IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case Number: 28A / 2021

Case Number: 1439 / 2016

In the matter between:

GLONIE MERCHIA JACOBZ N O Appellant

and

ANDRÉ EUGENE DE CLERCK First Respondent

ELMARIE DE CLERCK Second Respondent

Coram : Wille, J et De Villiers, AJ

Heard : 12th of March 2021

Delivered : 19th of March 2021

JUDGMENT

Wille, J et De Villiers, AJ:

Introduction

[1] This is a civil appeal from the magistrates' court for the district of Vredendal. Mr Jacobsz was the owner of certain immovable property.[1] Mr Jacobz passed away on the 2nd of June 2010. The appellant is his widow, cited in her a capacity as the executrix in and to his deceased estate.[2] They were married out of community of property. Mr Jacobsz entered into a sale agreement[3] in respect of the property with the first and second respondents on the 11th of May 2009.

[2] The respondents agreed to purchase the property for the of R750 000,00 subject to the sale of their existing property within a period of at least (60) days from the date of conclusion of the agreement. The sale agreement was further subject to the granting of certain bond finance to the respondents in the sum of R250 000,00. This, all within a stipulated time period.

[3] An addendum[4], was thereafter entered into which provided, inter alia, that: the respondents would take occupation of the property on the 1st of July 2009: that this would be

[1] The remaining extent 34 of the Farm Zandfontein (Number 105) - hereinafter referred to as the 'property'
[2] She was appointed as the executrix in and to the deceased's estate on the on the 9th of September 2015
[3] The 'agreement'
[4] The 'addendum' which was concluded on the 29th of June 2009

prior to registration of transfer of the property into their names: that they would pay rental in an amount of R5000,00 per month and that the time period afforded to the respondents to sell their property would be extended by a further (90) days. The respondents took occupation of the property on the 1st of July 2009. They duly paid the agreed rental for a period of no less than (6) months. No further payments were made by the respondents.

Factual Matrix

[4] During May 2016, the appellant instituted action against the respondents and claimed, inter alia, the following: payment of the sum R355 000,00 for unpaid rental from July 2009 to May 2015 in terms of the addendum: payment (as an alternative claim)[5], in the amount of R355 000,00 for damages suffered by the deceased estate as a direct result of the respondents continued occupation of the property without making any payments in respect thereof: payment in the amount of R32 814,78 in respect of unpaid property rates and taxes for which the respondents accepted liability in terms of the agreement and payment in the amount of R7 808,54 in respect of unpaid municipal service charges for water and electricity, consumed by the respondents while they occupied the property.

[5] At the commencement of the trial in the court of first instance, the appellant's legal representative placed on record that, to the extent that it may be found that the agreement and the addendum thereto were not enforceable, the appellant abandoned so much of her claim which exceeded the monetary jurisdiction of the magistrates' court. This would mean that the appellant's alternative claim would be limited to the sum of R200000,00. No objection was voiced in this connection by the respondents' legal representative.

[5] In her notice of intention to amend dated the 5th of December 2017

[6] The respondents raised a shield in the form of a counter claim for payment in the amount of R120 000,00 in respect of certain maintenance and repair work done to the property and also a claim for the delivery of certain items which allegedly belonged to the respondents and were alleged to have been in the deceased's possession. The respondents withdrew their counter claim sounding in money on the first day of the trial and their second counter claim was similarly withdrawn shortly thereafter.[6]

[7] The magistrate in the court *a quo* dismissed the appellant's claims[7], on the basis that: the suspensive conditions to the agreement had not been fulfilled which caused the agreement to lapse: that the agreement and the addendum thereto were of no force and effect: that the appellant was prevented from claiming payment of any rental in terms thereof and that the clause in the agreement which recorded the parties' consent to the jurisdiction of the magistrates court was of no force and effect.

[8] Besides, the court *a quo* held that it was not competent for the appellant to abandon that part of her alternative claim for any damages that exceeded the monetary jurisdiction of the magistrates' court in the manner that she did at the inception of the trial. The magistrate held that procedurally, a formal amendment to this effect was required. The appellant's alternative claim for damages pursuant to the respondents' unlawful occupation of the property, according to the magistrate, exceeded the monetary jurisdiction of the magistrates' court and was dismissed solely on this ground.

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[6] On the 9th of April 2019
[7] On the 4th of May 2020

[9] Wisely, the appellant is not persisting with her claim founded on the agreement and the addendum thereto. This appeal is directed solely against the findings in connection with the alternative claim for damages and the subsequent cost orders that were made by the court of first instance.

[10] The core issues in this appeal are accordingly the following: whether the court *a quo* had jurisdiction to determine the appellant's alternative claim: whether the appellant is entitled to damages: if so, to what extent has the quantum thereof been established and whether a costs order ought to have been granted against the respondents in respect of their aborted counter claims. Further, the respondents take the point that the appellant's claim has prescribed, alternatively that a large portion of the claim has since become prescribed because the appellant only correctly formulated and filed her alternative claim on the 5th of December 2017. The argument on this score is that prescription continued to run against the appellant for the period before the notice of intention to amend was filed and accordingly the appellant's claim is now limited to the sum of only R30 000,00.

Discussion

[11] Sections 38 (1) and (2) of the Act[8], provide that:

> '*In order to bring a claim within the jurisdiction, a plaintiff may in his summons or at any time thereafter explicitly abandon part of such claim'*
>
> *and*

[8] The Magistrates' Courts Act No 32 of 1944

> *'If any part of a claim be so abandoned it shall thereby be finally extinguished: Provided that, if the claim be upheld in part only, the abandonment shall be deemed first to take effect upon that part the claim which is not upheld'*

[12] The magisterial monetary jurisdiction threshold at the time of these proceedings in the court *a quo*, was limited to claims not exceeding the sum of R200 000,00. The court *a quo* found that for an abandonment of part of the appellant's claim to be achieved, this could only be done by way of a formal amendment to the appellant's pleadings. In this case it could only be achieved by way of a formal amendment to the appellant's particulars of claim. It must be so that an abandonment of any portion of a claim in litigation may be abandoned by way of formal amendment proceedings.

[13] This however cannot be the only manner in which to achieve this result. We say this because as a matter of logic a litigant must be entitled to abandon any part of a claim prior to judgment or even before judgment on appeal. In *General Carpets*[9], it was held that even at the appeal stage, a party is entitled to abandon a part of his or her claim. This before a final judgment. In a belt and braces approach, the appellant has in any event, in the alternative, in these appeal proceedings, abandoned the amount of R155 000,00 in respect of her alternative damages claim against the respondents.[10]

[14] The appellant wisely conceded that the suspensive conditions to the agreement were not fulfilled and that the agreement lapsed and was no longer of any force and effect. The appellant

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[9] *General Carpets v De Villiers* 1990 (4) SA 411 (W) p 413 - 415

[10] In her alternative claim as formulated in her amended particulars of claim

contends that the respondents no longer had any legal right to occupy the property.[11] This notwithstanding, the respondents continued to unlawfully occupy the property without paying any consideration for a period of about (78) months.[12]

[15] The appellant's case is that she is entitled to claim for damages suffered as a result of the respondents' unlawful possession of the property.[13] Her claim is based on the reasonable and market-related rental in respect of the property at the time that the respondents were in unlawful occupation of the said property. The respondents did not present any evidence in support of their contention of the oral agreement in terms of which they agreed to maintain the property. This, in lieu of paying any rental.

[16] The respondents conceded that in terms of the initial agreement they would pay a rental amount of R5000,00 per month. Most significantly, the respondents' attorneys of record confirmed that the respondents accept liability for all and any outstanding rental in connection with their occupation of the property.[14] This was the position as at the 3rd of May 2010.

[17] The appellant also presented expert evidence which referenced the market value of the property during this time. The property had a market value of approximately R1500 000,00. It must also be born in mind that the respondents initially agreed to pay a purchase price of R750 000,00 for the property. If damages are difficult to determine or cannot be assessed with certainty, the plaintiff is still entitled to judgment upon production of all the evidence that can

[11] This on the 26th of October 2009
[12] From January 2010 until July 2015. The appellant only claimed payment for a period of (71) months.
[13] *Hefer v Van Greuning* 1979 (4) SA 952 (A)
[14] Madeleyn Inc sent a letter on behalf of the respondents confirming the position as at the 3rd of May 2010

reasonably be produced to enable the court to assess the quantum of the loss.[15]

[18] It is clear that the agreement and the addendum thereto are of no force and effect. The only claim upon which the appellant can rely is the alternative claim which was introduced as a result of a notice of intention to amend dated the 5th of December 2017. This alternative claim is formulated as follows:

> '*Alternatiewelik, en indien die Hof bevind dat Eiseres nie kan steun op voormelde koopkontrak en addendum nie, wat ontken word deur Eiseres, is dit Eiseres se saak dat Eerste en Tweede Verweerders aanspreeklik is vir skade a.g.v. verblyf sonder vergoeding (en wat tot gevolg gehad het dat die eiendom nie uit verhuur kon word aan ander huurders teen vergoeding nie) vir voormelde tydperk synde R 5000-00 per maand synde die redelike en billike markverwante huur betaal t.o.v. voormelde eiendom in die totale bedrag van R 355 000,00'*

[19] The appellant initially appears to have misconstrued the legal nature of her claim which is a claim for unjustified enrichment. Although not a model of clarity, we nevertheless hold the view that the aforesaid formulation of the appellant's alternative claim does indeed possess the essentials necessary to sustain a claim founded in enrichment. Both *Cooper*[16] and *Visser*[17], lend support to our views in this connection.

[20] In this connection, we also refer to the penchant observations of de Villiers AJ in *Lobo Properties*[18], in which it was held as follows:

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[15] *Esso Standard SA (PTY) LTD v Katz* 1981 (1) SA 964 (A)
[16] Cooper: Landlord & Tennant Vol 2 at p 58
[17] David Visser, Unjust Enrichment: Juta 2008
[18] *Lobo Properties v Express Left Co (SA) (Pty) Ltd* 1961 (1) SA 704 (C) at 709 E-G

> *'Both parties may have been willing to contract, but either, may have waited for an approach from the other to discuss terms. Mr. Steyn was therefore perfectly correct in contending that the averment of a tacit contract of letting and hiring, as contained in para 7 of the declaration, was not supported by the facts alleged in paras 3 to 6 and was to be regarded as a non sequitur. He was, however, also correct in conceding that on the facts alleged a condiction would lie, on the basis relied upon in the alternative by BURKE, A.J., in Blignaut's case'*

[21] The respondents also advance that whatever the nature of the appellant's claim may have been, insufficient evidence was adduced to prove that she suffered damages in the amount of R5000,00 per month, or any amount at all. However, the parties agreed during May 2009 that R5000,00 would be a fair rental in respect of the property. More significantly, the respondents adduced no evidence in rebuttal of the appellant's allegations in this regard. In these circumstances, R5000,00 per month appears to us to be a fair measure of the damages sustained by the appellant in these peculiar circumstances.

[22] In *Hyprop Investments*[19], a full bench of the South Gauteng High Court dealt with this latter aspect in the following terms:

> '*The market rental value formula for determining damages, therefore, does not address the situation where other damages are claimed for holding over. In such cases it becomes necessary to determine whether they are in the nature of special damages (if formulated in contract) or consequential damages (if formulated in delict) since the requirements and hence the outcome may differ. This was the difficulty confronting the court in Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd 1955 (3) SA 249 (C). The landlord did not seek a market related rental but loss of trading profits by reason of its inability to extend its own trading operations and put merchandise on the floor of the premises where the defendant was holding over. The court allowed the claim on the basis that these were consequential damages which were not too remote as they were the natural,*

[19] *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding and Another* [2013] All SA 449 (GSJ) at [52]

reasonable and probable consequence of the "wrongful holding over" (The court's analysis attracted criticism in "The case of the Diehard Tenant" (supra))'

[23] In summary the respondents' case was the following: that they disputed that they signed the addendum: that they indeed occupied the property for the period from the 1st of July 2009 until December 2014, but that they would maintain or improve the property in lieu of any rental payments. On this score not only did they not lead any evidence whatsoever in support of these averments, but they also withdrew their counter claim for the alleged maintenance and improvements. Furthermore, the legal arguments advanced on behalf of the respondents, may be dealt with swiftly.

[24] Firstly, their proposition in connection with section 38 (1) of the Act is clearly wrong. Secondly, the abandonment of portion of the appellant's claim must be seen in its proper context. The agreement contained in it a clause consenting to the jurisdiction of the magistrate's court. The appellant's legal representative made it abundantly clear at the inception of the trial that in the event that the court held the agreement to be null and void, then in that event, the appellant would abandon so much of her claim to fall within the jurisdictional limit of the magistrate's court. This was done in order to pursue her alternative claim for damages. This procedure cannot be faulted, and it amounted to a misdirection by the court *a quo* to hold otherwise.

[25] Thirdly, the disputes about electricity consumption and rates and taxes are of no moment in view of the abandonment of the appellant's claim limited to the sum of R200 000,00. Finally, as mentioned before, the respondents advance that the appellant failed to prove that the reasonable market related rental was the sum of R5000,00 per month, coupled with the fact that the appellant was unable to demonstrate upon which day the respondents had vacated the

property.

[26] These arguments are not sustainable for, inter alia, the following reasons: that the respondents initially and by agreement paid R5000,00 per month by way of rental for at least (6) months: that the respondents admitted their liability for any and all outstanding rental due to the appellant as at the 3rd May 2010: that the respondents failed to present any evidence to the contrary in this connection: that the respondents were not in a position to dispute the conclusions by the expert in connection with the valuation of the property: that the argument advanced in connection with the alleged speculation of the market related rental is euthanized by the fact that the respondents paid R5000,00 per month, this by agreement, for at least (6) months: that the prescription defence is of no moment as the appellant's claim is in any event limited to a period of (40) months at R5000,00 per month. This defence is also squarely struck down by sections 13 (1) (h) and (i) of the Act.[20]

[27] The alternative prescription issue which was raised in argument by the respondents' legal counsel requires some further scrutiny. The issue is this: that because the appellant only formulated and filed her alternative claim on the 5th of December 2017, prescription continued to run against the appellant and accordingly the appellant's claim falls to be greatly reduced and is limited now to the sum of R30 000,00.

[20] The Prescription Act 68 of 1969. Section 13(1) (h) provides that if the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed the running of prescription is interrupted subject to certain conditions. The important point is that the summons was served within (12) months of the appointment of the executrix. Sections 13 (1) (h) and (i) find application and the appellant's claim has clearly not prescribed.

[28] The notice of intention to amend so as to include the correct formulation the appellant's alternative claim was only filed on the 5th of December 2017. The amendment was however subsequently granted by the court a quo. This position on this issue is now settled in our law.

[29] It is abundantly clear that the amendment filed by the appellant operates retrospectively and would perforce date back to the day the summons was issued. Any possible defence of prescription accordingly does not arise.[21] In the result, the appeal is upheld and the order in the magistrates' court is set aside and substituted with the following order:

1. That the first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay to the appellant the sum R200 000,00 together with interest on the aforesaid amount at the prescribed legal rate, a tempore mora, to date of final payment, both days inclusive.

2. The first and second respondents are liable, jointly and severally, the one paying the other to be absolved, for the costs of the trial action and the costs of this appeal, on the scale as between party and party, as taxed or agreed.

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WILLE, J

I agree:

[21] *Anglo Dutch Meats (Exports) Limited v Blaauberg Meat Wholesalers CC* (A 599/ 0) [2002] ZAWCHC 37 (27 June 2002)

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DE VILLIERS, AJ