THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-reportable

Case No: 1046/2016

In the matter between:

BUDGE, JONATHAN STUART	**FIRST APPELLANT**
BOON, FARREL EAN N O	**SECOND APPELLANT**
BUDGE, VIVIEN BARBARA N O	**THIRD APPELLANT**
POLLOCK, RICHARD N O	**FOURTH APPELLANT**
WAVELENGTHS 1147 CC (IN LIQUIDATION)	**FIFTH APPELLANT**
MIDNIGHT STORM INVESTMENTS 256 (PTY) LTD (IN LIQUIDATION)	**SIXTH APPELLANT**

and

GLYN-CUTHBERT, RUSSELL	**FIRST RESPONDENT**
SANTANA, ANTHONY N O	**SECOND RESPONDENT**
SANTANA, LEANNE N O	**THIRD RESPONDENT**
RUSKING REAL ESTATE MARKETING (PTY) LTD	**FOURTH RESPONDENT**
COREFACTS 1069 CC	**FIFTH RESPONDENT**
COPPER SUNSET TRADING 326 (PTY) LTD	**SIXTH RESPONDENT**
CENTRAL LAKE TRADING 304 (PTY) LTD	**SEVENTH RESPONDENT**
DAVPROP 26 (PTY) LTD	**EIGHTH RESPONDENT**
WEST DUNES PROPERTIES (PTY) LTD	**NINTH RESPONDENT**
LITTLE SWIFT INVESTMENTS 338 (PTY) LTD	**TENTH RESPONDENT**
TURQUOISE MOON TRADING 289 (PTY) LTD	**ELEVENTH RESPONDENT**
ALFA BUSINESS VENTURES 33 (PTY) LTD	**TWELFTH RESPONDENT**

Neutral citation: *Budge & others v Glyn-Cuthbert & others* (1046/16) [2018] ZASCA 18 (16 March 2018)

Coram: Shongwe ADP, Willis, Saldulker, Mbha and Van der Merwe JJA

Heard: 5 March 2018

Delivered: 16 March 2018

Summary: Claims arising from an agreement to dissolve a business relationship between two parties – repudiation not established – enrichment claims and ancillary relief – appeal dismissed – cross-appeal partially successful.

ORDER

On appeal from: The Gauteng Local Division, Johannesburg (Mphahlele J sitting as the court of first instance):

1 The appeal is dismissed.

2 The cross-appeal is upheld in respect of claims A, C and H and is also upheld in respect of the absence of a costs order in the court a quo when claim B was dismissed.

3 The orders of the court a quo in regard to claims A, C and H are set aside, and in respect of claim B the omission of the court a quo to make an order as to costs is corrected and, in respect of these four claims (ie claims A, B, C and H), the following is substituted therefor:

'Claims A, B, C and H are dismissed with costs.'

4 The cross-appeal in respect of claim E is dismissed.

5 The appellants are jointly and severally liable to pay the respondents' costs in the appeal and cross-appeal, the one paying the others to be absolved.

6. The first appellant is to pay the costs of the application to amend the quantum of damages in claim B.

JUDGMENT

Willis JA (Shongwe ADP and Saldulker, Mbha and Van der Merwe JJA concurring):

Introduction

[1] Although there are six appellants and twelve respondents in this appeal and cross-appeal, the two lead actors among the dramatis personae are Mr Jonathan Budge, (the first appellant) and Mr Russell Glyn-Cuthbert, (the first respondent). The fifth, sixth, seventh, ninth and tenth respondents played no part in the litigation. The

first appellant and the first respondent had been business partners from 2001 to 2007, mutually agreeing in November 2007 to go their separate ways and to divide up the assets built up during their partnership. It was in the dividing up of these assets between the first appellant and the first respondent that the dispute between the parties arose, leading to the litigation in the high court and, subsequently, to this appeal and cross-appeal. In view of the fact that there are these two lead actors in the dispute and so many other parties I shall, for convenience and in order to avoid confusion, take the unusual step of referring to the two lead actors as the first appellant and the first respondent respectively but to the other parties by the names that have generally been used, both in the court a quo and in this appeal.

[2] The appeal and cross-appeal arise from a trial in the Gauteng Local Division, Johannesburg (Mphahlele J). Judgment was delivered on 3 June 2016. The main issue in the appeal is whether the court a quo correctly found that the first respondent had not repudiated a dissolution of partnership agreement (the agreement), which he had concluded with the first appellant. As a result of this finding, the court a quo dismissed the first appellant's claim for damages based upon the alleged repudiation. The appeal is also concerned with whether the court a quo correctly dismissed a liquidator's claim, based on enrichment, for reimbursement of a management fee paid to the fourth respondent. A further issue in the appeal is whether that court correctly dismissed a claim by the first appellant for costs that he has incurred in the winding up of certain companies. The appeal to this court is with the leave of the court a quo, which was granted on 9 September 2016.

[3] The appellants were the plaintiffs in the court a quo. They brought nine separate claims against the respondents. These were claims A to I respectively. The court a quo found partially in favour of the first appellant in claim A but dismissed much of the relief sought thereunder, by reason of its finding that there had been no repudiation of the agreement. It dismissed claim B, having found that there had been no repudiation of the agreement but made no order as to costs in respect of that claim. Other than his partial success in regard to claim A, the first appellant succeeded in respect of his claim H and the fourth appellant, who was liquidator of companies in which the first appellant and the first respondent had been shareholders, was successful in respect of claims C and E. The court a quo

dismissed the appellants' respective claims D, F, G and I. The appellants sought and were granted leave to appeal to this court in respect of claims A, B, D, F, G and I.

[4] The cross-appeal by the respondents before this court has also been heard with the leave of the court a quo. It had found for the appellants in respect of four of their claims (two of which were in favour of the first appellant and two in favour of the fourth appellant). The respondents contend that the court a quo should have dismissed the appellants' claims in their entirety. The cross-appeal was in respect of the orders of the court a quo in respect of claims A, C, E and H, as well as its failure to make a costs order when dismissing claim B.

[5] Also in contention before us is an application made by the first appellant, after leave to appeal had been granted, to amend the quantum of his damages. If the amendment were to be granted, it would relate to claim B only. Self-evidently, as counsel for both sides agreed, if the appellants' claim B were to fail, there would be no need to consider the amendment. The amendment is, in any event, opposed by the respondents on the basis that it is not supported by the evidence lead during the trial.

An outline of the history of the matter

[6] The first appellant and the first respondent came together as business partners in order to own, develop and speculate in immovable properties. To this end, they held equal shares and interests in various private companies and close corporations respectively. These shares and interests were held either by them in their individual personal capacities or through family trusts.

[7] On 26 November 2007 the first appellant and the first respondent entered into a 'memorandum of agreement', also styled a 'dissolution of partnership' (the agreement aforesaid), in terms of which their business relationship would come to an end with effect from 30 November 2007. Various of the corporate entities, through which they had conducted their business were also parties to the agreement and have been joined in the action, either as plaintiffs or co-defendants. Essentially, the agreement provided that the immovable properties would be sold and thereafter the proceeds divided equally between the first appellant and the first respondent. The

first appellant intended to go farming. The first respondent intended to continue in the business of property development. By reason of the first respondent's intention to continue, on his own, in that line of business, the agreement essentially provided that he would buy or 'take over' various of the properties that he and the first appellant had owned together. The agreement had been drawn up by the first respondent's then attorney.

[8] The following clauses in the agreement are relevant to the determination of the issues:

'**...**

2.3 Wavelengths will continue to market and sell the developments reflected in 2.2 above as it has been accustomed to. Wavelengths will endeavour to complete the developments by not later than the 28th February 2009. Should any units not be sold by this date, then the parties will make a decision how to dispose of the units.

2.4 As and when income is received in the process of finalizing the developments, the net proceeds, after all expenses have been paid, will be shared equally between Russell [the first respondent] and Jon [the first appellant] or their respective holding trusts.

...

5.2 The Companies [the companies reflected in annexure A to the agreement] undertake to sell the properties to Rusco by not later than June 2008 for an amount of R29 million gross.

5.3 The sum of R29 million will be paid to the Companies and the net proceeds will be paid to Jon and Russell or their nominated entities.

5.4 The balance outstanding due to Jon from time to time, will bear interest at 4% below prime bank rate calculated from 30 June 2008 until date of payment to Jon. Jon will be paid in full by not later than 28 February 2009 failing which Jon shall at his option elect to either increase the interest charged to the prime rate or demand that the property be sold on the open market to realise the capital.

...

12 BREACH

Should any party ("the defaulting party") commit a breach of any of the provisions of the agreement, then the party who is not in breach ("the aggrieved party") shall be entitled to give the defaulting party written notice to remedy the breach. If the defaulting party fails to comply with that notice within fourteen (14) days of the receipt thereof, subject to any other

provisions of this agreement to the contrary, the aggrieved party shall be entitled to claim specific performance, or cancel the agreement, in either event without prejudice to the aggrieved party's rights to claim damages. The foregoing is without prejudice to such other rights as the aggrieved party may have in common law or statute.'

[9] Clause 2.1 of the agreement lists some 29 'developments', as referred to in clause 2.2, quoted above. It also records that 'Savannah Falls Phase 1' contains 65 stands. Under the heading 'General' (clause 14), the agreement contains the standard clauses that variations and amendments thereto must be agreed in writing and signed by both parties thereto, as well as the fact that any indulgence, leniency or extension of time, by one party shall not affect his rights to enforce the terms of the agreement.

[10] In terms of the agreement, in order to 'take over' these properties, the first respondent would form a company to be known as 'Rusco (Pty) Ltd' (Rusco). Rusco would buy the properties owned by Wavelengths 1147 CC, the fifth appellant (Wavelengths), Midnight Storm Investments (Pty) Ltd, the sixth appellant (Midnight Storm), Turquoise Moon 289 Trading (Pty) Ltd, the eleventh respondent (Turquoise Moon), and Alfa Business Ventures 33 (Pty) Ltd, the twelfth respondent (Alfa Business Ventures). These appear in a schedule in annexure 'A' to the agreement. As appears from the extract of the agreement quoted above, the aggregate sum agreed for these transactions was R29 million. The nett proceeds of the sale of these properties, listed in Annexure 'A', were to be divided equally between the first appellant and the first respondent (or their respective nominees). The agreement provided that Rusco would be paid R3 million as a management fee for 2008. It was expected that both sides would receive about R12.4 million each. In terms of the agreement, the first respondent would be liable in his personal capacity as well as Rusco.

[11] The first respondent purchased a so-called 'shelf company' known as 'Rusking Real Estate Management (Pty) Ltd', the fourth respondent, (REM) on 30 November 2007. During 2008 the first respondent was responsible for paying a management fee of R3.42 million from Wavelengths to REM and not to Rusco. Rusco was, in fact, never formed.

[12] As is apparent from clause 5.4 thereof, the agreement also provided that if Rusco had not paid the sum of R29 million before 30 June 2008, it would be obliged to pay the first appellant interest at a rate of four per cent below prime and if there were arrears at 28 February 2009, the first appellant would be able to claim interest at the prime rate. As from 30 November 2007, the first appellant discontinued any active participation in the business.

[13] Davprop 26 (Pty) Ltd (the eighth respondent), (Davprop) one of the entities in which the first appellant and the first respondent held equal shares, sold its immovable property to REM on 16 April 2008. That sale was not finalised. Subsequently, the first appellant and the first respondent agreed to vary the dissolution agreement further by the first appellant selling his shareholding in Davprop to the first respondent. That agreement is reflected in a resolution of the Davprop board of directors dated 25 August 2008. On 16 April 2008 Turquoise Moon sold Plot 68 Kempton Park to Danking Properties (Pty) Ltd for a purchase consideration of R7 million. On the same day Wavelengths sold Antonio Manor to REM for R4.8 million. On 26 September 2008 Midnight Storm sold 27 individual stands to Rusking Manor CC for R207 000.00 per stand. On 7 October 2008 Midnight Storm sold 24 individual Cranford Glen stands to Rusking Manor CC for R192 000 per stand. On 24 May 2010 Midnight Storm sold Eagle Rock to Turquoise Moon for R1 million. On the same day, 24 May 2010, Wavelengths sold Maple Ridge to Turquoise Moon for R3.4 million. In each instance (enduring over a period of more than two years), the first appellant signed the offers to purchase on behalf of each seller and the first respondent accepted the offers on behalf of the respective purchasers. In addition, the first appellant said, in evidence, that the payment of the 2008 management fee to REM rather than to Rusco, made absolutely no difference to him. Those monthly payments took place without demur from the first appellant. In the circumstances, the first respondent's failure to incorporate Rusco was entirely immaterial to the dispute between the parties. REM had served the purpose intended by the parties and, at all material times, the first appellant had been content that this should be so.

[14] In summary, during the period between the signing of the agreement and the liquidation of Wavelengths and Midnight Storm, only one property, 'Bastion Gate'

was transferred in terms of the agreement. This was effected by the first appellant and the first respondent both signing an agreement on 1 March 2009, in terms of which the first appellant sold his 50 ordinary shares in Turquoise Moon. On 22 February 2010 a ten million rand 'interim dividend' was paid to the first appellant and first respondent via Wavelengths and distributed such that the first appellant received R8.5 million and the first respondent R1.5 million.

[15] From the time that the first appellant and the first respondent met on 8 December 2008 to discuss the state of affairs relating to the dissolution, the relationship between the two gradually deteriorated. On 17 May 2010 the first respondent wrote to the first appellant to inform him that he, the first respondent, was in the process of 'obtaining finance' to perform his obligations in terms of the agreement. The appellants accept that, until that date, there had been no repudiation by the first respondent.

[16] In the process of trying to untangle their business relationship, the first appellant and the first respondent entered into a number of ad hoc agreements, including payments, out of their partnership assets, to the first respondent while he attempted to sell the assets and realise the proceeds. These are relevant not only to claims C and D but also the overall picture. It is clear that, at least as a result of the financial crisis, the parties had agreed that the 'cut-off' date of 30 June 2008 (if one may indeed cast it in such imperative terms) was not regarded by either of the parties as having been 'cast in stone'.

[17] Meanwhile, during the periods 1 January 2008 to 31 December 2008, the first respondent transferred a sum of R3.42 million as a management fee from Wavelengths to REM. This was paid in 12 monthly instalments. The first respondent contends that this had been agreed to between the parties. The first appellant contests this. Similarly and again similarly disputed, the first respondent transferred R4.56 million from Wavelengths to REM during the period 1 January 2009 to 31 December 2009. The first respondent contends that this had been agreed to between the parties. In March and April 2010 the first respondent transferred a further sum of R300 000, in two equal instalments from Wavelengths to himself as 'remuneration'. The first respondent's entitlement thereto is also in dispute.

[18] In respect of the allegation of repudiation, the first appellant relied on the first respondent's failure to incorporate Rusco as one of two grounds for his entitlement to cancel and claim damages from the first respondent. The immateriality of this issue to the first appellant over a number of years (to which reference was made in para 13 above), has the consequence that he cannot rely on it as a 'repudiation'. The other ground is a letter sent by the first respondent's attorneys, Schwarz-North of 26 November 2010. It has been referred to by the parties as 'the repudiation letter'. It reads as follows:

'Dear Sir,

RE: WAVELENGHTS // J BUDGE // R GLYN-CUTHBERT – YOUR REF B152891

1. Your with prejudice email of 19 November 2010 refers.

2. Our client was, as your client is fully aware, entitled to repayment of the amount of R3 000 000.00. Notwithstanding that your client has had knowledge of this for a considerable period of time, your client has now sought to make this an issue. Your client has, at all material times, had access to all the banking accounts (and still does).

3. The amount of R3 000 000.00 represents amounts loaned by our client to Wavelengths and which loans were always repayable at our client's election.

4. Your client's contention that the repayment was not authorised is not correct and accordingly there exists no basis for the demand contained in your email under reply. Your client is invited to disclose the basis for the contention that this was not authorised and that our client was not entitled to repayment of the loans made.

5. Both you and your client are well aware that our client disputes that there is an agreement as contended for in your email under reply.

6. Our client's instructs us that Eagle Rock was sold by Wavelengths to Turquoise Moon. Your client signed the agreement of sale on behalf of Wavelengths (as seller) and our client signed the agreement on behalf of Turquoise Moon (as purchaser). Our client further instructs us that he has purchased your client's shares in Turquoise Moon and paid an amount of R2 750 000.00 to your client. Despite payment of this amount to your client, our client instructs us that your client is unlawfully refusing to transfer his shares in Turquoise Moon to our client. Our client urgently requires your

client to sign the relevant share transfer form. Please confirm that your client will do so.

7. Certain stands in Buccleuch have been sold. Our client has already advanced an amount of R2 250 000.00 to your client. Our client has, in essence, paid your client for his share of Eagle Rock and Erf 368/370 Buccleuch. Insofar as there is a shortfall relating to your client's share in respect of Erf 335 Buccleuch (Antonio Manor), our client will instruct the transferring attorneys of Antonio Manor to pay such shortfall directly to your client.

8. To the extent that we have failed to deal with any of the allegations contained in your email under reply, our failure to do so is not to be construed as an admission of any issue not pertinently dealt with and all rights vested in our client to respond thereto in due course and in the appropriate forum remain reserved.

Yours faithfully,

HP NORTH

SCHWARZ – NORTH INC'

[19] In order to understand the context of this so-called 'repudiation letter', it is useful to have regard to the preceding e-mail from the first appellant's attorneys, Ramsay Webber, to which the repudiation letter was a response. Ramsay Webber's letter asserts conditions to payments which were not contained in the dissolution agreement. Amongst other things, the email from the first appellant's attorneys to the first respondent's then attorneys contains the following: '…we understand that your client has sold Eagle Rock and possibly Buccluech. Please note that our client will not allow transfer of either of these properties unless payment pursuant to the agreement between our respective clients is made to our client or the funds which are derived from the transfer of the funds is held in trust.'

[20] An exchange of correspondence over the issue of these particular properties continued in emails from the first appellant's attorneys and the first respondent's then attorneys on 12 and 14 January 2011 and the response, by formal letter from the first respondent's on 18 January 2011. At that time, the first appellant was threatening to

bring the liquidation applications, to which reference is made below. The first repondent had protested that this would be unnecessary as progress was being made in respect if the sale of the hitherto unsold properties.

[21] On 4 April 2011 the first respondent's attorneys sent a letter to the first appellant's attorneys, referring to the sale of properties by Midnight Storm and Wavelengths and requesting the first appellant to sign the necessary resolutions to give effect thereto. Even though the first appellant claimed that the first respondent had, on several occasions, claimed that he 'had found a way to get out of the agreement' (this being something that the first respondent denied having said), it is clear that there were ongoing attempts to give effect to the spirit of the agreement.

[22] There was thus a live dispute over the sale of certain of the properties and payment of the proceeds thereof. It is against this background that the statement in paragraph 5 of the 'repudiation letter' must be understood. The dissolution agreement does not contain the provisions contended for in Ramsay Webber's earlier e-mail. Consideration must be given to the remaining contents of the repudiation letter in order to place the contested statement in context. In paragraphs 6 and 7 first respondent's attorneys clearly affirm the terms of the amended dissolution agreement in respect of the sale of shares in Turquoise Moon and the sale of the Eagle Rock and Maple Ridge properties.

[23] Relying, inter alia, on this exchange of correspondence, the first respondent asserted in evidence that he had sought to give effect to the terms of the dissolution agreement to the extent that he could, given the availability of funds and that it had been the first appellant who had, for quite some time, failed to give effect to the terms of the dissolution agreement by refusing to agree to the transfer of the properties, which the first respondent had (through various legal entities) offered to purchase at the prices agreed to in annexure 'A' to the dissolution agreement.

[24] The first appellant's stance was that the first respondent had breached the terms of the dissolution agreement by failing to acquire the annexure 'A' properties by no later than 30 June 2008 as contemplated in clause 5.2 of the dissolution agreement. The first respondent's response to this assertion has been that clause

5.4 of the dissolution agreement contemplated the possibility of a delay in the acquisition of the annexure 'A' properties because express provision was made for the first appellant to receive interest, calculated from 30 June 2008 to date of payment. The first appellant's own evidence is consistent with the inferences that he gave effect to that election and claimed interest at the prime rate calculated from 1 March 2009. The calculation of the first appellant's alleged damages reveals that the first appellant has consistently claimed interest at what he contends to be the agreed rate. The first appellant accepted that he was aware at the time of the conclusion of the dissolution agreement that the first respondent would need to obtain funding finance for the acquisition of the annexure 'A' properties and that he did not have R29 million to pay to the property-owning companies. The first respondent contended that an alternative option available to the first appellant was to have the properties in annexure 'A' sold 'on the open market' to procure the capital.

[25] The first appellant and the first respondent each held 25 per cent of the issued share capital in Alfa Business Ventures, the twelfth respondent. The immovable property, constituting the only asset of Alfa Business Ventures has been sold and the proceeds thereof have been distributed to the parties entitled thereto. The sum of R501 088.91 due to the first respondent, is currently held in the trust account of the first appellant's attorneys.

[26] On 15 November 2011, Meyer J sitting in the Gauteng Local Division, Johannesburg, granted final winding-up orders of both Midnight Storm and Wavelengths. He did so on the basis that it would be just and equitable in terms of s 81(1)*(d)*(iii) of the Companies Act 71 of 2008 (the new Companies Act), even though the applications had erroneously been brought in terms of s 344*(h)* of the Companies Act 61 of 1973 (the old Companies Act). The applications had been brought by the first appellant in the appeal now before us. Relying on the well-known tests set out by Coetzee J in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*,[1] Meyer J referred to various factors, in particular the acrimonious relationship that had developed between the parties and 'the complete breakdown of the relationship of trust that had once existed between them', to conclude that it would be just and

[1] *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 349G-350H.

equitable to make the orders that he did.[2] The judgment has since been reported as *Budge NO & others v Midnight Storm Investments 256 (Pty) Ltd & another; Budge N O v Wavelengths 1147 (Pty) Ltd*.[3] Although aspects of Meyer J's judgment have been criticised by this court in *Thunder Cats Investments 92 (Pty) Ltd & another v Nkonjane Economic Prospecting and Investment (Pty) Ltd & others*,[4] this has no bearing on the present case. The orders of liquidation still stand.

[27] Shortly after Meyer J granted these liquidation orders, Mr Richard Pollock, the fourth appellant (Mr Pollock), was appointed as the lead liquidator of both Midnight Storm and Wavelengths. On 18 July 2012, Mr Pollock joined the first appellant in instituting the action that is the subject matter of the appeal and cross-appeal now before us. The appellants instituted nine separate claims against the first, second, third, fourth, eighth and eleventh respondents.

[28] The trial ran for nine days. The first appellant and Mr Pollock testified for the appellants. The first respondent and Mr Terrence Hatkilson, a chartered accountant specialising in forensic audits, testified for the respondents. Mr Hatkilson's evidence is irrelevant for the determination of this appeal. There was a welter of documentary evidence as well as transcripts of the insolvency enquiry held in terms of ss 414 and 415 of the old Companies Act, arbitration proceedings between the parties in 2015 and the court records in the applications for the liquidation of Midnight Storm and Wavelengths.

The claims of the appellants and the resulting orders of the court a quo

[29] The first claim (claim A) was for an order declaring that the first respondent had repudiated the agreement and that the first appellant was entitled to cancel it and that Mr Pollock be appointed to divide up the assets equally between the two lead actors and that the first respondent should account and debate his transactions relating to the dissolution. The second claim (claim B) was for damages in an amount of R2 483 552.96, arising from the repudiation, payable by the first

[2] *Budge N O & others v Midnight Storm Investments 256 (Pty) Ltd & another; Budge N O v Wavelengths 1147 (Pty) Ltd* [2011] ZAGPJHC; 2012 (2) SA 28 (GSJ) paras 10-21.
[3] *Budge N O & others v Midnight Storm Investments 256 (Pty) Ltd & another; Budge N O v Wavelengths 1147 (Pty) Ltd* (supra) fn 2.
[4] *Thunder Cats Investments 92 (Pty) Ltd & another v Nkonjane Economic Prospecting and Investment (Pty) Ltd & others* [2013] ZASCA 164; 2014 (5) SA 1 (SCA) para 14.

respondent to the first appellant. The third claim (claim C) was for REM to repay Wavelengths R3.42 million being the management fee referred to above. The claim was based on enrichment, alternatively the provisions of s 42(3) of the Close Corporations Act 69 of 1984 (the Close Corporations Act). The fourth and fifth claim (claims D and E) were similar to that of the third, save that they were for the payment of R4.56 million received by REM in 2009 and R300 000 received by the first respondent as a 'salary' in March and April of 2010. The sixth claim (claim F) was for the rectification of the register of shareholders and directors in Turquoise Moon, the eleventh respondent. The seventh claim (claim G) was for rectification of the register of shareholders and the directorships in Davprop. The eighth claim (claim H) was for an order authorising the release of the sum of R501 088.91 paid into the trust account of Ramsay Webber, the appellants' attorneys, in part satisfaction of the debt owed to the first appellant. The ninth claim (claim I) was for R187 861.80, being a claim for damages arising from unpaid costs orders in the winding-up applications heard by Meyer J. In respect of all claims the appellants sought an order that the respondents be made jointly and severally liable, the one paying the others to be absolved for the costs of the action.

[30] In respect of claim A, the court a quo ordered the first respondent, within 15 days of the order, to account to the first appellant and to debate with him all relevant dealings since 30 November 2007, the first respondent to pay the costs. The court dismissed claim B but made no order as to costs. In respect of claim C, the court ordered REM to pay Mr Pollock in his capacity as liquidator of Wavelengths R3.42 million, the fourth respondent to pay the costs. The court dismissed claim D, Mr Pollock to pay the costs. In respect of claim E the court ordered the first respondent to pay Mr Pollock in the same capacity R300 000, the first respondent to pay the costs. The court dismissed claims F and G, the first, second and third appellants to pay the costs. In respect of claim H the court granted the relief sought but made no order as to costs. The court dismissed claim I, the first appellant to pay the costs.

The issue of repudiation and the conclusions of the court a quo in respect of claims A and B

[31] The court a quo correctly relied on the test in *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd*,[5] that repudiation is not so much a matter of intention as it is of perception.[6] The judge went on to find that 'the totality of the evidence presented in court', including 'the conduct of the parties during the period leading up to the alleged repudiation' were such that she was unable to find that there was a valid repudiation and therefore, cancellation, by the first appellant of the agreement. This was the basis upon which the court a quo dismissed claim B and granted only partial relief in respect of claim A. The court a quo's conclusions concerning the repudiation are strongly contested by the appellants.

[32] This court is not convinced that the conclusions of the court a quo in respect of the repudiation are wrong. Consequently, it correctly decided that the appellants' claims in respect of claim B had to be dismissed. In regard to claim A, by reason of its finding concerning the question of repudiation, it also correctly dismissed most of the relief sought by the appellants thereunder. The order concerning the accounting and a debate thereof is quite unnecessary. In their particulars of claim, appellants have already claimed all to which they may have been entitled from the first respondent. In regard to claim A, the correct order is to dismiss it in its entirety.

The appellants' other claims

[33] The enrichment claims in claims C, D and E will now be considered seriatim. They do not arise from the contract or agreement between the parties. For different reasons, the claims for rectification and restoration of directorships in claims F and G as well as the claims for the release of funds in terms of claim H and the claim for compensation for costs in claim I will, thereafter, also be considered separately.

[34] Claim C is a claim by Mr Pollock in his capacity as liquidator of Wavelengths for the repayment of R3.42 million made by it as a management fee to REM in 2008. As the first appellant had acquiesced in this payment to REM and had agreed upon the amount to be paid, it hardly lies in his mouth to complain that it was made to the wrong legal entity, especially as, on his own version of events, it made no difference to him whether it was Rusco or REM that had been paid. Moreover, the claim was

[5] *Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).
[6] See especially paras 16-19.

based on enrichment but the enrichment was not at the expense of Wavelengths. The court a quo therefore erred in regard to claim C. The correct order is to dismiss this claim, with costs. The cross-appeal in respect of this claim succeeds.

[35] Claim D is also for the repayment of a management fee paid by Wavelengths to REM in 2009. The amount in question was R4.56 million. This time, the first respondent contends that it was agreed between the parties. Relying on *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others*,[7] the court a quo found, on a balance of probabilities, that a management fee was likely to have been agreed as there was still work to be done and the relationship between the parties had not yet broken down. This finding cannot be disturbed. The appellants contend that, even if this factual finding were to remain, the agreement to pay this sum amounted to a variation of the agreement, which has given rise to the whole dispute and, as it constituted a variation thereof, that was not reduced to writing, it could not be enforced. The agreement to pay this sum was not, however, a variation of the original agreement between the parties but a separate additional one. The order made by it in respect of claim D must, accordingly, stand. The appeal must be dismissed.

[36] Claim E was also brought by Mr Pollock in his capacity as liquidator of Wavelengths for the repayment of an amount paid to the first respondent by it. The amount was for R300 000, paid in two equal amounts of R150 000 each as a salary for the first respondent in March and April 2010. It is common cause that these amounts were paid and that there was no agreement thereto. The first respondent's contention is that he was entitled to assume, in the circumstances, that the first appellant had 'no objection' thereto. This defence cannot be sustained. The court a quo correctly ordered that the money be repaid. Counsel for the first respondent conceded that, in regard to claim E the cross-appeal had to be dismissed.

[37] Claims F and G have fallen away. The first appellant's family trust has not persisted with its appeals and has tendered costs to the date of notification thereof. The trust's claims related to share transactions in Turquoise Moon and Davprop. The

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[7] *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) at 14I-15D.

latter company, in which each of the first appellant and the first respondent had an equal shareholding, sold its only property to Rusco for R3 million. This was provided for in terms of clause 4.2 of the agreement. There is some confusion as to when, precisely, this transaction was completed but, in any event, the matter appears to have become settled between the parties. As there is no continuing appeal against the order of the high court dismissing the claims in claims F and G, nothing more needs to be said. The orders of the court a quo must stand.

[38] Having concluded that claim H should succeed, the court a quo declared that the sum of R501 088.91, together with accrued interest, be released to the first appellant in part-satisfaction of 'the plaintiff's successful claims in terms of this judgment'. In the end, the first appellant, did not succeed in any of its claims against the respondents. Claim E, which was successful against the first respondent, was brought not by the first appellant but by the liquidator of Wavelengths. The cross-appeal must succeed in respect of this claim and Claim H should be dismissed.

[39] Claim I may briefly be disposed of. The first appellant made this claim on the basis that, but for the first respondent's repudiation, the applications for the liquidation would not have been incurred. I agree with the court a quo that, quite apart from any other considerations, because of the failure of the respondent's claims based on the repudiation, this claim must accordingly fail. The court a quo correctly dismissed claim I, with costs. In any event Meyer J, when granting the liquidation orders, ordered that the costs be costs in the liquidation. The appeal against this order must be dismissed.

Costs

[40] Although the court a quo made no order as to costs in respect of claim B, it did not provide any reasons therefor. This omission clearly occurred per incuriam and should be corrected, such that costs follow the result in respect of this claim. Two counsel were not employed in the trial itself. This must be reflected in the costs orders that follow. The appeal is to be dismissed. The costs thereof must follow that result. The respondents were largely successful in the cross-appeal. Costs must follow the result. Although, in the appeal and cross-appeal, the appellants employed two counsel but the respondents did not. This will affect the order as to costs.

Summary of conclusions

[41] In summary, the appellants' appeals in respect of claims A, B, D, F, G and I must fail. The appeal must therefore be dismissed in its entirety. The respondents' cross-appeal in respect of claims A, C, and H succeeds. The cross-appeal in respect of the absence, in the court a quo, of a costs order relating to the dismissal of claim B also succeeds. The cross-appeal in respect of claim E must, however, fail.

Order

[42] The following order is made:

1 The appeal is dismissed.

2 The cross-appeal is upheld in respect of claims A, C and H and is also upheld in respect of the absence of a costs order in the court a quo when claim B was dismissed.

3 The orders of the court a quo in regard to claims A, C and H are set aside, and in respect of claim B the omission of the court a quo to make an order as to costs is corrected and, in respect of these four claims (ie claims A, B, C and H), the following is substituted therefor:

'Claims A, B, C and H are dismissed with costs.'

4 The cross-appeal in respect of claim E is dismissed.

5 The appellants are jointly and severally liable to pay the respondents' costs in the appeal and cross-appeal, the one paying the others to be absolved.

6. The first appellant is to pay the costs of the application to amend the quantum of damages in claim B.

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N P WILLIS

Judge of Appeal

APPEARANCES:

For the Appellants:	L J Morison SC (with him, E J Keeling) Instructed by: Ramsay Webber, Johannesburg c/o Lovius Block, Bloemfontein
For the Respondents:	A R G Mundell SC Instructed by: Schwartz-North Inc, Johannesburg c/o Bezuidenhouts, Bloemfontein