

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5038/07

FULL BENCH

In the matter between:

PORTION 29 GOLDEN HIGHWAY (PTY) LTD

Appellant

and

PATEL, ASHRAF MOHAMED

First Respondent

PATEL, RAYHANAH AHMED

Second Respondent

J U D G M E N T

MAKHANYA, J:

[1] This is an appeal against the findings and orders in the judgment handed down by Bokaba AJ on 4 June 2007. The learned judge granted

judgment in favour of the respondents (plaintiffs in the court *a quo*) against the appellant (defendant in the court *a quo*) in terms of the following orders:

- “28.1.1. *Payment of the sum of R1 011 000,00 (One Million Eleven Thousand Rand);*
- 28.1.2 *Interest on the said amount at 15,5% per annum from 3 April 2000;*
- 28.1.3 *The defendant is to pay the plaintiffs’ costs;*
- 28.1.4 *The defendant’s counterclaim is dismissed with costs.”*

[2] The appellant’s appeal is based on the main submission that the respondents, in the circumstances of this matter, were not impoverished. Alternatively, if it were to be found that the respondents were impoverished, it would be iniquitous in the circumstances to order the appellant to repay to the respondents the entire amount of R1 011 000,00 paid by respondents as purchase price in a sale agreement that failed.

[3] The purchase price of R1 011 000,00 was paid by the respondents to the appellant in terms of an agreement of sale relating to an immovable property. The agreement of sale, however, in time, failed. Prior to the failure of the agreement of sale, however, the respondents occupied the immovable property for a period of 45 months. During that period they collected rentals from a third party, a tenant (Kiasha Park Motors CC) for their own account in an amount of R711 000,00.

[4] In the proceedings before the court *a quo* the respondents' cause of action was founded on the basis that the appellant was unjustly enriched in the amount of R1 011 000,00 paid to it, as purchase price, by the respondents, as the agreement of sale had failed.

[5] In this appeal the submission that respondents were not impoverished is based on the argument that the appellant's enrichment (if any) was not at the expense of the respondents but consisted of the rental amounts paid to the respondents by Kiasha Park Motors CC, a third party, over a period amounting to R711 000,00.

[6] An alternative ground of appeal related to an equitable remedy which formed the basis of the appellant's counterclaim for R650 000,00 which action was dismissed with costs by the court *a quo*.

Common cause facts

[7]

7.1 On 3 February 1997 the respondents in terms of an agreement of sale purchased from the appellant, Portion 38 of the Farm Vlakfontein and improvements thereof ("*the property*"). On 1 January 1996 prior to the purchase the respondents had taken occupation and control of the property.

- 7.2 The total amount of payment made in terms of the agreement of sale was R1 011 000,00. The sum of R500 000,00 of this total amount had been paid to the appellant prior to 3 February 1997.
- 7.3 The respondents had possession and control of the property for the period 31 January 1996 to 30 September 1999.
- 7.4 On 23 March 2000 the respondents instituted the action claiming non-fulfilment of the suspensive condition, and tendered possession and control of the property to the appellant.
- 7.5 On 10 February 2006 Claassen J found in favour of the respondents that the suspensive condition contained in clause 2.4 of the written agreement was not complied with and consequently the agreement was found to be of no force and effect.
- 7.6 Before Bokaba AJ, the respondents claimed the refund of R1 011 000,00 purchase price paid to the appellant. The respondents' claim for refund was successful and were awarded an order for the return of R1 011 000,00.
- 7.7 The respondents' claim for refund was based on unjust enrichment.

[8] We propose, in dealing with this appeal, approaching it from, firstly, the respondents' original claim, namely, unjust enrichment. Thereafter, and in the alternative, dealing with the court's *a quo* refusal to grant appellant's counterclaim.

Unjust enrichment

[9] The respondents in order to succeed on unjust enrichment had to show or comply with the following requirements:

- 9.1 The appellant must be enriched;
- 9.2 The respondents must have been impoverished;
- 9.3 The appellant's enrichment must be at the expense of the respondents;
- 9.4 The appellant's enrichment must be unjustified.

See: LAWSA, vol 9 – para 76 by Lotz revised by Horak and
Bowman De Wet Du Plessis NNO & Others v Fidelity Bank Ltd
1997 (2) SA 35 (A) at 43D-F.

Now, in terms of the evidence before court as contained in the pleadings, the evidence of Mr Razak (the accounting officer of Kiasha Park Motors CC) and the common cause factors: The property since it was taken possession of by the respondents was utilised commercially, as portion of it was rented out to Kiasha Park Motors CC. The following businesses or services were conducted on the premises by Kiasha Park Motors CC: Service station, garage, car sales and workshop. The sole member of Kiasha Park Motors CC was the first respondent. Kiasha Park Motors CC paid rentals to the respondents. The rentals paid by the CC were equivalent to the monthly instalments payable in terms of the sale agreement between the respondents and appellant in respect of the property. The rentals paid by the Kiasha Park Motors CC to the respondents were used by the respondents as instalments on or in satisfaction of instalments payable under the agreement of sale and as such were paid directly to the appellant. The rental payments made direct to the appellant clearly constituted payments made or procured at the instance of the respondents who had to carry out the obligation in terms of the sale agreement to pay towards the property's purchase price.

[10] As submitted on behalf of the appellant the court has to consider whether, on the evidence, the respondents were impoverished by payments claimed to have enriched the appellant and at the same time question whether the alleged enriching payments were made at the expense of the respondents.

[11] When we do that assessment we find that the amounts (over and above the deposit of R300 000,00) which are said to have constituted the enrichment of the appellant, accrued to the respondents as a result or consequence of being given possession of the property which was the subject of the failed agreement. That agreement failed, not owing to appellant's breach, but as a direct result of non-fulfilment of a suspensive condition. The amounts accruing to the respondents, would not have so accrued but for being given such possession. Simultaneously their possession of property meant a loss to the appellant. The loss consisting of the commercial benefits or fruits that would have flowed from such possession by the appellant. The instalments paid to the appellant, in the fulfilment of failed contractual obligations, were equivalent to the rentals paid by Kiasha Park Motors CC to the respondents arising from their possession of the property. But for such possession they would not have received those rentals and fruits of property. The fact that the rentals were paid directly to the appellant does not change the fact that they constituted payments to the respondents in discharge of rental obligation.

[12] Thus, if one looks at the overall picture the respondents got possession of the property; the respondents caused to be paid over to the appellant the amounts which accrued to the respondents arising from the belief in the validity of the agreement and possession of property. Again, looking at the transaction as a whole a question can be posed: How could the respondents become impoverished by paying over rentals to the appellant, rentals that could never have accrued to them but for the possession of property whose

sale agreement has failed? It failed not because the appellant was in breach but failed as a direct result of the non-fulfilment of a suspensive condition. Again, looking at the overall picture how was the appellant enriched at the expense of the respondents by receiving instalments on the property which the appellant had given the respondents possession of in the belief that there was a valid agreement. The answer seems obvious. The enrichment of the appellant pursuant to the payment of the instalments (equivalent to the rentals) was not unjust as the appellant had parted with the possession and the commercial benefits and fruits flowing from the property owned by the respondents as a result of the failed agreement. The end result is that neither were the respondents impoverished nor the appellant enriched at the expense of the respondents in consequence of payments made over to the appellant, payments equivalent to the rentals paid by the third party on the property.

[13] For these reasons the enrichment of the appellant (if any) must be reduced by the amount of R711 000,00 to cover the amount of the instalments paid out of the rentals of the agreement as submitted by the appellant.

[14] If we are wrong in our assessment and findings as indicated above, we propose to deal with the court's *a quo* refusal of the appellant's counterclaim.

[15] The appellant's counterclaim against the plaintiffs was based on what it termed as "*fair and reasonable rental*" for a period of 45 months that the respondents had been in occupation of the property. The appellant in its counterclaim stated that insofar as it is liable to repay the purchase price to

the respondents, it is entitled in return for a fair and reasonable compensation for the occupation, use and enjoyment of the premises by the respondents over the indicated period.

[16] It is clear that the appellant's contention herein is based on the principle of restoration to each party what has been received in an unenforceable contract because of non-fulfilment of a suspensive condition. This contention in turn, is based on considerations of equity. See *Cash Converters SA v Rosebud Western Province Franchise* 2002 (1) SA 708 (C).

[17] In refusing the competence of the counterclaim or failure of the respondents to restore not only the property to the appellant but the benefits derived therefrom the use and occupation of the property, the court *a quo* stated that as a consequence of the alienation of property the appellant ceased to be entitled to the receipt of rental income once the property had been sold to the respondents. Reference in support of this contention and finding was made to the matter of *Govindasamy v Govindasamy* 1957 (4) SA 495 (D). The court *a quo* concluding that “*an innocent purchaser does not have to account to the seller for any rent which he/she earned during his/her agreed possession of property sold in terms of a cancelled deed of sale in order to effect complete restitution*”.

[18] However, on close analysis of the facts pertaining to this matter, it will be found that the facts in *Govindasamy supra* are distinguishable from the facts of our case. Briefly, in *Govindasamy* the facts were as follows: The

plaintiff had in terms of a written contract of sale, taken possession of the immovable property after he had paid an amount on account of the purchase price. Later, the plaintiffs, as it turned out, were evicted by the true owner of the property. When the defendant sought to recover rentals and other fruits received by the plaintiffs during the occupation of the property, the court refused such recovery. In doing so the court stated that an action for rescission based on eviction cannot be placed on the same footing as other remedies open to purchaser against seller. Concluding by finding that the plaintiff was entitled to keep the fruits in the form of the action taken by the plaintiff. So whereas the plaintiff's claim in that case was founded on eviction, from property occupied pursuant to a legally enforceable contract, the appellant's case in counterclaim in this case was founded on equity or restoration on a legally unenforceable contract owing to a non-fulfilment of a suspensive condition.

[19] The principles involved in the defendant's counterclaim were well stated by Mackeurtan in his work "*Sale of Goods in South Africa*" 3rd edition p 330 to 333 where the following appears:

"The application of the principles just stated to contracts of purchase and sale should not be difficult. Whenever such a contract, defective in its incidents, followed by total or partial performance in an honest belief in its validity, is repudiated or found to be unenforceable, there immediately arises a situation calling for a relief. The ordinary contractual remedies are, ex hypothesi, excluded by the absence of valid contractual obligations, and there is no delict on which to found an action. If in this event the law permitted only the continuance of then existing position, it could rightly be accused of impotence or inequity, and it avoids this reproach by means of the condictio through which equitable and proper relief, in the direction of restoration to their original positions is given to the parties to the imperfect contract.

In any bilateral contract where one party has admittedly partially performed his part and the other party receives a benefit therefrom, the former can sue the latter by a condictio on the ground of unjust enrichment. But where the plaintiff has deliberately refused to perform his part, this remedy is not open to him. The condictio is available only in cases of genuine dispute or misfortune.”

See also 4th edition Mackeurtan (*supra*) p 320; *Nortje v Pool* NO 1966 (3) SA 96 (A); and *Haumann v Nortje* 1914 AD 293.

[20] *In casu* it is clear that the respondents during the occupation of the property in accordance with unenforceable contract have received the rentals that in the absence of the unenforceable contract would have accrued to the appellant. The repayment of the rentals in a form of compensation to the appellant serves the restoration process in accordance with the principles of equity. As it is accepted that the appellant has not by its own default breached the terms of the contract, contrary to the position in *Govindasamy’s* case *supra*.

[21] Further the court *a quo* in support of its findings that the respondents are entitled to retain profits stated the following:

“Enrichment of a purchaser as a result of a bona fide use of land of which he or she was placed in possession pursuant to a valid enforceable contract is not unjust enrichment within the law.” (my own underlining)

The legal principle referred to by the court *a quo* appears in the judgment of *Naicker v Bell* 1965 (4) SA 210 (SR) at 212. In our view this quoted conclusion is not applicable in the case before this Court, as the case before

Court is distinguishable from the case from which the quotation appears. The facts and remedy sought in the *Naicker v Bell* case (*supra*) are different from the present case. The facts in the case of *Naicker v Bell* were as follows: The plaintiff and the defendant entered into a written agreement of sale in terms of which the plaintiff purchased immovable property from the defendant who was the registered owner thereof. The plaintiff occupied the property and paid the defendant an amount or amounts towards purchase price. In time the plaintiff effected improvement to the property. After a year or two, however, before the full price had been paid by the plaintiff, the property was attached under two writs of execution issued against the defendant. In the action instituted thereafter by the plaintiff the defendant admitted that the plaintiff had been evicted from the property in breach of the warranty against eviction by the defendant. The admission made by the defendant clearly led the court to reach the conclusion encapsulated in terms of the quotation appearing above, as the defendant had breached an implied term or warranty against eviction. The contract was a validly enforceable contract. *In casu* the contract is unenforceable owing to the non-fulfilment of a suspensive condition and parties have consequently to be restored to their former positions on basis of equity. Alternatively where the defendant had placed the plaintiffs in possession of land, as in the present case, in pursuance to the unenforceable contract and the plaintiffs receive a benefit therefrom in the form of rentals, the defendant can sue the plaintiffs by a *condictio* on the ground of unjust enrichment. See *Mackeurtan (supra)* where he states:

“In any bilateral contract, where one party has admittedly partially performed his part and the other receives a benefit therefrom, the former can sue the latter by a condictio on the ground of unjust enrichment.”

See also *Naicker v Bell* and *Haumann v Nortje (supra)* and *Breslin v Hichens* 1914 AD 312.

[22] In conclusion in relation to the counterclaim, in our view, the court *a quo* erred in refusing the action of the appellant, based on the counterclaim. The counterclaim should have succeeded with costs.

[23] The counterclaim being provisional, provisional on success of the respondents in the main claim, it cannot in this appeal succeed by virtue of the finding that the respondents' claim fails in respect of the payment to which the counterclaim relates. The appellant was fully entitled to raise this provisional defence, which would have succeeded had the main claim succeeded. The appellant is thus entitled to the costs on the counterclaim.

[24] The original judgment, however, stands and the appeal fails insofar as it relates to the R300 000,00 paid by respondents pursuant to the agreement, over and above the amount of R711 000,00 with which we have already dealt. In regard to the remaining R300 000,00 of the amount of R1 011 000,00 paid by respondents to appellant, we are in agreement with the conclusion of the learned trial judge that the respondents had established the necessary requirements to make out a cause of action against the appellant for unjust enrichment. We are not however able to agree that the appellant during the

trial accepted the *onus* of showing that there was no unjust enrichment or that any *onus* in law rested on the appellant. The *onus* of showing in respect of such unjust enrichment rested throughout on the respondents and nothing in the record can properly be construed as acceptance of a totally unnecessary *onus* by the appellant. The fact that it agreed to begin does not show that it accepted anything more than an evidential as opposed to a true *onus*. The reason for this would presumably be that the admissions already made and agreed to were sufficient to show that there were payments to the appellant by the respondents amounting to the full amount of R1 011 000,00 and from this a presumption of enrichment in this amount arose. The operation of such presumption does not have the effect of changing the overall *onus* which lay on the respondents to establish unjust enrichment.

[25] LAWSA (First Re-Issue) Vol 9 in para 76 dealing with enrichment sets out the four requirements for any action based on enrichment as being:

1. The defendant must be enriched.
2. The plaintiff must be impoverished.
3. The defendant's enrichment must be at the expense of the plaintiff.
4. The enrichment must be unjustified (*sine causa*).

This formulation of the requirements for unjust enrichment was accepted by Schutz JA in *McCarthy Retail Ltd v Short Distance Carrier CC* 2001 (3) SA 482 (SCA) and was correctly accepted by the respondents' counsel in his heads of argument.

[26] Dealing with the first requirement, it is common cause that the amount of R300 000,00 being the deposit due in terms of the failed agreement, was paid by respondents to appellant. From this a presumption (not as we have already said, an *onus*) of enrichment arises. The presumption was not rebutted in evidence.

As found by Schutz JA in *McCarthy Retail Ltd (supra)* at 490H:

"The presumption was not in any way rebutted in respect of this portion of the claim."

This requirement is therefore satisfied.

[27] In respect of the second requirement it follows as a matter of logic that *prima facie* the respondents were impoverished by the amount of the payment made unless some evidence was adduced to show that this was not the case.

[28] In respect of requirement 3 it similarly follows that the enrichment of the appellant was at the expense of the respondents, at whose instance the amount of R300 000,00 was paid to the appellant. In this regard the findings of Bokaba AJ that despite the fact that the payments were actually made by

Kiasha and not the plaintiff, the payment was in truth one emanating from the respondents, and was made at its instance and discharged a liability owed by Kiasha to respondents, is plainly correct.

It is to be found in paragraphs [18] and [19] of his judgment at p 79-80 of the record. We have nothing to add to his reasons.

[29] In regard to requirement 4 the enrichment was *prima facie* unjust in that respondents did not receive a countervailing performance for their payments in that they did not receive ownership of the property in respect of which they paid the R300 000,00. There was thus no *causa* for the payment. Again there was no evidence to rebut this inference.

[30] It therefore follows that the requirements for unjust enrichment as far as they apply to the initial payment of R300 000,00 were fulfilled and to this extent the judgment of the court *a quo* is correct.

[31] In regard to the costs of the main action, the respondents achieved limited success in obtaining judgment for R300 000,00. This would normally result in a cost order in their favour. But the appellant achieved success in relation to the major part of the claim of R711 000,00. In the trial the evidence related virtually exclusively to the issue on which the appellant was successful. These facts make it equitable to order that each party pay its own costs.

[32] As regards costs of appeal the general rule is that the successful party is entitled to his or her costs. The appeal has substantially succeeded and costs follow this result.

[33] In the premises, we would grant the following orders:

1. The appeal is upheld with costs.
2. The orders granted by the court *a quo* are set aside. They are substituted with the following orders:
 - 2.1 The defendant is ordered to pay the plaintiffs the sum of R1 011 000,00 (one million eleven thousand rand) less R711 000,00 (seven hundred and eleven thousand rand) i.e. R300 000,00 (three hundred thousand rand) and
 - 2.2 Interest on R300 000,00 at 15,5% per annum from 3 April 2000.
 - 2.3 Each party to pay its own costs.

G M MAKHANYA
JUDGE OF THE HIGH COURT

I agree:

D MARAIS
JUDGE OF THE HIGH COURT

I agree:

H K SALDULKER
JUDGE OF THE HIGH COURT

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17 AUGUST 2009

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25 MARCH 2010