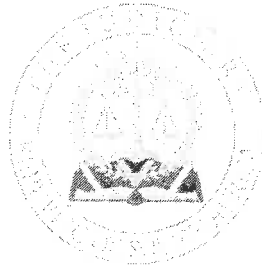


Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

CASE NO:	1766/2017
DATE HEARD:	23 APRIL 2021
DATE DELIVERED:	23 JULY 2021

In the matter between:

JOHANNES DIEDERICK LATEGAN N.O.	1st Plaintiff
CHEREÉ LATEGAN N.O.	2nd Plaintiff
PETRUS JOHANNES ERASMUS N.O.	3rd Plaintiff

[In their capacities as trustees of the Elnathan 2011 Trust]

and

NG WHITE FARM PROPERTIES (PTY) LTD	1st Defendant
WILLEM CHRISTOFFEL SCHOLTZ N.O.	2nd Defendant
ANNA JUDITH SUSANNA SCHOLTZ N.O.	3rd Defendant
HENDRIK JOHANNES VAN ECK N.O.	4th Defendant
REGISTRAR OF DEEDS, VRYBURG	5th Defendant

Coram: Snyders AJ

JUDGMENT

Snyders AJ:

INTRODUCTION:

- [1] The Plaintiffs seek leave to further amend their particulars of claim. The First Defendant opposes the amendment only in relation to the introduction of the proposed enrichment claim.
- [2] The Plaintiffs are the trustees for the time being of the Elnathan 2011 Trust and the First Defendant is NG White Farm Properties (Pty) Ltd. The second to fourth defendants are the trustees for the time being of the Swellendam Trust and the Fifth Defendant is the Registrar of Deeds. Only the First Defendant defended the main action and has opposed this application.
- [3] On 23 July 2020, the Plaintiffs delivered a notice of intention to amend their particulars of claim. The notice of intention to amend contained a number of proposed amendments. The proposed amendment in issue is the conditional claim based on enrichment. It is prudent to deal with the background of this matter before setting out the details of the proposed amendment and objection thereto.

BACKGROUND:

- [4] On 07 November 2012 and at Pretoria, the Plaintiffs and First Defendant entered into a written deed of sale for the purchase of Erf 588, a Portion of Erf 187, Vaalharts Settlement measuring 91.485 hectares ("**the property**"). In terms of clause 1 of the deed of sale, the parties agreed that the Plaintiffs would pay the First Defendant the purchase price on date of registration of the transfer of the property, but no later than two months prior to the expiry of the lease agreement in respect of the property concluded between the First Defendant and a certain JDL Trust. The lease agreement expired on 31 December 2016. The Plaintiffs

would also provide the First Defendant with approved bank guarantees for the full purchase price six months prior to the expiry of said lease agreement (i.e. 30 June 2016).

- [5] According to the First Defendant, the Plaintiffs were not registered as VAT vendors at the time of the conclusion of the deed of sale. The sale was thus subject to VAT. The purchase price was thus R9 120 000.00 being R8 000 000.00 plus VAT at 14%.
- [6] In terms of clause 4 of the deed of sale, the Plaintiffs would take possession of the property on date of registration.
- [7] The First Defendant alleges that the Plaintiffs breached the agreement by failing to provide the guarantees on or before 30 June 2016, failing to provide the guarantees for the full purchase price, failing to provide guarantees for the purchase price by 31 October 2016 and failing to pay the purchase price or any portion thereof by 31 October 2016 or at all thereafter.
- [8] On 31 January 2017 the First Defendant purported to cancel the deed of sale based on the failure to pay the purchase price by 31 October 2016. On 06 March 2017, the First Defendant again purported to cancel the deed of sale on the basis that the guarantee was not furnished in accordance therewith. The Plaintiffs contend that the deed of sale was not validly cancelled and remains extant. The First Defendant alleges that it was terminated by written notice.
- [9] The Plaintiffs instituted action during August 2017 claiming, *inter alia*, the enforcement of their rights in terms of the deed of sale. The First Defendant delivered a Plea and Counterclaim. In the Counterclaim, the First Defendant sought the ejectment of the Plaintiffs from a 8 hectare portion of the property. In the Plea to the Counterclaim, the Plaintiffs admit that it took occupation of the 8-hectare portion during November 2012 and have been in occupation since. The Plaintiffs allege that it is in legal occupation of the 8-hectare portion. In the

proposed amendment, the Plaintiff sets out the basis, distinct from the agreement, by virtue of which it has occupation of the 8-hectare portion.

- [10] On 24 June 2019, the Plaintiff delivered amended particulars of claim. On 12 July 2019, the First Defendant delivered its consequentially adjusted plea and counterclaim. On 09 December 2019, the First Defendant filed a further amended plea and counterclaim. This sparked the current application to amend by the Plaintiffs.

THE PROPOSED AMENDMENT:

- [11] The proposed amendment forming the basis of this application is a conditional claim in the event that the Court finds that the agreement was lawfully terminated by the First Defendant and that the Plaintiffs are not entitled to specific performance, viz transfer of the property into their name. The Plaintiffs allege that during November 2012, the First Defendant verbally granted the Plaintiffs consent to occupy an 8-hectare portion of the property for an indefinite period terminable at the will of the First Defendant. The Plaintiffs thus had open occupation and control of the 8-hectare portion since November 2012 to the exclusion of the rights of the First Defendant. Alternatively, pleaded the Plaintiffs, it took occupation of the 8-hectare portion of the property during November 2012.
- [12] During or about November 2012, the Plaintiffs planted 1 600 pecan nut trees and have cared for same since. Prior to the amended counterclaim filed in October 2017 seeking a *rei vindicatio*, the First Defendant did not take issue with the Plaintiffs occupation and control of the 8 hectare portion of the property; alternatively the Plaintiffs took occupation of the 8 hectare portion of the property in the *bona fide* but mistaken belief that it had the First Defendant's consent to do so. The planting of the pecan nut trees are pleaded to be a necessary and useful improvement. The market value of the property has thus increased by R2 400 000.00. In its replying papers, the Plaintiffs amended the amount of trees planted from 1 600 to 653. Consequently, the increase in the market value of the

property was reduced from R2 400 000.00 to R975 000.00. As a result, the First Defendant was unjustly enriched at the expense of the Plaintiffs in the sum of R975 000.00. The Plaintiffs pray for payment of this amount in the event that the trial Court finds that they are not entitled to transfer of the property.

THE OBJECTION TO THE AMENDMENT:

[13] In its notice of objection to the proposed amendment, the First Defendant stated that:

13.1 The proposed claim is not the same or part of the relief originally or currently claimed by the Plaintiffs;

13.2 The proposed claim arose more than three years before the Plaintiff's Rule 28 notice in circumstances where: the proposed claim is for expenses allegedly incurred by the Plaintiff in planting and caring for pecan nut trees on the First Defendant's property; the proposed claim would, therefore, have fallen due when the pecan nut trees were planted; and the Plaintiff planted the pecan nut trees more than three years before the Rule 28 notice; and consequently

13.3 The Plaintiffs' proposed amendment seeks to introduce a new cause of action in respect of a claim which has already prescribed in terms of section 11 of the Prescription Act, 68 of 1969.

[14] The Plaintiffs contend that it occupies the 8 hectare portion of the property with the express or tacit consent of the First Defendant; alternatively that it took occupation and control of said portion in the *bona fide* but mistaken belief that it had the First Defendant's express or tacit consent to occupy. The First Defendant denies that the Plaintiffs were ever lawful or *bona fide* occupiers of the property and deny ever granting the Plaintiffs consent to occupy or use the property. The First Defendant was unaware that the Plaintiffs had occupied the 8-hectare

portion. Additionally, the First Defendant disputed the Plaintiffs' right to occupation in an eviction application which was served on the JDL Trust. It appears that the First to Third Plaintiff in the present proceedings are also the trustees of the JDL Trust. In the founding affidavit of the eviction application, it was stated that:

"I confirm that the Elnathan 2011 Trust and its trustees have no right to possession of the property – Even if the aforesaid dispute is decided in their favour, clause 4 of the agreement of sale stipulates that they are only entitled to occupation on date of registration of transfer of the property in their names. I will accordingly investigate this allegation by their attorneys and, if found to be true, will cause eviction proceedings to be instituted against them as well."

That application was served on 02 October 2017 and the eviction application against JDL Trust granted. However, the Plaintiffs were not cited as parties in that application and no eviction order sought, nor granted, against the Plaintiffs.

- [15] The Plaintiffs allege that prescription will begin to run against lawful and/or *bona fide* occupiers when legal proceedings are taken to terminate occupation. In *causa* on 17 October 2017 when the First Defendant filed its counterclaim seeking to eject the Plaintiffs from the property based on the *rei vindicatio*. The First Defendant states that prescription begins to run when the improvements are made because the increase in the owner's estate occurs at this stage. Consequently, legal proceedings to terminate occupation is not a prerequisite.

THE ISSUES:

- [16] There are two issues to be determined in this application. The first is whether the First Defendant has relied on grounds of objection outside of that which was set

out in its notice of objection. The second is whether the proposed amendment seeks to introduce a new cause of action which has prescribed.

RULE 28(3):

[17] Rule 28(3) of the Uniform Rules of Court provide:

“Any objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded”.

[18] A party cannot be allowed to rely on grounds of objection not raised in the notice of objection.¹ Mr Van Der Walt, for the Plaintiffs, contend that the First Defendant is limited to what is contained the notice of objection, viz that the proposed amendment introduces a new cause of action which has prescribed. The grounds outside of the notice of objection are facts alleged in the answering affidavit. The first issue raised by the First Defendant is whether the Plaintiffs were lawful or *bona fide* occupiers of the 8-hectare portion of the property. The second contention is when the First Defendants took issue with the Plaintiffs’ occupation and control of the 8-hectare portion.

[19] A formal notice of motion proceedings in terms of Rule 6 was not envisioned for the Rule 28 process.² In this matter, however, this is the route the parties had followed. The facts alleged by the First Defendant stem from an answering affidavit which was filed in response to the Plaintiffs founding affidavit. In my view, all of the factual disputes raised by the First Defendant directly relate to the grounds of objection. There are no new grounds of objection raised by these facts. They are so closely intertwined with the grounds of objection that they do not appear to be separate therefrom. This is what distinguishes this matter from ***Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd***³. The purpose of Rule

¹ ***Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd*** 1999 (1) SA 1153 (SE) at 1158A-C

² ***Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd***, *supra*, at 1157H

³ ***Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd***, *supra*

28(3) is for the party who wishes to amend to know the basis upon which the objection to the proposed amendment is based. The filing of an answering affidavit in this matter formed part of that basis and did not detract from, alter, nor was it distinguishable from the stance taken in the grounds of objection. The facts were used in support of the objection that the proposed amendment is based on a new cause of action which has prescribed. It is my finding that the First Defendant did not raise new grounds of objection.

NEW CAUSE OF ACTION:

- [20] The Plaintiffs assert that the enrichment claim does not introduce a new cause of action because they had raised it in their plea in reconvention. The plea in reconvention raised a lien as a defence for the planting and caring for the pecan nut trees. A lien can only be raised as a defence and does not constitute a cause of action as was stated by the Appeal Court in **Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons**⁴. Thus, irrespective of whether the enrichment claim is conditional, it does constitute a new cause of action.

PRESCRIPTION:

- [21] **Section 12(3)** of the **Prescription Act**, 68 of 1969 states:

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

⁴ 1970 (3) SA 264 (A) at 270 E-F

- [22] In the matter of **Gericke v Sack**⁵, the Appellate Division held that a party who alleges that a debt has prescribed bears the onus to prove such allegation. The First Defendant has to prove the date upon which prescription began to run and when it was completed. In other words, the date upon which the Plaintiffs knew the facts from which the debt arose; alternatively the date upon which the creditor is deemed to have knowledge of such facts. Prescription is interrupted when notice is given in terms of rules of Court to amend a summons⁶.
- [23] Counsel for the parties are *ad idem* that prescription begins to run against lawful or *bona fide* possessors or occupiers when they become aware that they are not the owners of, or entitled to occupy the property. The question is when this awareness was within the knowledge of the Plaintiffs in order to determine whether the matter has prescribed. Mr Van Der Walt argued that the Plaintiffs became aware of the facts on 07 October 2017 when the First Defendant filed its counterclaim. Mr Nel, for the First Defendant, countered that the Plaintiffs were aware that they were not lawful or *bona fide* possessors since November 2012 when the pecan nut trees were planted. An alternative date would be 02 October 2017 when the First Defendant sought the eviction of the JDL Trust, who have the same trustees as the Plaintiffs.
- [24] In support of his argument, Mr Van Der Walt sought to rely on the matter of **Meyer's Trustees v Malan**⁷. This decision, which was followed in a number of matters⁸, stated that enrichment claims of possessors or occupiers in respect of improvements do not arise until the owner of the immoveable property asserts his rights to the immoveable property or makes a demand in respect thereof, which is incompatible with the continued possession or occupation of such immoveable property. This matter came under heavy criticism in the Appeal Court in the matter of **Nortje en 'n Ander v Pool, NO**⁹. The criticism stems from

⁵ 1978 (1) SA 821 (AD) at 827H to 828B

⁶ **Mias De Klerk Boerdery (Edms) Bpk v Cole** 1986 (2) SA 284 (N) at 287 B to E

⁷ 1911 TPD 559 at 559 and 573

⁸ See **Mattheus v Stratford and Another** 1946 TPD 498 at 505 and **De Kock NO v Van Schalkwyk** 1966 (1) SA 696 (O) at 701A -F

⁹ 1966 (3) SA 96 (A)

the dissenting judgment by Ogilvie Thompson JA and the dissenting judgment of Rumpff AR. Ogilvie Thompson JA refers to¹⁰ the sound criticism by Prof De Vos¹¹ of the **Malan** matter. This criticism is that a *bona fide* possessor need not wait for the true owner to take steps to evict him in order to claim compensation. The *bona fide* possessor may at any time after he discovers that he is not the true owner of the land take steps to claim compensation. Additionally, Rumpff AR held¹²:

"Na my mening is dit, wat die reg betref, onnodig vir die eisers om te wag tot 'n formele versteuring deur die eksekuteur, en wat die feite betref, is dit onrealisties om van hulle te verwag om voort te gaan met ontginning terwyl hulle nou weet dat die kontrak ongeldig is, en, danksy die weiering van die eksekuteur tot legalisasie van die kontrak, hulle enige moment kan verwag om in hul bedrywigheid gestop te word."

[25] Although not bound by the minority decision above, I accept the reasoning by Ogilvie Thompson JA and Rumpff AR. Consequently, I do not agree with Mr Van Der Walt that the Plaintiffs first had to take action against the Plaintiffs before they could raise an enrichment claim.

[26] In a majority decision by the Full Court of this Division, **Lakka v Beukes and Another**¹³, the Court held:

"[68] The further argument by Mr Jankowitz is that since a lien is accessory to a main obligation, in this case the claim for enrichment against the Visagies, the lien is extinguished when the main obligation prescribes. Since the first respondent has attached

¹⁰ At 106B

¹¹ **Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg** at P133

¹² At 126C

¹³ (CA & R 60/2018) [2020] ZANHC 11 (23 MARCH 2020)

proof of improvements done over the period 2010 to 2015, the argument is that the enrichment claim had prescribed and that the lien could therefore not be invoked.

[69] To succeed with such an argument, the appellant would have to show that during the period 2010 to 2015, the first respondent had knowledge of the facts to sustain an enrichment claim against the Visagies. The evidence however shows that the first respondent effected the repairs for the benefit of herself and her family while under the impression that she would become the registered owner of the property. There could have been no question of an enrichment claim at that stage. The earliest an enrichment claim could have become due is after the property had been sold to the appellant and the first respondent had become aware of the facts from which the claim arose in terms of s12(3) of the Prescription Act, No. 68 of 1969."

- [27] When did the Plaintiffs, exercising reasonable care, come to know that they are not in lawful occupation of the property? The argument by Mr Nel is that the Plaintiffs knew that they could not occupy the immoveable property prior to registration. They knew from the onset at November 2012 that they could not be in lawful occupation of the property. The size of the entire immoveable property is 91.485 hectares. The Plaintiffs case is that since 2012 they occupied an 8-hectare portion thereof in terms of a verbal agreement. The First Defendant disputed this verbal agreement for the first time some 05 years later in October 2017. In the eviction papers relating to JDL Trust, the First Defendant said it would investigate the claims by the Plaintiffs and launch eviction proceedings if they were occupying the 8-hectare portion. What transpired, however, was not eviction proceedings, but a Counterclaim filed on 09 December 2019. However,

I am not convinced that this was the first date upon which the Plaintiffs became aware of their unlawful occupation of the property. Although not a party to the eviction proceedings against JDL, as the trustees in both the JDL Trust and Elnathan 2011 Trust, the Plaintiffs were privy to the First Defendant's dispute of their unlawful occupation.

[28] Having found that the Plaintiffs did not need to wait for the First Defendant to take action to lodge an enrichment claim, it follows that by exercising reasonable care, the Plaintiffs should have been aware that they could not be in occupation of the 8-hectare portion by 07 October 2017. Nevertheless, the Rule 28 notice, which interrupts prescription, was served and filed on 23 July 2020. It follows that although the amendment raises a new cause of action, it has not prescribed. Even if I am incorrect on this aspect, it raises a triable issue which is better suited to a trial court to make a finding on after hearing and evaluating the evidence lead.

[29] There is no reason why costs should not follow the result. Although both counsel sought punitive cost orders, I am not satisfied that the conduct by either party warrants a punitive cost order.

[30] In the premise, the following order is made:

1. **The Plaintiffs are granted leave to amend their particulars of claim in accordance with their notice of intention of amend as qualified in terms of paragraph 31.2.1 and 32.2.23 of their replying affidavit;**
2. **The costs of the application are to be borne by the First Defendant.**



J SNYDERS
ACTING JUDGE
NORTHERN CAPE DIVISION

For the applicant: **ADV D VAN DER WALT SC**
(oio **Magoma Attorneys.**)

For the respondents: **ADV EJJ NEL**
(oio **van de Wall Inc.**)