IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **4261/2023**

In the matter between:

CS OOSTHUIZEN BOERDERY CC — Applicant
(Registration number: 1993/006738/23)

and

RADIANT HOUR MINISTRY INTERNATIONAL (NPC) — Respondent
(Registration number: 2013/000945/08)

CORAM: PJJ ZIETSMAN AJ

HEARD ON: 16 NOVEMBER 2023

DELIVERED ON: 30 NOVEMBER 2023

Introduction

[1] On 10 September 2014 the Respondent purchase the property known as Plot 1 Rocklands Agricultural Holdings, Bloemfontein ("the property") from the Applicant in order to conduct its business from the premises.

[2] The written sale agreement contains an entrenched formalities clause and also stipulates that the Respondent shall not make any improvements and/or additions to the property without the prior written consent of the Applicant.

[3] When the Respondent failed to honour the payment terms of the agreement the Applicant proceeded to cancel the agreement and now seeks an order to evict the Respondent from the premises.

[4] The Respondent opposes the application on the basis that:

(a) The dispute between the parties must be resolved by way of an alternative dispute resolution process;

(b) The parties verbally agreed to extend the time within which the purchase price was to be paid; and

(c) The Respondent relies on an improvement / enrichment lien.

Discussion

[5] Mr Nkhahle who appeared for the Respondent bravely tried to persuade me to exercise my discretion and refer the dispute to mediation in terms of Uniform Rule 41A(3)(b).

[6] In support for such contention Mr Nkhahle relied on the judgment of Daffue J in *DIY Superstores (Pty) Ltd v Kruger and others*[1].

[7] It is not clear from the papers whether the parties complied with the procedural requirements of Uniform Rule 41A, but I was informed from the bar that the parties indeed complied with the rule and that the Applicant is not in favour of mediation.

[8] The dictum in *DIY Superstores (Pty) Ltd v Kruger and others* is no authority for the proposition that the Court has a discretion to direct a matter to mediation.

[9] Rule 41A(3)(b) simply provides is mechanism for a Court to direct the parties to consider referring a dispute to mediation but it is still open to the parties to then agree to so refer the dispute to mediation, or not.

[10] The Respondent's reliance on Rule 41A(3)(b) and *DIY Superstores* is thus misplaced.

[1] (113/2022) [2022] ZAFSHC 75 (19 April 2022).

[11] Even if I accept that I have an inherent discretion to direct the matter to mediation I would not have exercised my discretion in favour of the Respondent because in *casu* the sale agreement is cancelled and it is evident from the papers, and the argument in court, that the Applicant has no intention to reinstate the agreement. I therefor see no prospects of success to direct the parties to consider mediation where the Applicant is clearly not in favour of same.

[12] The Respondent also relied on the alternative dispute resolution clause contained in paragraph 35 of the agreement, however the said clause deals with the alternative dispute resolution process in terms of the National Credit Act, 2005 and since it is common cause that the agreement between the parties is not regulated by the National Credit Act, the Respondent's reliance on clause 35 of the agreement is likewise misplaced.

[13] The defence that the payment terms in the written agreement was verbally amended was raised in the answering affidavit but it was not advanced in the Respondent's heads of argument nor in argument before me.

[14] In any event, cases such as *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Ander*[2]; *Brisley v Drotsky*[3]; and *Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs and Another*[4] stands in the way of the Respondent's reliance on a verbal amendment to the written agreement.

[15] Lastly, the Respondent relied on an improvement / enrichment lien as a defence against eviction.

[16] It is not in dispute that the Respondent developed the property but the Respondent did not allege that such improvements were made with the Applicant's prior written consent.

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[2] 1964 (4) SA 760 (A).
[3] 2002 (4) SA 1 (SCA).
[4] 2010 (4) SA 261 (ECM).

[17] The improvements included *inter alia* the building of ablution facilities, a nursery, a storeroom and additional rooms. The only evidence with regards to the cost of the developments is that *"[the Respondent] spent in excess of Two Million Rand to renovate, develop and erect new structures"*.

[18] The Applicant did not deny that the Respondent made improvements to the property but alleged that the Respondent did not satisfy the requirements of an improvement lien.

[19] First, the Applicant alleged that the Respondent made the additions to the property without the Applicant's prior written consent and in conflict with clause 29[5] of the agreement. As such, the Applicant contended that the improvements were constructed by the Respondent at its own risk and cannot form the basis of any right to remain in occupation of the property.

[20] In *Palabora Mining Co Ltd v Coetzer* [6] Mahomed J (as he was then) declined to uphold a right of retention which was in contrast with the provision of an agreement concluded between the parties, on the following basis:

> "There is a third difficulty with the respondent's defence to the claim for ejectment, based on a right of retention. It arises from clause 7 of the lease which provides:
> 'The lessee shall not make any alterations or additions to the premises . . . without the prior written permission of the lessor . . . . Any alterations or additions hereinbefore mentioned will become the property of the lessor, without payment or compensation to the lessee.'
> It is not contended by the respondent that he received any such 'written permission' from the applicant to effect the 'alterations or additions to the premises'. No right of retention can, in these circumstances, be successfully invoked."

[21] On this basis alone the Respondent's reliance on an improvement lien against eviction cannot be upheld.

[22] There is another reason why the Respondent has not made out a proper case based on an improvement lien.

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[5] Clause 29 provides that: "The Purchaser shall not make any improvements and/or additions to the Property without the prior written consent of the Seller".

[6] 1993 (3) SA 306 (T) at 309 F – H.

[23] Cloete JA, writing for the Supreme Court of Appeal in *Rhoode v De Kock and Another*[7] explained the legal position as follows:

"[13] The appellant claimed the rights of a bona fide purchaser based on the decision in *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 (3) SA 642 (A) at 657. He therefore claimed to be entitled to recover necessary and useful expenses and to exercise a lien over the property until paid. His affidavit does not distinguish between the two categories of expenses. I shall consider both possibilities.

[14] So far as the claim for necessary expenses is concerned, Rhoode would have a claim for reimbursement for expenditure of money or material on the preservation of the property. He has no claim for his own labour: *Harrison v Marchant* 1941 WLD 16 at 20 – 21. The problem facing the appellant, however, is that he relies on the evidence of Bouwer who has estimated what the improvements would cost as at February 2010. That evidence is irrelevant. It does not establish that the appellant actually expended anything in money or materials.

[15] So far as useful expenses are concerned, the amount of compensation is limited to the amount by which the value of the property has been increased or the amount of the expenses incurred by the appellant, whichever is the less; and the court has a wide discretion. That was the Roman law: D 6.1.38; the position was the same in the Roman-Dutch law: Voet 6.1.36; and it remains the same in the modern South African law: *Meyer's Trustees v Malan* 1911 TPD 559 at 568; *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648, 656 – 657 and 664 – 665.

[16] Here again, one does not know what the appellant's actual expenses were. In addition, there is no acceptable evidence that the value of the property was increased. The opinion expressed by Van der Spuy is of no assistance as neither the factual foundation nor his motivation therefor are set out:

(a) Van der Spuy never visited the property, but relied upon photographs and what was told to him by an unnamed appointee. Not all of the photographs shown to him were annexed to the appellant's answering affidavit. Moreover, and more importantly, what the 'appointee' sent to examine the property told Van der Spuy is nowhere recorded.

(b) The factors taken into account by Van der Spuy in arriving at his 'provisional' valuation, such as the location of the property, its size and

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[7] 2013 (3) SA 123 (SCA) at para [13] – [17].

> zoning, comparable sales in the area and the nature, extent and degree of completion of the improvements, are nowhere set out.
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> The criticism by the respondents' counsel of the answering affidavit on this aspect as containing 'vague, bald, terse, sketchy and insufficient allegations' is entirely justified."
>
> (footnotes omitted)

[24] The same criticism applies in *casu.*

[25] The Respondent simply alleged that an amount in excess of R 2 million was spent to renovate and develop the property without drawing a distinction between necessary and useful expenses, without giving any credible evidence that the value of the property had increased as a result of the developments, and without giving any credible evidence as to the actual expenses of the developments.

[26] It follows that the Respondent has not made out a case in terms of an improvement lien.

[27] Accordingly the application succeed, with costs.

Order

[28] I make the following order:

1. The Respondent and/or all persons or juristic persons holding occupation through the Respondent shall vacate Plot 1 Rocklands Agricultural Holdings, District Bloemfontein, Free State Province, within fifteen (15) days of this order.

2. The sheriff of this court or his/her lawful deputy is authorised and directed to take any and all such steps as are necessary to evict/eject the Respondent and all persons or juristic persons holding occupation through the Respondent from the aforesaid premises in the event that the Respondent or any other person do not vacate the premises within the timeframes of this order.

3. The Respondent to pay the costs of the application.

[redacted]

RJJ ZIETSMAN AJ

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