

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 HIGH COURT, KIMBERLEY**

CASE No: CA&R 109/11

Delivered: 11/02/2013

BENITA STEENKAMP N.O	1ST APPELLANT
LUKAS MARTHINUS STEENKAMP N.O	2ND APPELLANT
RACHEL VAN DER MERWE N.O	3RD APPELLANT
GERTRUDA MAGDALENA GRUNDLINGH N.O	4TH APPELLANT

and

C.A. DU TOIT CENTRAL (EDMS)BEPERK	RESPONDENT
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Coram: Tlaletsi J et Mamosebo AJ

JUDGMENT

Tlaletsi J,

Introduction

- [1] This is an appeal against a decision of the magistrate sitting in the Upington district court in an action instituted by the respondent C.A Du Toit Central (Pty) Ltd, a company registered in terms of the company laws of the Republic of South Africa. The action was instituted against the appellants in their capacities as the trustees of the Belurana Family Trust, a trust also registered in terms of the laws of the republic under reference number IT 43/2003.
- [2] In the action the respondent sought judgment against the appellants for delivery of certain items listed on Annexure “A” to the summons alternatively payment of the amount of R12 775.00, alternatively an amount of R23 328.00 together with interest on the said amount *a tempore morae*. The second prayer was for payment of the amount of R43 073-94 together with interest on the aforesaid amount plus costs of suit. The action arises from a transaction involving a sale of immovable property to the respondent by the Belurana Family Trust.

The pleadings

- [3] The respondent’s pleaded case (as amended) is briefly as follows:
- 3.1 Clause 14 of the written sale agreement entered into by the parties does not set out the correct terms of the parties’ agreement as it incorrectly refers to “*alle meubels in woonstel+breekgoed*” (all furnitures in the apartment +crockery).
- 3.2 Clause 14 should have included the following handwritten addition thereto: “*Wat sal linsluit die algehele inhoud van die*

betrokke eiendom soos op datum van besigting, alternatiewelik ondertekining van die ooreenkoms.”

- 3.3 The incorrect description and/or qualification of the movable items as referred to in clause 14 of the written sale agreement was brought about by a common mistake by the parties and that the parties signed the agreement on the *bona fide* but mistaken belief that it sets out the true or correct agreement of the parties.
- 3.4 That in terms of clause 14 of the agreement (Annexure “A”) a specific, alternatively a tacit, further alternatively an implied term of the agreement that in addition to all the built-in or other fittings, floor mats, curtain pelmets, lampshades, electrical fittings, and the entire contents of the apartment as on the date of viewing, alternatively the date of signature of the agreement, were all part of the subject matter of the sale agreement.
- 3.5 That the respondent complied with all its obligations in terms of the agreement, including payment of the purchase price. As a result, the property was transferred into the respondent’s name on 11 November 2004.
- 3.6 That the appellants failed to comply with their obligations in terms of the agreement by failing and or refusing to deliver to the respondent the aforesaid property in a condition that was agreed to in the sale agreement.

3.7 The respondent is demanding compliance by the appellants with the terms of the agreement by delivering the items due to it as agreed to in Annexure “A”.

3.8 In the event that it is found that the appellants are not in possession of the said items or not in a position to deliver the aforesaid items, in that event payment of an amount of R12 775.00 by the appellants which represents a fair and reasonable value of the said items.

[4] The respondent’s second claim is as hereunder.

4.1 The respondent contends that it was at all times known to the appellants that the respondent and its director who acted on behalf of the respondent at the time of the conclusion of the agreement, was domiciled in Bloemfontein. That it was also brought to the attention of the appellants that the said property was purchased for the purpose of, among others, hiring it out to holiday goers and consequently it was within the contemplation of the parties at the time of the conclusion of the agreement that:

4.1.1 In the event of the appellants breaching the agreement, it would be necessary for the respondent’s director to travel from Bloemfontein to Mosselbay in order to establish the extent of the breach and the damages, if any. It was further within the contemplation of the parties under the circumstances that the respondent would not be in a position to hire out the property for the same value in the event of

appellant's failing to comply with their part of the agreement.

4.1.2 As a result of the appellant's conduct as set out above, the respondent suffered damages in that it was necessary that the respondent's representative during the period 16 November 2004 until 19 November 2004 to incur costs and disbursements in order to determine the nature and extent of the appellants' breach in the amount of R43 079.94.

[5] The respondent is therefore claiming rectification of the written sale agreement(Annexure "A") by including the following handwritten words in clause 14: "*wat sal insluit die algehele inhoud van die betrokke eiendom soos op datum van besigting, alternatiewilik ondertekening van die ooreenkoms*" "A", alternatively payment of the amount of R12 775.00 together with interest on the said amount *a tempore morae*; payment of the sum of R43 073,94 together with interest on the aforesaid amount *a tempore morae*, and costs of suit.

[6] The appellants'Plea to the respondent's particulars of claim (as amended) may be summarised as hereunder:

6.1 They admit that annexure "A" did not reflect the entire terms of the sale agreement between the parties. However, the broad, vague and unenforceable stipulations in clause 14 were immediately rectified by telefax in order for it to reflect the correct terms of the agreement between the parties and that the said rectification was specifically, alternatively tacitly accepted by the respondent.

- 6.2 That the written sale agreement initially incorrectly referred to all the furniture in the dwelling/apartment plus crockery (breekgoed). This mistake was rectified by first appellant with a list of all movable assets which were part of the agreement.
- 6.3 That there was never a *consensus* between the parties that all furniture and crockery without qualification, would be included whether as a specified, alternatively tacit, or implied term of the sale agreement.
- 6.4 The appellants therefore deny that they failed to comply with their obligations in term of the agreement between them and the respondent. They further deny that the respondent is entitled to payment of the amounts of R12 775.00 or any amount representing damages suffered by the respondent.

Factual Background

- [7] For a better understanding of the issues it is necessary that a brief chronology of the events leading to the dispute be set out. This information is obtained from the pleadings as well as the evidence tendered at trial and is mostly common cause.
- [8] Mr Van der Merwe (“Van der Merwe”) is a director of the respondent private company and has at all material times resided in Bloemfontein. He had an interest in acquiring property in the Western Cape coast. He was referred by a friend to a certain Mr Bobby van Schalkwyk (“Van Schalkwyk”) who is an estate agent in Mosselbay. Van der Merwe phoned Van Schalkwyk and informed him that he was looking for residential properties which were fully furnished and ready for

immediate hiring out for holiday purposes. He mentioned that the property he wanted should be a guesthouse type and be situated in Mosselbay.

- [9] On 2 September 2004 Van Schalkwyk phoned first appellant and advised her that he had a person that was interested in purchasing a residential property with its furniture for purpose of immediate hiring out. He enquired whether she would allow him to market her property for sale purposes. First appellant agreed to Van Schalkwyk marketing their property. Van Schalkwyk enquired from first appellant what price was she willing to sell her property for. First appellant replied that they wanted an amount of R1 250 000.00 for the property. She further informed him that she wanted an additional amount of R80 000.00 for the furniture. The property under discussion and which is the subject matter of this appeal is De Valle 21 and is situated in Mosselbay.

- [10] On 2 September 2004 Van der Merwe travelled from Bloemfontein to Mosselbay where he met Van Schalkwyk for the first time. Van Schalkwyk took Van der Merwe around and showed him about 20 residential properties which were on the market. In the process Van der Merwe took detailed photographs of both the inside and outside of the houses and premises of the properties shown to him. His intention was to later make time and go through his photographs and compile a shortlist of the properties he would consider for purchase.

- [11] The following day on 3 September 2004 Van der Merwe phoned Van Schalkwyk and advised him that there were properties out of those he saw the previous day that he wanted to inspect. The properties in question were De Valle 21 and two others. The two went to inspect

thesaid properties. Van Der Merwe was impressed by De Valle 21 as it gave him a feeling of a guesthouse,[*wasexpensive*] and ready for immediate hiring out. He made it known to Van Schalkwyk that De Valle 21 was his first choice. Van der Merwe made an offer to purchase the property at an amount of R1 180 000.00 including its contents (“*met die meubels, die fittings, die inhoud, alles was daarin is*”). Eighty thousand Rand(R80 000.00) of the amount offered was for the contents which was in line with the first appellant’s instruction to Van Schalkwyk.

- [12] Van Schalkwyk completed a *pro forma* offer to purchase which constituted a sale agreement upon acceptance for De Valle 21. Clause 14 of the offer to purchase which is in issue *in casu* stated that:

“Benewens alle ingeboude of ander vaste toebehore, volvloermatte, gordynkappe, Lampskerms en toebehore van vaste elektriese ligte, word die volgende toerusting as deel van hierdie ooreenkoms beskou...”

Van Schalkwyk inserted the following words in clause 14 in his handwriting “*Alle Meubels in Woonstel*”. Van der Merwe read the document and added the following to clause 14 “+ *breekgoed*”.

- [13] Van der Merwe initialled the handwritten part of clause 14 and signed the document. Van Schalkwyk also initialled clause 14 and signed as a witness. Van Schalkwyk telephoned the first appellant and informed her that Van der Merwe is making an offer for the property with the entire contents because he wanted to hire it out with immediate effect. He told her that the offer made was an amount of R1 180 000.00. The first appellant advised Van Schalkwyk that there were clothes and personal items in the cupboards which could not be included in the sale. Van

Schalkwyk responded that Van der Merwe was prepared to conclude the transaction only if he could purchase the property with its entire contents otherwise he would not be interested.

[14] It is not disputed that first appellant did not wish to accept the offer of R1 180 000.00. She wanted R1250 000.00 for the apartment and R80 000.00 for the furniture. She discussed the matter with her husband, the second appellant. The latter persuaded her to accept Van der Merwe's offer and mentioned that she must not be petty; that their new apartment was not yet complete and that there was no place to take the furniture to; and that the purchaser needed the furniture to hire out the property.

[15] First appellant telephoned Van Schalkwyk and advised him that she was accepting Van der Merwe's offer. She further informed him that as compensation for the "low offer", she wanted to have the use of the property free of charge with her family during the period 2 to 14 January 2005. She requested that this condition be included in clause 19 of the agreement. It is common cause that Van Schalkwyk conveyed what she was told by first appellant to Van der Merwe who accepted the condition. Van Schalkwyk consequently inserted the following words in clause 19 as a special condition:

"19 SPECIALE VOORWAARDES

Hierdie Koopkontrak is onderhewig aan die volgende spesiale voorwaardes naamlik: verkoper kan gratis vakansie hou in eenheid vanaf 2 to 14 January 2005."

Van Schalkwyk and Van der Merwe initialled the inserted clause 19.

- [16] On Friday 3 September 2004 at 16h36 Van Schalkwyk sent the signed offer to purchase to the first appellant by telefax. The first appellant did receive the offer to purchase. According to her she understood the offer to indicate that the respondent wanted to buy the apartment with its contents which were included in the amount offered. She then phoned Van Schalkwyk and informed him that she did not like the “wording” or that she was not happy with the description and she was going to send him a list of what they were prepared to leave in the house which were part of the house and which were not their personal property. She mentioned further that Van Schalkwyk replied that he did not believe that Van der Merwe would be interested in what she was saying because he wanted everything. She testified further that she took the offer to the second appellant and informed him that she was not satisfied with the description. They discussed it and they thereafter signed.
- [17] On the same day, 3 September 2004, first appellant remitted the signed offer by telefax to Van Schalkwyk. The offer was signed by the two on behalf of the trust and at that stage they had not effected any changes in the document. The parties agree that at this stage a binding agreement had been concluded between them for the sale of the property. Van der Merwe returned to Bloemfontein. It however seems that first appellant was not satisfied with what she regarded as a “swaak” (weak) transaction. She testified that she was also dissatisfied with her husband’s decision. He however had a final say in the matter. She mentioned that her husband only wanted to sell the apartment and was relieved that he had money for the new apartment.
- [18] It is common cause that on 5 September 2004 Van Schalkwyk received an agreement with clause 14 amended by first appellant with the

following handwritten words: “*sien aangehegte lys*”(see the attached list)per telefax from first appellant. There was however no list attached to the document. Van Schalkwyk informed first appellant that he was going to send the document to Van der Merwe and that he was not sure if he would sign it as he was not obliged to do so since there was already a binding agreement in place between him and the seller. Van Schalkwyk discussed the matter with Van der Merwe and the latter informed him that the changes were not acceptable to him. He reiterated that he was buying the property with its entire contents.

[19] On 15 September 2004 first appellant enquired from Van Schalkwyk whether the amendment was acceptable to Van der Merwe. Van Schalkwyk advised her that the agreement was finalised and that the amendments were not accepted by Van der Merwe. On 16 September 2004 Van der Merwe received a telephone call from the attorney responsible for the transfer of the property at the firm Oosthuizen, Marias & Pretorius. The attorney informed Van der Merwe that there was a list which is an inventory of the apartment that Van der Merwe had to sign and fax it back to him if he found it complete. The attorney then sent the list (Annexure C1 to C7) to Van der Merwe.

[20] Upon receipt of the inventory, Van der Merwe phoned the attorney and informed him that he was unable to compare the inventory with the contents of the apartment as he was in Bloemfontein. He further told him that there is a contract in place for the sale of the apartment with all its contents and that he was prepared to sign the inventory but could not confirm if it represented what was in the apartment as at 2 September 2004.

- [21] After speaking to the attorney, Van der Merwe phoned Van Schalkwyk and reported to him what the attorney said to him. He read the list to him and said that to him it appeared reasonably complete. Van der Merwe signed the inventory and sent it back to the attorney per telefax on 16 September 2004. The inventory was sent under cover of a letter (Exhibit “E”) in which he confirmed *inter alia*, that according to the agreement all the furniture and “*breekgoed*” (crokery) in the apartment as at 2 September 2004 were part of the sale; that the contents as listed in the inventory were the main reason for the purchase of that property; that photographs were taken during the visit to the apartment in the event that clarification was required. The attorney’s evidence was not tendered at trial and as such Van der Merwe’s evidence on this aspect is not contradicted.
- [22] On 30 October 2004 first appellant removed several items with a bakkie from the apartment. The items included some of the furniture which was in the apartment. On 11 November 2004 the property was transferred to the respondent. Van Schalkwyk received the commission due to him as provided for in the agreement.
- [23] On 16 November 2004 Van Schalkwyk received a telephone call from a certain Mrs Eilene Fourie who was a caretaker at the De Valle apartment block. She was to assist in hiring out De Valle 21. She made a report about the activities that were taking place at the property. Van Schalkwyk drove to the property and found a bakkie parked on the premises with furniture loaded on it. Mrs Fourie was also present. Van Schalkwyk chose not to confront first appellant before he could establish from Van der Merwe whether any arrangements had been made with him.

- [24] It is common cause that sometime later Mrs Fourie phoned first appellant and accused her that “*die woonstel se stertvere is nou uitgetrek*”(the apartment’s tail feathers have been pulled out). Van Schalkwyk phoned Van der Merwe to report what happened. He mentioned that first appellant was removing some items and also exchanging some of the items in the apartment with others. Van der Merwe confirmed that he had no arrangement with the appellants to do what they were doing to his property. He arranged that photographs be taken of what was happening. Photographs were taken and were sent to Van der Merwe.
- [25] Having perused the photographs Van der Merwe phoned first appellant and informed her that he purchased the apartment with the entire contents and demanded that she return the items removed from the apartment within 24 hours and to put the apartment in the position it was as at 2 September 2004. First appellant responded by stating that she was at that moment in Upington and not at Diaz Strand (Mosselbay) and therefore unable to comply with the demand.
- [26] On 16 November 2004 Van der Merwe decided to travel to Diaz Strand to see what changes had been made to his property. He requested his friend Mr Frank de Beer to accompany him and assist him with the driving of the motor vehicle since he had to return the following morning. They travelled a distance of about 800 to 900 km and arrived at 20h00.
- [27] On arrival Van der Merwe discovered that several furniture items as well as some of the crockery were missing. Some of the furniture were shifted

around to close or make up for the spaces created by those removed. He enquired from the tenants and they confirmed that they had not removed anything from the apartment. Van der Merwe took photographs of the apartment to enable him to compare them with the photographs taken on 2 September 2004.

- [28] As agreed, first appellant and her family had use of the apartment free of charge for the period 2 to 14 January 2005.

Judgment of the Court a quo

- [29] The district magistrate in his judgment (both extempore and later in his reasons for judgment provided in terms of Rule 51(1) of the Magistrate's Court Rules) recognised the fact that clause 14 did not reflect the true agreement between the parties and that both parties sought rectification thereof. The magistrate found the first appellant to have been an unsatisfactory witness who did not reply directly to questions put to her; that questions had to be repeated in order to get simple answers from her; she was evasive, contradictory and unimpressive. He recorded that the first appellant conceded that she always wanted to establish what the intention of counsel was with his questions before she could answer questions put to her. Her evidence was in so far as it was in conflict with the rest of the evidence rejected.
- [30] The magistrate found that first appellant was (admittedly) aware when she received the offer that the respondent wanted everything included; was advised by her husband to accept the offer as made and that the agreement was concluded on that basis. Her actions of removing some of the items from the apartment were in conflict with the agreement and led to the respondent suffering damages. The magistrate found further that it

was necessary for Van der Merwe to travel from Bloemfontein to Mosselbay to appraise himself of what was happening; that it was expected of the owner of the property to take steps to mitigate his damages. The respondent was granted proved general damages in the amount of R4 650.00 and special damages in the amounts claimed plus costs of suit.

The Appeal

[31] The appellants have raised several grounds upon which they are challenging the decision of the magistrate. A summary thereof boils down to: The magistrate erred by finding that:

(a) there was *consensus* between the parties regarding the items to be included in the sale agreement;

(b) clause 14 be rectified in order for it to read “*totale inhoud*”;

(c) the special damages suffered by the respondent was an amount of **R4 650.00**

(d) general damages in the amount of **R43 073.94** be awarded in circumstances where the respondent had not shown that the damages were foreseeable and reasonable under the circumstances;

(e) the matter was technical in nature and justified the employment of senior counsel;

(f) awarding subsistence, travelling and preparation costs at a higher scale of costs provided in the Magistrate's Court rules;

(g) by not rejecting the respondent's claims; and

(h) by not finding that the respondent failed to mitigate its damages and failed to prove the quantum of its fair and reasonable damages.

[32] In this Court Mr FG Janse Van Rensburg who appeared on behalf of the appellants contended that the respondent should not have succeeded with its claim for rectification as pleaded seeing that there was never a meeting of the minds between the parties as to which movable property was in fact part of the sale agreement. He submitted that it was common cause that it was never the intention of the parties to include items of a personal nature. The real dispute between the parties is their interpretation of what constituted the items of a personal nature. He argued that Van der Merwe signed the list that was sent to him by the attorney responsible for the transfer of the property and despite having the photographs he took of the property to compare and having had a two weeks period to consider what was meant by the contents of the apartment. He concluded that the magistrate should have found that the written sale agreement was indeed rectified by the addition of the words "*aangehegtelys*" and the appeal should therefore succeed.

[33] The first appellant was the sole witness for the appellants at trial. As indicated above, she was the only person who had direct dealings with Van Schalkwyk (the estate agent) and Van der Merwe on behalf of the respondent. In her evidence first defendant raised what may be referred to as defences to the respondent's allegations and evidence. The

defences she raised amount to: the document that she signed was not a binding agreement but merely a process of negotiations; the signed offer was not a contract but merely a temporary document; the written agreement that she signed is not valid because she could not sell something that did not belong to her; although she signed the agreement it was part of and conditional on the list of the contents that she would be prepared to allow the respondent to have; although she signed the agreement, there was a counter offer from her side to the effect that only the contents of the apartment which were on the list were to be part of the sale agreement; that Van der Merwe by signing the list accepted her counter offer; that at the time of signature of the written agreement there was no *consensus* or meeting of the minds between the parties; finally, that the appellants are entitled to an order for rectification of clause 14 of the agreement because she and Van der Merwe agreed that only the contents of the apartment which were on her list were part of the sale but due to a common and *bona fide* oversight the reference to the list was omitted in the wording of clause 14.

- [34] The reasons advanced by first appellant why she regarded the document she signed as a temporary document and merely a step in the negotiations process are that the ink in a fax document does not last long and that a fax cannot be used as an original document. In my view, the reasons are baseless because it would not have been necessary for her to sign the document if she believed that the ink would not last long and that it is not an original document. What is important in my view, is that her signature on the document signified and confirmed that she accepted and agreed to what was stated in the document. There was never any discussion that there would be an opportunity in future for another document to be prepared and for the parties to come together to sign the

document. The document she signed stated in unambiguous terms that the offer became a binding agreement upon signature of the document. Furthermore, she signed the document after having discussions with her husband who is her co-trustee about the contents of the agreement. Lastly, first appellant was during cross-examination described by her legal representative as a person with experience in business and who was thorough and careful. Therefore, she must have had a clear understanding that she was accepting the terms of the agreement by signing the faxed document.

[35] There could not have been *consensus* between the parties that the contents of the apartment should be limited to the list prepared by first respondent. In the first place when the discussions took place, up until the appellants signed the offer to purchase on behalf of the trust, there was no mention that a list would be prepared and submitted later. Secondly, it was only two days later after the signature of the offer, when there was already a binding agreement in place that first appellant introduced the words: “*See the attached list.*” Even at the stage when she faxed the document to Van Schalkyk, the list was not attached, meaning that it was not compiled yet. Thirdly, first appellant conceded that what she wrote on the document was an afterthought as she was not satisfied with what her husband had persuaded her to accept. This concession was also made in her affidavit in the application for *mandement* van spolie which preceded these proceedings.

[36] First appellant’s allegations that she did mention to Van Schalkwyk before she signed the offer that a list would be prepared is highly improbable. The allegation is contradicted not only by Van Schalkwyk but by the documents, her own evidence and the objective facts of the

case. Furthermore, she could not explain why she did not include the list in the document before she signed and later faxed it to Van Schalkwyk. Instead what was included is what Van Schalkwyk confirmed that she requested that it be included that she would have free holiday with her family in lieu of the low offer she accepted for the property.

[37] The first appellant's introduction of the list or inventory was an attempt to unilaterally vary the terms of the agreement. Her unilateral conduct is against clause 13 of the agreement which states that the agreement is the sole agreement between the parties and any changes or variations thereto shall be of no force or effect unless reduced to writing and signed by both parties. It cannot be said that when Van der Merwe signed the list/inventory he was agreeing to the variation or rectification of the agreement. It is clear from the evidence that it was never his intention to do so but that he was of the view that it complied with what they had agreed to namely, the inclusion of the entire contents of the house and that the list was only required for the purpose of the registration of the transfer of the property at the Deeds Office.

[38] It is first appellant's evidence that clause 14 before the attempt to amend it, meant that the respondent was entitled to the contents of the apartment without limitation. In her own evidence she on two occasions (on 30 October and 16 November 2004) removed some of the furniture which was in the apartment when it was viewed by Van der Merwe on 2 and 3 September 2004. She did not inform either Van der Merwe or Van Schalkwyk and Mrs Fourie that she intended to remove some items from the apartment. When she removed the items she already knew that Van der Merwe rejected her attempt to unilaterally change the terms of the agreement. There was no doubt in her mind at the time that the

respondent wanted the apartment with its entire contents. When requested by Van der Merwe to return the items she removed, she refused to do so. Her actions in removing the items from the apartment amounted to breach of the sale agreement.

- [39] The purpose of a claim for rectification is to formulate the parties written agreement so that it should conform with the intention of the parties (*Levin v Zoutendijk 1979(3) SA 1145(W) 1147-1148*). In *casu*, the common cause facts are that at the time when the agreement was signed i.e, on 3 September 2004 there was no doubt in the mind of the appellants, Van der Merwe and Van Schalkwyk that the respondent purchased the property with the entire contents of the apartment. Although first appellant was not satisfied with this state of affairs, she was convinced by her husband to accept the offer as it was made. The parties understood clause 14 to mean that.

- [40] The appellants pray that Clause 14 be rectified to read:

“Benewens alle ingeboude of ander vaste toebehore, volvloermatte gordynkappe, +lampskerms en toebehore van vaste elektriese ligte, word die volgende toerusting as deel van hierdie ooreenkoms beskou: alle meubels in woonstel en breekgoed, soos per aangehete lys.”

The difficulty with the appellants’ claim for rectification is that they allege that there was no consensus between the parties as to precisely which movable items were part of the sale agreement. In the absence of *consensus* between the parties, a claim for rectification cannot succeed since doing so would amount to a construction of a new contract for the parties. In my view the issue in dispute, is not what were the items of a

personal nature which were in the cupboards and some clothing that were to be excluded from the contract. I say so because those items could not have been included in the agreement since they were not part of the guesthouse business. These items could not have attracted and or induced Van der Merwe to purchase the apartment for the purpose he wanted it for.

- [41] On the other hand the respondent's claim for rectification is that clause should read:

“Benewens alle ingeboude of ander vaste toebehore, volvloermatte, gordynkappe, lampskerms en toebehore van vaste elektriese ligte, word die volgende toerusting as deel van hierdie ooreenkoms beskou: alle meubels in woonstel plus breekgoed wat sal insluit die algehele inhoud van die betrokke eiendom soos op datum van besigting en ondertekening van die ooreenkoms.”

- [42] All the objective facts as pointed out above support the respondent's claim that on 3 September 2004 when the agreement was signed there was consensus between the contracting parties that the property was sold with its contents as it was on 2 and 3 September 2004 and that due to bona fide oversight on the part of contracting parties they accepted that their intention was captured in clause 14 as it then was. The addition of the words to the effect that the contents as at the day of viewing or signature would correctly reflect what the parties agreed to. It would not amount to making up a contract for the parties.

- [43] I am therefore satisfied that the appellants are not entitled to rectification of the agreement and that they have breached the agreement by removing some of the movable items which were in the apartment on the

2nd and 3rd September 2004. The respondent is entitled to rectification of clause 14 as shown above.

- [44] As regards damages the appellant's grounds of appeal are that the magistrate erred by awarding special damages as pleaded by the respondent and ought to have dismissed the respondent's claim in this regard. It was contended on behalf of the appellants that the respondent had failed to prove that there were special circumstances at the time of conclusion of the agreement present or drawn to the attention of the appellants to justify the special damages as claimed and further that the respondent had failed to show that the expenses incurred by Van der Merwe were reasonable; and that the loss claimed was too remote and could not have been foreseen by the appellants.
- [45] In order for the respondent to succeed with a claim for special contractual damages, it had to show that the damages suffered must have been in the contemplation of the parties and that the contract must have been entered into on the basis of the parties' knowledge of the special circumstances giving rise to the damages. See: *Southern Enterprise Development Fund Inc v Industrial Credit Corporation Africa Ltd 2008 (6) SA 468(W); Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3)SA 670 (A).*
- [46] It is expected of an innocent party to mitigate its damages, and the *onus* is on the defendant to prove that the innocent party has not mitigated its damages. The innocent party is not required to do more than what a reasonable man would do to mitigate his damages.

[47] The respondent's claim for special damages is itemised on Annexure K5. The items are categorised as telephone costs, travelling costs per km tariff; travelling costs per hourly tariff, hourly tariff and diverse expenses. The evidence presented by Van der Merwe to support the items claimed is that he had no option but to travel to Mosselbay in order for him to ascertain the nature and extent of the breach by the appellants; he travelled by an Audi 2.7 motor vehicle at a specific tariff; it was necessary for him to be accompanied by a friend to assist him to drive the motor vehicle; that the friend was entitled to claim at a particular tariff; that Van der Merwe charged his travelling time in accordance with a tariff prescribed in the government gazette for consulting engineers doing work for government; and telephone and meals costs.

[48] In awarding the special damages the trial magistrate held that:

“Indien verweerder nie die bepalings van die kontrak verbreek het nie sou Mnr Van der Merwe nie vanaf Bloemfontein na Mosselbay gereis het om hom te vergewis van wat aan die gang is nie. Hierby moet daar ingedagte gehou word dat die woonstel ten tyde van die gebeure ook te huur was. Indien dit nie te huur was nie en die verweerder by wyse van Mev Steenkamp die enigste was wat by die woonstel kon aandoen, kon daar dalk aangevoer word dat dit nie vir hom nodig was om die rit te onderneem nie. Dit was egter nie die geval nie. Daar word tereg regtens van ‘n eienaar verwag om stappe te doen om sy skade te beperk. Dit was dus nodig vir Van der Merwe om daarheen te reis. Aangesien daar niks tot die teendeel aangetoon was rondom die uitgawes teweeggebring tot die reis nie word die gevolgsade ook toegestaan soos versoek. Koste volg die suksesvolle party”.

[49] It is clear from the record that the trial magistrate did not apply his mind to the question whether Van der Merwe was entitled to claim damages based on his professional capacity as a consulting engineer. The award for special damages was simply granted because it was claimed. It cannot be said that it was within the contemplation of the parties that in the event of the breach Van der Merwe would incur such damages in his capacity as consulting engineer. There is no link between his professional capacity and the transaction to purchase property. The respondent may very well be entitled to some special damages but not in his capacity as a professional engineer. The trial magistrate further failed to consider whether all the expenses incurred including the mode of transport used and being accompanied by a friend were necessary. It is also notable that Van der Merwe has claimed Value Added Tax for the amounts he charged. These issues which have been raised by the appellants are relevant and cannot be decided on appeal. It would therefore be appropriate that the issues relating to special damages be referred back to the trial court for determination.

[50] As regards costs, the trial magistrate simply ordered that costs should follow the result. He ordered that costs should include increased advocates costs, preparation, and traveling and subsistence expenses. He did not consider whether the matter justified the employment of senior counsel and also at an increased scale or provide reasons for the special costs order. In my view the issues before the trial court were not such complex that they justified the order granted. An appropriate order would have been to award party and party costs on the ordinary scale applicable in the magistrate court since the respondent was successful in that court. The trial magistrate therefore failed to apply his mind properly when making the costs order.

[51] In conclusion, the appeal should fail in so far as the appellants seek rectification of the agreement in their favour and the award for general damages. The award granted was agreed to by the parties. Their appeal as regards special damages and the costs order awarded by the trial magistrate should however succeed.

ORDER

[51] In the result the following order is made:

1. **The appeal against rectification of clause 14 is dismissed.**

Clause 14 is rectified to read:

“Benewens alle ingeboude of ander vaste toebehore, volvloermatte, gordynkappe, lampskerms en toebehore van vaste elektriese ligte, word die volgende toerusting as deel van hierdie ooreenkoms beskou: alle meubels in woonstel plus breekgoed wat sal insluit die algehele inhoud van die betrokke eiendom soos op datum van besigting en ondertekening van die ooreenkoms.”

2. **The appeal against the award of general damages is dismissed.**

3. **The appeal against the award of special damages in the amount of R43 073.94 succeeds and the order of the district magistrate is set aside and the matter is referred back to the district magistrate for reconsideration of the award for special damages.**

4. **The award of costs is set aside and is substituted with an award for costs on party and party costs on the ordinary magistrate court scale.**

5. There shall be no costs on appeal.

Tlaletsi J

Northern Cape High Court, Kimberley

I agree.

Mamosebo AJ

Northern Cape High Court, Kimberley

Appearances:

For the appellants: Adv F Van Rensburg

Instructed by: Elliot, Maris, Wilmans & Hay

For the respondent: Adv P Fischer

Instructed by: Haarhoffs Inc.