IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.
13.12.2013 **DATE** — **SIGNATURE**

CASE NO: 46158/08

DATE:

IN THE MATTER BETWEEN

PIETER DANIEL HARTZER	PLAINTIFF
AND	
GERALD SABINO DE SOUSA	1ST DEFENDANT
MARIA JOSE DIOGO ROMANO DE SOUSA	2ND DEFENDANT
GILRUI FAST FOODS CC	3RD DEFENDANT
REGISTRAR OF DEEDS	4TH DEFENDANT
ABSA BANK LTD	5TH DEFENDANT

JUDGMENT

PHATUDI, AJ

INTRODUCTION

[1] The plaintiff in these proceedings instituted an action against the defendants arising out of alleged breach of contract annexed as "A" to its particulars of claim, which comprised three claims, each with alternative claims.

Claim 1 against the defendants was one based on the written agreement to purchase the first defendant's members interest[1] in third defendant ("the CC") dated 28 March 2008 ("the first contract") and the subsequent written cancellation agreement dated 12 June 2008.[2]

[2] In order to establish its claim against the defendants, the plaintiff testified and also called one witness to support its claim.

[3] The plaintiff testified that he saw a newspaper advertisement calling upon interested parties to make offers to the agent Mr Johan Kruger, for the purchase of a Maxi's franchise.

[4] He stated that the agent, Mr Kruger, took him to the business premises to conduct an inspection, and he found it to be neat and clean.

[5] He then also asked to conduct due diligence of the financial statements of the business, which were furnished to him by Mr Kruger.[3] The said financial statements represented the turn-over figures of Maxi's Willow Glen for the period

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[1] Bundle A pp27-34
[2] Bundle A pp35-36
[3] Bundle D p25

June 2007 to September 2007. These financials were shown to him before he was invited by the owners of the franchise for an interview. He further testified that it was the same Mr Kruger who furnished him with the business' balance sheet for the period ending 29 February 2008,[4] which reflected a net profit of some R284 108,00 per annum, with roughly R23 600,00 net profit generated per month.

[6] The witness also testified about the contents of the letter from the Financial House, owned by Martin Lemmer, dated 14 November 2007, in which it was confirmed that the business generated a net income of R26 179,00 after deductions of expenses. It was on the basis of this confirmation that prompted him to have made an offer.

[7] Having seen the financials shown to him by the agent the plaintiff then signed an offer to purchase.[5]

[8] The terms and conditions of the contract were that the first defendant sold the entire member's interest in and to third defendant, against payment of R620 000,00. The plaintiff would pay a deposit of R120 000,00 into the trust account of the estate agent of Messrs Morgen Hectares, and the balance of the purchase price was payable by way of transfer of a certain property known as Unit 24, Arcadia Gardens ("the property").

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[4] Bundle D pp49-52B
[5] Bundle D pp11-17

[9] Having signed the offer to purchase the witness received a letter of approval of his franchise issued by Maxi's restaurant dated 10 April 2008, and subsequently signed a franchise agreement with them.

[10] The agent, Mr Kruger, then asked the plaintiff to sign the CK2 forms, being for change of membership into its name, which was received by the Registrar of Close Corporations on 25 April 2008. Transfer of the membership's interest was, however, not registered as on 7 May 2008 for apparent defects in the CK2 form submitted for that purpose. According to his evidence no transfer of membership ever took place, not until on 10 0ctober 2008, long after the business of the CC had been closed.

[11] The membership of the entity still vested in first defendant as on 19 August 2008.[6]

[12] The plaintiff testified further that he was asked to sign a purchase agreement with one Ms Maria Jose de Sousa, the second defendant. The sale was for the property to be sold for R500 000,00 and occupation was to take place on 1 May 2008. It is not clear from the contract as to when was it signed.

[13] The witness, on questioning the involvement of Ms De Sousa in the sale contract, testified he was told that it was her "prerogative" to enter into the agreement, even though her son, first defendant, was supposed to be a party thereto.

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[6] Bundle D, p59-60

[14] The property to be sold was owned by the plaintiff and his spouse to whom he was married in community of property and of profit and loss. To that extent he was also asked to sign a mandate by the seller to transfer the property into the second defendant's name, which he signed on or about April 2008, and took occupation of the business on 1 May 2008, after having paid the deposit required into the agent's trust account.

[15] The witness further testified that he noticed some defects in the business which he required that they be fixed before he took occupation on 1 May 2008. He alluded to the credit card machine which had to be delivered first for customers to swipe on, but used first defendant's credit card line account for May 2008, with the understanding that first defendant would refund him.

[16] In the course of May 2008, the witness was called by Attorneys Stuart van der Merwe to settle the bond on the property. He, however, on account of his dissatisfaction asked him to "hold his horses", and not proceed with the process of transfer of the property and sale of the property concerned. He, the attorney, however, did not stop the transaction. His dissatisfaction, according to him, stemmed from the poor sales generated in May 2008 as opposed to the financials provided to him by Maxi's[7] summary of reports.

[17] He said comparing the summary of financial reports referred to, and the income statement for end February 2008, the profit margins would have been

[7] Bundle D pp29-48

R163 000,00 per month to arrive at a turn-over of R1 964 927,00 with a net profit of roughly R284 108,00 per annum. The witness testified that the figures submitted to him constituted a misrepresentation and were, therefore, false.

[18] The witness then instructed the transferring attorneys to halt the conveyancing process. He then also confronted the first defendant with the "grossly inflated figures". The parties then allegedly agreed to cancel the sale agreement and refund the deposit paid.

[19] The witness in order to solidify their parting agreement, sought to draw a draft cancellation agreement which was, at any rate, not signed by the parties.[8] First defendant undertook to consider its contents, but it was never ever signed.

[20] In an attempt to secure the first defendant's signature, the plaintiff testified that he drafted a "memorandum van ooreenkoms" dated June 2008, in which it sought to cancel the first agreement. The plaintiff signed it, but the first defendant did not append his signature thereon.

[21] The contract was, however, ultimately signed by the parties on 12 June 2008.[9] In terms of the cancellation agreement the parties agreed that:

(a) the parties entered into a written sale agreement for the purchase of Gilrui Fast Foods CC, and

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[8] Bundle D p99
[9] Bundle D pp146-147

(b) the buyer has already paid a deposit of R120 000,00, and

(c) the buyer is no longer interested to proceed with the sale transaction, therefore they agreed that

(d) the agreement dated 28 March 2008 is hereby cancelled,

(e) the seller shall immediately take repossession of the property, and the buyer shall restore possession thereof,

(f) both parties' rights regarding cancellation were reserved, and either party was at liberty to claim damages against the other party.

[22] Having signed the cancellation agreement ("second agreement") the plaintiff sought to claim ractification thereof, as the said document did not capture details pertaining to cancellation of the sale of the flat and the return of the deposit already paid.

[23] 0n 16 July 2008, it appears that second defendant paid an amount of R55 230,00 being for cancellation of the bond on the property as part of the transaction with first defendant.

[24] Despite the directive plaintiff issued to his attorneys to halt the transfer process, the plaintiff was issued with a letter dated 17 July 2008 from Stuart van der Merwe Inc in which it was confirmed that the property had been registered in the

Deeds office on 17 July 2008.[10] This was confirmation of registration of the flats into second defendant's name.

[25] The Deeds' search done on the property on 1 August 2008 revealed that the property was registered in the second defendant's name and registration was endorsed on 4 June 2008, even though he was loath to proceed with the sale or transfer thereof.

[26] The *bona fide* error referred to was in relation to the transfer and registration of the property in second defendant's name.

[27] Aggrieved by what transpired the plaintiff subsequently caused a letter of demand to be issued to the first defendant dated 19 August 2008. The witness stated that despite demand re-transfer of the property has not yet taken place to date.

[28] In an attempt to mitigate his loss, the plaintiff removed from the business the computer, TV-set and a jumping castle machine so as to defray its costs.

[29] He mentioned that he lost his rental amount as set out in exhibit "J2" which was amended in terms of rule 28 of the Uniform Rules of Court.

That, in short, was the evidence in chief for the plaintiff. The plaintiff was thereafter subjected to lengthy cross-examination by the defence counsel.

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[10] Bundle D p5

[30] Under cross-examination the witness testified that he signed the franchise form for the business on 2 April 2008, not as an agent but as a client, but could not offer any explanation why he mentioned himself as an agent in the same form.

[31] It was put to him by the defence counsel that Mr Kruger was an agent for both the witness and first defendant, which submission the witness did not dispute.

[32] The witness also stated that he relied on the financial statements presented to him as the reason why he had invested in the food outlet. The financial statements were handed to him by Mr Kruger who was the business broker.

[33] The witness conceded that such financials were not even signed by first defendant and thus, he could not have made any misrepresentation to him either.

[34] The first contract the parties concluded did not make any reference to financial statements as a pre-condition for materialisation thereof.

[35] The witness conceded that the sale was "voetstoots" with the result that first defendant could not have given any warranty or guarantee on the profits or its condition.

[36] The witness was referred to the cancellation agreement the parties signed. From the contents thereof the witness admitted that it was the buyer who no longer wished to proceed with the business, and there could, therefore, not have been any breach thereof on the part of the defendant.

[37] The witness was confronted with the question as to why no reference of cancellation or stoppage of transfer of the flats was made when the entire transaction was cancelled, and his answer was "it slipped" his mind.

[38] The transfer of the property into second defendant's name was cancelled at the instance of the plaintiff. As a result he conceded that first defendant could not have made any misrepresentation.

[39] The witness stated that his daughter-in-law had experience as an accountant of more or less ten years. She is the one responsible for having drawn the data on Maxi's daily sales for him and thus he could not have been misled.

[40] It was put to the witness that the parties' cancellation agreement (p146 Bundle E) did not stipulate that plaintiff would be entitled to a refund of the deposit paid, which version once again the witness did not dispute, and furthermore admitted that he was, therefore, not entitled to a refund.

[41] The witness also conceded that the agent was entitled to earn its commission from proceeds of the transaction, and in the event of cancellation the witness would remain liable for the agent's commission.

[42] 0n removal of the Plasma TV-set, the credit card machine and jumping castle, he conceded also that he exercised self-help contrary to the law.

[43] As to the seller's compliance with suspensive conditions, the witness answered in the positive and that such conditions were never amended.

[44] The witness conceded further that it was bound by the clause dealing with "roukoop" in the "first agreement".

ISSUE FOR DETERMINATION

The legal question for consideration is whether out of an agreement, in terms of which the parties had mutually agreed to terminate its operation, arises any obligations *inter partes*.

[45] Before I approach the question, I consider it useful to have a re-look at the contents of Bundle H which was signed by both counsel and presented before the court on 19 November 2013, as part of the record. The document referred to represents issues that are common cause and those in dispute.

[46] Issues found to be common cause could be summarised as follows:

46.1 The agreement of sale (annexure "A") attached to combined summons.

46.2 Plaintiff paid the first defendant a deposit of R120 000,00.

46.3 The member's interest in third defendant was transferred to plaintiff on 10 0ctober 2008, and was later re-transferred to first defendant subsequent to cancellation of sale contract.

46.4 The cancellation agreement (annexure "B") was concluded on the terms and conditions as set out therein.

46.5 0n 24 April 2008, the plaintiff and second defendant concluded a written sale agreement in respect of the property (the flats) on the terms set out in annexure "C", and plaintiff took all steps to transfer the property to second defendant. The property (Unit 24, Arcadia Gardens) was transferred into the name of second defendant on 17 July 2008.

46.6 The amount of R55 230,00 was paid to the conveyancers relating to the purchase of the property on 16 July 2008, although later plaintiff tendered the return of the business to first defendant, as the second defendant did not pay the full purchase price of the property to the plaintiff.

46.7 The plaintiff failed to transfer the unencumbered flat to the first defendant as part of the purchase price in terms of the "first agreement" of sale.

46.8 None of the terms and conditions of the "first agreement" were altered by written agreement to the contrary.

46.9 The plaintiff did not return the business of third defendant to first defendant after conclusion of the cancellation agreement.

[47] The issues that are and remain in dispute are the following:

47.1 whether Morgan Hectares was the first defendant's agent;

47.2 whether first defendant and/or his agent, during the facilitation or negotiations, made any representations to the plaintiff that the business of third defendant was profitable;

47.3 whether both parties complied with their obligations under the sale agreement;

47.4 whether the cancellation agreement made provision for a refund for the purchase price to the plaintiff;

47.5 whether the sale agreement was cancelled as a result of the plaintiff's failure or breach of contract;

47.6 whether first defendant is entitled to retain any money paid by plaintiff as "roukoop";

47.7 whether the written agreement in respect of property sold (annexure "C") was void;

47.8 whether ownership in the property was lawfully and duly transferred to second defendant;

47.9 whether the plaintiff's alternative claim for the payment of the purchase price of the property has become prescribed in law.

[48] In the present instance, the defendants have closed its case without having tendered any evidence in defence. Application for absolution from the instance

was immediately sought.[11] Both counsel were requested to submit written heads of argument in support of and opposing the intended application.

[49] For the purposes of this judgment I shall confine myself to the application for absolution from the instance brought on behalf of the defendants.

[50] It is trite that the test employed by the court at this stage of the proceedings is whether there is evidence upon which a court might find for the plaintiff.[12] The court has, of course, a wide discretion whether to grant or refuse application for absolution from the instance, and in the exercise of its discretion it will, as a matter of principle, not have regard to the credibility of witnesses unless the plaintiff's witnesses are blatantly lying or have so palpably broken down that the court cannot reasonably place reliance on them.

[51] I now proceed to analyse and evaluate the evidence adduced by the plaintiff in support of its claims and their alternatives, *seriatim* as follows:-

[52] The plaintiff's claim 1 is founded on a written contract of sale to purchase the first defendant's members interest in the third defendant. The contract aforesaid is dated 28 March 2008 ("the first contract"). This contract was subsequently cancelled in writing by the parties on 12 June 2008.

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[11] Rule 39(6) Uniform Rules of Court
[12] Carmichele v Minister of Safety & Security 2001 1 SA 489 (SCA)

[53] It appears that Morgen Hectares accountants were the drafters of the contract which the parties signed on 28 March 2008.

[54] The plaintiff contended that in view of the subsequent cancellation agreement, it was invariably entitled to the repayment of the purchase price of R620 000,00, or tacitly, it was a term of the cancellation that plaintiff would be entitled to such repayment.

[55] It was contended on behalf of the plaintiff that where obligations from the contract have been lawfully cancelled by mutual agreement, mutual obligations flowing from such obligation arise to restore performance received.[13] In the present instance, however, it was the plaintiff who declared, by mutual assent, in the cancellation agreement that he "nie met die transaksie wil voortgaan nie" and on plaintiff's own version, he has failed to transfer the unencumbered flat valued at R500 000,00 to the first defendant as stipulated in clause 7.3 of the "first contract" of sale.[14]

[56] It was the plaintiff who himself instructed the broker not to pay the deposit it received on 2 May 2008, being one day after taking over the business. On the contrary, the defendants have complied with all the suspensive conditions of the first contract.

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[13] Cash Converters South Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd 2002 1 SA 708 (C) at 717

[14] Bundle D p69

[57] The defendants thus contended further that the "first contract" was cancelled by the plaintiff's failure or breach of contract. In consequence in terms of clause 18 of the "first contract" the defendant is entitled to retain as "roukoop" all monies paid as liquidated damages. It was submitted that by virtue of the "roukoop clause" referred to, which was part of the main agreement, the plaintiff is not entitled to claim restitution in the manner guided by the authorities on the point.

[58] The general principle of our law is that a contractor who wishes to claim restitution has to be able and willing to restore performance he has received under the contract. The issue is whether the general principle is applicable to all instances where cancellation resulted from a mutual agreement, where there is no "guilty or innocent" party that occasioned termination of the parties' agreement. I propose to return to this proposition later in the course of this judgment.

[59] It suffices to mention that because of the plaintiff's failure to have paid in full the purchase price, but only the deposit of R120 000,00, which invariably resulted in breach of contract, plaintiff is precluded from claiming restitution if one follows the general principle alluded to. If this then is the attitude adopted by the defendants, the next inquiry is whether the defendant would be perfectly entitled to withhold the deposit paid as liquidated damages under the "roukoop clause".

[60] It is my considered view, having reviewed the authorities on the point, that where the parties inserted such a provision in their agreement cancelling the principal

agreement by mutual assent, as an instrument in terms of which one of the parties forfeits the performance or prestation made, that in itself, ought not result in injustice, inequity or prejudice, whatsoever.

[61] I now turn to deal with the plaintiff's first alternative claim. It was contended on behalf of the plaintiff that if found that the cancellation agreement (annexure "B") did not contain a tacit term which would entitle the plaintiff to repayment of the purchase price, then rectification thereof should be invoked on account of the mistake common to the parties as no provision was incorporated therein.

The defendant on the flip side of the coin, contended that both the cancellation agreements as crafted by the plaintiff were silent, not only with reference to their contents on rectification, but were simply devoid of the requirements for a claim on rectification. Counsel for defendants contended that there was no cogent evidence on the agreement on restitution that would otherwise justify rectification sought.

[62] Turning to plaintiff's second alternative claim, it was submitted on behalf of the plaintiff on the one hand, that the claim was one based upon an alleged material misrepresentation by the first defendant about the lucrative profitability of the third defendant's business, while it was allegedly operating at a loss, and the misrepresentation which was intentionally made, alternatively negligently made, induced the plaintiff to contract much to his detriment.

Counsel for the defendant submitted on the other hand, that during cross-examination, the plaintiff admitted that the first defendant had made no misrepresentations to him and furthermore the first contract (annexure "A") did not contain any warranties, guarantees or other representations on that aspect. This is apparent from clause 9[15] and 13.1[16] of the relevant contract. To that extent no liability could possibly be imputable to the first defendant based on alleged misrepresentation.

[63] Regarding plaintiff's third alternative claim, it was submitted that the "second agreement" namely cancellation agreement, was void as it failed to state in which manner the purchase price was payable and to that extent it offends the provisions of the Alienation of Land Act 1981.[17] Furthermore, it was said that plaintiff did not possess the intention to transfer the property to second defendant as it did not pay the purchase price of R500 000,00 to the plaintiff. For that reason alone, plaintiff is thus entitled to re-transfer of the property in his name, alternatively the underlying *causa* for transfer would serve as part of the purchase price in respect of the first sale contract now resiled by agreement. In the same breath, the second defendant would have been unjustifiably enriched at the expense of the plaintiff if the property is not re-transferred to him. Consequently, plaintiff seeks a refund of R500 000,00 and interest from the second defendant.

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[15] Bundle D p70
[16] Bundle D p71
[17] Act no 68 of 1981

Counsel for defendants, however, submitted that as plaintiff conceded that the "second contract" was a "separate contract" and unrelated to the "first contract" it could reasonably not have served as a cushion to launch a claim as part of the purchase price of the refund claimed. The plaintiff on the other hand, was the one who stopped or halted the transfer process from proceeding even though it turned out that the transfer and registration of the property concerned was effected at his own instance[18] when he authorised Attorneys Stuart van der Merwe to proceed with the transfer of the property into the name of second defendant. The argument that plaintiff lacked intention to transfer the same is unsustainable. In the present instance the plaintiff is not entitled to re-transfer of the property on the grounds it formulated its claim.

[64] In so far as claims 2 and 3 are concerned, the plaintiff's claim is couched briefly as follows:

That these are claims for special damages which the plaintiff claims fell within the realm contemplated by the parties, should the first defendant commit a misrepresentation. The damages alleged were also set out, apart from the evidence, in its Claim 2 (pp16-19) and Claim 3, which damages it was argued, flow from the misrepresentation committed.

As already seen the plaintiff admitted under cross-examination that no misrepresentations were committed by the first defendant, and no compensation

[18] Bundle E pp100-101

for the damages attendant to the conclusion of the "first contract" was pleaded by the plaintiff for the breach of contract. Accordingly, it was submitted on behalf of defendants that no finding be made in favour of the plaintiff at this point of the proceedings.

[65] There remains the first defendant's claim in reconvention which calls for attention. The first defendant, in short, claims the forfeiture, by virtue of the "roukoop" clause in the "first contract", to retain all monies paid as liquidated damages. I propose to revert to this question when dealing with the *ratio* for judgment herein.

[66] I have earlier on referred to Bundle H signed by both counsel for the parties on 19 November 2013, and which formed an integral part of the record. This document outlined briefly the issues that were common cause between the parties and also whittled down those issues that are and remain in dispute to which I shall focus attention on.

[67] From the evidence it is plain that no misrepresentation, whether intentional or negligent, was ever made by the first defendant and/or his agent during the negotiations that led to the conclusion of the agreement of sale (annexure "A"). In the same breath there is no evidence that the first defendant and/or his agent ever made any misrepresentation or warranty on the profitability of the business of the third defendant.

[68] From our common law it seems the weight of authorities suggest that a party who has been induced to enter into a contract by the misrepresentation of an existing fact, is entitled to rescind the contract provided that the misrepresentation was material, and was intended to induce him or her to enter into the contract, and did so induce him. The same principle obtains whether it was fraudulent (intentional) or negligent, both of which if established, could give rise to a claim in damages. *In casu* it is clear that the "first agreement" of sale (annexure "A") was terminated by mutual agreement between the parties, ("the second agreement") not due to any form of misrepresentation by any of the defendants, but at the instance of the plaintiff who was the purchaser. The express words of the existing clause found in the cancellation agreement were that "die koper nie met die transaksie wil voortgaan nie" and consequently "die ooreenkoms gedateer 28 Maart 2008 word hiermee skriftelik gekanselleer".

[69] Applying the ordinary canons of construction to the terms of the cancellation agreement referred to, nowhere was it alleged that the cancellation was on account of any alleged misrepresentation, in whatever form, on the part of the first defendant. This finding is of course supported by the concessions made by the plaintiff itself under cross-examination. By the same token no misrepresentation was alleged to have been made by the parties' agent who would otherwise have been a third party to be held liable for damages either, if it was the guilty party.[19]

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[19] De Kock v Gafney 1914 CPD 377 at 380

[70] Having found that the misrepresentation could not be imputable to the first defendant, the next leg of the inquiry is whether the plaintiff would be entitled to a refund of either the deposit paid, or the purchase price allegedly paid or said to be due to it in terms of the "cancellation agreement" between the plaintiff and first defendant.

[71] Following what transpired when the parties signed the "cancellation agreement" I am of the opinion that, the reason advanced by the plaintiff when it sought to resile the "first contract" dated 28 March 2008, this act constituted no more than a waiver or discharge by agreement. The content of the "cancellation agreement" almost invariably shows that when the parties to an existing contract come together in an agreeing frame of mind, and agree to vary or discharge their contract, the transaction amounts to a variation or discharge by agreement, or a cancellation by mutual assent.[20] Where, however, one of the parties by conduct has evinced an intention not to enforce one or more or all of his/her rights conferred by the contract, in which event there can be no waiver, then such a departure from the contract may be characterised in so many words ranging from abandonment, acquiescence, release, renunciation or surrender, relinguishing of a right, or even waiver.

[72] In consequence it follows from the contractual nature of waiver of a right conferred by the terms of a contract that the intention to waive must be

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[20] Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 4 SA 569 (A) 588F-J

communicated to the other party,[21] *In casu*, this requirement has undoubtedly been fulfilled. The effect, in my view, is that when the cancellation of the contract has been communicated and accepted by the non-resiling party, though in an agreement, the consequence thereof become a donation for whatever has been performed under the contract before it became cancelled.

[73] Having expressed the aforegoing proposition one then ought to consider whether in the present case, where the obligations under the contract have been lawfully cancelled by mutual consent in the circumstances outlined above, does obligations arise to restore performance received, in this case by the first defendant.

[74] Following the general principles of our law, as crystalised in case law in particular the *Cash Converters SA*'s case,[22] it seems trite that generally on cancellation of a contract it is incumbent on both contracting parties to restore each to the other what has respectively been received thereunder.[23] The rule also applies equally to contracts cancelled by reason of, for example, misrepresentation or contracts cancelled by reason of breach of the contractual provisions. The duty applies to both the "innocent" and "guilty" party, although the rule has some limitations and exceptions. Although the learned judge COMBRIE, J, (with SELIKOWITZ, J concurring) did not specifically refer to any isolated limitations or exceptions as he considered it unnecessary to delve into them, it should be acknowledged that the crux of the topic is derived from considerations of equity in which notions of unjustified

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[21] Traub v Barclays Bank Ltd 1983 3 SA 619 (A) 634H
[22] 2002 1 SA 708 at 717H-J (full bench judgment)
[23] See also De Wet and Van Wyk *Kontraktereg en Handelsreg* 5th ed at 220-221

enrichment may have a role to play. In my opinion the limitations or exceptions referred to would probably encompass the Roman-Dutch law concept of "roukoop" normally found in most commercial transactions.

[75] Be that as it may, the parties' contract dated 28 March 2008 which had in it the so-called "roukoop clause"[24], has been mutually cancelled in the "second cancellation agreement" dated 12 June 2008 which, in my view, would have fallen by the way side. The difficulty, however, is that no provision has been made therein specifically for the refund of the deposit of the R120 000,00 already paid to first defendant.

[76] This then raises the question whether, because of no breach of contract was ascribable to the first defendant, and the fact that there was no misrepresentation either that could be linked to the first defendant, on what basis, having had regard to the "limitations and exceptions" referred to in the *Cash Converters SA* case, *supra*, would the plaintiff be entitled to a refund of the deposit claimed. The principles of unjustified enrichment would, in my view, not find application since the cancellation of the first agreement, which was validly and lawfully concluded, was not due to any fault on the part of the first defendant.

[77] Furthermore it was the plaintiff himself who caused the transfer of the property which otherwise would have served as a balance on the purchase price to be halted.

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[24] Clause 18, annexure "A", bundle A, p34

[78] It was the plaintiff himself who, on his admission, failed to tender restitution. Generally, a party to a contract who wishes to claim restitution has to be able himself or herself, to be willing to restore what he/she has received under the contract.[25]

[79] The plaintiff submitted that should it be found that a tacit term cannot be implied from the cancellation which would entitle the plaintiff to a repayment of R620 000,00 then rectification ought to be invoked to the salvation of the plaintiff.

[80] It is trite that rectification has as its object to have a written contract conform to the common intention of the parties, consequently, it overrides the parol evidence rule. The *onus* of proof rests squarely on the party seeking its assistance. Such party must establish the following requirements:

(a) an agreement between the parties, reduced to writing;

(b) that the written agreement did not reflect the common intention of the parties correctly;

(c) an intention by both parties to reduce the agreement to writing;

(d) a mistake in drafting the agreement.[26]

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[25] Van Schalkwyk v Griesel 1948 1 SA 460 (A) at 472

[26] Propfokus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd 2007 3 All SA 18 (SCA)

[81] The plaintiff crafted two draft cancellation documents[27] and none of which could be reasonably be said to encapsulate the requirements for ratification. Apart from that, none of the documents referred to included in it a reliance on or any reference to ratification as a remedy common to the parties.

The document having been drafted by the plaintiff's attorney no evidence was led or provided that the attorney erred in the drafting thereof. In the circumstances, I find that the "first agreement", just like the "second agreement" did not suggest that they did not correctly reflect the common intention of the parties or that there was an error in drafting the relevant documents to warrant the relief sought. In the circumstances the claim for ratification ought to fail for lack of substance.

[82] The plaintiff's third alternative claim, seeks relief based on the agreement of sale between it and second defendant in terms of which it purported to sell the property known as Unit 24 Arcadia Gardens for the purchase price of R500 000.00 ("the property").

It is, however, the plaintiff's case that the said agreement is and has at all material times been void by virtue of the provisions of the Alienation of Land Act 1981[28], alternatively vague which renders it void in that the manner in which the purchase price was to be paid by second defendant was not spelled out in the contract and

[27] Bundle D, p99, Bundle E p145
[28] Act No 68 of 1981

furthermore the plaintiff did not intend to transfer the property in ownership to second defendant either.

Having not paid the purchase price it was therefore entitled to a re-transfer of the property to it as the real *causa* for the transfer was to serve as part of the purchase price of the "first contract" of sale and in consequence, the second defendant would be unjustly enriched at the expense of the plaintiff if the property is not re-transferred to it.

[83] I must remark that the third alternative claim has been couched in a multi-pronged fashion in that it was founded on a multiple sub-causes of action within an action ranging from the invalidity of the sale agreement, lack of intention to transfer property allegedly sold, to unjustified enrichment, all of which stand in my view on a different footing.

Be that as it may, I have already found that the "first contract" of sale, whether void or voidable at the instance of the aggrieved party has been cancelled by mutual agreement between the parties thereto. In my view, the moment the parties agree to discharge the terms and conditions of their principal agreement by a subsequent written agreement, the substance of and the rights and obligations flowing therefrom correspondingly, ought to collapse with it and the parties may under certain circumstances tender restitution to each other. The general rule as already seen is that cancellation of the agreement exposes the contractants to

restore to each other the prestations each received. To this general rule, as stated by CONRIE J in the *Cash Converters S.A's* case, *supra*, there[29] are "numerous qualifications, limitations and exceptions to the rule."

[84] I venture to suggest that such "numerous qualifications, limitations and exceptions" the learned judge referred to, include instances for an example, where the cancellation was actuated by one party on grounds other than misrepresentation or breach of contract which was not due to any fault on the part of the defendant. In the present instance, clearly the "cancellation agreement" dated 12 June 2008, could not be said to be at the instance of the first defendant, but as matters stand, it was at the initiation of the plaintiff himself, the buyer who declared therein that "die koper nie met die transaksie wil voortgaan nie"[30].

In the circumstances it should be accepted that in the absence of any misrepresentation or warranty made or alleged against the first defendant, nor breach of his contractual obligations, plaintiff cannot be heard to argue that applying the general rule of restitution he is entitled to a refund of the deposit paid or let alone payment of R500 000.00 allegedly made when the property was transferred. In this way there is no reason to hold the first defendant liable to refund or tender any restitution and accordingly, he cannot be faulted. The transfer of the property purported to be sold to second defendant worst still, was frustrated and halted unilaterally by the plaintiff on his own accord.

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[29] P 717 H- of the judgment
[30] Bundle A, Annexure B, p35-36

[85] There is accordingly weighty evidence on record that reveal it was the plaintiff who repudiated not only the "first agreement of sale" but also the "second agreement" of sale of the property with second defendant. In the result, the contention that plaintiff did not intend to effect or proceed with the transfer of the property purported to be sold to the second defendant is a far cry in the bewilderness which cannot avail him.[31]

[86] To the extent that circumstantially it was in fact the plaintiff who ostensibly repudiated the "first agreement" and the "second agreement" the repudiation could well have amounted to a waiver and discharge thereof, as it had voluntarily surrendered its rights of which it was quite familiar with. In *Ex Parte Sussens*[32] MURRAY J stated that:

> "The necessity for a full knowledge of the law in the case of waiver follows from the principle that waiver is a form of contract in which one party is taken deliberately to have surrendered his rights: there must therefore be proof of an intention so to surrender which can only exist where there is knowledge both of the facts and the legal consequences thereof."

[31] Bundle E, pp 100-101
[32] 1941 (TPD) 15 at 20

In the present case no doubt the plaintiff who at all material times was assisted by its attorneys had acquired knowledge both of the facts (that he did not want/wish to proceed with the transaction and when he halted transfer of the property) and the legal consequences of his conduct.

[87] Returning to the "second sale agreement" of the property it seems plain that clause 8 required the plaintiff to have first placed the second defendant *in mora* before it could initiate an action to recover the deposit allegedly paid and/or to claim re-transfer of the property. In the present instance, however, the contract did not make provision for registration of a bond or the provision of acceptable guarantees. In consequence, the implied term that arises is that payment was presumed to be by way of cash. For that reason, it cannot be said that but for the undetermined method of payment alone the contract is void and not rectifiable. Such a contract may in my view be saved by a tender of cash when or if it does not make provision for payment in cash, but by some other method to be negotiated[33]. The method of payment may, however be made sufficiently certain by implied terms provided they can be implied from the document itself.[34]

[88] An examination of the "second agreement" of sale of the property reveals that the contract is not a nullity for uncertainty or vagueness for failure to have set out the manner the purchase price had to be paid. That approach as contended for cannot be sustained and in the result the plaintiff's conditional third alternative claim is

[33] *Dold v Bester* 1984 1 SA 365 (D)
[34] *Gandhi v SMP Properties (Pty) Ltd* 1983 1 SA 1154 (D)

with respect, irrelevant. See: the general principle in *Engelbrecht v Nel*[35] which, however, does not apply in the facts of the present case.

[89] Taking into account the aforegoing considerations and bearing in mind the facts as well as the evidence adduced in the course of the plaintiff's case, I am of the firm view that there is no (sufficient) evidence at this stage of the proceedings upon which this court might reasonably find for the plaintiff. I am fortified in my conclusion as the plaintiff has failed, up to the moment when it closed its case, to make out a *prima facie* case. The reason for conclusion I have reached is that the plaintiff's evidence and that of its witness combined, have been pourous and so palpably broken-down that the court would not reasonably have had reliance upon them. By the same token, I do not believe that even if assuming for a moment, that any of the defendants would have elected to testify in own defense, the possibility of enhancing the plaintiff's claims would have been not only remote, but also obscure.

[90] Having said so, I come to the conclusion that the application for absolution from the instance ought to succeed in respect of all the claims made against the defendants.

[91] There remains the question of the first defendant's counter-claim which invariably is based upon a provision in the "first contract" which entitled him to retain all monies paid as liquidated damages brought about by the "roukoop clause' found

[35] 1991 2 SA 549 at 552

in the contract. In order to succeed with the forfeiture sought, the first defendant has to allege and show by way of evidence and/or on a balance of probabilities the breach or scope of plaintiff's liability that it is entitled to the forfeiture of the deposit of R120 000.00 and/or the R150 000.00 as liquidated damages.

Counsel for the defendant submitted that such an entitlement was apparent from the "first agreement" of sale, (clause 18) and thus there was in fact no need for the first defendant to have presented evidence in order to succeed with his claim in reconvention. I am unable to subscribe to this submission for the following reasons:

(a) It is a hard fact that the "first agreement" dated 28 March 2008 has been formally rescinded or cancelled by mutual agreement in a written contract dated 12 June 2008, even though the cancellation was not actuated by the first defendant or was due to fault associated with it.

(b) Accordingly, it cannot be said that the right to claim forfeiture arises *ex facie* that contract which no longer existed when the claim in reconvention was circumscribed and formulated as its existence has extinguished.

(c) Evidence was therefore, necessary to establish the continued existence of the restitution clause in the event of contestation by the plaintiff.

(d) In the present instance the first defendant chose to close its case and did not lead evidence in pursuance of its forfeiture claim.

(e) Seeing that a ruling on absolution has been granted already which naturally does not finally determine or end the rights of the parties the doors for future resuscitation by the plaintiff of its claim are not completely shut off.

(f) The legal scriptures as found in case law, prescribe that where there is a claim and a counterclaim arising from the same facts, and where the evidence on the merits is in the nature of things bound to be inextricably interwoven, a trial court should be very chary of granting absolution because thereafter the court has in any event to hear the defendant's case and to weigh the evidence as against that of the plaintiff in regard to which it has already give a decision.[36] In the latter case, however, the appeal court found that the magistrate has misdirected himself on the matter before him on the test to be applied in deciding on absolution and in doing so, he evaluated and rejected the plaintiff's evidence at that stage and he so placed himself in the untenable position in that in endeavoring to assess the defendant's evidence he weighed it against the evidence which rejection was at that stage an irreversible decision."[37]

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[36] *Atlantice Continental Assurance Co of SA v Vermaak* 1973 2 SA 527D-E
[37] At p527C-E of the *Vermaak's* decision.

[92] In the light of these considerations and for the reasons outlined, I refrain from pronouncing on the sustainability or otherwise of the first defendant's claim in reconvention in relation to the deposit as the defendant was already in possession of the R120 000.00 deposit paid by the plaintiff. Accordingly to make an order for forfeiture would in my opinion be a manifest absurdity and an exercise in futility. I therefore find that the following order would be appropriate:

Court Order:

1. That absolution from the instance in respect of all claims is granted.

2. The plaintiff is ordered to pay the costs.

M G PHATUDI
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

DELIVERED ON:	13 December 2013
HEARD ON:	19 November 2013
FOR THE PLAINTIFF:	Adv H M Barnart
INSTRUCTED BY:	Bekker Attorney
FOR THE 1ST AND 2ND DEFENDANTS:	Adv D B du Preez SC
INSTRUCTED BY:	Werner Kruger Attorneys
FOR THE 4TH AND 5TH DEFENDANTS:	No Appearance