

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 4151/2022

In the matter between:

STACEY ILDA HARRISON

Plaintiff

and

CHERE HATTINGH

Defendant

JUDGMENT

Bloem J

[1] It might be difficult to appreciate that, not so long ago, the litigants were friends. They had such a close relationship that they entered into agreements of lease and sale without the assistance of legal practitioners. Those agreements form the subject matters of this judgment.

[2] The plaintiff, Stacey Harrison, approached the defendant, Chere Hattingh, when she learned that the defendant might sell her farm. After discussions, they concluded two agreements in respect of seven hectares of farm 819, East London (the property) of the defendant's farm. The one was a lease agreement and the other was intended to be a sale agreement. The defendant received payment in the total amount of R157 500 subsequent to the conclusion of those agreements. After 17 months from the conclusion of the agreements, the parties had a fallout. The plaintiff instituted the present action wherein she claims repayment of the amount of R157 500. In addition, she claims R150 393.55 that she allegedly spent to effect certain improvements on the property.

The pleadings

[3] The plaintiff founded her claims on the agreements, both of which were concluded on either 12 or 14 February 2021. In respect of the lease agreement the plaintiff alleged that the defendant let the property to her at a monthly rental of R8 000. She took occupation of the property on 1 March 2021. It is common cause that the defendant received payment in the total amount of R157 500, made up of a deposit of R20 000 and rental in the total amount of R137 500 paid between February 2021 and July 2022. The plaintiff claims the repayment of the deposit and rental.

[4] The defendant admitted that she concluded the lease agreement with the plaintiff. She denied that certain clauses thereof were scratched out by agreement and pleaded that the plaintiff unilaterally scratched out those clauses “*before [the plaintiff] returned a copy of the agreement of lease to the defendant*”. She furthermore pleaded that “*any plans or drawings for permanent structures must be approved by the defendant in writing prior to the commencement of construction work*” and that “*the defendant shall not be responsible for effecting any alterations, renovations or additions to the lease premises, which shall be effected by the plaintiff at her own costs and expense*”. The defendant also denied that the lease agreement was subject to the condition that the sale agreement was binding upon the parties, as alleged by the plaintiff.

[5] In respect of the sale agreement, the plaintiff alleged that she entered into it with the defendant simultaneously with the lease agreement. Since the terms of the sale agreement, titled ‘A Gentlemen’s Agreement’, are central to the dispute, they are quoted in full hereunder.

“The conclusion and full agreement is as follows:

1. The “Temporary” Agreement of the separate signed Lease, that is in place for a period of 9 years commencing on the 01 March 2021, has been set in place as a security and “interim” measure; whilst Stacey Harrison makes lump sum payments towards the purchase of the above stated property of 7 HA’s and whilst we wait for the sectional title to be finalised. Thereafter, once finalised in full, the Sectional Title will be transferred to

Stacey Harrison's Family Trust.

2. *The monthly rental of R8 000.00 for the temporary Lease Agreement, will be kindly deductible from the purchase amount of R770 000.00.*
3. *An upfront deposit will be paid of R20 000.00 to Chere Hattingh which is kindly deductible from the purchase price of R770 000.00.*
4. *The cost of the Sectional Title Deed will be for the account of Stacey Harrison in regards to the 7 HA portion.*
5. *Stacey Harrison undertakes to make the lump sum payments as often as possible to attend to the payment of R770 000.00 (R110 00.00 per hectare) for the sale of the 7 HA's portion of the farm. The Lease Agreement will terminate automatically when the last and final lump sum is paid towards the purchase of the property; being that the R770 000.00 has been receipted in full by Chere Hattingh.*
6. *Both parties agree that Stacey Harrison and her family, from commencement of the Temporary Lease Agreement and whilst waiting for the sectional title to be finalised, may treat the property with respect thereof and care for it as if it were our own, attending to the wellbeing of the land and preform maintenance, carry out fixed building, put up fencing, build fixed structures, home, shed, dig dams etc". (sic)*

[6] The plaintiff alleged that the sale agreement is contrary to the provisions of the Subdivision of Agricultural Land Act 70 of 1970, and accordingly unenforceable. The plaintiff alleges that, when she and the defendant entered into the lease and sale agreements, they were unaware of the provisions of the Subdivision of Agricultural Land Act, which prohibits the subdivision of agricultural land.¹

[7] Although the defendant admitted the terms of the sale agreement, she pleaded that the sale agreement was unlawful and unenforceable and that "*any payments made by the plaintiff to the defendant was made in accordance with the provisions of the agreement of lease*". The defendant denied that the plaintiff was entitled to payment of R150 393.55 claimed by the plaintiff in respect of bush clearing; levelling

¹ Section 3(a) of the Subdivision of Agricultural Land Act provides that, subject to the provisions of section 2, agricultural land will not be subdivided, unless the Minister of Agriculture has consented in writing. Section 2 does not apply to the facts of this case and it is common cause that the Minister of Agriculture has not consented to the subdivision of the defendant's farm.

of a portion of the ground; constructing a perimeter fence around the property; and for material and labour used in respect of the above.

The evidence

[8] The plaintiff and her husband testified in support of her claims. She testified that she was looking to purchase agricultural land to enable her to set up stables for her daughter's horses; to grow vegetables for her family and oats for the horses; and to construct a proper dwelling for her elderly in-laws who lived in KwaZulu Natal. It suited her and the defendant to enter into a temporary lease agreement to enable her to occupy the property as soon as possible and to ensure income for the defendant, who was, according to the plaintiff, experiencing financial difficulties. She testified that the defendant drafted the lease agreement and sent it to her by email. They subsequently discussed the terms thereof and discussed the need for a sale agreement, which she drafted. After discussion with the defendant, she scratched out certain clauses of the lease agreement to make the terms of the lease agreement consistent with the sale agreement. She then signed both agreements and emailed them to the defendant for signature.

[9] After she had signed the agreements, she arranged for her mother-in-law to pay R20 000 to the defendant, whereafter she repaid her mother-in-law. On that same day, an additional R4 000 was paid to the defendant from a banking account which she shared with her husband. She testified that she arranged with Sassure Agricultural Logistics Contractors (Pty) Ltd (Sassure) to make the monthly rental payments of R8 000 to the defendant, whereafter she repaid Sassure. Payment to the defendant was stopped after July 2022 because, according to her, the defendant attempted to have her removed from the property. The plaintiff testified that, to make the property accessible and habitable, she spent R150 393.55.

[10] The plaintiff's husband, Darryn Harrison, testified that he is a director of Sassure. It specialises in agricultural contract work, which includes soil testing; analysis of laboratory results for purposes of advising what fertiliser should be used for certain crops; advising whether the soil should be ripped or tilled or both and which machinery should be used; and, if contracted to do so, perform all or some of

the above. He has about 20 years of experience in the industry, excluding five years of training at a college. Most of Sassure's clients are organs of state, both nationally and provincially. It also has private clients. He and his co-director would interact with their clients to establish what they require to be done; advise them; and, if contracted, oversee the operations. They are accordingly involved in the process from consultation to completion of a project.

[11] In this case he consulted with his wife as to what she wanted done on the property. The brief was to make the property accessible and habitable. Upon his arrival on the property for the first time, he noticed that there was hardly any portion that was not overgrown. Bush clearing had to be conducted. It charged the plaintiff R57 600, exclusive of VAT of R8 640 to clear the bush, labour in respect thereof and the costs of the removal of bush and tree waste. The gradients of the property were steep and had to be levelled for the project. Sassure hired a dozer tractor from Glendale Agri (Pty) Ltd, which charged for 40 hours of lending the tractor to it at R450 per hour, plus VAT of R2 700. During that period, the tractor was used to clear and level the road from the entrance of the property to the front camp and to clear and level the front camp. He testified that Sassure purchased poles, farm gates and fencing, including single strand barbed wire and single strand razor wire to construct an external fence; and did repairs and maintenance to portions of the existing fence. It charged Sassure R41 397, exclusive of VAT of R6 209.55 for the supply of materials and labour for the construction, repair and maintenance of the fence.

[12] Mr Harrison testified that, since the project was not a big one, Sassure was unable to obtain big discounts from service providers in respect of material that it purchased for the fence. He was of the view that the prices at which Sassure purchased the fencing materials and hired the tractor and the prices that Sassure charged the plaintiff for services rendered were reasonable.

[13] The defendant testified that she is an educator living on a farm. The property forms part of that farm. She was in negotiations with a neighbouring farmer who showed interest in purchasing her farm or a portion thereof. When negotiations failed, she concluded the two agreements with the plaintiff. The idea was that the plaintiff would be a lessee until she was registered as the holder of a unit in a

sectional title scheme that the defendant intended registering over the farm. They did not discuss what would happen if the sectional title scheme could not be registered. The plaintiff took occupation of the property on 1 March 2021. She received a deposit of R20 000 during February 2021 and all other payments alleged by the plaintiff, totalling R157 500. She received the last payment of R8 000 during July 2022. When she made enquiries, the plaintiff informed her that she had stopped making payments on the advice of her attorney. Throughout the plaintiff's occupation of the property, it was used mainly by Sassure for the storage of its trucks, trailers, machinery and other farming implements.

[14] Regarding payment, the defendant acknowledged having received the total amount of R157 500. She specifically did not dispute that it was the plaintiff who had arranged for payment to be made in terms of the agreements. The defendant confirmed that she sent the lease agreement to the plaintiff by email. The plaintiff went to her house with hardcopies of the lease agreement and the sale agreement. Both of them signed the agreements. It was only after the lease agreement had been signed that the plaintiff scratched out certain clauses. She did not agree with the deletions, but the plaintiff told her that there was no problem in that regard. She sent the lease agreement to her attorney who was alarmed to see what was contained therein and what was deleted. She said that the purpose of the sale agreement was *"the purchase of sectional title"*.

[15] The defendant did not dispute that bush clearing was done, the ground was levelled and that material and labour used therefor. Regarding the fence, the defendant denied that the plaintiff caused an external fence to be constructed because, according to her, there was already an external fence in good condition when the plaintiff took occupation of the property. She testified that the plaintiff added three or four strands of wiring over the existing fence. She estimated that the plaintiff had expended no more than R10 000 on the repair of the fence.

Discussion

[16] The parties agree that the agreements must be read together. It is common cause that the plaintiff deleted certain clauses of the lease agreement. What is in

dispute is when she deleted those clauses. Before the agreements were signed, the parties exchanged various WhatsApp messages. Those messages give context to when the plaintiff scratched out (deleted) those clauses. They show that, prior to 14 February 2021, the plaintiff sent an email to the defendant wherein she informed the defendant that she was awaiting the defendant's *"feedback or amendments, if you have, or if not, then just for you to please kindly sign the lease agreement where I made all my scribbles and also sign gentlemen's agreement and just please send me a copy"*. At 08h37 on 14 February 2021 the defendant messaged the plaintiff that she had a glance at the documents, being the two agreements, that she would go through them properly and that she had *"also forwarded [the documents] to [her] attorney for any comments to ensure we do things correctly"*. At 16h48 on 14 February 2021 the defendant messaged the plaintiff that the lease *"agreement is fine by me. I checked. Will sign and email back to you tomorrow. Will also confirm with attorney"*. The plaintiff testified that the defendant thereafter signed both agreements and emailed them to her.

[17] The exchange of WhatsApp messages does not support the defendant's version, namely that the plaintiff deleted certain clauses of the lease agreement after the parties had signed it. First, if the defendant's version was correct, then the plaintiff would not have informed the defendant before 14 February 2021 that she was awaiting the defendant's feedback on inter alia *"all my scribbles"*. The plaintiff's evidence was that the scribbles referred to the first page of the lease agreement and the deletion of certain clauses. Those deletions were accompanied by the abbreviation 'n/a', meaning not applicable. On the first page of the lease agreement, the plaintiff wrote that the *"conditions of this lease agreement are kindly binding by the separate 'Gentlemen's Agreement'"*. The parties' signatures appear on the right of the entry on the front page of the lease agreement. The position of those signatures does not support the defendant's version, namely that, when she signed the lease agreement, that entry had not been made. Second, the entry on the first page of the lease agreement and the nature of the clauses that had been deleted are consistent with the conclusion of the sale agreement. For instance, clauses that limited the use of the property primarily for agricultural purposes; that provided that the defendant should first give approval of plans or drawings for permanent structures on the property before they were constructed; that provided that no

permanent structures or stipulated temporary structures be erected during the lease period; and that provided that the defendant or her agent could inspect non-permanent structures that the plaintiff was permitted to erect were all deleted. Those deletions give credence to permanence in the form of future ownership of the property by the plaintiff, rather than temporary occupation in the form of a lease agreement. Third, it is common cause that the lease agreement was initially sent by the defendant to the plaintiff. The plaintiff thereafter sent the lease agreement to the defendant. The correspondence shows that, on receipt of the plaintiff's WhatsApp message, the defendant informed the plaintiff that she would forward the lease agreement to her attorneys. If the entry on the first page had not been made and if the clauses had not been deleted, there would have been no need for the defendant to have referred the unaltered lease agreement to her attorneys. That is so because the lease agreement was drafted by her.

[18] Added to the above, the defendant's version in that regard was not put to the plaintiff. She was accordingly not given an opportunity to comment on the defendant's version. In the circumstances, it is found that, when the lease agreement was signed, the plaintiff had already made the entry on page one thereof and had already deleted certain clauses thereof, as testified to by her. The defendant's version in that regard is accordingly rejected.

[19] Despite the defendant acknowledging receipt of the total amount of R157 500, Mr Barker, counsel for the defendant, submitted that the payment that the defendant received could not be said to have been made in terms of the agreements. Counsel pointed to the fact that the deposit was paid by the plaintiff's mother-in-law and the rental was paid by Sassure, the submission being that the lease agreement was concluded for the benefit of Sassure, to enable Sassure to use the property to store its vehicles, trucks and farming implements. The difficulty with that submission is that it is not foreshadowed in the pleadings. The plaintiff alleged that she made payment to the defendant in the total sum of R157 500 in terms of the agreements. Although the defendant denied that allegation, she nevertheless pleaded that "*any payments made by the Plaintiff to the Defendant was made in accordance with the provisions of the Agreement of Lease*". Mr Barker submitted that the plaintiff's own evidence showed that payment was not made by her.

[20] What was essentially submitted on behalf of the defendant was that there was no agreement between the defendant, on the one hand, and the plaintiff's mother-in-law and Sassure, on the other hand. In that case, there would have been no obligation on the plaintiff's mother-in-law and Sassure to pay the deposit and rental respectively to the defendant. The further implication of the submission is that the defendant was not entitled to accept payment of those amounts from those sources. But, the defendant accepted such payment and did not return the payment to the payers. The defendant's acceptance of the payment amounted to the discharge of the plaintiff's obligation to make payment in terms of the agreements to the defendant. Her acceptance of the payment constituted valid payment in terms of the lease agreement.² But, more importantly, all that the plaintiff was required to show was that the amounts that she is reclaiming were paid to the defendant by her or her agent.³ The evidence shows that Sassure and the plaintiff's mother-in-law acted as her agents when they made the payments to the defendant.

[21] In terms of the lease agreement, the plaintiff had an obligation to pay a deposit of R20 000 and monthly rental of R8 000. The plaintiff adduced proof of such payment into the defendant's bank account.⁴ The proof of payment was in the form of written notification by the banker of the plaintiff's mother-in-law in respect of the deposit of R20 000 and Sassure's banker in respect of the rental.

[22] In the circumstances, it was immaterial that payment to the defendant was made by the plaintiff's mother-in-law and Sassure, and not by the plaintiff. In any event, the plaintiff's undisputed evidence was that she had repaid the money to her mother-in-law and Sassure. The submission on behalf of the defendant in that regard has no substance and is accordingly rejected.

[23] The context within which the agreements were concluded was dealt with above. Regard being had to the terms of those agreements, read together, there can be no doubt that the goal was to transfer ownership of the property from the defendant to

² *Vereins- Und Westbank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA) par 12.

³ *Frame v Palmer* 1950 (3) SA 340 (C) at 346F.

⁴ *Pillay v Krishna and Another* 1946 AD 946 at 958.

the plaintiff. That was also the evidence of both the plaintiff and defendant. The parties agreed that the plaintiff would occupy and possess the property even before the registration of the transfer of ownership. The plaintiff's occupation and possession of the property before registration of transfer was secured by the lease agreement. They agreed that, once registration had taken place, all the payments that the plaintiff would have made until then, would have been treated as payment towards the purchase price of the property. The rental that the plaintiff paid would form part of the purchase price only once the property was transferred to the plaintiff by registration. It follows that the rental paid could not form part of the purchase price if the property was not transferred by registration. The sale agreement is unenforceable because subdivision of agricultural land is impermissible in terms of section 3(a) of the Subdivision of Agricultural Land Act. The parties cannot rely on the sale agreement, with the result that the property cannot be transferred to the plaintiff. In the circumstances, the rental paid cannot form part of any purchase price, since there was no sale agreement.

[24] In accordance with the agreements, particularly the lease agreement, the defendant gave the plaintiff undisturbed possession and occupation of the property from 1 March 2021 and the plaintiff paid the deposit and rental until July 2022, a period of 17 months. Both parties accordingly benefitted from the agreements, in that the defendant gave possession of the property to the plaintiff in return for rental, which the plaintiff paid to her. In the circumstances, the plaintiff, having benefitted from the lease agreement by having enjoyed the undisturbed possession and occupation of the property, is not entitled to the return of the rental. The rental was paid precisely because the plaintiff had possession and occupation of the farm between 1 March 2021 and 31 July 2022. She was accordingly required to pay, and indeed paid, rental in the total amount of R136 000 for that period. There is no basis upon which the defendant can lay claim to the difference between what the plaintiff paid to her, namely R157 500, and what the defendant was entitled to, namely R136 000 in respect of rental. The plaintiff is accordingly entitled to repayment of the amount of R21 500, which includes the deposit of R20 000. The defendant did not institute a counterclaim in respect of the deposit to lay a basis as to why the deposit should not have been returned to the plaintiff.

[25] I now deal with the plaintiff's alleged enrichment claim. The plaintiff claimed that, because the sale agreement is unenforceable and because she spent R150 393.55 on the property, the defendant has been enriched by that amount and she has been impoverished to that same extent. The essential elements for an enrichment claim are that (i) the defendant must be enriched; (ii) the plaintiff must be impoverished; (iii) the defendant's enrichment must be at the plaintiff's expense; and (iv) the enrichment must be without cause.⁵ The onus is on the plaintiff to prove each of the above elements.⁶

[26] The expenditure by one person upon the property of another is divided into necessary, luxury and useful expenses. Necessary expenses are incurred to preserve or protect the property. Luxury expenses add to the amenity of the property, but do not render the property more profitable. Useful expenses increase the value of the property although their omission would not render the property less valuable.⁷ Based on the evidence, I am of the view that the expenses that the plaintiff incurred were necessary. The plaintiff's undisputed evidence was that the expenses were incurred to make the property accessible and habitable. Access to the property could not be gained without those expenses having been incurred. Those expenses also had to be incurred to enable the plaintiff to use the property for the purpose for which she concluded the agreements. As a rule, necessary expenses may be reclaimed.⁸

[27] The facts of this case make it immaterial to determine whether the plaintiff was a bona fide occupier or a bona fide possessor.⁹ The facts are that she occupied the property by virtue of the lease agreement. She also occupied it with the intention of becoming the owner thereof by virtue of the sale agreement, which turned out to be invalid. She made the improvements upon the property believing that she had the right to effect them. Under those circumstances, she would be entitled to repayment of the necessary expenses incurred by her, if it is found that the defendant was enriched at her expense and that the enrichment was without cause.

⁵ *PRASA v Community Property Company (Pty) Ltd and Another* [2024] ZASCA 35 par 27.

⁶ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (AD) at 224H-225A.

⁷ *Lechoana v Cloete and Others* 1925 AD 536 at 547.

⁸ *Lechoana* fn 7 at 547.

⁹ *Fletcher and Fletcher v Bulawayo Waterworks CO Ltd* 1915 AD 636 at 647.

[28] Once the plaintiff took occupation of the property, she expended money to make it accessible and habitable. The evidence shows that the plaintiff was impoverished when she made payment to Sassure to make the property accessible and habitable. The defendant, on the other hand, was enriched to the extent of the plaintiff's impoverishment when the plaintiff effected the improvements. It goes without saying that the defendant's enrichment was at the plaintiff's expense. There can be no doubt that, had the parties not concluded the sale agreement, the plaintiff would not have incurred the expenses on the property to make it accessible and habitable.

[29] The plaintiff incurred the expenses because she believed that, based on the sale agreement, she had the right to effect the improvements. The sale agreement is invalid. The enrichment was accordingly made in terms of an invalid sale agreement. The result is that the defendant's enrichment at the plaintiff's expense was without a legal ground (*sine causa*).

[30] This court must, on the evidence placed before it, endeavour to ascertain the extent of the plaintiff's impoverishment and the defendant's enrichment. In my view, the improvements have increased the land by no more than the amount actually expended, which is the amount claimed by the plaintiff. The plaintiff is accordingly entitled to payment of the amount of R150 393.55.

Costs

[31] The matter was set down for hearing on 13 May 2024. On that day it was postponed to 15 May 2024 because the defendant's counsel was ill. The costs occasioned by the postponement were reserved. Although no fault can be laid at the defendant's door for the postponement, the plaintiff was ready to proceed on 13 May 2024 and incurred expenses and costs when she and her legal representatives were in attendance on that day. It would, under the circumstances, be unjust and inequitable to the plaintiff to order that each party should pay her own costs occasioned by the postponement on 13 May 2024, as submitted by Mr Barker. Given the reason for the postponement and that the plaintiff incurred costs, it would

be appropriate to order the defendant to pay the wasted costs occasioned by the postponement on 13 May 2024.¹⁰ Since the plaintiff was substantially successful in the action, the defendant should also pay the costs of the action.

[32] In the result, it is ordered that the defendant shall pay to the plaintiff:

1. the amount of R21 500;
2. the amount of R150 893.55;
3. interest on the above amounts at the prescribed legal rate from the date of this judgment to the date of payment thereof; and
4. costs of suit, such costs to include the costs reserved on 13 May 2024.

GH BLOEM
Judge of the High Court

APPEARANCES

For the plaintiff: Mr M Somandi, instructed by Wheeldon Rushmere and Cole Attorneys, Makhanda.

For the defendant: Mr J Barker, instructed by Netteltons Attorneys, Makhanda.

Dates of hearing: 13, 15, 16 and 17 May 2024.

Date of delivery of judgment: 25 June 2024.

¹⁰ In *Society v Feldman* 1979 (1) SA 930 (E) counsel for the respondent applied for a postponement when the case was called. The reason for the postponement was that the respondent was confined to hospital and too ill to attend the hearing. The proceedings had to be postponed and the respondent was ordered to pay the wasted costs occasioned by the postponement. See also *Westbrook v Genref Ltd* 1997 (4) SA 218 (D&CLD) at 221G-222D.