

**IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)**

DATE: 13 NOVEMBER 2007  
CASE NO: 35536/2002

UNREPORTABLE

In the matter between:

**JORGEN BLADT**

**FIRST PLAINTIFF**

**REITZ GAME RESERVE (PTY) LTD**

**SECOND PLAINTIFF**

VS.

**DEON ROBERT RETIEF**

**DEFENDANT**

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**JUDGMENT**

**BOTHA J:**

The first plaintiff is Mr Jorgen Bladt, a Danish national.

The second plaintiff is Reitz Game Reserve (Pty) Ltd.

The first defendant is Mr D.R Retief an attorney practising in Musina. He was the only defendant cited by the plaintiffs, but in the counterclaim he is cited as the first defendant. The second defendant in the counterclaim is the second plaintiff in convention. I shall refer to the defendants as they are cited in the counterclaim.

The third defendant in the counterclaim is the Aage V Jensen Charity Foundation (the Foundation).

The plaintiffs instituted three claims against the first defendant.

The first claim, a claim for the rendering of an account was settled during the course of the trial. The parties drafted a document, which I have marked "X". They wish it to be made an order of court.

The second claim is for payment of an amount of R38 835.62. The third claim, which is in the alternative to the second claim, is for payment of an amount of R24 412.83.

It is alleged that on 30 June 1999 the first plaintiff granted the first defendant a written power attorney in terms of which the first defendant would act as the first plaintiff's attorney and agent in the Republic.

It is also alleged that during July to August 1999 the first defendant concluded an agreement with the first plaintiff, who represented the second plaintiff, a company to be formed, in terms of which the first defendant would act as the second plaintiff's attorney and agent in the Republic and also serve as a director of the second plaintiff.

It is alleged that the first defendant, in breach of his contractual duties and his duties as a director of the second plaintiff failed to collect occupational interest due to the second plaintiff in terms of a deed of sale concluded by the second plaintiff and the third defendant. It is alleged that in terms of the deed of sale the third defendant would take occupation of the farm Reitz on the date of signature of the deed of sale, which was 23 September 1999. It is alleged that in terms of clause 4 the third defendant had to pay occupational interest on the purchase price of R1 875 000.00 at 12% per annum to the date of transfer. It is

alleged that transfer of the property to the third defendant took place on 23 November 1999. It is alleged that occupational interest in an amount of R36 835.62 accrued to the second plaintiff and that the first defendant failed to collect it.

Claim three is based on an alleged admission of liability allegedly made by the first defendant to a representative of the first plaintiff, one Van Niekerk, on 17 December 2002.

The deed of sale between the second plaintiff and the third defendant was annexed to the plaintiff's particulars of claim.

Clause 3 thereof reads as follows:

"Transfer of the property will be passed to the Purchaser as soon as practicable after the costs referred to in (i) above and the full purchase price have been paid or guaranteed as aforesaid. Should transfer of the property not be effected by the date of occupation referred to in Clause 4 the Purchaser shall with effect from that date to date of transfer be liable for payment of interest to the Seller on the purchase price at the rate of 12% per annum".

The first sentence of clause 4 reads as follows:

**"The Purchaser shall be placed in occupation of the property on the date of signature thereof, with effect from which date, all risk, profit and loss attaching thereto shall be the responsibility of and for the benefit of the Purchaser; subject to the following:".**

In his plea the first defendant denied that the deed of sale correctly reflected the agreement between the second plaintiff and the third defendant. He alleged that the true intention of the parties was that occupation would be given on the date of transfer. In a counterclaim rectification of the deed of sale is asked. In the counterclaim the second plaintiff was cited as the second defendant and the Foundation as the third defendant.

The first defendant also pleaded prescription, alleging that the cause of action arose prior to 26 November 1999 whereas the summons was issued on 20 December 2002.

The first defendant assumed the duty to begin.

He testified that at the end of June 1999 he was approached by a Danish national, Mr Krossteig, who had an option from Mr

N.G Fourie to buy the farm Reitz for R1.75 million. See Exhibit A46.1 A. Mr Krossteig told him that he actually obtained the option on behalf of someone else, who turned out to be the first plaintiff. He asked him to draft a deed of sale. Exhibit A46.1 to 46.8 is the deed of sale between Mr Fourie as seller and the first plaintiff as the purchaser drawn up by him. It was signed on 29 June 1999. The first plaintiff signed the deed of sale as trustee for a company to be formed. The idea was that his Danish company would hold the shares in the company to be formed.

He then received instructions to form the company. The first plaintiff gave him a general power of attorney (see A 46.9 - 46.11) and a special power of attorney to establish the company. See A 114. The first plaintiff also asked him to serve as a director of the company to be formed. The company that was formed is the second plaintiff.

The third defendant was upset about the sale of Reitz to the first plaintiff. Mr Krossteig later told him that he had discussed the problem with the first plaintiff and that the first plaintiff was prepared to withdraw from the sale. Mr Krossteig later told him

that the price would remain the same: R1,75 million. He drafted a deed of sale and kept it in his file.

Later on he received instructions from the first plaintiff. The first plaintiff said to him that he wanted to be compensated for his wasted costs, but that it should form part of the purchase price. He drafted a further deed of sale.

Because Mr Fourie was under pressure, the first plaintiff instructed him to proceed with the transaction between Mr Fourie and the second plaintiff so that Mr Fourie could get his money.

On 19 August 1999 the first plaintiff confirmed that he accepted the third defendant's offer to buy Reitz at the original price of R 1,75 million plus costs. See A64.2.

Shortly, thereafter he discussed the matter with the director of the third defendant, Mr Skov, who told him that he and the first plaintiff had agreed on a purchase price of R1 ,85 million.

On 20 August 1999 the first plaintiff sent him a letter in which he asked him to prepare a deed of sale. He invited him to make suggestions in respect of the costs. He then prepared a new draft

which reflected a purchase price of R 1,85 million. It made provision for occupational interest.

He compared the provisions the contract between Mr Fourie and the first plaintiff with the provisions of the contract between the second plaintiff and the third defendant.

The first plaintiff made it clear to him that he had to capitalize the loss of interest. The reason was that it was important to the first plaintiff for tax purposes. He gave instructions to effect the necessary amendments to his draft. Occupation had to be given after transfer and occupational interest had to fall away.

He assumed that the alterations were effected. He cannot remember if he checked the alterations. The fact is that a fault crept in. The intention was that interest would form part of the price

Interest was calculated till 31 October 1999 on the basis that it would take 45 days to get transfer.



In paragraph 3 of the deed of sale the second sentence should be deleted. In paragraph 4 it should be stated that occupation will be given against transfer.

He referred to his fax to Mr Skov dated 22 September 1999 (A75). He gave the first plaintiff a copy of it as well as of the deed of sale. They did not go through the deed of sale clause by clause.

He told the first plaintiff that Mr Skov was not interested in early occupation. They did not agree on occupational rental. The second defendant would be compensated for the loss of the use of its money.

In his letter dated 25 August 1999 to the first plaintiff, he referred to costs of R190 000.00. That included transfer duty. At that stage he was not sure that it would be recovered.

In a letter dated 31 August 1999 the first plaintiff confirmed that his costs should preferably reimbursed by means of an increase in the purchase price. See A69.

He explained his fax dated 22 September 1999 to the first plaintiff in his office.

A135 shows the last page of the deed of sale as it was received from the third defendant. The date was filled in by his typist. See A77.11.

His appointment as a director was merely a question of convenience. He had no powers or functions. The idea was that he should be available to act on instructions of the first plaintiff if anything had to be done in the Republic.

He denied that he received the keys of the farm on 22 September 1999. The keys could have been given to him at a later stage.

He was asked about the allegation that he admitted to one Van Niekerk that he owed the first plaintiff R24 412.83. He explained that his office would have been closed on 17 December 1999, it being his habit to close his office on the Friday preceding the 16<sup>th</sup> December. The letter of Wiseguys dated 17 December 2002 (not 2000) refers to a conversation on 13 December 2002.

He denied that he made such an admission on that day. He explained that after the first plaintiff terminated his mandate he received many enquiries from a Mr Muller, a Mr Genis, a Mr Smit and a Mr Stoop. The first time that occupational interest was broached, was in a fax from Wiseguys dated 10 December 2002. See A 136.1. He did not see the fax when it was received. When Mr Van Niekerk telephoned him on 13 December 2002 he told him that there was no provision for occupational interest because it had been capitalized. When he was told that it stood in the deed of sale, he looked at it and found to his surprise that it was included in the deed of sale.

He told Mr Van Niekerk that it did not accord with his recollection of the transaction and that he would investigate the matter and revert to him. He said to him that if it was payable, they would rectify the matter. Mr Van Niekerk mentioned prescription. He said that he would obtain instructions. He told Mr Van Niekerk that Mr Skov was a gentleman who would pay If anything was payable. He did not make an admission. He pointed out that according to the auditor, Mr Gert Smit, the third defendant had overpaid the second plaintiff by R15 000.00. He said that if occupational interest was payable that amount had to be taken into

account. He also pointed out that transfer took place on 25 November 1999.

The letter from Wiseguys dated 17 December 2002 (A 136.6), in which it is alleged that he admitted liability, was only received by him when he returned to his office in the New Year. At that stage he also received the summons. He did not answer the letter because it is not his habit to litigate by way of correspondence.

In June 2002 the first plaintiff revoked his powers of attorney.

In cross-examination he conceded that if occupational interest was payable, it would have been his duty as transfer attorney to see to it that it was paid by the purchaser.

He could not remember that the keys of the farm were handed over on 23 September 1999. It is possible. There could have been more than one set of keys. Mr Fourie would in any event have had a set of keys.

Transfer duties were eventually refunded. When he sent the fax of 22 September 1999 he was satisfied that it would be

refunded. When he wrote the letter dated 25 August 1999 (A67) he was still in doubt about the refund.

The calculation of costs was done on 22 September 1999.

He agreed that the costs and interest were only calculated on the amount of R1 ,75 million and not on R1 ,875 million.

He agreed that the fax of 22 September 1999 stated that the third defendant could take occupation immediately. He agreed that that accords with Clause 4 of the deed of sale. Mr Skov had told him, however, that the third defendant was not interested in early occupation. Immediate occupation was offered by the first plaintiff and he conveyed it to the third defendant.

It was necessary to include occupational interest in his draft because occupational interest had become payable in terms of the deed of sale between Mr Fourie and the first defendant.

The idea of occupational interest is to give the seller the fruit of his money if he has given occupation before transfer.

Occupational interest in respect of a farm is different from

occupational interest in respect of a house. In the case of houses there is a market. Farms are not let for short periods. In the case of a game farm, the season ends in August.

In this case occupation was a non-issue. There were two Danish buyers whereas the original seller was still in possession. The first plaintiff never really occupied the farm except for two short visits.

He conceded that if occupational interest was payable, Mr Van Niekerk's calculations were correct.

He conceded that his clients had reason to be dissatisfied with his service in 1999-2000 because he was distracted by the fatal illness of his wife.

Mr Leif Skov is the chairman of the third defendant, the Foundation.

At the end of June 1999 he was in South Africa and he visited Mr Krossteig in Musina. He wanted to set up a nature reserve in the area. Mr Krossteig showed him two farms and he

started negotiating with the owners. He went to the first defendant for the purposes of the drafting of a deed of sale. At that stage Mr Krossteig told him that the first plaintiff had brought Reitz, which was situated in the middle of the nature reserve that he was planning. Mr Krossteig said that he was sorry that he had shown Reitz to the first plaintiff. He said that he was sure that he could persuade the first plaintiff to buy another farm. Some time later Mr Krossteig told him that the first plaintiff agreed that the third defendant could buy Reitz for the same price.

He wrote a letter to the first defendant on 12 August 1999 in which he said that he would give the first plaintiff a ring. See A64.1 A. He telephoned the first plaintiff on about 15 August 1999. They agreed that the third defendant could buy Reitz. They agreed that the first defendant would pay the same price as the first plaintiff paid to Fourie and that costs should be added. He knew that transfer costs and interest were involved. The first plaintiff said that the costs had to be added to the price of R1,75 million. They discussed interest. The first plaintiff told him that he had paid Mr Fourie the purchase price.

On 19 August 1999 the first plaintiff sent him a letter confirming the agreement. See A64.2.

At that stage they did not know the amount of the costs. The first defendant would come up with the figures.

In a letter dated 20 August 1999 to Mr Krossteig he expressed his impression that the first plaintiff was relieved to get out of the sale. See A64.5. Also on 20 August 1999 he wrote a letter to the first plaintiff confirming the agreement that the third defendant would buy Reitz for the existing purchase price with the addition of costs. See A64.7.

He then instructed the first defendant to draft a deed of sale.

On 22 September 1999, when he was on his farm in Denmark, he received a fax from the first defendant in which the costs to be added to the purchase were specified. They amounted to R124 886.97 comprised of four components:

- (a) three trips to South Africa: R60 000.00;
- (b) transfer costs: R15 863.00;



- (c) interest paid to Fourie for the period up to registration: 14 August 1999 to 16 September 1999: R17 523.97;
- (d) loss of interest on transfer duty of R175 000.00 for three months: R5 250.00;
- (e) loss of interest on the purchase price between the date of transfer to him on 16 September 1999 to the end of October 1999 when payment would be received from the third defendant R26 250.00.

He was upset when he received this fax, but he felt pressurized and decided to accept the additional amount of costs. That amount was added to the amount of R1,75 million in a draft deed of sale annexed to the fax, bringing the purchase price to R1,875 million. He signed the draft deed of sale and faxed it back to the first defendant. A 129 - A 135 is the signed deed of sale he faxed back.

He went through the letter faxed to him by the first defendant. In the deed of sale he saw that the price represented R1,75 million plus R125 000.00. He looked at the annexure listing the movables.

Clauses 3 and 4.1 are not in accordance with the agreement between him and the first plaintiff. Clause 3 is nonsensical because it means that the third defendant had to pay interest twice.

Clause 4 was wrong because they agreed that occupation would be taken at the time of the transfer. The third defendant had nobody there to take transfer. If he had realized the problems he would not have signed the deed of sale.

In clause 3 the second sentence should be deleted. Clause 4 should have provided that the purchaser would take possession against transfer.

The third defendant took possession of the property in November 1999. Transfer took place on 25 November 1999.

In June 2004 he received a letter dated 21 June 2004 from attorney Tromp. See A 136.11.1.

On 21 July 2004 he wrote a letter to the first defendant in which he told him that he did not owe the first defendant anything. See A 136.11.1.

On 18 August 2004 he answered Mr Tromp's letter. See A 136.12. He stated that it was agreed that occupational interest would be payable.

In cross-examination, with reference to his letter dated 18 August 2004, he explained that at a stage the first plaintiff wanted even more than R 1,75 million plus costs. He refused to pay more. He agreed that Mr Retief's fax of 22 September 1999 did not mention the occupation of the farm.

When he had the discussion with the first plaintiff they were aware that the third defendant could not take possession before the second plaintiff took transfer.

He knew that the transfer from Fourie to the second plaintiff took place on 16 September 1999.

He and the first plaintiff agreed that the third defendant had to pay the interest that the second plaintiff had to pay to Fourie.

There was no agreement on the interest rate. The period for which interest would be payable was not known.

He accepted that interest was paid to make good the loss of the use of money.

They agreed that the third defendant would take possession at the time of registration.

According to him he had already reached an agreement with the first plaintiff before he received the letter dated 19 August 1999. See A64.2. That was through Mr Krossteig.

He was aware of the first plaintiff's letter dated 10 August 1999 to the first defendant. He agreed that the first plaintiff's letter of 19 August 1999 (A64.2) did not mention the issue of occupation. Nor did he mention it in his letter dated 20 August 1999 to the first plaintiff. See A64.7.

He never saw the letter dated 24 August 1999 by the first plaintiff to the first defendant (A65) in which a price of R1.9 million is mentioned.

With regard to the first defendant's fax of 22 September 1999 (A75) he said that he would have opposed the first applicant's claim for travelling costs if he had raised it. Items b, c and d in paragraph 2 were discussed.

They knew occupation would be given after registration.  
That is why interest was payable until registration.

When he had his discussion with the first plaintiff nothing was said about the animals on the farm. Mr Krossteig had given him an indication of what was on the farm.

He agreed that many clauses in the deed of sale were not discussed.

He repeated that if the third defendant had to pay occupational interest, it would have to pay interest twice.

He was referred to a paragraph in the first defendant's fax dated 22 September 1999 in which it is stated the third defendant could take over the farm immediately. He said that if they moved onto the farm they would not pay interest.

He was referred to his letter to Mr Tromp dated 18 August 2004. It was pointed out that he did not say in the letter when occupation could be taken. What he said was that there was no agreement to pay occupational interest. He agreed. It was pointed out to him that his evidence was to the effect that there would be no occupation before transfer. He agreed.

That concluded the evidence on behalf of the first defendant.

The first plaintiff and Mr S Van Niekerk testified on behalf of the plaintiffs.

The first plaintiff confirmed that he agreed to withdraw from the transaction with Mr Fourie when he heard that the Foundation was interested in the farm Reitz.

When he was in Denmark Mr Skov telephoned him. Mr Skov said that he would give him a price that would make the matter neutral in the sense that he would not suffer a loss. Mr Skov suggested that since they both knew the first defendant, the first defendant should take care of the price.

At that stage he did not know what the costs of his transaction with Mr Fourie were.

On 22 September 1999 he was back in South Africa and on that day he visited the first defendant in his office. The whole transaction was discussed. The next day the first defendant told him that Mr Skov had signed the deed of sale. He asked him to go through it and to sign it.

He did not discuss occupational interest with Mr Skov. He does not know whether he discussed it with the first defendant. It was obvious.

Until 23 September 1999 Mr Fourie looked after the farm. When asked whether he knew that the third defendant would take occupation on signature, he answered that it had to take

responsibility for the farm on his signature because he was leaving the farm. The first defendant was assisting him in buying another farm. The deed of sale in respect of the other farm, Bakstaan, was signed on the same day.

He never saw the fax dated 22 September 1999 sent by the first defendant to Mr Skov. The costs were left for the first defendant to calculate. They were not discussed. The first defendant said that if he signed the deed of sale it would be neutral.

He described how his relations with the first defendant started and how they deteriorated in 2000. He only found out that occupational interest had not been paid some 2 or 3 years later. He was told of the unpaid occupational interest by Mr Van Niekerk of Wiseguys.

In cross-examination he denied that tax considerations were mentioned in respect of the transaction with the first defendant.



During their telephone conversation he and Mr Skov agreed that the first defendant would draft a deed of sale and make calculations for the purposes of the fixing of the price.

He agreed that the first defendant appeared to be efficient and that he had given him a power of attorney.

It was on the first defendant's advice that the first defendant was appointed as a director of the second plaintiff. He agreed that in Denmark it was normal for attorneys to be appointed to the boards of companies.

He expected the first defendant to report to him, but he did not. He agreed that on 8 October 1999 he gave the first defendant permission to forward financial statements relating to Bakstaan to him. SeeA82.

He never discussed the terms of the sale of the farm Reitz. He knew from what Mr Skov had told him that he would break even.

Mr Skov signed the deed of sale. He signed it. The defendant said that he would break even. To his mind that was the end of the story. The first defendant drafted the document. The price would be such that he did not make a loss. In fact the price was a little less than what he wanted but he agreed to it.

He was shocked by Mr Skov's evidence. Mr Skov should have been grateful to him. He saw Mr Skov for the first time in court.

The details of the costs were not discussed by him and Mr Skov. The first defendant had the figures. He denied that he and Mr Skov discussed interest.

As far as he was concerned everything that preceded the signing of the deed of sale was water under the bridge. He trusted the first defendant in respect of the calculations.

It was put to him that if the deed of sale was incorrect it had to be corrected. He disagreed and expressed the view that the written document was binding.

He could not remember that interest rates were discussed.

When it was put to him that they may have been discussed, he replied that it was still water under the bridge.

He seemed to disagree that costs would be added to the original purchase price. He and Mr Skov discussed the principle that the farm would go to the third defendant and that he should make no loss or profit. The details were left to the first defendant.

When it was put to him that it was mentioned that occupation would be given on transfer, he answered that nothing was discussed.

He denied that the capitalization of interest for tax purposes was discussed.

Eventually he agreed that costs would be added to the purchase price.

He agreed that he and the first defendant discussed the terms of the deed of sale on 22 September 1999. He cannot

remember what was discussed. The deed of sale relating to Bakstaan was also discussed.

He is sure that the first defendant must have discussed the composition of the additional R125 000.00 but he cannot remember anything. He cannot recall that he received a copy of the first defendant's fax dated 22 September 1999.

He agreed that the first defendant must have given him calculations that made sense.

When it was put to him that according to the first defendant and Mr Skov there would be no payment of interest apart from the purchase price of R1, 875 million, he disagreed and pointed out that he accepted the deed of sale.

He denied that the intention was that there should be a fixed price.

He was satisfied with the deed of sale as it stood. He cannot recall that he read it. He was in a hurry. He -trusted the first

defendant. He cannot remember any discussion of specific clauses.

He was asked why occupational interest was provided for if interest was already included in the amount of R125 000.00. He said that he had no idea why it was so.

The first defendant told him that the deed of sale was the way to ensure that he made no loss or profit. When it was put to him that according to Mr Skov and the first defendant the deed of sale was incorrect, he asked why they waited six years to tell him that.

He did not read the deed of sale properly. He did not go through it line by line.

The first defendant drafted the deed of sale. Mr Skov signed it. He signed it. Everything else was water under the bridge.

Clause 4 is correctly worded. When he sold the farm, he left it. He agreed that he did not read the clause.

He could not find out that the occupational interest had not been paid because he did not have the necessary books at his disposal. He could not get them from the first defendant. The issue of occupational interest popped up when Mr Van Niekerk started digging.

His bookkeeper, Mr Stoop gave up when he could not get documents from the first defendant.

He denied that occupation was of no great concern to him. He did not want to be responsible any more.

Mr S Van Niekerk is a chartered accountant attached to Wiseguys of Tzaneen. After he was approached by attorney Muller he became involved in the affairs of the first plaintiff. The books of the plaintiffs that he received were incomplete. He received a mandate to bring them in order. He proceeded step by step to bring the books in order.

After he had received a letter dated 13 November 2002 A107) from the first -defendant, he thought that the first defendant did not owe the plaintiffs anything.

When he went through some contracts, however, he discovered that the occupational interest payable in terms of the deed of sale relating to the farm Reitz had never been paid.

That led to his letter dated 10 December 2002 to the first defendant. See A 136.1. In the letter he calculated the amount of the interest to be R38 835.62.

He discussed the matter with the first defendant. He thinks it was on 13 December 2002. The first defendant agreed that the amount was never paid. He brought up the issue of an amount of R 15 000.00 for which a credit should be given. He agreed to see to payment of the balance.

On 17 December 2002 he sent a letter (See A 136.6) in which he thanked the first defendant for agreeing to a portion of the occupational interest. He hoped to receive payment. The nett amount due after the credit of R15 000.00 is R24 412.53 as set out in the letter.

In cross-examination he pointed out that he never was the auditor of the second plaintiff because he is a director.

He formed his initial view that the first defendant did not owe the plaintiffs anything after he had examined the first defendants trust account.

His opinion that the first defendant owes the occupational interest is based on the assumption that clause 3 is correct.

When he called the first defendant on 13 December 2002, the first defendant agreed to look into the matter. The first defendant said that he would call him back. He received the return call on his cell phone. He cannot recall the exact conversation. He thinks the R15 000.00 was discussed during the second conversation.

The first defendant indicated that he would pay the balance. When it was put to him that the obligation was an obligation of the third defendant, he said that he was not a lawyer. When asked why the first defendant undertook to pay the balance, he answered that he did undertake to pay.

He agreed that in terms of the deed of sale the third defendant had to pay occupational interest. He agreed that if the



first defendant said "I agree" it could refer to him or the client. He expressed the view, however, that the first defendant had to pay. He handled everything and he had to collect the occupational interest.

He agreed that according to him the basis of the first defendant's liability was as set out in the second page of his letter dated 10 December 2002, namely that the first defendant attended to the transfer and omitted to pay the occupational interest due to the second plaintiff. See A 136.2.

It was put to him that the liability to pay the occupational interest must have been a liability of the third defendant. He answered that the first defendant was liable because he made every other payment.

He denied that the fax of 22 September 1999 (A76-77) sets out the first plaintiff's costs. He had seen the letter but he did not rely on it.

If one looks at the flow of cash the first plaintiff only recovered R107 000.00 of his costs.

He accepted that the period over which interest was calculated in paragraph 2e of the fax dated 22 September 1999 (See A 76) overlaps with the period over which he calculated the amount of R38 835.62.

The total amount of R125 000.00 (or R124 000.00) never benefited the first plaintiff. According to his calculations the first plaintiff benefited in an amount of R107 000.00 which was shown as a profit in the books of the second plaintiff.

He accepted that his formulation of the basis of the first defendant's liability in his letter of 10 December 2002 could have been more careful.

He was asked to what degree the first defendant agreed to pay occupational interest. He answered that they agreed that occupational interest was payable, that they agreed on the balance of an amount and that they reached a point where the first defendant said that he would make payment.

This agreement was reached during the second telephone conversation, still on 13 December 2002.

He was asked whether he could still recollect the conversation. He said that he remembers it as much as he can.

He sent a fax as confirmation. See A 136.6. When it was put to him that the first defendant told him that interest had been capitalized, he answered that they discussed many things. He cannot remember that it was discussed, but it could have been mentioned. In the end they agreed that occupational interest was not paid. He said it was a mistake.

He was referred to his letter dated 17 December 2002 (See A 136.6) and it was put to him that it appears from the letter that there was no certainty on what was agreed. He answered that there was no uncertainty about item 1.

It was put to him that when the first defendant said that it was a mistake, he could have referred to the deed of sale. He disagreed. The gist was that there was a mistake, the third defendant should have paid.

He agreed that he could have mentioned the issue of prescription.

When it was put to him that the first defendant told him that he would revert to Mr Skov and that Mr Skov was a gentleman who would pay, he answered that he did not remember it, but that he could not dispute it.

If the first defendant had said to him that Mr Skov would pay if occupational interest was payable, he would not have been satisfied.

After the conversations on 13 December 2002 he investigated the two items listed in his letter of 17 December 2002. Item 1 was simple. Item 2 was complicated and referred to an amount of R14 553.86 that had to be put off against another amount of interest.

He accepted that the first defendant could have received his letter of 17 December 2002 together with the summons and that there would have been no point in any further correspondence.

That concluded the evidence on behalf of the plaintiff.

The parties handed in a written agreement of settlement regarding claim 1.

I shall start with the plea of prescription. Even though the plaintiff did not file a replication, I am of the view that it must be accepted on the evidence that the plaintiffs could not reasonably have realized by 26 November 1999 that no occupational interest had been paid. In fact they could not reasonably have realized that for some months to come. The first plaintiff was living in Denmark and he was dependent on the first defendant who held a general power of attorney on his behalf.

The issue may not have been pleaded, but in my view it was sufficiently canvassed in the evidence for the court to find that in terms of section 12(3) of the Prescription, 1969 Act 68 (Act 68 of 1969) prescription did not commence to run at least before the beginning of January 2000. That puts paid to the plea of prescription.

It was accepted in argument that where all the signatories to the deed of sale were joined as parties in this case, it was competent for the first defendant, who was not a party to the deed

of sale, to rely on rectification. Mr A.J Louw se, who appeared for the first defendant, referred me to **Christie Law of Contract in South Africa, 5th edition 332, and Movie Camera Company (Pty) Ltd v Van Wyk [2003] 2 All SA291C at 301 c - 302-a.**

Mr Snyman, who appeared for the plaintiffs', argued that the *onus* on a party relying on rectification is a heavy one. I do not think it is a heavier *onus* than the normal *onus* in civil cases, but I can appreciate that it must be difficult, if not impossible, to prove rectification if the other party alleges that he was involved in the negotiations preceding the drafting of the written document and that the written document exactly conforms with his intentions. That is not the case in this matter.

The first plaintiff, on his version, did not read the deed of sale in any detail. He did not discuss it in any detail. He left the drafting of the document to the first defendant. On his version he did not discuss issues like occupation and occupational interest. He simply assumed that the document he signed gave effect to the agreement in principle that an amount would be added to the original price of R1.75 million that would compensate him for the loss of having to buy another farm. The calculation of the costs to

be added to the amount of R1. 75 million was left entirely to the first defendant.

In the circumstances the first plaintiff is not in a position to gainsay the evidence of the first defendant.

The first defendant's evidence about the terms of the agreement is supported by that of Mr Skov and it is also supported by his fax dated 22 September 1999 (A75, 76).

The evidence of the first defendant and Mr Skov that the first plaintiff's loss would be capitalized and added to the purchase price, is corroborated by the first plaintiff's letter dated 31 August 1999. See A69. It is supported by the fax dated 22 September 1999, which sets out in detail how the increase of R125 000.00 is composed. It is clear from the fax dated 22 September 1999, that the purchase price would be increased by an amount that included interest beyond the date of signature, until the estimated date of transfer. The probabilities are overwhelming that the inclusion of that amount was intended to represent occupational interest.

Mr Snyman argued that in this transaction there was room for a distinction between occupational interest representing compensation for the loss of the use of capital and occupational interest representing rental. I do not agree. There is no evidence that the mere occupation of the farm was of any commercial value. It could hardly be the case where Mr Fourie would remain in partial occupation until 31 October 1999. It is also significant that in the other deeds of sale before the court (the transactions with Fourie and Ludeke) there was no question of rental being charged besides interest.

I accept the evidence of the first defendant that with two Danish purchasers and Mr Fourie in partial possession until 31 October 1999, occupation was very much a non-issue.

The first plaintiff admits that he never discussed occupational interest and that he never saw the reference to it in the deed of sale. He can therefore not say that it was to his knowledge part of the contract between the parties and that it should be part of the deed of sale.



The main problem of the first plaintiff is that on his version the mind that worked for him was that of the first defendant. There is simply no way that he can rely on the cold letters of the deed of sale if the first defendant says that the document did not conform with what he intended.

The first defendant gave an plausible explanation of how the mistake crept in. He explained in his fax of 22 September 1999 how the increase of R125 000.00 was calculated.

The fact that it did not in the eyes of the first plaintiff, or Mr Van Niekerk, seen *ex post facto*, achieve adequate compensation, is irrelevant.

The first plaintiff tried to distance him from the fax of 22 September 1999. He said that he never received a copy of it. The first defendant said that he discussed it with the first plaintiff and he gave him a copy of the fax. This evidence was not disputed in cross-examination. It is likely and I accept it.

For all these reasons I accept the evidence of the first defendant and Mr Skov on the issue of rectification.

I find that the first defendant has discharged the *onus* of proving rectification as claimed.

On the issue of whether there was an admission by the first defendant to pay such occupational interest as may be owing the onus is on the plaintiff.

On this issue I am confronted by two mutually destructive versions. Nobody suggested that the conflict can be resolved with reference to credibility alone. It has to be resolved on the probabilities.

I formed no negative impressions of the first defendant. Where he was remiss he was prepared to make the necessary concessions. His version of the conversations between him and Mr Van Niekerk is logical and it makes sense. Although he did not deny that he could be liable to the plaintiffs, it remains improbable that he would without more assume liability where the primary liability lay with the third defendant.

I also did not form any negative impression of Mr Van Niekerk. As a director of the second plaintiff and given his mission

he cannot be described as impartial. He also appeared to be somewhat dogmatic and dismissive of evidence like the fax dated 22 September 1999.

It is possible that in his zeal, after having read the deed of sale without taking into account the background such as the fax dated 22 September 1999, he made assumptions and formed impressions that may be wrong.

He presumably did not make notes of the conversation on his cell phone which he received in a parking lot. He clearly did not remember everything that was discussed. The fact that he concedes that the capitalization of interest could have been discussed narrows the gap between his evidence and that of the first defendant. It could only have been discussed if the first defendant raised it to show that occupational interest was not payable. He mentioned the fact that it was agreed that occupational interest had not been paid. That was not the point. It was common cause.

He does not dispute the possible mention of the issue of prescription, which, at the time, must have been a very likely topic.

**3. In respect of claim 1 the settlement agreement marked X is made an order of court.**

The context in which the first defendant acted is very plausible. It implies, however, that the first defendant did not assume personal liability but suggested that Mr Skov, being a gentleman, would not raise a technical defence such as prescription.

The fact is that Mr Van Niekerk could not remember everything that was discussed. He had to concede that issues not related by him could have been discussed. It is possible that he has a selective memory subconsciously influenced by his preconceived idea that occupational interest was payable because the deed of sale provided for it and that he did not pay attention to the nuances of what the first defendant was saying.

I am not convinced that the version of Mr Van Niekerk is more probable than that of the first defendant. For that reason claim 3 cannot succeed.

**In the result the following order is made:**

- 1. Claims 2 and 3 are dismissed with costs.**
- 2. Prayer 1 of the counterclaim is granted.**