

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: I 1048/2011

In the matter between:

ANTON ERIK VAN SCHALKWYK

PLAINTIFF

and

DAVID EMMANUEL FREITAS DIAS

1ST RESPONDENT

RENARD HATTINGH

2ND RESPONDENT

Neutral citation: *Van Schalkwyk v Dias* (I 1048/2011) [2018] NAHCMD 396 (4 December 2018)

Coram: NARIB AJ

Heard: 18 - 21 July 2016 and 26, 28 November 2018

Delivered: 4 December 2018

Flynote: **Contract** – Sale and purchase of immovable property – Agreement orally made and in writing – Non-compliance with the Formalities In Respect of Sale of Land Act, 1969 (Act 71 of 1969) – Agreements void *ab initio* - Immovable property subsequently sold to a third party – Specific performance impossible – Court ordering refund of moneys paid.

Summary: The plaintiff claims a refund only against the first defendant, due to failure of a purported purchase and sale agreement which was entered into between the plaintiff and the first defendant in respect of Erf 1582, Tutungeni Township, Rundu (the property), and pursuant to which plaintiff paid certain amounts to the first defendant. After absolution was granted by this court, the Supreme Court on Appeal reversed the decision as regards the prayer for refund as between the plaintiff and the first defendant.

The Supreme Court confirmed this court's finding that the initial written agreement had lapsed due to non-fulfilment of a suspensive condition, but proceeded on the assumption that an oral agreement and a subsequent written agreement which were both entered into after the initial written agreement had lapsed were valid and enforceable and that if the plaintiff made full payment under the oral agreement, he could enforce it. The Supreme Court further held that where a suspensive condition fails, the parties revert the position which they had been in before the contract was concluded. Accordingly, moneys paid to the first defendant had to be paid back.

However, this court is of the view that the Supreme Court's judgment was rendered, per *incuriam* when it proceeded on the assumption that the oral agreement and the subsequent written agreement were valid and enforceable and had either been cancelled by the first defendant or performance in terms thereof had become impossible due to transfer of the property to an innocent third party. The error occurred due to incomplete record of the judgment on this court being placed before the Supreme Court. Because the Formalities In Respect of Sale of Land Act, 1969 (Act 71 of 1969) has not been complied with, both oral agreement and the subsequent written agreement are *void ab initio*, and no question of cancellation or damages due to non-performance, arises.

Plaintiff had made payments pursuant to the agreements which were found to be *void ab initio*.

Court held that plaintiff entitled to a refund on the basis of unjustified enrichment (*condictio indebiti*) and even if the issue of refund was not canvassed in the pleadings and on the strength of the Supreme Court decision in *Kashela v Katima Mulilo Town Council and Others*¹, a formulation of the issue in the pre-trial order is binding on the parties and also on the Court, whether or not it was set out in the pleadings.

ORDER

1. The first defendant is ordered to refund to the plaintiff, the total amount of N\$ 515 070, 52, plus interest thereon at the rate of 20% per annum from the date of service of the Combined Summons to the date of payment.
2. Plaintiff is awarded 70% of the costs of suit to be paid by the first defendant.

JUDGMENT

NARIB AJ:

[1] On 29 July 2016, I delivered a judgment in this matter, absolving both defendants from the instance with costs.

[2] Plaintiff, dissatisfied with that outcome, noted an appeal to the Supreme Court, and on 13 April 2018, the Supreme Court delivered its judgment, and made the following order:

'Order

[37] In the result, I make the following order:

¹ Unreported Case No. SA 15/2017, delivered on 16 November 2018 at paras [23] and [24]

1. The appeal succeeds against the High Court's order granting absolution from the instance in respect of prayer 2 of the appellant's amended particulars of claim, with costs, such costs to include the costs of one instructing and one instructed counsel.
2. The order of the court *a quo* is set aside and substituted with the following order:
 - (i) Absolution from the instance is granted in favour of first defendant in respect of prayers 1 and 3 of the plaintiff's amended particulars of claim.
 - (ii) Absolution from the instance is refused in respect of prayer 2 of the plaintiff's amended particulars of claim.
 - (iii) No cost order is made in respect of the orders mentioned in (i) and (ii) above.
 - (iv) Absolution from the instance is granted in favour of second defendant with costs in respect of all the relief sought against him in the plaintiff's amended particulars of claim.
3. The matter is sent back to High Court for determination of the refund question.'

[3] It is accordingly clear that the only aspect of the case this Court is seized with at this stage of the proceeding is the question of refund. The refund is claimed only against the first defendant, due to failure of a purported purchase and sale agreement which was entered into between the plaintiff and the first defendant in respect of Erf 1582, Tutungeni Township, Rundu (the property), and pursuant to which plaintiff paid certain amounts to the first defendant.

[4] In the judgment I delivered on 29 July 2016, I referred extensively to the pleadings and issues raised by the parties for resolution of the Court, as per their proposed pre-trial order. I have further summarised the evidence on behalf of the plaintiff. It is accordingly not necessary for me to do so, once again. I shall refer to plaintiff's evidence only where it is necessary for the resolution of the remaining issue of the refund.

[5] I must point out at the outset that, perhaps due to inadvertence, a travesty was perpetrated on the Supreme Court, in that certain portions of my judgment were not placed before it. Pages 18 and 19 of my judgment, containing paragraphs [63] to [74] were not included in the appeal record. This is evident from Volume 7 of 7 of the appeal record, between pages 734 and 735. The last

paragraph on page 734 is paragraph [62] and the first paragraph on page 735 is paragraph [75]. Some twelve paragraphs of my judgment were thus not included in the appeal record. Furthermore, that part of the record of proceedings containing the argument or address by the parties on the question of absolution from the instance was also omitted, perhaps because it was considered unnecessary.

[6] The result was that a crucial part of my findings on absolution were not considered by the Supreme Court. In that part of the judgment, I dealt with the question whether, what the Supreme Court refers to as the 'oral agreement', (paragraphs [23](b) of the Supreme Court judgment) and the second written agreement (paragraph [23](d) of the Supreme Court judgment), were in fact valid agreements.

[7] I came to the following conclusion:

'[66] It is further clear at this stage that the further agreements entered into between the plaintiff and the first defendant are dependent for their validity on the agreement evidenced by exhibit "B". These are exhibits "E", "G", "H" and "L". These are all agreements intended to resolve the dispute between the parties regarding payment of the purchase price and transfer of the property.

[67] As standalone agreements, they are fatally defective in that the provisions of the Formalities Act, were not complied with. None of them mention the property being sold, or the price at which the property is sold, except that in exhibit "E", the property to be transferred is mentioned. They do not purport to be purchase and sale agreements, but agreements regulating performance and perhaps an increase in the purchase price.

[68] The Formalities Act requires that a contract of sale of land or any interest in land be reduced in writing and be signed by both parties thereto.'

[8] Perhaps as a result of the above omission from the record, and regrettably so, the Supreme Court remarked as follows:

'[24] The first and second agreements must be read together. If not, there would be no reason for a second agreement. If the appellant, as he alleges, made full payment under the first agreement he could enforce it and sell the property to the Angolan Consulate in his own right and without involving the first respondent at all. Conversely, if the later agreement is to be regarded as a stand-alone, then the previous one is irrelevant. Appellant would then have been entitled upon establishing payment in respect of the

second agreement, to enforce it on its own terms and at the price agreed to in the second agreement only. What the link is between the two agreements was never explored in the evidence or in the argument.² It was assumed that, if appellant could establish performance in respect of both agreements he would be entitled to specific performance provided, of course, he could establish that the sale of the property from first to second respondent was *mala fide*. This he could not show and thus withdrew the appeal against the second respondent.

...

[26] Where a suspensive condition fails, the parties revert the position which they had been in before and contract was concluded. Moneys paid in anticipation of the condition must be repaid. In other words and in general, restitution must take place. In the present matter however no money was transferred prior to the condition failing and the first contract lapsing. An oral agreement after the first written contract had lapsed, in terms whereof payments were to be made in instalments substituted the lapsed agreement, unless in the mind of the appellant the oral agreement varied the first written agreement thus keeping it alive which in law could not be the case as it had already lapsed at the time. The court *a quo* nonetheless and correctly found that restitution could not in these circumstances take place as there was nothing to return when that written contract lapsed. It therefore seems to have been assumed that if the first written agreement had lapsed so had the second written agreement. Why this assumption was made is not stated.³ It can also not be factually correct, as the second agreement was unconditional and had been entered into subsequent to the oral variation of the first written agreement. As the facts stood, the second agreement could not lapse with the first as it did not even exist when the first agreement lapsed.

[27] The court *a quo*'s judgment to the effect that there were no payments made under the first agreement when it lapsed and therefore no restitution could take place based on the failure of this contract was therefore correct. However, this could only affect the position up to the date of the lapsing of the first agreement and not payments made under the second agreement. Further no reasons were provided as to why the oral variation of the first written agreement, substituting it, which was not in dispute had to be ignored in this context. The fact that the original oral agreement has lapsed was however neither here nor there. Neither party performed in terms thereof. All payments were made pursuant to the oral agreement after the original written one had lapsed on the oral agreement was not attacked on any basis at all.

...

[29] Assuming the oral agreement was a valid agreement and had to be considered together with the second agreement as a whole (as it was accepted in the court *a quo*) then it was either cancelled (on the version of the first respondent) or it can no longer be enforced, because the property that formed the subject matter of the sale had been transferred to an innocent third party (second respondent). If the former, then restitution

² Underlining is for emphasis only.

³ This, of course, is not correct because in my judgment, in paragraphs [66] and [67], which I refer to above, I provided the basis for the invalidity of second written agreement.

must take place as first respondent does not claim any damages. This follows from the cancellation as a matter of course and is not a *condictio* but the normal consequences of termination. If the latter, then appellant is entitled to the damages he suffered because he can no longer claim specific performance.⁴

[9] The result is that my findings founded on the provisions of the Formalities In Respect of Sale of Land Act, 1969 (Act 71 of 1969) were not assailed in the Supreme Court judgment, nor were they referred to and dealt with. They accordingly stand and must have a bearing on the outcome of this matter.

[10] Furthermore, the Supreme Court rendered its judgment on the assumption, which in my view was wrongly made, that the oral agreement was a valid agreement and had to be considered together with the second written agreement. I say that the assumption was wrongly made, in view of my findings based on the provisions of the Formalities Act, which the Supreme Court did not have the opportunity to consider.⁵

[11] Accordingly, I believe that the judgment of the Supreme Court was rendered, per *incuriam*⁶ when it came to the conclusion that the oral agreement was either cancelled (on the version of the first defendant) or it can no longer be enforced, because the property that formed the subject matter of sale had been transferred to an innocent third party.

[12] Based on the above reasoning, the Supreme Court found that, if the oral agreement had been cancelled, then restitution must take place as the first defendant does not claim damages, and if specific performance is no longer possible due to transfer of the immovable property to an innocent third party, then plaintiff would be entitled to the damages he suffered because he can no longer claim specific performance.

⁴ Underlining is for emphasis only.

⁵ It is not clear whether this aspect was addressed at all by the parties in the Supreme Court, as they certainly should have been aware of my judgment and this aspect is foreshadowed in paragraph [56] of the my judgment on absolution from the instance, which forms part of the appeal record. The parties had also been requested to address this issue during the application for absolution from the instance.

⁶Trade Fairs and Promotions (Pty) Ltd v Thomson and Another 1984 (4) SA 177 (W) at 185D – I.

[13] The position which obtains as per my previous finding based on the provisions of the Formalities Act, of course, is that the oral agreement and the second written agreement were neither cancelled, nor were they enforceable, as they were *void ab initio*.

[14] I have to consider whether plaintiff would still be entitled to a refund in these circumstances, as per prayer 2 of the amended particulars of claim.

[15] The Supreme Court specifically refers to the fact that it was conceded on behalf of the appellant (the plaintiff in this matter) that appellant did not expressly canvass the issue of the refund in his pleadings, and that reliance was placed simply on the fact that this issue had been raised in prayer 2 of the relief sought in the amended particulars of claim.

[16] Reference is further made, in the Supreme Court judgment, to the fact that the issue of the refund was raised by the parties as per their proposed joint pre-trial order.

[17] The issue was formulated as follows as per the proposed joint pre-trial order, which was made an order of Court:

'2.4 In the event of the court finding that the agreement has lapsed and is unenforceable, the First Defendant must refund to Plaintiff all payments received from the purchaser as payment of the purchase price and whether Plaintiff is in that event also entitled to interest on the money paid by him to First Defendant at the legal rate of 20% (or any other rate) calculated from date of payment to the date of refunding the money;'

[18] The issue of the refund was raised by the parties as per their proposed joint pre-trial order, paragraph 2.4 thereof, as an issue of law to be resolved.

[19] The Supreme Court thus dealt with the question of the refund and made the order which I referred to earlier in this judgment.

[20] It would therefore appear that I was wrong, when I, at the stage of absolution from the instance, came to the conclusion that, because the issue of

the refund was not raised by the plaintiff in his amended particulars of claim, and in view of the provisions of Rule 7(8), such relief could not be granted. The Supreme Court's judgment shows that such relief can still follow, in view of the evidence the plaintiff had tendered, the relief as prayed for and what was agreed between the parties as per the proposed pre-trial order.

[21] I must therefore also accept, in view of the Supreme Court decision in *Kashela v Katima Mulilo Town Council and Others*⁷, that such formulation of the issue is binding on the parties and also on the Court, despite what is or is not in the pleadings.

[22] In view of the judgment by the Supreme Court, the moneys which were paid by the plaintiff can be claimed simply by a prayer to that effect, coupled with the allegations and the evidence to the effect that it was in fact paid and the fact that the issue is raised as per the proposed pre-trial order of the parties.⁸ Despite the fact that this aspect arises within the context of a claim for damages, as per paragraph [33] of the Supreme Court judgment, and perhaps, despite the fact that the judgment of the Supreme Court was rendered *per incuriam*, I find myself bound by that conclusion and accordingly proceed to consider the question of the refund.

[23] I have, in my judgment on absolution dealt with the evidence of the plaintiff regarding the payments made pursuant to the purchase and sale agreement.

[24] From plaintiff's evidence, it is apparent that a total amount of N\$ 583, 020. 52 was paid by the plaintiff to the first defendant. Of this amount, a sum of N\$ 483 020, 52 was paid by either cheque or bank transfers i.e. money and an amount of N\$ 100 000, was in kind in the form of a Land Cruiser, trailer and a bike which were given to the first defendant.⁹

⁷ Unreported Case No. SA 15/2017, delivered on 16 November 2018 at paras [23] and [24]

⁸ It is difficult to conceive such a *causa* to be *rei vindicatio*, because some payments in respect of which refund is claimed were made in kind, whereas others were either by cheque or transfers from a bank account. *Vide* Exhibits "C2" to "C12" and Exhibit "C" and "G". Once money has been paid to the first defendant it became his property and could not be claimed by way of *rei vindicatio*. See: *Pinto v FNB 2013 (1) NR 175 (HC) at para [33]*.

⁹ *Vide Exhibit "C1"*

[25] A further payment of N\$ 260 000 is a contentious matter between the parties. This payment was allegedly made by the Angolan Consulate. According to plaintiff the payment was made on his behalf, pursuant to the agreement between plaintiff and the first defendant, a copy of which was received into evidence as Exhibit "E". Plaintiff's evidence in this regard, particularly, during cross-examination was not entirely satisfactory, but in view of the fact that the defendant elected not to call any witness, and considering the probabilities in this case, I find that the amounts of N\$ 65 000 each, which were paid by the Angolan Consulate in Rundu, on 20 October 2008, 02 December 2008, 08 January 2009 and 02 February 2009, were all paid pursuant to the agreement evidenced by Exhibit "E".

[26] Exhibit "E" is dated 30 April 2008, and all the above payments were made subsequent to this date. It is further too much of a coincidence that these payments add up to exactly the amount referred to in Exhibit "E".

[27] A further indication, that the payments were made pursuant to the agreement evidenced by Exhibit "E" is that the property had to be transferred to the Angolan Consulate of Rundu subsequent to the full payment. It is common cause that the payments were made by the Angolan Consulate.

[28] All of the above factors, coupled with the fact that the first defendant elected not to testify and to provide any countervailing evidence drive me to the inexorable conclusion that the payments were made pursuant to the agreement evidenced by Exhibit "E". In so concluding, I have not lost sight of the fact that as per Exhibit "E", the full amount had to be paid within a period of six months from May 2008.

[29] Accordingly, I conclude that a total payment made by the plaintiff or on behalf of the plaintiff amounted to N\$ 843, 020. 52 of which an amount of N\$ 100 000 was in kind and of which an amount of N\$ 260 000, was paid by Angolan Consulate in Rundu.

[30] However, it is apparent from plaintiff's own evidence that he made the said payments from moneys received from the Angolan Consulate in Rundu, pursuant to an agreement he had entered into with them. Plaintiff took possession of the first defendant's property on 01 October 2005.

[31] It is not clear from his evidence, whether he subsequently leased the property to the Angolan Consulate in Rundu, or whether he simply entered into a purchase and sale agreement with them, in respect thereof. What is clear however that plaintiff is allowed the Angolan Consulate in Rundu to occupy the property, until it was sold and transferred to the second defendant on 07 February 2012.

[32] Plaintiff was ambivalent as to whether he received any rental payments from the Angolan Consulate in Rundu, during the period they occupied the property at his behest.

[33] In his evidence in chief, he testified that he advised the first defendant that he (the plaintiff) intended to lease the property to the Angolan Consulate as from 01 October 2006, and that this led to Mr. Dias (the first defendant) insisting that plaintiff should then pay more for the property. Such discussions culminated in the agreement in terms of which the first defendant agreed to sell the property to the plaintiff for an amount of N\$ 600 000 instead of the original agreed amount of N\$ 450 000.

[34] Plaintiff testified further that the amount of N\$ 260 000 which was paid on his behalf by the Angolan Consulate was to some extent "meant to compensate him (the first defendant) for the occupational rent that I had to pay", meaning that the amount of N\$ 260 000, was also meant to cover occupational interest of N\$ 3 500 per month, which was agreed as per the terms of the Deed of Sale (Exhibit B). This evidence was consistent with plaintiff's reply to further particulars when it was stated on his behalf:

'AD PARAGRAPH 3.3

Occupational interest was initially not paid but instead the parties agreed to a final settlement payment of N\$ 260 000, 00 to be paid by Plaintiff whereupon transfer of

ownership of the property was to be effected immediately. A copy of that additional agreement is annexed to Plaintiff's particulars of claim marked "B" which amount was paid on behalf of Plaintiff as is more fully set out in Annexure "D" annexed hereto.'

[35] During cross-examination, plaintiff initially admitted that he rented out the property to the Angolan Consulate, but appeared to contradict himself later during the same cross-examination, by denying this same fact.

[36] It is clear from plaintiff's own evidence that he derived a substantial financial benefit from his possession of the property during the period of 01 October 2005 to 07 February 2012. It is evident from Exhibit "C1" that plaintiff received a total payment of N\$ 1, 090, 000. from the Angolan Consulate during the period 09 December 2005 to 03 April 2007. There is also some correlation between the dates on which he received payments from the Angolan Consulate and when he made payments to the first defendant, even though this is not the case in all instances.

[37] According to plaintiff, the total amount of N\$ 1, 090, 000 which he received from the Angolan Consulate was for the sale of the property to them. I was however not provided with a Deed of Sale in this regard.

[38] Mr. Boesak has urged me to adopt an equitable approach to the resolution of this matter and to refer it for debatement. His submission, if I understood it well, was on the basis that, the Supreme Court also appears to have adopted an equitable approach by referring the matter back to this court to further adjudicate on prayer 2 of the amended particulars of claim. However, Mr. Boesak could not point me to any authority that would allow me to go down that route, and I know of none, particularly as this is neither raised in the pre-trial order nor as per the pleadings.

[39] Had it not been for the decision of the Supreme Court, I would have found that plaintiff's cause of action is not apparent from the pleadings, and in view of the provisions of Rule 7(8), he should be non-suited. I believe the plaintiff's claim to

be properly founded in *condictio indebiti*¹⁰ or *condictio sine causa*, which should have been pleaded, to allow the defendant to properly traverse these matters.

[40] A further issue which could properly have been traversed is the full benefit derived by the plaintiff from his possession of the property.

[41] In accordance with the decision of the Supreme Court, I should consider the refund within the context of damages, as 'All the evidence to claim damages had been led. Appellant made payments without any counter performance from the first respondent. First respondent cannot make performance as the property had been sold to an innocent third party. Appellant had an agreement to sell the property for N\$ 1, 2 Million to the Angolan Consulate, which *prima facie* established the market value of the property and hence also, *prima facie* his damages'.

[42] However, in view of my finding on the basis of the Formalities Act, both the question of cancellation of the agreement and the question of damages do not arise.

[43] What then could be the legal basis of the refund? I am unable to think of any, other than an action founded on enrichment, in particular *condictio indebiti*. I accordingly find that on the facts of this matter, plaintiff's claim for refund can be founded only on an enrichment action, in particular, *condictio indebiti*.¹¹

[44] Had the Supreme Court been fully apprised of the reasons of my decision, I believe that some guidance could have been derived from its judgment on this rather crucial aspect. Regrettably, this did not happen with the result that the Supreme Court judgment assumes the validity of the oral agreement and the second written agreement. That these agreements are invalid is clear, in that in one instance it is not in writing, as required by the Formalities Act, nor is the full purchase price contained in Exhibit "E". As stated in my earlier judgment, they are

¹⁰ See generally *Enocon Construction (Pty) Ltd and Another v Palm Sixteen (Pty) Ltd* 1972 (4) SA 511 (T) at 513F; *Rand VIR Rand (Edms) BpK v Boswell* 1978 (4) SA 468 (W) at 473B-C.

¹¹ This seems to have been assumed in *CD Development Co. (East Rand) v Novick* 1979 (2) SA 546 (CPD)

agreements intended to resolve the dispute between the parties regarding payment of the purchase price and transfer of the property.

[45] The agreement evidenced by Exhibit "E" appears to have been signed by both parties and the property to be transferred is mentioned. However, it is clear that other material terms of the intended agreement between the parties is not contained in Exhibit "E", for example, that it should be read together with the oral agreement, or that the amount of N\$ 260 000, must be considered together with the other amounts paid by the plaintiff as per the oral agreement. Exhibit "E" also does not contain any provision relating to who is responsible for the transfer costs, and whether it purports to be a purchase and sale agreement. Its full text reads as follows"

'AGREEMENT BETWEEN

AE VAN SCHALKWYK
i.d. 690304 5057 089

&

DEF DIAS
i.d. 710605 509 8089

The following agreement has been made between abovementioned parties.

- An amount of N\$ 260 000. 00 (two hundred and sixty thousand Namibian Dollars) will be paid for house Erf 1582, Tutengeni, Rundu in a period of six (6) months as from May 2008.
- After full payment is made, the house, Erf 1582, will be transferred to the Angolan Consulate of Rundu.

The abovementioned agreement is true and will be adhered to.

Signed

Signed"

[46] My understanding of the evidence of the plaintiff was that the agreement evidenced by Exhibit 'E' was not only intended to cater for occupational interest, but also to constitute an agreement on amounts that could finally be paid before transfer could take place, and further, moneys due by the Angolan Consulate to the plaintiff in respect of the sale of the property to them.

[47] That the terms of the oral agreement in terms of which payments amounting to N\$ 583, 020. 52 were made to the first defendant and the terms of Exhibit “E” have to be read together, admits of no doubt.

[48] It is also clear that the oral agreement dealt with a material part of the agreement between the parties, i.e. the purchase price, and so did the terms of Exhibit ‘E’. Both these agreements thus had to be in writing and signed by both parties. Therefore, on the authority of *Mack v Uni-Signal (Pty) Ltd 1993 NR 304 (HC) at 310 I – J*, I reaffirm my earlier conclusion that both the oral agreement and the agreement evidenced by Exhibit “E” are invalid for want of compliance with section 1 of the Formalities Act.¹²

[49] Mr. Boesak has referred me to *Herbstein & Van Winsen*¹³, for the proposition that if at the close of the defendant’s case, there is not sufficient evidence upon which the Court ought to give judgment in favour of the plaintiff, the defendant is entitled to be absolved from the instance.

[50] The test is stated as follows in *Ruto Flow Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 TPD at 309 E*:

‘If the defendant does not call any evidence but closes his cause immediately, the question for the Court would then be: ‘Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?’

[51] It is clear from plaintiff’s evidence that he had made payments to the first defendant pursuant to agreements which I found to be *void ab initio*. However, it

¹² That section provides as follows:

“Formalities in respect of contracts of sale of land and certain interests in land

1. (1) No contract of sale of land or any interest in land (other than a lease, mynypacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.

(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.”

¹³ Cilliers *et al*, 2009. *The Civil Practice of the High Courts of South Africa*, (5th Ed, Vol 1). Cape Town: Juta & Co Ltd, pp 921 – 922).

has also been established that the plaintiff has derived some benefit from the property in that he received payments from the Angolan Consulate, Rundu. The amount received from the Angolan Consulate is mentioned in Exhibit "C1".

[52] Plaintiff has paid an amount of N\$ 483, 020. 52 to the first defendant in terms of the invalid oral agreement, and further gave a Land Cruiser motor vehicle, a trailer and a bike, all of which together was valued by the parties in the amount of N\$ 100 000. To this extent he has been impoverished.

[53] In view of the fact that the further amount of N\$ 260 000, was not paid by him, and there is no evidence before me that he had to repay this amount to the Angolan Consulate in Rundu, plaintiff failed to prove that he has been impoverished in this regard. I am also not so certain as to whether the first defendant has been enriched by receipt of this amount, considering that he did not receive occupational interest for the period during which persons from the Angolan Consulate in Rundu remained in occupation of his property at the plaintiff's behest.

[54] Furthermore, plaintiff received a total amount of N\$ 1, 090, 000 from the Angolan Consulate in respect of property of the first defendant. On his own evidence, he spent N\$ 422 050, on renovations to the first defendant's property, thus retained the amount of N\$ 667, 950.

[55] According to plaintiff, of the amount of N\$ 1, 090, 000 received from the Angolan Consulate, the amount of N\$ 600 000¹⁴ was the purchase price of the property and an amount of N\$ 422 050 was for renovations at the property. This leaves a balance of N\$ 67, 950, which the plaintiff received directly as a result of his possession of the property during the period 01 October 2005 to 03 April 2007. In this regard, I refer to the evidence contained in Exhibit 'C1' and Exhibit 'D'.

[56] Considering that the plaintiff's evidence was that he had rented the property to the Angolan Consulate in Rundu, even though he was not so firm on this aspect, and considering that plaintiff's evidence further was that rental payments

¹⁴ Since the terms of the sale agreement cannot be given effect to, presumably this amount has to be refunded to the Angolan Consulate in Rundu.

would amount to only N\$ 42 000, per year, I must conclude that the amount of N\$ 67 950 must have been received by plaintiff as occupational interest.

[57] Accordingly, this amount must be deducted from the amount of N\$ 583 020. 52, which plaintiff had paid to the first defendant as part payment for the purchase price, leaving a balance of N\$ 515, 070. 52.

[58] I accordingly find that plaintiff has been impoverished and first defendant enriched to the extent of N\$ 515, 070. 52, and that this amount together with interest has to be refunded to the plaintiff.

[59] Mr. Vaatz submitted that interest could run from the date of service of the Combined Summons and I see no reason why I cannot accede to this submission.

[60] This brings me to the question of costs.

[61] I am not entirely satisfied with the fact that a complete judgment of the Court was not placed before the Supreme Court, and in view of the fact that the issues arising from the Formalities Act were canvassed with the parties in argument, this aspect of the record was also not placed before the Supreme Court.

[62] Furthermore, the fact that plaintiff did not make specific allegations founding the basis for the refund in his particulars of claim further complicated this matter.

[63] However, the first defendant is also not without blame, as he could also have placed the complete record before the Supreme Court. The matter was further complicated by the fact that the first defendant in his plea relied in part on cancellation of the purchase and sale agreement, which turned out not to be the case. In any event, no supporting evidence was provided for cancellation of the agreement.

[64] Plaintiff was thus partially successful in this matter, albeit on a basis other than what was envisioned by the Supreme Court. Plaintiff should thus be entitled to some measure of costs, albeit, not the full costs order.

[65] In the exercise of my discretion, and based on what I have set out above, I hold that plaintiff should be granted 70% of the costs of suit on a party and party scale.

[66] In the result, I make the following order:

1. The first defendant is ordered to refund to the plaintiff, an amount of N\$ 515 070, 52, plus interest thereon at the rate of 20% per annum from the date of service of the Combined Summons to the date of payment.
2. Plaintiff is awarded 70% of the costs of suit to be paid by the first defendant.

G Narib
Acting

APPEARANCE:

Plaintiff

A Vaatz
of Andreas Vaatz & Partners, Windhoek

First Defendant

AW Boesak
instructed by Dr. Weder, Kauta & Hoveka Inc,
Windhoek