



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A163/2023

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 12 MARCH 2025

SIGNATURE

In the matter between:

CAREL PASSANO

Appellant

and

BELINDA ERASMUS

Respondent

Summary: *Enrichment lien – an enrichment lien arising from improvements effected to a property, constitutes a real right which can be enforced against a subsequent purchaser of an immovable property, despite the claim of enrichment being against the erstwhile owner, who had been enriched by the improvements. The exercise of such a lien is a lawful and valid defence against eviction. In this matter, the lien was*

exercised by the holder thereof by remaining in possession of a house constructed on a previously vacant plot of agricultural land. The new owner alleged that the respondent was in unlawful occupation of the property while she exercised her lien and claimed for enrichment based on such alleged unlawful occupation. The new owner's appeal against the dismissal of his claims by the court a quo was dismissed.

ORDER

The appeal is dismissed, with costs.

J U D G M E N T

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 12 March 2025.

DAVIS, J

Introduction

[1] The appellant, having been the plaintiff in the court a quo, appealed to us against an order whereby his enrichment claim against the respondent had been refused. The basis for the refusal was that the respondent's enrichment lien had

been declared valid in respect of a house which she had built on a property previously belonging to her ex-spouse, with his consent and while they were still married.

Proceedings in the court a quo

[2] An application aimed at evicting the respondent was referred to trial by Raulinga J on 25 April 2017. The issues to be determined at trial were defined as follows:

“3.1 If the respondent (defendant in the future action) has effected necessary and/or useful improvements to the immovable property situated at Plot 179, Boltonwold, Meyerton (the “property”) on or before 3 June 2015 and if so,

3.1.1 Against whom such a claim, if any, vests.

3.1.2 The extent and nature of such improvements.

3.1.3 The qualification of such improvements ...

3.1.4 The determination of enrichment of the applicant (plaintiff in future action), if any.

3.2 If the respondent holds an improvement lien over the property.

3.3 If the respondent was and is entitled to remain in occupation of the property since 8 September 2015 and, if not, the reasonable compensation payable to the applicant for such occupation.

3.4 If the Applicant is entitled to an eviction order against the respondent ...

3.5 *The costs of the action*".

[3] At the time the matter came on trial before Van Nieuwenhuizen J in November 2022, the respondent had already vacated the property, resulting in the eviction-related relief having become moot. That only left the parties' respective enrichment claims alive.

[4] In terms of a ruling by Van Nieuwenhuizen J, the issues of merits and quantum of the respondent's counter-claim were separated.

[5] The issue which the appellant sought to have decided in the court a quo, was formulated as follows by his counsel at the time: "*The only point in dispute is whether the defendant was entitled to be in possession or occupation and if not, the plaintiff is then entitled to compensation in lieu of rental so to speak*".

[6] This formulation accords with par 3.3 of the order of Raulinga J and is dependent on the determination of paragraph 3.2 of his order, that is, whether the respondent had been entitled to an enrichment lien over the property. The lien was also called an improvement lien in the order, but in the context of this case, the two terms are interchangeable.

[7] Our learned sister in the court a quo found as follows in this regard: "*19. The defendant ... had a retention lien in respect of the property and was entitled to occupy the property until she was compensated for the improvements she effected to the property. In the result, the defendant's occupation of the property was ex lege lawful*". The term "*retention lien*" is interpreted to mean a lien which allowed the respondent to retain possession of the property.

[8] The appellant's claim (and the respondent's counter-claim) were both dismissed on the merits by Van Nieuwenhuizen J. She made no order as to costs

and refused leave to appeal. The matter came before us with leave from the Supreme Court of Appeal.

The evidence

[9] Save for the issue of the quantum of the improvements and the extent of the respondent's alleged enrichment at the expense or impoverishment of the appellant, surprisingly little of the remainder of facts were in serious dispute. I shall hereunder attempt to summarise and distil the facts from the parties' affidavits and their rather scant oral evidence.

[10] When the respondent and Mr Erasmus intended getting married, Mr Erasmus bought a 2,5ha piece of vacant land for R 15 000.00 from his father in 2004. He told the respondent that because the property was agricultural land, it could not be registered in both their names hence he became the sole registered owner.

[11] After the purchase, the respondent started improving the property with the consent of Mr Erasmus. Over time, she equipped the property with a borehole, secured electrical reticulation, erected a three-bedroomed house with a double garage, planted trees and cultivated a fenced garden around the house.

[12] The respondent testified that the improvements either cost her or were valued at R520 000.00. She had all the "slips" to prove this, and the improvements were financed by her from the proceeds of a dog-breeding business that she ran as well as from her sheep farming operations. The details of the improvement costs were listed in Annexure A to the respondent's counter-claim.

[13] The house was completed in 2006, after her marriage to Mr Erasmus, and they moved in in 2007.

[14] On 4 June 2015, the appellant bought the property from Mr Erasmus for R300 000.00. The respondent, upon hearing of this, unsuccessfully attempted in the Magistrates Court of Meyerton to stop the transfer of the property. Due to the fact that the Magistrates Court was found to have lacked the requisite jurisdiction, the respondent could not obtain an interdict, as a result of which the applicant took transfer of the property on 15 August 2021. By that time, the relationship between the respondent and Mr Erasmus had become so acrimonious that the proceedings in the Magistrate Court had even been initiated in terms of the Domestic Violence Act¹.

[15] At the time that the appellant bought the property, he was told by Mr Erasmus that the respondent would vacate the house soon thereafter. This was, however, not the case and the respondent continued to occupy the house with her two children, refusing to leave.

[16] Prior to the launching of the eviction application, the appellant unsuccessfully attempted to coerce the respondent into signing a lease agreement.

[17] In his founding affidavit, the appellant disputed the respondent's improvement lien (of which he had gained knowledge due to the application in the Magistrates Court) and claimed that the "*Placaeten*"² were applicable. Despite this, he formulated the position in his founding affidavit thus: "*I believe that an enrichment lien, should an applicant be successful, entitles said applicant to remain in possession of said property until compensated for any useful and necessary improvements*"³.

¹ 116 of 1998.

² In particular, act 10 of the *Placaeten* of 1658 and 1659, as considered in *Coetzer v Palabora Mining Co Ltd* 1993 (3) SA 306 (T) per Mahomed J (as he then was).

³ Par 30 of the founding affidavit.

[18] The only evidence led by the parties, were that of themselves and a letting agent called by the appellant.

[19] While the parties' evidence was in accordance with that summarized above, the letting agent testified about the possible rental amount of the house. She testified however, that she could only testify as to rental at the time of the trial and said: "*I cannot speak before that, but for now the house has been renovated, everything has been replaced, so we can look at about ten*" (meaning R10 000.00 per month).

[20] Although she was asked to make an estimation, the letting agent could not specify with any level of certainty what rental might have been justified at any time from 2015 to 2022. She said that while the house had been "beautifully" re-done at the time of her inspection in 2022, "*... I cannot speak for years ago because I have not seen the property then*".

Discussion

[21] The court a quo, in respect of an enrichment lien, referred to the following extracts from *Lakka v Beukes and Another*⁴:

"It is trite that a bona fide possessor who has preserved or made improvements to another's property at his or her expense has a right of retention against the property to secure compensation for his or her necessary and useful expenses. This is a real right and an absolute defence against eviction by the owner or any future owners of the property. The exceptions being where ownership is acquired though a sale in execution where the purchaser was unaware of the

⁴ (CA & R 60/2018) [2020] ZANCHC 11 (23 March 2020).

right of retention and the retentor, with full knowledge of the sale fails to inform the purchaser of this right and sales in insolvency.

Where it is the previous owner of property who has been enriched (as in this case the Visagies) at the expense of the lien holder, it is to him that the lien holder should seek redress for purposes of a possible enrichment claim, but the right to retention can be held against the new owner (even though he or she has not been enriched) until the lien holder has been duly compensated. In Pheiffer v Van Wyk and Others⁵ the SCA held:

[12] A real lien (an enrichment lien) is afforded a person who has expended money or labour on another's property without any prior contractual relationship between the parties. The lien holder is entitled to retain possession until his enrichment claim has been met. It is an established principle of our law that the owner of the property subject to a right of retention may defeat the lien by furnishing adequate security for the payment of the debt".

[22] As to the issue of whether the respondent qualified to be regarded as a *bona fide* occupier, the court a quo relied on the following extract from *Boshoga & Another v Mmakolo and Others*⁶:

"[32] In Wille's Principles of South African Law⁷ reference is made to de Vos Verrykingsaanspreeklikheid 245-7 who defines (for the purposes of the law of enrichment) a bona fide possessor as someone

⁵ 2015 (5) SA 464 (SCA) at 467.

⁶ (82446/2016) [2018] ZAGPPHC 656 (7 March 2018).

⁷ 9th Edition at 1075

who possesses (either directly or indirectly) property of which he believes he is the owner; a mala fide possessor, on the other hand, acts as if he were the owner, while knowing that he is not. An occupier is someone who does not have the animus domini but nevertheless occupies the property because it is in his interest to do so. Occupiers are divided into lawful occupiers (i.e. those who have the right to occupy the property), bona fide occupiers (i.e. those who believe themselves to be lawful occupiers, but are not) and mala fide occupiers (i.e. those who occupy property as if they are lawful occupiers, but know that they are not)”.

[23] To the above can be added that the learned authors of *Wille’s Principles of South African Law* contended that “useful improvements” must be taken to mean improvements that increase the value of the property⁸.

[24] Although the cases relied on by the learned judge in the court a quo (apart from *Pheiffer v Van Wyk*) are somewhat obscure Safflii references, the contents correctly reflect the state of our law. See in this regard inter alia *Kommisaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd*⁹, *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd*¹⁰, *Roode v De Kock & Ano*¹¹ and *Mancisco & Sons CC (in liquidation) v Store*¹².

[25] I am also of the view that the law had correctly been applied to the facts: the respondent had had permission of the owner of the property to effect the improvements. She afterwards also occupied the property with the obvious

⁸ Ibid.

⁹ 1960 (3) SA 642 (A).

¹⁰ 1968 (1) SA 571 (A).

¹¹ 2013 (3) SA 123 (SCA).

¹² 2001 (1) SA 168 (W) (a decision of a full court).

consent of Mr Erasmus – she was therefore not only a bona fide possessor, but also a bona fide occupier.

[26] It is also common cause that there never existed any lease agreement between the respondent and Mr Erasmus and also not between the respondent and Mr Erasmus' successor in title, the appellant.

[27] The fact that the improvements were useful, also cannot be denied. The mere fact that the improvements constituted a lettable asset, as claimed by the appellant, alone prove their usefulness. It also cannot be gainsaid that the construction of a house, together with ancillary works, would have and, in fact did improve the value of what had before been mere vacant land.

[28] The respondent had, therefore, satisfied all the requirements of an enrichment lien.

[29] Although it was Mr Erasmus, as the property owner at the time, who had been enriched by the respondent's conduct in her having constructed the house, her lien is a real right enforceable against all third parties, that includes also the appellant.

[30] Not only could the appellant not have succeeded in his claim for eviction of the respondent, the exercise of her lien by remaining in occupation of the house, had been lawful.

[31] The appellant's contention, raised in the founding affidavit, that the *Placaeten* should find application, was not dealt with by the court a quo but was again relied on by the appellant before us. As set out in *Coetzer v Palabora Mining Co Ltd* (supra), the *Placaeten* sought to ameliorate the position of a landlord who is held ransom by an erstwhile tenant who refuses to vacate the

property by claiming reliance on an enrichment lien. The *Placaeten*, which had been received into our law, only apply to rural land, and their application to urban property as considered in *Coetzer v Palabora Mining Co Ltd*, has been rejected by the Supreme Court of Appeal¹³.

[32] Notwithstanding that the vacant plot in Meyerton might be agricultural land (a fact which had not even been clearly proven), there was never any landlord/tenant relationship between the appellant (or Mr Erasmus) and the respondent. The *Placaeten* then clearly finds no application.

[33] Would the appellant in any event be able to claim that he has an enrichment claim against the respondent for the value of her occupation?

[34] It has been held¹⁴ that the exercise of a right of retention diminishes the rights which a property owner would normally have in respect of his property (i.e. by not being able to use it himself). It has also been held¹⁵ that a person exercising his or her right of retention may not benefit therefrom beyond the consequences of exercising a lien e.g where a lien is exercised over business premises and the retentor then capitalizing on this exercise by making a profit therefrom.

[35] The appellant had not, however, based his claim on any limitation of his rights as the property owner or any exercise by the respondent of her right “wider than merely an object of security”¹⁶. There was also no evidence of any “commercial exploitation”¹⁷.

[36] The appellant had squarely based his enrichment claim on the premise that the respondent’s occupation at the time had been unlawful. Not only had he

¹³ *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA).

¹⁴ *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 (CPD).

¹⁵ *Ibid.*

¹⁶ *Ibid* at 653 D – E.

¹⁷ *Ibid* at 653 E – F.

expressly pleaded that the respondent's enrichment was as a result of her unlawful occupation¹⁸, but he had pleaded that "*... during the same period, the applicant has been impoverished by the respondent unlawful occupation of the property*"¹⁹. The alleged unlawfulness of the respondent's conduct was the premise upon which the appellant had claimed R528 000.00.

[37] The appellant must be held to his pleadings and it follows that, once the respondent's occupation had been found to have been lawful, then the appellant's enrichment claim (as pleaded) fell away.

Costs

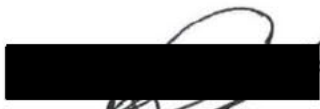
[38] In the court a quo, no order as to costs was made. This was because neither party had been successful in their respective claims. Before us, only the appellant had appealed. Costs should follow the event of his unsuccessful appeal. Although the respondent had not appeared at the appeal, we are uncertain as to whether any taxable costs had been incurred by her. For that reason, a formal costs order should be made.

Order

[39] In the premises, I propose that the appellant's appeal be dismissed, with costs.

¹⁸ Par 7.1 of the appellant's declaration.

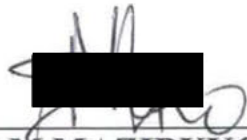
¹⁹ Par 9 of the appellant's declaration.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree


C VAN DER WESTHUIZEN
Judge of the High Court
Gauteng Division, Pretoria

I agree and it is so ordered.


N.G.M MAZIBUKO AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 19 February 2025

Judgment delivered: 12 March 2025

APPEARANCES:

For the Applicant:

Adv A. J. J du Plooy

Attorney for the Applicant:

Richards Attorneys, Pretoria.

For the Respondent:

Ms M Muller

Attorney for the Respondent:

Legal Aid Board, Vereeniging