

OCCUPIER WITH IMPROVEMENT LIEN AND THE NEW PROPERTY OWNER

Lakka v Beukes and Another (CA&R 60/2018) [2020] ZANHC 11 (23 March 2020)

What happens if, on transfer, the new owner finds an occupier in the home who refuses to move, claiming an improvement lien? The improvements in this instance were effected at a time when the seller was still owner and hence the purchaser was not the enriched party. The new owner, on the other hand, was thwarted in an attempt to evict the occupier because the occupation as a result of the right of retention is not unlawful in our law. The judgment illustrates the applicable principles.

The Judgment can be viewed [here](#).

FACTS

In July 2016, Lakka bought a property from the Visagies for R160,000 and transfer was duly registered in January 2017. In terms of the sale agreement, the purchaser (Lakka) would take possession of the property on the date of registration.

When Lakka sought to move into the property, however, she found it occupied by Beukes. Beukes refused to vacate because the property was sold to her by the Visagies in 2010 for R 21,000 which she had paid. Between 2010 and 2015 she (Beukes) had also performed various renovations to the house. During 2016, Beukes was informed by her attorney that transfer could not be effected into in her name due to an outstanding bond liability of the Visagies. Later, in August that year, Beukes was informed that Lakka had bought the property. She was requested to sign a lease agreement but declined the invitation.

Unexpectedly, on 31 January 2017, some R11,000 was paid to Beukes by the Visagies. Then in March 2017, she received a letter from Lakka's attorneys demanding that she vacate the property.

Subsequently, in a letter from her attorney, Beukes accepted the repudiation of the sale agreement by the Visagies but still refused to vacate the property until such time as Lakka paid her R170,000 which she (Beukes) had expended on improvements to the property from 2010 until 2015.

Lakka instituted eviction proceedings against Beukes. The magistrate found that because of improvements Beukes had effected to the property during her occupation thereof, she could exercise her improvement lien and occupy the premises until such time as she was compensated. As such her occupation was not unlawful.

Lakka appealed to the High Court and questioned the magistrate's finding of a valid lien that constituted a defence against eviction, on two broad bases. Firstly it was contended that Beukes is not a *bona fide* possessor and was therefore not entitled to a real lien; and secondly, that the lien is at best a debtor and creditor lien to which Lakka was not a party and against whom the lien cannot be exercised.

HELD

Bona fide possessor's right of retention

- A *bona fide* possessor who has preserved or made improvements to another's property at his or her expense has a right of retention against the property to secure compensation for his or her necessary and useful expenses. This is a real right and an absolute defence against eviction by the owner or any future owners of the property. Exceptions exist where ownership is acquired through a sale in execution where the purchaser

was unaware of the right of retention and the retentor, with full knowledge of the sale, fails to inform the purchaser of this right; and also in sales in insolvency.

- Where it is the previous owner of property who has been enriched (as in this case the Visagies) at the expense of the lien holder, it is from that previous owner that the lien holder should seek redress for purposes of a possible enrichment claim, but the right of retention can be held against the new owner (even though he or she has not been enriched) until the lien holder has been duly compensated. In *Pheiffer v Van Wyk and Others* the Supreme Court of Appeal held: 'A real lien (an enrichment lien) is afforded a person who has expended money or labour on another's property without any prior contractual relationship between the parties. The lien holder is entitled to retain possession until his enrichment claim has been met. It is an established principle of our law that the owner of the property subject to a right of retention may defeat the lien by furnishing adequate security for the payment of the debt.'
- This right of retention is however not only available to *bona fide* possessors, but also to *bona fide* occupiers. Whether this real right extends to the *mala fide* possessor (or *mala fide* occupier) is however not clear cut. A distinction seems to be made in our law as to whether the expenses were necessary or whether it was useful. As far as necessary expenses are concerned the position of the *mala fide* possessor is the same as that of the *bona fide* possessor as far as a claim for compensation and his or her right of retention is concerned.
- It is clear that a real right of retention or a real lien does not necessarily only lie in the domain of a *bona fide* possessor. It is in this context that Beukes' position had to be evaluated. Lakka argued that: (i) by accepting the repudiation of the agreement by the Visagies and the repayment of R11,000; and (ii) by initially being prepared to move out of the property, Beukes ought to have been or was aware that she was no longer a *bona fide* possessor of the property and as such could not exercise an improvement lien against the property. The argument is flawed because firstly, it is not only a *bona fide* possessor who can validly exercise an improvement lien; and secondly, at the time of effecting the improvements to the property, Beukes was a *bona fide* possessor who had reasonable grounds to believe that she will become the owner of the property and as such she is entitled to exercise an improvement lien over the property.

Nature of the lien

- Lakka argued that since Beukes had effected repairs to the property as a consequence of the contract between her and the Visagies, a debtor and creditor lien has been established, which is personal in nature and can only be held against the Visagies and Lakka was not a party to the contract.
- The facts did not support the agreement due to the price discrepancy and dispute regarding the purchase price agreed upon between Beukes and the Visagies. Should one rely on the version of Beukes that R22,000.00 of the purchase price was to be applied towards repairing the property, it still leaves a balance of R46,000.00 in respect of Beukes' improvements, not flowing from the alleged agreement between her and the Visagies, and in terms of which Beukes would be able to exercise an improvement lien.
- The magistrates' court was thus correct in finding that Beukes was not an unlawful occupier as defined in the PIE Act, in that she had a right in law to occupy the property by virtue of the real lien she was entitled to exercise against the property.

CONCLUSION

The appeal was dismissed with costs.