

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 4505/2013

In the matter between:

DOUGLAS MASON

Plaintiff

and

CHRIS SWANEPOEL

Defendant

CORAM:

NAIDOO, J

HEARD ON:

10 February 2015 and 27 October 2015.

Written Heads filed 20 November 2015

DELIVERED ON:

19 FEBRUARY 2016

- [1] The plaintiff sued the defendant for an amount of Two Hundred and Twenty Nine Thousand Eight Hundred and Eighty Two Rand and Sixty Seven Cents (R229 882.67), being the cost of renovations to a farmhouse, in respect of which the defendant granted him a right of occupation, alternatively, being the cost of renovations effected by the plaintiff to the farmhouse, in consequence of a verbal agreement between the parties. Mr DM Grewar represented the plaintiff and Mr MC Louw represented the

defendant in this court. At the commencement of the trial, counsel informed the court that they had agreed to separate the issues of the merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court, and that this court is required to adjudicate the merits only. The court is indebted to both counsel who submitted comprehensive written Heads of Argument in this matter.

- [2] The plaintiff's case is that in January/February 2011, the defendant granted him a right of *habitatio* of a farmhouse called Wetherun (Wetherun) on the farm Pandam, in the area of Steynsrus, Free State, on which the defendant also lived. The conditions of such *habitatio* are that the plaintiff would restore Wetherun, at his cost, to its original condition or to a habitable condition. In return, the plaintiff would occupy the house and/or live in it for as long as he wants. The plaintiff claims, in the alternative, that he and the defendant entered into a verbal agreement in about January/February 2011 in terms of which the plaintiff could occupy the farmhouse Wetherun for as long as he wants on condition that he restores Wetherun to its original condition or to a habitable condition. I pause to mention that the plaintiff is a Canadian citizen and has temporary residence in South Africa. As a freelance journalist, he is obliged to travel frequently and is in South Africa for a few months at a time.
- [3] As a result of the right of *habitatio*, alternatively the verbal agreement between the parties, the plaintiff undertook renovations to the farmhouse from May 2011 until 14 February 2013, during which time he expended an amount of R229 882.67

for the useful and/or necessary restoration of Wetherun. On 14 February 2013, the defendant summarily terminated the plaintiff's occupation of the farmhouse, alternatively repudiated and/or breached the verbal agreement between them. The plaintiff's claim is consequently based on damages suffered as a result of the breach of the verbal agreement, alternatively on the unjustified enrichment of the defendant at the expense of the plaintiff who has been impoverished in the amount claimed.

- [4] The defendant's case is that the parties did enter into an agreement but on terms different to those claimed by the plaintiff. His version is that they agreed that the plaintiff would restore/renovate Wetherun as claimed by the plaintiff, but that the defendant would not be obliged to compensate the plaintiff for any costs incurred in such renovations, except if the farm were to be sold. In that event the defendant would compensate the plaintiff for any increase in the value of the farm as a result of the renovations. He denied being unjustifiably enriched as a result of the renovations effected by the plaintiff. In addition, the defendant, by way of an amendment to his plea in September 2015, raised a special plea that the agreement between the parties was void *ab initio* because it did not comply with section 3 of the Subdivision of Agricultural Land Act 70 of 1970 (the Act). The agreement was terminable at the instance of either party. He terminated the agreement, as he was entitled to do, as a result of blasphemous statements made by the plaintiff to the defendant and his family.

- [5] The issues before this court are:

- 5.1 Whether the agreement concluded by the plaintiff and defendant is unlawful and/or void for being in contravention of section 3 of the Act;
- 5.2 Whether it was express/tacit/implied condition of the agreement that the plaintiff would be compensated upon termination of the contract by either party, or whether the parties agreed that compensation would be paid to the plaintiff only upon sale of the farm Pandam, if there was an increase in the value of the farm as a result of the renovations.
- 5.3 Whether the defendant was entitled to cancel the agreement because the plaintiff made certain blasphemous statements;
- 5.4 Whether the defendant repudiated the agreement without just cause and is in breach thereof; and
- 5.5 Whether the defendant was unjustifiably enriched as a result of the renovations to Wetherun.

APPLICABILITY of ACT 70 of 1970

- [6] The preamble to the Act states that the purpose of the Act is “To control the subdivision and, in connection therewith, the use of agricultural land” Section 3(d) of the Act stipulates that subject to the provisions of section 2
- “no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person

mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into...

unless the Minister has consented in writing”

- [7] One of the objects of the Act is to prevent subdivision of agricultural land which results in fragmentation of the land so as to render farming thereon uneconomical or unsustainable. In my view, the granting of the right of *habitatio* does not fall within the contemplation or purview of the Act. The portion of land on which Wetherun stood was not intended to be subdivided or to be used for the purpose of farming. The agreement concluded by the parties does not, in my view amount to a lease as contemplated by the Act, which does not define “lease”. **The New Shorter Oxford English Dictionary** defines lease as “A contract between parties by which one conveys property, especially lands (later also rights, services, etc) to the other for a prescribed term, or at will, usually in consideration of a periodic payment”.
- [8] This definition of “lease” read in the context of the purpose and objects of the Act puts the agreement between the plaintiff and defendant outside the scope of the Act. The evidence and the pleadings (prior to amendment of the plea) suggest that the application of the Act to the agreement between the parties was discussed when the plaintiff requested that consideration be given to subdividing, for his benefit, the land on which Wetherun stood. The defendant advised him that is not possible and that it was

probably illegal. This idea appears to have been abandoned and the subdivision of the land, therefore, was not an agreed term of the contract. The amendment to the plea, raising the special plea, was introduced a few months before the trial in this matter commenced, and fortifies my *prima facie* my view that the parties, and the defendant particular, did not consider that the Act applies to the agreement between them.

UNJUST ENRICHMENT

[9] The defendant's evidence is that the farm Wetherun belonged the Lindsay and Helgaard Slabbert Trust (the Trust), and forms part of a bigger unit (comprising six other farms). He testified that he rented the farm since 1992 and bought it in 2002. He farms on the six other farms forming part of that unit of farms. It is not clear if the farm the defendant purchased is called Wetherun or if only the farmhouse, which is the subject matter of this case, bears that name. The parties throughout referred to the defendant's farm, where he resides, as "Pandam". Under cross-examination the defendant agreed that the role of the Trust was never mentioned or discussed. He also said that the Trust, to whom "the deed is registered", was not involved in the agreement between him and the plaintiff. When asked why he referred to the farm and the property as his, his reply was "that's how we talk". It is therefore unclear who owns the farm on which Wetherun is situated, and what the defendant meant when he says he bought the farm after

leasing it for ten years. It would appear, from his evidence that “deed” refers to the title deed relevant to the property.

- [10] The connection between the defendant and the Trust, legally or otherwise, was not placed on record. It seems that the Trust’s ownership of the farm was mentioned to the plaintiff during the discussions regarding the transfer, to the defendant’s heirs, of the rights and obligations he acquired in terms of the agreement between him and the plaintiff . In his plea, he simply denied being unjustifiably enriched at the plaintiff’s expense, without elaborating. Plaintiff’s counsel, Mr Grewar, in his Heads of Argument, acknowledges the Trust’s ownership of the farm. If it is in fact so that the Trust owns the land, then it is the Trust which would be unjustifiably enriched by the improvements made by the plaintiff to the farmhouse Wetherun. The Trust is not a party to these proceedings. In my view, therefore, the plaintiff’s claim based on unjust enrichment against the defendant cannot be sustained.

BREACH OF CONTRACT

- [11] The parties started off on a very cordial note, as evidenced by an e-mail letter from the defendant to the plaintiff dated 3 March 2011. From this letter it is clear that there was on-going communication between them on a variety of topics, but more importantly on “the agreement concerning Wetherun”. The defendant invited the plaintiff to continue exchanging thoughts in this regard, and indicated that he would discuss the matter with his lawyer so that by the time he saw the plaintiff again, he hoped to have a “working document” in place. The defendant also

indicated his excitement over “the whole project” and the plaintiff’s input in regard thereto, offering to assist the plaintiff, “where possible, to create something beautiful”. Both agree that they formed a friendship and the plaintiff stayed on the defendant’s premises for several months while Wetherun was being renovated. For most of that time it appears that the relationship was a close and warm one.

[12] The parties agree that an agreement was entered into between them, and the following terms are common cause:

12.1 The plaintiff would, at his own cost, renovate the farmhouse Wetherun;

12.2 In return, the defendant granted the plaintiff the right to occupy the farmhouse for an indefinite period, possibly even for the lifetime of the plaintiff;

12.3 The agreement was terminable at the instance of either party.

The point of departure is the payment of compensation to the plaintiff. As indicated, the plaintiff alleges that should the contract be terminated, for whatever reason, he would be compensated for the cost of renovations upon termination of the contract. The defendant alleges that the parties agreed that the plaintiff would be paid no compensation unless the farm was sold. It is only in that event that the plaintiff would be compensated for any increase in value of the farm.

[13] A few months into the renovation project, the relationship between the parties became progressively strained. It seems that

the defendant's wife (according to the plaintiff), at some stage, was involved in stipulating the execution of some of the work, which the defendant denies but alleges that his wife was simply giving direction to the workmen to continue with work in the absence of the plaintiff. At one stage, the plaintiff left the defendant's property and rented premises in a neighbouring town, while commuting to the defendant's farm to continue with the renovations. The plaintiff was extensively cross-examined about keeping the room in which he stayed at the defendant's premises, in an untidy state. It seems that this caused much irritation to the defendant and his wife. The defendant admitted to this when he was cross-examined. The length of the plaintiff's stay at the defendant's home appears to have been another source of irritation to the defendant, which contributed to the gradual cooling off of the relationship between them. It seems that the proverbial straw that broke the camel's back was the incident on 14 February 2013 when the plaintiff made the alleged blasphemous utterance/s to the defendant's son.

- [14] The defendant appears to have been enraged by the remarks of the plaintiff, who concedes that he made utterances which upset the defendant, and he apologised to the defendant for such remarks. The defendant clearly did not accept the apology and ordered the plaintiff to (permanently) leave the farm. The plaintiff regarded this as a repudiation of the contract between him and the defendant, accepted it as such and left the farm, effectively halting the renovation project. The defendant pleads that he terminated the contract between the parties as a result of the blasphemous utterance by the plaintiff, as he was entitled to do.

Remarkably, the content of this utterance was not put before this court; the defendant stoically refused to do so, and the plaintiff merely indicated that he was accused of taking the name of the Lord in vain.

- [15] It was not agreed between the parties that the making of blasphemous statements would be a ground for termination of the contract, nor can it be said to be an implied or tacit term of the contract. This much was confirmed by the defendant in his testimony when he said that his religious beliefs did not play a part in the conclusion of the contract nor was it agreed that he could cancel the contract if the plaintiff made blasphemous statements. The defendant alleged that the contract between him and the plaintiff was a “friendship agreement” and asserted that the plaintiff was well aware of his strong Christian beliefs and ought to have known that the defendant could cancel the contract if he made such utterances. In my view, this assertion is misguided and not rational. Even if the plaintiff was previously admonished for making blasphemous statements (according to the defendant’s evidence, and which was denied by the plaintiff), it is not reasonable or rational, in the absence of any agreement to this effect, to import such utterances into the contract and rely on those utterances to cancel the contract, however devout a Christian the defendant is and however aggrieved he may have been by such remarks. It is clear from the evidence of both parties that an amicable relationship between them was necessary for the continuance of the contract. The plaintiff agreed that in view of the strained relations it was better to terminate the contract, but not in the manner and for the reasons advanced by

the defendant. I agree and I will deal further with this later on. The impression that is gained from the reasons put forward by the defendant for the souring of relations between the parties, is that some of the incidents were contrived to caste the plaintiff in a bad light or that there was an over-reaction to certain incidents on the part of the defendant, for example, the untidy room incident.

[16] Mr Louw, in his Heads of Argument correctly asserted that in deciding whether the plaintiff has proved the disputed term of the contract, namely that the defendant is to compensate him for restoration costs if the agreement is cancelled, the court must assess whether the plaintiff's or defendant's version is to be preferred in this regard. In order to make such a finding, the court must assess the credibility and reliability of the parties as witnesses, and weigh their respective versions against the probabilities, taking into account the evidence, as a whole.

[17] In evaluating evidence and dealing with the calibre of witnesses, it is instructive to refer to the dictum in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003(1)SA 11 (SCA) at pages 14-15 paragraph 5**, where the court said the following:

“...the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or

improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. "... a witness' reliability will depend, apart from the factors mentioned... above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. "... this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment... the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."

[18] The plaintiff came across as an educated, articulate and meticulous person. His account of the manner in which events unfolded was confirmed very largely by the defendant. He produced his notes and records relating to the renovations, together with photographs of the farmhouse during different stages of the renovation process, from which it was evident that a large amount of work was undertaken by him. The plaintiff testified that he had previously undertaken renovations of this nature in England and Canada and knew what he was doing. His answers to questions were direct and he had a good recall in respect of dates and the sequence of events. The line of cross-examination of the plaintiff went largely towards the progress of the renovations and incidents which allegedly eroded the relationship between the parties. The plaintiff was steadfast in his recollection of dates and the sequence of events. In spite of the lengthy cross-examination regarding certain incidents that apparently caused irritation to the defendant, it was not suggested that these incidents or the

breakdown in the relationship was a ground for termination of the contract

[19] The defendant was evasive in respect of a number of issues, and did not have the clarity of recall regarding the dates, sequence of events and even the content of some discussions that the plaintiff did. His answers in response to questions regarding his right to cancel the contract indicate a somewhat authoritarian attitude, for example, he said it was his farm, he was responsible for the farm and the people who live there and that he made the rules (relating to how people should behave). His answers in respect of the alleged blasphemous statements by the plaintiff support the plaintiff's contention that the defendant's conduct on the day he was confronted about these statements was emotional and indicated a loss of self-control, fortifying my view that the conduct of the defendant in terminating the contract was irrational. If this was a "gentleman's" agreement or a "friendship" agreement, as alleged, it would have been expected of the defendant to draw to the attention of the plaintiff that continuance of the contract, in the light of the strained relations between them, was no longer possible and to discuss the termination of the contract, as agreed to between them.

[20] With regard to the probabilities in respect of the issue of compensation, the plaintiff explained that because a lifelong right of occupation was agreed upon, the cost of the renovations would be discounted progressively against a nominal amount in respect of occupation of the farmhouse. The nett result would be that over

time there would be no amount owing to the plaintiff in respect of the cost of renovations. This would be the case only if he took occupation of the farmhouse and remained in occupation over an extended period. If the agreement were terminated by either party, then he would be compensated for the cost of the renovations due at that time. He did not take occupation or even complete the renovations, due to the termination of the contract by the defendant. Hence, the amount he expended on renovations up to the date of termination was due to him. The terms of the agreement that he consented to were clearly with the intention of investing in accommodation for himself whenever he was in South Africa. His response to the defendant's version that he would not be paid any compensation if the contract were terminated was that no person in his right mind would agree to such a term. I agree. It makes no economic sense and is illogical, given that he would have no prospect of recovering his money unless the farm was sold.

- [21] The defendant's version is, in essence, that the plaintiff would have to expend a large amount of money and then wait for an event, that may never happen, to be compensated. That someone of the plaintiff's experience and intelligence would agree to such a term or condition is, in my view, improbable and is an indication of the fact that the defendant was not acting in good faith. Another indicator of the defendant's lack of good faith in this matter is his denial that the renovations would have cost as much as the plaintiff is claiming. His view is that such renovations should have cost about Fifty Thousand Rand (R50 000.00). The defendant is a successful farmer who, by his own admission, runs

a large farming operation and has been doing so for twenty seven years. He also testified that he is good with finances and “balances the budget”. It takes a high degree of skill and financial acumen to run such a large operation. It is also his evidence that he effected repairs and renovations to the buildings on his farm, using Mr Motaung (the contractor hired by the plaintiff) to do so. It is unlikely that he would have no knowledge of the cost of such renovations. Given the extent of the renovations done by the plaintiff, which are not in dispute by the defendant, it is remarkable that the defendant asserts that such extensive work can be done for a quarter of the amount claimed by the plaintiff. It is difficult to resist the inference that the defendant is fabricating a version in order to escape compensating the plaintiff for what he is entitled to.

[22] I am, therefore, of the view that in respect of the term of the contract relating to compensation, the probabilities favour the plaintiff’s version, and that the agreement between the parties was that the plaintiff would be compensated for the cost of renovations upon termination of the contract. It is improbable, taking the evidence as a whole, that the plaintiff would have agreed to compensation as alleged by the defendant. I also find that the defendant was not entitled to cancel the contract on the basis of an alleged blasphemous utterance by the plaintiff and that such termination was unlawful.

ORDER

[23] In the circumstances, I make the following order:

23.1 Judgment on the merits is granted in favour of the plaintiff.

23.2 The defendant is ordered to pay to the plaintiff such damages in respect of the renovations to the farmhouse Wetherun, as the plaintiff is able to prove.

23.3 The defendant is ordered to pay the plaintiff's costs on a party and party scale.

S. NAIDOO, J

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