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

CASE NO: A3113/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
10/5/2022	
DATE	SIGNATURE

In the matter between:

BIRRELL, MICHAEL Appellant

and

ALEXANDER, CLIFFORD Respondent

JUDGMENT

MOORCROFT AJ (MAZIBUKO AJ concurring):

[1] In this matter I make the following order:

1. *The appellant's application for condonation for the late prosecution of the appeal is granted;*
2. *The appeal is reinstated;*
3. *The appellant is ordered to pay the costs of the application for condonation on the unopposed scale;*
4. *The appeal is partly upheld and the order made by the Learned Magistrate is set aside and substituted by the following order:*
    - *4.1. The plaintiff's claim is dismissed;*
    - *4.2. The defendant's counterclaim is dismissed;*
    - *4.3. Each party shall pay his own costs.*
5. *Each party shall pay his own costs of the appeal.*

[2] The reasons for the order follow below.

Introduction

[3] This is an appeal against a judgment and order of the Johannesburg Magistrates' Court in Johannesburg wherein the Learned Magistrate granted judgment in favour of the respondent (the plaintiff *a quo*) for the payment of R 52 617, 72 and ancillary relief, and dismissed the counterclaim of the appellant (the defendant *a quo*). The appellant persists with its counterclaim only in respect of one claim.

[4] The parties are referred to below as they were in the Magistrates' Court.

Condonation for late prosecution of the appeal

[5] The appellant seeks condonation for the late prosecution of the appeal and for the non-compliance with the sixty-day period prescribed by Rule 51(1) of the Uniform

Rules of Court. The application is not opposed.

[6] The factors which a Court must consider when exercising its discretion whether to grant condonation[1] includes the degree of lateness and the explanation for the delay. The appellant was one month late in prosecution the appeal and the delay is satisfactorily explained. The delay was not wilful. I conclude that condonation ought to be granted and that the costs associated with the condonation must be borne by the appellant on the basis that it seeks an indulgence.

The merits of the appeal

[7] The parties are referred to below as they were referred to in the court *a quo*, in other words the appellant is referred to as the defendant and the respondent is referred to as the plaintiff.

[8] The plaintiff claimed payment of the amount of R52 617,72 as “contractual damages” based on an agreement between the parties that he would be entitled to a refund of monies which he had invested into a partnership relating to the purchase and on-sale of an immovable property.

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1 See Section 84 of the Magistrates’ Courts Act, 32 of 1944 and the discussion by Erasmus et al *Superior Court Practice* 2015, D1- 669 to 678, 688, and see *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) 477A–B and *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) 720E–G.

[9] The defendant defended the action on the ground that there was no such agreement and counterclaimed for damages suffered by him in the amount of R117 617,72 as a result of the plaintiff's repudiation of the partnership agreement. The defendant also raised a special plea of non-joinder which was dismissed and which is

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not in issue in the appeal. The plaintiff and the defendant testified and no other witnesses were called.

Analysis

[10] The parties concluded an oral partnership agreement in May of 2014 in terms of which they would purchase two immovable properties referred to as the Junker property and the Silika property, and then sell the properties for a profit.

[11] The parties would be jointly liable for all costs associated with the purchase of the immovable properties including costs related to costs of the eviction of occupiers at the immovable properties. The profit would be split equally.

[12] The plaintiff and his wife then signed offers to purchase in respect of both properties. The purchase of the Silika Street property was never finalised but the sale agreement in respect of the Junkers property provided for a purchase price of R170 000 payable by a deposit of R40 000 and the balance upon transfer. Payment was to be secured by way of the usual guarantee.

[13] The breach clause of the agreement contained a rouwkoop[2] provision.

[14] The plaintiff paid:

14.1 R40 000,00 as the deposit for the Junker Property;

14.2 R9 117,72 and R3 500,00 (i.e. R12 617,72) towards legal fees for the eviction process at the properties.

[15] The defendant paid:

15.1 R14 599,64 towards legal fees for the eviction process at the Junker property;

15.2 R 30 000,00 towards the seller of the Junker property as an 'incentive' to negotiate.

[16] The defendant counterclaimed these amounts together with an amount of R75 000 in respect of a loss of profit on the sale of the two properties. In the appeal the defendant only seeks an order for payment of the R30 000.

[17] There were various delays and the defendant no longer wanted to proceed with the partnership business. In September 2015 electronic mail correspondence took place between the parties:

2 As to which, see *The Mine Workers' Union v J Prinsloo; the Mine Workers' Union v J P Prinsloo; the Mine Workers' Union v Greyling* 1948 (3) SA 831 (A).

17.1 On 7 September 2015 the plaintiff wrote:

> *"Hi Mike, I have a proposal or you. Please pay me all the monies that I have spent on these 2 cases and you can have both. You have not reverted back to me as promised. I trusted you with how these two deals were supposed to pan out, but you don't seem to be interested anymore. I have tried for over a year to push both. Eviction orders were granted for both and nothing else has happened. The amount in question is R 40 000, 00 to Sauls and R 12 617, 72 to MJS R 52 617, 72. Please check and advise soonest."*

17.2 The defendant replied on the same day to refer to amounts due by the partnership to a third party and charges that needed to be laid with the authorities.

17.3 The plaintiff in turn responded by querying that any amount was due to a third party, and stated:

> *"I am done with both cases. Mike. You have done nothing about both matters for this year. You are not responding to my proposal. As I said, my patience is up with asking you for months on end, to no avail. I want out of these two cases. Tomorrow eve @ 8? Best regards Clifford C Alexander."*

17.4 The defendant suggested a meeting.

17.5 The plaintiff responded on 8 September 2015:

> *"Mike, my 1st email states my case clearly. I do not want any further part in both."*

17.6 The defendant replied:

> *""I will go on then pay your money back on registration."*

17.7 The plaintiff then wrote:

> *"Thanks Mike. Please note that both otps[3] are cancelled forthwith as far as me and Brenda[4] is concerned"*

[18] This evidence is at odds with the case pleaded by the plaintiff,[5] namely that –

18.1 the defendant would reimburse the plaintiff the amount of R52 617.72;

18.2 This payment would be made when both properties had been transferred, alternatively within a reasonable time from 8 September 2015, whichever occurred first;

18.3 the plaintiff would then assign his rights in the two properties to the defendant;

18.4 the partnership would be dissolved once payment was made.

[19] Once the plaintiff had cancelled the agreement of sale and the offer to purchase, there was nothing to assign.

[20] In the absence of *consensus* there can be no contract.[6] The evidence and argument show that the parties had widely divergent views of what was agreed in September 2015. However, the email correspondence seems to indicate that

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3 The offers to purchase the two properties.
4 The plaintiff's spouse.
5 Particulars of claim, paragraph 6, Caselines 001-252 to 001-253 and 001-275.
6 *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 993E-F.

the partnership was now at an end and the defendant intended to continue with the partnership business.

[21] The partnership was established to purchase the two properties and once the plaintiff cancelled the agreement of sale of the Junker property it was no longer possible to continue with the business. The deposit for the Junker property was forfeited as rouwkoop. Subsequently, in 2016 the defendant was however able to purchase the Junker property with a new partner and a deposit was paid again, and then re-sold at a profit to a third party purchaser.

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[22] The plaintiff did not set out to prove its pleaded case. The evidence that was led, related to a different contract allegedly set out in the email correspondence. The case on the evidence then turns on two questions:

22.1 The meaning of the phrase *'your money'*. It could refer to the deposit or the legal costs or to both amounts, and

22.2 the meaning of the phrase *'on registration'*. It could refer to registration of the Junker property pursuant to the offer to purchase made by the plaintiff and the resultant agreement of sale, or the registration of the transfer of both properties, or to the transfer of the Junker property at the behest of the defendant independently of the partnership business.

[23] The agreement relied on by the plaintiff is so vague that no real meaning can be attached to it.[7]

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7 Compare *Levenstein v Levenstein* 1955 (3) SA 615 (SR) [8]
See *Pillay v Krishna* 1946 AD 946.

[24] A plaintiff has to prove its case on a preponderance of probabilities. The plaintiff failed to prove the agreement[8] alleged in the particulars of claim and also the agreement alleged to be apparent from the email correspondence and relied upon in the appeal. I therefore conclude that the Learned Magistrate erred in granting judgment in favour of the plaintiff.

[25] The defendant abandoned its counterclaim for R75 000 as loss of profit and for the amount of R14 599,64 paid towards the eviction of unlawful occupiers. The amount of R30 000 that was paid as an "incentive" remains.

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[26] This payment was admitted in a replication that was subsequently withdrawn and the Learned Magistrate did not find it necessary to deal with the "validity of the withdrawal of the admission" as the plaintiff could not dispute the payment in evidence.[8]

[27] In paragraph 3.1 of his counterclaim[10] the defendant alleged that he suffered damages in this amount of R30 000 *"in respect of the deposit paid for the Junker Street Property."* It was however common cause that the whole deposit of R40 000 was paid by the plaintiff and it was not seriously suggested that the R30 000 was paid in terms of the written contract for the sale of the Junker property.

[28] In my view the defendant did not prove this amount on a preponderance of probabilities and the counterclaim stands to be dismissed.

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8 Judgment, p 30, footnote 1 (Caselines 001-217) [10]
Caselines 001-290.

Costs

[29] The appeal is upheld in part. In the order made on appeal, both the claim and the counterclaim are dismissed because neither party could prove his claim *a quo* on a preponderance of probabilities.

[30] Under these circumstances it is appropriate to order each party to pay his own costs.

Conclusion

[31] For these reasons I made the order set out in paragraph 1 above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

N MAZIBUKO

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **10 MAY 2022**

COUNSEL FOR THE APPELLANT: T LIPSCHITZ (DEFENDANT):

INSTRUCTED BY: PRESHNEE GOVENDER ATTORNEYS

COUNSEL FOR RESPONDENT (PLAINTIFF): DM POOL

INSTRUCTED BY: MERVYN SMITH ATTORNEYS DATE OF THE APPEAL HEARING: 25 APRIL 2022

DATE OF JUDGMENT: 10 MAY 2022