



NOT REPORTABLE

CASE NO: SA 24/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PAUL VIVIERS

Appellant

and

JOHAN BARRINGTON IRELAND

First Respondent

ANTHEA VANESSA IRELAND

Second Respondent

Coram: DAMASEB DCJ, HOFF JA and FRANK AJA

Heard: 13 April 2018

Delivered: 3 May 2018

Summary: The appellant sought an order against the judgment by the court *a quo*. In the order the main claim by the appellant had been dismissed and the counterclaim by the defendant had been granted.

The appellant is the registered owner of the immovable property and the respondents were and are still in occupation of the property since 1 February 2008.

The appellant's claim was twofold, (a) *rei vindicatio* as owner in respect of immovable property, and (b) a claim for enrichment for occupation. The respondent's defence and counterclaim was based on an agreement of sale in respect of the property and transfer of the immovable property. The respondents claimed registration of the immovable property and if the agreement had lapsed, the repayment of the deposit paid, N\$1 100 000.

The appellant answered to the counterclaim pleading that the agreement had lapsed due to non-fulfilment of suspensive conditions. The written agreement did not provide for a date by which the suspensive conditions, were to be complied with. However the parties orally and tacitly extended agreed deadlines on a number of occasions.

By January 2010, the respondents had stopped paying occupational rent and it is alleged by the appellant that by 8 April 2010 he had decided to not give further extensions. His lawyer addressed a letter to the appellant putting him on terms and further correspondence followed. In the court *a quo*, the court had found that the final letter addressed to the respondent created an impression that the appellant had extended the period within which the suspensive condition had to be fulfilled to 18 June 2010.

On appeal the issues for determination were fundamentally similar. Firstly the Court found in favour of the appellant who brought an application for condonation

based on the late lodging of the record and late filing of security and an order that the appeal to be re-instated. The Court reasoned that the appellant had a very arguable case and prospects on appeal which further advanced his case for reinstatement.

In upholding the reasoning of the court *a quo*, the Court found that where parties do not agree to a timeframe within which a condition must be fulfilled then it is implicit that a reasonable time is envisaged. Based on the evidence of appellant, the Court held that he was still willing to await the outcome of the FNB finance application and that the letter of 18 June 2010 that requested the respondents to provide proof that they have the finances in place on that date extended the deadline to 18 June 2010. Therefore the appeal against the judgement of the court *a quo* was dismissed.

The Court further dealt with the issue regarding the occupational interest payable pending the transfer of the property to the appellant. There was a dispute whether the interest had increased by agreement from N\$10 000 to N\$20 850 per month. In its findings, the Court held that the version of the appellant was more probable, the N\$20 850 had been calculated on the basis of what the monthly costs of N\$1,7 million finance from the bank would have been. Therefore the respondents were found to be liable for occupational interest as from January 2010 when they had stopped paying the increased amount, up to the date of transfer of the property into the respondents' names.

APPEAL JUDGMENT

FRANK AJA (DAMASEB DCJ and HOFF JA concurring):

A. The reinstatement application

[1] In this appeal the record and the security were filed late with the Registrar of this court. As a result the appeal lapsed. The appellant seeks condonation for the late lodging of the record and the late filing of the security and an order that the appeal be re-instated. Respondents oppose this application.

[2] What caused the delay in the lodging of the record was the fact that it went missing in the High Court as the company instructed to prepare the record could not start with its work immediately to compile the record for the purposes of the appeal. It should be kept in mind that this company is contracted by the Ministry of Justice for, among others, this purpose. The record was provided to this company by the office of the Registrar of the High Court and they typed and prepared it as an appeal record. The lawyer for the appellant discovered later that the full record had not been provided to the company, but only the recording of the evidence led at the trial. The files containing the pleadings and the exhibits had not been made available to the company. This was then arranged and had to be added to the record. It was only after a complete record had been compiled that the record was lodged and simultaneously with the lodging of the record the security was filed.

[3] Faced with the fact that the delay was caused by factors outside the control of the appellant or his lawyer, the lawyer acting for the respondents examined the

conduct of the appellant's lawyer in minutiae and launched a barrage of criticism against the conduct of the appellant's lawyer. It is submitted for example, that he waited too long to ask for the record to be transcribed. They however do not suggest that had the record not gone missing, the appellant would not have been able to comply with the rules. The appellant's lawyer is criticised for not commencing with a reconstruction of the record immediately after he was informed that it was missing, for his failure to inspect the initial (incomplete) record and hence only to discover it was incomplete after it was transcribed. This is described as 'pivotal and monumental'. The fact that he waited four days after receipt of the initial incomplete transcribed record before he took the matter up with the registrar of the High Court. Here it must be born in mind that two of the four days fell over a weekend. The list of criticisms is not complete but all the criticisms were in the same vein, namely that the appellant's lawyer did not act with the required alacrity.

[4] In considering the actions of the lawyer of the appellant, I'm of the view that one must take a realistic rather than an idealistic view of the role he played. He was faced with an unexpected event (the missing record) which he had to deal with expeditiously while still managing his practice and what this required of him in terms of court processes and appearances. Taking this into account, can it be said that he unduly delayed in taking the steps he did to get the record ready and lodged, file the security and launch the condonation application. In my view and on the facts of this matter, he did what was expected from a reasonable lawyer, and despite the fact that he might have done this or that one week earlier had he spent every hour that he was awake solely on this matter does not mean that he was remiss in his duty to his client or to this court. It will serve no purpose to cite a plethora of case law on condonation as the crux of the law is that this court can in

the exercise of its discretion, based on the peculiar facts of the case it is considering, condone a non-compliance of its rules and reinstate an appeal that has lapsed. One of the factors that need to be considered in this context is the prospects of success should the appeal be reinstated. From what is stated below, the appellant has a very arguable case and hence clearly has prospects on appeal which further advances his case for reinstatement.

B. Proceedings a quo

[5] The appellant (Viviers) instituted an action in the High Court seeking the eviction of the respondents from a property of which he is the owner and which it was alleged they were in possession of as well as an amount (equal to the reasonable rental) Viviers claimed represented the amount by which the respondents were enriched by their possession. The respondents denied the claim of Viviers and alleged that they had taken possession of the property pursuant to a purchase agreement they had entered into with Viviers. This agreement was subject to two suspensive conditions which they alleged were fulfilled. They thus sought a transfer of the property to them and tendered the portion of the purchase price still outstanding against transfer of the property to them. The court *a quo* found for the respondents and upheld the counterclaim. Viviers appeals against this decision maintaining that the relief in his claim should have been granted.

C. Suspensive conditions

[6] It is common cause between the parties that they concluded a written purchase agreement in respect of immovable property belonging to Viviers. It is further common cause that the respondents paid an amount of N\$1,1 million to Viviers shortly after the conclusion of this agreement leaving a balance of N\$1,7

million. The said agreement was subject to two suspensive conditions. First, that the respondents, not being Namibian citizens, had to obtain work permits to allow them to stay and operate a business (using the property as a guesthouse) in Namibia. Secondly, they had to obtain a loan secured by a mortgage bond from a bank for the balance of the purchase price. The fact that they did obtain work permits became apparent during the trial *a quo* and is not an issue in this appeal.

[7] The question that needs to be determined is whether respondents complied timeously with the condition to raise the balance of the purchase price against the security of a mortgage bond over the property (as they allege) or whether the agreement had lapsed prior to the arranging of such finances (as Viviers alleges). This in the context where the agreement itself did not mention a specific deadline in this regard. Despite the conditions not being fulfilled and assumedly on the expectation that they would be fulfilled, the respondents were given possession of the property and in terms of the agreement had to pay occupational interest of N\$10 000 per month. There is a dispute between the parties whether this occupational interest was at a later stage increased to N\$20 850 per month.

[8] Its further common cause between the parties that despite attempts to raise the necessary finances from Bank Windhoek limited (twice) and Nedbank Namibia Ltd these attempts failed and that in the beginning of 2010 the respondents applied to First National Bank Ltd (FNB) for the necessary finances. Viviers knew of all these attempts to raise finances and was happy to maintain the status quo at that stage. As far as the respondents were concerned the application to FNB was regarded as the last throw of the dice. In an email to Viviers, the first respondent stated that the application was unsuccessful 'I do not know what to do and maybe

we must then put the place on the market and I will just go back to South Africa again'. In cross-examination the first respondent conceded that if FNB did not approve the application 'there were no further avenues open to us'. On 8 April 2010, FNB declined the respondents' application for financing. This prompted the first respondent to address an email to Viviers referring him to this fact which, among others stated as follows:

'The situation is as follows – I owe you lots and lots of money and FNB turned the application down and now I do not know which way. They said we must leave it for another year and then see but it's not something I would like to do.

In any event, I am busy with a proposal . . . which . . . will help us to bring some of the arear amounts up to date.

I don't know what the answers are but we will have to investigate a few options and at least we now got a little bit of time with the permit which has been extended until end December 2011'.

[9] According to Viviers it was after receipt of this letter that he decided he had waited long enough and then sought advice from a lawyer. In a letter dated 14 April 2010, a lawyer acting on his behalf, addressed a letter to the respondent stating that they were in breach of their obligations in that they had not raised a bond and also did not pay the agreed upon occupational interest. The respondents were put on terms to rectify the alleged breaches within 14 days failing which Viviers would exercise his rights in terms of the agreement. First respondent answered to this letter the next day denying that they were in breach of the occupational interest clause and explaining the dilemma to raise finances in detail indicating that he had requested FNB to provide him with the reasons for the decision. The respondents also consulted a lawyer who on 26 April 2010 likewise responded to the letter from Viviers' lawyer indicating that they were in the process

of raising a bond and requesting another month for this purpose. This was followed up with letters on 6 May 2010 and 31 May 2010 indicating that the respondents were awaiting a further decision from FNB. On 14 June 2010 FNB informed the respondents that it would grant them finances to the tune of N\$1.3 million secured by a mortgage bond over the property. The respondents being able to raise the additional N\$400 000 themselves thus became able to pay the balance of the purchase price. On 16 June 2010 the lawyers of respondents informed Viviers' lawyers that the respondents had 'raised capital for final payment in terms of the agreement'. On 18 June 2010 the lawyer acting for Vivier wrote to the respondents' lawyer as follows: (The lawyers of Viviers either had not seen the letter of 16 June 2010 or did not believe the contents thereof.)

'Insofar as the agreement contains two suspensive conditions, our client urgently requires written proof that these conditions have been met as at date hereof. Our client's information is that your clients have not obtained the finance, nor approval of the "necessary bond of N\$1,700 000" as required in clause 2 of the agreement, nor have your clients obtained the required residence permits, despite more than a reasonable time having passed since the signing of the agreement.

If the above is the factual situation the agreement has lapsed and is no longer of any force and effect and our client will not proceed with the transfer of the property'. (My underlining.)

[10] The court *a quo* found that the letter of 18 June 2010 from Viviers' lawyers indicated that the deadline for obtaining the funding was 18 June 2010. In other words, Viviers allowed the respondents up to 18 June 2010 to comply with the conditions. This the respondents complied with as they had the necessary finance in place four days prior to the deadline, i.e. on 14 June 2010. This meant that they, upon tendering the outstanding amount against transfer of the property into their

name, were entitled to specific performance. Counsel for appellant submits that the contract lapsed when the first respondent informed Viviers on 8 April 2010 that 'FNB turned the application down and I now do not know which way'. It is submitted that by then a reasonable time to obtain the necessary finances had expired and the agreement thus lapsed. Counsel for the respondents submits the contrary and supports the decision of the court *a quo* essentially maintaining that the letter of 18 June 2010 imposed the deadline of that date for the fulfilment of the condition.

[11] Where parties do not agree to a timeframe within which a condition must be complied with it is implicit that a reasonable time is envisaged. Where the parties agree on the time period the court will however honour such agreed period as the parties clearly, as between them, agreed such period as reasonable. In the present matter, Viviers on a number of occasions, tacitly at least, agreed to extend the period so as to enable the respondents to make applications to banks for financing. Thus he, on his own evidence, was still willing to await the outcome of an application for financing to FNB which application was made in the beginning of 2010, ie more than two years after entering into the contract. This was after two failed attempts at Bank Windhoek and one at Nedbank.

[12] Viviers' patient and accommodating attitude was probably what caused the first respondent to, even after the last attempt to raise funds from FNB initially failed, inform Viviers that 'because their (presumably) work permits had been extended to December 2011 that they will have time to 'investigate a few options' in order to raise the finance in respect of the outstanding balance of the purchase price. This response must have been fortified by the fact that the Viviers did not

indicate that the agreement had lapsed as far as he was concerned and that they had to vacate the property. He initially gave them 14 days to come up with the finances and did not respond to the request for a month extension or the letters indicating that they were further engaging FNB. It was after all the outcome of their application to FNB that he agreed to await. The reasonable inference arising from the conduct of Viviers was that as the respondents were still busy negotiating with FNB with regard to their application, Viviers was awaiting FNB's final decision as he earlier undertook to do. This is why there was no communication from Viviers to the effect that he regarded the contract as no longer in force or putting the respondents on terms to vacate the property. That this inference is the correct one was reinforced by Viviers in his evidence when he conceded that in his mind the agreement 'was still there' when the letter of 18 June 2010 was sent and that he wanted to see the written proof that the conditions had been fulfilled as the 'agreement was still active' on that date. The first communication they received from Viviers subsequent to the letter from his lawyer of 14 April 2010 is the letter of 18 June 2010 indicating that they must provide proof that they have the finances in place on that date otherwise he would regard the agreement as having lapsed. He did not act on the 14 day period stipulated in the letter of 14 April 2010 nor did he react to the letters on behalf of the respondent's keeping him up to date with the process of FNB. He had tacitly extended the 14 days granted in the 14 April 2010 letter and it was on the letter of 14 June 2010 that he determined a final deadline.

[13] The letter of 18 June 2010 is clear in my view. It expressly states that if the necessary finances is not in place as at date thereof Viviers would regard the agreement as having lapsed due to non-fulfilment of the suspensive condition. By clear implication he did not regard it as having lapsed prior to this date. Thus proof

is sought that the conditions 'have been met as at date hereof' and if this could not be done 'the agreement has lapsed and is no longer of any force and effect . . .' In short the respondents sought extension of time to comply with the condition which was granted up to 18 June 2010. The respondents managed to raise the necessary finances prior to this deadline namely on 14 June 2010. The contract therefore did not lapse as the condition was fulfilled timeously. The court *a quo* thus correctly found in favour of the respondents in this regard.

[14] It thus follows that the appeal against the judgment of the court *a quo* relating to the fulfilment of the suspensive condition cannot be sustained. As the enrichment claim was premised on the agreement having lapsed nothing more needs to be stated in this regard.

D. Occupational interest

[15] There is one last aspect that needs to be dealt with, namely the occupational interest payable to Viviers pending the transfer of the property to the respondents. As mentioned above there is a dispute whether it was by agreement increased from N\$10 000 to N\$20 850 per month. First respondent maintained that he voluntarily increased it to this amount and that the amount in excess of the stipulated N\$10 000 per month would be regarded as payment in respect of the outstanding capital. On his own version he stopped paying this increased amount as from January 2010. Viviers maintained that the amount was agreed upon when it became obvious that the financing would not be forthcoming within the period initially envisaged. This higher amount was calculated on the basis of what the monthly costs of N\$1,7 million finance from the bank would be. In other words, what the respondents' monthly instalment would have been to the bank had the

finances been raised from the bank. In fact, on the evidence of the first respondent, he did this calculation. It is also clear from the evidence of first respondent that it was to this amount that was referred to in the email of 8 April 2010 when he admitted that 'I owe you lots and lots of money . . .' and that the proposal he was working on at the time would help him 'to bring some of the arrear amounts up to date.'

[16] In my view the probabilities favour the version of Viviers in this regard. It is improbable that he would wait for the balance of the purchase price for such a long period without seeking any market related interest. The property's value would appreciate whereas the value of the debt owing to him would depreciate (in buying power). The adjusted amount would be more in line with the market rental and would not burden the respondents unduly as this is the amount they were prepared to pay as it was equal to what would have been payable, had an application for financing been successful. The respondents' pleadings on this aspect is not in line with his version as on their version this would have impacted the capital amount outstanding. They simply decided to stop payment of the occupational interest and took the N\$10850 portion of the increased payments made and allocated this to occupational interest resulting in them ceasing to pay occupational interest as from January 2010, as according to them they have overpaid. First respondent is a prolific writer of emails yet there is no communication in this regard until respondents are stated to be in arrears. Then this new angle appears despite the email admitting that lots and lots of money was owing to Viviers. If one has regard to the payments and the email admitting liability for the increased amount the probabilities are that the explanation tendered in evidence that the higher monthly payment was to reduce the capital amounts

outstanding is an afterthought and that Viviers version in this regard must be accepted.

[17] The court *a quo* did not deal with this dispute over the quantum of the occupational interest. This is probably because the enrichment claim of Viviers is premised on the purchase agreement having lapsed. The counterclaim is premised on the conditions being fulfilled timeously and not on a breach of the agreement relating to occupational interest. There is no suggestion that the agreement had been cancelled due to non-payment or under-payment of the occupational interest. The pre-trial order however expressly included this as a dispute of fact that had to be determined and in the context of the court *a quo*'s finding it should have been determined as it is an important obligation of the defendants pending the transfer of property to them. I shall thus incorporate this aspect into the court order I make.

E. Costs

[18] In view of the fact that respondents disputed the amount of the occupational interest as alleged by Viviers, both in the court *a quo* and in this court the appeal was substantially successful. Respondents compelled appellant to seek the intervention of this court in respect of the occupational interest. In the result I am of the view that the appellant is entitled to his costs on appeal.

[19] The position in the court *a quo* was different. The appellant sought the eviction of the respondents based on the contract having lapsed as the conditions were not fulfilled. The court *a quo* correctly held against him and he must pay the costs of his failed claim. In the counter claim the respondents sought specific

performance based on them being able to tender the full balance of the purchase price. As a side issue the quantum of the occupational interest, pending the transfer of property also had to be determined. In my view however, as the claim for specific performance was the main claim, the respondents were substantially successful entitling them to the costs of the counterclaim.

F. Conclusion

[20] In the result:

- (a) The appellant's failure to lodge the record timeously and to file his security timeously is condoned and the appeal is reinstated.
- (b) The appeal succeeds to the extent indicated in the judgment with costs.
- (c) The order of the court *a quo* is altered to read as follows:
 - 1. The plaintiff, Mr Paul Viviers, must against security for the payment of the balance of the purchase price in the amount of N\$1 700 000, sign all the documents necessary to pass transfer of ownership of the immovable property situated at No. 16 Mosé Tjitendero Street, Olympia, Windhoek, Namibia into the defendants' names (Mr John Barrington Ireland and Anthea Vanessa Ireland);
 - 2. If the plaintiff fails to sign the documents by no later than 14 days from the date this judgment is delivered, then and in that

event, the Deputy Sheriff for the District of Windhoek is authorised to, against security for the payment of the balance of the purchase price in the amount of N\$1 700 000, sign all the documents necessary to pass transfer of ownership of the immovable property situated at No. 16 Mosé Tjitendero Street, Olympia, Windhoek, Namibia from the plaintiff, Mr Paul Vivers, in the defendants' names (Mr John Barrington Ireland and Anthea Vanessa Ireland);

3. It is declared that the amount of occupational interest provided for in the agreement between the parties was increased to N\$20850 per month and that the respondents are liable for such occupational interest as from January 2010 up to the date of transfer of the property into the respondents' names;
4. The costs of the claim and counterclaim are to be paid by the plaintiff, such costs to include the cost of one instructing and one instructed counsel.

- (d) The costs of the appeal shall include the costs of one instructing and one instructed counsel.

FRANK AJA

DAMASEB DCJ

HOFF JA

APPEARANCES

APPELLANT:

P C I Barnard

Instructed by Du Pisani Legal
Practitioners

FIRST AND SECOND

RESPONDENTS:

A H G Denk

Instructed by Chris Brandt Attorneys