THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 694/2015

In the matter between:

HANS PIETER WOLFGANG SCHEIBERT **APPELLANT**

and

LYNETTE ETHEL ALLEN **RESPONDENT**

Neutral Citation:	*Scheibert v Allen* (694/2015) [2015] ZASCA 126 (26 September 2016).
Coram:	Lewis, Shongwe, Willis, Saldulker and Dambuza JJA
Heard:	18 August 2016
Delivered:	26 September 2016

Summary: Contract: damages for breach of warranty: onus on plaintiff to prove diminution in value of property as a result of breach of warranty: the evidence must show an adverse difference between the purchase price and the market value of the property: the purchase price paid for the property was lower than its market value: breach of warranty did not result in loss of value of the property.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Blignault J, sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2 The order of the court a quo is set aside and is substituted with the following:

'The plaintiff's claim is dismissed with costs.'

JUDGMENT

Dambuza JA (Lewis, Shongwe, Willis, Saldulker JJA concurring):

[1] The appellant, Mr Hans-Peter Scheibert, appeals against an order that he pay damages to the respondent, Mrs Lynette Allen, for breach of a warranty in respect of a sale of immovable property. The appeal is with leave of the court a quo (Blignault J).

[2] On 29 July 2009 Mr Scheibert sold his immovable property, Erf 2054, situated at No 6 Bridle Road, Oranjezicht, Cape Town, to Mrs Allen for R7 375 000. On 4 August 2009, in a written addendum to the agreement of sale, Mr Scheibert warranted that all alterations, additions and improvements to the property had been approved by the City of Cape Town (the City). The dwelling on the property comprised a main house and a 70m² flatlet situated on a level lower than the main house. The flatlet comprised two bedrooms, a bathroom and a kitchen.

[3] The property was transferred to Mrs Allen on 6 October 2009. After moving into the property, Mrs Allen and her husband prepared to effect some renovations to alter certain features of the house. The renovation plans prepared by an architect

were rejected by the City because the kitchen in the flatlet had never been approved by the City. Further, this kitchen rendered the property a double residential unit in contravention of the provisions of the zoning scheme and a condition of title to the property.

[4] The architect presented Mrs Allen with two options. She could retain the kitchen and submit to the City an application for removal of the title deed restriction, a process which, according to the architect, could take six to 24 months, at an estimated cost of R38 750. Alternatively, she could remove the kitchen, rendering the property a single dwelling and submit revised plans to the City. Mrs Allen chose the second option and then instituted proceedings against Mr Scheibert claiming damages for breach of warranty.

[5] Mr Scheibert admitted that he was in breach of the warranty but denied that Mrs Allen had suffered any damages as a result. He contended that Mrs Allen had bought the property at a price lower than its market value and that the removal of the kitchen did not derogate from the market value of the property. Mr Scheibert had also pleaded, in the alternative, that Mrs Allen ought to have mitigated her damages by seeking removal of the restrictive condition of title. Thus the issues for determination by the court a quo were whether the removal of the kitchenette had resulted in loss of value to the property and whether Mrs Allen had been obliged to mitigate her damages as contended.

[6] In the summons, Mrs Allen's main claim was for R350 000 'in respect of diminution in the value of the property' as a result of the removal of the second kitchen. She also claimed R35 000 as costs incurred in the removal of the second kitchen and R7 827.24 in respect of alterations to the renovation plans. The court a quo awarded damages of R217 827 which comprised damages of R175 000 for 'loss of the flatlet as the second residential unit', R35 000 for removal of the flatlet kitchen and R7 827.24 as costs of amending the design of the renovations and resubmission of the plans to the City.

[7] In support of her claim for diminution of the value of her property, Mrs Allen gave evidence, and relied on the expert evidence of Mr John van der Spuy, a

professional valuer. Mrs Allen's evidence was to the effect that her family decided to relocate from Milnerton to the Cape Town City Bowl area as their two sons were studying at the Cape Town University of Technology and their daughter was going to the University of Cape Town. She chose the property in question because it had the self-contained flatlet which her sons could use 'with some independence'.

[8] According to Mr van der Spuy's valuation report, he was instructed to '…determine the impact on the market value at the date of sale caused by the removal of the second kitchen…'. When doing the comparable sales analysis Mr Van der Spuy considered the subject property to be a double dwelling. He described his methodology in carrying out his task as a 'comparable sales' method, in terms of which he examined sale (prices) of five homes in the Oranjezicht area and compared them to that of the subject property. Three of the five houses were on Bridle Road. House No 2 Bridle Road had been sold for R5.1 million on 5 December 2007. Number 10 Bridle Road had been sold for R7 million on 18 January 2008. Number 8 Bridle Road had been sold for R9.8 million on 13 February 2009. The last two properties were on Rugby Road. Number 2 Rugby Road had been sold for R7.3 million on 22 February 2009 and No 5 Rugby Road had been sold for R6.25 million on 30 August 2008. From this information Mr Van der Spuy concluded that Mrs Allen had paid a 'premium price' for the subject property. He assumed that the higher price was, in part, attributable to the self-contained flatlet.

[9] Mr Van der Spuy then went further to consider 'comparable residential rentals of apartments in Oranjezicht which he found to be approximately R4 000 per month for a '…two bedroomed, 70m² unit with a lounge, kitchenette and bathroom facilities'. He then applied a capitalisation calculation of 8.5% on an estimated rental loss of R31 500 per annum. He also considered that a 70m² flat would sell for approximately R1.2 million. From this he concluded that '…the adjusted valuation of the overall property would reduce by approximately R350 000, ie to just over R7 million'.

[10] When doing the comparable sales analysis, Mr Van der Spuy interviewed three estate agents, one of whom was his wife. All three estate agents were satisfied that the removal of the kitchenette had resulted in loss of value of the property. This is the view that Mr Van der Spuy also held. He then computed the quantum of the

diminution as set out in his report, '…utilising potential rental loss of an independent' dwelling.

[11] At the invitation of the court a quo the parties filed heads of argument on the issue of whether a claim for damages in lieu of specific performance was available to Mrs Allen. The court then considered the different approaches to the assessment of damages, that is, the negative difference between the patrimonial position after the damage causing event and the factual loss or asset deterioration. The difference between the two approaches is not material for the purposes of this case because, on both approaches, Mrs Allen had to prove reduction in value of the property.

[12] The court a quo reasoned that, because the breach related to a specific portion of the property, Mrs Allen was entitled to claim damages in an amount that would put her in the position that she would have been but for the breach. The court found that the breach had only impacted the use of the flatlet. It accepted Mr Van der Spuy's opinion that Mrs Allen had bought the property at a price higher than its market value. The court then halved Mr Van der Spuy's 'diminution' value assessment based on use of the flatlet as part of a single dwelling. Hence the award of R175 000 as damages for diminution in value.

[13] The basic principle in claims for damages based on defective performance or breach of warranty in a contract is that the plaintiff must establish that he or she has suffered damages.[1] Unlike damages for delict, damages for breach of contract are normally not intended to recompense the innocent party for patrimonial loss, but to put him in the position he would have been in if the contract had been properly performed.[2] The difference was succinctly stated by Van den Heever JA in *Trotman v Edwick & another*:

'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues in delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him. The Roman-Dutch authorities I have consulted are not helpful and merely state that the plaintiff is

[1] *Sommer v Wilding* 1984 (3) SA 647 (A) at 664-7; A J Kerr *The Principles of the Law of Contract* 5th eds (2002) at 737.
[2] *Mostert N O v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at para 76.

entitled to his *id quod interest*, but I suppose they take the obvious for granted and imply that damages should be assessed on the same principles as in, say, the Aquilian action.'[3]

[14] In *Katzenellenbogen Ltd v Mullin*[4] the court held that where a contract is one of purchase and sale of a marketable commodity and is breached by non-performance, the extent of the innocent party's loss is ordinarily established by applying the market value measure. If a party wants to avail himself of a measure other than the normal one the onus rests on him to satisfy the court that the measure contended for is the appropriate one to employ in all the circumstances of the case. A litigant does not have an unqualified discretion in the selection of the measure to be employed in determining the extent of the loss.

[15] The basis for the conclusion by Mr Van der Spuy, that Mrs Allen had paid a premium price for the property, is flawed. Firstly, on his own evidence, Mr Van der Spuy did not look at properties similar to the subject property. Having considered the subject property to be a double dwelling property, one would have expected that he would have compared sales relating to a more-or-less similar double dwelling properties. Second, even the comparable sales that Mr Van der Spuy considered did not show that Mrs Allen paid a price higher than the market value. Their average market value was approximately R7 million.

[16] Moreover, Mr Van der Spuy had not done any inflation adjustment on the prices he had considered. Had he done so, he would have realised that three of the five properties on his list were sold at prices higher than the subject property. In fact, the evidence shows that R7 million was in fact the lowest base for properties in the area of the subject property. Number 10 Bridle Road, described by Mr Van der Spuy as unrenovated and 'vacant land', had been sold for R7 million in January 2008. Even further, he had omitted two significant comparable sales from his list. Number 8 Bridle Road had been sold for R9.8 million in July 2008 and for R11 million in February 2009. Number 27 Bridle Road, which was less than half of the size of the subject property, was sold for R8 million in July 2008. Mr Van der Spuy explained the higher price in respect of No 8 Bridle Road by saying that the plot was considerably

[3] *Trotman v Edwick* 1951 (1) SA 443 (SCA) 449B-C.
[4] 1977 (4) SA 855 (A).

more level and the dwelling thereon superior than the subject property. But the explanation does not account for the rest of the evidence.

[17] Mr Van der Spuy also explained that his comparable sales exercise was only intended to establish the market value of the property. With regard to his assessment of diminution in value, at first, he testified that he considered that although Mrs Allen intended to use the flatlet for her student sons, he also took into account that a potential buyer might want to use it for commercial gain. Later, his evidence was that he relied on his subjective opinion together with the consultations he had had with the three estate agents. According to him, the term 'premium price' meant 'upper market prices in the area at the time' and/or 'equivalent to top prices in that area'; 'it wasn't a premium price for the property per se…' This explanation does not assist Mrs Allen. At best Mr Van der Spuy's evidence establishes that Mrs Allen had not paid more for the property than she would have paid for a comparable single dwelling property and, in fact, Mr Van der Spuy also testified that he was '…satisfied that the [purchase price paid by Mrs Allen] was a fair reflection of the market value at that point in time'. I may also say that no basis had been laid for a claim based on rental.

[18] Mr Scheibert's expert, Ms Marlene Tighy, also a valuer, used a more comprehensive and scientific property evaluation method called 'multiple-regression analysis' to examine data relating to 42 historical sales in the area. The data consisted of different value forming attributes such as the size of the plot, the size of the dwelling, its condition, age, the number and the type of rooms, for example, bedrooms and bathrooms, sale dates and prices. These attributes were fed into two formulas each of which placed emphasis on different attributes resulting in two inflation adjusted evaluations for each property. On this methodology, Ms Tighy concluded that the selling price of the subject property had been below its market value of R9 million or the market price for a single dwelling in the area.

[19] The submission that Mrs Allen bought the subject property at a price lower than its market value is consistent with the background to the sale. Mr Scheibert had been living on the property until 2008 when he relocated to Germany. In about July or August 2008 he instructed estate agents to market the property. At first his asking

price was between R10 and R11 million. As time went on and in light of the slump in the housing market in 2008, he gradually reduced the price until he set it at R8.9 million, this being the price at which he believed that his neighbour, Mr Winter, had sold No 8 Bridle Road. His evidence was that he regarded this price as his 'bottom line'. However, he did not receive any offers until June 2009 when he received an offer of R5 million which he rejected. By that time he was desperate for a buyer. The costs of maintaining the subject property, with a bond of R4 million, together with the relocation and re-establishment costs had drained his financial resources. Both he and his wife were too busy to attend to the marketing of the house, so it was his eldest daughter, who was a student at the University of Cape Town, who liased with estate agents. It was under these circumstances that he accepted Mrs Allen's offer and sold the house for considerably less than its market value.

[20] Consequently there is no evidence to support Mrs Allen's claim for a reduction in the value of the subject property. Even with the breach of warranty, the market value of what was delivered remained higher than what was paid. Therefore, Mrs Allen failed to prove that the breach of the warranty resulted in damages as she had pleaded. That being the case, it is not necessary to deal with Mr Scheibert's second defence based on failure to mitigate the damages. Nor is it necessary to consider the claims for the costs of removing the kitchen and redesigning the plans since Mrs Allen did not prove that she had suffered any loss.

[21] In the result:

1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

'The plaintiff's claim is dismissed with costs.'

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N DAMBUZA

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	W Duminy SC and G A Leslie
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