REPUBLIC OF SOUTH AFRICA

IN THE HGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.:48754/2012

REPORTABLE: NO

OF INTEREST TO OTIIER JUDGES: NO

REVISED: YES

DATE: 11/10/2016

In the matter between:

LEBEKO MOSES

NAKANA

PLAINTIFF

and

NTOMBIYAKHE

KWINANA

DEFENDANT

Heard: **21 May 2015**

Delivered: **11 October 2016**

JUDGMENT

A.A.L OUW J

Introduction

[1] The applicant/plaintiff (hereinafter referred to as plaintiff) launched an application against the respondent/defendant (hereinafter referred as the defendant) for the return of certain goods in a house in […].

[2] The defendant opposed the application. The plaintiff replied to the defendants opposition.

[3] The application was referred to oral evidence by an order of Bosman AJ dated 14 November 2012.

[4] On 23 April 2013 the matter came before Preller J and after some deliberations an order was made ordering for an inspection to be conducted, for the result of the inspection to be recorded in terms of the order, and for the matter to be referred for trial. This order was executed and caused a notice in terms of rule 36(10) dated 9 May 2013 and served on the defendant on 10 May 2015.

[5] The house referred to in the first paragraph above is house [...] in […], in which estate the defendant and associated entities own a number of properties. This estate is an up-market estate situated in Midrand.

[6] The parties together with their representatives met at the house the on 24 April 2013 and a list of furniture of 58 items was compiled. The list was accompanied by 58 photographs. In terms of paragraph 2 of the court order the defendant had to indicate the ownership of which

of those assets she disputed. In the context it means that she had to say which of those assets she claimed as hers and therefore do not belong to the plaintiff. The plaintiff claims all assets as his.

[7] The concluding part of the rule 36(10) notice in which the 58 items are listed state:

> *"Please take further note that if you, or any other person, dispute the applicant/plaintiff's claim to the items mentioned above you should do so in writing within 10(ten) days of receipt of this notice.''*

[8] The usual function of a rule 36(10) notice is not for a party to admit or deny ownership, but instead to admit or deny photographs. The passage at the end of the notice was clearly inserted in an attempt to apply with the order of Preller J. It was only during cross-examination that the defendant heard about the existence of this notice.

[9] The defendant is a chartered accountant running a firm Kwinana & associates. From the evidence it appears that she is also a business woman and engaged in property development. This is done through a company Slipknot Investments 74 (Pty) Ltd and, it seems, other entities associated with her or her family. For simplicity's sake, as nothing turns on it, I shall simply refer to the defendant's property.

[10] During the beginning of 2011 the plaintiff entered into a written lease in respect of house [...] in the estate. He fully furnished that house. It was later agreed that the plaintiff move to house [...] as he preferred that house. No new lease agreement was entered into but the lease at the amount of R20 000 per month simply continued.

[11] During this period a working relationship developed between the plaintiff and the defendant. He was contracted by the defendant as project manager in respect of a number of houses she was building in that estate.

[12] During the period he was working for her, she transferred huge amounts, running into millions, into his account. At some stage the relationship must have soured for she appointed a private investigator, Mr Kitching, to investigate the affairs of the plaintiff. The defendant's version is that on 7 December 2011 she and the private investigator met with the plaintiff and he confessed. He agreed to leave the property, house [...], by 9 December at 17h00. He also agreed that all his possessions may remain in that house until he has paid the amount of R522 000. This alleged meeting and agreement was at the club house of the estate. It is astounding that nothing of this meeting as well as the alleged agreement was put to the plaintiff in cross-examination neither did it feature in any of the affidavits the defendant made in this case. There were other applications beside this one. She did not mention this version in any one of three affidavits.

[13] On the afternoon of 9 December 2011 the plaintiff left the estate to visit his brother. He was out of the estate for approximately three hours. When he returned he was told by the security that he was not allowed to enter. This instruction was, according to the evidence of the defendant, given by her personally as she went to the entrance gate to sign the necessary document in that regard.

[14] The plaintiff was thus locked out of his residence and even his personal items like clothing, toiletries, and laptop remained there. His BMW X5 was also at the house.

[15] The defendant's attitude is that he owed her money and that she therefore locked him out until he had repaid everything he had to pay her. The plaintiff was of the opinion that he owed only R 150 000 which he paid. On 22 June 2012 he received an email which reads:

> "Pay R250 000 and you will have access to whatever I have for you in my possession."

[16] It is interesting to note the ambivalent tone of this email.

[17] From 24 June to 29 July the plaintiff paid the full R250 000 as agreed but was still denied access to his goods.

[18] The plaintiff demanded further money. She send an sms dated 1August 2012:

"Pay R122 800 and you will have access to whatever I have for you in my possession."

It is striking that the wording of this sms is the same as the previous one namely with that qualification "whatever I have for you in my possession".

[19] This led to a letter by the plaintiff's attorneys dated 20 August 2012 as follows:

"Please note that your client has once again gone back on her word and demanded another payment from our client in order to settle the matter even though the matter was indeed settled as per our last letter.

We have been instructed that your client on 1 August 2012 made another proposal to our client in order to settle the matter.

Your client demanded payment in the amount of another R122 800-00 and indicated that if such payment is received our client will have access to his assets currently being held by your client.

In view of the history of the matter and in order not to drag this matter out any longer, our client agreed to pay the amount of R122 800-00 as a final settlement of the matter.

Our client therefore paid the amount of R122 800-00 by way of the following payments:

1. *R22 800-00 on 2 August 2012;*
2. *R20 000-00 on 7 August 2012;*
3. *R80 000-00 on 19 August 2012.*

Your client indicated that as soon as the money showed on her account she would

release our client's assets.

Our instructions are that same have not been released, and we await your written confirmation before 12:00 on 21 August 2012 that our client can collect his assets, failing which we will have to approach the court for the relevant relief on an urgent basis."

[20] Despite the fact that the plaintiff also paid this amount the defendant still refused to hand over anything. When the application was before Bosman AJ on 14 November 2012 he ordered the return of the BMW as well as all personal items, such as clothing to the plaintiff.

[21] Thus the dispute at this stage is only about the furniture as listed in the notice in terms of rule 36(10).
Having said this, the plaintiff's claim still remains as per his declaration.

[22] The plaintiff made a good impression as a witness. He cannot be faulted for long after he purchased the goods not being in the possession of proof of purchase any more. Nothing emerged in cross-examination which can affect his credibility.

[23] The same cannot be said for the defendant. Her evidence was that she in total paid R3,3 million to the plaintiff of which R450 000 was for furniture for house [...], which she wanted to rent out as a furnished house. The house is the property of a family trust whilst she claims that the furniture is the property of the company Slipknot.

[24] The least that can be expected of a chartered account managing a company where such a relatively big amount is an issue is to be able to show how R450 000 was spent with reference to bank statements, invoices etc. Apparently her attorney also expected that for the following passage is to be found towards the beginning of her evidence in chief:

"And then the other thing, Ms Kwinana, the honourable court asked you specifically if

you had not... If ... How much did you pay over to Lubekwa to buy this furniture and then you give... You gave the exact figure. So are you keeping records of everything and is that because you are an accountant? - I am keeping the records. Hence I know that this is the amount... These are the amounts I paid and for what purpose.

It is not as if there was just a blank cheque to... [intervene]. -

No.

You knew what was bought and you checked? - Yes.''

[25] The defendant then proceeded to testify that the plaintiff kept the invoices and because he was at that stage still trusted and regarded as part of the family, she did not insist in getting the invoices from him. In the circumstances one would have expected a rule 35(3) to have been served on the plaintiff's attorneys.

[26] In any event an invoice is not the only part of a bookkeeping system. The defendant should have been able to identify by entries in the company's books what amounts were paid when to the plaintiff to buy the furniture with.

[27] From the outset the defendant was argumentative and started off her evidence by the following:

"My Lord, I was... I just want to show you that, today you are dealing with a professional con artist.

COURT: Yes? - And then the forensic investigation also found out that, in fact, Moses Lubekwa is wanted by Interpol... [intervene].

Ms Mbanjwa... Just a moment... Ms Mbanjwa, how can I listen to any of this evidence when it was not put to the plaintiff?"

[28] Another example of her argumentative stance is that when it was put to her that she locked out the plaintiff on 9 December she denied, apparently having in mind locking out with a key and insisted that she went to the security to sign documentation and arrange

that the plaintiff be prohibited from entry. This is locking out in the ordinary sense of the word.

[29] The evidence shows that the plaintiff had furniture before he received any money from the defendant for the alleged purpose of buying furniture for house [...]. She visited him at house [...] where he first stay and saw that the house was furnished.

[30] Whilst the plaintiff alleges in paragraph 8 of the declaration that he fulfilled his obligations in terms of the oral rental agreement that is denied by the defendant. This is a false denial. The defendant in fact deducted the R20 000 rental from his salary. She testified that he never breached the rental agreement. Thus she did not have the lessor's hypothec in respect of movable goods but simply kept his goods for an unrelated purpose. Thus she took the law into her own hands and resorted to self-help.

[31] Crucially she did not call Mr Kitching about the alleged meeting at the club house on 7 December 2011. He could have confirmed the agreement set out in paragraph 12 above.

[32] I accept the plaintiff's evidence and reject that of the defendant. The furniture claimed in the declaration belong to the plaintiff.

[33] In ordering the defendant to return the goods, I shall make provision for a reasonable period in order that the plaintiff can make alternative arrangements for the lessee in the property.

[34] The order is therefore as follows:

1. The defendant is ordered to on or before 31 October 2016 make available for collection by the plaintiff the following items:

The main bedroom

1.1. Bedroom suite

1.2. Three piece couches

1.3. Carpet

1.4. Flat screen TV

1.5. TV stand

1.6. Curtains and decor

Bedroom 2

1.7. Base set

1.8. Head boards

1.9. Storage box at foot of bed

1.10. Carpet

Bedroom 3

1.11. Base set

1.12. Head boards

1.13. Storage box at foot of bed

1.14. Carpet

TV room

1.15. Three piece couches

1.16. TV stand

1.17. Flat screen LCD TV

1.18. Home theatre system

Study

1.19. Glass top table with six chairs

1.20. Study desk and chair

1.21. Lenovo computer

1.22. Printer

Sitting room

1.23. Leather couches

1.24. Coffee table

1.25. Flat screen LCD TV

1.26. TV stand

Bar

1.27. One bar unit

1.28. Mini fridge

Dining room

1.29. Dining table with eight chairs and serving set

1.30. Double door fridge

1.31. Washing machine

Garden

1.32. Garden table with chairs

1.33. Garden round table with two chairs

Others

1.34. Curtains throughout the house

1.35. Crockery and cutlery

2. The defendant is ordered to pay the costs of the application/action including all reserved costs.

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A.A. LOUW

Judge of the High Court