THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 286/11

Reportable

In the matter between:

LEKUP PROP CO NO 4 (PTY) LTD **APPELLANT**

and

JOHN COLIN WRIGHT **RESPONDENT**

Neutral citation: *Lekup Prop Co No 4 (Pty) Ltd v Wright* (286/11) [2012] ZASCA 67 (23 May 2012).

Coram: Cloete, Cachalia, Snyders and Leach JJA, and Petse AJA

Heard: **2 May 2012**

Delivered: **23 May 2012**

Summary: Contract: doctrine of fictional fulfilment: state of mind of party against whom doctrine invoked, discussed.
Practice and procedure: difference between status of affidavits where matter referred to trial, as opposed to evidence on specific defined issues.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Vally AJ sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

2 Paragraphs 1 to 3 and 5 to 7 of the order of the court a quo are set aside and the following order substituted therefor:

'(a) It is declared that the agreement of sale concluded by the parties on 12 April 2004 in respect of the proposed portion 12 of erf 39 Sandhurst lapsed on 31 December 2005 and was of no force or effect after that date.

(b) The defendant is ordered to pay the plaintiff's costs of suit in respect of the claim and counterclaims and the costs of the application proceedings.'

3 Paragraph 4 of the order of the court a quo stands, viz 'The counterclaims of the defendant are dismissed'.

JUDGMENT

CLOETE JA (CACHALIA, SNYDERS AND LEACH JJA AND PETSE AJA CONCURRING):

[1] The present appeal concerns primarily the state of mind a party must be shown to have had for the doctrine of fictional fulfilment to be invoked successfully against that party.

[2] The appellant, a company, owns erf 39 in the township of Sandhurst. On 12 April 2004 it sold a portion of the erf to the respondent, Mr John Colin Wright. The agreement of sale incorporated an annexure A, which provided:

'Notwithstanding anything contained to the contrary in the said Agreement of Sale, the Purchaser records that:

1. he is aware that the property is not yet sub-divided and this Agreement of Sale is subject to sub-division being formally approved and registered by not later than 31 October 2004, as per sub-division plan attached as annexure B1, B2, B3.

2. In the event of sub-division not being registered by 31 October 2004, this Agreement of Sale shall be cancelled.'

The parties executed a series of addenda extending the date. The final extension was to 31 December 2005. By that date the sub-division had not been approved, much less registered. The case was conducted on the basis that despite the reference to cancellation in para 2, the meaning of the clause was that if the condition had not been fulfilled on the date specified, the agreement would lapse.

[3] The appellant, as applicant, instituted motion proceedings against the respondent in the South Gauteng High Court in which it sought a declaratory order that the agreement had indeed lapsed. After the respondent had delivered his answering affidavit the matter was, by consent, referred to trial. The appellant in its declaration asked for similar relief to that claimed in its notice of motion, which stood as a simple summons. The respondent delivered a plea and counterclaim. In his plea, the respondent alleged:

'14.1 The Plaintiff deliberately and intentionally failed to procure the required rezoning and subdivision of the property;

14.2 Based on the doctrine of fictional fulfilment, the relevant term/s of the contract must therefore, *inter alia* for purposes of the Plaintiff's allegation that the agreement had lapsed, be deemed to have been fulfilled;

Alternatively:

14.3 The Plaintiff has breached the agreement by failing:

14.3.1 to exercise due and proper care in order to ensure that the rezoning and subdivision of the property was obtained timeously;

14.3.2 to take all reasonable and necessary steps to timeously obtain the rezoning and subdivision of the property as it was required and obliged to do in terms of the agreement;

14.4 The plaintiff should not be permitted to rely on its own breach and negligence in order:

14.4.1 to escape from its obligations under and in terms of the agreement;

14.4.2 to let the agreement lapse or be permitted to cancel the agreement to the prejudice of the Defendant.

14.5 The Defendant is entitled to the relief set out in his counterclaim which is filed herewith.'

The relief sought by the respondent in his counterclaim relevant for present purposes was:

'30.1 A Declaratory Order that the Agreement has not lapsed;

30.2 An Order for specific performance in terms whereof the Plaintiff is directed to fulfil its contractual obligations to procure the rezoning and the subdivision of the property and to take all necessary and reasonable steps to achieve this, including the signing of all documents to give effect thereto.'

The further allegations in the plea, and the further and alternative relief sought in the counterclaim (to one aspect of which I shall briefly have to return), were not pursued.

[4] The appellant's application for sub-division was approved by the City of Johannesburg in March 2007, subject to conditions. On fulfilment of the conditions, the sub-division would have been capable of registration in the Deeds Registry.

[5] The trial court (Vally AJ) found in favour of the respondent and on 23 February 2011 made an order that incorporated the following paragraphs:

'1. The plaintiff's claim for a declaratory order is dismissed.

2. It is declared that the agreement of sale of the property has not lapsed and the suspensive condition contained in Clause 2 of Annexure A to the agreement is deemed to have been fulfilled.

3. The plaintiff is to take all the necessary steps to effect the transfer of the property to the defendant and the defendant is to meet all his obligations in terms of the purchase of the property within three months of the date of this order.

4. The counter claims of the defendant are dismissed.'

The remaining three paragraphs of the order dealt with costs. The trial court subsequently granted the appellant leave to appeal to this court.

[6] I propose dealing first with the law relating to fictional fulfilment. The remedy is an equitable one that had it origins in Roman law, that was

accepted in Roman-Dutch law and that was first analysed by this court in two decisions handed down in 1924, namely, *Gowan v Bowern* 1924 AD 550 and *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573. In the latter case Innes CJ succinctly stated the position as follows:[1]

'[B]y our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part.'

For present purposes, two aspects require emphasis: the meaning of dolus, and the requirement that nothing short of dolus will suffice.

[7] Dolus in this context does not bear its usual meaning of deliberate wrongdoing or fraudulent intent but a more specific meaning, namely, the deliberate intention of preventing the fulfilment of the condition in order to escape the obligation subject to it. In *Gowan v Bowern* Wessels JA said:[2]

'The Court must hold that if a contract is made subject to a casual condition then if the person in whose interest it is that it should not be fulfilled deliberately does some act by which he hinders the accomplishment of the condition, he is liable as if the condition had been fulfilled. But a party cannot be said to frustrate a condition unless he actively does something by which he hinders its performance. There must be an intention on his part to prevent his obligation coming into force.

There is nothing to prevent his folding his arms and allowing events to take their course. *Paul*, in D.45.1.85.7, uses the word *curaverit*, and *Cujacius* also uses this term in dealing with the promissor's liability. *Curare ut* or *ne* here signifies to bring actively about a certain set of circumstances . . . The only *culpa* for which a promissor *sub conditione* is liable is some deliberate act, some act done with the intention of causing the condition to fail or, perhaps, also a deliberate omission[3] where there is a duty to do something, by which he frustrates the happening of the condition in his own interest in order to enrich or benefit himself.'

Towards the end of his judgment the learned judge said:[4]

'I do not think that the Civil law goes further than this:—

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[1] At 591.
[2] At 571.
[3] A question settled in *Ferndale Investments (Pty) Ltd v DICK Trust (Pty) Ltd* 1968 (1) SA 392 (A).
[4] At 572.

If a promise is made subject to a casual condition the promissor may not for his own benefit, in order to escape the consequences of the contract, actively do something to prevent the fulfilment of the condition. To do so is *dolus*.'

In his judgment in *Koenig v Johnson & Co Ltd* 1935 AD 262 at 272[5] the same learned judge, then Chief Justice, referred to part of the first passage just quoted and, in a later passage in the Koenig case[6] (that was subsequently approved in *Ferndale Investments (Pty) Ltd v DICK Trust (Pty) Ltd* 1968 (1) SA 392 (A) at 395A-C) said:

'[I]f it is the fault of the person in whose favour the condition is inserted that the condition cannot be fulfilled, or if he intended to prevent the condition from being fulfilled, the law considers the condition to have been fulfilled as against him. The nature of the contract is always an important element. In some cases the person benefitted by the non-performance of the condition can sit still and do nothing to assist in its fulfilment; in other cases it is his legal duty to assist in the condition being fulfilled, and in all cases if he deliberately and in bad faith prevents the fulfilment of the condition in order to escape the consequences of the contract the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith.'

In *Scott & another v Poupard & another* 1971 (2) SA 373 (A) at 378H Holmes JA, who delivered the majority judgment, said that the principle underlying the doctrine of fictional fulfilment may be stated thus:

'Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him.'

[8] If the intention was to escape the obligation, it matters not whether the person concerned was actuated by the purest or the basest of motives, because the doctrine is concerned with intention, not motive. In *Koenig v Johnson* Koenig sold and transferred to Johnson & Co his shares in the Contex company. Payment of the last instalment of the purchase price was conditional on Koenig delivering letters patent for which application would have to be made by Contex. Johnson & Co believed, on legal advice, that any

[5] The judges who heard that appeal were equally divided. See p 298.
[6] At 272.

such application would be improper as it would infringe the existing patent rights of another party. It accordingly used its newly acquired controlling interest in Contex to prevent the making of the application. Wessels CJ said:[7]

'If Johnson & Co deliberately and intentionally frustrated Koenig on delivering the "new patent," their opinion and motive are immaterial.'

[9] The other point that requires emphasis is that for the doctrine to be applied to the action or inaction of a contracting party, what must be proved is intention in the sense just discussed ─ negligence does not suffice. That is apparent from a number of judgments delivered in this court. In *Gowan v Bowern* Innes CJ said:[8]

'It is difficult to see how the principle of fictional fulfilment of a condition can operate on the mere ground of *culpa*. It will I think be found that in cases in which there may be duty on the promissor to take any active steps to bring about the fulfilment of a condition, that duty arises either from a term of the contract itself, or because the omission of such steps will render the happening of the condition impossible. In the last mentioned case the neglect to take the steps will generally be due to a desire to defeat the condition, and the doctrine would apply.'

In the same case De Villiers JA quoted[9] what is clearly the translation by Sir Henry Juta[10] of Van der Linden's *Institutes of Holland* 1.14.9.2:

'The conditions are deemed to be fulfilled when the debtor, who has bound himself subject to them, is himself and intentionally the cause of their not being fulfilled.'[11]

The learned judge, in the course of referring to the Roman law and other Roman-Dutch law authorities, then went on to say:

'If such person, whom I shall call the debtor, deliberately hinders or impedes the fulfilment of the condition, he is liable just as if the condition had been fulfilled.'[12]

I have already (in para 7 above) quoted two passages from the judgment of Wessels JA at 571-2 from which it is quite clear that that the learned judge,

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[7] At 273.
[8] At 553.
[9] At 566.
[10] Which in the 5th ed (1906) is at p 112-113.
[11] Morice's translation 2 ed (1922) p 138 is: 'Conditions are considered to have been fulfilled, if the debtor who has bound himself under a condition is himself intentionally the cause of its not being fulfilled.'
[12] At 566.

having analysed the old authorities, was of the view that only intentional conduct suffices. The learned judge also said:[13]

'It seems to me difficult to extract from the texts of the *Corpus Juris* that mere negligence on the part of the promissor which may incidentally cause the conditions to fail is enough . . . He need not be diligent so that the condition may be fulfilled. Nor can I find in any of the older commentators a clear statement that a condition has to be regarded as fulfilled if, through the *culpa* of the party interested, the condition is frustrated. . . . It is true that Gowan's delay in forwarding the vessel indirectly caused the second instalment [on the payment of which Bowern's claim against Gowan for commission depended] to fail, but the delay was not purposely plotted so that the condition should fail and this seems to me essential. Gowan must have contrived something which caused the second instalment not to be paid.'

[10] In the *MacDuff* case Innes CJ, in the course of his review of the old authorities, referred[14] to the same passage in Van der Linden to which De Villiers JA had referred in *Gowan v Bowern* and concluded with the passage referred to in paragraph 6 above. Solomon JA also referred to the passage in Van der Linden and continued:[15]

'The rule, as laid down in the passage from *Van der Linden* cited above, is an equitable one, based upon the principle that it is contrary to good faith for a party, who finds that he has entered into a disadvantageous contract deliberately to set about to prevent the other party from fulfilling a condition upon which his own obligation depends.'

[11] In the present case the appellant accepted that he had a tacit contractual duty to take all reasonable steps to ensure that the property was sub-divided and the sub-division registered. The addendum to the agreement did not contain a true condition but the doctrine of fictional fulfilment has been extended. It is an equitable doctrine and equity demands that in certain cases a contracting party should be held to a bargain where it has deliberately not performed an obligation for the purpose of avoiding the contract: *Du Plessis*

[13] At 571-2.
[14] At 591.
[15] At 599.

NO & another v Goldco Motor & Cycle Supplies (Pty) Ltd 2009 (6) SA 617 (SCA) paras 22-29.

[12] Therefore in the present matter, in order successfully to invoke the doctrine of fictional fulfilment, the respondent bore the onus of proving that the appellant, by deliberate commission or omission, prevented the sub-division from taking place, with the intention of avoiding its obligations under the agreement. I proceed to examine the evidence.

[13] Mr John Alastair Legh was called to give evidence by the appellant. At the time that the agreement was concluded, he and Mr David Kuper were equal shareholders in the appellant and he was a director. Kuper died before the matter was heard. Legh testified that he and Kuper were property owners and developers and that they had purchased erf 39 through the appellant for this purpose. Their intention was to sub-divide the erf and sell it. To this end they appointed a town planner, who, when his advice proved to be erroneous, was substituted with another town planner, Mr Henry Nathanson; and an estate agent, Mr Eskel Jawitz. The appellant called both Nathanson and Jawitz to give evidence.

[14] Legh said in his evidence-in-chief that he and Kuper 'desperately wanted' the sub-division to go through. He confirmed that the time within which the sub-division was to take place as reflected in the addendum to the agreement was extended on 28 October 2004 to 31 January 2005; on 31 January 2005, to 30 April 2005; on 25 April 2005, to 31 July 2005; and on 29 July 2005, to 31 December 2005. He said that the extended dates were discussed with Nathanson, which the latter disputed. Legh's evidence was that he thought Nathanson was proceeding diligently with the rezoning process. He also said that even after the final extension had been granted at the end of July 2005, 'we really, really wanted to get rid of these properties'.

[15] Jawitz had been an estate agent for 41 years when he testified. He said that the property market had turned in about 2000 and that in 2004 it was 'definitely rising, very buoyant and very vibrant'. In re-examination he said that

at no time between April 2004 (when the agreement was concluded) and 31 December 2005 (the date of the final extension) did the shareholders of the appellant ever decide that they wanted to get out of the agreement but, on the contrary, they were 'totally amenable to extend the period . . . notwithstanding the increase in market values, they were very happy to extend it based upon their belief that, as I understood it, sub-division was going to come through in ... this period'. He went on to express the opinion that:

'[T]here was no point in the sellers selling either the stand or the property at the time that they did if they were not of the belief that in actual fact sub-division would come through. Then they should have rather waited until sub-division came through and then put the properties back on the market which would have then realised for them a substantially higher price.'

Junior counsel, who alone represented the respondent at the trial, cross-examined Jawitz further after he had been re-examined, and in so doing elicited the following evidence:

'Again, if the sellers would have had no intention, or if they honestly believed that sub-division was not coming through, then again it reinforces my comment, M'Lord, that they should have rented out the property for a year or two and then when sub-division came through they would have put it on the market and then sold it for more, but they chose to sell it at the market price then according to my discussions with them and according to my understanding that in actual fact the whole sub-division was in the process and that they had every expectation that it was going to come through within the relevant times'

and:

'[M]y point was if they honestly did not expect sub-division to come through it would have paid them to rent it out for R25 000 and put it on the market when sub-division came through, because as it is they were selling it at a 2004 price and they would have received the money at 2005 or 2006 which in itself was almost crazy M'Lord.'

[16] Nathanson explained what happened about the sub-division. There were at the time two routes that could be followed: either under the Town Planning and Townships Ordinance 15 of 1986 or under the Development Facilitation Act 67 of 1995. Nathanson's evidence was that the procedure under the Ordinance would have taken longer, especially if there were objections; whereas under the Act, there are time-frames imposed which had

the consequence that from the time an application for rezoning and sub-division was submitted to the time it was granted, 129 days would lapse, despite objections.

[17] In May 2004 the decision was taken on behalf of the appellant to follow the route prescribed by the Act. The reason given by Legh was that although this process cost significantly more 'we wanted to transfer these two properties' and it was considered that the procedure under the Act would be quicker. Nathanson accordingly prepared an application under the Act. He described the process as 'cumbersome' and said that this was the reason why the application was only ready in September 2004. The Act requires the application to be served on a 'designated officer'. But at about that time the legal advisers to the Johannesburg City Council, who were the designated officers under the Act, all resigned as designated officers pursuant to a resolution of the Council. Consequently there were no designated officers until one was appointed on 27 January 2005 and that person had to be trained. As a result the system only began to operate again in about March 2005. Nathanson had left a copy of the application on the desk of the Registrar of the Development Facilitation Tribunal, which he took to the new designated officer; but he did not 'trigger' the application, ie he did not ask the designated officer to consider it, as that would have started the 129 day process which he did not wish to do, for the reasons that follow.

[18] In March 2005, Nathanson met with the senior legal advisor of the City of Johannesburg and he was given a copy of an affidavit that the Council was going to use to challenge the applicability of the Act. (The challenge commenced in March 2005 and culminated more than five years later in the decision by the Constitutional Court reported as *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* 2010 (6) SA 182 (CC).) Also in March, Nathanson established that the Council was not going to recognise any decisions taken under the Act by the Development Facilitation Tribunal and that it would not participate in any applications under the Act. He had discussions with various persons at the Council, the Development Facilitation Registrar's office and members of the Tribunal and formed the

view that the Council's challenge would be resolved within a short space of time; and he was of the view that the Council's prospects of success were 'remote'.

[19] Nathanson was at the time aware of s 67 of the Act, subsections (2) and (3) which provide:

'(2) After a land development application has been lodged in terms of this Act the same or a substantially similar land development application may not also be brought in terms of any other law.

(3) If a land development application has been rejected in terms of this Act, the same or a substantially similar land development application may not, within a period of two years, thereafter be brought in terms of any other law.'

Nathanson interpreted the effect of these sections to be that in the event of the Council succeeding in its challenge, an application under the Act would fail and that he could not then bring a similar application under the Ordinance within a period of two years; and that an application under the Act and the Ordinance could not be brought simultaneously.

[20] Nathanson said that the decision not to file the application for enrolment was taken by himself, 'with my client's knowledge'. Legh, on the other hand, said in cross-examination that had he known that Nathanson had not proceeded with the application, he would have been 'shocked'.

[21] On 15 November 2005 Nathanson wrote a letter to Legh in which he summarised what had already happened; set out in detail what in his view would happen if the appellant continued with its application under the Act or brought a new application under the Ordinance; and recommended that the application under the Act be abandoned and that an application be brought under the Ordinance. The appellant did not react to the recommendation until the following year.

[22] On 6 December 2005 the respondent sent a letter to Jawitz requesting a further extension of time for the approval of the sub-division. This time the appellant refused.

[23] The trial court found against the appellant on two bases. The first was that the appellant had acted unreasonably in refusing a further extension after 31 December 2005. The second was that the appellant had made no application for sub-division, either under the Ordinance or the Act, before that date. The trial court also rejected the argument that no dolus had been established, finding that despite agreeing to the extensions, the appellant did not do anything to ensure that the condition was fulfilled; and that by its action and deliberate inaction, the appellant had frustrated the fulfilment of the condition.

[24] The reasoning of the trial court overlooks one fundamental point: the onus was on the respondent to show that it was the appellant's intention, by not taking steps to secure sub-division of the erf, to escape its obligations under the contract. Whether the appellant acted reasonably or not, is irrelevant, save to the extent that this might indicate the appellant's intention; and in any event, so far as the first finding of the trial court is concerned, the obligation on the appellant was limited to the lifetime of the contract. If the obligation could not be fulfilled within the agreed period, the appellant was perfectly entitled to refuse a further extension.

[25] The mere fact that the appellant gave extensions at all creates the probability that it had no intention to escape from its obligations in terms of the agreement by exploiting the condition to which they were subject. Legh's evidence summarised above in para 14 was that the appellant had no such intention. That evidence was not challenged and there is no reason to reject it. Jawitz's evidence quoted above in para 15 negatives any suggestion that the members of the appellant were intent on destroying the bargain. There is no reason to reject his evidence either. And even if Nathanson did agree with the appellant in March 2005 that he would hold back the application under the Act, the reason was not to frustrate the contract. The reason was, in Nathanson's words:

'[A]s at June, July 2005 I was still of the view that it would make sense to wait it out and just see for the next while whether it was going to be resolved and the expectation was that it was, because you could not have or it was my understanding

that you could not have these three spheres of government simply allowing the system to break down like this.'

[26] Had the intention been to frustrate the agreement, the appellant would not have granted the two further extensions which it did (on 25 April and 29 July). Nor does the appellant's failure to respond to Nathanson's letter of 15 November 2005 before the end of the year indicate such an intention. Nathanson's recommendation was incapable of being implemented by 31 December. If, on the other hand, Nathanson did not tell the appellant about his intention not to activate the application under the Act, and if it be assumed both that he was negligent (I emphasise that this is an assumption) and that his negligence can be attributed to the appellant, this does not suffice. For the reasons already given, only dolus suffices.

[27] The mere fact that there was a delay does not mean that the appellant was actuated by dolus. In the heads of argument drafted by senior counsel then representing the respondent (who did not appear before us) much reliance was placed on the decision in *Thanolda Estates (Pty) Ltd v Bouleigh 145 (Pty) Ltd* 2001 (3) SA 196 (W). In that case Wunsh J concluded[16] that the defendant had an obvious duty to take steps to procure the fulfilment of the conditions (that sub-division of the property be approved and that a township establishment on the property be approved in principle within 180 days); and further concluded[17] that 'the defendant's conduct in avoiding the fulfilment of the condition was intentional'. The latter finding distinguishes that case from the present. The question facing the court in that case, as formulated by the learned judge,[18] was 'whether the non-fulfilment of the conditions can properly be attributed to the defendant's conduct'. That question does not arise for decision in this case, and I expressly refrain from deciding on the correctness of the view expressed by Wunsh J as to the incidence of the onus involved in answering it.

[16] In para 16.
[17] Ibid.
[18] Ibid.

[28] The correct approach to the question facing this court ─ whether dolus in the sense required has been established ─ is set out in the following passage from the judgment of Innes CJ in the *MacDuff* case at 590 (and as I have already pointed out, it applies equally to deliberate and calculated inaction):

'Where the nonfulfilment of the condition is due to the deliberate and calculated action of the debtor, *dolus* will ordinarily be present. But the nature of the contract or the established intention of the parties may conceivably negative it even then ─ and in such a case the doctrine would not operate.'

[29] In argument, senior counsel who represented the respondent on appeal nailed his colours to the mast and relied solely on what Nathanson did and did not do, the submission being: first, that it should be inferred from Nathanson's action and inaction that he intentionally prevented the fulfilment of the condition; and second, that his intention should be attributed to the appellant. I have considerable difficulty with the second proposition, but it is unnecessary to explore it further. The case advanced in oral argument was not pleaded; it was not put to Nathanson; and counsel found himself unable to show from the record facts from which the inference for which he contended, could properly be drawn.

[30] The action and inaction of those acting on the appellant's behalf was not shown to have been prompted by a desire to escape the obligations it had under the agreement. The respondent accordingly did not discharge the onus on him and the relief based on the doctrine of fictional fulfilment sought by him and granted by the court a quo, should have been refused.

[31] Similar relief cannot be obtained by a decree of specific performance. Assuming, again without deciding, that the appellant breached the contract by not obtaining registration of sub-division timeously, the effect of such a failure would be that the contract lapsed. It could therefore no longer be enforced. The remedy of specific performance would accordingly not be available, and the respondent would be limited to a claim for damages for breach of contract. Although such a claim was pleaded, and quantified on the basis of the loss to

the defendant of the profit he would have made but for the appellant's breach, no evidence whatever was tendered to prove the amount of the loss. The respondent's counsel nevertheless asked that paragraph 4 of the order made by the court a quo should be amended so that it dismissed only the claims based on fictional fulfilment and for specific performance, and decreed absolution from the instance in respect of the claim for damages. We were informed from the bar that the defendant wishes to pursue the damages claim if it has not prescribed (a question on which I express no opinion) and we were urged to open the door that the trial court had closed. But the insurmountable difficulty facing the defendant is that he brought no cross-appeal against the order dismissing all of his counterclaims and this court is accordingly not entitled to interfere with that order in the manner suggested: *SA Railways and Harbours v Sceuble* 1976 (3) SA 791 (A) at 793F-794E; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 560G-H.

[32] Before making the appropriate order, I wish to say something about the manner in which the trial was conducted. It will be recalled that the appellant initiated motion proceedings and that the matter was referred to trial after the respondent had filed his answering affidavit. At the trial, the respondent was allowed to read from that affidavit and did so, extensively. That was not the correct procedure. A witness who gives evidence in trial proceedings, must do so in the ordinary way. In our practice, lay witnesses are not usually permitted to read from pre-prepared statements even if those statements have been prepared by themselves. The learned judge a quo was under a misapprehension as to the status of the affidavits, as appears from what he said whilst Legh was being cross-examined, namely: 'I will accept that the affidavits in this application are proper evidence before this court'. Affidavits filed may of course be used for cross-examination and also as proof of admissions therein contained, but (save to the extent that they contain admissions) they have no probative value; and in the absence of agreement, they do not stand as the witness's evidence-in-chief, or supplement it. And if, by agreement, they are to be treated as such, it is unnecessary and a waste of time and costs for them to be read into the record. A referral to trial is different to a referral to evidence on limited issues. In the latter case, the

affidavits stand as evidence save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.

[33] The following order is made:

1 The appeal succeeds with costs, including the costs of two counsel.

2 Paragraphs 1 to 3 and 5 to 7 of the order of the court a quo are set aside and the following order substituted therefor:

'(a) It is declared that the agreement of sale concluded by the parties on 12 April 2004 in respect of the proposed portion 12 of erf 39 Sandhurst lapsed on 31 December 2005 and was of no force or effect after that date.

(b) The defendant is ordered to pay the plaintiff's costs of suit in respect of the claim and counterclaims and the costs of the application proceedings.'

3 Paragraph 4 of the order of the court a quo stands, viz: 'The counterclaims of the defendant are dismissed'

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T D CLOETE

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M D Kuper SC (with him S P Pincus) Instructed by: Faber Sabelo Edelstein, Johannesburg Matsepes Incorporated, Bloemfontein
For Respondent:	J Both SC (with him J Bothma) Instructed by: Hattingh Ndzabandzaba Attorneys, Centurion Naudés, Bloemfontein