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: 740/2023

In the matter of:

MARIA HELENA VISAGIE N.O. Applicant

and

JUMALO TRADING CC Respondent

Coram: Lever J

JUDGMENT

Lever J:

1. This is an application to evict a former tenant as well as for one month's arrear rental in respect of a certain immovable property. The claim is based on the right of an owner to vindicate his/her property.

2. Originally, the late Mr Visagie was the registered owner of the immovable property concerned. The relevant immovable property falls into the estate of the late Mr Visagie. It is also common cause that the executor of the late Mr Visagie's estate is now the applicant.

3. It is common cause that the applicant representing the estate of the late Mr Visagie is the registered owner of the immovable property concerned.

4. It is also common cause that the respondent is in possession of the said immovable property and remains in possession of the said immovable property.

5. Although it was previously disputed, it is also now common cause that a written lease agreement had existed between the respondent and the late Mr Visagie.

6. It is further necessary to point out that as part of the said written lease agreement the respondent had the option to purchase the property concerned. It is common cause that the respondent did not exercise this option while it was available to him.

7. In anticipation of exercising his option in terms of the said lease agreement and in furtherance of developing his own or the respondent's business, the member of the respondent, on behalf of the respondent, made certain improvements on the relevant property. The said

improvements consisted of the installation of a weigh bridge, fencing and the construction of a warehouse. The value of these improvements is claimed by the respondent to be in the order of two and a half million Rand.

8. The respondent maintains that certain breaches of the written lease agreement by the late Mr Visagie prevented him from exercising this option. The respondent goes no further than that.

9. Subsequent to the option expiring and negotiations between the late Mr Visagie and the member of the respondent, the late Mr Visagie sold the business as a going concern which included the relevant immovable property to another entity. This other entity is controlled by a trust and Mr Engelbrecht an attorney of this court represents such trust. Mr Engelbrecht also represents the applicant in these proceedings.

10. The agreement of sale referred to herein provided that payment was to be in two tranches. The first payment of two and a half million Rands and the balance of eight hundred thousand Rand.

11. In terms of the said agreement of sale, possession and occupation was to pass on payment of the first amount due. It is common cause that this first amount was paid. The balance has not been paid and the property has not been transferred into the name of the purchaser in the Deeds Registry.

12. Mr Visagie passed away after the Notice of Motion and founding affidavit in this matter were filed.

13. The respondent alleges that it has the right to continue to possess the property concerned by virtue of an improvement lien.

14. However, before we can get to consider the merits of the argument relating to the existence of an improvement lien, the respondent has raised certain points *in limine*.

15. The points *in limine* are as follows: The applicant no longer has *locus standi* to launch the present application; and there is an alleged non-joinder that is alleged to be material and fatal to the present application. These were the preliminary points that were argued at the hearing of this matter.

16. Mr Bester, who appeared for the respondent herein argued that the sale was a sale of the business and the rights to possession and occupation of the property in terms of the relevant agreement of sale passed to the buyer, being the entity represented by Mr Engelbrecht. On that basis Mr Bester argued that the applicant had divested itself of its *locus standi* by virtue of the provisions of the agreement of sale. It followed according to Mr Bester that the applicant no longer had *locus standi* to launch the present application.

17. Mr Van Niekerk SC, who appeared for the applicant, argued that the buyer had not yet obtained transfer, nor had it obtained cession of the registered owners cause of action and on that basis the buyer was not entitled to sue for ejectment. As authority for that submission, Mr Van Niekerk referred me to the case of JADWAT AND MOOLA v SEEDAT[1]

18. Mr Van Niekerk then argued that a buyer of immovable property in eviction proceedings only had a personal right to obtain *vacua possessio,* it can only be enforced against the person who sold it the property. Also, the buyer had no contractual relationship with the respondent in this matter. Further, in the absence of a real right or a contractual relationship with the respondent, the buyer had no *locus standi* to evict the respondent. As authority for these propositions, Mr Van Niekerk relied on the case of RED STRIPE TRADING 68 CC v KHUMALO[2].

19. Then Mr Van Niekerk relied on the case of RED STRIPE TRADING 68 CC v MAHLOMOLA AND ANOTHER[3], where the court held:

> "As a *rei vindicatio* is an inseparable part of the ownership of land, it cannot be ceded without the property being transferred in terms of the law, which in the present case is by registration of transfer in the deeds registry. It must be stressed, as is made plain in the case quoted above, that the *rei vindicatio* is only a remedy and not a right, it cannot be ceded separately from the right of ownership."

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[1] 1956 (4) SA 273 (N) at 276C-D.
[2] (31039/04) [2005] ZAGPHC 31 (23 MARCH 2005) at para [10].
[3] [2006] JOL 17294 (W) at para [17].

20. Finally, Mr Van Niekerk relied upon section 16 of the Deeds Registries Act[4], which provides as follows:

> "Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar: ..."

21. The primary relief sought by the applicant appears from prayer 1 of the Notice of Motion. The said prayer seeks to evict the respondent and all others occupying the relevant property through it. It is clear from the papers that the right claimed is the right of the owner to 'vindicate' or reclaim possession of the property he/she owns. The relevant property being immovable property, such 'vindication' of the right to possess can only be effected by the registered owner. This much is clear from the authorities and legislation cited above.

22. The sale agreement between the late Visagie and the buyer cannot and did not change this. The estate of the late Visagie is still the registered owner of the property concerned. It is therefore the only party with the necessary *locus standi* to prosecute the present application. Thus the contention by the respondent that the applicant lacks the necessary locus standi to launch and prosecute this application by virtue of the said sale agreement cannot stand.

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[4] Act 47 of 1937.

23. The next point *in limine* is the non-joinder of the purchaser of the relevant property. Mr Bester, for the respondent, argued that the purchaser of the relevant property had a direct interest in the outcome of the present application. Mr Bester argued that this direct interest arose from whether I held the sale of the business including the immovable property in question to be valid or invalid insofar as it relates to the immovable property.

24. This argument on the non-joinder of the purchaser is in my view contrived and strained. Firstly, the issue of the validity of the sale of the business concerned insofar as it relates to the immovable property is not a question before me for decision. Secondly, the applicant was bringing the application to fulfil its obligation to the purchaser by virtue of the relevant sale to deliver possession to the said purchaser. It is not necessary to join the purchaser to achieve this objective. Thirdly, it is quite clear from all of the circumstances that at all times material to this application the purchaser had full knowledge of this application and the purchaser's representative was intimately involved in the presentation of the applicant's case in this matter. If necessary, the purchaser could have joined at any time up to the commencement of argument if its position was threatened in any way. To hold otherwise in the particular circumstances of this case would be to put form over substance with the risk of merely running up the costs without any change to the outcome. That is not something this court is willing to entertain. In all of the

circumstances of this case, it is not a necessity to join the purchaser. The non-joinder point also stands to be dismissed.

25. The only dispute of fact that might have existed between the parties, on the papers, was the existence or otherwise of the written lease and the associated option to purchase. This dispute was disposed of when Mr Bester correctly conceded the existence of the written lease and the associated option to purchase as well as the fact that the terms of such agreement are as disclosed in the said written lease agreement and the associated option to purchase.

26. Thus, in determining if the respondent has a *ius retentionis* by way of an improvement lien, it is necessary to examine the terms of the relevant written lease agreement before considering the other requirements of an improvement lien.

27. There are two clauses in the said lease that need to be read together to determine what the parties intended with regards to improvements on the property, made before the option to purchase was exercised. The relevant clauses are clause 9.1.2 and clause 27 of the said agreement.

28. The relevant portion of clause 9.1.2 of the said agreement reads as follows:

> "9.1 The tenant shall –
>
> 9.1.1 ...

> 9.1.2 not make any alterations or additions whatsoever to the premises without the prior written consent of the Landlord. In the event of the landlord agreeing to any such alteration or addition to the premises, the Landlord shall be entitled, on termination of this Agreement, to require the Tenant to restore the premises at the Tenant's expense to the same condition it was in prior to such alteration or addition. On termination of the lease, the Tenant shall be obliged to remove any/all of the alterations, additions or improvements at the Tenant's cost and shall be obliged to make good any damage incurred by such removal unless otherwise agreed in writing with the Landlord. If the Tenant does not remove all the alterations, additions or improvements by the Expiry Date or the date of termination, then the remaining items shall become the property of the Landlord who shall be entitled to remove and make good the affected areas at the Tenant's cost or retain such alterations, additions or improvements without compensating the Tenant therefore;"

29. The relevant portion of clause 27 of the said agreement reads as follows:

> "27. The Landlord grants the Tenant permission to do improvements on the property at his own costs prior to exercising his option to purchase. Should the tenant made (sic) improvements to the property and does not exercise the granted option to Purchase, the costs of the alterations will not be refunded by the Landlord and the Landlord reserves the right to demand the property in it (sic) original condition, also at the cost of the tenant. ..."

30. Having regard to the terms of the clauses quoted above, there is no possibility of a right of retention whether by way of an improvement lien or otherwise.

31. The requirements for an eviction based on a *rei vindicatio* are:

a) The applicant is the owner of the land in question;

b) That the respondent is in possession of such land; and
c) If a prior right of possession is conceded, that such right has been validly terminated.[5]

32. The requirement that the applicant is the owner of the land is established in the papers and in any event, it is common cause.

33. The requirement that the respondent be in possession of the relevant property is common cause.

34. The fact that the month-to-month lease has now been validly terminated cannot and has not been contested.

35. Accordingly, the applicant has established the requirements for exercising vindicatory relief in the circumstances and is entitled to evict the respondent as sought in prayer 1 of the Notice of Motion.

36. The rental due for the month of October 2022 has not been placed in dispute and in such circumstances, the applicant is entitled to judgment in the amount of R22300.00 (twenty-two thousand three hundred) Rand.

37. Attorney and client costs are provided for in the agreement and the applicant is entitled to such costs.

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[5] LAWSA: 3RD Edition: Vol 26(1), para 292.

Accordingly, the following order is made:

1) The Respondent, and all others occupying on behalf of or through it, are ordered to vacate the property being the remaining extent of portion 5 of farm number 187, situated in the Sol Plaatje Municipality, and to do so within 10 days from date of this order herein.

2) The Sheriff of this court be authorised and directed, in the event of the respondent and those occupying through or on behalf of it, failing and/or refusing to comply with paragraph 1 of this order, to enter upon the said property and to eject and to remove all persons found to be occupying the property through or on behalf of the respondent, together with their own as well as the Respondent's belongings, from the said property, and furthermore to place the property in the possession and under the control of the Applicant.

3) The Respondent is ordered to pay the Applicant the sum of R22 300 (twenty-two thousand three hundred) Rand.

4) The Respondent is ordered to pay the costs of this application on the scale as between attorney and client.

[redacted]

Lawrence Lever
Judge
Northern Cape Division, Kimberley

REPRESENTATION:	
Applicant:	*ADV J VAN NIEKERK (SC)*
Instructed by:	*ENGELSMAN MAGABANE INC.*
Respondent:	*ADV E BESTER*
Instructed by:	*ADRIAN B HORWITZ & ASSOCIATES*
Date of Hearing:	*31 May 2024*
Date of Judgment:	*07 June 2024*