

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

|     |                                 |
|-----|---------------------------------|
| (1) | REPORTABLE: NO                  |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED.                        |

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| SIGNATURE | DATE: 26 July 2024 |
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Case No. 2023-112776

In the matter between:

**APOSTOLIESE GELOOF SENDING VAN SUID AFRIKA,  
GEMEENTE PRIMROSE**

Applicant

and

**CHAYAH INVESTMENTS (PTY) LTD**

Respondent

**JUDGMENT**

**WILSON J:**

1        The applicant, AGS Primrose, owns ERF 2[...],[...] T[...] Road, P[...] Township, G[...] (“the property”). In late July 2022, AGS Primrose agreed to sell the property to the respondent, Chaya. The sale fell through, because Chaya did not pay the instalments due under the agreement. Chayah paid R1.2 million towards the R3 million purchase price, but failed to make good on the rest. AGS Primrose now

approaches me to evict Chaya from the property, having cancelled the sale agreement on breach.

2 Chaya agrees that the sale agreement is dead, but avers that it was never valid in the first place. Chaya says that AGS Primrose was not authorised, under its own constitution, to sell the property, and that the sale was accordingly void from the outset for lack of the “written authority” required under section 2 (1) of the Alienation of Land Act 68 of 1981. Chaya also says that the sale agreement was, in substance, a credit agreement under the National Credit Act 34 of 2005. That being so, the validity of the sale depended upon AGS Primrose being a registered credit provider. Since AGS is not so registered, the sale was void from the outset.

3 AGS Primrose denies that the National Credit Act applies to the sale agreement. It also asserts that its agents were properly authorised to enter into the sale agreement. But neither party contends that the issue of whether the sale agreement was cancelled on breach or void from the outset affects the unlawfulness of Chayah’s occupation. Both parties accept that Chayah has no right to occupy the property, and that it must vacate. Chayah in fact tenders to vacate, provided that AGS Primrose returns the R1.2 million Chayah paid toward the purchase price and R28 557.94 in rates and taxes it has paid on the property while in occupation. Chayah also claims an enrichment lien to the value of R50 000 it spent building a boundary wall at the property, and R100 000 it spent securing the property while in occupation.

### **The payments made under the sale agreement**

4 AGS Primrose asserts a right of “*rouwkoop*”, provided for in clause 6.2 of the sale agreement, to retain the purchase price instalments Chayah has already paid. Though harsh, *rouwkoop* clauses are enforceable, so long as they are not excessive. If I find that the *rouwkoop* clause applicable in this case is excessive, section 3 of the Conventional Penalties Act 15 of 1962 empowers me to reduce the amount AGS Primrose is entitled to retain to the extent that it is equitable to do so, taking into account the parties’ “rightful interest[s]”.

5        The dispute about the underlying cause of the sale agreement's demise is accordingly material to the extent to which Chayah is entitled to restitution of its performances under the sale agreement. If the sale agreement was void from the outset, then so was the *rouwkoop* clause, and Chayah is entitled to the return of all the money it paid under the agreement. If the sale agreement was valid, and AGS Primrose cancelled it on breach, then the extent of Chayah's entitlement to the return of the money depends on the extent, if any, that I should temper the application of the *rouwkoop* clause.

6        Tempting as it is to delve into these issues, I do not think I can do so on the facts of this case. In *Rhooide v De Kock* 2013 (3) SA 123 (SCA) the Supreme Court of Appeal held that an owner who sells property under an agreement that ultimately fails is entitled to eject the purchaser from the property merely upon proof of the seller's ownership and the fact that the purchaser has no right in law to remain in occupation. The question of the extent to which the purchaser may be entitled to restitution as a result of the agreement's cancellation or voidness is irrelevant to the seller's right of exclusive possession as owner (see paragraphs 22 to 25).

7        *Rhooide* left open the possibility of making the execution of an ejectment order conditional upon the payment of restitution. However, Cloete JA made clear that if there is any doubt about what is due to either party as a result of the sale agreement's failure, the proper approach is to require the parties to establish the extent of their rights to damages or restitution in separate proceedings (see paragraph 25).

8        Here, there is a great deal of doubt about whether and to what extent Chayah is entitled to restitution. In the first place, there is a dispute about the validity of the sale agreement. Secondly, if the sale agreement was valid, there is a dispute about the extent to which the *rouwkoop* clause is enforceable, and about the extent to which the AGS Primrose's damages arising from the cancellation of the agreement affect the extent to which it should be entitled to retain Chayah's payments. The first question – whether the sale agreement was void from the outset – may be capable of resolution on the undisputed facts. But the second question – what is due to the parties if the sale agreement was valid but cancelled on

breach – is hopelessly disputed on the papers, and is irresolvable in these motion proceedings.

9        However, since both parties accept that the sale agreement no longer provides Chayah with a right of occupation of the property, the issue of whether the agreement was void from the outset or cancelled on breach has nothing to do with AGS Primrose's right to the ejectment relief it seeks. That question, together with the question of who owes what to whom on any given answer to it, can and must be explored in a separate case, which may well require the hearing of oral evidence.

10       In other words, what, if anything, AGS Primrose may have to repay Chayah as a result of the collapse of the sale agreement cannot be determined on the papers before me. And it need not be determined before I order Chayah's ejectment.

### **No enrichment lien**

11       That leaves only the question of whether Chayah is entitled to retain the property pursuant to an enrichment lien. Chayah's papers are sorely lacking in the detail necessary for me to find that such a lien exists.

12       A right of retention pursuant an enrichment lien is only available to an occupier who makes necessary or useful improvements to the property. Wisely, Ms. Bhabha did not attempt to press Chayah's contention that the employment of security guards at the property constituted an "improvement" to the property. It plainly did not. But Chayah also fails to allege the primary facts necessary for me conclude that the construction of the boundary wall was either a necessary or a useful improvement to the property. Ms. Bhabha submitted that a boundary wall is always at least useful to a property on which it is constructed. I do not agree. Without knowing more about the nature of the wall and the property to which it is added, I cannot fairly infer that the wall is either necessary or useful.

13       If that were not sufficient to conclude that no enrichment lien has been shown (it is), then I would have to point out that the amount by which AGS Primrose was enriched by the construction of the boundary wall was not established. A lien

secures the occupier's expenses on the improvements, or the extent to which the improvements enhanced the property's value, whichever is the lower amount. Chayah has not established the extent, if any, to which the wall enhanced the value of the property, so it is impossible to work out the value secured by the right of retention Chayah claims.

## **Order**

14 For all these reasons, the ejectment application must succeed.

15 I make the following order –

- 15.1 The respondent is ejected from ERF 2[...], 2[...] T[...] Road, P[...] Township, G[...] ("the property").
- 15.2 The respondent is ordered to vacate the property by no later than Friday 16 August 2024, failing which the sheriff may evict it.
- 15.3 The respondent is directed to pay the costs of this application.

**S D J WILSON**

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 July 2024.

HEARD ON: 22 July 2024

DECIDED ON: 26 July 2024

For the Applicant: HF Geyer  
N Sibanyoni  
Instructed by Swanepoel Van Zyl Inc

For the Respondent: B Bhabha

Instructed by WP Steyn