THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 41/2022

In the matter between:

KRÜGEL HEINSEN INCORPORATED **APPELLANT**

and

CATHERINE HELEN THOMPSON **FIRST RESPONDENT**

COUPLES INVESTMENT CC **SECOND RESPONDENT**

Neutral citation: *Krügel Heinsen Incorporated v Thompson and Another* (Case no 41/2022) [2023] ZASCA 38 (31 March 2023)

Coram: SALDULKER, VAN DER MERWE and MABINDLA-BOQWANA JJA and NHLANGULELA and OLSEN AJJA

Heard: 27 February 2023

Delivered: 31 March 2023

Summary: Appeal – reception of further evidence on appeal – evidence of events post-dating judgment of court of first instance – may be received in

special and exceptional circumstances – new evidence demonstrates that no damages suffered for alleged breach of mandate – evidence allowed and appeal upheld.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Mabuse J, Khumalo J and Ceylon AJ concurring), sitting as court of appeal.

1. The application to adduce further evidence on appeal is granted.
2. The appeal is upheld with costs, including the costs of the application to adduce further evidence on appeal.
3. The order of the full court is set aside and replaced with the following order.

   'The appeal is dismissed with costs.'

JUDGMENT

Olsen AJA (Saldulker, Van der Merwe and Mabindla-Boqwana JJA, and Nhlangulela AJA concurring)

[1] This appeal has its origin in an agreement of compromise which went wrong in its implementation. The parties to the compromise were:

(a) Couples Investment CC (Couples), the second respondent, which was cited together with Catherine Thompson, its sole member and the first respondent; and

(b) FirstRand Bank Limited (FirstRand), which, for reasons which will become apparent, is not a party to the present appeal, despite the fact that it was the second respondent in the court of first instance.

The proceedings commenced with an application launched by Ms Thompson and Couples in the Gauteng Division of the High Court, Pretoria (the high court). The refusal of the application by the court of first instance was followed by a successful appeal to the full court. Special leave to appeal having been granted by this Court, Krügel Heinsen Incorporated (Krügel Heinsen), the first respondent in the original application, appeals against the order of the full court.

[2] A summary of the circumstances which gave rise to the compromise, its content, and an account of how it went awry, is a necessary precursor to an understanding of the issues which must be decided in this appeal. I am unable to discern from the papers why it is that Ms Thompson is a party in this litigation. She chose to be an applicant, and no objection to that was raised by the respondents. She is obviously the directing mind of Couples, but the rights in issue in the case are those of Couples.

[3] Ms Thompson was a director of Industrial Lifting Instrumentation and Pump Supplies (Pty) Ltd (ILIPS), a company which owed money to FirstRand, as did Couples, which was also a customer of FirstRand. Couples had bound itself as surety for ILIPS's debt in favour of FirstRand, and had registered a mortgage bond in favour of FirstRand over immovable property it owned, to secure its obligations as surety.

[4] ILIPS could not pay its debts and was wound up finally by an order granted in 2013. FirstRand then launched proceedings for the winding up of Couples, asserting claims against Couples which included its obligations as surety for ILIPS. These proceedings were opposed.

[5] In the meantime Couples found a buyer for its property. That is when Krügel Heinsen, a firm of attorneys, entered the picture. It was appointed as conveyancer for the transfer of the mortgaged property to the buyer.

[6] An agreement had to be struck between Couples and FirstRand as to the terms upon which FirstRand would agree to the cancellation of its mortgage bond over the property, so that it could be transferred to the buyer. FirstRand wanted to be paid out the proceeds of the sale of the property. The amount FirstRand would recover from or contribute to the winding up of ILIPS was a significant factor in determining the extent of FirstRand's claim against Couples in the latter's role as surety for ILIPS.

[7] Against that background FirstRand and Couples concluded the agreement of compromise, the express terms of which were recorded in a letter dated 5 December 2014 written by the attorneys acting for FirstRand. They amounted to this.

(a) Against the registration of transfer of the mortgaged property FirstRand would be paid R2 350 000.

(b) A further amount of R500 000 would be retained out of the proceeds of the sale, and invested in an interest-bearing trust account by Krügel Heinsen.

(c) Once the liquidation and distribution account in the winding up of ILIPS was confirmed, FirstRand's attorneys would provide Krügel Heinsen with a copy of the confirmed account and instruct it to pay over the amount of R500 000, or any lesser amount found payable by FirstRand to the liquidators in terms of the confirmed account.

(As FirstRand could not make any claim in excess of R500 000, it was implied that the interest earned on the trust investment would be for the benefit of Couples. It was equally clear that if less than R500 000 was required by FirstRand, the balance left would be payable to Couples.)

[8] A little over two years later FirstRand's attorneys sent a letter to Krügel Heinsen, the material portion of which read as follows.

'We enclose herewith a copy of the letter as received from our client enclosing the first and final liquidation distribution and contribution account.

Our client must refund the estate with the amount of R518 624.29.

You are under these circumstances requested to call up the investment and pay over to our trust account, the amount of R500 000.00.'

[9] This instruction given by FirstRand's attorneys followed a letter sent by FirstRand to its attorneys, which was in turn copied to Krügel Heinsen when the instruction was given. However the letter from FirstRand made it clear enough that the account in question had not been confirmed. FirstRand's attorneys and Krügel Heinsen overlooked the fact that it was a necessary condition for the making of the demand that the account should have been confirmed. Acting in error, in February 2017 Krügel Heinsen then paid R500 000 to FirstRand's attorneys, and the interest accrued on the investment to Couples.

[10] FirstRand's attorneys disbursed the R500 000 in accordance with FirstRand's instructions. In a letter sent to FirstRand's attorneys about six months later, the attorneys acting for Couples asserted that FirstRand had appropriated the money paid in error, and had thereby repudiated the agreement of compromise recorded in the letter of 5 December 2014. The letter recorded that the alleged repudiation was accepted, and the agreement of compromise cancelled.

[11] Ms Thompson and Couples then launched their application against Krügel Heinsen and FirstRand. The first prayer in the amended notice of motion was for orders declaring that both respondents had repudiated the agreement of 5 December 2014, that the applicants had lawfully cancelled that agreement, and that they were entitled to payment of the amount of R500 000 in issue. They also

sought an order that Krügel Heinsen pay the amount in question 'plus interest thereon at the prescribed rate of interest from 11 January 2017 to date of payment'.

[12] There followed a number of alternative orders largely arising from related disputes between Couples and FirstRand. However the second alternative claim was for an order that the amount of R500 000 be reinstated into trust 'by [Krügel Heinsen] alternatively [Krügel Heinsen and FirstRand] together with interest at the prescribed rate from 11 January 2017 to date of payment'.

[13] The case Couples sought to make in its founding affidavit went along the following lines.

(a) It had given Krügel Heinsen a mandate to take R500 000 of the proceeds of the sale of the property of Couples into trust, and to disburse the money in the manner laid down by the terms of the agreement of compromise Couples had reached with FirstRand.

(b) Krügel Heinsen released the money on an instruction from FirstRand's attorneys, acceded to by Krügel Heinsen despite the fact that the liquidation and distribution account of ILIPS had not been confirmed.

(c) Whilst Couples could concede that the conduct of Krügel Heinsen, and that of FirstRand, up to this point was a product of error, the subsequent conduct of FirstRand in appropriating the money constituted a repudiation of the agreement of compromise which Couples had accepted.

(d) Given that the agreement of compromise was cancelled, Couples was entitled unconditionally to repayment of the sum of R500 000.

[14] The claim to an order declaring that Krügel Heinsen had repudiated the agreement of compromise was doomed to fail from the outset. Krügel Heinsen was not party to the agreement of compromise. In the circumstances, according

to the judgment of the full court, what was argued before it was that Krügel Heinsen had breached a duty owed to Couples as its client, and was obliged to compensate Couples for the loss consequently suffered. This argument depended for success, inter alia on a finding that FirstRand had repudiated the agreement of compromise; because if it had not, the agreement would not have been lawfully cancelled, and all Couples could ask for was that the money be restored to its trust status and continue to stand as security, as contemplated by the agreement of compromise. It is clear from the papers that Couples did not want that; it wanted unfettered access to the money. On its papers in the matter, Couples could only succeed against Krügel Heinsen on the basis that it had suffered damages as a result of breach by the latter of its mandate.

[15] In its answering papers Krügel Heinsen, besides making the not unnatural protest that it no longer held the R500 000 in trust, and was therefore in no position to disburse that sum again, advanced the case that it had been obliged in terms of the conditions upon which it received the money into trust to obey the instructions of FirstRand's attorneys as to the disposal the money. Counsel for Krügel Heinsen did not persist in that contention before us, and accepted that an error had been made.

[16] In their answer FirstRand and its attorneys accepted that the instructions to call for payment of the R500 000, as well as to the disposal thereof, had been given in error. It had therefore arranged for the money to be paid to its attorneys and lodged in an interest-bearing trust account for the benefit of Couples on the same terms as the money had earlier been lodged in an interest-bearing trust account by Krügel Heinsen. FirstRand thus denied that it had repudiated the agreement.

[17] In the high court the application was dismissed with costs. There is no need to comment on the reasons for that decision beyond observing that the court found that there was a dispute of fact concerning the question as to whether FirstRand had repudiated the agreement.

[18] Couples obtained leave to appeal to the full court. Before the appeal was argued Couples delivered a notice withdrawing the appeal against the judgment in favour of FirstRand, recording that this had been done 'as the matter has become settled, each party to pay its own costs'. I will revert shortly to how the withdrawal of the appeal against FirstRand was dealt with before the full court, and how matters with regard to that issue unfolded in this Court.

[19] The full court granted judgment against Krügel Heinsen for payment of the sum R500 000 to Couples, together with interest thereon at the prescribed rate from 11 January 2017. Other issues aside, that order could not be made without first concluding that had it been established that FirstRand had repudiated the agreement of compromise.

[20] The legal principles applicable to an enquiry into whether a contract has been repudiated were set out by this Court in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA); [2001] 1 All SA 581 paras 16 to 20. The prominent elements of the principles set out in *Datacolor* were confirmed in *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC);2021(8) BCLR 807 (CC) paras 104 and 105. The test is an objective one: would a reasonable person in the position of the innocent party conclude from the conduct of the other party that the latter's performance would not be rendered? It must be assumed that a reasonable person would give the matter careful consideration, taking into account background material and circumstances. Conduct from which

repudiation may be inferred must be 'clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis' (*Datacolor*, para 18, where the court observed further that repudiation is a serious matter requiring anxious consideration, and not lightly to be presumed).

[21] In this case the full court made no attempt at assessing FirstRand's conduct against the principles set out in *Datacolor*. The entire enquiry was dealt with in single a paragraph of the judgment. Having recorded, correctly, that the release of the money had been erroneously requested and erroneously granted, the judgment proceeded as follows:

'The bank then clearly decided to snatch at the bargain and unlawfully appropriate the amount contrary to the agreement by effecting payment into that account. This constitutes a repudiation or at least a breach of the agreement of 5 December 2014. The appellants accepted the repudiation and therefore the agreement was lawfully cancelled on 1 September 2017. In the result, Couples is not liable for the bank's possible contribution obligation to the liquidators of ILIPS and the bank is not entitled to any form of substituted security. Despite the recent correspondence the bank and [Krügel Heinsen] have failed to rectify the breach of agreement and to do justice.'

[22] Of course the position remained that when it realised its error, and the reaction of Couples to it, FirstRand had paid the money into trust to be held on the same terms as contemplated by the original agreement of compromise. Indeed, before FirstRand's answering papers were delivered, the attorney who personally handled the matter for FirstRand addressed a letter to the attorney representing Couples, explaining that he was personally responsible for the bona fide mistake in instructing Krügel Heinsen to release the sum of R500 000, and that his firm would tender the costs of the application on an unopposed basis if the application were withdrawn. The offer was not accepted.

[23] In my view there was no easy answer to the question as to whether Couples had been entitled to regard the conduct of FirstRand as repudiatory, and accordingly to cancel the agreement of compromise. What is more, the transition from a finding that FirstRand repudiated the agreement to a judgement against Krügel Heinsen was not as obvious as seems to have been assumed by the full court. The language of 'duty of care' was not apposite. And there was no basis for the finding that the cancellation of the compromise freed Couples from liability for any contribution that FirstRand had to make to the liquidators of ILIPS. The suretyship remained extant. However, there is no need to examine these matters any further. This appeal turns on issues which post-dated the judgment of the court of first instance.

[24] Before the appeal was argued in the full court it came to the attention of those representing Krügel Heinsen that the settlement between FirstRand and Couples involved the latter agreeing to release the R500 000 being held in trust for Couples by FirstRand's attorneys, to the liquidators of ILIPS. Quite what further detail concerning the settlement was known to Krügel Heinsen at the time is not clear on the papers before us. Be that as it may, when counsel for Couples and Ms Thompson (as appellants) argued the matter in the full court the provisions of that settlement were not disclosed. When counsel for Krügel Heinsen addressed the full court he attempted to make what appears to have been an application from the bar for the admission of further evidence in the way of a disclosure of the terms of the settlement to the court, to be taken in to account by it in determining the appeal. (It must be remembered that at that time Couples had no judgment in its favour for payment of R500 000. It was seeking it on appeal.) Counsel for Couples objected, contending that the appeal had to be decided on the record as it stood. It is common cause that the full court refused to receive evidence of the settlement. However, the subject was not dealt with in its judgment.

[25] Given these circumstances Krügel Heinsen has made a formal application to this Court asking it to receive further evidence in terms of s 19*(b)* of the Superior Courts Act 10 of 2013. The founding affidavit in that application, supported by a confirmatory affidavit from the attorney dealing with the matter for FirstRand, describes how the settlement came about and what its essential terms were. Simply put, the agreement reached was to the effect that, in exchange for:

(a) Wesbank (a division or trade name of FirstRand) having no further claims against Couples and Ms Thompson;
(b) Couples (and Ms Thompson as well) being released from all suretyship obligations in favour of Wesbank;
(c) Couples being released from its suretyship liability in favour of FirstRand (for the loan) that formed the basis of the initial compromise

Couples and Ms Thompson would withdraw their appeal against FirstRand in the present case and Couples would permit FirstRand's attorneys to pay the R500 000 in trust to the liquidators of ILIPS.

[26] Couples delivered an affidavit in opposition to the application for the receipt of further evidence which in my view can only be described as an exercise in obfuscation. There is no doubt at all that Couples in effect utilised the R500 000 held in the interest-bearing trust account in its name, inter alia, to buy its release from its obligations to FirstRand and Wesbank. The cynical attempt by Couples and Ms Thompson to exclude the evidence of the settlement, and to extract the benefit of another R500 000 out of this litigation by pursuing the appeal in the full court against Krügel Heinsen, and persisting with those pursuits in this Court until their counsel rose to address us, is to be deprecated.

[27] In its affidavit opposing the reception of further evidence in this Court Couples raised the argument that a formal application ought to have been made to and therefore considered by the full court. In principle that is correct. Replying to that, the attorney for Krügel Heinsen said that on his side it was assumed that the provisions of the settlement agreement would be disclosed to the full court by Couples. It suffices to say that that this appears to have been a quite reasonable stance.

[28] Receiving further evidence on appeal is not lightly done. An appeal court's function is to decide whether the judgment of the court a quo was correct on the material placed before it. However in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) paras 42 & 43 the principles were stated thus.

'[42] In *Van Eeden v Van Eeden* [1999 (2) SA 448 (C) at 454], the Cape High Court held that it was well established that the Court's powers as derived from s 22*(a)* of the Supreme Court Act should be exercised sparingly. The Court held, further, that in that case the additional evidence related to facts and circumstances which had arisen after the judgment of the Court *a quo*. This raised the question whether it was competent for the court, in the exercise of its power under s 22*(a)*, to receive such evidence or to authorise its reception. Comrie J held that the section did not include any express limitation which would exclude the reception of the evidence then sought to be tendered and that the court exercising appellate jurisdiction had a discretion whether or not to allow the evidence to be admitted, which discretion should be exercised sparingly and only in special circumstances. From time to time, he held, cases did arise which cried out for the reception of post-judgment facts.

[43] In my view, this approach is correct. The Court should exercise the powers conferred by s 22 'sparingly' and further evidence on appeal (which does not fall within the terms of Rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late

filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted.'

[29] Here the evidence is to the crucial effect that Couples suffered no damages as a result of the alleged breach of mandate by Krügel Heinsen. The factual evidence is common cause. These are special and exceptional circumstances. The interests of justice demand that the evidence be received.

[30] The approach of Couples recorded above to the application for the receipt of further evidence, and to the appeal generally, was not addressed or defended in argument before us. Counsel for Couples confined his submissions to the subject of the interest on the sum of R500 000 which Couples had lost as a result of the premature release of the money from the trust account of Krügel Heinsen. His argument was that this Court should adjust the judgment of the court a quo to allow such a claim.

[31] The issue was touched on in the affidavit in support of the opposition of Couples to the admission of further evidence, where Ms Thompson stated that that the 'mora interest' (by which she clearly meant interest at the prescribed rate) on R500 000 from 2 February 2017 to the date of the settlement with FirstRand is R104 585.17. (The loss of interest on the money which ought to have been held in trust was also mentioned in passing in the founding affidavit.)

[32] There are a number of difficulties with this argument. The first is that there was no prayer for interest as damages for breach of contract by Krügel Heinsen beyond the normal prayer for interest on the capital sum for which judgment was sought. The second difficulty is that any loss would not be in respect of interest at the prescribed rate, but the net interest which would have been earned if the money had remained in the interest-bearing trust account. There is no evidence

of that rate, which may very well have fluctuated from time to time; nor any account of the agency and administration fees which would have been debited to the account. (That there were such fees, to which Couples made no objection, is apparent from a statement of the account annexed to the founding affidavit.) Nothing is said in the papers about the fate of the interest on the sum of R500 000 whilst it was lodged in the trust account of FirstRand's attorneys. A case for a claim for lost interest has not been made out.

[33] The following order is made:

1. The application to adduce further evidence on appeal is granted.
2. The appeal is upheld with costs, including the costs of the application to adduce further evidence on appeal.
3. The order of the full court is set aside and replaced with the following order.

   'The appeal is dismissed with costs.'

P J OLSEN

ACTING JUDGE OF APPEAL

Appearances:

For appellant:	Mr J S Griesel
Instructed by:	Savage Jooste & Adams Inc, Pretoria
	Symington & De Kok, Bloemfontein
For respondents:	Mr T P Kruger SC
Instructed by:	Jaco Roos Attorneys Inc, Pretoria
	Noordmans Inc, Bloemfontein