

SOUTH AFRICA / JUDGMENT

Passano v Erasmus (82775/2015) [2023] ZAGPPHC 583 (16 January 2023)

[2023] ZAGPPHC 583

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse Van Nieuwenhuizen

CASE / FILE NUMBER

82775/2015

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Policy

IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 82775/2015

REPORTABLE: NO

OF INTEREST TO OTHERS

JUDGES: NO

REVISED

DATE: 16 January 2023

In the matter between:

CAREL
PASSANO
Plaintiff
and
BELINDA
ERASMUS
Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

1. The plaintiff seeks an order for the eviction of the defendant from Plot 1[...] B[...], Meyerton (“the property”). The plaintiff, furthermore, claims an amount of R 528 000, 00 on the basis that the defendant has been enriched by her occupation of the property.
2. The defendant opposes the relief claimed by the Plaintiff and alleges that she has a lien over the property in respect of certain improvements she effected on the property. The defendant also instituted a counter-claim in terms of which she seeks compensation for the improvements she effected on the property.

Background

3. The facts pertaining to the relief claimed by both parties are largely common cause.
4. The defendant’s erstwhile husband, Theuns Erasmus (“Erasmus”), purchased the property from his father for an amount of R 30 000, 00. The defendant testified that, when she and Erasmus took possession of the property in 2004, the property was a vacant plot. During the period 2004 until November 2006 she improved the property by supplying building materials and overseeing the building of a house on the property. The defendant testified that she effected the improvements in the bona fide belief that she and Erasmus were the joint owners of the property. The defendant’s believe proved to be incorrect as Erasmus registered the property in his name.
5. The defendant retained the receipts of the expenses she incurred and testified that the expenses amount to R 528 064, 22.
6. The marriage relationship between the defendant and Erasmus broke down and Erasmus vacated the property during 2015. The defendant and the minor children, however, remained on the property. A divorce action followed, and a divorce order was granted during 2017. The defendant testified that she did not receive any compensation from Erasmus for the improvements she effected on the property.
7. Prior to the finalisation of the divorce and on 3 June 2015 the plaintiff purchased the property from Erasmus for an amount of R 300 000, 00. The defendant became aware of the sale and testified that her previous attorneys obtained an interdict in the Magistrate’s court to prevent transfer of the property until she had been compensated for the improvements she effected on the property. She was, however, informed by her previous attorneys that the Magistrate’s court was the incorrect forum and that the interdict was set aside.
8. As a result, the property was registered in the plaintiff’s name on 21 August 2015.

9. Subsequent to the registration of the property in the name of the plaintiff, the plaintiff endeavoured to enter into a rental agreement with the defendant, without any success. The defendant testified that she did not have the necessary financial means to pay any rent to the plaintiff and that she was under the impression that she may remain on the property until she had been compensated for the improvements she had effected on the property.
10. Being unable to generate an income from the property whilst the defendant occupied the property, the plaintiff lodged an application for the eviction of the defendant on 18 September 2015.
11. The defendant opposed the application on the basis that she has an improvement lien for the improvements she effected on the property and that she is entitled to remain in occupation of the property until she has been compensated for the improvements.
12. The application was heard by Raulinga J on 25 April 2017 and in view of the issues in dispute, Raulinga J referred the matter to trial. The terms of the order relevant to the present dispute, were delineated in the order as follows:

“3.1 If the Respondent (Defendant in the future action) has effected necessary and/or useful improvements to the immovable property situated at Plot 1[...], B[...], Meyerton, and herein after referred to as “the immovable property”, on/or before the 3rd of June 2015, and if so:

3.1.1 Against whom such claim, if any vests;

3.1.2 The extent and nature of such improvements;

3.1.3 The quantification of such improvements in accordance with the common law principles;

3.1.4 The determination of enrichment of the Applicant (Plaintiff in the future action) if any.

3.2 If the Respondent holds an improvement lien over the property.

3.3 If the Respondent was and is entitled to remain in occupation of the immovable property since 8th September 2015, and if not, the reasonable compensation payable to the Applicant by the Respondent for such occupation.”

13. At the inception of the trial, I was informed by the parties that it was agreed that the issue pertaining to the quantum of the defendant’s claim be separated from the remainder of the issues contained in the order of Raulinga J. An order in the aforesaid terms was accordingly, in terms of the provisions of rule 33(4), granted.
14. I pause to mention that it is common cause between the parties that the defendant vacated the property during April 2022.

Plaintiff’s eviction claim: lawfulness of defendant’s occupation of the property

15. In view of the fact that the defendant vacated the property in April 2022, it is no longer necessary to issue an eviction order.

16. The question that remains is whether the defendant's occupation of the property was lawful.
17. The applicable legal principle pertaining to the lawfulness of the defendant's occupation of the property was succinctly summarised in *Beukes and Another* (CA&R 60/2018) [2020] ZANCHC (23 March 2020) as follows:

"[57] It is trite that a bona fide possessor who has preserved or made improvements to another's property at his or her expense has a right of retention against the property to secure compensation for his or her necessary and useful expenses. This is a real right and an absolute defence against eviction by the owner or any future owners of the property. The exceptions being where ownership is acquired through a sale in execution where the purchaser was unaware of the right of retention

and the retentor, with full knowledge of the sale fails to inform the purchaser of this right and sales in insolvency.[9]

- [58] Where it is the previous owner of property who has been enriched (as in this case the Visagies) at the expense of the lien holder it is to him that the lien holder should seek redress for purposes of a possible enrichment claim, but the right of retention can be held against the new owner (even though he or she has not been enriched) until the lien holder has been duly compensated. In *Pheiffer v Van Wyk and Others* [10] the SCA held:

'[12] A real lien (an enrichment lien) is afforded a person who has expended money or labour on another's property without any prior

contractual relationship between the parties. The lien holder is entitled to retain possession until his enrichment claim has been met. It is an established principle of our law that the owner of the property subject to a right of retention may defeat the lien by furnishing adequate security for the payment of the debt."

18. It is clear from the facts that the building of a house and outbuildings on the property improved the property's value and enriched Erasmus. It is, furthermore, clear from para [33] in *Boshoga and Another v Mmakolo and Others* (82446/2016)

[2018] ZAGPPHC 656 (7 March 2018) that the defendant was a bona fide occupier at the time the improvements were effected:

"[32] In Wille's Principles of South African Law[10] reference is made to De

Vos Verrykingsaanspreeklikheid 245-7 who defines (for the purposes of the law of enrichment) a bona fide possessor as someone who possesses (either directly or indirectly) property of which he believes he is the owner; a mala fide possessor, on the other hand, acts as if he were the owner, while knowing that he is not. An occupier is someone who does not have the animus domini but nevertheless occupies the property because it is in his interest to do so. Occupiers are divided into lawful occupiers (i.e. those who have the right to occupy the property), bona fide occupiers (i.e. those who believe themselves to be lawful occupiers, but are not) and mala fide occupiers (i.e. those who occupy property as if they are lawful occupiers, but know that they are not)."

19. The defendant, therefore, had a retention lien in respect of the property and was entitled to occupy the property until she was compensated for the improvements she effected to the property. In the result, the defendant's occupation of the property was ex lege lawful.

Plaintiff's enrichment claim:

20. The basis for the plaintiff's claim for enrichment is pleaded as follows in the particulars of claim:

"Throughout the duration of her occupation of the property

7.1 her occupation of it has been unlawful;

7.2 she has failed, refused and/or neglected to enter into a lease agreement with the applicant;

7.3 she has been enriched by the value of her occupation, because her estate has enjoyed the saving of not having paid any rental or other related amounts (such as the costs of water and electricity consumed on the property) in respect of her occupation."

21. In view of the finding that the defendant's occupation of the property was lawful, the plaintiff's claim as pleaded aforesaid, stands to be dismissed.

Defendant's claim for compensation for the improvements she effected on the property

22. It is clear from *Beukes and Another*, referred to *supra* that the defendant's enrichment claim in respect of the improvements she effected on the property lies against Erasmus. The defendant's claim in this regard, therefore, stands to be dismissed.

Costs

23. Neither of the parties were successful and neither is entitled to costs.

ORDER

1. The plaintiff's claim is dismissed.
2. The defendant's counterclaim is dismissed.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE HEARD:

17 November 2022

DATE DELIVERED:

16 January 2023

APPEARANCES

COUNSEL FOR THE PLAINTIFF:

Adv A Du Plooy

ATTORNEYS FOR THE PLAINTIFF:

Richards Attorneys

COUNSEL FOR THE DEFENDANT:

Ms Mc Muller

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Prepared on 9 October 2026 · Esheria