

SOUTH AFRICA / JUDGMENT

Adderley Acceptances (Pty) Ltd. v Rom and Another (38/88) [1988] ZASCA 38 (30 March 1988) [1988] ZASCA 38

COURT

Supreme Court of Appeal

BEFORE

Rabie, Jansen, Hoexter, Vivier, Nicholas

CASE / FILE NUMBER

38/88

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In THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the matter between:

ADDERLEY ACCEPTANCES (PTY) LTD Appellant

and

FLORENCE ROCHELLE ROM First Respondent KAREN CELIA LEVIN Second Respondent
Coram: RABIE, ACJ, JANSEN, HOEXTER, VIVIER, JJAet NICHOLAS, AJA Heard: 15 March 1988 Delivered:
30 March 1988

JUDGMENT NICHOLAS, AJA :

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Mr. Brian Richman lived in Bantry Bay, Cape

Town. From his house he carried on business as a financial broker and consultant through a one-man company, Adderley Acceptances (Pty.) Ltd. ("Adderley Acceptances"). He was also a director of a private company, Servix (South Africa)

(Proprietary) Limited ("Servix"), of Johannesburg, which carried on the business of electrical engineers and contractors.

One of his clients was Mrs. Florence Rom, a divorcee of Sea Point. Mrs. Karen Levin became a friend of his in about August 1983. At the end of November 1983,

Richman placed on loan with Servix R90 000 provided by Mrs.

Rom and R110 000 provided by Mrs. Levin. Four and a half

months later (in the middle of April 1984), Servix was in .

liquidation. It was hopelessly insolvent, with no prospect

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of any dividend to creditors. Mrs. Rom and Mrs. Levin had lost everything. The two women, who were at that time unacquainted, instituted separate actions for damages against Adderley Acceptances in the Cape Provincial Division of the Supreme Court. In March 1986 the two actions were consolidated and heard by BERMAN J, who gave judgment in favour of Mrs. Rom for R90 000, and in favour of Mrs. Levin for R110 000, with interest on the respective capital sums at the rate of 18½% per annum from the date of judgment to date of payment.

An application by Adderley Acceptances for leave to appeal was dismissed with costs. On a petition to the Chief Justice, however, leave was granted to appeal to this court. It was ordered that the costs of the petition

for / 4

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for leave to appeal be costs in the appeal; and that the order for costs made by the court a quo on the application for leave to appeal be altered to an order that the costs of the application be costs in the appeal. The appeal record does not include copies of the pleadings in Mrs. Levin's case, and Mrs. Rom's pleadings were not in all respects a model of clarity. Nevertheless, the issues as they had crystallized by the end of the trial are reasonably clear in both cases.

In each there were two causes of action -

- (a) Alleged fraudulent misrepresentation; and
- (b) Failure by Richman (more strictly by Adderley Acceptances, which was his alter ego) to disclose matters which it was his duty to disclose to the plaintiffs.

Richman was the agent of each of the plaintiffs.

Each..... / 5

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Each relied on his financial expertise and his integrity. He held a position of trust and confidence in relation to their affairs. In the performance of his duties he was required to act bona fide. Cf. *S v Young*, 1977 (1) SA

602 (A) at 609 B-C. He was under a duty to make disclo-

sures to his principal of everything known to him respect-

ing the transaction on which he was employed, which would be likely to influence her conduct. More particularly, where he had an interest that was adverse to his principal's interest, he was subject to a duty to reveal to the principal all the material facts which he knew or which he should have known, and to deal fairly with his principal: *Mallinson v Tanner*, 1947 (4) SA 681 (T).

It will be convenient to deal first with the case. / 6

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case of Mrs. Rom, and then, more briefly because most of the ground will already have been covered in connection with Mrs. Rom, with the case of Mrs. Levin. 1. MRS. ROM'S CASE. Mrs. Rom's main cause of action against Adderley Acceptances was originally this:

1. During November 1983 Richman, acting on behalf of Adderley Acceptances, orally represented to Mrs. Rom that -
 - (a) He had investigated the financial affairs of Servix; (b) Servix was in a strong and sound financial position; and (c) Loans made to Servix would constitute a safe investment and would be equivalent to investing with a bank or similar financial institution.
2. The said representations were material, and Richman made them with the intention of inducing Mrs. Rom to authorize him to invest her money in Servix.

3. .../ 7

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3. The representations were false to the knowledge of Richman in that -
 - (i) he had not properly investigated the affairs of Servix; (ii) the company was not in a sound financial position; and (iii) loans made to Servix would not constitute a safe investment and would not be equivalent to investing with a bank or similar financial institution.
4. Mrs. Rom, relying on the truth of the representations, authorized Adderley Acceptances to invest R90 000 with Servix, and it did so in 1983.
5. Servix has been liquidated and no dividend to its creditors will be paid. As a result, Mrs. Rom has suffered the loss of the whole of her investment.

This was her case in relation to alleged fraudulent misrepresentation.

At a later stage Mrs. Rom's particulars of claim were amended. by the inclusion of the following paragraph:

"12...../8

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"12. At all material times hereto, and unbeknown to

Plaintiff, First Defendant was a director of the said Company and was, in the premises, in duty bound to disclose to Plaintiff his interest in the said Company, but First Defendant fraudulently, and with the intention of inducing Plaintiff to authorise the said investment, concealed from her the fact that he was a director of the said Company and was accordingly not in a position to give her impartial advice in regard to the financial stability of the Company."

And during the trial it emerged that Rich-

man himself lent R100 000 to Servix on 14 November 1983 and withdrew the whole amount on 21 November. Adderley Acceptances did not disclose these facts to Mrs. Rom. This concealment was fully canvassed at the trial, and

BERMAN U treated it as if it had been duly pleaded.

Counsel for the appellant did not suggest that the learned judge was wrong in so doing.

This / 9

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This and the concealment referred to in para. 12 of the particulars of claim formed the basis of Mrs. Rom's claim in regard to failure to disclose.

At the date of the trial, Mrs. Rom was 62

years old and in poor health. (BERMAN J described her as

"a sickly elderly lady".) She had received her school education at the Good Hope Seminary. When she left school,

she began a course for the BA degree at the University of

South Africa, but, at the age of 21, she married Dr. David

Rom. The marriage was dissolved in 1963. She was obliged

to work in order to provide for herself and the children

of the marriage. She got employment with an estate agent.

Because of her personal circumstances, she was always very careful with money. Over the years she slowly accumulated

a.../10

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a competence, which in November 1983 totalled R90 000. In 1981 she had suffered a massive coronary thrombosis and she had been in indifferent health since then. Because she was uncertain about her future earning capacity, she could not afford to go into a risky investment. She invested always with banks, building societies and similar institutions. She first met Richman in about 1981, when he was looking for a house, and through him she acquired a building society fixed deposit certificate for R25 000 which had some two years to run to maturity.

Thereafter and until the middle of April 1984 she was his client, and he made a number of investments on her behalf.

Richman told the court a quo during his

evidence / 11

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evidence that he was born in 1940. After matriculating, he was articled to a firm of chartered accountants, and at the same time attended the University of Cape Town, where he obtained an accountancy qualification. After qualifying, he began operating on his own account as a finance broker and financial consultant. He formed Adderley Acceptances, of which he was the only beneficial shareholder and the only effective director, and whose business he described in the "Report of Directors" for 1983 as "financial and economic consultants, advisers, economists, brokers and traders in the money market".

He specialized "in the larger type of institution". His business was "basically funding of public and semi-public sector loans". He had very few small

clients.../ 12

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clients such as Mrs. Rom and Mrs. Levin.

He became a director of Servix in April 1981.

If one is to believe his own evidence he was no more than a dummy director, who took little part in the company's affairs. He owned no shares. Mr. Costa Zackos, the managing director, had approached him, saying ,

"Listen, I've heard about you. I need some one in Cape Town just in case a cheque needs to be signed, and I need a director."

Richman told the trial judge that he could think of only one reason for his agreeing to become a director:

" ... Servix clients and mine are similar and it would be, it's one sort of other vehicle to sort of say hullo to my clients on social occasions and things like that."

As a director he was paid R500 or R1 000 per annum, and he charged / 13

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charged the company a moninal fee when, about once a year, he flew up to Johannesburg for directors' meetings. On his evidence, he appeared to have little or no knowledge of the internal workings of Servix, and he said later that he had no inkling during the period December 1983 to April 1984 of the gathering crisis in the company's affairs. He was not, he explained, an executive director.

(BERMAN J regarded Richman's evidence in this

regard with scepticism, saying in his judgment that he was not

" .. so credulous as to accept the self-portrait painted by Mr. Richman as showing a true picture of his association with Servix.")

Richman said that he flew to Johannesburg

to attend the official opening on 17 November 1983 of the electrification of Tembisa Township on the East Rand, in

in.... / 14

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in which Servix had been concerned. After this there was luncheon for all the participants, which was followed by a meeting of Servix's board of directors.

At the meeting the annual accounts were pre-

sented by the auditors. Richman's understanding was that the company was doing exceptionally well. He said:

"That was my understanding and it showed in the balance sheet."

There was little dispute between Mrs. Rom

and Richman in regard to the Adderley Acceptances' management of her investments before November 1983. Until March of that year, her money had always been placed with banks and building societies. In that month Mrs. Rom authorized Richman to place her money with National Acceptances Ltd.,

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a company which operated in the money market, in order to get a better rate of interest. Thereafter National Acceptances placed short term loans on her behalf with a variety of public companies of standing. It would seem clear that Richman told Mrs. Rom that these investments were similar to those made with a bank, because on 5 September 1983 Adderley Acceptances issued to Mrs. Rom a "receipt" in Richman's own hand, recording that R25 000 has been "placed today", and confirming that "you have a total of R75 000 placed at call with Banks or similar institutions." (a). Alleged fraudulent misrepresentation.

Mrs. Rom said that she had money falling due in November 1983, and that Richman, who also knew this because he had control of her investments, advised

her / 16

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her to place all her money with Servix. Richman, on the other hand, said that the initiative came from Mrs. Rom, who

" ... on more than one occasion said to me that she

wasn't happy with the interest rate she was getting ... She wanted me to find her an investment where she'd get more than she was getting at that stage."

He accordingly mentioned Servix, and said that he was going

to Johannesburg and was to make a further investigation

into the company. When he returned,

" ... her basic question was 'what do you think of Servix: ... I said, it looks all right "

Whatever the true position as to the initiative, Mrs. Rom's

evidence is clear (and it was not really disputed by Rich-

man on this point) that she was a reluctant lender to

Servix.

She / 17

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She said that she was "wary" of an investment in Servix. She told Richman that she was not interested in an investment in that company. She could not afford a risky investment. She was "put off" from the beginning and asked a great many questions. She wanted to buy an annuity from the Old Mutual. He advised her against it -that would involve tying her money up. She said she was not interested in investing in a private company. He told her that Servix dealt only in

"government contracts" such as Escom and Koeberg: it was a very good investment -"they were as safe as houses." She looked up Servix in the Cape Town telephone directory, and was disturbed to see that its entry was in small print. Richman explained that "Servix was big in Johannesburg. This is just a

branch / 18

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branch here." She said that Richman seemed to have tremendous confidence in Servix. He said he had gone through the balance sheets, and that "he could lay his head on a block for them!" He persuaded her, and she believed him.

That Mrs. Rom was a reluctant lender and

that it was only after weeks of argument, persuasion and

reassurance that she was brought to the point of authori-

zing the loan, is clear from the evidence of Richman himself.

She temporized. She repeatedly asked questions. She raised

the matter of the annuity with the Old Mutual more than once.

She agreed to make the loan. Then she changed her mind:

she wanted "to have another think." So then they went

over the whole thing once more; and he gave her further

assurances.

Eventually / 19

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Eventually she agreed. On 25 November Adderley Acceptances wrote to Mrs. Rom stating that it had that day received her "cheque for R15 000 (ex Allied) for investment on her behalf. The total funds under control are now R90 000". On 30 November 1983 Adderley Acceptances confirmed that Mrs. Rom's funds had been placed "with our clients, Servix South Africa Proprietary Limited."

Under cross-examination, Richman made an important admission regarding his representations to Mrs. Rom.

He admitted that he had told Mrs. Rom that he had investigated the financial affairs of Servix; that the company was in a strong financial position; and that any loans made to the company would be a safe investment. He did, it is true, deny that he told her that a loan to the

company / 20

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company would be equivalent to investing with a bank or similar financial institution. But further consideration of this aspect is unnecessary, because Mrs. Rom herself said under cross-examination that she knew that the investment with Servix was not an investment which was being made in a bank or similar financial institution.

The alleged representations having been for the most part admitted, the next inquiry is whether they were true or false.

Richman said in his evidence that his under-

standing at the Servix directors' meeting was that

"the company was doing exceptionally well as was shown in the balance sheet."

That had also been his view based on a study of the 1982

balance / 21

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balance sheet. And, he said, "There was other information which I had received as well." He said that when in Johannesburg he actually investigated the financial affairs of the company and spoke to other people and looked beyond the balance sheet.

It is a striking feature of Richman's evidence

in this regard that he did not say that he consulted the

obvious sources: he did not inquire from his friend Mr. Zackos,

the managing director, or from the company's management; he

did not seek to exercise his right as a director to inspect

books and documents in accordance with the provisions of s.

284(3) of the Companies Act, No. 61 of 1973 (Cf. *Wes-Transvaalse*

Boeresake (Edms.) Bpk and Another v *Pieterse and Another*,

1955 (2) SA 464 (T)); and he did not say that he had

studied / 22

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studied progress reports or any other relevant documents. It appears that he sought information only from sources outside the company. This is an extract from the record of his evidence in chief:

"Now, tell me, from whom essentially, apart from balance sheets, did you get information regarding the prospects and progress and fortunes or misfortunes of the company Servix? — Yes.

No, from whom? — Various bank managers dealing with the accounts.

No, well when, when did you, I'm talking about generally. — Yes, generally, I'd met, I'd meet them on, on the odd occasion. I'd met them, I'd meet a bank manager of Servix at a, at a bank lunch or something like that and we'd discuss Servix. They were all extremely happy with it, with the company. We, we had a trip to the site once where they took their bank managers and all the people they dealt with, so I spent a day with their main commercial manager who was extremely happy with the company. The day, the day at Tembisa, at the cock-tail party luncheon, I bumped into officials of the Bantu Admin. Board, Hubert Davies, I think there were Easy Electric. The engineers involved,

the / 23

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the architects and there was a joyous feeling that Servix would be getting the bulk of all the other electrification of Soweto, and there'd be a lot of common work together over the next few years and there was a very ebullient and buoyant feeling there."

Asked by the trial judge what further invest-

igation, what other enquiries, he had to make in Johannesburg, Richman replied:

"What, what's the quality of their work, what the future contracts look like and this I was able to pick up at the dinner at the lunch party. I've been to the odd client of theirs."

As an investigation of Servix, this was a travesty, and Richman, as a self-styled "financial and economic consultant", must have known it.

Nor did the 1983 balance sheet show that Servix was in a strong financial position or that substantial loans could safely be made to Servix.

The.... / 24

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The balance sheet revealed that as at June 1983, the company's only source of working capital was its overdraft facilities with the bank, and Richman apparently did not think it necessary to make an enquiry into the overdraft limit. The overdraft then stood at R435 884. Accounts payable amounted to R2 478 642, and money to pay them, if it could be got at all, was to be got only from the bank. "Cash resources" were reflected as R11 772. Servix had ceded its book debts to Barclays National Bank Limited as security for its overdraft and it had executed a second cession of its book debts to an insurance company. Although the company's assets exceeded its liabilities, it was in a highly vulnerable position, since it needed only one importunate creditor and a bank which had become un-

co-operative / 25

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co-operative, for Servix to be plunged into commercial in-solvency. Furthermore, a comparison of the 1983 with the 1982 balance sheet (which Richman says he made) strongly suggests that the company was in decline. It reveals that there had been a drop in net income before taxation of 3.38%; turnover had increased by only 2.68%; and administration expenses had increased by 56% from R640 088 to R853 451.

Richman, as an accountant, could not have de-rived from the balance sheet any confidence that Servix was in a sound financial position.

It is not being wise after the event to take into account the disaster which occurred in April 1984. In business, approaching catastrophe casts its shadow before

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it, unless those concerned are wilfully or stupidly blind. If Richman had investigated Servix, he must have seen the signs; and if he did not investigate Servix he could not honestly have expressed an opinion as to its financial po-sition. Moreover, it is a significant fact (which Richman did not disclose to Mrs. Rom) that the company agreed to pay interest at the rate of 22½%, when the prime rate was 19%. This it would not have done unless, as Mrs. Rom's counsel put it, it was "strapped for cash".

That Richman's eyes were open to the danger

which was threatening is to be inferred from his precipitate

withdrawal of his R100 000 loan on 21 November 1983, shortly

after the director's meeting. Under cross-examination,

he.../ 27

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he was unable to give a reason for the withdrawal, and, in his attempt to do so, he was reduced to babbling incoherence. As BERMAN J said in his judgment,

"It is to my mind a fair inference to draw that it was as a result of what he learnt on receipt of the 1983 balance sheet of Servix that Mr. Richman withdrew his very recently made personal investment in that company."

My conclusion is that Richman made the re-

presentations which he admitted making, knowing that they were false, or, taking the most charitable view in his favour, without belief in their truth, or recklessly, care-less whether they were true or false.

Mrs. Rom's case based on alleged fraudulent . misrepresentation was in my opinion clearly proved. There is in Colman J's judgment in Novick and Another v Comair

Holdings...../28

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Holdings Ltd. and Others, 1979 (2) SA 116 (W) at 149-150, a useful check-list of what has to be proved by a party seeking to avoid a contract on the ground of misrepresentation, and it can be employed in this case:

- (a) The representations on which Mrs Rom relied were made.
- (b) They were representations as to facts. (c) The representations were false.
- (d) They were material, in the sense that they were such as would have influenced a reasonable man to authorize the loan.
- (e) They were intended to induce Mrs. Rom to authorize the loan.
- (f) They did induce her to do so.

In addition, Adderley Acceptances had knowledge of the falsity of the representations, and, as a result of the investment, she suffered a loss of R90

000. (b) Failure to disclose.

Here...../ 29

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Here the plaintiff's case was that

- (i) Richman failed to disclose that he was a director of Servix; and (ii) He failed to disclose his withdrawal of his loan to Servix a few days before he lent her money to Servix.
- (i) Director.

In her evidence Mrs. Rom said that she did

not know that Richman was a director of Servix, and that, if she had known, it would have made a difference to her decision to invest in Servix. She said:

"I would've thought that he couldn't be impartial if he was involved in it, and I would have investigated it more carefully."

Richman testified that Mrs. Rom did know

that he was a director of Servix. He said that there had

been an occasion when she was sitting on the patio of his

house / 30

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house looking towards Koeberg nuclear power station, and

"I would have mentioned as I do mention in passing conversation that I had been there That I was a director of one of the contracting companies. This was possibly a good few months before this."

A further piece of evidence by Richman was that during discussions in November 1983 about a possible investment for Mrs. Rom's money,

"I mentioned to her that I was a director of a company up in Johannesburg I showed her the balance sheet for the previous year which is the one for '82, I think it is. And I said I was going up to Johannesburg in a week's time or later that month and I'm going to have a further investigation into the company and if I like, if, in my opinion it looks sufficiently good, I could suggest she puts some funds in it if we can get a decent rate for her."

The talk about Koeberg power station, if it ever took place, did not amount to a disclosure that Richman was / 31

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was a director of Servix, and the story about the 1982 balance sheet was not put to Mrs. Rom in cross-examination. Richman's evidence to what he was going to do in Johannesburg is lame and unconvincing, particularly in the light of the "investigation" which he says he made.

BERMAN J said in his judgment that he was satisfied on a review of the evidence that Richman did not disclose to Mrs. Rom that he was a director of Servix.

Although her evidence was untrue in one respect, the learned judge thought her to be a credible witness generally. He said:

"That her evidence, in this regard is untrue cannot be gainsaid, (but) it does not follow that her evidence on other aspects of the matter must, as Mr. Horn contended, be rejected. Indeed Mrs. Rom did not make upon me the poor impression Mr. Horn was at pains to portray / 32

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portray. She is a sickly, elderly lady who I observed stood up stoutly in the face of a searching and vigorous cross-examination. If in the course of that ordeal she faltered, it was neither often nor to any extent; she certainly never came across as a deliberate liar, and, taking it all in all, and without seeking to damn her with faint praise, she was, in my view by no means a bad witness, unworthy of belief."

On the other hand, BERMAN J said that

"... there certainly exist good grounds for declining to accept Mr. Richman as a wholly credible witness."

After referring to a number of criticisms of Richman as a witness, the learned judge said this:

"What however I hold to be the most damning circumstance for not preferring Mr. Richman as a witness to either Mrs. Rom or Mrs. Levin is that he himself put a considerable amount of his own money into Servix, viz. R100 000; he received the 1983 balance sheet two days later; he no doubt studied and digested it; he withdrew his full loan five days' later, yet within a matter of days he persuaded, permitted or allowed Mrs. Rom

and / 33

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and Mrs. Levin to invest their funds in the company without saying a word to either of them That is not, in my considered view, the conduct called for from a person such as Mr. Richman vis-a-vis persons like Mrs. Rom or Mrs. Levin, for he was no mere acquaintance suggesting an investment to them, - he was a financial counsellor giving not only advice on a professional basis, i.e. in return for remuneration to his company, but in fact handling the investments of and for these two ladies "

In the light of these credibility findings (with which there is no reason to disagree), and the probabilities, BERMAN J's conclusion that Richman did not disclose to Mrs. Rom that he was a director of Servix cannot be assailed.

It was submitted on behalf of Adderley Acceptances that even if it be accepted that Richman did not disclose that he was a director, "it was not established

that / 34

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that he omitted to do so with the intention to defraud, i.e. to induce the Respondents, to their prejudice, to invest in Servix: and that in any case it was not proved that the

failure to disclose induced the respondents to invest."

Although it was alleged in para. 12 of Mrs.

Rom's particulars of claim that the concealment was fraudulent and made with the intention of inducing the plaintiffs to authorize the investment, these were not necessary allegations. The gist of this cause of action was not fraud, but breach of a duty of good faith by the agent.

As pointed out above, where an agent has an interest adverse to his principal (as in this case where Richman as a director of Servix had an interest adverse to the interest of Mrs. Rom), he is under a duty to make disclosure to his principal / 35

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principal of all material facts which he knows or should know.

It was argued on behalf of Adderley Acceptances that "the fact that Richman was a director would have encouraged rather than discouraged (the plaintiffs) from investing in Servix." I do not agree. Disclosure would at least have provoked questions regarding Richman's interest, particularly if it had also been disclosed that Servix was prepared to pay interest well above the prime rate, and that Richman was going to put the difference between 18% and 22½% into his own pocket.

(ii) Concealment of facts relating to Richman's loan to Servix.

In this regard, I can not do better than

quote / 36

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quote a passage from BERMAN J's judgment, with which I entirely agree,

" What highlights Mr. Richman's (Adderley Acceptances') culpability is the dramatic sequence of events which took place over the last 16 days in November 1983, viz. on 14 November he lent Servix R100 000 of his own money; at a meeting on 16 November he received the balance-sheet of that company; on 21 November he withdrew his entire investment; on 25 and 26 November he commenced investing plaintiffs' funds and by 30 November he had put in R200 000 of their money. The withdrawal of his own substantial investment, in the circumstances and the haste in which this was done, is, I am satisfied, a matter which also should have been made known to the two ladies before their funds were lent to Servix. To have withdrawn his own investment but seven days after making it and then to have permitted the two ladies, regard being had to his

relationship with them, to put their money where he had so quickly withdrawn his own, is an essay in cynicism worthy of the severest strictures."

In my opinion, therefore, it was proved that

Richman failed to disclose these two matters to Mrs. Rom,

that / 37

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that it was his duty to disclose them, and that his failure was a contributing cause (with the fraudulent misrepresentations) of the loss which she suffered. Conclusion in Mrs. Rom's case. In all the circumstances I am satisfied that BERMAN J's decision in the case of Mrs. Rom was clearly right. MRS. LEVIN'S CASE.-

Mrs. Levin lived at Beach Road, Sea Point, Cape Town. She matriculated at Rustenburg Girls' High School, took a teacher's diploma at the University of Cape Town in 1969 and then became "a daywear buyer for Foschini's" in 1970. She was married in 1974, and had a daughter. There-after she did "little odd jobs", but mostly she was involved

in...../ 38

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in charity work. In 1983 Mrs. Levin was engaged in divorce proceedings against her former husband. In August of that year she met Richman at a party. They became friends and then formed a sexual relationship. They dined together about twice a week; she accompanied him on an overseas trip; and in November 1983 she went with him to Johannesburg where, he told her, he was going to the opening of a power station which had been completed by Costa Zackos, whom she had met at the Cape Sun Hotel at a dinner to which she was taken by Richman. They stayed together at the hotel in Johannesburg.

From September 1983 she assisted Richman in his business on one or two mornings a week at a remuneration

of..../ 39

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of R50 a morning. She knew that he was a financial consultant and operated on the money market. She had confidence in him, because she had seen him in action,

"... heard people phoning for advice, delivered certificates to different building societies, knew he was involved in this, and considered him, as he presented himself, very knowledgeable and expert in his job." Alleged Fraudulent Misrepresentation.

Mrs. Levin said in her evidence that a de-

posit of R70 000 which she had with the Bank of the Orange

Free State was to become due at the end of November 1983.

She did not want another fixed deposit for a year because she was hoping that her divorce would be finalized in February, when, she thought, she might be needing money.

She asked Richman what was the best thing to do on a short

term / 40

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term basis. He said, "Give me the money and I will find the right place to put it." He asked if she had any other money, and she told him that she had R40 000 with Herthco Nominees, a fund run by a firm of accountants. He advised her to take her money out of Herthco, saying he was not happy with her having money there. Asked why, he replied:

"I know what goes on in the market place. It's not a good place."

Cheques which she received from the Bank of the Orange Free

State she endorsed and handed over to Richman. A few days

later she delivered a cheque from Herthco to Richman's office.

She and Richman discussed

what she should do with the money. She had previously

emphasized / 41

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emphasized that her main concern was safety; that she only invested with banks and financial institutions; and that that was the way she wished to continue. Richman said "I think we will give this money to Costa" (i.e. Costa Zackos).

She replied that this was not the sort of investment she

liked to be in: the safety of her money was of primary importance. He said that

"... it was the equivalent of putting it in a bank or financial institution ... He was fully au fait with the workings of the company ... The company was going from strength to strength. It was involved in Government contracts and there was positively no danger involved at all. There was no risk factor involved at all The company was doing so well that in the near future it was going to go public."

He said again,

" ... that it was the equivalent of investing in a ... financial institution or a bank. That it was buoyant / 42

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buoyant, that it had everything going for it, that there was not one iota of risk, ... that it was more than safe, that he personally guaranteed it, that he would never do anything that would put anything of mine in jeopardy."

And, she said, because she trusted him, she accepted his assurances.

Richman's account how he came to lend

Mrs. Levin's money to Servix was very different.

He said that on the aircraft while returning

from Johannesburg, he was looking at the Servix balance

sheet which he had received at the directors' meeting on

the previous day. Seeing this, Mrs. Levin mentioned that

she had some money which would be due towards the end of

November, and asked what Richman thought about finding a

home for it with Servix. Richman, (whose evidence was that

"he..../ 43

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"he did not like talking business on an aeroplane", and that he preferred discussing business in front of his desk), said that he suggested to Mrs. Levin that she talk to him at his desk in Cape Town. She did so. She told him that she had about R100 00 becoming due towards the end of the month and she wanted a better rate of interest. She asked, could Richman find her one. She said that she liked what she's seen of Zackos and what she'd heard of Servix, and wanted to know whether "they were strong enough to borrow and if so would they take her money." Richman went on to say that he and Mrs. Levin spent two or three days negotiating, with the upshot that she told him that she was prepared to invest with Servix on a short term basis provided the rate was correct. He told her he had another

client / 44

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client who was also prepared to invest with Servix. He contacted Zackos and arranged to place the funds with Servix.

On 1 December 1983 Richman confirmed in writing to Mrs. Levin that he had received funds from her as follows:

- (i) 26.11.1983 R50 000,00
- (ii) 30.11.1983 R20 000,00(iii) 30.11.1983 R40 000,00

and that "these funds are at present placed with clients at a yield to you of 18.50% per annum "

It is not possible to reconcile the accounts by Mrs. Levin and Richman as to how the question of a loan by Mrs. Levin to Servix arose, but Mrs. Levin's version is clearly to be preferred.

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BERMAN J said that Mrs. Levin

" ... left upon me the impression of a somewhat weak and colourless personality who Mr. Richman would have had little difficulty in impressing with his apparent expertise in financial counselling and as a person who would have readily sought and followed his advice; she did not, for all that however, strike me as a person given to lying, nor one who could have stood firm under a gruelling cross-examination, with a contrived, concocted story."

As against this, the learned trial judge considered (for reasons referred to above) that there were good grounds

for declining to accept Richman as a wholly credible witness, and that both Mrs. Rom and Mrs. Levin were to be preferred to him as witnesses. There is no reason to disagree with BERMAN J's assessment.

Richman's account of how Mrs. Levin came to make the loan is unconvincing. His story about the discussion / 46

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discussion in the aircraft rings false. Mrs. Levin was his travelling companion and his intimate friend. He had spent the previous day with Servix. It is not credible that, if she asked him whether a home for her money could be found with Servix, he would have refused to answer at that time. Nor is it credible on Richman's version, that he and Mrs. Levin spent two or three days negotiating. On his story, there was nothing to negotiate about except the rate of interest.

I did not understand counsel for Adderley Acceptances to argue that Richman did not make the re-presentations to Mrs. Levin which she says he made. And I do not think that it was arguable, having regard to the fact that Mrs Levin's evidence in this regard was not

challenged / 47

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challenged in cross-examination; to the fact that Richman himself did not deny making them; and to the probabilities. It is highly improbable that Mrs. Levin, who had previously invested only in banks and financial institutions, and to whom safety was paramount, would suddenly have decided to invest in Servix, of which she knew nothing, unless there had been representations and assurances from Richman; and it is extremely unlikely that he would not have given to Mrs. Levin assurances such as those which he was admittedly giving to Mrs. Rom at the same time.

In Mrs. Levin's case, too, all the ingre-dients of a claim based on fraudulent misrepresentation wére fully established. The representations were made. They were false to the knowledge of Richman. They were

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material. They were intended to induce and did induce Mrs. Levin to invest R110 000 in Servix. And as a result she suffered a total loss of that amount. (b) Failure to disclose. (i) Director.

Mrs. Levin said that Richman did not tell her that he was a director of Servix, and she did not know he was a director until long after the loan was made.

Richman said that she did know, because he told her on three occasions.

He mentioned to Mrs. Levin, as he had mentioned to most other people, that he was a director of a company that had one of the main contracts at Koeberg, which "one sees directly from my house."

In.../ 49

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In mid-October 1983, he accompanied Mrs.

Levin to dinner with Zackos at the Cape Sun Hotel. On the way he explained to her who Zackos was, and he introduced her to him as "my fellow director and of Servix." At dinner Zackos discussed

"various contracts, the future growth of the company, he was planning to go public, he was doing specially well, he was very proud of it, he was a very very, charismatic gentleman."

Mrs. Levin knew that Richman was going to Johannesburg to attend "the electrification opening", in which Servix participated.

Even if these communications did take place, they have little bearing. It was Richman's duty to tell Mrs. Levin pertinently in relation to the proposed loan,

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that he was interested as a director of the borrower. That duty was not absolved by a communication in the course of social small talk which was unconnected with the loan. As BERMAN J observed,

"(Richman) never specifically and in terms and when discussing with the investment of their funds in Servix, told them that he was a director of that company, as one would ordinarily have, with every justification, expected him to do at such time and in such circumstances."

(ii) Concealment of facts relating to Richman's loan

to Servix.

BERMAN J's observations, quoted above with

reference to the case of Mrs. Rom, apply equally to Mrs.

Levin's case.

Conclusion.

As in the case of Mrs. Rom I am satisfied

that / 51

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that in the case of Mrs. Levin BERMAN J's decision was clearly right. ORDER OF THE COURT.

The appeal is dismissed with costs.

H C NICHOLAS, AJA

RABIE, ACJ)

JANSEN, JA)

concur

HOEXTER, JA) VIVIER, JA)

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