IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR767/2010

In the matter between:

VERNA CASTELYN Appellant

and

JANICE ELIZABETH SELLICK First Respondent

J D VEDAN AND COMPANY Second Respondent

Coram: Koen J et Chetty J (concurring)

Heard: 21 November 2016

Delivered: 13 December 2016

O R D E R

(a) The appeal is dismissed and the Plaintiff is directed to pay two thirds of the First Defendant's costs of the appeal on the attorney and own client scale.

(b) The cross-appeal is dismissed and the First Defendant is directed to pay the Plaintiff's costs of the cross appeal on the attorney and own client scale.

(c) The judgment of the court *a quo* in respect of the Plaintiff's claim in convention is confirmed.

(d) The judgment of the court *a quo* in respect of the First Defendant's claim in reconvention is amended to read:

'Judgment is granted in favour of the First Defendant against the Plaintiff for payment of the sum of R3 400.00 together with interest thereon at the rate of 15,5% per annum from date of service of the claim in reconvention to date of payment, and with a costs order that each party pay their own costs relating to the claim-in-reconvention.
The Second Defendant is directed to pay the sum of R3 400.00 together with interest thereon as aforesaid from the deposit of R150 000.00 to the First Defendant, and thereafter to refund the remaining balance of the deposit together with interest that has been earned on the deposit from being invested, to the Plaintiff.'

J U D G M E N T

KOEN J

Introduction:

[1] On 30 April 2014 the Regional Court at Durban granted the following orders:[1]

'(a) In respect of the Plaintiff's claim in convention, judgment is granted in favour of the First Defendant with costs on the attorney and client scale, including the costs of counsel;

(b) In respect of the First Defendant's claim in reconvention, judgment is granted as follows:

(i) The Plaintiff shall forfeit to the First Defendant the sum of R77 184.00 as damages suffered by the First Defendant as a direct and foreseeable consequence of the Plaintiff's breach;

(ii) The Plaintiff shall pay interest at 15,5% per annum on the sum of R77 184.00 from the date of judgment to the date of payment in full;

(iii) The Plaintiff shall pay the First Defendant's costs on an attorney and own client scale, including the costs of counsel.

[1] The Appellant was the Plaintiff and the First Respondent was the First Defendant in the court *a quo*. The Second Respondent was the Second Defendant. It is the duly appointed conveyancers in terms of the agreement referred to below. It took no active part in either the trial or in the appeal. For convenience the parties shall be referred to as in the court *a quo*.

[2] The Plaintiff appeals against the whole of the judgment. The First Defendant cross-appeals against only that part of the learned regional magistrate's judgment which disallowed a damages claim for R100 000 in her claim-in-reconvention.

[3] The genesis of both the claim-in-convention and claim-in-reconvention is to be found in a written agreement relating to the purchase of the immovable property situate at […] O. Drive, Durban, the cadastral description whereof is remainder of portion 2 (previously portion 15 of (2)), of Erf […] Brickfield in extent 1342 square metres (hereinafter referred to as 'the property').[2]

[4] In the claim-in-convention the Plaintiff maintains that she was entitled to resile from the agreement because of a misrepresentation made to her, which would therefore entitle her to the repayment of the deposit of R150 000.00 she had paid to the Second Defendant. This contention is denied by the First Defendant who in turn alleges that the Plaintiff breached the agreement causing her to suffer various damages. She therefore claimed forfeiture of the deposit paid as a genuine pre-estimate of damages and sought to recover damages over and above that amount.

[5] In what follows, I shall:

(a) determine the true nature of the Plaintiff's cause of action as formulated in the pleadings;

(b) identify the true agreement between the parties which the Plaintiff seeks to resile from, and on which the First Defendant relies for her damages;

(c) analyse whether there was an actionable misrepresentation which would entitle the Plaintiff to resile from the agreement and claim restitution;

(d) what damages were recoverable by the First Defendant.

[6] The learned magistrate gave a very comprehensive judgment. I do not intend repeating the comprehensive summary of the material evidence contained therein,

[2] The property comprises land with improvements thereon. In the evidence reference was made to 'the fenced in portion' which comprises the buildings and the garden immediately around the buildings, and the road, being a portion of Oakleigh Drive, which the parties accept forms part of the property, but which lies outside the fenced in area which the Plaintiff said she viewed as the property.

nor shall I repeat findings with which this judgment does not take issue. This judgment will deal only with those aspects on which I have concluded that the learned magistrate misdirected himself or where, although I arrive at the same conclusion as he did, my approach and reasons for doing so are different.

The Plaintiff's cause of action:

[7] *Ex facie* the Plaintiff's particulars of claim:

(a) The Plaintiff relied on a written purchase and sale agreement concluded between her and the First Defendant at Durban on 17 October 2011 relating to the purchase of the property;

(b) Pursuant to the terms of the agreement the Plaintiff paid a deposit in the sum of R150 000.00 to the Second Defendant;

(c) The Plaintiff alleged that:

> 'At all times material … the First Defendant, both verbally and in terms of the agreement, expressly and/or impliedly, represented to the Plaintiff that the property measured One Thousand Three Hundred and Forty Two (1342) square metres and that the Plaintiff would have beneficial use and enjoyment over a property of that extent.'[3]
>
> 'Alternatively, the First Defendant and/or her duly authorised agent represented that the fenced in area the Plaintiff was shown was the full extent of the property being purchased, which was represented to the Plaintiff on the written agreement of sale as being an area in extent of one thousand three hundred and forty-two square metres (1342m2)'.[4]
>
> 'The representation as to the extent of the property was false in that:
>
> (a) The true extent of the property as described is seven hundred and forty-four (744) square metres; alternatively
>
> (b) The First Defendant 'has, and the Plaintiff would have had, beneficial use and enjoyment of the property only to the extent of seven hundred and forty-four (744) square metres, the remaining portion of the property being a public road'.[5]
>
> 'At all times material …, the First Defendant was aware of circumstances referred to immediately herein above, alternatively was

[3] Paragraph 7 of the particulars of claim.
[4] Paragraph 7A of the particulars of claim.
[5] Paragraph 9 of the particulars of claim.

negligent in making the representation as to the extent of the property as recorded in the agreement'[6]

(d) The Plaintiff further alleged that:

'In all the circumstances, and at the conclusion of the written agreement, the Plaintiff believed she was only purchasing the fenced in property which was represented to her as measuring one thousand three hundred and forty-two square metres (1 342m2) when in fact the property the First Defendant wished to transfer was the fenced in property, then only measuring 744 square metres (744 M2) and the remaining portion being a public road. The parties were not at *ad idem*'.[7]

(e) Relying on the aforesaid alleged misrepresentations, the Plaintiff on 13 February 2012 sought to resile from the agreement.[8]

(f) In the prayer the Plaintiff claimed judgment in the following terms:

'(a) declaring the agreement to be cancelled and of no force and effect;
(b) directing the Second Defendant to repay to the Plaintiff the sum of One Hundred and Fifty Thousand Rand (R150 000.00);
(c) directing the Second Defendant to pay any interest that would have accrued on the amount calculated from the date of deposit with the Second Defendant; alternatively
(d) costs of suit against the First Defendant, save that in the event of the Second Defendant opposing any of the relief sought, then costs are to be awarded against the First and Second Defendant jointly and severally, the one paying the other to be absolved'. [9]

[8] Mr Pillay, who appeared for the Plaintiff argued that the Plaintiff's cause of action was based on the misrepresentation alleged, alternatively a lack of consensus regarding the *merx*. As regards the latter, although paragraph 10A of the particulars of claim contains a reference to the parties not being '*ad idem*', the prayer to the particulars of claim was inconsistent with the cause of action being based on *dissensus*. If that was the cause of action, then the prayer would have included a declaration that no valid agreement came into existence, and for repayment of the

[6] Paragraph 10 of the particulars of claim.
[7] Paragraph 10A of the particulars of claim.
[8] The First Defendant, relying on the Plaintiff's repudiation and/or breach of the agreement, cancelled the agreement on 21 February 2012 - paragraph 11 of the particulars of claim.
[9] Paragraph 15 to the particulars of claim.

deposit paid, probably on the basis of a *condictio indebiti.* The prayer, to the contrary, presupposes the conclusion of an agreement, which because of the alleged misrepresentation, is then sought in prayer (a) to be declared 'cancelled and of no force and effect'. That is the basis upon which the matter was dealt with in the court *a quo* and it is the cause of action that will be considered in this judgment. No case for the repayment of the deposit on the basis of a c*ondictio indebiti* was advanced in the pleadings or in evidence before the court *a quo*.[10]

[9] The alleged misrepresentations will furthermore be confined to what are truly misrepresentations, that is statements made preceding the conclusion of an agreement, which induce the conclusion of an agreement and on which reliance is indeed placed by the other party to the agreement in concluding the agreement.[11] Statements, for example as to the extent of the property, recorded in the agreement, are terms thereof which might give rise to a breach of the agreement if incorrect, but are not misrepresentations.

The Agreement:

[10] Although the particulars of claim base the Plaintiff's claim on a written purchase and sale agreement concluded between the Plaintiff and the First Defendant at Durban on 17 October 2011, this is factually incorrect if regard is had to the relevant chronology of material events. I deal with these briefly in what follows immediately below.

[11] Following inquiries made by the Plaintiff, she and her husband viewed the property on 15 October 2011 and thereafter submitted a written offer, through the estate agent Mr Fann, to the First Defendant. The First Defendant was not present when the Plaintiff and her husband viewed the property.

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[10] Even if the pleadings are assigned as benevolent an interpretation as possible and the evidence as extensive an interpretation (as to possibly suggest the evidence having broadened the issues arising from the pleadings to include a cause of action based on *dissensus)*, the Plaintiff's claim on that cause must also fail. The Plaintiff presented an offer to the First Defendant with specific terms which the First Defendant relied upon and accepted. Whether the issue is approached on the basis of the Reliance theory or the so called doctrine of quasi mutual assent, objectively there was agreement. No case has been advanced on the pleadings for any unilateral *justus* error.

[11] See generally *Spenmac (Pty) Ltd (formerly Bobcart (Pty) Ltd) v Tatrim CC* [2014] 2 All SA 549 (SCA) but specifically at para 25.

[12] The terms of this offer by the Plaintiff and her husband included *inter alia* the following:

(a) The purchase price of the property was R1 250 000.00;

(b) A deposit of R400 000.00 was payable within 14 days of acceptance of the offer;

(c) Clause 7.1 provided that:

'The Property is sold voetstoots, in its present condition, and the PURCHASER acknowledges that he has thoroughly inspected the property and the sellers declaration attached hereto, before he signed this agreement and that he has acquainted himself with its nature, extent, locality, conditions of title, servitude, leases, any conditions to be lawfully imposed at the instance of the Government and/or Provincial and/or Local Authority and anything which may adversely affect the value of the property, including any statutory and other rules relating thereto and shall have no claim whatsoever against the SELLER or the AGENT for any defects in the Property whether latent (not visible on inspection) or patent (visible on inspection).'

(e) Clause 7.2 provided that:

'If the property has been erroneously described herein, such mistake or error shall not be binding on the seller but the description of the property as set out in the sellers title deed shall apply and in such event, the parties hereto agree to the rectification thereof to conform to the intention of the parties. It is further noted and agreed that if the surveyor general has altered the description of the property in pursuance of any scheme or of provision of numbering of erven in any municipal area that the new description should apply ….'

(f) Clause 16 provided that:

'This agreement constitutes the entire contract between the SELLER and the PURCHASER and any acts, representations, announcements, statements, warranties, guarantees or conditions not recorded herein shall be of no force or effect whatsoever, the PURCHASER acknowledging that neither the SELLER nor any person acting on his behalf has made any representations, announcements, statements or warranties in inducing the conclusion of this AGREEMENT. In particularly the PURCHASER shall have no claim against the SELLER whatsoever in respect of any statement or representation relating to the property or improvement thereon or to any matter or thing arising in any negotiations prior to the conclusion of this Agreement.'

(g) Clause 10.4 provided that:

> 'In the event of any party … having to consult with Attorneys as a consequence of any breach of the terms of this Agreement by any party, then the defaulting party will be liable to pay the said Attorneys' costs of (sic) the Attorney and own scale…'

(h) It was a further term of the agreement that 'approved building plans of the whole property' would be provided.

[13] This written offer signed by the Plaintiff and her husband was thereafter transmitted by the agent to the First Defendant, and was accepted by her signing it on the 17 October 2011.

[14] On 19 October 2011, and in apparent discharge of the obligation to provide the building plans, the agent Mr Fann met the Plaintiff and her husband in the parking lot of St Augustines Hospital in Durban. It is common cause that at this meeting Mr Fann, at the lowest common denominator of the evidence adduced, mentioned to the Plaintiff and her husband that they were also acquiring a portion of a road. Mr Fann's evidence in fact went beyond that and he repeatedly stated that he had told the Plaintiff and her husband that they were acquiring part of Oakleigh Drive.[12]

[15] The Plaintiff and her husband thereafter decided, for reasons personal to them but irrelevant to this judgment, that only the Plaintiff herself would be the purchaser of the property, rather than the Plaintiff and her husband and requested that that decision be implemented. The deposit payable to the Second Defendant was also to be reduced to R150 000.00. The First Defendant agreed to this. Insofar as the identity of the purchaser was concerned, the name of the Plaintiff's husband then deleted wherever it appears as being a purchaser and this deletion duly initialled. The effect thereof was that the Plaintiff purchased the property on the same terms as she and her husband had previously bought, save for the amendment relating to the deposit. It was common cause that this happened on 27 October 2011. Whether this was simply an amendment of the original agreement, or whether

[12] After extensive cross-examination he eventually conceded that he might have been mistaken. That was a fair concession having regard to human fallibility, but did not accord with his primary recollection of that discussion. There is no reason not to believe Mr Fann on this aspect. But it is a factual dispute irrelevant to the dispute.

it resulted in a new agreement[13] is of little or no consequence. What is important is that the agreement which the Plaintiff sought to resile from was not the one of 17 October 2011 (as alleged in the particulars of claim, with both her and her husband as purchaser), but the agreement between the Plaintiff and the First Defendant which came into existence on 27 October 2011 when the amendments were deleted. Significantly further, the effect thereof was that the Plaintiff, with knowledge (at the minimum) that she was also acquiring a part of a road, agreed to proceed with the purchase of the property on her own, on the basis of the offer previously submitted and agreed to, including clauses 7.1, 7.2 and 16.

[16] Pursuant to this amended/new agreement between the Plaintiff and the First Defendant, the Plaintiff duly paid the deposit in the sum of R150 000.00 to the Second Defendant on 11 November 2011, thus giving partial effect to her obligations as purchaser.

[17] The Plaintiff's case was that it was only thereafter, more specifically on 4 November 2011, that her husband attended upon the Surveyor General's office and discovered that a portion of Oakleigh Drive was included in the property that she had purchased. Her claim is that she did not wish to acquire this portion of a public road and hence her decision to resile from the agreement.

The misrepresentation:

[18] The Plaintiff does not contend for a positive misrepresentation by the First Defendant or her agent. Mr Pillay who appeared on behalf of the Plaintiff fairly conceded that an alleged representation that the property measured one thousand three hundred and forty-two square metres (1 342 m^2), was not based on any representation which preceded the conclusion of the agreement, but was the extent inserted in the agreement, and hence simply a term of the agreement. The evidence established that the extent of the property as per its cadastral description is in fact one thousand three hundred and forty-two (1 342 m^2) and accordingly that term of the agreement, even if it could be elevated to the level of the representation (which

[13] In her email of 27 October 2011 the Plaintiff styled her request that she be reflected as the sole purchaser as constituting her 'amended offer to purchase duly initialed'.

in my view it cannot) is correct and could not amount to a misrepresentation. Mr Pillay also accepted that there was no positive representation made that the Plaintiff would have the beneficial use and enjoyment of the full extent of the one thousand three hundred and forty-two (1 342 m^2). Often, the full extent of property as per the cadastral extent is not capable of being used and enjoyed to the full in respect of every square millimetre, because of the nature of the land, topographical features such as streams, dams, and the like. Nor, as accepted by Mr Pillay, was there any positive representation by the First Defendant or her duly authorised agent that the fenced in area on the property was the full extent of the property purchased.

[19] Instead, the contention advanced by the Plaintiff was that there was a misrepresentation by silence, or an actionable non-disclosure, in circumstances where there was a duty on the First Defendant, or her agent, to disclose that a 'large' part of the property to be acquired was a road, and that it was the failure of the First Defendant and/or her agent to do so, which was relied upon and which in fact induced the conclusion of the agreement. When asked as to what the disclosure should have been, Mr Pillay stated that there should have been words along the lines of:

> 'You will be purchasing a substantial/large portion of the public road O. Drive '.

[20] Whatever the effect of a failure to disclose that the Plaintiff and her husband would be acquiring ownership of a part of Oakleigh Drive might have been in respect of the written offer made by them and accepted by the First Respondent on 17 October 2011, is not the issue. Considerations such as whether there was involuntary reliance by the Plaintiff and her husband on what was presented to them, absent the disclosure that ownership of part of Oakleigh Drive would also be acquired, or what the impact of clauses 7 and 16 might be in respect of such non-disclosure, are irrelevant. On 27 October 2011 the Plaintiff unequivocally and in no uncertain terms with knowledge, at best for her that she was also acquiring a portion of a road, and at worst knowledge that the portion of the road she was acquiring was indeed part of Oakleigh Drive, elected to purchase alternatively to proceed and continue with the purchase of the property. She thereafter further implemented the agreement by paying the deposit. She thereby specifically assumed the risks

mentioned in clauses 7 and 16 of the agreement relating to the nature, extent, locality, conditions of title, servitude, leases etc. of the property.

[21] To the extent that it might be contended that she thought that the fenced in area was one thousand three hundred and forty-two (1 342 m^2) metres in extent, whereas it only amounts to some three hundred and forty-four (344 m^2) square metres, even assuming it to be a misrepresentation, it was not a misrepresentation which induced the conclusion of the agreement. The unequivocal evidence of the Plaintiff, and insofar as relevant that of her husband, was that she was not 'buying for size' and that the actual extent of the fenced in area, assuming that was the only portion she thought she was buying, played no role.

[22] The sale between the Plaintiff and the First Defendant was therefore not induced by any misrepresentation by silence or omission. She had been told by the agent before electing to proceed with the sale on her own that she was also acquiring a portion of a road (a portion of Oakleigh Drive, if Mr Fann's evidence is accepted).

[23] Mr Pillay submitted that she was not told that it was a portion of Oakleigh Drive, as opposed to for example part of the sewer and drain road behind the property (but which does not form part thereof), nor that it was a 'large/substantial' part of that road. That is however legally irrelevant. At the level of the lowest common denominator, the Plaintiff had been told that she was acquiring part of a road and having that knowledge she could make further inquiries or insist on further details (if in fact she had not been told specifically that it was part of Oakleigh Drive). The reference to the extent of this portion of the road in terms of "large" or "substantial" are so vague as to be of no consequence.

[24] The Plaintiff failed to establish grounds on which she could resile from the agreement. The claim in convention was therefore rightly dismissed with costs. The scale of costs is that contractually provided for in the agreement.

<u>The First Defendant's counterclaim</u>:

[25] The Plaintiff's failure to pay or secure the transfer costs to the Second Defendant,[14] amounted to a breach of the agreement. She was placed in *morae* by proper demand to remedy that breach and when she failed to do so, the agreement was cancelled validly. No submissions to the contrary were advanced.

[26] An aggrieved party is, in the event in the cancellation of an agreement, in her election entitled to claim damages, to place her in a position she would have been in had the breach not occurred, according to her positive *interesse*. Damages must be assessed in relation to the date of the breach and can only extend to such damages as arise directly from the breach and/or were within the contemplation of the parties at the time of contracting as the natural and probable consequence of such breach.[15]

[27] Following the cancellation of the agreement, the First Defendant on 15 April 2012[16] sold the property for R1 150 000.00. In the interim the First Defendant had remained on the property and continued living there until 1 July 2012. The parties agreed that had the sale to the Plaintiff been implemented, the property would in the ordinary course have been transferred into the name of the Plaintiff by 1 March 2012.

[28] The First Defendant claimed the following damages in her claim-in-reconvention:

(a) Rate charges levied by the municipality in the sum of R3 355 88;[17]

(b) The costs of employing a security guard to prevent the property from being vandalized for the period from 1 July 2012 to 17July 2012, at the rate of R200 per day, giving a total of R3 400.00;

(c) A loss of R100 000.00, being the difference between the price which the Plaintiff had contracted to pay the First Defendant and the sum for which the First Defendant subsequently sold the property;

(d) R73 784.24, being 'interest accrued at 15,5% on the purchase price of R1 250 000.00 from 1 March 2012 being the date upon which transfer would have been affected but for a breach to 17 July 2012 (139 days)

[14] Demanded *inter alia* on 23 January 2012.
[15] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 46ffg.
[16] Occupation was required to be given on registration of transfer.
[17] Further rates of R39,07 allegedly in respect of the period 1 to 17 July 2012 were waived.

being the date of registration of the sale of the property to the new purchaser';

(e) Wasted conveyancing costs in the sum or R11 837. 61.

[29] The learned magistrate found in favour of the First Defendant on the counterclaim in respect of the amounts claimed in sub-paragraphs (b) and (d) above, giving a total of R77 184.00, and declared the deposit paid by the Plaintiff forfeited to that extent. The Plaintiff appeals against the award of those damages. The First Defendant has cross appealed only against the disallowance of the damages in sub-paragraph (c) above. This judgment therefore need not deal with the damages disallowed in sub-paragraphs (a)[18] and (e)[19] above. I deal with the damages in issue under the various heads in subparagraphs (b), (c) and (d) *seriatim* below.

The costs of the security guard:

[30] This amount is claimed as security services in respect of the period after the First Defendant had vacated the property and before transfer was affected. The reasonableness of incurring these charges and the quantum thereof were not disputed, are fair and reasonable, and were correctly allowed. No argument to the contrary was addressed to us.

The loss of R100 000 on the sale of the property:

[31] This amount was in my view correctly disallowed for the reasons stated by the learned magistrate but also, as fairly accepted by Mr Alberts who appeared for the First Defendant, that the extent of any damages suffered in this regard had to be assessed with reference to the market value of the property as at the date of the breach. No evidence was given in that regard. The property was sold a number of months later. Although this was a sale at arms- length, there was no evidence as to

[18] The rates for March to June 2012 were rightly disallowed. The First Defendant remained in occupation of the property, had the full use thereof, and was accordingly liable for the resultant costs relating to her continued occupation.

[19] In terms of the agreement the purchaser would be liable for all costs in relation to the transfer of the property into her name, including but not limited to transfer duty, conveyance fees, stamp duties, value added tax and other charges in relation thereto. It is not clear on what basis any liability for wasted conveyancing costs could attach to the First Defendant. Certainly there was no proof that she had paid any. The learned magistrate in my view correctly disallowed this claim.

how the property market had been affected in the interim, specifically whether the price fetched was a fair reflection of the market value of the property as at the date of the breach and cancellation of the agreement. The First Defendant had the opportunity to adduce this evidence, failed to do so, and accordingly failed to discharge the onus of proof. The learned magistrate correctly concluded that

> '…the market value of the property at the time of breach of contract must be proved to enable the court to assess damages'

and that

> '(e)ven if the contract price (at which the property was subsequently sold) could be accepted as the market price at that time (of the sale), there is no market price at the time of breach of the contract'.

[32] This conclusion makes it unnecessary to consider the effect of the decisions in *Culverwell and another v Brown*[20] and *Hutchinson v Hylton Holdings and another*[21] any further. As much as the property was vigorously remarketed after the Plaintiff unlawfully repudiated the sale, there was a delay of some months before the second sale was concluded. It would have been easy for the First Defendant to have led evidence as to whether the price finally achieved also represented the fair market value of the property at the date of the breach. I am not persuaded that the learned magistrate had erred in this regard.

The interest on the purchase price:

[33] This amount was allowed by the learned magistrate, in my respectful view incorrectly so. This was not an instance where a contract was sought to be enforced, where payment had to be made by a specific date and where interest, subsequent to the defaulting party being placed in *mora,* would accumulate *a tempore morae* at the prescribed rate of interest in terms of the Prescribed Rate of Interest Act.[22] Admittedly the First Defendant did not receive the R1 250 000.00 on 1 March 2012. However her claim is a damages claim. She would, for example have to show that had she received the money (but for the breach and cancellation), she would have invested that money at a specific rate of return, or applied the proceeds of the sale to discharge a bond liability thereby saving the interest payable in respect of such

[20] 1990 (1) SA 7 (A).
[21] 1993 (2) SA 405 (T).
[22] Act No 55 of 1975.

liability, or applied such proceeds to reduce an overdraft facility thereby saving the overdraft interest for which she otherwise remained liable. Interest at the *morae* rate on the full purchase price, cannot, without any evidential basis thereof, qualify as proof of damages that she might have suffered. A further complicating factor in calculating any damages in this regard is also that although she might not have received the purchase price, she was saved the costs of finding alternative accommodation by remaining on in occupation of the property until 30 June 2012,[23] and that would also have to be brought into the calculation. It was incumbent on the First Defendant to prove her damages. In my view she failed to do so and she should not have been awarded the interest as damages.

[34] In respect of the counterclaim, the First Defendant should accordingly only have succeeded to the extent of R3 400.00 with interest thereon at the rate of 15,5% per annum from the date of service of the claim-in-reconvention to the date of payment.

Costs:

[35] In terms of the agreement, costs are payable on the attorney and own client scale.

[36] The First Defendant was successful in respect of the appeal on the claim-in-convention, in warding off the Plaintiff's claim for repayment of the sum of R150 000. She also succeeded with her counterclaim for the security charges in the sum of R3 400, which was not opposed vigorously, and enjoyed limited success to that extent in respect of the Plaintiff's appeal. But she was unsuccessful in respect of the interest claim which had been awarded in her favour (R73 384.00) and the claim for R100 000 (the subject of her cross-appeal). In respect of her claim-in-reconvention the First Defendant was accordingly unsuccessful save for the amount in respect of the security charges, which the court *a quo* had in any event allowed and did not form part of the cross-appeal. The First Defendant was unsuccessful in respect of her cross-appeal in respect of her claim for the loss of R100 000 in the purchase price.

[23] She had acquired another property, but no evidence in regard thereto, to sustain a damages claim was adduced.

[37] The Plaintiff was thus substantially unsuccessful in her appeal, save that she did succeed to ward off the First Defendant's interest claim. Most of the evidence and argument before us had however concentrated on the disallowance of the claim in convention. It seems fair in all the circumstances, in the exercise of my discretion on the issue of costs, that the First Defendant be awarded two thirds of the costs of the appeal.

[38] Save for the amount of R3 400, which was in any event not controversial, the First Defendant was substantially unsuccessful with her cross-appeal. It seems fair that she be directed to pay the costs of the cross-appeal.

[39] Insofar as it concerns what remains in respect of the claim-in-reconvention, the First Defendant is only entitled to payment of R3 400.00 with interest thereon at 15,5% from date of service of the claim in reconvention to date of payment. The costs order in the court *a quo*, although the First Defendant was successful to that limited extent, should in my view be altered to also take account of the substantial extent to which she was unsuccessful in her counter-claim, by that order being amended to read that the Plaintiff and Defendant shall each pay their own costs relating to the claim in reconvention in the trial court.

Order:

(a) The appeal is dismissed and the Plaintiff is directed to pay two thirds of the First Defendant's costs of the appeal on the attorney and own client scale.

(b) The cross-appeal is dismissed and the First Defendant is directed to pay the Plaintiff's costs of the cross appeal on the attorney and own client scale.

(c) The judgment of the court *a quo* in respect of the Plaintiff's claim in convention is confirmed.

(d) The judgment of the court *a quo* in respect of the First Defendant's claim in reconvention is amended to read:

‘Judgment is granted in favour of the First Defendant against the Plaintiff for payment of the sum of R3 400.00 together with interest thereon at the rate of 15,5% per annum from date of service of the claim in reconvention to date of payment, and with a costs order that each party pay their own costs relating to the claim-in-reconvention.
The Second Defendant is directed to pay the sum of R3 400.00 together with interest thereon as aforesaid from the deposit of R150 000.00 to the First Defendant, and thereafter to refund the remaining balance of the deposit together with interest that has been earned on the deposit from being invested, to the Plaintiff.’

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KOEN J

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CHETTY J

APPEARANCES

FOR APPELLANT:	Mr I PILLAY
Instructed by: Ref.: CAS1/0001 Tel.: 031 201-8955	MACGREGOR-ERASMUS ATTORNEYS
FOR FIRST RESPONDENT:	Mr S ALBERTS
Instructed by: Ref.: 08S447001 Tel.: 031 3149300	BERKOWITZ COHEN WARTSKI
SECOND RESPONDENT:	NO APPEARANCE - ABIDED BY THE DECISION OF THE COURT