1 500 000.00 (one million five hundred thousand rand), including the liability for the conveyancer's fees.

Trial Evidence

[25] The parties reached agreement during the pre-trial conference regarding the status of written communication between themselves as well as the status of documents, unless the authenticity of the documents is challenged. Mr Kotane was the sole witness called for the plaintiffs and his testimony was based on the communication and documents exchanged between parties. The IDC closed its case without calling witnesses.

[26] Mr Kotane informed the Court that Jasco was his previous client. He became aware that the electrical manufacturing business was up for sale and Jasco was amenable to sell it to him. He approached the IDC for funding early in the negotiations and held initial meetings with Mr Paul Ngwenya (Mr Ngwenya) and Mr Mpana.

[27] Based on the evidence tendered, the Court determined that the IDC's denial of involvement in the drafting of the original sale agreement lacked merit. As demonstrated in the correspondence referred to in evidence, the IDC was to subscribe for 20% of the shares in AZC. The Memorandum of Incorporation (MoI) granted the IDC the right to appoint at least two non-executive directors and the Chairman of the AZC board. The IDC had the right to approve or veto the approval of AZC's annual budget to pass a special resolution. The MoI was amended following advice obtained from the IDC's competition lawyers because the provisions translated to "control" of AZC by the IDC for competition law purposes. The conditions pertaining to the competition authorities were thus resolved. The original sale agreement, the company constitution documents, and the conditions of the sale agreement were vetted by the IDC. I am of the view that all the agreements must be viewed as a composite relating to the acquisition.

[28] At the trial, counsel for the IDC abandoned its reliance on the special plea, and accepted that barring the registration of the SNB, which was a condition for the draw down of the funds, the loan agreement became unconditional. As will be seen, the delay in the registration of the SNB was a condition for the draw down on the facility. For reasons which will be traversed fully later, the delay in the registration had been at instance of the IDC. The concession was correctly made on the facts of this case. Evidence showed that on 26 March 2020, Mr Comfort Sebola who took over from Mr Mpana as the deal maker responsible for the transaction addressed an email to Jasco, its transaction advisor, the IDC, including Mr Thaver, advising that barring the registration of the SNB, all the conditions were fulfilled. The email, reads:

"This is an undertaking confirming that funding agreements between AZC and IDC in respect of the purchase executed and have become unconditional in accordance with the terms. The disbursement will follow post the registration of the SNB."

[29] The same day, on 26 March 2020, AZC and Jasco concluded a third addendum to the original sale agreement. Jasco confirmed that all the conditions precedent contained in clause 2.1 have been fulfilled or waived. Accordingly, barring the closing date, the sale agreement came into effect in AZC's hands. In addition, the IDC's appointed conveyancers, Tasneem Moosa Inc. confirmed that the GNB was registered the morning of the 26 March 2020 after it had been "fast tracked" because of the impending lockdown.

[30] The above milestones coincided with the outbreak of Covid-19 pandemic. On 26 March 2020, the IDC sent an email to AZC, requesting a telephonic discussion seeking information about the impact of the Covid pandemic on its clients, and measures taken to minimise its financial impact. A virtual meeting involving the management team and Jasco took place to discuss this. Mr Kotane's evidence was that there was no mention of a review at this meeting.

[31] Mr Kotane testified that on 15 April 2020 (the April proposal), he "proactively" communicated to the IDC the impact of Covid and the lockdown, to demonstrate that they were managing the business well during the pandemic. His evidence was that his intention was "to provide the IDC with necessary visibility into the financial performance of AZC Electrical" and a cash flow forecast.

[32] The forecast stated that the company requires a short-term facility of R10m at the end of May 2020 to ensure business continuity. He noted there would be a "shortfall by the end of June 2020 as a consequence of a loss of trade because of the Covid 19 lockdown and extended lockdown". He also requested a 12 month "payment holiday" in respect of the subordinated loan and an 18 month "payment holiday" in respect of the senior loan debt. He nevertheless stated that AZC would break even in the month of May 2020, but impressed on the IDC for an urgent resolution.

[33] Mr Kotane informed the Court that the Jasco business managed to trade during the lock down without the need for financial assistance. The proposal made to the IDC was “forward looking”.

[34] Although he testified that the IDC did not identify the material change or the adverse material event it relied on to warrant the review, during cross examination, he acknowledged that the IDC considered the request for a disbursement and a payment holiday “a material change to the transaction” but disagreed with that view. Part of his complaint was that the IDC waited till the end of the process to conduct the review. There was no crisis in the business. The implications of the updated valuation were dire since he had taken over the control of the Jasco business. As a result, the time frames for the transaction closing date were affected by the uncertainty. According to Mr Kotane, he “smelt a rat” from the conduct of the IDC. In his view, the IDC was trying to find its way out of the transaction. The conduct of the IDC was evidence of “the deal falling apart, and a deal being cancelled.” He had to call the IDC as no one informed or prepared him for this.

[35] Mr Kotane informed the Court that he, Jasco and the IDC nevertheless held a meeting to understand the time frame for conducting the review and valuation. His recollection was that it would take approximately 10 days. This oral evidence contradicts the particulars of claim which state that “the defendant did not complete its review of the transaction within the three-week period it had afforded itself”.

[36] By 5 June 2020, the registration of the SNB was in “preparation”, meaning it was up for registration the following day. On inquiry, the attorneys responsible advised Mr Kotane that Mr Fanie Naude asked them to hold over the registration. Despite previous discussions with Mr Naude during May 2020, he was not aware until that day that there was an instruction to withhold the registration of the SNB.

The IDC gave a different reason for stopping the registration but did not state what that reason was.

[37] He testified that at the telephonic meeting, the IDC informed him it was reviewing a “couple of transactions” but commenced a new process of valuation of the business without communicating the reasons for doing so. He was at the mercy of the seller to keep the transaction alive and requested Jasco to give him more time because the SNB was not registered. On 5 June 2020, Jasco agreed to extend the deadline for the payment of the purchase price to 19 June 2020 on more stringent terms.

[38] It is common cause that Jasco cancelled the sale agreement with AZC on 22 June 2020. On the other hand, the IDC relayed the outcome of the review to AZC in an email dated 24 June 2020. The trial proceeded on the basis that the revised valuation and assessment of the purchase price by the IDC represented the sum it was prepared to fund AZC since it denied the repudiation.

The Issues for determination

[39] The issue is whether the plaintiffs have established that the IDC repudiated the loan agreement. They rely on the following acts:

- i. the conduct of the review of the Jasco business;
- ii. instruction to the attorneys to hold over the registration of the SNB;
- iii. failing to complete the review within period as pleaded by the plaintiffs; and
- iv. the letter dated 24 June 2020.

The question is whether the above acts, exhibited “a deliberate and unequivocal intention”² not to be bound by the loan agreement. The onus lies on AZC to prove that the IDC repudiated the loan agreement. If proved, a related question is whether the repudiation was the cause of the cancellation of the contract between Jasco and AZC.

Applicable Legal Principles

[40] According to AJ Kerr in *The Principles of the Law of Contract*³ states that repudiation:

“[I]s commonly used of a refusal to perform a contract acknowledged to be binding, or of a declaration of inability to perform, or of the declaration of a similar nature. In addition, denial of the original existence of a contract which does in fact exist.”

[41] AZC and the IDC agree that *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd (Datacolor)*⁴ adequately sets out the principles for determining a repudiation. It states that:

“[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.”

[42] The court in *Datacolor* confirms that a “repudiation is not a matter of intention, it is a matter of perception”.⁵ A court, faced with the enquiry, must superimpose its own assessment of what the innocent party's reaction to the guilty party's action should reasonably have been.⁶ It is whether a notional reasonable

² *Inrybelange (Edms) Bpk v Pretorius* 1966 (2) SA 416 (A) at 427; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 844-846.

³ Kerr *The Principles of the Law of Contract* 6 ed (Butterworths, Durban 2002) at 575.

⁴ [2001] 1 All SA 581 (A), 2001 (2) SA 284 (SCA).

⁵ *Id* at para 16.

⁶ *Id* at para 19.

person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming.

[43] The test is an objective one. As stated by the court in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*:⁷

“The question is therefore: has the appellant acted in such a way as to lead a reasonable person to conclude that he does not intend to fulfil his part of the contract?”⁸

[44] In each case the answer depends on the character of the contract and the facts of the case. After considering several authorities, in the *Standard Bank of SA Ltd v Absa Bank Ltd*⁹ Moseneke AJ, as he then was, cautioned that:

“[T]he relationship which exists between a banker and its customer is a collection of a number of complex juristic relationships which tend to vary from customer to customer, depending on the specific agreement which has been entered into between the customer and the bank. Naturally such relationship would exhibit in varying degrees certain features which have been recognised both in our common law as well as in various judicial *dicta*. However, in any given case, in my view, the proper course to take is not to apply a rigid and pre-existing characterisation of the customer-banker legal relationship, but to examine the specific legal *nexus* which exists between a particular banker and its customer. Indeed, some such relationships would have strong features of a principal and an agent; sometimes characteristics of a loan for consumption; and indeed, sometimes such relationship is, as I have indicated earlier, one between a debtor and a creditor and very often the relationship would be a collection of features of each of these legal institutions I have referred to. I am consequently not persuaded by the argument that the only way to characterise or typify the right relationship between a banker and its customer is by resorting to agency.”¹⁰

[45] The conduct complained of must be interpreted in context having regard to the relevant circumstances known to the parties at the time.¹¹ The loan agreement

⁷ 1980 (1) SA 645 (A).

⁸ *Id* at 653E-F.

⁹ 1995 (2) SA 740 (T) 746G-747E.

¹⁰ *Id* at 747B-E.

¹¹ *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] ZASCA 7; 2009 (4) SA 399 (SCA).

is not a standalone agreement. The IDC is not a registered bank but a development finance institution. The loan agreement and the relationship exhibit another features beyond that of an arms-length one between a funder and lender. The IDC as the funder had acquired an equity interest in the funded entity, AZC. The conduct complained of, and the loan agreement must not only be interpreted holistically having regard to the above factors but must be given a commercially sensible meaning.¹²

[46] There is in addition to the considerations to be weighed, the meaning to be ascribed to the letter dated 24 June 2020 from the IDC to AZC. As consistently held by the courts, interpretation is a matter of law and not of fact and, is a matter for the court and not for witnesses. Ultimately, as the court stated in *Datacolor*, whether AZC was entitled to resile from the agreement will depend on the nature and the degree of the impending non or malperformance.¹³

[47] It is imperative to restate that, as against the loan agreement to advance the loan facility, a central term was that AZC was obliged to repay the loan(s) over a fixed period, failing which AZC would be in breach of its terms. A feature not given weight by the plaintiffs is that the IDC was not a mere lender, it also held shares in AZC as a condition for funding the venture.

Analysis

[48] As already alluded to, the IDC agreed that the action should proceed from the premise that the loan agreement became effective on its terms even though the SNB was not yet registered, based on correspondence from Mr Sebola. During cross examination, Mr Kotane confirmed that Jasco had a market share and a well-known trading business name. As at the effective date, AZC was not going to trade using the Jasco name but enter the market as AZC Electrical. The sale

¹² *Bekker NO v Total South Africa (Pty) Ltd* 1990 (3) SA 159 (T) at 170G-H.

¹³ *Datacolor* n 4 above at para 16 referring to the decision by Corbett JA stated in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (AD).

agreement limited the period of the use of the Jasco trade name. AZC agreed to stop using or referring to the Jasco name in its business stationery, promotional material, products and interactions with its customers and suppliers as soon as reasonably possible after the effective date but by no later than 12 months from the effective date. The import of this was that the change of name would have an impact on the goodwill of the business, although the extent was not established.

[49] It will be recalled that the effective date of the sale preceded the agreement on the purchase price, which was at that date, merely a price range capped at R65m. Mr Kotane agreed during cross examination that the calculation of the purchase price and the funding agreement were linked to the value of the business. He agreed that because of the national lockdown, Jasco was unable to conduct physical stocktaking, which was integral to determining the purchase price and the transaction closing date.

[50] On 31 March 2020, Jasco and AZC then agreed that “for the purposes of determining the value of the Stock as at the Effective Date, Jasco will conduct a physical stocktaking of the Stock commencing on the first day following the expiry of the Lockdown Period.” All this was after the conclusion of the loan agreement.

[51] There was no dispute that as of 28 April 2020, the stock-take, which was scheduled for 1 May 2020 and 3 May 2020, and the calculation of the purchase price were still pending. Jasco auditors had not yet confirmed the purchase price. The definitive agreement on the purchase price of R 56, 914,315.00 was subsequently agreed in an addendum dated 22 May 2020. Again, it bears emphasising that the purchase price was settled after the conclusion of the loan agreement in February 2020, some months after the IDC conducted its initial due diligence in May 2019.

[52] Clause 1.39 of the loan defines various “material adverse event” and refers to “the condition (financial or otherwise), of the business, obligations (whether contractual or regulatory), operations or prospects of the Borrower.” Although the IDC did not invoke this clause or use the language employed in its engagements with AZC, the absence of a material adverse condition was as a condition for the draw down of the funds. Mr Kotane conceded during cross examination that the IDC had the right to review the loan agreement if it identified a material adverse event. He testified that the IDC was required to communicate this to AZC and none of this occurred. This evidence must be viewed against correspondence exchanged on 26 May 2020 where the IDC informed him of the material changes, stating that:

“The AZC transaction was tabled before an internal committee, and the committee suggested that we review the transaction to validate *the material changes* and requested an updated valuation taking into consideration the Covid 19 pandemic impact and the time taken since approval.” [italicised for emphasis]

The above was in response to the April 2020 proposal where Mr Kotane requested a payment holiday and an advance of facilities of R10m. Despite his earlier evidence, Mr Kotane conceded that the IDC had indeed considered the April proposal in the same email dated 28 April 2020 referred to prior to the email of 26 May 2020 above.

[53] The IDC’s position was that since the loan facility had not yet been disbursed, “the IDC has no direct exposure in AZC to merit the IDC credit committee to approve a COVID-19 temporary funding intervention”. It suggested that AZC approach Jasco for the R10m facility as a loan to address the impact of Covid-19. The IDC would in turn “pay the seller ‘Jasco’ the purchase price less R10m”. Although during the evidence Mr Kotane stated that he supported the proposal, it remained unclear whether he approached Jasco and what Jasco’s response was.

[54] Evidence also shows that after the April proposal, Mr Kotane sent a forecast to the IDC. The proposition put to him during cross examination embodied in the email dated 26 May 2020, was that the circumstances of the business had changed materially. The 5-year budget forecast and balance sheet he provided to the IDC, showed that:

“Due to the COVID-19 trading environment of April to June 2020, the Cash in Bank position for the first few months of the Financial Year ending 30 June 2021 is a negative one, the trading environment will normalize and allow for a positive cash position by November 2020.

The R5m Deferred Loan from Jasco is settled at the end of June 2021.”

[55] Although Mr Kotane did not concede the material change, he agreed that his report conveyed to the IDC that AZC was unable to generate sufficient revenue for the duration of the lockdown period and for a period going forward. The following factors emanating from his report which he stated were aimed at mitigating the risk of a credit default, were put to him, namely that:

- i. Production at key customer plants of the business had come to a halt, or production had been reduced to half of the usual capacity, translating to reduced orders.
- ii. One of these key customers together with minor ones requested payment extensions which impacted and payment by business debtors’ incoming cash flow.
- iii. The landlord agreed to a reduction of the payment the rental to 50% in May for it to be paid over 3 months.

[56] Another factor raised with Mr Kotane which would have an impact on AZC’s cash flow was that Jasco retained the right to “sweep” R 5million from the business on the transaction closing date and a further R 5million, 24 months

after the closing date. During cross-examination, a question whether Jasco's right "to sweep" the first R 5million was prospective or in fact took place arose. An email written by Mr Kotane to the IDC on 4 June 2020² detailing the five-year budget forecast was put to him. It confirmed that the first R 5 million had been swept from the available cash, further straining the cashflow available for operating the business.

[57] A further challenge raised with Mr Kotane was that in terms of the loan agreement, AZC was obliged to pay the IDC's conveyancers the costs incidental to the lodgement or registration of any registrable security referred to in the Funding Agreement. Mr Kotane sent the pro-forma invoice to the IDC, requesting that the amount due be deducted from the loan facility to be disbursed by IDC. The IDC declined the request. It was put to him that AZC was not able to pay the R 359 086.50 in attorney's fees. He denied the inability to pay without explaining why he made the request to the IDC given the terms of the loan agreement.

Was there a repudiation of the loan agreement?

[58] As already stated, there must be (a) an act of repudiation evincing a deliberate and unequivocal intention no longer to be bound, and (b) the act of the adversary, 'accepting' and thus completing the breach. The court in *Datacolor* emphasises that:

"[18] The conduct from which the inference of impending non- or mal performance is to be drawn must be clearcut and unequivocal, i.e. not equally consistent with another 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."

[59] Mr Kotane stated that the updated valuation was a drastic change not authorised by clause 24.2 which stated that:

“24.2 No addition to or variation or consensual cancellation of this Agreement, including this clause, has effect unless in writing and signed by the Parties

First, Clause 24.2 relied on dealt with the terms of the sale agreement between Jasco and AZC. It could not be raised against the IDC in its capacity as the funder. Importantly, Mr Kotane agreed during cross examination that he and AZC consented to the review. Jasco was also involved in the discussions about the review. It is evident that, the email of the 26 May 2020 above, did not only refer to a “review” it also referred to an “updated valuation”. It rendered the review and valuation consensual since the plaintiffs did not object to it.

[60] As to the period within which to complete the review, Mr Kotane’s oral evidence conflicted with the particulars of claim on whether the IDC undertook to complete the review in 10 days or in three weeks. AZC did not lead evidence to clarify this conflict. The same letter of 26 May 2020 from the IDC referred to above states regarding the period of the view that:

“We will therefore schedule a meeting between the IDC, AZC and Jasco to request that we be given the opportunity to confirm the issues as per the internal committee's request and to *possibly discuss the timelines.*” [emphasis added]

On 5 June 2020, Mr Kotane was informed of a decision to hold back the registration of the SNB. AZC and Jasco agreed to extend the day for the payment of the purchase price to 19 June 2020. I accept that simultaneously with the exchange of the information required by the IDC to review the transaction, on 15 June 2020, Mr Kotane reminded the IDC of the extension of the sale between Jasco and AZC to 19 June 2020. I find it could be accepted that the IDC was reasonably aware of the extension agreement and timelines.

[61] On the conspectus of the above facts, delaying the registration of the SNB while the review and valuation was underway was not unreasonable or unlawful. As put to and agreed by Mr Kotane, the value of the business and the purchase

price were linked. It follows that there was a potential that the review would influence the value and extent of assets required for registration as security under the SNB more or less than those identified earlier.

[62] It is clear Mr Kotane continued to engage with the IDC and Jasco after the agreeing to the review and on 5 June 2020 when registration of the SNB was held over. This is inconsistent with a reasonable belief that the conduct relied on were acts of repudiation of the loan agreement.

[63] It bears emphasising that the cancellation of the sale agreement by Jasco on 22 June 2020 preceded the letter from the IDC dated 24 June 2020. Mr Kotane merely advised the IDC that he presented its revised valuation to Jasco on 24 June 2020 after the cancellation and Jasco declined to reconsider the matter and referred to its letter of termination of 22 June 2020. He invited the IDC to advise on how to “unwind the transaction” but did not state that he considered the IDC’s conduct a repudiation of the loan.

[64] The acid test is whether the facts and the evidence are consistent with a repudiation of the loan agreement. That also centres on the reduced valuation of the business and what would have weighed in the mind of a notional person on receipt of the letter dated 24 June 2020 from the IDC. I restate it for convenience:

“We did have a meeting this yesterday morning and the following were the outcome.

1. The price of the business is agreed at R40 205 338, with a condition that an update review need be done and presented to the investment credit committee. Also bear in mind that as the time lapses, the price might change either way.
2. The working capital need of R10 000 000 needs to be funded by Jasco on a loan basis (as a review DD will still need to be done, this can change significantly).
3. A new/revised sale agreement needs to be signed and presented to the IDC for us to reconsider the transaction.”

[65] It communicates the reduced value of the Jasco business to R 40 205 338.00. AZC submitted on these facts that, viewed objectively, the perception of a reasonable person placed in its position would conclude that proper performance of the funding agreements would not be forthcoming from IDC. I disagree.

[66] There was no dispute that the IDC's first due diligence concluded in May 2019. It was also undisputed by Mr Kotane that the focus then was whether the assets of the business were sufficient as security to cover the loan. I must pause however to mention the exchange about the cashflow and financial model developed between October and November 2019, in an email by Mr Craig Unsworth from Jasco, Mr Mpana of the IDC, Mr Kotane and others that:

“R15,45 million of R21,27 million (+72% of debtors received) is received last 2 days of the Month - which means it will be received before Take on date of the first, thus on the 1st one will expect debtors to be minimal: whilst R14,76 million of R20,27 million (+72,8% of creditors) are due on the first 4 days of the Month— which implies that this will only be payable after Take on date, 1st May 2020; inverse of the debtors.”

[67] In response, Mr Unsworth stated that:

“This model assumes that the accumulated Cash reserves of R16.3m will be "swept" by Jasco immediately following the effective date and that the starting cash position for AZC will be zero.”

[68] The import of this information on the future liquidity of the Jasco business was not ventilated fully during evidence or in cross examination. The IDC nevertheless concluded the loan agreement in February 2020 approximately eight months after the first due diligence and approximately three months after the above exchange. The impression from this evidence is that, at first, liquidity of the Jasco business was not a terminal constraint to pursuing the loan since the business's customers were trading. The final purchase price of R 56 914, 315.00 was agreed on 22 May 2020 incorporated in the addendum concluded on 5 June

2020. The reduction in the value of the business resulted in a variance of approximately R 16 708.977 between the purchase price and the senior loan debt agreement, excluding the subordinated loan. However, this result cannot be viewed in isolation to determine if it constituted a repudiation of the loan.

[69] The letter from IDC also advised AZC to approach Jasco for the additional facility of R 10 million a loan basis. It is not clear from the evidence what effect this would have on Jasco's asking price. It appears consistent with the IDC's earlier response to the request for the financial facility by Mr Kotane. Other than to say that Jasco would not have been disposed to do so, Mr Kotane did not unequivocally say Jasco refused the advance.

[70] It was specifically canvassed with Mr Kotane that during the course of these events, after the loan agreement, the IDC required a forecast of how the business would perform over a 5-year horizon. Mr Kotane agreed that the cashflow model at "take on date" did not reflect a forecast of the cash the business would have after AZC had taken over. I understood this concession as an acceptance that the circumstances of the business had changed.

[71] The plaintiffs made much of the reference to "a new/revised sale agreement needs to be signed and presented to the IDC for us to reconsider the transaction". This said nothing of the loan agreement between AZC and the IDC. Although the IDC led no evidence as to the meaning of this phrase, it was put to Mr Kotane that after the original sale agreement, AZC and Jasco generally embodied financial changes or prices in an addendum. The suggestion, which was not disputed, was that all that would be required was to change of the purchase price to the revised value determined by the IDC. Of course, this would have called for a price negotiation between Jasco and AZC. As attested by Mr Kotane, Jasco was not prepared to reopen discussion and stood by its letter of termination. But does this rise to a repudiation and a cause of the cancellation by the IDC?

[72] A reasonable person would not have read the letter in isolation but considered it in conjunction with the financial information submitted by Mr Kotane after the Financial Model developed in October and November 2019. They would have had regard to the character of the loan agreement and the above facts collectively. It would have been evident that the value of the Jasco business was finally determined in May 2020, some months after the sale agreement and the conclusion of the loan agreement. It would have been apparent that the letter did not communicate an unequivocal termination of the loan agreement or an unequivocal refusal to no longer be bound by the loan agreement.

[73] Although it was a reduction of the value of the business, the IDC was prepared to advance a loan commensurate to the revised value. The revised value would have been considered in the light of the financial information from Mr Kotane showing, there was “a material change” in the financial fortunes of the business.

[74] Equally, it was not disputed that the senior and subordinate loan facilities created a reciprocal obligation for AZC to repay the loan within the stipulated period of 54 and 21 months respectively. This was material to the terms of the loan. Financial information presented by Mr Kotane in April 2020 and May 2020 coupled with the request for a payment holiday indicated AZC would not meet its repayment obligations. Mr Kotane also stated in the heads of argument that the IDC was reviewing “all transactions” or some of the transactions. This confirms that AZC was not “singled out” for the review.

[75] It was put to Mr Kotane that the IDC intended to proceed albeit on a revised loan amount. The challenge put to him was that the Jasco Board that decided it would not proceed. Although the revised value of the business by the IDC, coupled with the request to revise the sale agreement altered the financial terms

of the original loan, I am unable to agree with the plaintiffs that it was a repudiation of the loan or evinces an intention not to be bound by the loan.

[76] In my view, if the plaintiffs disagreed with the revised valuation and were of the view that it was designed to undermine the fruition of the transaction as implied by Mr Kotane during his evidence, the plaintiffs bore the duty to adduce evidence to show that the IDC undervalued the Jasco business deliberately to repudiate the loan. No such evidence was presented.

[77] Concluding that the revised value was a repudiation would have an anomalous consequence. The IDC would be obliged to fund the AZC business in an amount above its value in circumstances where it was clear AZC would not meet the repayment period in terms of the loan. The objective evidence demonstrates trading circumstances had changed. It would not be a commercially sound, sensible and reasonable to compel the IDC provide AZC with funds that were more than the value of the business to be acquired. More so, it was clear AZC would not be able to meet the repayment obligations stipulated in the loan agreement. Objectively, the reduced loan amount offered by the IDC remained a significant amount *vis a vis* the purchase price, indicating it persisted with the transaction, albeit at a reduced amount. That is not consistent with a repudiation of the loan agreement

[78] Equally, the language of a “mal-performance” of the loan agreement is not appropriate having regards to the nature of the contractual relationship involved in this case in my view. The reduction of the value was not a case of merely rendering performance less than is due.¹⁴ It was based on objective facts and the reduced value found, based on trade information supplied by Mr Kotane.

¹⁴ *Janowsky and Others v Payne* 1989 (2) SA 562 (C) at 564-565.

[79] The question of causation is not clear cut, given the findings above. In view of what I have found, whether the IDC was the cause of the cancellation of the sale by Jasco rests on the allegation that the IDC delayed its response. As already alluded to, Jasco and AZC extended the date for the payment of the purchase price to 19 June 2020. AZC received Jasco's termination letter on 22 June 2020. The IDC sent its email with the revised value on 24 June 2020 after Jasco cancelled the sale agreement.

[80] First, as said, there was conflict between the evidence tendered by Mr Kotane and what was pleaded. The particulars of claim state that the IDC was to complete the review within three weeks "it had given itself". Whether this was from 26 May 2020 or from 5 June 2020, was not canvassed succinctly. At the same time, he testified that the IDC was to do so within ten days. Although not pressed on this in during cross examination, I accept that on 15 June 2020, Mr Kotane sent a reminder to the IDC about the looming extension deadline of 19 June 2020 reached between AZC and Jasco. Whether the IDC was a party to the agreement of the deadline was also not canvassed in evidence. Assuming in favour of the plaintiffs that the IDC agreed to the deadline, at best, the IDC breached an undertaking to send its review results which is not the same as a repudiation of the loan.

[81] Mr Kotane testified that despite the termination letter from Jasco, he nevertheless presented the revised value to Jasco, but Jasco declined to re-engage or withdraw its letter of termination. The question that remained unanswered is whether Jasco's stance would have remained the same had the IDC found value proportionate with Jasco's asking price, despite the delay. This was not canvassed at all. The consequence is that the delay by the IDC is not the only feasible hypothesis for the termination of the sale agreement. It is equally probable that even if presented by 19 June 2019, Jasco would have terminated the sale

agreement because AZC and the IDC undervalued its business and offered a purchase price far below its asking price.

[82] If I am wrong and the IDC repudiated the loan agreement, then an important consideration is whether IDC acted without a “lawful excuse”. As said, evidence shows that the value of the business had decreased and AZC would not perform the loan repayment obligations according to their true tenor because it was already in a precarious financial position due to the reduction in trade by its significant customers following the national lockdown and the Covid pandemic. It would not be commercially sound, sensible and reasonable to compel the IDC to provide AZC with loan funds when it was evident its revenue streams would not meet the loan repayment.

[83] Another consideration not raised by the plaintiffs is that the GNB had already been registered over the assets of Jasco, and the 20% shareholding subscription by the IDC finalised. Collectively and objectively, they weigh against Mr Kotane’s view that the email revaluing the Jasco business was a repudiation of the loan agreement.

[84] In sum, I find: AZC and Mr Kotane did not consider the review of the transaction on 26 May 2020 and the instruction to delay of the registration of the SNB on 5 June 2020 as acts of repudiation at the time. Instead, he consented and engaged with the IDC without objection. He did not place the IDC on terms for a breach of an undertaking provide the valuation within an agreed time, be it ten days or three weeks. The letter from the IDC does not repudiate the loan agreement. Its effect is to reduce the valuation of the Jasco business, and by implication the amount it will lend to AZC for the purchase. All this was based on objective facts pointing to changed circumstances of the Jasco business. The reason for not disbursing the agreed loan is lawful and contemplated by the terms of the loan agreement. The IDC was not obliged to disburse funds where there

was an adverse material change which would not only inhibit the repayment of the loan but commit it to a loan above its assessment of the value of the business.

[85] An innocent party must accept the repudiation. At the end of Mr Kotane's evidence, a question arose as to whether AZC cancelled the loan agreement and accepted the repudiation. The IDC contended that 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 must be communicated to the repudiating party.

[86] The plaintiffs' particulars state that they cancelled the funding agreement. They nevertheless sought leave to amend the particulars of claim and introduce a letter of demand dated 20 August 2020 sent to the IDC as evidence of acceptance of the repudiation. The IDC objected to the amendment. Although courts take a benevolent approach to an amendment, this issue need not detain the Court. The acceptance of the letter will not alter the finding that the plaintiffs failed to establish the repudiation. In any event, the service of summons served as a clear indication of the acceptance of the alleged repudiation.

Damages

[87] The plaintiffs pleaded an alternative claim based in delict. They alleged that there was negligent and or an omission by the IDC.

[88] The court in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty)Ltd*¹⁵ held that:

“Even if one were to classify a claim for damages for breach of contract as delictual in nature, one would still have to determine whether there is a line of demarcation between this form of liability and that arising from the *lex Aquilia*, and, if so, where this lines is to be drawn.

....

¹⁵ [1984] ZASCA 132; [1985] 1 All SA 347 (A).

The mere fact that the respondent might have framed his action in contract therefore does not *per se* debar him from claiming in delict. All that he need show is that the facts pleaded establish a cause of action in delict. That the relevant facts may have been pleaded in a different manner so as to raise a claim for contractual damages is, in principle, irrelevant.”¹⁶

[89] Other than the complaint about the delay in submitting the valuation and review results, the plaintiffs failed to allege facts or lead evidence to support the delictual claim. Given the approach I take that there was no repudiation, I must point out obvious deficiencies in the damages claim for completion.

[90] Both plaintiffs claim a loss of income in the amount of R 43 308,211.00 (forty three million three hundred and eight thousand two hundred and eleven rands) for AZC and an amount of R 7 500,000.00 (seven million five hundred thousand rands) for Mr Kotane based on an annual salary of R 1.5 million per annum agreed to in the loan agreement. In so far as the conveyancer’s fees of R 359,086.50, AZC merely pleads that “it is liable” for the amount.

[91] What I discern is that the formulation of the contractual damages claim appears to be a combination of compensatory as well as restitution damages. The latter relates to the claim for conveyancer’s fees. In essence, they seek to be placed in the position they would have been had the original loan agreement been performed in so far as the first two claims.

[92] A plaintiff suing for damages must set them out in such a way that will enable the defendant to reasonably assess the quantum thereof.¹⁷ The principle is that the damages must flow naturally as a foreseeable consequence of the IDC’s repudiation.¹⁸ The court in *Monumental Art Co v Kenston Pharmacy (Pty) Ltd*¹⁹ held that:

¹⁶ *Id* at 350-351.

¹⁷ Rule 18(10) of the Uniform Rules of Court.

¹⁸ *Holmdene Brick Works v Roberts Construction SA* [1977] ZASCA 61; 1977 (3) 688 (A).

¹⁹ 1976 (2) SA 111 (C).

“[I]t is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of loss could have been made.”²⁰

[93] First, there is no basis or evidence upon which AZC claims it would have generated the income claimed and the period over which such income would have been generated. It is not supported by the objective evidence of the performance of the AZC business as at effective date or the time of the alleged repudiation.

[94] In so far as the damages in respect of the salary claim, there was a dispute about the interpretation of the clause 18.2.3 entitling Mr Kotane to R 1.5 million. The clause prohibited AZC from making:

“any payment to any to its directors and/or managers other than bone fide salaries and directors fees (which salaries and fees may not, collectively, exceed R 1500000.00 (One Million Five Hundred Thousand Rand) for Sizwe Kotane in the Financial year ending an 30 June 2020 ("Salary limit") but provided that the Salary Limit may, thereafter, be increased at CPI, per financial year), starting with the financial year ending on 30 June 2021.”

[95] The IDC contends that the amount was merely a cap subject to approval of the AZC Board, which had the ultimate say on the salaries payable to the Board and the management. Be that as it may, it was open to Mr Kotane to adduce evidence to show he would have earned the said sum regardless of the performance of the business.

[96] What remains is the conveyancer’s fees for the registration of the SNB which would have been incurred to prepare the documents for registration. Mr Kotane does not say he has paid these fees but merely that AZC is liable to pay. Indeed, the loan agreement transfers the liability for the payment to AZC. It is common cause that registration did not occur. I was not directed to any evidence

²⁰ *Id* at 118D-E.

to show that the conveyancers either made a demand or instituted proceedings against him for the amount nor any receipts or proof of payment of the said amount.

[97] For the reasons above, the claim must fail, and the costs of the litigation must follow the result.

[98] In the result, I make the following order:

- a. The action by the first and second plaintiffs fails and is dismissed with costs.

NTY SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
JOHANNESBURG

This judgment is handed down electronically by circulation to the Applicants and the Respondents' Legal Representatives by e-mail, publication on Case Lines and release to SAFLII. The date of the handing down is deemed to be 7 October 2024. An apology for the late delivery, the ill health of the presiding judge was communicated to the parties.

Dates of Hearing: 5th, 6th and 15 February 2024

Date Judgment: 7 October 2024

Appearances:

For the Plaintiffs:	Mr Phiri
Instructed by:	RB Phiri Incorporated
For the Defendant:	Advocate Z Ngwenya
Instructed by:	MMMG Attorneys