**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**NORTH GAUTENG DIVISION, PRETORIA**

**CASE NO: 72319/2012**

27/10/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

27.10.2016
DATE

SIGNATURE

In the matter between:

**GERHADUS VENTER** — 1st Plaintiff

**SAREL VAN DER WALT** — 2nd Plaintiff

and

**MINISTER VAN OPENBARE WERKE** — 1st Defendant

**MINISTER VAN GRONDSAKE** — 2nd Defendant

**DIE KOMMISARIS VAN DIE NOORDWES**

**PROVINSIE DIE REGERING VAN DIE REPUBLIEK VAN SUID-AFRIKA** 3rd Defendant

4TH Defendant

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**JUDGMENT**

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**MSIMEKI J,**

**INTRODUCTION**

[1] This action started as an application. The first plaintiff, in claim 1, seeks a declaratory order that he is entitled to transfer of three immovable properties which, together, are referred to as "the property", from the fourth defendant to the first plaintiff (himself) and the registration thereof in his name and that the defendants be ordered to do whatever will be necessary to effect such transfer. The second plaintiff, in the alternative, seeks a declaratory order that he is entitled to payment for "noodsaaklike en nuttige uitgawes en verbeterings" in respect of the three immovable properties; that an amount R3 719 646.00 represents reasonable costs and value of the expenses incurred and improvements effected on the properties; payment of the aforesaid amount and interest thereon at the rate of 15.5% per annum from the date of judgment to date of payment and costs.

**BACKGROUND FACTS**

[2] The matter, as it was correctly submitted and conceded, has a long history, the first plaintiff appears to have successfully applied to the

Government of the day to become caretaker and occupier of the land ("the property"). The first plaintiff appears to have conducted farming activities on the land since 1987. A commission under the chairmanship of S W McCeath J was set up to consider the issues of the land in accordance with the provisions of **Chapter 6 of Act 108 of 1991**. The secretary of the Commission, during 1993, according to the first plaintiff, issued a general notice regarding the three properties and others. S. W McCeath J on 17 December 1993 wrote a letter to the then Deputy-Minister of Agriculture and Land Affairs, Mr A. T Meyer directing that the first plaintiff be given the first option to buy Portion 1 of Fritchley 444 Ms, Portion 1 of Alfred 383 Ms and Portion 5 of Eyam 436 Ms. These are the three immovable properties referred to above. The first plaintiff contends that he was duly informed of this decision late in 1993. Additional land, according to the first plaintiff, would be required to achieve "ekonomiese eenheid". The first plaintiff contends that he accepted the first option. The necessary documents, according to the first plaintiff, were signed by the relevant people. The first defendant, on 2 October 1999, according to the first plaintiff, made a written offer which the first plaintiff accepted. On 30 October 1999, in writing, the first plaintiff informed the first defendant that he was intending to buy the land. On 29 August 2000 the first defendant informed the first plaintiff that the value of the land was R470 000 00. The first defendant's offer, according to the first plaintiff, was accepted on 8 June 2001. (See: Annexure "M"-Indeks-Pleitstukke). A valid agreement of sale, according to the plaintiff, came into being. The land is still registered in the name of the fourth defendant. On 11

July 2002, and in the Transvaal Provincial Division under case number 11824/2002, the first plaintiff brought an application relating to the issues of the land. The application was opposed. The parties agreed that the matter be referred to trial and same was postponed *sine die* and the costs were reserved. This action arises from the order of the Court. The defendants defended the action. The matter, ultimately, serves before me.

[3] The filed documents, according to the particulars of claim, seem to reveal a dispute of fact regarding the validity and the enforceability of the first plaintiff's rights regarding the transfer of the immovable properties and the registration thereof in the name of the first plaintiff.

[4] Advocate M. Rip SC and Advocate S. Maritz SC and Advocate Mohlamonyane appeared for the plaintiff's and the defendants respectively when the matter was argued.

[5] The court, at the commencement of the hearing, was informed that the first plaintiff, who was said to be destitute, was no longer involved in the matter. Effectively, the second plaintiff and the defendants are now the parties in the matter.

[6] On 27 August 2014 the parties agreed to settle the matter between the second plaintiff and the defendants. Their agreement became an order

of the Court. The Order which constitutes pages 115 and 116 of Indeks-Kennisgewings reads:

"1. *THAT the merits and quantum in respect of the Second Plaintiff's claim be separated;*

2. *THAT the First and Fourth Defendants accept liability for payment in respect of the necessary and useful improvements that the Second Plaintiff effected on the immovable property referred to in Paragraph 54.1 of the Particulars of Claim;*

3. *THAT the Defendants, jointly and severally, shall pay the trial costs for today;*

4. *THAT the remaining issues relating to quantum be postponed sine die."*

[7] Regard being had to Ledwaba DJP's order, it becomes clear that the issues have been narrowed.

[8] On 26 November 2015 and at law Chambers, High Court Pretoria, the parties held a pre-trial conference the minutes of which form pages 112 to 114 of the papers (Indeks-Kennisgewings). Paragraphs 5, 6 and 7 of the minutes read:

"5. *The parties agree that the average amount of their relevant expert's valuation be regarded as the reasonable value of the*

*reasonable and necessary and useful improvements that second Plaintiff effected on the immovable property referred to in paragraph 54.1 of the particulars of claim, namely R2610 000. 00.*

6. *The Plaintiff undertook to get his expert only for purposes of a possible settlement on quantum and without prejudice of rights to compile a fair and reasonable valuation of the rent value of the property over the year 2001-2015.*

7. *The Defendant confirms that the land claim over the farm is dormant and the second Defendants closed their file."*

[9] On 22 January 2001 the Director-General, Department of public works, Republic of South Africa, wrote to Lawrence De Jager, in response to their letter which had been addressed to the Department, and said:

*"Please be advise (sic) that Portion 1 of the Farm Alfred 383 MS and Portion 5 of the farm Eyam 436 MS are, still subject to a restitution claim".*

Paragraph 8.7 above seems to deal with the issue of the restitution claim.

[10] There is now no issue regarding liability for payment of the necessary and useful improvements that the second plaintiff effected on the immovable property referred to in paragraph 54.1 of the Particulars of

Claim. The first and the fourth defendants have accepted such liability. The first and fourth defendants are responsible, jointly and severally, for paying the trial costs of 27 August 2014.

[11] The parties agreed on 26 November 2015 that the average amount of their relevant experts' valuations would be regarded as the reasonable value of the reasonable, necessary and useful improvements that the second plaintiff effected on the immovable property referred to in paragraph 54.1 of the particulars of Claim. Such amount is R 2 610 000 00.

[12] The land claim over the property no longer appears to be an issue. This is clarified by paragraph 7 of the minutes of the pre-trial conference of 26 November 2015.

**THE ISSUE**

[13] The second plaintiff holds the view that the full amount of R 2610 000 00 should be paid to him while the defendants are of the view that an amount of R 1 390 000 00 representing the rental for the period that the second plaintiff occupied the property should be deducted from the R 2 610 000 00 which the second plaintiff should receive. The issue to be determined is whether such deduction should be made. The second plaintiff contends that such deduction should not be made while the defendants insist that the deduction be made. This indeed, is a legal question which the Court is called upon to resolve. On 12 November

2001, the first and second plaintiffs concluded a written agreement in terms of which the second plaintiff purchased the property from the first plaintiff. The second plaintiff is said to have taken possession of the property towards the end of 2001. He is still in possession of the property. Their agreement was conditional in that the property first had to be transferred to the first plaintiff who would in turn transfer the property to the second plaintiff.

[14] The property which is still registered in the name of the fourth defendant has not been transferred to the first plaintiff. As shown above, the first plaintiff brought an application which was later turned into an action seeking such transfer. The first plaintiff is said to be destitute and appears to have abandoned the action. In the meantime, the second plaintiff, after taking possession of the property effected some improvements on it. These are the improvements which the second plaintiff sued for in the alternative claim which is claim 2.

[15] It is submitted on behalf of the second plaintiff that the second plaintiff reasonably believed that he possessed the property with a view to becoming the owner thereof. The agreement between the plaintiffs attests to that.

[16] The papers do not reveal that a lease agreement was concluded between the parties. The Court has neither been told of the existence of a lease either between the first plaintiff and the defendants nor between

the plaintiffs. There is clearly no lease agreement between the second plaintiff and the fourth defendant or any of the defendants for that matter. Nothing has been said about this either in the papers or in argument.

[17] What the court has been told in argument by Mr Maritz is that the second plaintiff occupied the property for approximately 15 years with no hope of becoming the owner thereof. What is also clear is that nothing more was said about this aspect by Mr Maritz. The written agreement between the plaintiffs clearly gives one the idea that the second plaintiff wanted nothing else but to become the owner of the property. He even effected the improvements which are now the subject-matter of claim 2. The first and the fourth defendants have conceded that the second plaintiff should indeed, be compensated for the improvements that he has effected on the property.

[18] The basis on which the second plaintiff has been possessing and occupying the property since approximately 2002 has not been disclosed by the first and fourth defendants. The second plaintiff's version must be correct especially if regard is had to the written agreement between the plaintiffs.

[19] The Court was informed that money had changed hands between the first plaintiff and the State and between the plaintiffs. Upon enquiry by the Court, as to what could have become of the money, the Court was informed by Mr Rip that the first plaintiff had become destitute.

[20] Mr Rip submitted that the second plaintiff's belief is central and key to the determination of the issue that faces the Court. This submission, in my view, has merit. The second plaintiff, indeed, bought the property in order to become its owner. The agreement that the two plaintiffs concluded in respect of the property bolsters the second plaintiff's case. He spent a considerable amount when he improved the property which, according to him, was going to become his. I do not think that this can be gainsaid.

[21] Mr Maritz referred the Court to the matter of **Pheiffer v Van Wyk and Others 2015 (5) SA 464 (SCA)** to support his submission that the second plaintiff ought to pay reasonable rental for his occupation of the property.

[22] Mr Rip submitted that the **Pheiffer case** (*supra*) did not support the defendants' case. He further submitted that the **Pheiffer case** did not deal with the deduction which the Court was asked to deal with. Of course this submission is correct.

[23] If anything, Mr Rip's submission proceeded, the **Pheiffer case** merely confirms the principle set out in **Rademeyer and Others v Rademeyer and Others 1967 (2) SA 702 (C)**. The principle also comes out in **Liebenberg v Liebenberg 1971 (1) SA 878 (C)** the matter which Mr Rip referred the court to.

[24] The **Pheiffer matter** (*supra*) was an appeal in which a High Court order had substituted the appellant's improvement *lien* (enrichment *lien*) with a guarantee by the prospective purchaser of the property concerned. The defendant, in the appeal, challenged the adequacy of the substituted security. The case, indeed, does not help the defendants.

[25] In the **Rademeyer case** (*supra*), the plaintiffs had claimed from the defendants an amount which represented the costs of effecting useful improvements on a farm which the parties owned jointly in undivided shares. The plaintiffs held the view that the farm had to be sold as it would not be divided beneficially amongst the many beneficiaries. The plaintiffs had each occupied a portion of the farm and had effected many useful improvements on it. The defendants requested certain further particulars. The replies did not satisfy the defendants and this resulted in an application by the defendants for further and better particulars. The plaintiffs opposed the application. The court held that the plaintiffs were only entitled to their expenses less the gathered fruits and that they had to supply the defendants *"with particulars setting out what fruits they had obtained from the property"*. They, according to the court, did not have *"to give particulars of fruits derived from improvements effected by them"*. The Court held that the defendants were not entitled to the particulars they had requested "as the value of occupation was not part of the fruits to be deducted from expenses" and "*that the plaintiffs did not have to bring into account the value of their occupation when reckoning*

*the amount of their claim for improvements*". (**Rademeyer and Others** *(supra)* **at 702 B-E**).

[26] Van Zyl J at 711 G-H said:

*"It is also necessary not to confuse the matters that should be taken into account when dealing with a bona fide possessor who thinks he is owner and one who thinks he is occupier. The bona fide possessor who thinks he is owner does not envisage that he could be called upon to pay for his occupation: he occupies as owner. The bona fide occupier generally envisages that he will be called upon to pay his occupation".*

At 711H the court said:

*"...It seems to me that it is not in every case that a bona fide occupier can be said by his mere occupation to have been enriched to an extent that can be recovered by the owner".*

[27] In the **Liebenberg matter** (*supra*), the appellant claimed rent from the respondent based on a tacit lease. The Court found that the appellant failed to prove the agreement. The appellant, on appeal, contended that she was entitled to the rent based on a *condictio*. The Court held that the action had been based on a tacit lease. To allow the appellant to raise the aspect of a *condictio* or enrichment would result in prejudice on the part of the respondent.

[28] The **Rademeyer matter** (*supra*), in my view, seems to support the submission that Mr Rip made on behalf of the second plaintiff, namely,

that the amount of R 1 390 000 00 which is said to represent rental which the second plaintiff is liable for, for occupying the property should not be deducted from the R 2 610 000 00 which the parties agree he should be paid for the necessary and useful improvements that he effected on the property.

[29] The defendants are well within their rights to sue the second plaintiff for rental, which, according to them amounts to R 1 390 000 00. The defendants, in my view, are not entitled to any deduction based on the current papers. The second plaintiff, in my view, is entitled to full payment of the amount of R 2 610 000 00. The second plaintiff's claim for payment of the aforesaid amount, in my view, should succeed.

**ORDER**

[30] **I, in the result, make the following order:**

1. **Judgment in favour of the second plaintiff, against the first and the fourth defendants jointly and severally, the one paying the other to be absolved, is granted for payment by the first and fourth defendants to the second plaintiff of an amount of R 2 610 000 00.**

2. **The first and the fourth defendants, jointly and severally, the one paying the other to be absolved are ordered to pay interest in the aforesaid amount of R 2 610 000 00 at the rate**

of 15.5% per annum from the date of judgment to date of payment.

3. The first and the fourth defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay the reserved costs of the application in terms of which the matter was referred to trial together with the trial costs of 10 March 2016.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA