REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

14/11/2014 ..... L.S. Webster

DATE SIGNATURE

Case Number: A719/2011

DATE HEARD: 10 SEPTEMBER 2014

DATE OF JUDGEMENT: 14-11-14

In the matter between

MICHAEL RODNEY WALLACE SCREEN **APPELLANT**

And

LOUIS JOHN HAVEMANN **RESPONDENT**

JUDGEMENT

SWARTZ AJ

[1] This is an appeal and cross-appeal to the full bench of this division against a judgement delivered by the trial court on 20 September 2009, exactly five years ago to the day of hearing this appeal. Leave to appeal was granted on 4 August 2011. Initially the respondent raised a *point in limine* that the appeal and cross-appeal had lapsed. The appellant

sought condonation for the late filing of the record of appeal and the consequent lapsing of the appeal. This was opposed and the respondent argued that the appeal and cross-appeal had lapsed due to the effluxion of time and that the appellant's delay had exceeded all reasonable bounds. After argument and consideration, condonation for the late filing of the appeal was granted.

[2] The nature of the action has its origin in section 28 (1) of the Alienation of Land Act 68 of 1991. The appellant issued summons against the respondent claiming payment of two amounts, namely R75 000 and R162 113, 57. It is common cause that the appellant and the respondent concluded an agreement which was *null* and *void* in terms of the provisions of the Alienation of Land Act No.68 of 1981. The respondent instituted counter claims for ejectment of the appellant from his property; compensation for occupation of his property and payment of the sum of R152 610, 98, being the claim for the demolition and removal of the structures erected, and the restoration of the land and pre-existing buildings.

[3] The trial court ordered the respondent to pay the appellant the amount of R75 000 plus interest and absolved the respondent from the instance with regard to the appellant's second claim. The second claim for the payment of R162 113, 57 was in respect of improvements the appellant made to the respondent's property, in the *bona fide* belief that the agreement was valid. He further ordered the appellant to vacate the respondent's property and to pay him the amount of R27 394, 20, which amount the appellant conceded he is liable to pay for the reasonable costs in order to rebuild a portion of the barn demolished by the plaintiff. The trial court absolved the plaintiff from the instance with regard to the respondent's claim for compensation for occupation of his property and ordered each party to pay his own costs.

This is an appeal and cross appeal against that order, with leave from the court *a quo.* It is contended by the appellant that the trial judge erred in finding that the erection of a building without plans disentitled the appellant to claim compensation in terms of Section 28 (1)(a)(ii)(aa) and (bb) of Act 68 of 1981. Furthermore, that he has a right of retention as a result of the improvements to the property of the respondent and alternatively that, because of the non-compliance with the provisions of either Act 19 of 1998 or Act 62 of 1997, an order for ejectment was granted incorrectly. The respondent on the other hand contends that the appellant is not entitled in law to claim compensation for the structures erected by him and, that the structures erected by the appellant do not enhance the market value of the land because of its illegality and defects. Furthermore, the respondent contended that he was entitled to reasonable compensation for the appellant's occupation of the land and that he is entitled to compensation for the destruction of the existing buildings on the land.

[3] The appellant became romantically involved and entered into a relationship with the respondent's sister Ms Bell. They cohabitated in a cottage situated on the property of the respondent which they initially rented. They subsequently entered into the purported agreement which provided that a certain portion of the respondent's immovable property be sold to the appellant and Ms Bell and that they would have converted a barn situated on the property as a residence for themselves. The appellant made extensive alterations to the property with the full knowledge and consent of the respondent. The relationship between Ms Bell and the appellant soured and that led to the termination of the relationship. Based on the evidence presented, the trial court held that it was overwhelmingly beyond any doubt that the respondent would not have sold the one hectare piece of land to the appellant, but for the existence of the relationship. As soon as the relationship between Ms Bell and the appellant turned sour, the respondent immediately indicated that he was no longer prepared to give any effect to the agreement which was in any event *void.* On 27 March 2007 the appellant issued

summons against the respondent for, amongst others, repayment of the sum of R75 000 he paid towards the purchase price of the property. One year before the issuing of the summons, in a letter dated 20 March 2006, the respondent had already offered to the appellant, in due course, the repayment of the R75 000. Despite the tender, it is common cause that the amount was never actually repaid.

[5] It was common cause between the parties that the appellant was entitled to the repayment of the R75 000 paid to the respondent on 6 December 2004. It was contented on behalf of the respondent that the court *a quo* erred in granting judgement in favour of the appellant for the sum of R75 000 since he ought instead to have held that this amount had, prior to the commencement of the action, been tendered, which tender, so it was argued, had been ignored by the appellant. As there was no dispute whatsoever that the plaintiff was entitled to the repayment of the R75 000 the trial judge was correct in his comments that: "It is common cause between the parties that the plaintiff is entitled to repayment of the R75 000 paid to the defendant on 6 December 2004 and nothing needs to be further said about this". The Court *a quo* correctly ordered the payment of interest at the rate of 15,5% per annum from 4 April 2007, to date of payment (and this court does not have to deal with this issue any further).

[6] On the second claim of the appellant claimed that he was entitled to payment of the sum of R162 133, 57, the amount he paid for improvements to the property. It was contended that such improvements had been made in the *bona fide* belief that the agreement to purchase was legally valid. The appellant contended that the respondent was unjustly enriched in the amount of R162 113, 57. The respondent admitted that certain structures had been erected but pleaded that the structures had a negative value. In his counterclaim the respondent alleged that the erection of structures by the appellant caused damage to his property.

[7] It is common cause that the appellant and Ms Bell started with certain building activities on the portion of the land they thought they had lawfully purchased. It was common cause that no building plans with regard to the structures that were built / renovated by the Appellant exist.

Section 28 (1) of the Alienation of Land Act read as follows:

Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and –

(a) the alienee may in addition recover from the alienator –

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for –

(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(b) the alienator may in addition recover from the alienee-

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.

Section 4 (1) of the National Building Regulations and Building Standards Act of 1977 reads as follows: 103

"*No person shall without the prior approval in writing of the local authority in question erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act".*

Section 4 (4) of the Act reads as follows:

"Any person erecting any building in contravention of the provisions of sub-section 1 shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building".

[8] The trial Court held that the appellant was precluded from claiming reasonable compensation for any improvement which allegedly enhances the market value of the respondent's land. The reasoning was that, should he be granted compensation for the structure, it would be granted in respect of a structure that in any event stands to be ultimately demolished. On the other hand, the owner of the land may retrospectively and after the building has been erected, apply for the approval of the building plans.

[9] It is common cause that plans had to be submitted to the local authority for approval of the improvements and this was not done. The appellant contends that the decision of the

court *a quo* was wrong because, the statute itself does not distinguish between improvements that are lawful or improvements that are so-called unlawful. It was argued that neither Act 68 of 1981 nor Act 103 of 1977 prohibits a resulting claim for improvements under circumstances where a prior agreement or act is unenforceable and/or unlawful. A claim for compensation for improvements, despite no building plans as yet having been lodged with the local authority can be entertained, so it was argued. Reliance was placed on ***Metro Western Cape (Pty) Ltd v Ross 1986 (3) SA 181 (AD)***, where a person traded in contravention of the provisions of a certain ordinance. Despite this, the court concluded that, whilst the dealer traded illegally, the agreements that were concluded were not tainted with illegality. I am not persuaded by this argument. This case is entirely distinguishable from the present circumstances. Factually, the appellant knew that he had not submitted building plans to the local authority for approval of the improvements. Also, there was no evidence to suggest that the respondent, the owner of the land, would retrospectively seek approval from the local authority for the building plans. On 12 April 2007 the Mbombela Local Municipality issued a legal notice to the respondent advising him that an inspection had been carried out on the premises which revealed that Section 4 of the National Building Regulations and Building Standards Act had been contravened as the structure had been erected without approved building plans. An instruction was issued to rectify the situation by 29 May 2007. Counsel who appeared for the appellant submitted that the fear expressed by the trial court, namely that the appellant may be recompensed for a building that may ultimately have to be demolished, can be countered by ordering the respondent to pay the amount of R162 113, 57 to the appellant upon production of approved building plans by the relevant local authority. It is now some 7 years later. It is improbable that compliance with the legal notice issued on 12 April 2007 will now occur. For this very reasoning, the trial court was equally correct in ordering the eviction of the appellant from the property.

The trial court's finding on facts can only be interfered with if the trial judge erred in his evaluation of the evidence. A court *a quo* is in a much better position than an appeal court to form a judgment because it is able to observe witnesses when they testify and it is absorbed in the atmosphere of the trial. The trial judge was impressed with the evidence of the appellants witness, the agent evaluator Mr Jan Abraham van Rensburg, who made serious concessions under cross-examination regarding his valuation of the property and I quote: "*Mr van Rensburg, who made a very good impression upon me, quite fairly conceded that he accepted for purposes of the valuation that the guest cottage is a lawfully constructed dwelling and if that assumption of him is wrong, then obviously his whole valuation is also wrong and will carry no weight whatsoever. Mr van Rensburg also immediately conceded that he was not aware of the allegation made by the defendant that as a result of the conversion into a guest cottage that it encroached upon an access road used by the defendant in order to gain access to the further portion of his land. He said that that would have also obviously played an important role in him doing the valuation aforesaid. Brandon proved to be correct. He also agreed that should that assumptions of Mr Brandon proved to be correct, that the guest cottage is then not an asset to the defendant but a liability.*" The Respondent is the owner of the land and was equally aware of the building operations in progress for some fifteen months.

[10] It was illegal for the Appellant to have constructed the structure without any building plans and prior approval from the authorities. He now wants this Court to accept the illegality and enforce the illegal structure. The court will not allow the enforcement of an illegal act. See: ***Brits v van Heerden 2001 (3) SA 257 (c)***. Section 4 (1) of the National Building Regulations & Building Standards Act, No 103 of 1977 clearly provides that, no person shall, without the prior approval in writing of the local authority erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act.

In terms of section 4 (4) of the Act it is a criminal offence to build without plans and any person erecting structures under such circumstances shall be guilty of an offence. The Appellant cannot benefit from his own wrongdoing. This Court will not condone his wrongdoing and he has no case for compensation. The trial court ordered absolution from the instance on the appellant's claim 2 and there is no reason to interfere with that order.

[11] As I indicated above, the Respondent as the owner of the land knew as ought to have known that he did not give his permission for the approval of building plans on his property. He was aware of the destruction of certain buildings on the land and did not voice his disapproval by the destruction of the structures. The Respondent would have allowed the situation to continue. The spanner in the works was the termination of the relationship between the Applicant and Ms Bell. In his claim in reconvention the respondent claims that the structures are situated in a position that interferes with access reasonably and/or necessarily required for other portions of the property. The Respondent was aware of the erection of the structures and the location thereof. The building process continued for some fifteen months and he did not stop the process. He claims that the structures have a negative value, have to be demolished and removed and the land and pre-existing buildings restored to their condition prior to the occurrence of the appellant's building operations. The Appellant conceded that he was liable to pay for the reasonable costs in order to rebuild a portion of the barn demolished and conceded that amount to be R27 394, 20. The trial court held that Mr Baard, the agent builder of the defendant, exaggerated in his quotations to persuade him that the building should be condemned and he eventually conceded that the building material which will be removed from the Respondent's land, after assertion, certainly has a value. As there was no evidence placed before the trial court of the value of the building material which will be removed, the trial court could not come to the assistance of the respondent in order to award what he deemed to be reasonable compensation. No criticism can be levelled against

the reasoning of the trial judge. The respondents counsel conceded that the onus was on the respondent to prove the costs claimed by the respondent for the demolition of the guest cottage. The respondent did not discharge this onus. The trial court was correct in granting absolution from the instance.

In respect of the respondent's claim for compensation from the appellant for the occupation, use and enjoyment of his land, counsel for the respondent placed reliance on section 28 (1) of the Act, which provides that the alienator may recover from the alienee *a reasonable compensation for the occupational use or enjoyment the alienee may have had of the land.* On the evidence of the respondent, this has a value of at least R2000 per month. The respondent may have had a claim in this regard from the appellant. The difficulty however, is that the respondent is claiming compensation from the appellant for the occupation, use and enjoyment of his land in respect of an illegally erected and occupied structure. Furthermore, apart from the contested evidence of the respondent of the value of R2000 per month, no evidence was placed before the trial judge of what reasonable compensation is. Having heard the argument no criticism can be levelled against the reasoning of the trial judge for granting absolution from the instance. I agree with his finding that the respondent has not placed any evidence whatsoever *as to what a reasonable compensation would be for the occupation thereof* "sans" *the use of the barn and / or the guest cottage. Similarly no evidence was adduced before me on what a person would have been willing to pay as rent for that particular one hectare piece of land with or even without the barn.*

The trial court ordered that each party pay his own costs. This was an order entirely in the discretion of the trial judge. In my considered view that discretion was judicially exercised and should not be interfered with.

I propose the following order, *viz* that:

The appeal and counter-appeal be and are hereby dismissed.

SWARTZ AJ
ACTING JUDGE OF THE HIGH COURT

I AGREE

WEBSTER J
JUDGE OF THE HIGH COURT

I AGREE

SEMENYA AJ
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Appellant	:	Adv. CFJ BRAND
Instructed by	:	Christo Smith Inc.
Counsel on behalf of Respondent	:	Adv. GD HARPUR SC
Instructed by	:	Van zyl Le Roux Inc.

Date Heard	:	**10 September 2014**
Date Delivered	:	