



NOT REPORTABLE

CASE NO: SA 13/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JOHANNES JACOBUS VAN ZYL

Appellant

and

BARGAIN BUILDING SUPPLIES CLOSE

CORPORATION

First Respondent

GRAEME WELLS

Second Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 22 October 2019

Delivered: 19 November 2019

Summary: During October 2015 at Gobabis, the first respondent represented by the second respondent and appellant entered into a partly oral, partly written agreement. The terms of the agreement were that, appellant undertook to manufacture and erect a shed for the respondents at the respondents' instance and request at the first respondent's business premises, including laying the foundation for the shed and the overall completion of the metal construction. The respondents undertook to pay the appellant the amount of N\$60 000 for his labour

and they further undertook to supply him with the necessary materials needed to complete the manufacture and erection of the shed.

During November and December 2015 and January 2016, respondents delivered the 'necessary' materials to the value of N\$204 469,23 to the appellant. To their claim, respondents attached an undated letter received from the appellant's son acknowledging that the appellant received the 'necessary' materials to complete the project as per their agreement. The agreement was never fulfilled, despite the respondents' legal practitioners sending a letter of demand to the appellant on 8 November 2016. As a result, the respondents cancelled the agreement, issued summons and sought payment of N\$204 469,23 with interest thereon calculated at a rate of 20% per annum a *tempore morae* to the date of final payment and costs of suit.

The appellant filed a counter-claim alleging that the respondents breached the agreement by failing to supply the necessary materials to him and to provide municipal approved building plans which resulted in him being unable to fulfil his obligations as per their agreement and therefore suffering damages in the amount of N\$75 000. He also denied receiving the letter of demand and pleaded that the agreement was mutually cancelled by the parties and denied that he was indebted to the respondents.

The court *a quo* found that the parties' dispute centered around who was liable to get the approval from the Municipality of Gobabis. On the evidence tendered, the court *a quo* found that the appellant undertook to obtain municipal approval, but failed to do so. The court *a quo* therefore accepted respondents' case that the appellant did not complete his part of the agreement between the parties and respondents were not liable to pay anything to the appellant. Furthermore to this, the appellant was placed in mora and the contract was duly cancelled by the respondents. As a result, the court *a quo* ordered appellant to pay the value of the materials delivered to him in the sum of N\$203 339,73 with interest thereon and costs of suit.

At the hearing of the appeal, the appellant's counsel abandoned the heads of argument filed by the instructing legal representative and conceded that the appellant's counter-claim could not succeed, but counsel contended that the court a quo should have ordered absolution from the instance in respect of both the claim in convention and the counter-claim.

Held, further that the appellant is entitled to damages suffered in respect of manufacturing the shed, provided that he proves the quantum of such damages.

Held, further that the appellant failed to prove his counter-claim with regards to the damages.

Held, further that the respondents are entitled to the return of materials they delivered to the appellant or the manufactured shed or the monetary value of the materials. This was subject to any damages established by appellant, but as appellant did not prove the quantum of his damages, full restitution had to be made.

Held further that absolution from the instance regarding the appellant's counter-claim is granted.

The appeal is dismissed with costs.

APPEAL JUDGMENT

MAINGA JA (HOFF JA and FRANK AJA concurring):

Introduction

[1] This appeal is against a judgment (Oosthuizen J) holding that appellant did not prove his counter-claim in damages of N\$75 000 against the respondents

and an order in respect of the claim in convention that appellant pays the value of the materials delivered to him by the respondents in the sum of N\$203 339, 73.

Pleadings

[2] During October 2015 at Gobabis, the first respondent represented by the second respondent and appellant entered into a partly oral, partly written agreement. The terms of the agreement were that, appellant undertook to manufacture and erect a shed for the respondents on the respondents' instance and request at the first respondent's business premises, including laying the foundation for the shed and the overall completion of the metal construction. The respondents undertook to pay the appellant the amount of N\$60 000 for the labour of the services and they further undertook to supply the appellant with, *inter alia*, materials below to complete the manufacture and erection of the shed.

IPE STD Beams 200x100x23, at a weight of 36 kilograms each;

Mild steel plate;

Angle iron;

Flat bar;

IBR zinc;

Bolts;

L-channels 150x100x20x2.5;

[3] During November and December 2015 and January 2016, respondents delivered the materials below in the total amount of N\$204 469,23 to the appellant, which amount, the court *a quo* altered to N\$203 339,73.

240 x MS bolts & Nuts M16 x 65 valued at N\$2548,80 (including VAT),
and

140 x MS bolts & Nuts M12 x 30 valued at N\$470,40 (including VAT).

106 x IBR 0.47mm x 7.5m valued at N\$59 254 (including VAT).

40 x L-chan 150 x 90 x 20 x 2.0 mm valued at N\$21 674,40 (including
VAT).

1 x mild steel plate valued at N\$2 981,71 (including VAT), 1 x angle iron
70 x 70 x 6 x 6 m valued at N\$492,62 and 1 x flat bar 150 x 8 x 6 m valued
at N\$969,60 (including VAT).

20 x IFE section STD S355 200 x 100 x 6 m valued at N\$38 221,40
(including VAT).

10 x bar flat 30 x 4.5 mm x 6 m valued at N\$1 129,50 (including VAT).

20 x IPE STD 200 x 100 x 22.36 kg valued at N\$76 726,80 (including VAT).

[4] The respondents attached copies of the invoices below as proof of the
materials delivered to the appellant.

Invoice No 098464 marked BBS 2

Invoice No 098941 marked BBS 3

Invoice No 101554 marked BBS 4

Invoice No 101553 marked BBS 5

Invoice No 103085 marked BBS 6

Invoice No 391821 marked BBS 7

Invoice No 099616 marked BBS 8

[5] The respondents also attached an undated letter from the appellant's son, among other things, acknowledging that appellant received the materials as per para 2 above.

[6] On or about 8 November 2016, the respondents' legal practitioners addressed a letter to the appellant demanding that he complies with the agreement, failing which, the agreement between the parties would be cancelled. Notwithstanding the demand, appellant failed to comply with the agreement and failed to reimburse the respondents the amount constituting the value of the materials. The respondents cancelled the agreement, issued summons and sought payment of the amount of N\$204 469,23 interest thereon at the rate of 20% per annum a *tempore morae* to the date of final payment and costs of suit.

[7] Respondents' allegations are that appellant failed or neglected to comply with the agreement, when he failed;

(1) to manufacture and erect the shed on the premises of the respondents;

(2) to fit the shed with the IBR roof sheets;

- (3) to obtain the necessary municipal planning permission to erect the shed;
- (4) to reimburse the respondents the value of the materials delivered to the appellant for the manufacturing and erecting the shed.

[8] The appellant counter-claimed. In his plea to the respondents' particulars of claim, he admitted the agreement but denied that the respondents were entitled to cancel it and alleged that the respondent breached the agreement by failing to supply all the materials necessary to manufacture the shed and failed to provide municipal approved building plans. Appellant further denied receiving the invoices marked BBS4-7 in para [4] above. Appellant pleaded that he manufactured the shed, but was prevented from erecting the same due to the respondents' failure to provide municipal approved building plans. Appellant denied receiving the written demand from respondents' legal practitioners. He denied that respondents cancelled the agreement, but pleaded that the agreement was mutually cancelled by the parties and finally, denied being indebted to the respondents in the amount in their particulars of claim.

[9] In his counter-claim, appellant repeated his allegation in his plea in that the respondent failed to supply all the necessary materials to the appellant and failed to provide building plans approved by the Municipality and as a result he failed to put up the completed manufactured shed at the premises of the respondents. Appellant therefore suffered damages in the amount of N\$75 000 for the first phase of the manufacturing of the shed, which damages included;

- (a) the making of the shed;

(b) the construction of putting up the shed on Erf 85;

(c) the foundation of the shed;

(d) the overall completion of the metal construction, and the drawing of plans of the shed as well as the drawing from the engineer.

[10] Respondents were therefore legally liable to compensate the appellant in the said sum and prayed for judgment in the sum of N\$75 000, plus interest thereon *a tempore morae* at the rate of 20% per annum from date of judgment to date of payment and costs of suit.

[11] In replication, the respondents pleaded that in respect of invoices BBS 5 and 7 to the respondents' particulars of claim, the flat bar and mild steel were delivered to the appellant and signed for by the appellant's staff members, which the appellant acknowledged having received in the undated letter of appellant's son annexure "A" to appellant's counterclaim and annexure "BBS I" to respondents' particulars of claim. The respondents further pleaded that the appellant confirmed the completion of the shed in the email of 12 July 2016, which means the appellant received all the necessary materials to complete the shed. On the municipal approval, respondents pleaded that appellant on numerous occasions indicated to the second respondent and his manager, Mr Johan Cronje, that the appellant was in the process of getting the municipal plans approved.

[12] Except for repeating respondents' allegation on the municipal approval and the email of 12 July 2016 from the appellant to the effect that the shed had been manufactured and that appellant was awaiting the respondents' further

instructions, respondents denied every allegation contained in the appellant's counter-claim and prayed for the dismissal of that claim with costs.

High Court proceedings

[13] The court *a quo* found that the parties' dispute centred around who was liable to get the approval from the Municipality of Gobabis. It observed that the parties blamed each other for the obligation to obtain the municipal approval, but found that on the evidence presented, the appellant undertook to obtain municipal permission for the erection of the shed, but failed to do so. The court *a quo* reduced the respondents' original claim to N\$203 339,73. It found that the appellant failed to prove the amount he claimed for damages in that, there was no expert valuation of the work done in the manufacturing of the shed and no proof of the amount paid to the architect nor an invoice for the base plates. The court *a quo* further remarked that appellant was in possession of the structure he manufactured, which he did not tender in the pleadings, and that he should have in his possession any remaining material supplied to him by the respondents and the base plates he allegedly bought. The court *a quo* under the circumstances accepted that the manufactured but un-erected shed has monetary value far exceeding the damages claimed by the appellant.

[14] The court *a quo* accepted respondents' case that the appellant did not complete his part of the agreement between the parties and respondents were not liable to pay anything to the appellant. Furthermore to this, the appellant was

placed *in mora* and the contract was duly cancelled by the respondents. As a result, the court ordered appellant to pay the value of the materials delivered to him in the sum of N\$203 339,73, interest thereon and costs of the suit.

Submissions in this court

[15] Mr Mouton who represented and argued the appellant's appeal abandoned the heads of argument filed by the instructing legal representative, conceded that the appellant's counter-claim could not succeed, but submitted that an order of absolution from the instance should have been granted and not an order which, in effect, dismissed the counter-claim. Mr Mouton further argued that the respondents' particulars of claim do not allege damages, but that is what they claim as they claimed the purchase price of the materials delivered to the appellant. The submission then proceeded on the basis that it was not proven that the purchase price of the materials equated to damages suffered by the respondents. Mr Mouton further argued that the probabilities favour the appellant as to who should have obtained municipal approval and that the *court a quo* should have returned the verdict of absolution from the instance.

[16] Mr Muhongo for the respondents contended that on the limited issue of the obligation to obtain the municipal permission for the erection of the shed, the issue falls to be decided in favour of the respondents.

[17] During November 2016, the respondents through their legal representatives of record had demanded in writing that the appellant manufactures

and erects the shed, failing which, the agreement between the parties would be cancelled. Notwithstanding the demand, the appellant allegedly failed to perform as per the agreement, in the alternative, he failed to reimburse the respondents the value of the materials delivered to him, resulting in the respondents cancelling the agreement. Appellant denies having received the written demand and pleaded that the agreement was mutually cancelled by the parties.

[18] The appellant failed to comply with the agreement for the reason that the municipal permission had not been obtained. The parties blame each other for that obligation to obtain the municipal approval. But on a careful analysis of the evidence on that point, the versions of the parties are mutually destructive. It is unlikely that the appellant would have applied for the municipal approval to erect a shed on the first respondent's premises without the slightest participation of the second respondent. At least, the application for the approval would have required the second respondent's signature and his denial on that point is misplaced. There was evidence that appellant previously did work for the respondents and he apparently obtained municipal approval without the respondents' involvement. That could be so, it is not clear from the evidence, how long that was before the agreement which is the subject matter of this appeal. Circumstances could have changed since then. In my opinion, as Mr Mouton correctly argued, the probabilities favour the appellant on that point.

[19] Mr Mouton then argued that the court *a quo* should have returned a verdict of absolution from the instance. Mr Mouton is correct in his submission that the particulars of claim of the respondents does not claim damages. This is because

they do not claim damages, but restitution following from their alleged cancellation of the agreement. Respondents did not at the time they instituted action had to tender anything as by then they had not received anything from the appellant.

[20] In this case, where the agreement was cancelled in the circumstances as alleged by the respondents or as alleged by the appellant, the parties should have been restored to the positions they were in at the time of the agreement. Even in the circumstances where the respondents would have been the guilty party, they still would have been entitled to restitution to the extent that any damages they have caused did not exceed the value of what had to be restituted; to have ordered absolution from the instance as Mr Mouton suggested would have been to enrich the appellant unjustly at the expense of the respondents.

[21] The extent of the enrichment is evident from the facts. The respondents delivered to the appellants materials in excess of N\$200 000, whereas the extent of appellant's damages on his own pleadings only amount to N\$75 000. Mr Mouton submitted that the production of invoices itself does not prove the values claimed in respect of the materials delivered. Seen in isolation, this submission is undoubtedly correct. The problem that faces the appellant however is that he admitted that the materials delivered were to the values as stated in the invoices. Once the values had been established, the appellant had to make restitution of anything in excess of what he could have established as his damages.

[22] In the circumstances of this case, it is common cause that the respondent delivered materials to the appellant to manufacture a shed, which should have

been erected at the respondents' premises. It is also common cause that appellant manufactured the shed, but it was not erected due to the non-obtaining of the municipal approval. As the failure to obtain municipal approval is the fault of the respondents, the appellant is entitled to the damages he suffered in respect of manufacturing the shed provided he proved the quantum of his damages. As correctly conceded by Mr Mouton the appellant failed to prove the quantum of his damages. The respondents are thus entitled to the return of the materials they delivered to the appellant, or the manufactured shed, or the monetary value of the materials without making any provision for the damages allegedly suffered by the appellant. The appellant did not tender back either the materials or the delivery of the shed, resulting in the respondents being entitled to seek the monetary value of the materials delivered to the appellant.

[23] In *Feinstein v Niggli and another*¹, Trolip JA discussed the general principles relating to restitution where a contract is set aside on the ground of fraudulent misrepresentation. The principles would, however, be the same where the contract is set aside or rescinded on another basis.²

[24] At 700F-701A Trolip JA had this to say:-

'The object of the rule [*restitutio in integrum*] is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations. Hence, generally a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the representee is able and willing to restore completely everything that he has

¹ 1981 (2) SA 684 (A).

² *Cash Converters Southern Africa v Rosebud WP Franchise* 2002 (5) SA 494 (SCA) at 508F.

received under the contract. The reason is that otherwise, although the representor has been fraudulent, the representee would nevertheless be unjustly enriched by recovering what he had parted with *and* keeping or not restoring what he had in turn received, and the representor would correspondingly be unjustly impoverished to the latter extent (see *Actionable Misrepresentation* (*supra* at para 294 and note 5 thereto); *Marks Ltd v Laughton* 1920 AD 12 at 21; *Harper v Webster* 1956 (2) SA 495 (FC) at 502 B-D; *Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31G-32A). But since the rule is founded on equity it has been departed from in a number of varying circumstances where considerations of equity and justice have necessitated such departure (see *Harper's* case where the cases are collected and especially at 500B, 502E)'.

[25] Termination of the primary obligations of the contract (the obligations of both parties to perform) does not terminate all secondary obligations, such as the obligation to pay damages for breach or (unless a contrary intention appears) the obligation to abide by an arbitration clause in the contract.³

[26] Applying these principles which I associate myself with to the facts of this case, as already said, the appellant is entitled to (restitution of work and labour) damages once proved. The court *a quo* was correct to hold and for reasons it gave, that appellant's damages were not proved. Respondents are entitled to restitution of the materials they delivered to the appellant or the value thereof and the court *a quo* was correct to make the order it made in that regard. Given what I say in regards to the appellant's counter-claim, an order of absolution from the instance would be appropriate under the circumstances.

³ *Christie, RH: The Law of Contract in South Africa*, 3rd ed, Durban Butterworths, 1996 at p 597.

[27] In the result I make the following order. For sake of clarity, I alter the court *a quo's* order as indicated below.

1. The appeal is dismissed with costs, which costs include the costs of one instructing and one instructed counsel.
2. The court *a quo's* order is altered to read as follows:
 - 2.1 Defendant shall pay the value of the materials delivered to him in the sum of N\$203 339,73.
 - 2.2 Defendant shall pay interest on the above amount from 24 January 2017 at 20% per annum *a tempore morae* to date of final payment.
 - 2.3 In respect of the counter-claim an order of absolution from the instance is granted.
 - 2.4 Defendant shall pay the costs of suit of the plaintiffs, including the costs of one instructing and one instructed counsel.

MAINGA JA

HOFF JA

FRANK AJA
APPEARANCES:

APPELLANT:

C J Mouton

Instructed by Grobler & Co., Windhoek

FIRST AND SECOND RESPONDENTS:

T Muhongo

Instructed by Ens|Africa

(incorporated as LorentzAngula Inc.),

Windhoek