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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 17439/2015

DATE: 21st NOVEMBER 2023

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

MOSEWICKA, TIRTZA

Plaintiff

and

McLELLAN, COLIN

Defendant

Coram: Adams J

Heard: 27 July 2023

Delivered: 21 November 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 21 November 2023.

Summary: Contract – cancellation of contract – *restitutio in integrum* – ‘return to the previous position’ – property to be restored – where a sale has failed as a result of the non-fulfilment of a condition precedent, the risk of destruction of the entire merx rests on the seller – but the risk of partial damage or deterioration is on the purchaser – this position may be varied by the parties in the contract. Where property to be restored has deteriorated or depreciated, restitution need to be made only of the deteriorated or depreciated value.

ORDER

- (1) In terms of Uniform Rule of Court 33(4), the adjudication of the quantum of the fair and reasonable cost to remedy the fire damage caused to the restaurant and the farm stall on the plaintiff's property ('the separated issue'), be and is hereby separated from any and/or all other disputes between the parties.
- (2) The separated issue is postponed *sine die* and it is directed and ordered that the matter proceeds to trial on all of the remaining disputes between the parties.
- (3) It is declared that the written agreement of sale between the parties in respect of Portion [...] (a portion of portion [...] of the Farm Witpoort No [...]), Registration Division IR, Province of Gauteng ('the property'), is terminated and the parties are no longer bound thereby.
- (4) The defendant is entitled to restitution of the total amount of R2 154 000 paid by him pursuant to and under the sale agreement, less the fair and reasonable cost to remedy the fire damage to the restaurant and farm stall

situated on the property, caused by the fire on or about 27 December 2017.

- (5) It is declared that the defendant is entitled to restitution of the amount of £49 473.66, presently held in trust by the United Kingdom based company, Clipper Marine, which is authorised to release to the defendant the said amount forthwith.
- (6) Each party shall bear her / his own costs in this action to date.

JUDGMENT

Adams J:

[1]. The plaintiff is the owner of immovable property situated along Main Road in Kyalami, Gauteng ('the plaintiff's property'). It is a smallholding and its Deeds Office description is Portion [...] (a portion of portion [...]) of the Farm Witpoort No [...]), Registration Division IR, Gauteng Province. The improvements on the property during 2014 were: (1) A building that housed a restaurant and a farm stall ('the restaurant'); (2) Six completed residential cottages, in one of which resided the plaintiff and her life partner; and (3) One incomplete residential cottage, called 'RGF', that was in the process of being constructed.

[2]. On 7 November 2014, the plaintiff, as the seller, and the defendant, as the purchaser, concluded a written agreement of sale ('the sale agreement') for the purchase and sale of the plaintiff's property and some other listed movable assets, such as seven disassembled Greenhouses, livestock, furnishings and furniture and building material. The total purchase price agreed upon between the parties was R3 518 000, which was to be funded by a loan by the plaintiff to the defendant, to be secured by a mortgage bond to be registered over the property by the defendant in favour of the plaintiff. In terms of clause 7.1 of the sale agreement, the sale was subject to a suspensive condition, which reads in the relevant part as follows: -

‘7 SUSPENSIVE CONDITION

This agreement is subject to the following suspensive condition:

- 7.1 The sale will be subject to a suspensive condition that the Purchaser enters into a loan agreement for R3 518 000 by 28 February 2015 with the Seller, at a set annual interest rate of 13,75%, payable in 144 monthly payments of R50 000, the first of which will be paid on 1 March 2015, the terms of and conditions of the loan agreement taking precedence, and upon the security of a first mortgage bond to be passed over the property
- 7.2’
 (‘the suspensive condition’).

[3]. The defendant is a member of a Close Corporation by the name of Glenlea Trading CC (‘Glenlea’), as well as a member of Click Digital Express CC (‘Click Digital’), and a shareholder of Synpro (Pty) Ltd (‘Synpro’). During August 2014, pursuant to the sale agreement, the plaintiff gave the defendant and his aforementioned entities beneficial occupation of the restaurant and one of the cottages on the property, namely the so called ‘Photo shop’. The defendant paid rental to the plaintiff in respect of that occupation for the months of August and September 2014 and on 21 August 2014 he also paid to the plaintiff the amount of R350 000 towards the repayment of the plaintiff’s bond.

[4]. From October 2014, some of the tenants in the cottages, on instructions from the defendant, paid rental to him, whilst others continued paying their monthly rental to the plaintiff. From 28 February 2015 to May 2018, the defendant continued and retained his beneficial occupation of the restaurant and photo shop, during which period Glen Lea conducted a restaurant business styled ‘Windmill on Main’ in the restaurant and Click Digital and Synpro together ran a photo printing business in the photo shop. From 1 March 2015 to 31 March 2018, the defendant paid to the plaintiff monthly payments of R50 000 (in respect of repayment of the loan, which would have been advanced to him in terms of the sale agreement), totalling in the aggregate the sum of R1 804 000, which does not include the R350 000 payment in respect of the bond.

[5]. It is common cause between the parties that the sale agreement has been terminated and that the defendant and his companies vacated the plaintiff’s property during May 2018. The reason or reasons why the agreement

terminated are, according to the parties and by agreement between them, not relevant. The parties cannot however agree on how restitution should be made by them pursuant to the termination of the sale agreement.

[6]. In this defended action, which came before me as a stated case on 27 July 2023, the parties require that I adjudicate that issue. The only issue that requires determination by this Court relates to the way restitution should take place in respect of the terminated sale agreement. In particular, the following matters fall to be decided: (a) Whether there must be restitution by the plaintiff for the purchase of a *Bavaria Cruiser 33 yacht* ('the yacht') by the defendant for the plaintiff; (2) If so, whether the defendant is entitled to restitution in the sum of £75 000 (being the purchase price paid for the yacht) or in the sum of approximately £49 000 (being the sum for which the yacht was subsequently sold); and (3) Whether, in making restitution of the property, the defendant is obliged to remedy the damage caused by a fire whilst the defendant was still in occupation of the property.

[7]. No agreement has been reached on the quantum relating to the remedying of the damage caused by the fire. The parties required that aspect of the matter, insofar as it may be necessary to have same decided, to be separated from all other disputes between the parties in terms of Uniform Rule of Court 33(4), and to be dealt with at a later stage (if it becomes necessary). I am in agreement with the submissions made on behalf of the parties that it is convenient to separate the issues as aforesaid and to postpone the quantum of the plaintiff's damages *sine die*. Such an order is accordingly granted.

[8]. The issues in dispute between the parties are to be considered in the light of the facts in the matter, which were presented to the court in the form of a 'stated case' and facts agreed upon. Central to the facts, as set out in the paragraphs which follow, is the written sale agreement and its provisions and a proper interpretation thereof.

[9]. It is common cause between the parties that the loan agreement, as envisaged in clause 7.1 of the sale agreement, was not concluded by 28 February 2015. Therefore, on first principles, the suspensive condition was not

fulfilled, which means that the sale agreement becomes void. The plaintiff alleges that this meant that the agreement lapsed as a result of the non-fulfilment of the suspensive condition and that each party was entitled to restitution. The defendant avers that the suspensive condition was met by the doctrine of fictional fulfilment and that the sale agreement became enforceable, and that it was subsequently cancelled by the defendant as a result of the alleged breach of the agreement by the plaintiff. However, as alluded to *supra*, the parties are agreed that the difference between them as regards the consequences of the non-fulfilment of the condition does not have any significant effect on the outcome of the proceedings. In either event the parties would be entitled to restitution following the cancellation of the agreement for whatever reason. I also interpret this to mean that the sale agreement was in existence until cancelled during May 2018, and restitution should be done on that basis.

[10]. In any event, the defendant's case is that, despite demand by him, the plaintiff failed to transfer the property to him before May 2018, as demanded, and she also did not comply with the special conditions listed in clauses 8.1 to 8.3 of the sale agreement before 28 February 2015. These clauses relate to the completion by the plaintiff of the RGF residential cottage and to the installation of an electric fence, all of which the plaintiff had undertaken to attend to prior to 28 February 2015, but never did.

[11]. As part and parcel of the arrangement between the parties, the defendant had paid, on behalf of the plaintiff, the purchase price of GBP (£) 75 000 in respect of the purchase by the plaintiff of a *Bavaria Cruiser 33* yacht (the 'yacht') from a United Kingdom based entity called Clipper Marine. The plaintiff had paid this purchase price in instalments, the final payment having been made on 19 January 2015. The parties are in dispute as to whether this was done pursuant to the sale agreement or whether this arose in the context of a separate agreement. The yacht was subsequently sold by the plaintiff for the sum of £49 473.66.

[12]. On 27 December 2017, a fire occurred at the property in the restaurant,

causing significant damage to the restaurant. At that time the sale agreement was operative between the parties and the defendant was in occupation of and had vacant possession of the restaurant and the premises from which it was conducting business. The fire was not caused by, nor was it the fault of either of the parties, but was the work of an arsonist.

[13]. On 26 April 2018, the defendant sent a *mora* letter, to which he received no response from the plaintiff. On 31 May 2018, the defendant sent a cancellation letter, giving notice of the cancellation of the sale agreement. On 31 May 2018, pursuant to his cancellation notice, the defendant vacated the property, and in doing so, restored possession and occupation of that portion of the property which had been occupied by him since about August 2018. The damage caused by the fire was not remedied by the defendant.

[14]. It is common cause between the parties that the sale agreement was terminated on or about 31 May 2018 and that each of them are therefore entitled to the restitution of their performance under the agreement. In that regard, the express agreement between the parties, as per their written 'stated case' is that the defendant is entitled to repayment of the amounts of R350 000 and R1 804 000 paid by him pursuant to and in terms of the sale agreement.

[15]. What the parties are not in agreement with is whether, all things considered, the defendant is entitled to any restitution in these proceedings in respect of his payment of the purchase price for the yacht and, if so, what the amount of such restitution should be. The defendant's case is that payment of the purchase price for the yacht was made by him in anticipation of the conclusion of the sale agreement and the fulfilment of the suspensive condition therein. In any event, so it is contended by the defendant, irrespective of whether the payment of the purchase price of the yacht discharged an obligation under the sale agreement, the plaintiff would be liable to make restitution to the defendant of the said purchase price or the lesser figure of £49 743.66.

[16]. The plaintiff, on the other hand, alleges that the purchase of the yacht formed part of a separate agreement between the parties for the sale of the

business operated at the restaurant as a going concern. As such it falls outside the scope of these proceedings and does not form part of the restitution that is owed to the defendant.

[17]. If it is found by this Court that the yacht did form part of the restitution that is owed by the plaintiff to the defendant, then the question arises as to what the amount of the repayment should be. The defendant contends that he is entitled to repayment of the sum of £75 000, whereas the plaintiff is of the view that the defendant would only be entitled to the amount for which the yacht was sold, being the sum of £49 743.66.

[18]. The second issue in dispute between the parties, as already indicated *supra*, relates to whether the defendant is legally obligated to pay to the plaintiff the amount required to repair the restaurant and to return it to the condition it was in prior to the defendant taking beneficial occupation of it. In this regard, the plaintiff's case is that the defendant bore the risk in relation to the property in accordance with clause 6.1 of the sale agreement and so he must pay this amount. The defendant, on the other hand, submits that clause 6.1 does not apply in circumstances in which: (a) the agreement was not proceeded with; and/or (b) the plaintiff did not give the defendant vacant possession of or enjoyment of the full property (other than as admitted above). Therefore, so the contention on behalf of the defendant is concluded, he is not responsible to make restitution of a loss that he did not cause and in respect of which he was not at fault, the fire having been caused by an unknown third party, namely by an arsonist.

[19]. I proceed to deal first with the latter issue.

[20]. A convenient starting point is clause 6.1 of the sale of land agreement, which recorded that vacant occupation was given to the defendant on 1 March 2014. However, according to the 'stated case' presented by the parties during the hearing of this matter, occupation of the restaurant was given to the defendant during August 2014. All the same, during December 2017, when the fire occurred, the defendant was in occupation of the restaurant. The said clause also expressly and specifically provided that 'all risk and benefit of and to

the property and all improvements and services thereon shall pass to the [defendant]' on the said date, being 01 March 2014. *Ex facie* the written agreement between the parties, the defendant clearly bore the risk of damage to and destruction of the property or at least that part of the property which he had taken occupation of on 01 March 2014 or during August 2014, which included the restaurant.

[21]. The only question is whether this provision was rendered unenforceable as a result of the alleged non-fulfilment of the suspensive condition contained in clause 7.1 of the agreement (cited *supra*). Clearly not, as, on the agreed facts before me, the sale agreement was in force at the time of the fire and was only cancelled on 31 May 2018, which, in turn, means that the risk at the time lay with the defendant.

[22]. I interpose here to mention that the defendant, on the evidence before me, appears to have accepted the risk of damage to the restaurant as he took out indemnity insurance to cover the restaurant against fire and other damage. This, in my view, may very well be dispositive of this aspect of the matter.

[23]. Mr Ben-Zeev, Counsel for the plaintiff, submitted that, in terms of the common law, where a sale has failed as a result of the non-fulfilment of a condition precedent, the risk of destruction of the entire *merx* rests on the seller, but the risk of partial damage or deterioration is on the purchaser. This position may be varied by the parties in the contract.

[24]. *In casu*, the damage to the property as a result of the fire was clearly partial and not destructive of the entire property. The damage was limited only to the restaurant. On the common law therefore the risk would have fallen on the defendant. Even if this were not the case, clause 6.1 of the agreement clearly and expressly provided that 'all risk and benefit of and to the property and all improvements and services thereon shall pass to the [defendant]' upon vacant occupation being granted to him.

[25]. It is common cause that the defendant was not placed in vacant occupation of the entire property. He was however given vacant occupation of the restaurant and the photo shop, for which he paid no rent from October 2014

until he vacated the premises during May 2018. The various tenants on the property were also told to pay rent to him and not to the plaintiff from October 2014. He was therefore placed in effective possession of a significant portion of the property and was entitled to the benefits flowing from the property.

[26]. The defendant himself appears to have accepted this position as is apparent from the fact that during 2015, he took out an insurance policy with *Outsurance* in respect of that portion of the property which he occupied and which was in his possession.

[27]. I find myself in agreement with these submissions on behalf of the plaintiff. The simple fact of the matter is that, if regard is had to clause 6.1 of the sale agreement and the applicable legal principles, the risk of damage to the restaurant, rested squarely on the shoulders of the defendant. As correctly contended by Mr Ben-Zeev, clause 6.1 should be textually and contextually interpreted in the light of its purpose. In granting the defendant vacant possession of the property, the defendant was placed in a better position to protect the property against any harm than the plaintiff. He did so by taking out an insurance policy over the restaurant. He therefore bore the risk and such an interpretation accords with a businessman like interpretation.

[28]. Moreover, the defendant assumed all of the benefits that flowed from the property as well. His entities were able to conduct business from the property rent-free. He also was entitled to receive rent from the other tenants on the property. Clause 6.3 of the agreement also provided that the plaintiff remained liable for municipal rates and taxes and other municipal costs except for water and electricity costs, and the defendant benefited from this as well.

[29]. Therefore, in this context, it is reasonable and appropriate for the defendant to assume the risk of damage to the portion of the property that was in his possession. This included the restaurant, which had been in his possession for more than two years at the time of the fire.

[30]. Accordingly, I conclude that the obligation of the defendant to tender restitution includes his remedying the damage caused by the fire to the restaurant. The amount that is required to do so should therefore be deducted

from the amount due by the plaintiff to the defendant under her tender of restitution of the monetary sum of R2 154 000 due to the defendant.

[31]. As regards the defendant's claim for restitution from the plaintiff of the sum of £75 000, which is the purchase price paid for the yacht by the defendant on behalf of the plaintiff. The defendant subsequently – on or about 30 September 2015 – sold the yacht for £49 473.66, and that amount is presently held by UK based company, Clipper Marine, the entity from which the yacht was purchased.

[32]. The defendant's claim for payment of the amount of £75 000 is not sustainable if one has regard to his plea, which is to the effect that he specifically denies that the purchase of the yacht occurred in partial fulfilment of his obligations in respect of the sale of land agreement. He avers that the purchase and transfer of the yacht occurred 'in fulfilment of his obligations in respect of the purchase price of the businesses and their assets and equipment'. What is clear is that, according to the defendant's plea, the purchase of the yacht was unrelated to the sale of land agreement. In the 'stated case' the defendant's position is summarised to the effect that the said payment of the purchase price was made by the defendant in anticipation of the conclusion of the sale agreement and the fulfilment of the suspensive condition therein.

[33]. All the same, on the defendant's version, his claim for restitution of the purchase price should fail.

[34]. On the version as pleaded by the plaintiff, the yacht, purchased at the time during 2015 by the defendant on behalf of the plaintiff for about £75 000, was in part payment towards to the purchase price of the plaintiff's property. The yacht was subsequently sold by the plaintiff for £49 473.66, and the plaintiff tendered repayment of this amount. This, in my view, is the amount to be restored to the defendant. The simple point is that where the property to be restored has deteriorated or depreciated, restitution need to be made only of the proceeds of property sold. The property that was tendered in part payment of the purchase price in terms of the cancelled agreement, is a yacht, which would

have naturally depreciated in value over the years. This is particularly so in light of the fact that the yacht was purchased new by the defendant and would have immediately become second-hand and lost value once it was handed over. There is no suggestion in the papers that the yacht had lost value due to any conduct on the part of the plaintiff.

[35]. In these circumstances, I conclude that the restitution by the plaintiff to the defendant should be the amount presently held by Clipper Marine, that being £49 473.66.

[36]. In summary, the defendant is entitled to restitution of the amount of £49 473.66, presently held by Clipper Marine, pending the resolution of the dispute between the parties. I think that that amount should be released to the defendant immediately. The defendant is also entitled to repayment of the total amount of R2 154 000. From this amount should be deducted the total amount of the cost to remedy the damage caused by the fire to the restaurant during December 2017, which falls to be determined in a subsequent hearing at a later date.

[37]. An order giving effect to my foregoing conclusions should therefore issue.

Costs

[38]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹.

[39]. *In casu*, it cannot be said with any conviction that either one of the parties has been successful in this long and protracted litigation, which has had a tedious history. The plaintiff, it can be said, has succeeded in that her claim for damages has been granted. Conversely, the defendant has had a measure of success in that he has now been awarded repayment of the fairly substantial sum of £49 473.66.

¹ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

[40]. All things considered, I am of the view that, in the exercised of my discretion, I should order each party to bear his / her own costs. That, to me, seems to be a just and fair way of dealing with the legal costs in this matter.

Order

[41]. In the result, the order which I grant is as follows: -

- (1) In terms of Uniform Rule of Court 33(4), the adjudication of the quantum of the fair and reasonable cost to remedy the fire damage caused to the restaurant and the farm stall on the plaintiff's property ('the separated issue'), be and is hereby separated from any and/or all other disputes between the parties.
- (2) The separated issue is postponed *sine die* and it is directed and ordered that the matter proceeds to trial on all of the remaining disputes between the parties.
- (3) It is declared that the written agreement of sale between the parties in respect of Portion [...] (a portion of portion [...] of the Farm Witpoort No [...]), Registration Division IR, Province of Gauteng ('the property'), is terminated and the parties are no longer bound thereby.
- (4) The defendant is entitled to restitution of the total amount of R2 154 000 paid by him pursuant to and under the sale agreement, less the fair and reasonable cost to remedy the fire damage to the restaurant and farm stall situated on the property, caused by the fire on or about 27 December 2017.
- (5) It is declared that the defendant is entitled to restitution of the amount of £49 473.66, presently held in trust by the United Kingdom based company, Clipper Marine, which is authorised to release to the defendant the said amount forthwith.
- (6) Each party shall bear her / his own costs in this action to date.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	27 th July 2023
JUDGMENT DATE:	21 st November 2023
FOR THE PLAINTIFF:	Advocate O Ben-Zeev
INSTRUCTED BY:	Bouwer Cardona Incorporated, Parktown North, Johannesburg
FOR THE DEFENDANT:	Advocate Dave Watson
INSTRUCTED BY:	Christelis Artemides, Rosebank, Johannesburg