IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no: 49891/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

19/8/2018

In the matter between:

NCEBA ELLIOT KONDILE **Plaintiff**

and

MARTINUS WILHELMUS NOTHNAGEL N.O. **Defendant**

JUDGMENT

MOULTRIE AJ

Introduction

[1] The plaintiff was the successful bidder at an auction in respect of a residential property owned by the estate of the late father of the defendant, of which the defendant was the executor. The parties concluded a written sale agreement that

required the plaintiff to pay a "*non-refundable*" cash deposit immediately and, within 30 days of the acceptance of the sale by the defendant, to furnish a suitable guarantee for the balance of the purchase price, which was to be paid upon transfer.

[2] The plaintiff duly paid the deposit and took occupation of the property, but did not furnish the required guarantee having discovered that no certificate of occupation had been issued in respect of the buildings on the property by the relevant local authority in terms of section 14(1)(a) of the National Building Regulations and Building Standards Act No 103 of 1977 ("**the Building Act**"). The plaintiff does not, however, purport to have cancelled the agreement.

[3] Relying on the plaintiff's failure to furnish the guarantee, the defendant then cancelled the agreement in terms of a *lex commissoria* contained in the sale agreement, and relied upon a forfeiture clause which entitled him to "*retain [the deposit] as 'Rouwkoop'*". The plaintiff does not dispute the validity of the cancellation, but does seek repayment of the deposit despite the *rouwkoop* clause. The defendant also requested the plaintiff to vacate the property. The plaintiff initially refused, but eventually did so in December 2014 after the defendant had obtained an eviction order. The defendant made certain alterations to the property pursuant to which he obtained a certificate of occupation. He then sold the property to a third party.

[4] The plaintiff instituted the current action seeking the return of his deposit. In disputing the plaintiff's right to reclaim the deposit, the defendant relies upon the abovementioned *rouwkoop* clause, as well as a '*voetstoots*' clause in the sale agreement. In addition, the defendant raises various counterclaims, some of which seek to enforce performance of obligations that he alleges were incurred by the plaintiff prior to the cancellation of the agreement, and others of which are for damages.

The sale agreement and the relevant facts

[5] The terms of the sale agreement insofar as they are relevant to the determination of the disputed aspects of the plaintiff's claim and the defendant's various counterclaims in this matter were as follows:

"4. PURCHASE PRICE

The PURCHASE PRICE ... will be payable by the PURCHASER, as follows:

4.1 A cash deposit of 10% (ten percent) to the amount of R210,000 of the PURCHASE PRICE to the AUCTIONEER immediately on the fall of the hammer, which the PURCHASER hereby authorizes the AUCTIONEER to pay over to the SELLER; and

4.2 The balance of the purchase price shall be paid upon registration of transfer of the PROPERTY ..., and pending registration of transfer, shall be secured by means of a suitable guarantee issued by a Financial Institution acceptable to the SELLER. The said guarantee shall be delivered to the CONVEYANCER ... within 30 days from the DATE OF ACCEPTANCE, which guarantee shall be payable free of exchange.

4.3 ...

4.4 The deposit shall be non-refundable, except in the instance where the sale is not accepted by the SELLER in which event all monies paid by the PURCHASER to the SELLER in terms hereof shall be refunded to the PURCHASER.

...

5. COSTS OF TRANSFER

5.1 The PURCHASER shall be liable, in addition to the Purchase Price, for ... such proportion of the assessment rates levied by the Local Authority as may be due, or such proportion of charges and levies as may be due to a Home Owners Association or Body Corporate (all from DATE OF ACCEPTANCE of this offer until date of registration of Transfer), which amounts shall be paid immediately upon demand by the CONVEYANCER, to the CONVEYANCER ...

...

6. INTEREST

The PURCHASER will pay interest on the balance of the purchase price from DATE OF ACCEPTANCE to date of registration of transfer calculated at the greater of 11% (eleven percent) per annum, or the maximum rate permitted by law, both days inclusive. The interest will be payable monthly

in advance before or on the first day of each and every month, the first payment to be made on the first day of the month following the DATE OF ACCEPTANCE. Payment of the interest will be effected to the CONVEYANCER.

...

8. POSSESSION

8.1 Possession of the PROPERTY will be given to the PURCHASER and the PURCHASER shall be obliged to take possession thereof, on DATE OF ACCEPTANCE from which date the PURCHASER shall be liable for all municipal rates, taxes, consumption charges, insurance premiums and/or fees and levies payable on the PROPERTY, and from which date the PROPERTY shall be the sole risk, profit or loss of the PURCHASER. Should the SELLER have made any payment of such a nature for a period after the date of possession, he shall be entitled to a refund thereof pro-rata to the period of prepayment.

8.2 ... The PURCHASER shall be obliged, in the event of the cancellation or lapse of this agreement, to forthwith vacate the PROPERTY and restore it to the SELLER in the same condition as when the PURCHASER took possession. ...

...

9. VOETSTOOTS

9.1 The PROPERTY is purchased and sold Voetstoots and the SELLER shall not be liable for any defects, patent, latent or otherwise in the PROPERTY nor for any damage occasioned to or suffered by the PURCHASER by reason of such defect. The PURCHASER admits having inspected the PROPERTY to his satisfaction and that no express or implied representations, guarantees or warranties of any nature were made or given by the SELLER or his AGENT regarding the condition, quality or any other characteristics of the PROPERTY or any of the improvements

thereon or accessories thereof.

...

13. JURISDICTION

13.1 ...

13.2 In the event of the SELLER instructing its Attorneys to institute any proceedings against the PURCHASER for payment of the purchase price, interest and other monies due by the PURCHASER hereunder or for the performance by the PURCHASER of any of the terms and conditions herein, then the PURCHASER agrees that he shall be liable for and shall pay any such legal costs on the scale as between the Attorney and Own Client.

14. BREACH

In the event of the PURCHASER being in breach of any of the terms or conditions contained herein, and remain in default for 7 (seven) days after dispatch of a written notice by registered post or by facsimile, requiring him to remedy such breach, the SELLER shall be entitled to, and without prejudice to any other rights available at law:

...

14.3 Cancel the agreement without any further notice, and retain all amounts paid by the PURCHASER as "Rouwkoop" and the PURCHASER hereby authorises any third party holding such monies, to pay the same to the SELLER, and/or

14.4 Terminate this agreement and claim damages from the PURCHASER, which damages shall include, but not be limited to, the costs and expenses of advertising and selling the PROPERTY to a third party.

15. AUCTIONEER'S COMMISSION

The SELLER is liable to pay the Auctioneer's commission calculated at 5% plus VAT on the purchase price and other costs, which amount will be due and payable on date of confirmation from the deposit mentioned in Clause 4.1. In the event of the sale being cancelled by the SELLER due to the failure of the PURCHASER to comply with his obligations in terms of this Conditions of Sale, the PURCHASER will be liable for the payment of the Auctioneer's

commission as well as squandered costs.

...

20. CERTIFICATES TO BE OBTAINED

The PURCHASER shall at his own cost obtain:

20.1 A certificate of compliance ... to the effect that the electrical installation on the property complies with SABS 0142, or is reasonably safe

20.2 ...

20.3 A certificate of the occupation of the property (if applicable).

20.4 Or any such certificate as may be required by law and applicable to the subject property."

[6] The defendant's uncontested testimony was that although the house on the property had been built by his late father without his involvement, he had been informed by his mother prior to the auction that no certificate of occupation had been issued in respect thereof. No evidence was led as to the defendant's knowledge (or lack thereof) of any attempts made to obtain a certificate of occupation prior to the sale.

[7] The plaintiff gave uncontradicted evidence that when he viewed the property some time before the auction, the main building and the 'granny flat' were both occupied as residences: they were furnished, there was a well-maintained garden, the beds were made, food was being cooked and there were toothbrushes in the bathrooms. The defendant also did not dispute the plaintiff's evidence that the estate agent informed the plaintiff that the house was occupied by the defendant's mother and that the granny flat was occupied by his sister.

[8] The auction took place on 14 August 2013. Before it began, the plaintiff again inspected the property and requested to view the building plans. The defendant showed them to him.

[9] The plaintiff vehemently denied the defendant's testimony that the latter expressly informed him at this point that no certificate of occupation had been issued. If indeed this was the case, the plaintiff's claim clearly cannot succeed. However, as I note below, there are indications in the near-contemporaneous

documentary evidence that the defendant did not make such a disclosure. In any event, it is not necessary, on the view that I take of the matter, for me to decide this factual dispute. I therefore assume (without deciding) in favour of the plaintiff that the defendant did not expressly disclose the fact that no certificate of occupation had been issued.

[10] At the commencement of the auction, the auctioneer read out the terms of the sale. These were identical to the sale agreement, which was signed by the plaintiff immediately after placing the successful bid of R2.1 million. The defendant duly paid the cash deposit of R210,000.00 to the auctioneer. It is common cause that this was subsequently paid over to the defendant after deduction of advertising disbursements and the auctioneer's commission in the amount of R135,362.47.

[11] The plaintiff took occupation of the property on 27 August 2013 following the acceptance of the sale agreement by the defendant on about 23 August 2013. It is common cause that the plaintiff then attempted to obtain the required guarantee, but ran into difficulties when his bankers requested a copy of the certificate of occupation. The defendant led no evidence to gainsay the plaintiff's testimony that he then contacted the defendant's offices and was advised by an employee that he should approach the local authority to obtain the certificate.

[12] The plaintiff's evidence was that he approached the local authority because he "*thought it would be easy*" to obtain the certificate. He was informed that a certificate had been applied for by the owner of the property (i.e. the defendant's father) in September 2009, but the local authority had declined to issue one in the absence of certain professional reports that were required, but which remained outstanding. These included one from an engineer to confirm the structural integrity of the building. The plaintiff was informed that it would be illegal for him to continue to occupy the property in the absence of the certificate of occupancy.

[13] Despite this information, which caused him to became "*paranoid*" and to notice cracks that had evidently been repaired before he occupied the property, the plaintiff initially "*wanted to check if the problems could be fixed*" and undertook

various actions with a view to securing the issuance of the certificate, including arranging a meeting with an engineer who indicated that he might be able to do certain tests and assist in producing the required report. It is common cause that the defendant also indicated during a telephone call on about 11 November 2013 that he would assist in obtaining the certificate of occupation.

[14] According to the plaintiff, however, he was advised by his engineer and officials of the municipality that it might not merely be a matter of obtaining reports, and that, should the structure be found to be deficient in certain respects, alterations might need to be made to the buildings in order to obtain a certificate, in the absence of which there was a possibility that the local authority would take steps to have the buildings demolished.

[15] The plaintiff testified that in view of this information, he took legal advice and decided not to proceed with his attempts to obtain the certificate. However, when he was asked about this in cross-examination he was not able to recall having communicated an intention to cancel the agreement.

[16] The defendant confirmed that it was ultimately established that certain alterations would have to be effected, both to the property itself (i.e. the "*filling*" of certain support beams and adjustments the step to the garage) and to the submitted plans (a swimming pool that was on the plans had not been built) before the certificate could be issued. He further testified that he agreed during a telephone conversation on 26 November 2013 that he would "*rectify*" the problems. It is apparent from this that the defendant did not purport to cancel the agreement before this time.

[17] The plaintiff conceded that it was the defendant who ultimately cancelled the agreement as a result of his failure to furnish the guarantee. Moreover, he did not plead that this cancellation was invalid, either because the absence of the certificate had made it impossible to perform his obligation to furnish the guarantee, or for any other reason. The defendant was thus not 'placed on his defence' on this issue and it would not be appropriate for this court to make any finding in this regard.

[18] Whereas the plaintiff testified that he could not remember when the defendant

cancelled the agreement, the defendant's evidence was that after becoming frustrated with the plaintiff's failure to return his calls after 26 November 2013, he sent the plaintiff a letter on 28 November 2013 calling upon him to rectify the breach by delivering the guarantee, failing which the agreement would be cancelled. The letter was, however, not produced in evidence and the defendant in any event conceded that the plaintiff did not receive it.

[19] According to the defendant, the parties then met to discuss the matter on about 11 December 2013. He testified that although he initially indicated at this meeting that he was cancelling the agreement and that the property was to be vacated, when the plaintiff "*informed me that he still wanted the property, I said if he can provide the guarantees, I will be happy to proceed with the sale*". According to the defendant, the parties then proceeded to have a discussion about payment of occupational rental (I will deal with this further below), after which "*everyone closed for Christmas*". This is inconsistent with the defendant's subsequent testimony that the agreement was cancelled on about 10 December 2013.

[20] Although it was also not produced in evidence, it is apparent that the plaintiff's attorney sent the defendant a letter to the defendant on 14 January 2014 alleging that the defendant had fraudulently concealed the fact that the certificate of occupation had not been issued and requesting the return of the deposit. The defendant did, however, adduce into evidence his response of the following day, 15 January 2014. The following significant features emerge from this letter, which was a closely contemporaneous document:

(a) While the letter hotly disputed any fraudulent concealment and dealt in detail with the events of the day of the auction, there was no suggestion whatsoever that the defendant had expressly disclosed the absence of the certificate of occupation, as he stated in oral testimony. (I pause here to add that the defendant's argument – repeated in this letter – that the mere fact that the plaintiff approached the local authority constitutes proof that the defendant had disclosed the absence of the certificate at the time of the sale is disposed of by the plaintiff's uncontradicted evidence that he first approached the defendant's office for a copy of the certificate.)

(b) Although paragraph 4.10 of the letter referred to discussions on 11 December 2013, no mention is made of the payment of rental, let alone any agreed amount.

(c) The letter states in paragraph 4.11 that the defendant had sent a further demand for the delivery of the guarantee on 12 December 2013. This was neither mentioned by the defendant in his evidence nor canvassed with the plaintiff in cross-examination and is inconsistent with the defendant's version of a cancellation on 10 December 2013.

(d) The defendant went on to allege in paragraph 4.12 that the issuing of the demand on 12 December 2013 meant "*that we as the Seller cancelled the Agreement before receiving your letter and the agreement was indeed cancelled already*". At best for the defendant, this would imply that he cancelled the agreement '*without further notice*' (as he was entitled to do) on a date after 19 December 2013, although there is no mention in the letter of the precise date.

(e) In paragraph 4.13 of the letter of 15 January 2014, the defendant referred to a telephone conversation (evidently either on the previous day or the same day) in which the plaintiff had advised that he would "*only vacate the property after receiving his deposit back*". In response, the defendant stated that "*we hereby demand that your client immediately vacate the property within 24 hours and if your client still refuses to do so we will immediately proceed with an eviction application*".

[21] Although the letter is not a picture of clarity, and in some respects confoundingly contradicts both parties' evidence and refers to events that neither party mentioned in their evidence, I am constrained to conclude on a full conspectus of the evidence led at the trial, that the defendant validly cancelled the sale agreement on a date between 19 December 2013 and 14 January 2014. In the absence of any conclusive evidence from either party to the contrary, I take the view that the most probable date of cancellation was 14 January 2014. In particular, I consider that the following is relevant in this regard:

(a) the fact that an arrangement of some kind was made on about 11 December

2014, in terms of which the plaintiff was allowed to remain in occupation of the property;

(b) the fact that the cancellation could not have taken place before 19 December 2013, in view of the indications that a letter of demand giving the plaintiff seven days to furnish the guarantee had been sent on 12 December 2013;

(c) the plaintiff's clear concession that the contract was cancelled by the defendant – and not by the plaintiff himself, combined with the indication that the plaintiff made his allegation of fraudulent concealment in a letter of 14 January 2014, which would suggest that the cancellation took place on or before that date;

(d) the defendant's evidence that "*everyone closed for the Christmas break*" after the meeting of 11 December 2013 and that he only returned from the Christmas break on 14 January 2014; and

(e) the fact that the defendant only sought to formally demand that the plaintiff vacate the property for the first time in his letter of 15 January 2014.

[22] I also conclude on the basis of the letter of 15 January 2014 that the plaintiff's occupation of the property became unauthorised 24 hours after the letter was sent, on 16 January 2014.

[23] The defendant's counsel put it to the plaintiff numerous times during cross-examination that the certificate of occupation had ultimately been issued by the local authority in March 2014. The plaintiff however disputed this and correctly pointed out that it was unlikely given that the defendant did not inform him of this at the time, which was not disputed. Moreover, there are indications on the certificate itself that it was only issued on 5 January 2015, which is consistent with the defendant's evidence that he arranged for the required physical alterations to be made to the property only after it was vacated by the plaintiff in December 2014. When this was put to the defendant, he conceded that he only received the duly stamped certificate in "*January or February 2015*" and sought to suggest that the burden of his earlier testimony had been that the certificate had been "*issued*" in March 2014 but was only "*stamped*" in January 2015. Even

accepting this, the most charitable description of his evidence in this regard would be that it was misleading. Ultimately, however, nothing turns on this, in view of the conclusion that I have reached in relation to the defendant's 'holding over' counterclaim.

[24] The property was sold by the defendant to a third party in about September 2014, while the plaintiff was still in occupation and transfer took place in January 2015 after the plaintiff had vacated.

The claim in convention: Is the plaintiff entitled to the return of his deposit?

The plaintiff's pleadings and the nature of his cause of action

[25] The plaintiff pleads that having paid the deposit and taken occupation, he "*refused to pay the balance of the purchase price*" when he discovered that the property was "*not fit for occupation*". He pleads that "*the property did not have an occupation certificate and could never have it, alternatively there were impediments to getting it due to the building not complying with municipal regulations*". He goes on to plead that "*occupation of the property was therefore illegal*".

[26] The plaintiff does not allege (nor was any evidence led at the trial to suggest) that the defendant expressly made a false statement that a certificate of occupation had indeed been issued. Instead, he pleads that the defendant "*knew about the impediments to securing the occupation certificate but ... wilfully concealed" that*".

[27] Finally, the plaintiff pleads the common cause fact that the "*Defendant cancelled the agreement ... but refused to pay him back his deposit*".

[28] According to the plaintiff, these allegations entitle him to an order for the return of his deposit.

[29] As I have noted above, it is not in issue that the defendant validly cancelled the agreement as a result of the plaintiff's failure to furnish the guarantee. Where a contract is cancelled (whether unilaterally or by agreement) the general principle

is that the parties are required to return everything received thereunder.[1] This applies equally to the 'guilty' party and the 'innocent' party,[2] and gives rise to a "*distinct contractual remedy*" to claim restitution,[3] albeit one that is subject to the court's overriding equitable discretion to decline an order for restitution where it would result in the other party being unjustly enriched.[4]

[30] The parties may, however, agree that these general principles will not apply, and they did so in the current instance by means of clause 14.3 of the sale agreement, which allows the defendant to cancel the contract if the plaintiff breached, and to "*retain all amounts paid ... as 'rouwkoop'*".[5]

[31] It is beyond doubt that a forfeiture clause framed in these terms is ordinarily enforceable. This has always been the case, despite the penal nature of such clauses, and even though penalties were generally unenforceable in Roman Dutch law.[6] A party who breaches a contract is therefore not, without more, entitled to insist on his common law right to restitution of his partial performance where the innocent party exercises its right to cancel and invokes a contractual *rouwkoop* clause.

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[1] *Baines Motors v Piek* 1955 (1) SA 534 (A) at 544.

[2] *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (1) SA 708 (C) at 717H – 718A. This issue was not dealt with in the successful appeal. See also *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1974 (1) SA 414 (NC) at 424C, where the facts were in some respects notably similar to those in the current matter. Although the court held that the plaintiffs were not entitled to the return of the property without tendering the restitution of the purchase price, the agreement at issue in that case does not appear to have contained a clause similar to clause 8.2 of the sale agreement.

[3] *Baker v Probert* 1985 (3) SA 429 (A) at 438 – 439, where it was stated that 'restitution' here is used in the non-technical sense of 'restoration' or 'return', as opposed to the technical concept of *restitutio in integrum*.

[4] *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 700–701. A notable case in this regard is *Prefix Properties (Pty) Ltd and Others v Golden Empire Trading 49 CC and Others* 2011 (2) SA 334 (KZP), where a cancelling seller was allowed to retain the purchase price pending the outcome of an action for damages where it was shown *inter alia* that the purchaser would most likely not be able to satisfy the damages claim.

[5] In *Mineworkers Union v Prinsloo* 1948 (3) SA 831 (A) at 839, Tindall JA observed that the "*proper sense*" of the word "*rouwkoop*" is that of an agreed sum of money paid by a contractant "*to get quit of liability in respect of the contract*". Although it may (as here, and in the *Prinsloo* case) refer to a portion of the purchase price forfeited upon breach, it may also refer more broadly to a payment that the contract itself allows a party to make to withdraw from a contract, in which case the *"withdrawal does not amount to breach*" (LF Van Huyssteen *et al. Contract: General Principles* 5 ed (2016 at p 426).

[6] *Mineworkers Union v Prinsloo* (above) at 838 – 839 (Tindall ACJ) and 849 - 850 (Greenberg JA).

[32] The cancellation of a contract by the other party pursuant to a breach is, however, not the only context in which a contractant may potentially have a right to restitution of performance.

[33] A purchaser seeking restitution of performance made under a contract of sale may claim *ex contractu* under the *actio empti* for breach of the seller's obligation to make effective (and not defective) performance. Since the presence of a latent defect in the *merx* does not in itself amount to a breach of contract, the purchaser must allege and prove not only a latent defect, but also one of the following:

(a) that the seller expressly or impliedly warranted the absence of defects or the presence of qualities lacking in the object sold;

(b) that the seller was a merchant or dealer who publicly professed to have skill and expert knowledge in relation to the kind of thing sold or was a manufacturing seller; or

(c) that the seller fraudulently concealed the defect.

[34] A claim under the *actio empti* has the advantage of allowing the purchaser the possibility of claiming consequential damages caused by the breach.

[35] Should the purchaser be unable to found its claim on the *actio empti*, it may nevertheless be possible to invoke the *aedilitian* remedies, in particular the *actio redhibitoria*, for the restitution of performance as a result of the supply of a latently defective *merx*. This remedy arises from the residual obligation imposed on the seller *"by operation of law"* – as opposed to by the operation of the contract between the parties – not to sell goods that are defective.[7] The purchaser must either plead and prove:

(a) that a latent defect existed at the time of the sale that was sufficiently material to justify *redhibition,* in other words that it was of such a nature that the purchaser would not have concluded the sale had he been aware of it or, at least, that he would not have concluded the sale on the terms that he did;[8] or

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[7] *Phame (Pty) v Paizes* 1973 (3) SA 397 (A) at 416H.

[8] *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 (3) SA 188 (ECG) at paras 115 – 121; G Glover

(b) that the seller made a *dictum et promissum*: a positive statement (i.e. not an omission by silence)[9] materially bearing on the quality of the *merx* "*upon the faith of which [he] entered into the contract … [but which] turned out to be unfounded*".[10]

[36] While the purchaser may claim repayment of the purchase price under the *actio redhibitoria*, damages may not be recovered for consequential loss under that cause of action.

[37] In the current matter, there can be no doubt that both parties knew from the circumstances of the sale that the purchaser's purpose in concluding the sale was to use the property for the purposes of residential occupation. As Professor Glover points out, "*if a dwelling is sold, the parties cannot be heard to argue that it was not understood that the buyer or someone else with his consent, for instance, a lessee, would occupy the house*".[11] As such, it might have been open to the plaintiff to rely on an implied warranty that the property was fit for such residential occupation under the *actio empti* had clause 9.1 of the sale agreement not specifically stipulated that the plaintiff "*admits … that no express or implied representations, guarantees or warranties of any nature were made or given by the [defendant] or his agent regarding the condition, quality or any other characteristics of the property* …".

[38] In view of this provision, the plaintiff's counsel understandably described the claim during argument as one of "*fraudulent concealment*" of the pleaded defect. While this terminology would suggest that the claim is a contractual one, founded on the *actio empti*, it appears to me that the plaintiff's particulars of claim can equally be said to found a cause of action for restitution of his deposit under the *actio redhibitoria*, given that the plaintiff simply seeks restitution of the deposit and does not claim any damages.[12]

Kerr's Law of Sale and Lease 4 ed (2014) at 213 fn 230 and the authorities cited there.

[9] *Kerr's Law of Sale and Lease* (above) at 225.

[10] *Phame v Paizes* (above) at 417H-418H.

[11] *Kerr's Law of Sale and Lease* (above) at 197.

[12] The plaintiff rightly did not seek to suggest that the provisions of the Consumer Protection Act would apply to the transaction. The property was not "*supplied*" by the defendant within the meaning of that term

[39] In summary, therefore, the plaintiff's case is that the property was suffering from a latent defect in the form of the absence of the certificate of occupation, combined with the "*impediments to getting it*". The reference to impediments was evidently to the alterations that would have to be (and, in the event, were) made to the property before a certificate could be issued. There was no suggestion that the property suffered from any other defect, and in fact the evidence was to the contrary.

Can a purchaser rely on the actio empti or actio redhibitoria after valid cancellation and invocation of a rouwkoop clause by the seller?

[40] Before considering whether the plaintiff is entitled to the return of his deposit under the *actio empti* or the *actio redhibitoria*, it is necessary to determine whether those actions would in any event be available to him in circumstances such as the present, where the contract of sale has already been validly cancelled and the seller has invoked his rights in terms of the *rouwkoop* clause. It was vaguely suggested by the defendant's counsel that this would not be possible, but neither party referred to any authority in this regard.

[41] Although:

(a) it is true that the *actio empti* is essentially a contractual remedy for breach, and a party seeking to rely on it therefore has an election either to uphold the contract or cancel it and claim restitution and damages; and

(b) the *aedilitian* remedies afford a buyer who learns of a latent defect present at the time of the sale an election *"to rest content with the thing as it is"* or to make a claim under the *actio redhibitoria* or *actio quanti minoris*[13] and it is not logically possible to claim restitution (i.e. under the *actio redhibitoria*) while at the same time seeking to uphold the contract;[14]

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as defined in section 1, which requires that the supplier in an affected transaction must be acting "*in the ordinary course of business*". "*Business*" is defined to mean "*the continual marketing of any goods*".

[13] *Mitchell's Piano Saloons v Theunissen* 1919 TPD 392 at 400; *Coetzee v Van der Westhuizen* 1958 (3) SA 847 (T) at 852D-H.

[14] Although it would seem to me that the opposite probably applies to the *actio quanti minoris*, it is not necessary for me to decide that issue.

there is in my view no reason in principle why a purchaser cannot rely on the *actio empti* or *actio redhibitoria* to claim restitution of performance where it was the seller (and not the buyer himself) who cancelled the contract before the purchaser did so. Indeed, in one case, Schutz J (as he then was) expressed the view that there would be "*no substance*" in a party's contention that the other party could not "*cancel on the ground of fraud a contract that had already been cancelled*".[15]

[42] Moreover, I find it difficult to conceive that these remedies become unavailable solely because the seller has been the first to exercise its contractual right to cancel. Such an approach would have little to do with what justice may in the circumstances require. It would instead give rise to an unprincipled 'race to the finish', the result of which would be dependant partly on how quickly the purchaser discovered the latent defect, and partly on the parties' relative abilities to speedily seek and obtain legal advice as to their respective legal rights.

[43] In my view, the question whether the purchaser of defective goods is entitled to restitution under an otherwise cognisable *actio empti* or *actio redhibitoria* is not so much whether he happens to be the party who effected the cancellation, but rather whether the seller is entitled to invoke and rely on the *rouwkoop* clause in those circumstances. While there was initially much discussion in the early South African cases as to whether a *lex commissoria* combined with a *rouwkoop* clause could ever be enforceable, this controversy was ultimately decided, following Voet,[16] in the affirmative. It would appear, however, that the conclusion was not unqualified. While neither Voet nor any of the cases that I have considered deal squarely with the question whether a *rouwkoop* clause would be enforceable in the face of an otherwise cognisable right to restitution arising from a defect under the *actio empti* or the *actio redhibitoria*, Voet does indicate that a *rouwkoop* clause would not be effective where the seller "*himself commits default in making good those things which had to be made good under the covenant before the*

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[15] *Orda AG v Nuclear Fuels Corporation of South Africa (Pty) Ltd* 1994 (4) SA 26 (W). This statement was not considered by the Appellate Division in the subsequent successful appeal.

[16] Johannes Voet, *Commentary on the Pandects* (Gane's translation, 1956) at 18.3.3. Berwick's translation is transcribed in the judgment of Tindall ACJ in *Mineworkers Union v Prinsloo* (above) at 838.

payment of the price".[17] In my view, this would include a failure by the seller to comply with his obligation not to supply defective goods. Furthermore, even though the statement was made in the context of the situation where the purchaser's default "*has been due not to the buyer but to the seller*", it does not appear to me that this means that the purchaser has to go so far as to show that he was not in breach, or that the seller's cancellation was invalid. It would be sufficient to show that the default has been due to the seller's failure to comply with his general obligation not to supply defective goods, as appears to be the case in the current matter.

[44] I am fortified in my view in this regard by the observation of Tindall ACJ in *Mineworkers Union v Prinsloo*, regarding the court's "*equitable jurisdiction*" to decline to enforce penalty stipulations. Although the court in *Mineworkers Union v Prinsloo* held that the *rouwkoop* clause was not a penalty at common law, this has been overtaken by section 4 of the Conventional Penalties Act, 15 of 1962 ("**the Penalties Act**"), in terms of which such provisions are indeed to be regarded as penalties.[18] As such, a court may in terms of section 3 of the Penalties Act "*reduce the penalty to such an extent as it may consider equitable in the circumstances*". This would undoubtedly include not enforcing a *rouwkoop* clause, and allowing the purchaser to claim restitution of his full performance if he is able to successfully invoke the *actio empti* or the *actio redhibitoria*.

[45] Applying these principles, I conclude that a seller's reliance upon a *rouwkoop* clause pursuant to his cancellation does not in itself prevent the purchaser from claiming the return of his performance under either the *actio empti* or the *actio redhibitoria*.

Was the absence of the certificate and the impediments thereto a defect justifying restitution?

[46] In terms of section 14(4)(a) of the Building Act, it is a criminal offence for "*the*

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[17] Voet (above) at 18.3.5.

[18] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 473 – 474 confirmed in *Bank of Lisbon International Ltd v Venter* 1990 (4) SA 463 (A) at 470F. See also *Matthews v Pretorius* 1984 (3) SA 547 (W) at 551D; *Simopoulos and Another v Antoniou and Another* 2000 JDR 0626 (SE) at para 11.

owner of any building or, any person having an interest therein, erected with the approval of a local authority"[19] to occupy or use any building or permit the occupation or use of such a building in the absence of a certificate of occupancy issued by the relevant local authority in terms of section 14(1)(a). Furthermore, in terms of section 118(1)(b) of the Local Government: Municipal Systems Act, 32 of 2000, a certificate of occupancy is a prerequisite for registration of transfer of any property, and without such a certificate registration of transfer is not legally possible.

[47] Although I accept the defendant's proposition that a lease agreement (or indeed a sale agreement) concluded in respect of a property without a certificate of occupancy "*is not an illegal contract, neither is it a nullity nor is it void* ab initio",[20] that does not mean that the absence of a certificate of occupancy combined with the impediments thereto could never be a defect that may give rise to the *actio empti* or the *actio redhibitoria*. The test for the existence of a defect is simply the following:

> *"Broadly speaking … a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita for the purpose for which it has been sold or for which it is commonly used."*[21]

[48] *Glaston House* was a case concerning the sale of a property where both parties were aware that the purchaser's purpose in concluding the contract was to demolish the building on the property and erect a new one. When it emerged after the sale that a pediment embedded in the building had been declared as a national monument (a fact of which the seller was aware), the purchaser claimed

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[19] In *Wierda Road West Properties (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc* 2018 (3) SA 95 (SCA) at para 16 the court doubted that section 14(4)(a) applied, given that it was common cause that the building was built without approved plans. That is not the case in the current instance where the evidence indicates that the plans were indeed approved: the defendant's own testimony was that they had to be amended to remove the swimming pool.

[20] *Hyprop Investments Limited and Another v NSC Carriers and Forwarding CC and Another* 2013 (4) SA 607 (GSJ); *Wierda Road West Properties* (above) at paras 20 – 21, 23 and 28.

[21] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 683H, reaffirmed in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) at 465H. This definition applies irrespective of whether the plaintiff seeks to rely on the *actio empti* or an *aedilitian* remedy: see *Kerr's Law of Sale and Lease* (above) at 187 and 213.

under the *actio empti* for damages in the form of additional costs occasioned by the need to preserve the pediment. The question was raised whether the declaration of the pediment as a national monument and the consequent need for expenditure to preserve it constituted a latent defect. In the majority judgment, Galgut AJA found that the proclamation of the pediment as a national monument was a "*statutory prohibition which rendered the property unfit for the purpose for which it was purchased*", namely to be demolished, and that it indeed constituted a latent defect.[22]

[49] In *Odendaal v Ferraris*,[23] the Supreme Court of Appeal relied upon *Glaston House* in concluding that "*[i]t is now settled that any material imperfection preventing or hindering the ordinary or common use of the res vendita is an aedilitian defect*" and went on to hold that the absence of statutory approval to make building alterations to the property sold "*which may require either its demolition or alteration as a condition for approval*" constituted a latent defect. In reaching this conclusion, the court rejected the contrary finding of Goldblatt J in *Van Nieuwkerk v McCrae* that the absence of statutory approvals simply constituted "*the lack of certain qualities or characteristics which the parties have agreed the merx should have*".[24] *Odendaal* was followed in similar circumstances in *Haviside v Heydricks*.[25]

[50] On the authority of these cases, I conclude that the pleaded defect of the absence of a certificate of occupation, combined with the fact that its issuance was not merely a matter of administrative procedure but required alterations to be made to the building and the plans, not only constituted a defect at the time of the sale but one which was sufficiently material to justify restitution under the *actio empti*

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[22] *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) at 866C-G.

[23] *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at paras 24 – 26.

[24] *Van Nieuwkerk v McCrae* 2007 (5) SA 21 (W) at 29B. *Van Nieuwkerk* was followed in *Naidoo v Moodley* 2008 JDR 1546 (KZN) which was an appeal against the order of a magistrate for absolution from the instance based on a finding that the absence of the certificate was an actionable defect for which liability was ousted by a voetstoots clause. The High Court agreed with the purchasers that this was not the case and allowed to advance on the basis of the purchasers' contention that the sellers had breached an implied term that obliged them "*to give lawful occupation on transfer*", which included an obligation on the sellers, "*at their cost, to satisfy the requirements of the municipality for the issue of an occupation certificate*".

[25] *Haviside v Heydricks and Another* 2014 (1) SA 235 (KZP)

or *actio redhibitoria*.

[51] It is not necessary for me to decide whether the absence of the certificate could, in itself (i.e. without the "*impediments*" to securing it), constitute a latent defect in an appropriate case. However, even assuming that it could, it is apparent that this would not have been a defect of such a nature that the plaintiff would not have concluded the sale had he been aware of it in the current matter. The evidence shows that when the plaintiff discovered the absence of a certificate of occupation, he was undeterred. He proceeded to approach the local authority because he "*thought it would be easy*" to obtain one. It was only after it became apparent that there were impediments to obtaining the certificate that he demanded the return of his deposit.

The voetstoots clause and fraudulent concealment

[52] A voetstoots clause such as that contained in clause 9.1 of the sale agreement is ordinarily effective in exempting a seller from liability arising from latent defects under the *actio redhibitoria*,[26] but not where the purchaser shows "*not only that the [defendant] knew of the latent defect and did not disclose it, but also that [it] deliberately concealed it with the intention to defraud*", i.e. "*dolo malo*".[27]

[53] In formulating the *dolo malo* test in *Van der Merwe v Meades*, the Appellate Division rejected a line of authority that had developed in the Transvaal to the effect that proof of mere 'knowledge and non-disclosure' was sufficient to overcome a voetstoots clause. Instead, it approved the more stringent approach that had been followed in Natal, specifically the following extract from *Knight v*

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[26] In *Van Nieuwkerk* (above), Goldblatt J held that "*the term 'voetstoots' only excludes liabilities for latent defects of a physical nature in the merx*". This statement appears to have arisen from the distinction drawn by Nestadt J between cases of a defect in the *res vendita* on the one hand (to which a voetstoots clause applies) and cases where the purchaser's true complaint is the delivery of "*something different from what was bought*" (to which a voetstoots clause does not apply) in *Ornelas v Andrew's Café* 1980 (1) SA 378 (W) at 388G – 390C. While the latter cases will undoubtedly occur, it seems to me that that this will primarily be in relation to the sale of intangible property (as was the case in *Ornelas*) or the sale of items still to be manufactured (see, for example, *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 (GSJ) at para 39 and *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at para 20). In any event, in *Odendaal v Ferraris* (above) at para 26, the SCA distinguished *Ornelas* and rejected the approach taken by Goldblatt J in *Van Nieuwkerk*, holding that "*a voetstoots clause ordinarily covers the absence of statutory authorisations*" for alterations that had been had been made by the seller and which required such statutory authorisations.

[27] *Van der Merwe v Meades* 1991 (2) SA 1 (A) at 8C-F; *Odendaal v Ferraris* (above) at para 29.

Trollip:

> *"'I think it resolves itself to this, viz that … the seller could be held liable only in respect of defects of which he knew at the time of the making of the contract, being defects of which the purchaser did not then know. In respect of those defects, the seller may be held liable where he has designedly concealed their existence from the purchaser, or where he has craftily refrained from informing the purchaser of their existence. In such circumstances, his liability is contingent on his having behaved in a way which amounts to a fraud on the purchaser, and it would thus seem to follow that, in order that the purchaser may make him liable for such defects, the purchaser must show directly or by inference, that the seller actually knew. In general, ignorance due to mere negligence or ineptitude is not, in such a case equivalent to fraud."*[28]

[54] *Forsdick v Youngelson* was one of this line of Natal cases, and was specifically referred to in *Glaston House*.[29] Broome J held that "*the words 'designedly' and 'craftily' imply that there must be some element in the transaction beyond mere knowledge and non-disclosure*" and that "*it may be that the seller's awareness of the purchaser's ignorance would supply that element*".[30]

[55] The requirement of *dolo malo* thus means that the purchaser must show that:

(a) The seller intentionally concealed the defect, which would include the situation "*[w]here a seller recklessly tells a half-truth or knows the facts but does not reveal them because he or she has not bothered to consider their significance*";[31] and

(b) The seller "*designedly*" or "*craftily*" concealed the defect with the intention to defraud,[32] i.e. "*with the object of inducing the other party to enter into the*

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[28] *Knight v Trollip* 1948 (3) SA 1009 (D) at 1013.

[29] *Glaston House* (above) at 868H.

[30] *Waller v Pienaar* 2004 (6) SA 303 (C) at para 16.4, paraphrasing *Forsdick v Youngelson* 1949 (2) PH A57 (D).

[31] *Odendaal* (above) at para 29.

[32] *Van der Merwe v Meades* 1991 (2) SA 1 (A) at 8E-F.

contract or with the object of concealing from the other party facts, the knowledge of which would be calculated to induce him to refrain from entering into the contract."[33]

[56] As noted above, fraudulent concealment of a defect also gives rise to liability under the *actio empti*, and (as the plaintiff's counsel notes) the existence of a voetstoots clause is in such cases irrelevant.

[57] In the current matter, I am not persuaded that the plaintiff has met the test of fraudulent concealment laid down in *Van der Merwe v Meades.*

[58] In the first place, the plaintiff has not proved that the defendant was aware of the pleaded defect, namely the absence of the certificate of occupation combined with the "*impediments to securing*" one. While the defendant was admittedly aware of the absence of the certificate of occupation, there is no evidence that he was aware of the impediments to securing it.

[59] The plaintiff contended in argument that the "*defendant did not deny that an attempt to get the occupancy certificate in 2009 had failed*" but conceded that the evidence was that the defendant himself "*was never involved in the building of the house ... [it] was his father's project*". In the face of this, it is simply not correct, as the plaintiff argues, that the "*sellers*" had unsuccessfully applied for the occupancy certificates in 2009. It was the defendant's father that applied for the certificate and the defendant evidently only became aware of the "*impediments*" after the sale. There is no basis upon which to impute the presumed knowledge of the defendant's father to the defendant.[34]

[60] Secondly, even if I were to ignore the fatal conclusion reached in the previous paragraphs, and assume that the plaintiff had indeed proved the requisite knowledge of the defect on the part of the defendant, the plaintiff's claim fails because he has only demonstrated 'knowledge and non-disclosure'. In seeking to identify an "*element in the transaction beyond mere knowledge and non-disclosure*" that would demonstrate that the defendant's non-disclosure was

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[33] *Dibley v Furter* 1951 (4) SA 73 (C) At 88C-D.

[34] *Van den Bergh v Coetzee* 2001 (4) SA 93 (T) at 95D-96F.

intended to induce him to conclude the sale agreement, the plaintiff testified that he made an "*assumption*" at the time of the sale that a certificate of occupation had been issued and that clause 20.3 of the agreement was thus not "*applicable*". In essence, he claims that this assumption was wilfully induced by the defendant's positive conduct of showing him a building that was occupied. On the basis of the *McCann* case, the plaintiff's legal representative characterised this as a "*previous statement or representation [that] constituted an incomplete or vague disclosure which requires to be supplemented or elucidated*".[35] She also relied upon *Van Niekerk v Weps & Morris*, in which the court found that the seller's agent had fraudulently concealed the true facts in circumstances where he knew that the purchasers (who were evidently inebriated) "*were misleading themselves*".[36]

[61] There are a number of reasons why this conduct cannot assist the plaintiff:

(a) Firstly, there was no evidence that the defendant arranged for the building to be occupied with the intention that this would lead the plaintiff to draw any conclusions at all. The evidence was quite simply that the property had been occupied by the defendant's mother and sister for some time before the defendant made the decision (after consulting them) in his capacity as the executor of his late father's estate to sell it. There was no 'design' in this conduct.

(b) Secondly, there was no evidence to suggest that the defendant had any reason to believe that the plaintiff would be deceived by this conduct into thinking that a certificate of occupation had been issued. In fact, it is apparent that the defendant could not have held such a belief in view of the plaintiff's own evidence that he only became aware that occupation without a certificate would be unlawful under the Building Act at the time that he approached the local authority to obtain one, and that "*before that I had no idea what that was*". The defendant could thus not have known that the plaintiff "*was misleading himself*", as in the *Weps & Morris* case.

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[35] *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 726D-F.

[36] *Van Niekerk and van der Westhuizen v Weps and Morris* 1937 SWA 99 at 106.

(c) Thirdly, even if the plaintiff had been aware of Building Act (and even if the defendant knew this), there would have been at least two circumstances under which occupation of the building in the absence of the certificate of occupation might have been lawful: (i) a local authority may give written permission for a building to be occupied in the absence of a certificate "*for such period and on such conditions as may be specified in such permission*";[37] and (ii) such occupation is not unlawful "*in such circumstances and on such conditions as may be prescribed by national building regulation*".[38] While it is true that neither of these provisions objectively applied, there was no evidence to suggest that the plaintiff knew this to be the case. As such it cannot be concluded that the defendant made an incomplete or vague disclosure of the type referred to in *McCann* or that the plaintiff was led to believe that a certificate of occupancy had been issued by the bare fact that the property was occupied.

[62] I thus find that, in addition to failing to prove requisite knowledge of a material latent defect, the plaintiff has not proved that the defendant deliberately failed to disclose such a defect with the intention that the plaintiff would rely on the non-disclosure in making his decision to conclude the sale agreement.

Conclusion on the claim in convention

[63] In the circumstances, the plaintiff's claim in convention must be dismissed and he is not entitled to the return of his deposit under either the *actio empti* or the *actio redhibitoria*. The defendant is entitled to retain the deposit pursuant to his cancellation of the contract and invocation of the *rouwkoop* clause.

Counterclaim 1: Reimbursement of rates and levies incurred prior to cancellation

[64] The defendant's first counterclaim seeks reimbursement in respect of rates and levies that he paid in respect of the property in the 16-month period between the acceptance date (27 August 2013) and December 2014, when the plaintiff vacated the property.

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[37] Building Act, section 14(1A).

[38] Building Act, section 14(4)(a)(iv).

[65] Given that the sale agreement was cancelled during the course of this period, it is apparent that this claim is partly for specific performance of obligations incurred by the plaintiff prior to the cancellation of the agreement and partly for contractual damages arising from the plaintiff's breach, in respect of the remainder of the period.

[66] The plaintiff conceded under cross-examination that he did not make payment of the relevant rates and levies amounts at any time during the period, but disputed that the amount had been correctly calculated. During the trial, I enquired whether the parties could agree on the amount involved. I was subsequently advised that the relevant sum for the 16-month period was R64,130.87 and granted the defendant leave to amend this counterclaim to reflect this amount. I was informed that this translates to R107.38 per day.

Specific performance

[67] Although the plaintiff pleaded that he could not be held liable for these expenses under the agreement, on the basis that "*the agreement was never perfecta*", he conceded during cross-examination that "*I need to pay for my living expenses*" while he occupied the property. Moreover, although the parties to a sale agreement may agree otherwise, either expressly or by agreement, the residual common-law rule of risk in the law of sale is that the risk of loss (*periculum*) and benefit of advantages (*commodum*) in the merx pass simultaneously to the purchaser when the sale is *perfecta*. This occurs once there is agreement on the *merx* (the thing sold) and the *pretium* (the price) and any condition, resolutive or suspensive, has been fulfilled.[39]

[68] In the current matter, the agreement became unconditional at common law on 27 August 2013, when the sale was accepted by the defendant in terms of clause 3.3 of the sale agreement. As such, in the absence of any agreement to the contrary, the defendant would from that date have had no right to receive any fruits (such as any notional rentals)[40] from the property, but the plaintiff would

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[39] *Southern Era Resources Ltd v Farndell NO* 2010 (4) SA 200 (SCA) at paras 8 - 9.

[40] *Garvin NNO v Sorec Properties Gardens Ltd* 1996 (1) SA 463 (C) at 467 - 470, where it was noted out that rent on property "*is commonly paid to compensate the landlord for giving up or forgoing the ongoing*

have had the obligation to pay the rates and levies thereon upon demand by the conveyancer.

[69] This common-law position is in fact contractually confirmed in clause 8.1 of the agreement, which specifically states that, as from the date of acceptance, "*the property shall be the sole risk, profit or loss of the purchaser*". This clause also stipulates that the defendant would be entitled to a refund of any such amounts paid by him in respect any period after the acceptance date.

[70] In view of this clause, the plaintiff's legal representative rightly did not pursue the pleaded contention that he would not be liable to pay these amounts on the basis that the agreement "*was not perfecta*". Indeed, in an apparent effort to resist the defendant's counterclaim for 'holding over' damages (which I address in detail below), it was specifically contended that the risk and benefit passed as early as the date of "*signing of the agreement*".

[71] In the circumstances, the defendant is contractually entitled to specific performance in respect of the 142-day period between the acceptance date and the date of cancellation, which I have determined was 14 January 2014. At R107.38 per day, this amounts to R15,247.96. He is also entitled to interest on this amount at the prescribed rate (the agreement does not specify any rate of interest in respect any of any payment other than the balance of the purchase price). Furthermore, although clause 5.1 of the sale agreement stipulates that the defendant was required to pay these amounts "*immediately upon demand*", no demand was pleaded, nor was there any evidence of such a demand prior to the delivery of the counterclaim (1 September 2016). Interest will therefore run from that date.

Contractual damages: The rouwkoop clause and the Conventional Penalties Act

[72] The remainder of the defendant's first counterclaim is for contractual damages arising out of the plaintiff's breach.

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use or serviceability of the leased item in favour of the tenant. The rent which is paid compensates the landlord for his loss as a result of the moment to moment and continual use of his property being given up in favour of the tenant".

[73] I have already noted that the right afforded to the defendant by the *rouwkoop* clause allowing him to retain all amounts already paid by the purchaser constitutes a penalty in terms of section 4 of the Penalties Act. Although the applicability of the Penalties Act was not expressly raised in the pleadings, "*it is the duty of the Court to take the point of illegality [in this case, arising out of the application of section 2(1) of the Penalties Act] mero motu, even if the defendant does not plead or raise it*" as long as the illegality appeals *ex facie* the transaction, or it is satisfied that it in possession of all of the necessary and relevant facts.[41]

[74] In the current instance, although I specifically requested both parties' representatives to address the relevance of the *rouwkoop* clause in written argument, their contributions in this regard were decidedly unenlightening. While the plaintiff only referred to the common law as reflected in the *Prinsloo* case, and did not refer at all to the Penalties Act, the defendant's submissions only went as far as (correctly) recognising (on the basis of the *Shembe* case referred to above) that the forfeiture of the deposit constituted a penalty as contemplated in section 4 of the Penalties Act, but failed to deal with the effect of section 2(1), and merely contended that the issue was whether the penalty was fair and reasonable, upon which he contended there was no evidence.

[75] Section 2(1) of the Penalties Act provides that:

> *"A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty."*

[76] As was the case at common law,[42] the effect of section 2(1) is that a right to retain moneys already paid under a *rouwkoop* clause is an alternative to a claim for damages for breach of contract. A contractant is not entitled both to retain the

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[41] *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G-H. See also *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (SCA) at 525E-I, where Harms JA specifically identified non-compliance with section 2(1) of the Penalties Act as an instance which would justify a court in raising such a matter *mero motu*. See also *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) at paras 16 – 19.

[42] *Mineworkers Union v Prinsloo* (above), cited by the plaintiff's representative.

(deemed) penalty and claim damages in respect of an act or omission which is the subject of the penalty clause.[43] There is one exception: where the penalty is insufficient to cover the damages suffered, the innocent party may claim an additional amount as damages – as long as the agreement in question expressly provides for the recovery of damages. In other words, as long as the agreement allows for this, the defendant would be entitled both to retain the rouwkoop and claim damages, but only insofar as he first "*gives the other party credit*" for the *rouwkoop* paid and the damages claim relates solely to losses over and above those covered by the *rouwkoop*.[44]

[77] In the current instance, clauses 14.3 and 14.4 of the agreement purport to allow the seller, when cancelling the sale due to the purchaser's breach, to retain all amounts already paid by the purchaser "*and/or*" to claim damages. In view of the provisions of section 2(1) of the Penalties Act, a clause such as this cannot be read so as to allow the seller to claim damages and also insist on retaining the deposit, but must be interpreted as giving the seller an election between a claim for damages and retaining the deposit, save insofar as the deposit is insufficient to cover the damages suffered.

[78] Since there can be no doubt that the retained *rouwkoop* amount (R210,000.00) is far greater than the contractual damages claimed under the first counterclaim (R48,882.91), it follows that the defendant is not entitled to claim this amount as damages, and that this portion of the first counterclaim as amended must fail.

Counterclaim 2: Physical damage to the property

[79] The defendant's second counterclaim damages for physical harm alleged caused to the property during the plaintiff's occupation thereof was abandoned during the trial, albeit only after all the evidence had been led.

Counterclaim 3: Auctioneer's commission and costs

[80] The defendant's third counterclaim is for payment of R135,362.47 comprising the

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[43] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 473A-D.

[44] *De Lange v Deeb* 1970 (1) SA 561 (O) at 563F, confirmed in *Botha (Now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 796.

auctioneer's commission and costs incurred in conducting the auction. The availability of such a claim for special damages is identified in clause 15 of the sale agreement, which renders the purchaser "*liable for the payment of the Auctioneer's commission as well as squandered costs*".

[81] The defendant rightly argued that the amount is owing "*due to the breach ... and constitutes a contractual claim*" and also that the claim is one for "*contractual damages flowing from the cancellation*". As such, the same principles apply to this claim as those applying to the damages portion of counterclaim 1 discussed above.

[82] Even accounting for the contractual damages claimed under the first counterclaim (R48,882.91), the amount of R135,362.47 is more than adequately covered by the retained *rouwkoop* amount. As such, section 2(1) of the Penalties Act prevents the defendant from claiming this amount as damages. This counterclaim must consequently be dismissed.

Counterclaim 4: 'holding over' damages

[83] The fourth counterclaim is characterised by the defendant as a delictual claim for damages in respect of the plaintiff's alleged "*mala fide ... occupation and possession of the property*" for the 16-month period between 27 August 2013 (the date upon which the plaintiff took occupation) until the plaintiff vacated the property "*during December 2014*" (no evidence was led by either party as to the precise date) after the defendant had obtained a High Court eviction order on 20 November 2014.

[84] In my view, a delictual claim for unauthorised occupation cannot run from 27 August 2013: the plaintiff had a contractual right to occupy the property without charge from the acceptance date until the time when the agreement was cancelled, which I have found was probably 14 January 2014.

[85] Although the defendant testified that the parties agreed on about 11 December 2013 that the plaintiff would pay "*occupational rent*" in the monthly sum of 1% of the agreed purchase price, this was flatly denied by the plaintiff. In my view, the plaintiff's denial must be accepted. Not only was the defendant's own evidence

in this regard decidedly vague, there was no suggestion of any such agreement in the letter subsequently sent to the plaintiff on 15 January 2014 in which the defendant demanded that the plaintiff should "*immediately vacate the property within 24 hours*". Furthermore, if such an agreement had indeed been concluded, the claim might be expected to have been pleaded (at least in part) as one for specific performance of the obligation to pay rent agreed in terms of a contract concluded in December 2013, as opposed to damages claim for holding over.

[86] I do, however, accept that the defendant would, in principle, have a damages claim against the plaintiff in delict for unlawful holding over once the agreement was cancelled, albeit only from the date on which the defendant actually required the plaintiff to vacate the property.

[87] Irrespective whether the parties concluded a lease agreement in December 2013, the gravamen of the defendant's own evidence was that he did not actually require the plaintiff to vacate the property in December 2013. Indeed, it is apparent from the letter of 15 January 2014 that the defendant only raised the question of the plaintiff's vacation of the property at the earliest during a telephone conversation that took place the previous day, and in the letter only insisted that he should do so "*within 24 hours*". In other words, it is apparent that the defendant in fact permitted the plaintiff to remain in occupation until then.

[88] In the circumstances, I accept that the plaintiff is in principle entitled to such delictual damages that he can prove he suffered as a result of the plaintiff's unauthorised occupation of the property between 16 January 2014 and a date in December 2014. In the absence of a claim for consequential or special damages,[45] the relevant measure would be the probable market value of the rental that could have been achieved by the defendant during that period had the plaintiff not remained in unauthorised occupation thereof.[46]

[89] Even though a party may have established that it has suffered some loss, it must nevertheless prove the *quantum* of damages to which it is entitled. In this regard

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[45] See *Hyprop Investments* (above) at paras 54 – 56.

[46] *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W) at 256I.

the Appellate Division in *Esso Standard*[47] approved of the following dictum in *Hersman v Shapiro*:

> *"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it."*[48] [emphasis supplied]

[90] Thus, in circumstances such as this where the damages cannot be mathematically assessed by the court itself,

> *"[t]he critical question ... is whether the plaintiff, having successfully proved that he has suffered damage ... and that that damage was caused by the defendant, has produced all the evidence that he could reasonably have produced to enable the Court to assess the quantum of damage."*[49]

[91] The position was accurately summed up by the court in *Monumental Art Co* and *Whale Rock Trust* as follows:

> *"... it is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could*

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[47] *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A).

[48] *Hersman v Shapiro & Co* 1926 TPD 367 at 379.

[49] *Esso Standard* (above)at 968I-969I

have been made".[50]

and

> *"Thus where evidence is available to a plaintiff to place before the Court to assist it in quantifying damages, and this is not produced, so that it is impossible for the Court to do so, or there is no, or quite insufficient, evidence which can be produced by an unfortunate plaintiff, he must fail and the defendant must be absolved from the instance."*[51]

[92] In the current instance, the defendant's counsel sought to quantify the damages by attempting to extract a concession from the plaintiff that a monthly amount of 1% of the purchase price would have been an appropriate market rental for the property at the time. Even if such a concession from a factual witness would have constituted sufficient proof of damages (I have grave doubts that it would), the plaintiff resolutely resisted giving it. The plaintiff furthermore emphasised that the determination of a "*fair*" rental would be "*difficult*" in circumstances where it would not have been lawful for a lessee to occupy the property in question as a result of the absence of the certificate of occupation.[52] I agree: to the extent that it is possible to determine the market-related rental, it would be necessary to deduct the probable period of time that it would have taken the defendant to obtain a certificate of occupation.

[93] Having failed to extract the concession from the plaintiff regarding a market-related monthly rental, the defendant did not lead any evidence whatsoever of his own and instead sought to rely on what his counsel characterised in argument as "*the general rental amount*" of occupational interest in agreements for the sale of residential property, which he assured me was 1% of the purchase price. Even if it were to be appropriate for me to take judicial notice of this alleged fact (it

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[50] *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118E.

[51] *Aaron's Whale Rock Trust v Murray & Roberts Ltd* 1992 (1) SA 652 (C) at 655H – 656F.

[52] cf *Hyprop Investments* (above) at paras 54 and 59(b), where the court approved the statement of LTC Harms in *Amler's Precedents of Pleadings* 7 ed at 255 (relying in turn on *Sandown Park* (above) at 259I) that it is necessary for a party claiming holding over damages to "*allege and prove the market rental value of the premises for the period of the unlawful occupation and must show at least prima facie that the premises were lettable*". The statement remains in the latest 9th edition of *Amler* (p 239).

would not), it would be wholly irrelevant for the purposes of the assessment of the damages. The damages are not to be measured by what parties to sale agreements commonly agree as an amount of occupational rental pending the transfer of the property to the purchaser, but rather with reference to the market-related rental that a third-party lessor, uninterested in ownership of the property, might have been expected to agree to pay for the specific property at the relevant time.[53] This is a matter in relation to which I remain entirely unenlightened. Any attempt by me to assess damages would be an exercise in conjecture.

[94] It is significant that the defendant has failed to produce evidence that was evidently available to him with regard to the quantification of his damages. It was expressly recorded in both pre-trial minutes that the evidence of an expert would be led in relation to the quantification of damages. This was not done, even though the defendant went so far as to deliver notices in terms of Rules 36(9)(a) and 36(9)(b) indicating that a qualified valuator would be called as an expert "*in regard to the quantum of the Defendant's counter claim specifically ... claim 4*" and would express the opinion that an appropriate assessment of the fair and reasonable monthly rental would be 1% of the purchase price or R21,000 per month. This evidence was not led.

[95] In the circumstances, the defendant has failed to prove the damages that he suffered as a result of the plaintiff's unauthorised holding over. The plaintiff is thus entitled to an order of absolution from the instance on this counterclaim.

[96] For the sake of completeness, I note that any claim that the defendant may have in respect of the plaintiff's occupation of the property prior to the date of cancellation would have to be one for contractual damages arising out of the plaintiff's breach of the agreement. The same measure of damages as that in the delictual claim would apply to this claim.[54] To the extent that that any portion of such a claim may be cognisable under section 2(1) of the Penalties Act in the face of the defendant's enforcement of the *rouwkoop* clause, I find for the same

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[53] Of course, this would not necessarily be the case where the holding over was pursuant to a cancelled lease, and where the agreed rental might well be a useful guide to determining a market-related rental (see *Hyprop Investments* (above) at para 59(b)).

[54] *Hyprop Investments Ltd v NCS Carriers & Forwarding CC* 2013 (4) SA 607 (GSJ) at paras 41 – 53.

reasons set out above that the defendant has failed to prove any such damages and the plaintiff would similarly be entitled to an order of absolution from the instance.

Counterclaim 5: Interest on the purchase price prior to cancellation

[97] As with the first counterclaim, the defendant's fifth counterclaim is not one for damages, but rather for enforcement of the plaintiff's contractual obligation in terms of clause 6 of the sale agreement to make monthly interest payments in advance on the balance of the purchase price for the period between the acceptance date and the payment of the purchase price in full. The agreed annual rate of interest was 11% and the outstanding balance owed by the plaintiff after payment of the deposit was R1,890,000.00. The monthly interest payment was thus R17,325.00.

[98] The plaintiff's obligation to make each of the three claimed payments (in respect of September, October and November 2013) totalling R51,975.00 accrued prior to the cancellation of the agreement, as and when each payment became due and enforceable on the first day of each month.

[99] Other than the general contention that the defendant's "*damages claims*" should be dismissed in view of the *rouwkoop* clause and the passing of risk (which of course cannot apply to this claim), no specific basis was advanced by the plaintiff's legal representative in argument why he should not be required to make payment of this amount.

[100] In the circumstances, the defendant is entitled to judgment on this counterclaim in the sum of R51,975.00. Although the defendant would in principle be entitled to interest on each of the outstanding amounts from the agreed date when it became due, the defendant only claims interest "*from December 2014*". As such, an order will be made requiring the plaintiff to pay interest on the total amount from 1 December 2014.

Costs

[101] The usual principle is that the successful party should be awarded his costs in

relation to each of the claims and counterclaims. The defendant has been successful in relation to the claim in reconvention and counterclaim 5. Although he was partially successful in relation to counterclaim 1, this was only the case in respect of R15,247.96 (being just over 10% of his original claim of R143,737.92). The plaintiff readily conceded that he would be liable for some amount once the calculation was agreed. As such, my view is that the plaintiff was on the whole the successful party in this claim and he should be awarded his costs in relation thereto. The plaintiff should in principle have his costs in relation to the belatedly abandoned counterclaim 2, the unsuccessful counterclaim 3 and pursuant to the order of absolution from the instance in relation to counterclaim 4.[55]

[102] Although clause 13.2 of the sale agreement purports to entitle the defendant to recover attorney and own client costs relating to proceedings for payment of interest and other monies due by the plaintiff under the agreement, the defendant only prays for attorney and client costs. A court retains a residual discretion not to grant costs on the agreed scale in the event that "*good grounds*" are advanced by the losing party to do so.[56] I consider that the defendant is entitled to recover his costs on the attorney and client scale in respect of the contractual counterclaim upon which he has been successful. Not only did the plaintiff advance no grounds why that should not be the case, he did not raise any meaningful factual or legal defence to those claims.

[103] In principle, therefore:

(a) the defendant is entitled to costs in the claim in convention on the party and party scale and in the fifth counterclaim on the attorney and client scale; and

(b) the plaintiff's is entitled to costs in the first, second, third and fourth counterclaims on the party and party scale.

[104] I am mindful, however, that the costs incurred by both parties in preparing for and conducting the trial are not capable of being meaningfully allocated amongst the

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[55] *Aaron's Whale Rock Trust* (above) at 662.

[56] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at paras 22 - 27.

various claims and counterclaims. In order to avoid unnecessary disputes regarding such allocation, I consider that it is appropriate to allocate costs on the basis that the plaintiff's claim accounted for approximately 50% of each party's costs and time in the preparation and conduct of the trial, with 10% of the costs being incurred in respect of each of the defendant's five counterclaims.

[105] Having been successful in respect of the main claim and one of the counterclaims, the defendant should therefore be awarded 50% of his costs taxed on the party and party scale and 10% of his costs taxed on the attorney and client scale. However, since the defendant chose not to lead the expert evidence of the valuator with regard to the damages to the property and the question of rental, all costs associated with this expert evidence must be specifically excluded from his bill of costs.

[106] Since the plaintiff has been successful in relation to four of the counterclaims, he should be awarded 40% of his costs on the party and party scale.

Order

[107] The following order is made:

1. the plaintiff's claim is dismissed;

2. In respect of the defendant's counterclaim 1, the plaintiff is ordered to pay to the defendant the sum of R15,247.96 together with interest thereon at the rate prescribed by law calculated from 1 September 2016 to date of payment;

3. The defendant's counterclaims 2 and 3 are dismissed;

4. The plaintiff is granted absolution from the instance in respect of the defendant's counterclaim 4;

5. In respect of the defendant's counterclaim 5, the plaintiff is ordered to pay to the defendant the sum of R51,975.00, together with interest thereon at the rate prescribed by law calculated from 1 December 2014 to date of payment;

6. The plaintiff is ordered to pay:

6.1. 50% of the defendant's costs (determined without reference to any costs attendant upon the engagement and qualification of the expert valuator) taxed on the party and party scale; and

6.2. 10% of the defendant's costs (determined without reference to any costs attendant upon the engagement and qualification of the expert valuator) taxed on the attorney and client scale;

7. The defendant is ordered to pay 40% of the plaintiff's costs taxed on the party and party scale.

RJA Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

APPEARANCES

For the Plaintiff:	Att L Mbanjwa
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