

CASE NO.: SA 11/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between

**KOOS VAN ELLINCKHUIJZEN**

**APPELLANT**

And

**JAN BOTHA**

**RESPONDENT**

**CORAM:** Strydom, C.J., O'Linn, A.J.A., Chomba, A.J.A.

**HEARD ON:** 09/04/2002

**DELIVERED ON:** 21/06/2002

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**APPEAL JUDGMENT**

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O'LINN, A.J.A.:

SECTION A:

INTRODUCTORY REMARKS:

The appellant, Koos van Ellinckhuijzen, was the first respondent in the Court *a quo*. The second respondent was the House of Art, but in view of the settlement between it and the applicant reflected in the Court order, second respondent did not appeal.

The respondent before us is Jan Botha, the applicant in the Court *a quo*.

Mr. Mouton appeared before us as counsel for the appellant and Mr. Dicks as counsel for the respondent. The same counsel appeared for the parties in the Court *a quo*.

To prevent some confusion in referring to the parties, I will hereinafter refer to the parties as in the Court *a quo*.

The respondent appeals against the whole of the judgment and order given in the Court *a quo* by Gibson, J. on 23/11/2000.

The proceedings in the Court *a quo* arose in the following manner:

The applicant, Jan Botha, a businessman of Swakopmund in Namibia, and the respondent, Koos van Ellinckhuijzen, an artist residing at Windhoek, had entered into an agreement in terms of which Botha had commissioned Van Ellinckhuijzen, to paint for him a so-called "relief map" or "tourist perspective map of Namibia" as well as a "relief map" of South Africa. The final price to be paid by applicant to respondent for the paintings was N\$36 000 for the Namibian map and N\$45 000 for the South African map. After completion of the maps they were delivered to applicant.

Prior to the institution of litigation, the applicant had paid to the respondent the full purchase price of the Namibian map and all but N\$5 000 of the purchase price of the South African map. After keeping the

maps in his possession for a certain period, the applicant returned the maps to the respondent for certain purposes.

Whilst the maps were in the possession and/or custody of the first respondent, the applicant discovered that first respondent was busy selling the maps through the agency of the House of Art, the second respondent, who had been placed in possession of the maps and who had framed the maps on the instructions of first respondent.

Applicant immediately confronted the two respondents to state his claim as owner of the paintings and got the following response from the respondents. First respondent said in effect: "I have done my homework and is entitled to sell the paintings". Second respondent, in reaction to a letter from applicant's attorneys, indicated by means of a letter from her attorneys, that " she will not let the paintings out of her possession or control, until such time as her retention rights, for work done on the pictures in the amount of N\$3 000,00 has been satisfied". Applicant was not satisfied with the aforesaid responses and applied to the Court *a quo* on an urgent basis for an interdict to prevent the paintings from being sold by the first respondent.

After a settlement was reached with second respondent and certain agreements were reached with first respondent relating to the procedure to be followed for an expeditious finalization of the dispute, the applicant and respondents set out their respective cases in their affidavits and argued the matter before the Court *a quo*.

On 23<sup>rd</sup> of November 2000 Gibson, J. made the following order:

- “1. That applicant was entitled to approach this Court on an urgent basis prior to receiving an acceptable undertaking from second respondent as is on record.
  
2. That first and second respondents are ordered forthwith, upon second respondent’s right of retention in respect of work done in framing the paintings, to place the applicant in possession of the aforesaid original paintings, failing which that the Deputy Sheriff for the district of Windhoek is authorized and directed to attach and hand over to the applicant, the aforesaid painting.
  
3. That first respondent is ordered to pay the costs of this applicant on a scale as between attorney and client.”

On 28<sup>th</sup> March 2001 the first respondent filed a notice of appeal against the whole of the judgment and the order as to costs and set forth the following grounds of appeal:

“A. AD URGENCY

1. The Honourable Judge erred in finding that the respondent has satisfied in general, the requirements necessary to have approached this Honourable Court on a basis for urgency and more specifically the requirements that the respondent as applicant is called upon to
  - (a) set forth reasons why he claims that he could not be afforded substantial redress at a hearing in due course

and

- b) establish that there is no other satisfactory remedy available to him.

- 2. The Honourable Judge should have found that the respondent did not set forth sufficient reasons why he would not have been afforded substantial redress at a hearing in due course

and

should have found that there are alternative remedies available to the respondent i.e. *alia inter the rei vindicatio* and *action ad exhibendum*.

It is consequently submitted that this Honourable Court erred in having found that the Respondent was entitled to have approached this Honourable Court on a basis of urgency in the manner it did.

#### B. AD FINAL INTERDICT

- 3. The respondent sought a final interdict by way of an urgent application and this Honourable Court erred in finding that the respondent has established on a balance of probabilities that he had met the requirements necessary for the granting of a final interdict which are

- a) Clear Right

- 4. The respondent has failed to establish a clear right of ownership especially if one considers that:

- 4.1 the appellant denies ownership to vest in the respondent (therefore a dispute of fact);

- 4.2 the appellant was in possession of the drawings which create a rebuttable presumption of ownership in his favour;

- 4.3 the respondent on his own version admits that he has not paid the appellant in full with regard to the SA map (therefore ownership could not pass until the respondent has performed);

- 4.4 the respondent handed both the drawings back to the appellant's possession after he had made prints of the

drawings;

4.5 there is no concrete and/or substantial evidence before court that the respondent was granted credit to pay for the drawings except the word of the respondent which allegation is denied by the appellant (another dispute of fact relating to the question of ownership).

b) No other remedy

5. It is submitted that the respondent failed to satisfy the court that he had no other remedy available with which he could have achieved the same result.

6. This Honourable Court should have found that the respondent had available to him as the alleged owner

6.1 the *rei vindicatio* which is enforceable against the whole world being an *action in rem*

and

6.2 an award for damages

and

6.3 the *actio ad exhibendum* which can be instituted as an alternative to the *rei vindicatio*.

7. The Honourable Judge further erred in finding that:

‘This document (agreement, quotation or order) drawn up by the first respondent is remarkable for what it omits to say’ (emphasis provided)

in that, it is not for the appellant to prove his defence, but for the respondent to prove his claim on a balance of probabilities and it is respectfully submitted that the respondent did not provide any concrete and/or substantial proof of his claim to ownership but mere unsubstantiated allegations.

8. It is submitted therefore that this Honourable Court erred in making a ruling as it did which ruling was based only on speculation and on what the appellant “omitted” to say and not whether the respondent has proved his case on a preponderance of probabilities.

C. AD DISPUTE OF FACT

9. The issue central to this application was the issue of ownership to such drawings which claim of ownership by the respondent was denied by the appellant.
10. This Honourable Court found that the balance of probabilities with regard to the question of ownership favoured the respondent merely because
- (a) The appellant during the telephone conversation with the respondent on 10 March 2000 omitted to say that he was the owner of such drawings but instead used so-called obscure language such as

“I have done my homework and I can sell the drawings”

such omission to state that he (appellant) was the owner and that the usage of so-called obscure language are sufficient to conclude that ownership of the drawings vested in the respondent

whereas the appellant was

- (i) in possession of such drawings which created a rebuttable presumption of ownership in his favour
- and
- (ii) not paid in full by the respondent and ownership could not have passed to him
- and
- (iii) the respondent, bearing the onus of proof in both rebutting such presumption and proving his claim to ownership, did not provide this Honourable Court with one single concrete piece of evidence in either rebutting such presumption of ownership or proving his claim to ownership.

D. COSTS

11. The Honourable Judge erred in giving a special order as to costs in that the respondent did not lay any foundation in his papers nor did he present any evidence of *male fides* by the appellant to have warranted this Honourable Court to have made such a special order as to costs.”

The notice of appeal followed in essence the line of argument followed by first

respondent's counsel in the Court *a quo*.

Gibson, J., dealt with the points raised before her in a judgment which was generally well reasoned and persuasive.

Counsel for the first respondent, Mr. Mouton, in his heads of argument and *viva voce* argument in this Court, followed mainly the sequence as well as the content of the grounds of appeal set out in the notice of appeal. Unfortunately there is a lot of repetition and ambiguity in the grounds as set out because a point made under one head is often repeated under another head. Nevertheless, I will, wherever possible, attempt to deal with the points raised or in issue in a logical order.

SECTION B:

WAS THE APPLICANT ENTITLED TO APPROACH THE COURT A QUO ON AN URGENT BASIS

Mr. Mouton's attack on the finding of the Court *a quo* that the applicant was entitled to approach the Court on the basis of urgency is based on the following two propositions:

- (1) The applicant should have set forth sufficient reasons why he would not have been afforded substantial address at a hearing in due course and had failed to do so.
- (2) Should have established that there was no other satisfactory remedy available and failed to do so.



The alternative remedies relied on by Mr. Mouton is the *rei vindicatio* and the *action ad exhibendum*.

Mr. Dicks, on behalf of the applicant, supported the findings of the Court *a quo*. He submitted that sufficient reasons were set out and enumerated these as follows with due reference to the record of the evidence:

(i) Applicant saw a report in the "Namibian" newspaper on the 10<sup>th</sup> March 2000 that stated that appellant had put the aforesaid painting up for sale at the premises of the House of Art.

ii) The applicant immediately contacted the first respondent and confronted him with the fact that he, first respondent, was selling applicants paintings.

The first respondent responded by saying that he "had done his homework and that he could sell such paintings".

iii) On Saturday the 11<sup>th</sup> March 2000 the applicant contacted his legal representative, Mr. Christo van Rensburg of the firm Van Rensburg and Associates, who contacted the House of Art, who in turn confirmed that the paintings were indeed up for sale at a minimum price of N\$50 000,00 each and that there were considerable interest in them.

iv) A letter was faxed to the House of Art, informing it, *inter alia*, of

the applicant's ownership of such paintings and requesting the return of the paintings. This letter was faxed to the House of Art at 07:16 on 15<sup>th</sup> March 2000 and the latter was requested to respond by no later than 10 am the same day, which it failed to do.

- v) The House of Art did respond to applicant's letter later that morning in which it was made clear that it would let the paintings out of its possession and control, once an amount of N\$3 000 was paid to it.
- vi) The paintings are unique and extremely valuable. They were painted by the first respondent who is a wellknown and highly valued Namibian artist and whose art works are sought after. Furthermore there was keen interest in these paintings. The paintings could be sold at any moment.

Mr. Dicks also submitted why the applicant claimed that he could not be afforded substantial redress at a hearing in due course:

- i) The paintings were unique and extremely valuable.
- ii) The proceeds derived from the sale of the prints of the paintings were the applicant's sole source of income at the time.
- iii) The paintings added considerable value to the business.

- iv) The paintings, which are irreplaceable, could be sold at any moment.

Mr. Dicks also pointed out that although the Court was initially approached on the basis of urgency, it did not proceed on that basis due to the undertaking eventually given by the House of Art that it would not dispose of the paintings pending the finalization of the proceedings.

I agree with the Court *a quo* and Mr. Dicks that the reasons were sufficiently set out in the application.

Mr. Mouton's first point is without any merit. The so-called alternative remedies referred to by Mr. Mouton in his second point could not at all be regarded as remedies comparable with the immediate protection of the applicant's claim to ownership and possession.

The applicant needed the protection of his right to ownership, possession as well as copyright in order to continue with his business of making and selling prints to those engaged in the tourist business. When he is deprived of any of the above rights to the paintings, he would suffer irreparable harm.

In view of first respondent's determination to sell, a sale could have been concluded at any moment, including a sale to a person outside Namibia who consequently would fall outside the jurisdiction of the Namibian Court.

I conclude consequently that Mr. Mouton's second point is also without merit.

SECTION B:

WAS THE APPLICANT ENTITLED TO SEEK A FINAL INTERDICT BY MEANS OF  
NOTICE OF MOTION PROCEDURE

Mr. Mouton argued that before the applicant could succeed, he had to “establish a clear right of ownership” and that he had no other remedy.

I have already indicated under A, *supra*, for the purpose of deciding whether urgency was alleged and proved, that there was no substance in the point that the applicant had to prove that he had no other remedy.

Mr. Dicks pointed out on the authority of LAWSA, that the alternative remedy must:

- “(a) Be adequate in the circumstances;
- (b) Be ordinary and reasonable;
- (c) Be a legal remedy; and
- (d) Grant similar protection”<sup>1</sup>

It is crystal clear that the alternative remedies relied on by Mr. Mouton, do not meet these criteria.

I consequently reiterate that this point raised by Mr. Mouton, is without any

1 LAWSA; 1<sup>st</sup> re-issue, Vol. II, par. 312

substance.

According to Mr. Mouton, the applicant had failed to establish a clear right of ownership if one considers that:

- i) The first respondent denies ownership to vest in the applicant (therefore a dispute of fact);
- ii) The first respondent was in possession of the drawings which create a rebuttable presumption of ownership in his favour;
- iii) The applicant on his own version admits that he has not paid the first respondent in full with regard to the S.A. Map (therefore ownership could not pass until the applicant has performed);
- iv) The applicant handed both the drawings back to first respondent's possession after he had made prints of the drawings;
- v) There is no concrete and/or substantial evidence before Court that the applicant was granted credit to pay for the drawings except the word of the applicant which allegation is denied by the first respondent.

As to disputes of fact, it is trite law that: "In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real dispute which cannot be satisfactorily determined without the aid of oral

evidence; ...”<sup>2</sup>

The Court *a quo* did examine the alleged disputes and came to the conclusion that the issues raised as issues in dispute could be decided on affidavit and were so decided in her judgment.

## SECTION C:

### THE MERITS

1. The first respondent alleged that the ownership of the paintings remained with him because he had never sold the paintings but only the copyright to it.

If this is so, he at least sold the ownership of the copyright and this ownership had passed, also in the case of the South African painting. The allegation that N\$5000 of the purchase price remained outstanding and that no credit was given in regard to the South African painting for the outstanding amount, consequently appears to be superfluous and irrelevant.

At any event the defence that the full amount had not been paid only applies to the South African painting and is no defence to the claim of ownership of the Namibian painting.

It is common cause that the applicant and the first respondent had entered into two separate contracts of sale arising in each case from

<sup>2</sup> Petersen v Cuthbert & Co. Ltd, 1945 AD, 420 at 428  
Room Hire Co (Pty) Ltd v Jeppe Str Mansions (Pty) Ltd, 1949(3) SA 1155 (T) at 1162H - 1163A.

the commissioning of first respondent by the applicant to paint a map for applicant, in the first instance a map of Namibia and in the second instance a map of South Africa.

The issue raised by first respondent, artificial or otherwise, is what did he sell to applicant – the paintings themselves or the mere copyright to the paintings.

Fortunately the Court was not restricted to the mere say-so of the contesting parties on affidavit to decide this issue. There was available before Court some real evidence such as the writing by the first respondent himself on the receipt given by first respondent to applicant on receipt of payment in regard to the Namibia painting and the written contract written by the first respondent himself in regard to the South African painting.

The aforesaid receipt dated 15/3/1998 was signed by first respondent and states expressly for what the payment was acknowledged namely:

“In payment of Tourist/Perspective Map of Namibia.”

This document is unequivocal. If first respondent ever had in mind that he had sold only the copyright to the painting, this would have been what he would reflect in the receipt by stating: “In payment of the copyright of the tourist/perspective map of Namibia”. Alternatively he would have used the words: “In payment of the ownership of the copyright to the Tourist/Perspective map of Namibia”.

This payment was made after the delivery by first respondent to applicant of the completed painting already in December 1997.

The contract pertaining to the South African painting was written by first respondent and signed by both first respondent and applicant on the 8<sup>th</sup> December 1998 and reads as follows:

"J.J. VAN ELLINCKHUIJZEN

DATE: 08/12/98

13A HERZINGER STREET KLEIN-WINDHOEK

PHONE & FAX: (061) 271449 P.O. BOX 90518

AGREEMENT

QUOTATION

ORDER

FOR:

TITLE: "SOUTH AFRICA" (A PERSPECTIVE MAP)

NAME: JAN BOTHA I.D. #

ADDRESS: BOX 397, SWAKOPMUND, 25 1<sup>ST</sup> AVE VINETA

PICTURE SUBJECT: A PERSPECTIVE MAP OF THE REP. OF SOUTH AFRICA (LOOKING NORTH) W/TOURIST ATTRACTION DETAILS

SIZE: 1030mm x 760mm

FRAME: NOT APPLICABLE

START OF WORK: MIDDLE OF JANUARY 1999

HAND OVER DATE: BETWEEN END APRIL & END MAY 1999

PRICE N\$: 45 000,00 (FORTY FIVE THOUSAND NAM DOLLARS)



DEPOSIT N\$: *NOT APPLICABLE*

FIRST PAYMENT: *COMMENCEMENT OF JOB @ N\$ 8 000,00*  
 SECOND PAYMENT: *PER MONTH IN ADVANCE ON DELIVERY*  
*OF*  
 FINAL PAYMENT: *ON DELIVERY OF COMPLETED JOB*  
*(NEGOTIABLE)*

AGREED & SIGNED ON THE: *8<sup>TH</sup> DAY OF DECEMBER '98*

SIGNATURE, CLIENT: *(signed J H Botha)*

THANK YOU. WITH REGARDS: *(signed J.J. van Ellinckhuijzen"*

It must be noted that the agreement states that the "agreement is for a "perspective map" of South Africa and the "picture subject" was "a perspective map of the Republic of South Africa...". Nothing at all is mentioned about the "copyright" to a picture as the subject matter of the agreement. It is unimaginable that the agreement would have omitted any reference to "copyright" if that was the subject matter of the agreement. The size of the paintings commissioned, its handover date is even mentioned. The whole agreement as set out leaves no room at all for the contention that only the "copyright was sold".

The next document which is significant is dated 11 February 1998 also written and signed by first respondent and according to applicant, faxed to him by first respondent for the stated purpose of applicant insuring the Namibian painting against "All Risks". The relevant part of this faxed document reads:

"Evaluation perspective map of Namibia - 'An infinite land'.

Dear Mr. Botha,

The painting of Namibia which you had commissioned me to do is

worth N\$60 300.

Sincerely

Sgn JJ van Ellinckhuijzen.”

The applicant provided proof in support of his allegation in the form of a letter from “Alexander Forbes Risk Services” dated 4<sup>th</sup> April 2000, that he had insured the “Namibia” painting as from 1/4/1998 at a premium of N\$252 per month and the “South Africa” painting at N\$349 per month as from 26/7/1999. This fact further underlines the fact that the applicant at all relevant times regarded the paintings as his property.

At no stage of the proceedings did first respondent or his legal representatives suggest that the written document embodying the terms of the written agreement aforesaid did not correctly reflect the true agreement between the parties and had to be rectified and that he intend to bring an application in that regard.

No oral evidence is therefore admissible extrinsic to the written agreement to arrive at the true meaning of the agreement in the case of the South African painting.<sup>3</sup> The same principle applies *mutatis mutandis* to the receipt and valuation pertaining to the Namibian painting.

As it stands the plain meaning of the written agreement is that the first respondent sold to the applicant the South African painting

3 South African Law of Evidence, 4<sup>th</sup> ed, by Hoffmann & Zeffert, pp. 314 -315; 321 - 330

General Principles of the Law of Contract, by Joubert, par 7.1.2 pp 59 - 65

The Principles of the Law of Contract, 5<sup>th</sup> ed. by A.J. Kerr, at 391 - 393

commissioned by him at a price of N\$45 000,00. In regard to the Namibian painting the plain meaning of the receipt read with the written evaluation by first respondent is that the first respondent sold to the applicant the Namibian painting and that the latter paid N\$36 000 for this painting.

In the event that there was an ambiguity in these documents, such ambiguity would have had to be construed against the version contended for by the author of these documents in accordance with the “*contra proferentem* rule” also known as the rule: “*verba contra stipulatorem interpretanda sunt*”.<sup>4</sup>

The first respondent and his counsel however, relies on the inscription on the paintings themselves where the following inscriptions appear:

On the South African painting:

- i) Copyright© JAN BOTHA;  
Phone/fax +264 644 61492  
Distribution +264 81128 5060
  
- ii) In block: “ARTWORK” – followed by “J J van Ellinckhuijzen,  
P O Box 90518, Klein Windhoek, Namibia,  
Phone and fax: +264 61 271449” and signed  
“J J van Ellinckhuijzen, 1999.”

<sup>4</sup> General Principles of the Law of Contract, by Joubert, par 7.1.2 pp 63 - 64 and the decisions therein stated.

The Principles of the Law of Contract, 5<sup>th</sup> ed. by A.J. Kerr, at 324 - 326; 362 - 384

On the Namibian painting:

- i) In block: :Copyright © JAN BOTHA  
Fax/phone +264 64 461492”
  
- (ii) “Fax/phone + 264 61 271449  
VAN ELLINCKHUIJZEN ART STUDIO  
P O BOX 9943, EROS, WINDHOEK, NAMIBIA.”

The argument on behalf of first respondent is that these inscriptions show that applicant had only bought the “copyright” or the “ownership of the copyright” and that first respondent remained the owner.

Two points must be made immediately:

- (a) The inscription on the paintings cannot be used as evidence to contradict the clear terms of the written agreement in the case of the South African painting without any successful application for the rectification of the said agreement.
  
- c) None of the inscriptions state that Van Ellinckhuijzen is the owner and the mere fact that it states “Copyright Jan Botha” does not state expressly or by implication that Van Ellinckhuijzen is the owner and that Jan Botha is not also the owner.

In this regard the first respondent averred that his contact address was inserted to enable people who are “interested in the original painting” to contact him. First respondent did not go so far as alleging that his contact address was inserted to enable interested buyers to contact him and to enable him to sell the paintings.

At any event, applicant denies the allegation of first respondent as it stands and explains in reply:

“I however agreed for him to have his name and contact address on the painting (unlike with other commissioned work) to promote his business and give him additional spin-offs.”

As to the reason why it was specially inscribed on the paintings that “Copyright© Jan Botha”, applicant stated in his replying affidavit:

“The first respondent made the inscription in reaction to my specific request thereto to serve as a clear indication and proof of my copyright when requesting any other body to make prints of the original paintings. This would dispose of the necessity to have to convince anybody that I am entitled to have prints made for commercial purposes.”

The explanation by applicant appears by far the most plausible. When taken together with the facts which are common cause or not expressly

disputed, and the probabilities, the version of the applicant certainly is the most probable.

The facts which are common cause and in addition to those already dealt with *supra*, and which support the above conclusion, are the following:

- (a) During December 1997 and upon completion of thereof the first respondent handed the painting of the map of Namibia over to the applicant.
- (b) The painting of the map of South Africa was handed over to the respondent by the appellant during August 1999.
- (c) The respondent paid the appellant the sum of N\$40 000-00 for such painting.
- (d) Upon completion the first respondent also delivered this painting to the respondent.
- (e) Prior to and during the period that the paintings were in the possession of the applicant the first respondent never asserted his right of ownership in or to such paintings, nor did he at any stage lay claim to his paintings or asked for their return. He likewise during this period never claimed that the applicant

had only purchased the copyright in the painting, this notwithstanding the fact that the applicant had the Namibian painting in his possession for a long period.

- (f) The applicant handed both paintings back to the first respondent for certain purposes. They disagree to the reason why this was done.
- (g) On or about the 10<sup>th</sup> of March 2000 the first respondent advertised the paintings for sale at the House of Art for the amount of N\$50 000-00 each.
- (h) Upon becoming aware of the foregoing, the applicant immediately contacted the first respondent and confronted him with the fact that he was selling the applicant's paintings, to which the first respondent's only response was that "I have done my homework and I can do so" or words to that effect. The applicant thereafter informed the first respondent that he regarded the latter's actions as theft, whereupon the first respondent put down the telephone.
- (i) The first respondent has never demanded payment of the outstanding N\$5 000-00.

2. First respondent contended that first respondent was in possession of the paintings when the application was launched and that a presumption of ownership arises from that which was not rebutted by the applicant.

Although Mr. Dicks on behalf of the applicant, conceded that first respondent was in possession at the time, this concession seems to have been wrongly made.

The fact is that 2<sup>nd</sup> respondent was in possession and even had a right of retention for framing of the pictures.

It was even agreed between the parties that the second respondent, being Andriette Lucks, trading as House of Art, will retain possession until the proceedings between applicant and first respondent is satisfactorily concluded. It therefore appears that the whole basis of first respondent's claim based on "possession", falls away.

Be that as it may, a satisfactory explanation of why the paintings were handed back to the first respondent for a particular purpose has been given and in my view, any presumption in favour of the first respondent had been satisfactorily rebutted by applicant by producing "real evidence", as contained in the documents prepared and signed by first respondent himself.

3. The argument that the applicant did not pay the purchase price in regard to the Republic painting in full, that N\$10 000-00 was unpaid,



and that, in view thereof that no credit was given and that ownership could consequently not have passed.

The Judge *a quo* has found that only N\$5 000-00 was outstanding and I have no reason to find that she was wrong. The Court *a quo* also found that credit was given by implication for the payment of the balance. Again I have no reason to find fault with her finding.

The written agreement between the parties *inter alia* specified that payment will be made in installments payable after commencement of the job and that the final payment will be made - "@ delivery of the completed job: (negotiable)." This clearly shows that the final payment was in some sense, probably as to date of payment, "negotiable".

First respondent also did not allege or prove that he had ever demanded payment of the balance of N\$5 000 remaining in regard to the South African map. Notwithstanding the outstanding balance, the first respondent delivered the painting to the applicant.

It is difficult to come to a decision whether the sale was for cash or credit by virtue of the wording of the agreement referred to *supra*.

But even if it is assumed that the original agreement was a sale for cash on delivery, the inference is justified on a balance of probabilities that credit was given at least by implication, for the payment of the final instalment some time after delivery.

First respondent did not unequivocally or at all lay claim to the property, until he filed his answering affidavit in the application launched by applicant.<sup>5</sup>

Here first respondent did not demand payment on delivery. The presumption that the sale is for cash thus fell away....”<sup>6</sup>

It is accepted in our law that “although the transfer of possession before the price is paid is not in itself enough to draw an inference that credit has been given, that, plus the passage of what has been described as ‘a substantial, i.e. non-negligible period’ of time before the seller asserts his rights, is usually sufficient for it to be held that the sale has become one on credit with the consequence that ownership passes to the purchaser.”<sup>7</sup>

For the reasons abovestated, I conclude that the applicant had proved on a balance of probability all the elements for the relief required.

The appeal on the merits should consequently be dismissed.

#### SECTION D:

#### COSTS:

The respondent also appealed against the order of costs made by the Court a

<sup>5</sup> Pienaar v G North & Son (Pty) Ltd, 1979(4) SA 522(O) at 529A

<sup>6</sup> R v Salaam, 1933 AD, 318 at 320

<sup>7</sup> The Law of Sale and Lease, A J Kerr, 2<sup>nd</sup> ed, at 168

Lenda Lease Finance (Pty) Ltd v Corporation de Mercadeo Agrícola & Ors., 1976(4) SA 464(A) at 490D.

*quo*. The learned Judge found that the defence put forward by the first respondent was “highly implausible and untruthful” and ordered him to pay the applicant’s costs on an attorney and client scale.

The leading case on the award of attorney-and-client costs is Nel v Waterberg Landbouers Ko-opratiewe Vereeniging,<sup>8</sup> where it was stated that because of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the Court may find it just to make such an order. (See Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition, p. 717.) It was further stated in many cases that such an order would not be granted lightly. See e.g. Swisstool Manufacturing Co. (Pty) Ltd v Omega Africa Plastics (Pty) Ltd.,<sup>9</sup> and Pienaar v Boland Bank & Another,<sup>10</sup>.

In a recent decision of this Court, Government of the Republic of Namibia v Sikunda,<sup>11</sup> costs were awarded against the appellant in both the High Court and on appeal, on an attorney and own client scale, because the conduct of the appellant was tainted by irregularity and illegality to a considerable degree and the applicant should not be out of pocket in such circumstances.

The Court *a quo* had to exercise a judicial discretion in regard to costs. It made the special costs order because it found that the defence put forward by the respondent was highly implausible and untruthful. If this conclusion was correct, then that would have been a circumstance justifying the special order.

8 1946 AD 597

9 1977(3) SA 458(W)

10 1986(4) SA 102

11 Unreported, delivered on 21/02/2002

I cannot say that the learned judge *a quo* misdirected herself on the correct legal approach or the facts or that she exercised her discretion wrongly, even though I may not have given such an order as a Court of first instance. I am, however not convinced that a punitive order should be made in regard to the costs of appeal.

In the result the following order is made:

1. The appeal is dismissed.
2. The appellant to pay the costs of appeal.

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O'LINN, A.J.A.

I agree.

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STRYDOM, C.J.

I agree.

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CHOMBA, A.J.A.

/mv

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