THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 45/12
Reportable

In the matter between:

NORMAN HOWARD RHOODE **APPELLANT**

and

NEIL DE KOCK **FIRST RESPONDENT**
BERTA MARIA DE KOCK **SECOND RESPONDENT**

Neutral citation: *Rhoode v De Kock* (45/12) [2012] ZASCA 179 (29 November 2012).

Coram: Cloete, Cachalia, Bosielo, Wallis and Pillay JJA

Heard: **19 November 2012**

Delivered: **29 November 2012**

Summary: **Enrichment — whether lien for necessary or useful expenses should be enforced where failure to quantify the amount of the claim — whether *rei vindicatio* maintainable without a tender to repay what has been paid under a void contract — whether ejectment should be made subject to such repayment.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Allie and Samela JJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

CLOETE JA (CACHALIA, BOSIELO, WALLIS AND PILLAY JJA CONCURRING):

INTRODUCTION

[1] The respondents, Mr and Mrs de Kock, instituted motion proceedings as the applicants against the appellant, Mr Rhoode, as the respondent, in the Magistrate's Court, George, in which they claimed an order ejecting Rhoode from immovable property owned by them. The magistrate granted the order. An appeal by the appellant to the Western Cape High Court, Cape Town (Allie J, Samela J concurring) was dismissed. Leave to appeal to this court was refused by the high court but granted by this court.

THE FACTS

[2] The history of the matter began on 10 February 2006 when the respondents sold to the appellant a property described as 'The Boathouse, Langvlei, portion 1/191 district George' for R1,85 million. The deed of sale was signed by both respondents, who are married in community of property and in whose names the property is registered. It contained a suspensive condition that a loan for the full purchase price, to be secured by a mortgage bond over the property, would be obtained by the appellant within twelve months of the date of signature, ie on or before 9 February 2007. The appellant took possession of the property. The loan was never obtained.

[3] On 6 March 2007 and again on 1 September 2008, the parties attempted to extend the deed of sale by substituting those dates for the original date of signature. The amendments were initialled by De Kock and the appellant but not by Mrs de Kock. Between these dates, on 16 March 2007, the appellant paid R400 000 to the respondents in reduction of the purchase price.

[4] On 11 October 2009 De Kock sent an email to the appellant demanding a guarantee for the purchase price and threatening to cancel the agreement unless it was forthcoming within ten days. This email elicited a response from the appellants' attorneys on 30 October 2009 in which they contended that because the suspensive condition in the original deed of sale had not been fulfilled, the sale had lapsed; that the attempts by the parties on 6 March 2007 and 1 September 2008 to revive the sale were void for want of compliance with s 15(2)*(a)* read with s 15(5) of the Matrimonial Property Act 88 of 1984 and s 2(1) of the Alienation of Land Act 68 of 1981, inasmuch as Mrs de Kock, who was the co-owner of the property, did not sign the amended deed of sale; that Rhoode was entitled to repayment of the R400 000 he had paid on 16 March 2007; and that he reserved the right to claim the amount by which the value of the property had been increased by virtue of improvements made by him, once this amount had been quantified. There was no mention of a lien.

[5] The appellant continued in occupation of the property. In January 2010 the respondents approached the Magistrate's Court, George, ex parte for an order in terms of s 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The application was accompanied by an affidavit deposed to by De Kock. The order was granted and served on the appellant together with the affidavit.

THE AFFIDAVITS

[6] In his affidavit De Kock said that he and his wife were the registered owners of the property, and annexed a print-out of a deeds office search in support of this allegation. He then rehearsed the facts set out above and

recorded the respondents' acceptance of the legal position set out in the email from the appellant's attorney in so far as it dealt with the validity of the parties' attempts to revive the deed of sale. He went on to say (my translation):

'It is in my view clear from the aforegoing that there is at present no agreement between us [the respondents] and [the appellant] in terms whereof he occupies the property, and that he therefore has no right to occupy the property.

I concede that [the appellant] has already paid R400 000 to me, but I have a counterclaim against him for the period of his occupation of the property as well as any other damage that I have suffered from the whole incident.

He also alleges that he has effected improvements to the property that have increased its value by about R300 000. I deny this. I have made enquiries at the local authority and no plans for any alterations were submitted or approved. I am advised that the municipality can therefore legally compel me to demolish any illegal additions or alterations and to restore the property to the condition in which it was. That would then indeed cause me a loss that cannot be quantified now. I cannot expand on this aspect as the nature of the so-called improvements is not known to me.'

The cause of action relied upon by the respondents was clearly the *rei vindicatio*.

[7] In his answering affidavit, the appellant said:

'I depose to this affidavit in opposition to the relief sought by the [respondents]. I do so essentially on the basis that I am lawfully entitled to remain in possession of the property, by virtue of the operation of a so-called improvement lien. As will appear, the lien secures a substantial claim that I have against the [respondents], being the amount by which [they have] been enriched, and I have correspondingly been impoverished, by improvements to the property.'

The appellant averred that, up to the time his attorney pointed out the legal position, he had laboured under the impression that his occupation of the property was in terms of a binding contract, in terms of which he would become the owner of the property; and on this basis he contended that from 9 February 2007 until the end of October 2009 he was 'in contemplation of law, a bona fide possessor, or at least a bona fide occupier of the property'.

[8] The appellant went on to say:

'While I laboured under the belief that I would in due course become its owner, I caused substantial improvements to be effected to the property, as set out below. In order to quantify the cost of the improvements, a local builder of George, one Mr Gerhard Bouwer (of 3 Boom Street, Denneoord, George) was asked to inspect the property, and to furnish an estimation of what the improvements would cost, at current market prices (ie, as at February 2010). Mr Bouwer has furnished the following estimation:

(a) Building and/or rebuilding garden walls: R86 631,84.
(b) Introduction of car port and pergola to main house: R42 472,65.
(c) Repair to and upgrading interior of old house: R11 937,35.
(d) Repair to and upgrading exterior of old house: R23 574,25.
(e) Conversion of shed into three flats/chalets: R683 489,58.
(f) Introduction of veranda for flats/chalets: R38 767,10.
(g) Introduction of swimming pool: R55 685,00.
(h) Introduction of septic tank and plumbing: R36 373,70.
(i) Introduction of fresh water tanks and plumbing: R67 388,50.

I annex hereto, marked "A", a copy of Mr Bouwer's quotation.'

In a confirmatory affidavit, Mr Bouwer said:

'I should mention that my aforesaid assessment of the cost of executing the work performed by the defendant in improving the property was not intended to be, and was not presented to him as, a finite or precise quotation of the cost. It is, however, in my opinion, a fair evaluation, which ought not to differ by a substantial margin (whether upwards or downwards) from the result of a more detailed assessment.'

The total assessment made by Bouwer amounted to R1 046 319,97, of which a little under R600 000 represented materials and the rest, labour.

[9] The appellant's affidavit continued:

'I respectfully say that, assessed at current market prices, the aforesaid improvements have substantially increased the value of the property (ie, the value that it presently has, with improvements, compared with the value that it would presently have had, without improvements). My attorney has engaged a registered professional valuer, one Mr J P van der Spuy, to undertake an investigation in this regard. Mr van der Spuy examined photographs of the work that I did at the property (a selection of which is contained in the album marked "B") and also caused an appointee in the George area to undertake a physical examination of the property. Mr van der Spuy's provisional assessment is that my improvements increased the value

of the property by about R500 000.00. I shall obtain, and deliver in support of my opposition in this matter, Mr van der Spuy's confirmatory affidavit of the above.

. . .

It is self-evident that the improvements which I effected were all necessary and useful improvements, and not luxurious improvements.'

A confirmatory affidavit by Van der Spuy was annexed which added nothing to the facts.

[10] The appellant admitted that the alleged improvements were effected without building plans. He said:

'It is true that the improvements to the property were effected without approved building plans. However, I point out that the property is not within an urban area, in respect of which building regulations are generally more rigorously enforced, but is zoned as "farm" land . . . Moreover, it is a common practice for a local authority to receive and approve building plans well after the structure to which they relate has been erected, if the plans and the structure comply with the requirements of the National Building Regulations . . . The plaintiff has nowhere alleged that the improvements do not so comply, and I respectfully say, in any event, that they do comply *substantially*, so that the approval of the local authority will in due course be obtained, if necessary.' (Emphasis supplied.)

[11] In the replying affidavit De Kock dealt at some length with the nature, extent and alleged necessity for, and usefulness of, the improvements. He also annexed photographs of the property.

THE ISSUES

[12] Three issues arise for decision on appeal: first, whether the appellant has established a lien which entitles him to remain in possession of the property until compensated for the improvements he alleges he has made; second, whether the order of ejectment made by the magistrate and confirmed by the high court should be set aside and the matter remitted to the magistrate to receive a fourth set of affidavits; and third, whether the respondents' case was fatally defective, as submitted on behalf of the appellant, because they did not repay or tender to repay the R400 000 paid to

them by the appellant on account of the purchase price. I shall deal with the issues in that order.

THE LIEN

[13] The appellant claimed the rights of a bona fide purchaser based on the decision in *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 (3) SA 642 (A) at 657. He therefore claimed to be entitled to recover necessary and useful expenses and to exercise a lien over the property until paid. His affidavit does not distinguish between the two categories of expenses. I shall consider both possibilities.

[14] So far as the claim for necessary expenses is concerned, Rhoode would have a claim for reimbursement for expenditure of money or material on the preservation of the property. He has no claim for his own labour: *Harrison v Marchant* 1941 WLD 16 at 20-21. The problem facing the appellant, however, is that he relies on the evidence of Bouwer who has estimated what the improvements would cost as at February 2010. That evidence is irrelevant. It does not establish that the appellant actually expended anything in money or materials.

[15] So far as useful expenses are concerned, the amount of compensation is limited to the amount by which the value of the property has been increased or the amount of the expenses incurred by the appellant, whichever is the less; and the court has a wide discretion. That was the Roman law: D 6.1.38;[1] the position was the same in the Roman-Dutch law: Voet 6.1.36;[2] and it remains the same in the modern South African law: *Meyer's Trustee v Malan* 1911 TPD 559 at 568; *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd; Bulawayo Waterworks Co Ltd v Fletcher & Fletcher* 1915 AD 636 at 648, 656-657 and 664-665.

[1] Translation by Watson vol 1 p 207.
[2] Translation by McGregor J in *Ras v Vermeulen* 1927 OPD 5 at 8 and *Gane's* translation vol 2 p 249.

[16] Here again, one does not know what the appellant's actual expenses were. In addition, there is no acceptable evidence that the value of the property was increased. The opinion expressed by Van der Spuy is of no assistance as neither the factual foundation nor his motivation therefor are set out:

(a) Van der Spuy never visited the property, but relied upon photographs and what was told to him by an unnamed appointee. Not all of the photographs shown to him were annexed to the appellant's answering affidavit. Moreover, and more importantly, what the 'appointee' sent to examine the property told Van der Spuy is nowhere recorded.

(b) The factors taken into account by Van der Spuy in arriving at his 'provisional' valuation, such as the location of the property, its size and zoning, comparable sales in the area and the nature, extent and degree of completion of the improvements, are nowhere set out.

The criticism by the respondents' counsel of the answering affidavit on this aspect as containing 'vague, bald, terse, sketchy and insufficient allegations' is entirely justified. On top of everything else, there is the possibility that the local authority may order demolition of the alleged improvements.

[17] The present is not a case where it is common cause or cannot on the papers be disputed that the property has been increased in value, and there is a disagreement as to the amount. In such a case an owner seeking possession of his/her property would usually tender security such as a guarantee from a financial institution for the amount by which the property will in due course be found to have been increased in value, up to the amount claimed by the person asserting the lien (or such lesser amount as the court might be able to determine on the papers as being the maximum amount for which the lien is maintainable), and ask a court to exercise its discretion to order delivery of the property to him/her against provision of such security: *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 (1) SA 571 (A) at 582C-F and cases there quoted. Here, there is not even a prima facie case for the respondents to meet. The appellant's case amounts to this: 'I have made alterations and additions to the respondents' property. I have produced no acceptable evidence to establish whether the property has been improved

in value, nor have I disclosed what I expended in money or materials. But I wish to resist an application for ejectment until compensated for an amount that I have not begun to quantify.' To enforce a lien in these circumstances would in my view be to allow an abuse of the process of the court.

FOURTH SET OF AFFIDAVITS

[18] The appellant brought an application in the magistrate's court for the striking out of the allegations in the replying affidavit that dealt with the nature and value of the alleged improvements and in the alternative, for leave to deliver a fourth set of affidavits. The magistrate dismissed the application. In the high court, the appellant sought an order setting aside the order of ejectment granted by the magistrate and substituting an order granting him leave to deliver a fourth set of affidavits. That relief was also refused.

[19] In view of the conclusion to which I have come in the previous section of this judgment, no point would be served in granting the relief sought by the appellant. He would not be entitled to make allegations in a further set of affidavits that should have been in his answering affidavit, in the absence of any explanation as to why they were not there in the first place (*Kasiyamhuru v Minister of Home Affairs* 1999 (1) SA 643 (W) at 649F-650E) ─ and there was none; accordingly, the shortcomings in his case, which I have held to be fatal, could not be remedied.

RESTITUTION

[20] Counsel for the appellant submitted (I quote from the heads of argument) that 'it is an elementary principle of justice that someone who demands restitution of what he has performed under a contract, which has been cancelled or has otherwise failed, must himself restore, or at least tender to restore, what he received thereunder'; and that the respondents' failure to make such a tender or to repay the R400 000 paid by the appellant, had the effect that the cause of action was not complete. Counsel relied for this latter proposition primarily on *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1974 (1) SA 414 (NC) at 424C-427A.

[21] Senior counsel who was not responsible for the heads of argument, but presented oral argument on behalf of the appellant, went further and submitted that although the respondents' claim was couched in the form of a *rei vinidicatio*, they had, as a matter of fact, parted with possession of the property in terms of a void contract of sale; and that to avoid an illogical development in the law, they should be required to tender to restore what they had received. Counsel was unable to point to any case that supported this proposition, but referred to *Patel v Adam* 1977 (2) SA 653 (A), which he readily conceded did not go as far as he would have wished.

[22] *Bonne Fortune Beleggings* concerned a claim for restitution. It is therefore distinguishable. *Patel's* case is similar to the present matter on the facts, but it contains one important distinguishing feature: there, although the plaintiff relied on the *rei vindicatio* (see p 669B-C) for ejectment of the defendant from the property that had been sold in terms of a contract that was void, he specifically tendered payment of the amount paid to him on account of the purchase price. Rabie JA said at 670A-D:

'Such enrichment occurs, it has been said (see, eg, *Mattheus v Stratford and Others* 1946 TPD 498 at p 504) when the seller retains both the land and the price. There can, of course, be no quarrel with this view, but where, as in the present case (where, it may be noted, there is ─ save for the reference to improvements made by the defendant, a matter not in issue in these proceedings ─ no allegation that the plaintiff will be enriched at the expense of the defendant if he is granted the relief he seeks), the seller claims possession of his property against repayment of what he has received from the purchaser, there is no question of his being enriched at the expense of the purchaser if possession of the property is restored to him: the position in such a case is, simply, that the parties are restored to their original, ie, pre-agreement, positions. I can see no inequity in such a result: the agreement which the parties purported to conclude is, after all, declared by statute to be of no force or effect.'

[23] The court in *Patel* was therefore not concerned with the question whether the failure to tender return of what had been received under a void contract was fatal to a *rei vindicatio* brought by the owner. In the present matter, the mere fact that the appellant would be entitled to repayment of the

R400 000 (absent a defence) in order to prevent the respondents being unjustly enriched, does not mean that he is entitled to resist ejectment until the amount is repaid or tendered: he could do so only if repayment has to take place at the same time that the appellant is ejected ─ I shall revert to this question; or if a tender to repay is a necessary ingredient of the respondents' claim. And it is not, for the reasons given by Botha J writing for the full court of the Transvaal Provincial Division in *Vogel NO v Volkersz* 1977 (1) SA 537 (T) at 554H-555C:

'In my opinion, the principle adopted and applied in [*Akbar v Patel* 1974 (4) SA 104 (T)], with which I associate myself, is decisive on the question now being considered. The principle is that the seller of property under an invalid contract of sale has a claim to possession based only on his ownership and the purchaser's possession of the property, in accordance with the general rule propounded in the line of cases running from *Graham v Ridley* 1931 TPD 476, to *Chetty v Naidoo* [1974 (3) SA 13 (A)]. Nothing more is required to complete the seller's cause of action. It is true that in *Akbar's* case TRENGOVE J, referred to the tender of the plaintiff in that case to refund to the purchaser what he had received in respect of the purchase price of the property with the observation "as he is obliged to do in the circumstances" (at p 110H), but in my respectful view that observation was clearly *obiter* and the learned Judge was not applying his mind to the question whether such a tender was an essential ingredient of the plaintiff's cause of action. To require such a tender would be to negate the very principle upon which the decision was based. If the seller bases his claim to possession simply on his ownership and the purchaser's occupation of the property, as he is entitled to do, it is for the purchaser to raise the point that the seller is obliged to refund what he has received by way of payment of the purchase price of the property. If the point is raised by the purchaser, or by the Court *mero motu*, the Court will obviously make its order against the purchaser to restore possession to the seller conditional upon the seller refunding to the purchaser whatever the latter has paid in respect of the purchase price of the property, but it is not necessary for the seller to tender such a refund.'[3]

[24] I see no conceptual difficulty in following this approach. In some cases, where there has been performance under a void contract, a party would have no option but to sue for restitution and tender restitution of what he or she has

[3] *Vogel's* case was followed on this point in *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 (3) SA 653 (NC) at 663I-664H.

received pursuant to the 'contract', for example where money has been paid or where the party is not the owner of an article delivered by him or her under the 'contract'. But where the *rei vindicatio* is available, I see no reason why relief should be denied merely because there is another cause of action available that has advantages for the respondent/defendant. Of course the appellant is entitled to return of the R400 000 he has paid (subject to any counterclaim), otherwise the respondents would be unjustly enriched. But that means that the appellant has an action for the money; it does not mean that the respondents were obliged to tender the return of the money to complete their cause of action. The cause of action chosen by them was complete without such a tender.

[25] I revert to the question whether the order for ejectment should be made subject to repayment of the R400 000. The respondents have asserted a counterclaim for inter alia the period of the appellant's occupation of the property ─ which began on 9 February 2007 (more than five and a half years ago) and still continues. The appellant has already instituted a claim in the Western Cape High Court for repayment of the money and it seems to me more appropriate for the respondents' liability to be decided in those proceedings. To order repayment now would be to deprive them of the advantage conferred on them by Rule 22(4), which provides that:

'If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet.'

ORDER

[26] The appeal is dismissed with costs.

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T D CLOETE

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	S P Rosenberg SC
	Instructed by:
	Lamprecht Attorneys, Cape Town
	Honey Attorneys, Bloemfontein
For Respondent:	D J Coetsee
	Instructed by:
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