

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: **13800/2022**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
12 MAY 2025	
DATE	SIGNATURE

In the matter between:

ERIC GILFILLAN

Plaintiff

And

UNIQUE AUTO FINANCE (PTY) LTD

Defendant

JUDGMENT

Mahomed J

INTRODUCTION

[1] The parties concluded an agreement of sale of property, which included a suspensive condition, that the buyer, (the excipient/defendant) was to within 45

days of signature of the agreement, obtain a mortgage bond to secure the purchase price. However, during the 45 day period, the parties, “consensually” waived the suspensive clause when they agreed the purchase price would be paid partly in cash and partly through a bond. The defendant paid over R3.25 million, toward the purchase price of R5 million and the plaintiff, transferred the property to the defendant, who became the owner. This arrangement was never recorded. The transaction is regulated by the provisions of s2(1) of the Alienation of Land Act 68 of 1981 and the contract.

The issue

Does a waiver alter or impact on the terms of payment in the agreement between the parties and is therefore a contravention of the non-variation clause in the agreement.

- [2] I shall refer to the parties as they are in the action proceedings to avoid confusion. The plaintiff issued a summons for recovery of the “balance of the purchase price”, the defendant contends that the particulars of claim are excipiable, they fail to disclose a cause of action and therefor plaintiff must be ordered to amend its particulars of claim, within 20 days failing which the action stands to be dismissed.
- [3] The defendant argued that the price and performance are material terms and since the waiver was not reduced to writing the agreement is unenforceable. Advocate Carstens submitted that the plaintiff should have applied for a rectification of the agreement after the change. On the alternative claim on enrichment, the defendant argued the plaintiff seeks to enforce an unenforceable agreement through an enrichment action. Mr Carstens submitted that the plaintiff ought to have brought its claim through one of the condictiones, however irrespective of which one it pursues, the principle in our law is that the plaintiff can only claim for restoration of property unless if the defendant is unable to restore the property. A plaintiff may only claim for payment of monies if he can demonstrate that the property cannot be restored. The court was referred to the judgment in *Melamed and Another v BP Southern Africa (Pty) Ltd* .

- [4] It was further argued that s28 of the Alienation of Land Act prescribes what a party may do if there was performance on a failed agreement, the plaintiff should have asked for restoration of the property. Mr Carstens proffered that in the enrichment action the plaintiff failed to plead that the defendant is unable to restore the property, it is material, and the exception must be upheld. Counsel submitted that the plaintiff must be afforded 20 days to amend, failing which its claim is set aside. Counsel submitted that the costs ought to be granted on a scale B.
- [5] Advocate R Shepstone appeared for the respondent/plaintiff and contended that the facts are clear the property was sold and transferred, to the defendant who has paid only R3.25 million toward a purchase price of R5 million. The plaintiff's claim is for specific performance in terms of the contract, and in the alternative, the plaintiff claims in terms of an enrichment action, both claims are good in law. Counsel argued that the waiver of the suspensive condition must be properly ventilated at trial. He referred the court to the judgment in *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa*¹, where the court held that the surrounding circumstances, the conduct of parties and witness accounts are important to determining the outcome.
- [6] It was submitted that the waiver is a voluntary giving up of a right in an agreement and does not alter the payment obligations in a written agreement. A waiver of the suspensive condition cannot be determined in an exception as evidence will have to be led regarding the circumstances that led to the change. The seller waived a portion of the security provided by the purchaser, this cannot be viewed as a variation, a factual inquiry is necessary.
- [7] Furthermore, it was argued that the alternative claim for unjust enrichment is good in law, if one has regard to the part payment made and the transfer of the property to the purchaser. He submitted that the plaintiff made the necessary allegations and reminded the court that the property was transferred, the plaintiff is impoverished and contended that the party has an election to claim return of the property in terms of the rei vindicatio or the amount of the enrichment, the

¹ [2024] ZASCA 107 (3 July 2024)

amount being a lesser to the plaintiff's impoverishment or the defendant's enrichment. Counsel submitted that the necessary allegations have been made and that the exceptions must be dismissed the defendant must file his plea and the matter must proceed to trial when oral evidence can be led on the issue of a waiver and its impact on the contract between the parties having regard to the variation clause.

JUDGMENT

- [8] *In deciding an exception the court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents, and may uphold the exception only when the excipient has satisfied the court that cause of action or conclusion of law in the pleading cannot be supported by every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law... it is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.*²
- [9] When an exception is upheld as to a cause of action it is the end of the matter for a plaintiff. In casu the plaintiff argues that the suspensive condition was in fact a security which the plaintiff held, however the plaintiff by consensual agreement with the defendant, voluntarily gave up this security. The plaintiff accepted part payment, transferred the property, whereupon the defendant became the owner thereof.
- [10] The test for an exception is whether the pleading can sustain a cause of action on any reasonable interpretation of the facts alleged. The excipient bears the onus to demonstrate that the pleading cannot sustain a cause of action on any interpretation. The waiver/ variation was not in writing, there are no reasons for the change regarding the security for the sale before me and in my view the information is germane to the determination of the dispute between the parties. The strong arguments presented to this court proves that the complete facts are not before this court for determination at this stage of the proceedings. The intention of the parties can only be elicited through oral evidence, and I am of the

² 2019 (2) SA 37 (CC) at para [15]

view this will provide the context of the alleged voluntary waiver of the suspensive condition. It is not disputed that the sale price is R5 million, it is not in dispute that part payment of R3.25million has been paid over, only oral evidence will assist a court in understanding why the transfer had taken place before the full price was paid and about the seller's willingness to waive the security he had in hand. Several questions arise and remain unanswered relating to the claim in contract and the alternate claim in unjust enrichment.

[11] In the judgment in Phoenix Salt supra the court confirmed that when interpreting contracts a court must consider the contract in its entirety, the relationship between the parties, the surrounding circumstances and the parties' conduct during the contract. As mentioned earlier, the surrounding circumstances and the intention of the parties that led to the waiver in not before this court. Accordingly, the exceptions cannot succeed and are dismissed. The defendant must file its plea and set out its defence.

COSTS

[12] The legal representatives on both sides prayed that the cost must follow the successful party, on the appropriate scales, I propose that upon a more detailed context, the position of both parties would become clearer, and cost can be determined at the final determination of the matter for either party. Therefore, I am of the view that the costs should follow the cause.

I, therefore, make the following order:

1. The exceptions are dismissed.
2. The costs are in the cause.



Mahomed J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 10 February 2025

Date of Judgment: 12 May 2025

Appearances:

For Plaintiff:

Advocate Carstens Instructed by:

GJ Britz Attorneys

For Defendant:

Advocate R Shepstone Instructed by:

Eversheds Sutherland SA Inc

