



NOT REPORTABLE

CASE NO: SA 45/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ANTON ERIK VAN SCHALKWYK

Appellant

and

DAVID EMMANUEL FREITAS DIAS

First Respondent

RENARD HATTINGH

Second Respondent

Coram: SMUTS JA, FRANK AJA and MOKGORO AJA

Heard: 6 November 2017

Delivered: 13 April 2018

SUMMARY: It is common cause that the appellant and the first respondent entered into a deed of sale on 29 September 2005, in terms of which the first respondent sold immovable property to the appellant for an amount of N\$600 000. The deed of sale however rested on a suspensive condition requiring that the appellant obtain a loan for

the purchase price of the property from a registered commercial bank by no later than 17h00 on 30 September 2005. Should the appellant fail to do so, the agreement would lapse and the first respondent would be obliged to refund all monies paid to him, together with the legal interest. The bank declined to grant the loan resulting in the lapse of the agreement.

However the contention of the appellant was that a further oral agreement was entered into by the parties, seemingly reviving the lapsed agreement. Under that oral agreement the appellant would pay the purchase price of the property in monthly installments.

Also common cause is that the parties entered into a further written agreement concluded on 30 April 2008, in terms of which the same property would be sold by the appellant to the Angolan Consulate in Rundu, but he would have to pay an additional N\$260 000 to the first respondent in installments within a period of six months. Thereafter, the first respondent would transfer the property to the Angolan Consulate. During cross-examination in the High Court it was canvassed with him that the amount was meant to be partially occupational rent and partially payment towards the purchase price. There was however no clarity as to which portion of the amount was payment towards the purchase price. The appellant pleaded that the first respondent however failed to transfer the property to the Consulate or to him notwithstanding that he had paid the amount stipulated. For that reason the first respondent was in breach.

Although acknowledging the agreements concluded on 29 September 2005 and on 30 April 2008 and on the terms alleged, the first respondent disputes that payments had been made according to the terms of any of the agreements. His position lies on the basis that the original agreement had lapsed on the 30 September 2005, when no payments had been made and he had cancelled the second agreement of 30 April 2008. He then sold the property to second respondent. He thus disputed any claim for specific performance and declined any tender by the appellant.

Aggrieved, the appellant instituted proceedings in the court *a quo* seeking specific performance, and (alternatively) the repayments of all amounts he claimed he had paid to the first respondent together with interest.

After the appellant had closed his case in the court *a quo*, both respondents applied for absolution from the instance. The court *a quo* found in favour of both respondents and granted the applications, holding that there was no basis for a refund of direct or indirect payments made and appellant failed to even allege a basis upon which the relief was sought. The appellant accordingly instituted appeal proceedings before this court.

Although the appellant initially appealed against the whole judgment of the court *a quo*, having accepted the High Court ruling granting respondents absolution from the instance in respect of his claim for specific performance, he subsequently confined his appeal against the court's ruling only in so far as it had granted absolution in relation to the refund question in the context of the court's finding that he failed to plead the material facts in support of his claims for a refund.

Held that the court *a quo* correctly found that restitution could not take place when the first agreement had lapsed as no payment were made during the time that the first agreement was in place.

Held that the first and second agreements entered into by the parties had to be read together and the oral agreement entered into after the first written agreement had lapsed and stipulating that payments are to be made in installments had the effect of substituting the lapsed agreement.

Held that the second agreement was unconditional and could not lapse with the first as it did not even exist when the first agreement had lapsed.

Held that the court *a quo* erred in finding that no payments were made under the second agreement despite the evidence tendered by the appellant. The appellant is

prima facie entitled to be placed in the position he would have been in had he been able to sell the property to the Angolan Consulate.

Held that it cannot be said that a court could not or might not have put the first respondent on his defense in respect of the claim for a refund. Absolution should therefore not have been granted in relation to the question of the refund.

Held that the matter is sent back to the court *a quo* to decide the refund question.

The appeal therefore succeeds with costs, such costs to include the costs of one instructing and one instructed counsel.

APPEAL JUDGMENT

MOKGORO AJA (SMUTS JA and FRANK AJA concurring):

Introduction

[1] Initially, this appeal was against the whole of the judgment of the High Court. In this court the appellant altered his stance, confining his appeal against the order of the High Court granting absolution from the instance in relation to the refund of payments made towards the reduction of the purchase price of the property only. He had claimed specific performance in the form of the transfer to him and registration in his name of certain immovable property, namely Erf 1582 Tutungeni Residential Township, Rundu (the property) registered in the name of the second respondent against payment of the purchase price of the property. He also, presumably failing that and in the alternative, sought the refund of all payments made towards the reduction of the purchase price of the property.

[2] The High Court granted respondents an order for absolution from the instance in respect of both the appellant's claim for specific performance and what in this judgment is treated as the alternative claim, that is for the refund of payments made towards the purchase price of the property. The judgment was handed down on 29 July 2016 and the appeal to this court noted on 08 August 2016 against both respondents.

[3] On 20 October 2016, after filing his notice to appeal, the appellant filed a notice of withdrawal against the second respondent, tendering the wasted costs in that regard. This judgment will however, for ease of reference continue to refer to the parties as was the case in the High Court.

Factual Background

[4] In the High Court it was common cause between the remaining parties that they had entered into a deed of sale on 29 September 2005. In terms thereof, first respondent had sold the property to the appellant for an amount of N\$600 000. The deed of sale rested on a suspensive condition which stipulated that the purchaser would obtain a loan for the purchase price of the property from any registered commercial bank by no later than 17h00 on 30 September 2005, failing which the agreement would lapse and the first respondent, who is the seller, would be obliged to refund all monies paid to the buyer together with interest.

[5] As it turned out, the bank declined to grant the loan. According to the appellant, the bank having declined to grant the loan, they agreed that he could pay the purchase

price in installments in the ensuing months, contending that as a result, he had paid the full purchase price of N\$600 000. Of the total amount of N\$600 000, the appellant pleaded and testified that N\$100 000 was paid in kind. That amount was constituted by the value of a Land Cruiser motor vehicle, a trailer and a motor bike, which the appellant claimed was handed to the first respondent, although there was no documentary evidence submitted showing that the motorbike had exchanged hands.

[6] However, the first respondent's contention is that the loan for a mortgage bond having been denied, the sale agreement had automatically lapsed and was therefore of no force and effect. Denying receipt of any payments pursuant to the two agreements and also refuting the appellant's contention in his amended particulars of claim that the suspensive condition was for the exclusive benefit of the appellant, which he could unilaterally waive, the first respondent contended that the suspensive condition had also been for his benefit and could therefore not be waived without his consent. For that reason he submitted, without his agreement to waive the suspensive condition, the agreement had automatically lapsed as soon as the loan was denied.

[7] The parties are however in agreement that they entered into another written contract on 30 April 2008. Here, according to appellant and in what seemed to be a sale of the property by the appellant to the Angolan Consulate in Rundu, it was agreed that he would pay a further N\$260 000 to the first respondent in installments within a period of six months. Thereafter, the first respondent would transfer the property to the Angolan Consulate. What the parties did not know was that legally it was required that

the transfer of immovable property follows the succession of the respective sales of the same property, successively sold to the different purchasers. Thus, after the property had been sold to the appellant, the property had first to be registered in his name before it could be sold by him to the Angolan Consulate.

[8] The appellant however pleaded that the property was never transferred to him nor to the Consulate and for that reason the first respondent was in breach. He thus sought specific performance, and (assumedly in the alternative), repayment of all amounts he had paid to the first respondent together with interest. He was willing to pay any outstanding amounts towards the purchase price, if any, for purposes of specific performance.

[9] At the close of the appellant's case the respondents, from the bar, immediately applied for absolution from the instance. Having considered the claims for specific performance and the (alternative) refund to appellant of payments made towards the purchase price of the property, the court granted the order for absolution in both instances.

[10] The court held that the appellant failed to provide any evidence on the basis of which acting reasonably, it might or could find that the appellant had waived the suspensive condition in the deed of sale and had communicated it to the first respondent before the expiry date. Having assumed that the suspensive condition was for his sole benefit, the court concluded that it had in fact lapsed.

[11] Holding that in terms of rule 7(8) of the High Court Rules the appellant had to allege all the material facts he relied on in support of his claim, the court concluded that he had failed to do so. Declining his claim for a refund, the court additionally held that there was no basis for the claim of payments made by the appellant, whether directly or indirectly, as he had failed to even allege in his particulars of claim the grounds for such relief. Concerning his claims against the second respondent specifically, it suffices to say the court found that there was no admissible evidence that required the second respondent to be put on his defense, thus granting absolution in his favour too.

The appeal in this court

[12] In this court, the case of the appellant is confined to the appeal against absolution from the instance in relation only to the refund question in the context of the court's finding that he failed to plead the material facts in support of his claim for a refund. It is his contention that he must be refunded all sums he had paid to the first respondent and received by him directly or indirectly in respect of the purchase price of the property, including interest at the appropriate rate and calculated from the date of payment.

[13] The relevant issues which were common cause between the parties were identified. The first was that a deed of sale had been entered into between the parties on 29 September 2005 in the terms as submitted by the appellant. Common cause is

also the fact that the appellant had failed to obtain a loan on 30 September 2005, which was the date envisaged in the contract.

[14] Further common cause is the fact of the second agreement of 30 April 2008 in terms of which the appellant had to pay first respondent an additional N\$260 000 payable in installments over a period of six months. Once paid, the latter would transfer the property to the Angolan Consulate. Appellant testified that he has paid this amount to first respondent. In cross-examination it was put to the appellant that the N\$260 000 was meant to be partially for occupational rent and partially payment towards the purchase price of the property. Which portion of the amount was payment towards the purchase price was however not clear. First respondent denied the receipt of any payments pursuant to the two agreements. In respect of the second agreement, he pleaded that he cancelled it due to non-payment.

[15] Both parties agreed that they had been unaware that they were by law required to register immovable property in the sequence of the two sales. Thus, at the time of the institution of the suit in the High Court, the property was still registered in the name of the first respondent. It was also not in dispute that on 7 February 2012 however, the first respondent had in the meantime transferred the property to the second respondent, having been pleaded that the former had sold it to the latter on 19 March 2011.

[16] On 18 July 2014, following a case management process where both parties had been legally represented, a joint proposed pre-trial order was filed in terms of rule 26 of

the High Court Rules. The pre-trial order was made an order of court on 23 September 2014.

[17] In regard to the refund, the parties formulated the question of law to be resolved in the pre-trial order as whether, in the event that the court finds the deed of sale had lapsed and was of no force and effect, the respondent must refund the appellant all payments received from him made as payment towards the purchase price of the property. Further, and aligned to the refund issue, the court *a quo* also had to resolve whether the appellant was entitled to interest on the amounts paid, at the rate of 20% or any other legal rate calculated from the date of payment to the date of refund.

[18] A related question of fact for resolution, the order had directed, was whether directly or indirectly, the appellant had paid the purchase price in full. If any amount was still outstanding, that had to be determined. That would indeed be necessary in order to determine the actual amount paid by appellant and the interest due.

[19] In the heads of argument filed on behalf of the appellant, it is conceded that appellant did not expressly canvass the issue of the refund in his pleadings. Reliance is however placed on the fact that the issue had been raised in prayer 2 of the relief sought in his amended particulars of claim. It was also pointed out that, the fact that the parties had agreed in their proposed joint pre-trial order, which was made an order of the High Court, that the issue was to be included for resolution at trial. It was submitted that the first respondent can thus also not claim that he had been ambushed to avoid

the question. That, counsel contended, was sufficient for the refund question to be dealt with as an issue before this court.

[20] Counsel for appellant furthermore submitted that he had produced sufficient evidence at trial as proof of payments he had made to the first respondent. The court *a quo*, it was contended, was thus in error holding that there was no evidence supporting his claim for a refund and on that basis, granting the first respondent absolution from the instance.

[21] The court proceeded to hold that even if it had erred in deciding that the appellant was non-compliant with rule 78, no evidence had been placed before it showing that payments had been made as required in the deed of sale towards the reduction of the purchase price of the property and before the deadline of 30 September 2005, which is the date on which the first agreement lapsed. That the agreement indeed lapsed is conceded by counsel for appellant.

[22] Finally, the court held that whereas the appellant claimed specific performance from the respondents, he simultaneously rather than alternatively claimed for a refund. He was thus approbating and reprobating, failing to make a case for the refund he claimed.

[23] If regard is had to the evidence and the pleadings, the position at the close of the appellant's case (in the High Court) was as follows:

- (a) The first agreement lapsed due to non-fulfilment of the suspensive condition;
- (b) The parties however orally agreed that it would remain in place, save that appellant would be entitled to pay off the purchase price over time (the oral agreement);
- (c) Appellant did make payments to the respondent pursuant to this oral agreement;
- (d) At some later stage, appellant approached the respondent and a written agreement was entered into in terms whereof appellant had to pay respondent an additional amount of N\$260 000 and in turn the respondent would transfer the property to the Angolan Consulate. This second written agreement indicates that this amount had to be paid over a six months period;
- (e) Appellant made payments pursuant to this second agreement. According to the appellant, he made full payment but as indicated above, this was challenged during cross-examination. Nevertheless it is clear that payments were made in respect of this agreement; and

- (f) Neither party was aware of the fact that, in law, the property first had to be transferred to appellant before it could be transferred to the Angolan Consulate. First respondent's case was that he cancelled the agreement because the appellant was in breach of his payment obligations stipulated in the second written agreement.

[24] The first and second agreements must be read together. If not, there would be no reason for the second agreement. If the appellant, as he alleges, made full payment under the first agreement he could enforce it and sell the property to the Angolan Consulate in his own right and without involving the first respondent at all. Conversely, if the later agreement is to be regarded as a stand-alone, then the previous one is irrelevant. Appellant would then have been entitled upon establishing payment in respect of the second agreement, to enforce it on its own terms and at the price agreed to in the second agreement only. What the link is between the two agreements was never explored in the evidence or in the argument. It was simply assumed that, if appellant could establish performance in respect of both agreements he would be entitled to specific performance provided, of course, he could establish that the sale of the property from first to second respondent was *mala fide*. This he could not show and thus withdrew the appeal against the second respondent.

[25] I am afraid that the pre-trial order probably caused some misunderstanding as it listed in the pre-trial order as a 'matter of law' to be determined:

'whether (in) the event of the court finding that the agreement had lapsed and is unenforceable, the first defendant must refund to plaintiff all payments received from the purchaser as payment of the purchase price'

This created the incorrect impression that payments might have been made under the first agreement prior to it lapsing.

[26] Where a suspensive condition fails, the parties revert to the position which they had been in before the contract was concluded. Monies paid in anticipation of the condition must be repaid. In other words and in general, restitution must take place.¹ In the present matter however no money was transferred prior to the condition failing and the first contract lapsing. An oral agreement after the first written contract had lapsed, in terms whereof payments were to be made in installments substituted the lapsed agreement, unless in the mind of the appellant the oral agreement varied the first written agreement thus keeping it alive which in law could not be the case as it had already lapsed at the time. The court *a quo* nonetheless and correctly found that restitution could not in these circumstances take place as there was nothing to return when that written contract lapsed. It therefore seems to have been assumed that if the first written agreement had lapsed so had the second written agreement. Why this assumption was made is not stated. It can also not be factually correct, as the second agreement was unconditional and had been entered into subsequent to the oral variation of the first written agreement. As the facts stood, the second agreement could not lapse with the first as it did not even exist when the first agreement lapsed.

¹ *Bonne Fortune Beleggings v Kalahari Salt Works* 1974 (1) SA 414 (NC).

[27] The court *a quo*'s judgment to the effect that there were no payments made under the first agreement when it lapsed and therefore no restitution could take place based on the failure of this contract was therefore correct. However this could only affect the position up to the date of the lapsing of the first agreement and not payments made under the second agreement. Further no reasons were provided as to why the oral variation of the first written agreement, substituting it, which was not in dispute had to be ignored in this context. The fact that the original written agreement had lapsed was however neither here nor there. Neither party performed in terms thereof. All payments were made pursuant to the oral agreement after the original written one had lapsed and the oral agreement was not attacked on any basis at all.

[28] The question that thus arises is, in which circumstances would the appellant be entitled to a refund of the payments he made to the first respondent, if it does not flow from the failure of the condition in the first written agreement? Once established the further question would be to determine, based on the facts of this case, the extent of the refund.

[29] Assuming the oral agreement was a valid agreement and had to be considered together with the second written agreement as a whole (as it was accepted in the court *a quo*) then it was either cancelled (on the version of the first respondent) or it can no longer be enforced, because the property that formed the subject matter of the sale had been transferred to an innocent third party (second respondent). If the former, then restitution must take place as first respondent does not claim any damages. This follows

from the cancellation as a matter of course and is not a *condictio* but the normal consequence of termination.² If the latter, then appellant is entitled to the damages he suffered because he can no longer claim specific performance.

[30] A party who seeks specific performance may, in the alternative seek damages. This will be premised on the court not granting specific performance in the particular case.³ The present case is one where such claim would have been appropriate. This is so because if the court could not find that the second respondent knew about the prior arrangements between the appellant and first respondent it would not compel the second respondent to retransfer the property to first respondent, so as to enable the latter to transfer it in turn to appellant.

[31] As a matter of general principle, contractual damages are calculated on the basis of placing the innocent party in the same position as he or she would have been had the contract been performed.⁴

[32] The amount of the damages is not necessarily the same as the purchase price determined in the agreement. In the present matter however, I note that the appellant in his particulars of claim did not make any allegations that he suffered any damages, although he did seek a refund of all payments made to the first respondent.

² *Baker v Probart* 1985 (3) SA 420 (A) at 438-439.

³ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 470.

⁴ *Trotman v Edwick* 1951 (1) SA 443 (A) at 449B-C.

[33] It must be borne in mind that the test for absolution is not whether the appellant 'had established what would finally be required to be established, but whether there is evidence upon which a court, . . . could or might (not should, nor ought to) find for' the appellant.⁵ Would one be able to say that a court, applying its mind reasonably, would not have put the first respondent on his defense because the word 'damages' did not feature in the particulars of claim where a refund of payments is claimed in respect of which there was no counter performance and where such repayments are obviously an alternative for specific performance? All the evidence to claim damages had been led. Appellant made payments without any counter performance from the first respondent. First respondent cannot make performance as the property had been sold to an innocent third party. Appellant had an agreement to sell the property for N\$1.2 million to the Angolan Consulate which, *prima facie* established the market value of the property and hence also, *prima facie* his damages. He nevertheless limited his claim to a refund only, which was clearly a portion of his damages. In addition, even on the first respondent's version that the agreement had been cancelled, there is an entitlement to such refund as pointed out above. In my view it cannot be said a court could not or might not have put the first defendant on his defense in respect of the claim for a refund. It follows that the appeal, to the limited extent it was pursued should be allowed.

[34] Although I have dealt with the evidence, pleadings and submissions of the parties, I have been mindful to do so in broad terms and without detailed analysis. This is so because having allowed the appeal against absolution from the instance in respect of the refund of payments made:

⁵ *Stier v Henke* 2012 (1) NR 370 (SC) 373 para 4.

'[O]n appeal it is generally right for the Appellate Tribunal, when allowing an appeal against an order granting absolution at the close of the plaintiff's case, to avoid, as far as possible, the expression of views that may prematurely curb the free exercise by the trial Court of its judgment on the facts when the defendant's case has been closed.'⁶

Costs

[35] As the appeal must be allowed *albeit* to the limited extent indicated, the appellant is the successful party in the appeal and costs should follow the result. It must be pointed out that counsel for appellant in her heads of argument limited the appeal, so the fact that the appeal originally filed was of a much wider ambit did not cause wasted costs to the respondents.

[36] As far as the proceedings in the High Court are concerned, absolution should not have been granted in respect of the alternative relief in prayer 2 of the appellant's particulars of claim (the refund of monies paid), but was correctly granted in respect of prayer 1, claiming specific performance against both respondents. As this disposed of the matter against the second respondent, he was successful in the court *a quo* and was correctly awarded his costs in that court. As first respondent was successful in the absolution application in respect of the claim for specific performance, but should not have been successful in the claim for a refund, I am of the view that, as both parties should have been successful to some extent, a fair and equitable costs order as between appellant and first respondent in the court *a quo* would have been one that in effect meant that each party had to pay its own costs.

⁶ *De Klerk v ABSA Bank Ltd & others* 2003 (4) SA 315 (SCA) at 321 para 3.

Order

[37] In the result, I make the following order:

1. The appeal succeeds against the High Court's order granting absolution from the instance in respect of prayer 2 of the appellant's amended particulars of claim, with costs, such costs to include the costs of one instructing and one instructed counsel.

2. The order of the court *a quo* is set aside and substituted with the following order:
 - (i) Absolution from the instance is granted in favour of first defendant in respect of prayers 1 and 3 of the plaintiff's amended particulars of claim.

 - (ii) Absolution from the instance is refused in respect of prayer 2 of the plaintiff's amended particulars of claim.

 - (iii) No cost order is made in respect of the orders mentioned in (i) and (ii) above.

- (iv) Absolution from the instance is granted in favour of second defendant with costs in respect of all the relief sought against him in the plaintiff's amended particulars of claim.
3. The matter is sent back to the High Court for determination of the refund question.

MOKGORO AJA

SMUTS JA

FRANK AJA

APPEARANCES:

Appellant:

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First Respondent:

A W Boesak

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