



NOT REPORTABLE

CASE NO: SA 66/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RAINIER ARANGIES

Appellant

and

BALTHASER JOHANNES BOSCH

Respondent

Coram: DAMASEB DCJ, FRANK AJA and ANGULA AJA

Heard: 6 October 2021

Delivered: 4 November 2021

Summary: The parties in this appeal entered into a written agreement on 18 June 2014 in terms whereof they jointly purchased an aircraft. The agreement provided that the parties would be 'joint owners of the asset on a 50/50 basis' and that they will be sharing in the costs relating to the ownership of the aircraft. The relationship between the parties deteriorated and towards the end of 2015, the respondent indicated to the appellant that he wished to terminate the relationship on the basis that either he takes over the half share of the appellant or the latter should take over his half share in the aircraft. The appellant was not amenable to this. Respondent issued summons in February 2016 to terminate the relationship on the basis that appellant pays him half

of the value of the aircraft to acquire sole ownership in it. The respondent alleged that the value of a half share in the aircraft was N\$1 million, and he also sought an amount from the appellant in respect of payments made on behalf of the appellant to purchase the aircraft.

Appellant pleaded that he was not in breach of the agreement; that he was not prepared to terminate the co-ownership; that the aircraft was not worth N\$2 million as alleged and that if regard is had to his expenses in relation to the aircraft up to the date of the plea, respondent was the one indebted to him to the tune of N\$341 808,79. The appellant failed to disclose in his plea (and amended plea) that he, on 16 May 2016, without consulting the respondent and unbeknown to the respondent traded-in the aircraft for N\$1 million in pursuance of a transaction where he purchased a helicopter. He alleged that the respondent is entitled to N\$500 000 for the half share of the aircraft and concedes that he owes the respondent N\$78 739,20 relating to the costs of the upkeep and maintenance of the aircraft.

The court *a quo*, determined the value of the aircraft at N\$1,2 million and after conducting a debatement of account process concluded that the appellant owed the respondent N\$850 174,38 plus *mora* interest as from 2 October 2019 to date of payment of the said amount. Appellant appeals against this order and he maintains that the respondent owes him N\$704 465.

This court must determine whether the respondent was liable for half of the employment costs of the pilot; whether the court *a quo* was entitled to set-off the trade-in value of the aircraft; and finally, whether the court *a quo* was correct in its application of the 2,5 per cent interest in respect of monies owed by the appellant to the respondent? Further, the court must determine whether appellant's condonation and reinstatement application must be granted for the late filing of the record of appeal, power of attorney and security.

Held that, the cost of employing a pilot did not form part of the costs incidental to the joint ownership agreement (ie insurance, hangarage and costs to keep the aircraft's registration current). It was only belatedly claimed when it became clear to appellant that the reconciliation of the joint ownership will not leave him with the credit balance and as pointed out by the respondent in his evidence there was no need on his part for such agreement as he could, incur costs to obtain an instructor on an *ad hoc* basis to train him. The court *a quo* was correct to disallow this expense.

Held that, once it was conceded that the joint ownership had been terminated and the aircraft sold (traded-in) the whole matter turned into a debatement of account exercise.

Held that, to determine what was owing to whom, both parties had to prove their payments and charges in respect of the joint ownership. In this process a balance would be established in favour of one of the parties.

Held that, from an accounting perspective, seeing there was interest involved, the amounts proven to be due and payable had to be reflected at the time they became due and payable.

Held that, everything due and owing between the parties in the joint ownership venture had to be set-off against one another to determine the ultimate debtor.

Held that, set-off was thus inherent in the nature of the debatement of the account which on the pleadings included the value of the aircraft, and the court *a quo* had to determine it as part of the issues before it. This court finds that the court *a quo* was correct in its determination.

Held that, the court *a quo* correctly allowed interest in its reconciliation of the respective claims of the parties. The 2,5 per cent interest applied only subsequent to

the receipt of the trade-in value of the aircraft when this value caused a credit balance in favour of the respondent.

Held that, this court is satisfied that the appellant has shown good cause for the late filing of the record of appeal, power of attorney and security – that there are prospects of success as it is evident that appellant has an arguable case. The court condones appellant’s non-compliance with the rules of court and the appeal is reinstated.

Appeal is dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (DAMASEB DCJ and ANGULA AJA concurring):

Introduction

[1] The parties to this appeal entered into a written agreement on 18 June 2014 in terms whereof they jointly purchased an aircraft. This agreement spelt out that they would be the ‘joint owners of the asset on a 50/50 basis’ and further contained provisions as to the sharing of costs relating to the ownership of the aircraft.

[2] The relationship between the parties fairly rapidly deteriorated for reasons not relevant to this appeal and towards the end of 2015, the respondent indicated to the appellant that he wished to terminate the relationship on the basis that either he takes over the half share of appellant or that the latter should take over his half share in the aircraft. At that stage the appellant was not prepared to do this. After certain correspondences were exchanged between the parties’ legal practitioners the respondent issued summons in February 2016 to terminate the relationship on the

basis that appellant pays him half of the value of the aircraft to acquire sole ownership thereof. In the summons it is alleged that the value of a half share in the aircraft was N\$1 million. In addition, respondent also sought an amount from the appellant in respect of payments made on behalf of the appellant to purchase the aircraft.

[3] Appellant's plea to the claim was that as he was not in breach of the agreement he was not prepared to terminate the co-ownership relationship; that the aircraft was not worth N\$2 million as alleged by the respondent and that if regard is had to his expenses in relation to the aircraft up to the date of the plea (20 July 2016), respondent was indeed indebted to appellant to the tune of N\$341 808,79 being half of the expenses incurred up to that date.

[4] What the appellant did not disclose in his plea is that he on 16 May 2016, without consulting the respondent and unbeknown to the respondent traded-in the aircraft for N\$1 million in pursuance of a transaction where he purchased a helicopter. In an amended plea filed on 19 July 2017 the fact of the trade is also not mentioned. It is however conceded that the co-ownership relationship should be terminated. According to this plea the respondent is entitled to his half share of the aircraft stated to be N\$500 000 and a reconciliation is made relating to the costs of the upkeep and maintenance of the aircraft with the result that it is conceded by appellant that he owes the respondent N\$78 739,20 which he tenders.

[5] The court *a quo* which, by and large, had to conduct a debatement of account process concluded that appellant owed respondent N\$850 174,38 plus *mora* interest thereon as from 2 October 2019 to date of payment of the said amount.

[6] I interpose here to mention that the court *a quo* determined the value of the aircraft at N\$1,2 million at the trial.

[7] Appellant appealed against this judgment maintaining that it is indeed the respondent who owes him N\$704 465.

Joint ownership

[8] As the relationship between the parties was one of joint ownership they each had an undivided share in the aircraft and it could not be alienated without the consent of both parties¹. It is also an incidence of co-ownership that each co-owner was obliged to contribute proportionally to necessary expenses in respect of the preservation and upkeep of the aircraft which would include taxes or levies due to the civil aviation authorities.² Further, losses and charges are shared and so are, profits and losses.

[9] When respondent issued summons he was unaware that the aircraft had already been sold and was thus compelled to sue based on the value of the aircraft coupled with a tender that the aircraft be transferred to respondent as sole owner. By the time the trial started, this was no longer the case as appellant by then conceded that the joint ownership relationship had to be terminated and when the evidence

¹ *Pretorius v Botha* 1961 (4) SA 722 (T).

² 27 *Lawsa* 2 ed para 210.

indicated the aircraft had indeed been traded-in or sold for N\$1 million, it became common cause that respondent was entitled to at least N\$500 000 and should the aircraft be valued at more than N\$1 million to half of the value in excess of N\$1 million.

[10] Because of the trade-in of the aircraft, the whole trial, as pointed out above, became an exercise of debatement of an account. The court had to decide what costs in relationship to the upkeep and maintenance of the aircraft had to be shared between the parties, what was still owing in respect of the purchase price of the aircraft by appellant, how the trade-in value impacted on the account between the parties and whether there was a further amount in respect of the value of the aircraft to be recognised in this accounting between the parties.

[11] As interest was agreed between the parties in respect of dealings with the joint ownership these amounts had to be recognised as and when they became due and owing. This meant, for example, most of the costs relating to the aircraft such as hangarage and insurance had to be recognised monthly when appellant made these payments. Similarly, the trade-in price thus had to be recognised on the date of the trade-in as half of that amount became due and owing to respondent at that date.³ The additional N\$100 000 in respect of each party in relation to the additional value of the aircraft could only be recognised once determined by the court *a quo*.

[12] In short, in the debatement of the account and the reconciliation of such account it was required that amounts had to be recognised chronologically as and

³ *Kleynhans v Van der Westhuizen NO 1970 (2) SA 742 (A)* at 750A-B.

when they arose (became due, owing and payable) and this is the normal manner in which accounts are structured. As I point out below this is what the court *a quo* did.

Limited nature of the appeal

[13] In terms of the joint venture agreement, respondent paid more than his *pro rata* share of the purchase price of the aircraft and it was agreed that this would be regarded as a loan to appellant which the latter had to pay back with interest at the rate of 1,2 per cent per month within 12 months of the signing of the joint ownership agreement. During the trial it became common cause that the amount that the appellant had to pay back to respondent in this regard was N\$412 649,24.

[14] A large amount of time at the trial was used to establish what costs relating to the maintenance and upkeep of the aircraft the respondent would be co-responsible for with appellant. The court *a quo* accepted that this included insurance, hangarage and costs to keep the aircraft's registration current. The latter was referred to somewhat confusingly as currency costs. In the end, the court *a quo* allowed most of the costs claimed by the appellant but not the employment costs of a pilot for the aircraft that formed the subject matter of the joint ownership. From the notice of appeal these costs of the pilot are the only ground of attack on the court *a quo* as far as the aspect relating to costs is concerned. As there is no cross-appeal, none of the other costs items granted by the court *a quo* need consideration.

[15] According to appellant, he and respondent entered into an additional oral agreement in terms whereof he would be entitled to set-off amounts owing to the

close corporations of which he was the sole member for repairs done to vehicles of the respondent against the amount owing by him to the respondent. Appellant could also set-off other costs relating to the aircraft he incurred in respect whereof appellant was liable for half such costs. The court *a quo* found in appellant's favour in this regard and in its reconciliation used half the trade-in price of the aircraft (N\$500 000) in a set-off against the payments of costs incurred by appellant. The grounds of appeal attack this set-off only and none of the others. This is thus the second issue that needs to be considered. According to appellant, the court *a quo* was not entitled to regard this trade-in price as akin to payment on the date the trade-in was agreed.

[16] Appellant in his amended plea not only raised the additional agreement relating to set-off but also averred that, whereas his outstanding loan in respect of the purchase price of the aircraft attracted interest at the rate of 1,2 per cent per month, there was an additional agreement in relation to the other expenditure in respect of the aircraft to the effect that outstanding amounts would attract interest at 2,5 per cent per month. In the notice of appeal the court *a quo* is criticised for using this 2,5 per cent interest in respect of amounts appellant avers it was not apposite to do so.

[17] In summary, the appeal is directed at three aspects only. Firstly, was the employment costs of the pilot costs for the co-owners, ie was the respondent liable for half the costs. Secondly, was the court *a quo* entitled to set-off the trade-in value of the aircraft at the date of the trade-in to ascertain, as between the parties, who owed who what. Thirdly, was the court *a quo* correct in its application of the 2,5 per cent interest in respect of monies owed by the appellant to the respondent.

Employment costs of pilot

[18] Whereas there is a dispute among the parties as to who initiated the agreement to purchase the aircraft, it is common cause that they both intended to use the aircraft to obtain private pilot licences and that they would thereafter personally use it. The written agreement provided for certain specific costs in relation to the upkeep and maintenance of the aircraft and the court *a quo* allowed certain additional costs that can be described as costs normally incidental to co-ownership. The costs of the employment of the pilot was not mentioned in the written agreement nor does it follow from the joint ownership of the aircraft which could not be used for commercial purposes, ie to fly people or passengers for reward. It was, on the evidence, only available for personal use or to train potential pilots.

[19] In fact, the employment costs of the pilot did not feature in the initial reconciliations prepared by the appellant. This only came into being in a late amendment which caused the debit to him which he tendered in his second plea to become quite a large credit in his favour during the trial. Because the amendment was so late, the witness statements filed by respondent did not deal with this aspect at all as they were filed prior to this issue being raised on behalf of the appellant.

[20] However, counsel for the appellant raised this issue when he cross-examined the respondent as plaintiff *a quo*. Respondent stated that he only heard about the

employment of a pilot at the trial. He said among others 'I do not know any of this I am only hearing about this now', that this was not discussed with him and that he would hire his own instructor when he had a need for such service.

[21] When the appellant testified subsequently, counsel for respondent (who is not the same counsel that appeared in this court) took the matter further disputing that there was an agreement to employ a pilot. Appellant conceded that respondent was never requested to report for instructions to the pilot who was employed by Expedite Aviation CC, a corporation controlled by appellant. Respondent indicated that in the written agreement between the parties there was a reference to a 'training business', ie that the aircraft would be used for the purpose of training persons other than the parties and that the agreement in fact stipulates that it would not be used by 'third parties without the other party's expressed consent'. It seems from the evidence that the appellant thought that because the aircraft was registered in the name of the Expedite Aviation CC that the reference to use only by the parties and not third parties meant that appellant, respondent and authorised employees of Expedite Aviation CC could use it. Whereas counsel for respondent did not expressly put it to appellant that respondent denied that an agreement was reached that Expedite Aviation CC would employ a pilot of whom respondent would pay half the costs involved, he clearly disputed such an agreement by pointing out that this was not contained in the written agreement nor was there a need for such a pilot as far as he was concerned and that the consent of respondent was not obtained for this.

[22] In my view, the court *a quo* correctly disallowed this expense claimed. This was never contemplated in the written agreement, it did not form part of the costs

incidental to the joint ownership, it was only belatedly claimed when it became clear to appellant that the reconciliation of the joint ownership will not leave him with the credit balance. Furthermore, as pointed out by the respondent in his evidence, there was no need on his part for such agreement as he could incur costs to obtain an instructor on an *ad hoc* basis to train him. There was, on the probabilities, no basis to suggest that a full-time employee for a two year period was necessary or prudent.

[23] To suggest, as counsel for the appellant does, that simply because it was not pertinently put to appellant that it is disputed by respondent that he agreed to the employment of the pilot, that appellant's version must be accepted cannot be correct. By the time appellant (as defendant *a quo*) testified he and his counsel were aware through the testimony of the respondent that he disputed the alleged agreement and, as pointed out above, the cross-examination of the respondent also attempted to point out the improbability of the alleged agreement in the context of the envisaged transaction between the parties.

Set-off

[24] Whereas the respondent accepts that the appellant is entitled to half the value of the aircraft, what irks him is that the court *a quo* recognised half of the trade-in value (N\$500 000) as being paid on the date of the trade-in and not only after the court had established the value of the aircraft at the end of the trial. As pointed out above, the value of the aircraft was determined at N\$1,2 million which meant that respondent was entitled to a total payment of N\$600 000 as being half of the value of the aircraft when it was alienated by the appellant.

[25] According to counsel for appellant, set-off was not pleaded and hence the respondent could not rely thereon. Whereas it is true that set-off normally needs to be pleaded as it is a form of payment and the court must be made aware of the facts to have regard to set-off. That does not detract from the fact that the admitted facts indicate a set-off and the court could just not ignore that. This is because set-off:

‘. . . is a recognised principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the Court – as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together.’⁴

[26] It must be borne in mind that on the pleadings, appellant never admitted the wrongful alienation of the aircraft and the respondent was compelled to terminate the joint ownership on the basis of the value. On the pleadings, the issue of set-off simply did not arise in this context as there was no liquidated amount to work from.

[27] In his amended plea the appellant concludes as follows:

’11. Defendant pleads that the joint ownership/venture between the parties should be terminated upon the basis set out below:

⁴ *Schierhout v Union Government* 1926 AD 286 at 289-290.

- 11.1 The value of the aircraft is N\$1 000 000,00;
- 11.2 Upon termination of the joint venture between the parties each party is therefore entitled to 50% of such value, namely N\$500 000,00.
- 11.3 The credit balance of N\$421 260,80 reflected by "RA1" hereto, due and payable to the defendant, falls to be set off against the amount payable to the plaintiff, leaving a balance of N\$78 739,20 to which the plaintiff is entitled.
- 11.4 Defendant tenders payments of such sum to the plaintiff.'

[28] This is exactly what the court *a quo* did. Appellant conceded that the amount was payable 'upon termination' of the joint ownership in the aircraft. This occurred in May 2015. There is no issue that the amount affected by the trade-in was liquidated and immediately due and payable.

[29] Once it was conceded that the joint ownership had been terminated and the aircraft sold (traded-in), the whole matter turned into a debatement of account exercise as mentioned earlier. To determine what was owing to whom, both parties had to prove their payments and charges in respect of the joint ownership and in this process a balance would be established in favour of one of the parties. From an accounting perspective, seeing there was interest involved, the amounts proven to be due and payable had to be reflected at the time they became due and payable. It follows that in respect of the realisation of the value of the aircraft this also had to be done. The fact that the value of the aircraft would be important in the exercise is explicitly pleaded by the appellant. It thus follows that the court had to deal with this aspect in the accounting between the parties. In this context everything due and

owing between the parties in the joint ownership venture had to be set-off against one another to determine the ultimate debtor. Set-off was thus inherent in the nature of the debatement of the account which on the pleadings included the value of the aircraft, and the court *a quo* had to determine it as part of the issues in front of it.

[30] Surely, the fact that the appellant brought it to the court's attention that at the time of termination of the joint ownership, there was an amount capable of set-off and not the respondent cannot make any difference. The fact is on the pleadings and undisputed facts placed before court the respondent was entitled to a credit of N\$500 000 on the date the aircraft was traded in for N\$1 million.

[31] It follows that the attack on the judgment *a quo* on the basis that it incorrectly reflected the set-off is without merit.

Interest

[32] In respect of the overpayment by respondent in respect of the aircraft, the respondent was entitled to 1,2 per cent per month in respect of the outstanding balance. There is no issue with regard to this rate.

[33] The issue arises in respect of the amounts owing between the parties *inter se* in respect of debts other than the purchase of the aircraft arising from the joint ownership venture. Counsel for appellant submits that the agreement in this regard to charge interest at 2,5 per cent monthly was only in relation to the upkeep and maintenance of the aircraft and not in relation to the alienation of the aircraft.

[34] The submission is against the contents of what was admitted in the pleadings, namely:

'The parties agreed to incorporate a monthly sum representing 2,5 per cent interest upon any outstanding balance payable to plaintiff, and similarly agreed that a monthly sum representing 2,5 per cent interest would accrue on any amount due to the defendant.'

[35] Whereas it may be correct, as submitted on behalf of the appellant, that the parties did not foresee that appellant would sell the aircraft in stealth when they concluded the agreement relating to the 2,5 per cent interest, this is not of relevance. What was contemplated was that all debt arising between the parties (other than the purchase costs of the aircraft) in relation to the joint ownership venture would bear the agreed interest rate. It was not necessary to contemplate the exact nature of the debt that would so arise.

[36] The court *a quo* thus correctly allowed interest in its reconciliation of the respective claims of the parties. The 2,5 per cent interest applied only subsequent to the receipt of the trade-in value of the aircraft when this value caused a credit balance in favour of the respondent.

Condonation application

[37] As the record of appeal, the power of attorney of the appellant and the security were not timeously filed the appeal had lapsed.⁵ An application was thus brought by

⁵ Rules 7(6), 8(2)(b), 14(2) read with 9(1)(b) of the Rules of the Supreme Court.

appellant for the condonation of the late filing of the record and the reinstatement of the appeal.

[38] At the time the record was to be prepared appellant's legal practitioner was a director in a firm, whose managing director became the subject matter of a large anti-corruption probe by the Anti-Corruption Commission (ACC). The managing director, when this probe started to focus on him, moved to South Africa. As a result the legal practitioner of appellant became the go-to person in respect of information required by the ACC and the news media who were very interested in the probe. These events meant the legal practitioner for appellant had to manage the fall-out of this probe on the partnership, assist the ACC to obtain the necessary information relating to the absconded managing director's affairs relevant to the probe and ensure that the clients of the managing director were attended to. In this process the filing of the record did understandably not receive the priority it would have in normal circumstances. The lockdown as a result of the covid pandemic, also had a role to play in the late filing as the transcription services were not operational for a period of about a month. In addition to this, the traditional Christmas holidays where offices closed down also fell within the period that the record had to be filed.

[39] The respondent did not oppose the condonation application or take issue with the allegations of appellant's legal practitioner as to the disruption caused and the effects of the ACC probe on him personally. As a result I am satisfied that good cause was shown for the late filing of the record of appeal, power of attorney and security.

[40] As far as prospects of success are concerned, it was evident that the case for appellant was an arguable one so that it could not be said the prospects of success were so remote and to refuse the condonation application based on there being no prospects of success.

[41] It follows that the non-compliance with the rules will be condoned and the appeal reinstated.

Costs

[42] Counsel for appellant submitted that the costs *a quo* should not have been awarded to the respondent as his persistence up to the late stage that there was no agreement relating to the costs incidental to the joint ownership such as, hangarage, currency costs caused an unnecessary prolonged trial.

[43] I do not agree. These costs were awarded to appellant in the accounting or set-off process and despite this it left a debt balance to appellant. Furthermore, the belated pilot claim came to the fore and was persisted with *a quo* and in this court with much vigour but without merit which also took up unnecessary time. In addition, the conduct of the appellant in not disclosing the fact of the sale of the aircraft was at least as reprehensible as the conduct of the respondent.

[44] The court *a quo* thus did not exercise its discretion incorrectly in holding that the costs had to follow the result.

[45] The parties are *ad idem* that the costs of this appeal should follow the result and I shall make such an order.

Result

[46] The non-compliance with rules 7(6), 8(2)(b) and 14(2) of the Rules of the Supreme Court is condoned and the appeal is reinstated.

[47] The appeal is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioner.

FRANK AJA

DAMASEB DCJ

ANGULA AJA

APPEARANCES

APPELLANT:

T A Barnard

Instructed by Theunissen, Louw &
Partners

RESPONDENT:

P C I Barnard

Instructed by De Beer Law Chambers