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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A53/2024

In the matter between:

FADIEL BOWAS

Appellant

And

SHANAWAZ MOHAMMED

Respondent

Heard: 16 August 2024

Delivered: Electronically on 15 October 2024

JUDGMENT

LEKHULENI J

Introduction

[1] A contractual dispute between the appellant and the respondent is the subject of this appeal. The appellant is appealing the entire judgment and order issued by the Wynberg Regional Court on 29 November 2023. This is in relation to a contractual claim in which the appellant sought payment of R400,000 plus interest and costs from the respondent. The claim arises from an agreement for the sale of movable assets that was concluded on 12 November 2020. The trial court dismissed the appellant's claim with costs. The appellant has thus approached this court seeking a reversal of that order.

Background Facts

[2] The dispute between the parties arose in the following circumstances: On 05 October 2020, Fadiel Bowas Family Trust, represented by the appellant, entered into a written sale agreement with Grassy Park Pets (Pty) Ltd, represented by the respondent, for the sale of an immovable property (**the first agreement**) commonly known as 2[...] S[...] Road, for the sum of 4.1 million. The property in question was not sold as is, with all fixtures and permanent fittings. As part of the sale agreement, the parties agreed that a Gaggenau oven must be removed and replaced with a new oven. Additionally, they agreed that all fixtures, except for the Gaggenau oven, must remain in place.

[3] After signing the sale agreement for the immovable property, but before the transfer was completed, the appellant and the respondent entered into a **second sale agreement** in their personal capacities. This second agreement, which is the subject of this appeal, was signed on 12 November 2020. The reasons which led to the conclusion of the second agreement will be set out more fully below.

[4] In terms of this agreement, the respondent purchased the following moveable assets for a purchase price of R500 000, viz:

A Pool Heater
5 Air Conditioners
Stove and Ovens

A Camera System
A Jojo Tank
2 Wellpoint motors
Various Curtains and
Various animal cages.

[5] These movable assets formed part of the immovable property sold in terms of the first agreement when it was marketed for sale. Furthermore, these movable assets were not explicitly excluded from the sale of the immovable property.

[6] The purchase price of these movable assets was the sum of R500 000. The purchase price of the movable assets was to be paid in monthly instalments of R25 000 per month commencing on 10 January 2021. In the event the respondent failed to pay, the parties agreed that the total outstanding sum would become due and payable. The respondent made four monthly payments of R25,000 to the appellant and then stopped making further payments. Subsequent thereto, on 16 November 2021, the appellant's attorneys formally demanded payment of the balance of the purchase price in the sum of R400 000.

[7] The respondent failed to pay or heed the demand, and the appellant subsequently issued summons against the respondent for breach of contract and for payment of the total balance of R400 000 plus costs and interest. The respondent defended the appellant's claim and pleaded that the appellant was not the owner of the goods (listed above) allegedly sold in terms of the second agreement. The respondent specifically pleaded that after signing the second agreement, he ascertained in April 2021 that the appellant was not the owner of the goods in question.

[8] The respondent further asserted that the goods in question were, in fact, owned and were sold by Fadiel Bowas Family Trust, represented by the appellant, to Grassy Park Pets (Pty) Ltd, which the respondent represented in terms of the first sale agreement for the immovable property. Expressed differently, the respondent asserted that the movable assets formed part of the immovable property, which was sold by the Fadiel Bowas Family Trust to Grassy Park Pets (Pty) Ltd. The

respondent further contended in his plea that the goods in question formed part of the fixtures and fittings of the property sold and paid for by the Grassy Park Pets to the Fadiel Bowas Family Trust.

[9] According to the respondent, clause 18 of the sale agreement for the immovable property clearly mentioned that the property was sold with all its fixtures except for the Gaggenau oven, which was replaced with a new oven. In the premises, the respondent asserted that the appellant was not entitled to payment in terms of the agreement signed by the parties. The respondent further asserted that the sale agreement of the movable assets was void *ab initio* and that the respondent was entitled to be reimbursed the sum of R100 000 in respect of payments made in terms of the fraudulent misrepresentation by the appellant.

Findings of the Trial Court

[10] After hearing evidence from the appellant and his witness, the court below dismissed the appellant's claim and found that the immovable property was marketed with all fixtures except the Gaggenau oven, which was specifically excluded from the sale. The trial court also found that if indeed the appellant intended for those items listed in the second agreement to be excluded from the sale of the immovable property, the same would have been reflected, as was the case with the Gaggenau oven. The trial court concluded that the second agreement could only have been concluded with the amendment of the sale agreement in respect of the immovable property to reflect the parties' true intentions. The trial court dismissed the appellant's claim with costs and found that the sale agreement of the immovable property included all the items listed in the second agreement. It is this decision that the appellant seeks to impugn in this appeal.

Summary of evidence

[11] For the purposes of this judgement, I will briefly summarise the evidence that was tendered before the trial court, and I will not regurgitate the evidence verbatim. At the hearing of the matter before the trial court, the appellant testified and called

the estate agent who brokered the sale of the immovable property as his witness. The respondent did not testify but closed his case without presenting any evidence.

[12] The appellant confirmed the second sale agreement and the terms thereof. The appellant stated that the respondent and the estate agent approached him personally to purchase the movable assets listed in the second agreement. It was his evidence that all the items that were sold to the respondent in respect of the second agreement belonged to him and not the Trust. He denied that the said items belonged to the Fadiel Bowas Family Trust. According to the appellant, he bought all these items for his own use, and he owned the said movable assets. It was also his evidence that, as the owner of these assets, he did not intend to have them permanently affixed to the immovable property that was sold to Grassy Park Pets (Pty) Ltd.

[13] The appellant asserted that the movable assets listed above, were sold for R500,000 and that the respondent had to pay R25,000 monthly. He was referred to several invoices issued in his name regarding these items. The appellant averred that the respondent did not fulfil his payment obligations under the second sale agreement. The respondent paid him R100,000 but failed to pay the remaining balance.

[14] During cross-examination, the appellant admitted that the movable assets mentioned above were all in the house, which had been sold by the Trust to the Grassy Park Pests (Pty) Ltd. The appellant acknowledged that the second sale agreement was concluded on 12 November 2020, after the conclusion of the first sale agreement for the immovable property on 5 October 2020. He rebutted the assertions made in clause 3.3 of the second sale agreement that the parties agreed that possession of the movable assets had been given to the purchaser. In other words, he conceded that when the sale agreement of the movable assets was concluded, possession of the goods in question was never given to the respondent. The appellant further admitted during cross-examination that the movable assets referred to in items 4, 5 and 6 sold to the respondent belonged to the Fadiel Bowas Family Trust and not him. He was steadfast that the other items, though installed in the property of Trust, were his.

[15] When it was put to him that all the items listed in the second agreement, which was subsequently signed by the appellant and the respondent in their personal capacities, were included in the sale agreement of the immovable property, the appellant could not give a plausible answer. Instead, the appellant refused to answer that question. The appellant also conceded that the Fadiel Bowas Family Trust paid for three items that the appellant allegedly sold to the respondent.

[16] The estate agent, Mr Oliphant, who marketed the immovable property, was called to corroborate the appellant's case. His evidence, in short, was that he was a property practitioner with 5 years of experience. Mr Oliphant confirmed the second agreement signed by the appellant and the respondent. According to Mr Oliphant, the parties agreed that the respondent would buy certain items that the respondent would pay for them over an extended period. This witness stated that when the sale agreement of the movable assets was signed, the appellant and the respondent understood the terms thereof. He was referred to the sale of the immovable property, and he confirmed that the appellant and the respondent signed the agreement on behalf of the Trust and the Company, respectively.

[17] It was his evidence that, initially, everything (including the movable assets listed above) was included in the sale of the immovable property. However, the parties could not agree on the selling price of the property. The appellant was not prepared to let go of the immovable property for less. The appellant wanted R5.5 million as the purchase price for the immovable property. Subsequently, the parties came to an agreement that the respondent was going to remove the items in dispute. According to Mr Oliphant, the respondent then suggested that he would instead purchase the disputed movable assets. Mr Oliphant then told the appellant and the respondent that the separate agreement was outside the sale of the property.

[18] During cross-examination, Mr Oliphant testified that he marketed the immovable property with all the fixtures and fittings as part of the deal. The witness conceded that unless an item is specifically excluded, it would become part of the sale agreement. The legal representative of the respondent pointed Mr Oliphant to clause 18 of the sale agreement of the immovable property. This clause specified

that the property was being sold with all fixtures except for the Gaggenau oven, to which Mr Oliphant agreed.

[19] As a property practitioner, Mr Oliphant also admitted that a deed of sale in respect of the immovable property cannot be amended except in writing. It was his evidence that the deed of sale in respect of the immovable property in particular clause 18, was not amended. The witness also admitted that the sale agreement of the immovable property was between two entities, namely the Company and the Trust. The Trust represented itself as the owner of all the fixtures and fittings of the property. Mr Oliphant could not give a plausible answer when it was put to him that the appellant, in his capacity, could not sell those items to another person, particularly the respondent, the very same items sold to the company, which is a separate legal entity.

[20] That concluded the evidence before the trial court as the respondent closed his case without presenting any evidence.

Grounds of Appeal

[21] The appellant raised various grounds of appeal against the judgment of the court *a quo*. The grounds of appeal as discernible from the notice of appeal may, in a nutshell, be summarised as follows:

[22] That the court *a quo* misdirected itself by regarding documents discovered by the respondent as evidence in circumstances where such documents were never introduced as evidence by the respondent who failed to call any witness to testify or failed to testify in person. The appellant contended that the trial court misdirected itself by failing to consider that the appellant and the respondent are different parties from the sale agreement of the immovable property, and that they willingly contracted in respect of the sale contract for the movable assets and performed partially in terms of that agreement.

[23] According to the appellant, there was consensus between the parties when the sale of the movable assets was concluded. The appellant also asserted that the

trial court failed to consider Mr Oliphant's evidence that the property was originally marketed with the disputed movable assets included. However, it was only after the parties could not agree on the purchase price that the appellant agreed to ensure that the sale proceeded, that he would remove those items and accepted a lesser value than marketed. The appellant also averred that the trial court failed to address the fact that the respondent performed in terms of the sale of the movable assets.

Applicable Legal Principles and Discussion

[24] The appellant's claim is premised on an alleged breach of contract. Our law proceeds from the point of view that a litigant requesting a remedy must prove that he is entitled to it.¹ The rule is, therefore, not that the appellant always bears the burden of proof but that it is the party who asserts (appellant or respondent) and not the one who denies who has the onus.² This is the basic rule today. Simply put, he who seeks a remedy must prove the grounds therefor.

[25] In contractual matters, a party alleging a contract must prove the terms of the contract he seeks to enforce, including the absence of any additional terms that might provide the other party with a defence.³ The onus of proving the terms of the agreement may involve proof of a negative, for instance, that the parties did not agree upon an additional term alleged by the respondent.⁴

[26] In this case, it is common cause that on 12 November 2020, the appellant and the respondent concluded a written agreement in terms of which the respondent allegedly bought certain movable assets from the appellant. This agreement was a sequel to the sale of the immovable property between Fadiel Bowas Family Trust represented by the appellant and Grassy Park Pets (Pty) Ltd represented by the respondent. In terms of the second agreement, the respondent agreed to pay an amount of R500,000 for the movable items. The purchase price was to be paid by the respondent in equal instalments of R25,000 per month commencing on 10 January 2021 until the entire R500,000 was settled in full. It is common cause

¹ Zeffert *et al* *The South African Law of Evidence* (2007) at 57.

² *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 711.

³ *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A).

⁴ *Kriegler v Minitzer* 1949 (4) SA 821 (A).

that the respondent paid the first four instalments in terms of the agreement until he stopped making further payments.

[27] As previously stated, the respondent denied in his plea that the appellant was the owner of the goods allegedly sold in terms of the second agreement and placed the appellant to proof thereof. According to the respondent's plea, the goods formed part of the fixtures and fittings of the property sold by the Fadiel Bowas Family Trust and paid for by the Grassy Park Pets (Pty) Ltd. From the pleadings, the respondent did not raise any special defence. Furthermore, the respondent did not plead any additional term to the contract but instead, denied that the appellant owned the goods in question.

[28] In my view, there was no duty upon the respondent to prove his denial. Conversely, it is abundantly clear from the pleadings that the appellant bore the onus to establish the terms of the agreement, that he had complied with the agreement and that he was entitled to payment.⁵ Moreover, pursuant to the denial the respondent raised in his plea, the appellant bore the onus to prove that he owned the movable assets he allegedly sold to the respondent and that he had given vacant possession thereof to the respondent. Simply put, the appellant bore the onus to prove that the movable assets he allegedly sold to the respondent were his.

[29] The court below dismissed the appellant's claim and found that the immovable property was marketed and sold with all fixtures except the Gaggenau oven, which was specifically excluded from the sale. Expressed differently, the court *a quo* found that the appellant failed to prove that he was the owner of the assets in question, which were sold to the respondent. Against this backdrop, I turn to consider whether the trial court was correct in making this finding and in dismissing the appellant's claim.

[30] In his evidence in chief, the appellant asserted that the movable assets sold to the respondent were his and that he bought them for his private use. The appellant also contended that the respondent approached him personally with the estate agent

⁵ *Pillay v Krishna and Another* 1946 AD 946.

with a view of purchasing the disputed movable assets. The appellant averred that the respondent offered to pay R500 000 for these items, and he accepted the offer. Pursuant thereto, a written agreement was prepared, and both the appellant and the respondent signed the agreement. According to the appellant, the Fadiel Bowas Family Trust did not own the items. For all intents and purposes, he did not intend to have these items form part of the immovable property, which was sold by the Trust to the respondent's Company.

[31] The appellant and his witness' evidence on vacant possession and ownership of the disputed movable assets was completely discredited and dismantled during cross-examination. The appellant admitted that the items in question were included in the house when it was sold. The immovable property was marketed with the movable items the appellant sold to the respondent. During cross-examination, Mr Oliphant admitted that the immovable property was marketed with all fixtures and fittings as part of the deal for the sale of the immovable property. Mr Oliphant also conceded that unless one excluded an item in a sale contract, it would become part of the sale. Significantly, when the court asked Mr Oliphant for clarification purposes, the following unfolded:

“Court: Just to clarify the second last question the attorney had indicated that when the property was transferred in terms of the sale agreement not the movable items. I am talking of the property itself. In terms of those clauses, specifically clause 18 that the attorney is referring to but for the Gaggenau oven the property was transferred to the purchaser with all fixtures and fittings in terms of the agreement?”

Mr Oliphant: Yes...”

[32] From the above, it is abundantly clear that the movables that the appellant purportedly sold to the respondent were part of the immovable property that was sold by the Trust to the Company. The appellant could not lawfully sell the assets as he did not own them and could not give vacant possession to the respondent in his personal capacity.

[33] In my view, the Fadiel Bowas Family Trust represented itself as the owner of all the fixtures and fittings on the immovable property. The Trust, represented by the appellant, sold the immovable property with the relevant fixtures and fittings (including the disputes movables) to the Grassy Park Pets (Pty) Ltd, except for the Gaggenau stove. The appellant, in his personal capacity, could not sell or give vacant possession of those items to the respondent as the Trust had already sold those items to the respondent's Company, a separate legal entity.

[34] At the hearing before the trial court, Mr Oliphant and the appellant asserted that the discussion of the sale of the movable assets and the sale of the immovable property was done simultaneously. The facts do not bear out this contention. Surely, if the disputed movable assets were to be excluded from the sale of the immovable property, one would have expected such exclusion to be specifically included in the sale agreement. The only fixture that was excluded was the Gaggenau oven. It is apposite to remind ourselves that in an endeavour to discharge his onus, the appellant could not lead any evidence extraneous to the sale agreement of the immovable property that was signed and discovered in these proceedings. The law is definite on this point. In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*,⁶ Watermeyer JA, as he then was, stated as follows:

"Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

[35] This is still the law in South Africa. In *University of Johannesburg v Auckland Park Theological Seminary*,⁷ the court held that the parole evidence rule is of continued application and that not all evidence as to context is admissible and to establish context to a contract, evidence is to be used as conservatively as possible.

⁶ 1941 AD 43 at p. 47.

⁷ 2021 (6) SA 1 (CC).

[36] In my view, the trial court did not look at extraneous evidence when it considered the sale agreement of the movable assets as suggested by the appellant. The trial court had to determine whether the appellant had complied with the sale contract of the movables and was entitled to payment. In doing so, the court could not look at the sale agreement of the movable assets in isolation, particularly when one considers the onus the appellant bore and the denial of ownership of these items raised by the respondent's plea. The respondent stated that these goods belonged to the Trust, which sold them to his Company. In the circumstances, it became inherently necessary for the trial court to consider the first agreement dealing with the sale of the immovable property.

[37] At the risk of repeating myself, the respondent asserted in his plea that the appellant was not the owner of the goods but that they were, in fact, owned and sold by the Fadiel Bowas Family Trust. Simply put, the respondent's plea contained a denial of an essential element of the appellant's cause of action and the onus rested on the appellant. Although the respondent admitted the existence of the sale of the movable assets relied upon by the appellant, he denied that the appellant owned the property in question. His plea, therefore, cut through the appellant's cause of action. The appellant was accordingly required to prove all the terms of this contract, including the delivery of vacant possession and the disputed ownership of the property, which necessitated the consideration of the first agreement.

[38] Evidently, the agreement in respect of the immovable property is critical in this matter. The appellant had to show on a preponderance of probabilities that he owned the movable assets in question and that the suggestion that the property belonged to the Trust was false. Thus, the argument by the appellant's Counsel that the court *a quo* erred in considering the sale agreement of the immovable as it involved different parties is misplaced and unsustainable.

[39] I accept that the respondent did not present oral evidence; however, that is neither here nor there. The appellant had to prove that the movable assets were his and that he complied with the agreement. The appellant had to prove that the assets in question did not belong to the Trust but to him. When the appellant was quizzed during cross-examination, he confirmed that the only item that had to be removed

from the immovable property as per clause 18 of sale contract when it was sold was the Gaggenau oven. For completeness, clause 18 of the sale of the immovable property stated:

“The [immovable] property is Not sold as is with all fixtures and permanent fittings. 1 X Gaggenau will be removed and will be replaced with a new oven in its place. All other fixtures to remain.”

[40] To this end, the following unfolded during the cross-examination of the appellant:

Mr Nacerodien: Okay. Now I am putting it to you that all the items listed in schedule A or schedule 1 of the agreement which is subsequently signed was in the property and was included in that sale. What is your answer to that? You sold the property with everything in it. It was marketed like that and the only thing that you excluded was that Gaggenau stove.

Mr Bowas: I refuse to say something now.

Mr Nacerodien: You refuse to answer that?

Mr Bowas: I refused to answer that.

Mr Nacerodien: Okay

Mr Bowas: To contradict myself...”

[41] From the above, it is evident that the movable assets that the appellant sold to the respondent did not belong to him, and he could not give vacant possession thereof. The items were part of the immovable property that Fadiel Bowas Family Trust sold to Grassy Park Pets (Pty) Ltd, represented by the respondent. Importantly, the sale agreement in respect of the immovable property between the Trust and the Company was entered into on 5 October 2020. This agreement explicitly stated that all other fixtures save for the Gaggenau stove had to remain. The appellant could not, in my view, sell the properties that had already been sold by the Trust to the Company in a subsequent agreement that was concluded a month later, on 12 November 2020.

[42] The evidence before the trial court clearly indicates that the appellant could not and did not give vacant possession of the disputed assets to the respondent. According to clause 3.1 of the sale agreement for the movable assets, the seller (appellant) warranted that he is the lawful owner of the listed items. In clause 3.3 of the same agreement, the parties agreed that possession of items listed in the inventory has been given to the purchaser. However, during cross-examination, it became evident that the appellant did not give possession or could not give possession of the said assets as they were already sold together with the immovable property by the Fadiel Bowas Family Trust to Grassy Park Pets (Pty) Ltd. Furthermore, it became evident that the Trust paid for some of the movable assets, not the appellant. In my opinion, the appellant utterly failed to demonstrate that he had given vacant possession of the assets in question or that the said assets were his.

[43] In our law the contract of sale envisages the transfer of possession and not of ownership.⁸ I am mindful that although parties to a contract of sale usually contemplate a transfer of ownership in the thing sold, however this is not an essential feature of the contract. I am also regardful of the fact that sales by non-owners are quite permissible. However, I must stress that the delivery required of a seller is undisturbed possession (*vacua possessio*) coupled with the guarantee against eviction.⁹ It is further not necessary that the seller pass the ownership, for the seller's implied engagement is a warranty against eviction and not a warranty of title, but he must divest himself of all his proprietary rights in the thing sold in favour of the purchaser.¹⁰

[44] The conclusion of a valid contract of sale casts on the seller the obligation to deliver possession of the thing sold to the purchaser. From the conspectus of the evidence, I am of the firm view that the appellant as a seller, did not deliver undisturbed possession of the disputed assets coupled with the guarantee against eviction to the respondent. In my respectful opinion, the trial court was correct in its finding that the sale of immovable property agreement included all the items which

⁸ See Hackwill *Sale of Goods in South Africa* (1984) 5 ed at p. 23.

⁹ *Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A) 743H-744A.

¹⁰ *Koster v Norval* (20609/14) [2015] ZASCA 185 (30 November 2015) at para 4.

the appellant sold to the respondent in the second agreement. Thus, the appellant could not discharge his obligation to deliver possession of the thing sold to the respondent. Simply put, those items listed above, had already been sold to Grassy Park Pets (Pty) Ltd and could not be sold separately. They were not excluded from the sale contract of the immovable property.

[45] Lastly, the appellant's counsel argued in his written submissions that the court a *quo* erred when it proceeded to consider a contract (the sale of the immovable property) that was concluded between unrelated parties to the sale of the movable assets. Counsel also argued that the court a *quo* erred when it based its findings that the agreement for the sale of the movables could not have been concluded on the basis that a different contract existed between different parties which provided for something other than the terms contained in the written sale agreement for the movable assets. According to Counsel, this finding was made in circumstances where the respondent did not present any evidence to the court and, as a result, did not ventilate a version before the court.

[46] In my opinion, this argument is mistaken and misses the point. As previously stated, the respondent challenged the appellant in the plea to prove that the movable assets in question belonged to him. The respondent asserted in his plea that when the Fadiel Bowas Family Trust sold the immovable property, it was sold together with the movable assets to Grassy Park Pets (Pty) Ltd. The appellant had to prove that the movable assets were his and did not belong to the Fadiel Bowas Family Trust, as alleged. The appellant had to prove that he gave the respondent vacant possession of the assets in question and that he had divested himself of all his proprietary rights in the disputed assets in favour of the respondent. It is my opinion that the appellant did not provide sufficient evidence to satisfy the onus in question.

[47] The fact that the respondent did not present evidence is inconsequential. The appellant had a duty to adduce satisfactory evidence that he was entitled to a remedy. Furthermore, the fact that the respondent paid R100 000 to the appellant is immaterial. The agreement between the parties was void *ab initio* as the appellant did not own nor give possession of the *merx* or the *res vendita* to the respondent. In our law performance by one or even both parties to an illegal contract does not make

the contract legal.¹¹ Neither party can institute action on the contract or claim performance from the other party because from an illegal cause no action arises (*ex turpi causa non oritur actio* – also known as the *ex turpi* rule). In my opinion, the appellant failed to discharge the onus rested on him. Thus, the trial court was correct, in my view, in dismissing the appellant’s case.

[48] Consequently, given all these considerations, this appeal must be dismissed.

Order

[49] The appeal is dismissed, and no order is made regarding costs.

LEKHULENI JD
JUDGE OF THE HIGH COURT

I agree:

MTHIMUNYE S
ACTING JUDGE OF THE HIGH COURT

¹¹ See Hutchison D *et al* *The Law of Contract in South Africa* (2017) 3 ed at 14.