

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 36453/2009

DATE: 23/09/2010

IN THE MATTER BETWEEN:

GERD GRAF

EXCIPIENT/DEFENDANT

AND

JOSEF WENGER

RESPONDENT/PLAINTIFF

JUDGMENT

OMAR, AJ

This matter relates to an exception by the defendant to the plaintiff's particulars of claim as failing to disclose a cause of action, as the plaintiff is not entitled in law to claim damages to protect both his reliance and expectation interest, i.e. the plaintiff is not entitled to claim as damages the amount he

invested as well as a return on his investment, and that the plaintiff's claims are separate and distinct causes of action which have been pleaded as a single cause of action.

The plaintiff's claim is predicated on an oral agreement which he alleges was concluded between the parties herein, Gerald Kaa and Angela Schmitzer during 1999.

In terms of the agreement, the parties would purchase a piece of land, register the land in the name of the defendant and improve the property to enable the parties to use it as a weekend getaway.

The plaintiff alleges that the defendant breached the agreement, and that he is accordingly entitled to cancel the agreement and as such, claims cancellation of the agreement and his investment of R100 00-00 and damages in the amount of R200-00-00 being his share of the present value of the plot.

It was submitted by counsel for the excipient that damages for breach of contract is usually computed on the basis of so-called positive interesse. Broadly speaking, this method involves a comparison between the aggrieved party's actual financial position (now that the breach has occurred) with the hypothetical financial position in which he would have been if no breach had occurred, i.e. if the contract had been duly performed by the guilty party.

The positive interest also known as the expectation interest, was the final interest which the aggrieved party had in the fulfilment of the contract and was represented by the difference between the economic position which the aggrieved party would have enjoyed if there had been n breach and the position in which he actually found himself as a result of the breach.

It was submitted further by counsel for the excipient that what the plaintiff has lost (positive interesse) as a result of the alleged breach of the oral agreement, is his use and enjoyment of the property i.e. he is not able to retreat to the property on weekends. It is for this loss that the plaintiff must be compensated by the payment of money or otherwise. The plaintiff has not quantified his loss on this basis.

The negative interest, also known as the reliance interest, covers only the expenses and loss caused by relying on the contract, i.e. the difference between the economic position the aggrieved party would have enjoyed if he had not made the contract at all and that in which he actually finds himself.

See: Mainline Carriers (Pty) Ltd v Jaad Investments CC 1998 2 SA 468 (C).

Further, it was submitted that in our law a plaintiff is entitled to recover his or her reliance interest in the form of damages for breach of contract, but this interest is limited to the extent of his or her expectation interest. The plaintiff's

loss based on a claim for negative interesse is for payment of the monies he invested in the project i.e. his investment of R100 000-00.

Counsel for excipient also referred to the American system, as referred to by the judge in the Mainline Carriers case, where it is clear that a party must elect whether to claim for his expectation or reliance interest pursuant to a breach of contract, or the party must claim in the alternative i.e. he cannot claim both his reliance interest and expectation interest in one action. The plaintiff does not claim the amounts referred to in the alternative.

It was further submitted on behalf of the excipient that the plaintiff's claim for repayment of his investment is a claim for his negative or reliance interest, to place him in the position he would have been had the agreement not been concluded (the first claim). The plaintiff's claim for his current value of the plot is a claim for his positive or expectation interest, in order to place him in the position he would have been had the defendant performed in terms of the agreement (the second claim). The plaintiff's claims are separate and distinct causes of action which have been pleaded as a single cause of action. The plaintiff is not entitled in law to claim damages to protect both his reliance interest and expectation interest i.e. the plaintiff is not entitled to claim as damages the amount he invested in the plot as well as a return on his investment. In this matter, if the plaintiff is entitled to claim both his expectation and reliance interest in this action, he would obtain compensation in excess of his actual loss.

It was submitted by counsel for the plaintiff (respondent) that damages for breach of contract, unlike damages for delict, are normally not intended to re-compensate the innocent party for his loss, but to put him in the position he would have been in if the contract had been properly performed.

Counsel for the plaintiff referred to the judgment of Farlam J in the matter of Mainline Carriers (Pty) Ltd v Jaad Investments CC 1998 2 SA 468 (C) where, he submitted, it was clarified under which circumstances a plaintiff may sometimes be entitled to claim his loss in the sense of the expenditure he would not have incurred if the contract had not been entered into. This clarification is partly due to preferring English to Latin, and describing damages for breach as protecting the plaintiff's expectation interest, reliance interest or restitution interest rather than talking about his positive interesse or negative interesse. A plaintiff's expectation interest is protected by putting him in the position he would have been in if the contract had been properly performed (the normal contractual measure of damages), his reliance interest is protected by putting him in the position he would have been in if he had never entered into the contract; and his restitution interest, which may overlap with his reliance interest, is protected when the contract has been cancelled and he claims and offers restitution by analysing leading American, Canadian, English and Australian authorities. Farlam J convincingly demonstrates that the majority decision in Hamer v Wall 1993 1 SA 235 (T) at 241G, that a plaintiff is not entitled to "elect whether to pursue either his negative or positive interesse" is out of step and cannot be supported. He is entitled to make that election, either on the American-

Canadian-English basis that there is no restriction on his right to choose, or on the Australian basis that reliance damages can be claimed only where it is not possible to predict what position the plaintiff would have been in had the contract been properly performed.

Counsel for the plaintiff also referred to a number of other cases in support of his arguments and contentions.

I shall now endeavour to apply the legal position as I understand it to the facts pleaded in the present case and the grounds of the exception thereto.

Counsel for the excipient argued that the decision in the *Hamer v Wall* case, *supra*, must prevail as it was a majority decision by two senior judges in this division.

In *Hamer v Wall*, *supra*, the majority held that a party to a contract who complains of a breach of the contract by another party thereto may only claim his positive interesse, i.e. such damages as would place him in the position he would have occupied had the contract been performed and the breach not occurred. The court further held that a plaintiff could not elect to pursue either his negative interesse or his positive interesse.

In casu, it is clear to me that the plaintiff's claims are separate and distinct causes of action which have been pleaded as a single cause of action.

In my view, the plaintiff is not entitled to claim as damages the amount he invested in the plot as well as a return on his investment as this would result in the plaintiff obtaining compensation in excess of his actual loss.

I fully agree with the decision of the majority of the judges in the Hamer v Wall case, supra, that a plaintiff is not entitled to elect whether to pursue either his negative or positive interesse.

The submission by counsel for the plaintiff/respondent that a plaintiff is entitled to make that election under the circumstances is not acceptable and is in my view untenable. The further submission by counsel for the plaintiff that the legal point taken by the defendant should be argued at trial is equally untenable.

In the result, I make the following order:

1. The exception is upheld with costs.
2. The plaintiff is ordered to amend his particulars of claim within a period of ten (10) days from the granting of this order.

SS OMAR

ACTING JUDGE OF THE HIGH COURT

Counsel for the applicant:

Instructed by:

Counsel for the respondent: TP Kruger

Instructed by: