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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

DATE

SIGNATURE

Case No.: 30457/15

In the matter between:

**Davis, Alfred Bender
Davis, Penelope Myrna**

**First Applicant
Second Applicant**

And

Purple Fountain Properties 118 (Pty) Ltd

Respondent

Coram: VALLY J

Heard: 18 MAY 2016

Delivered 28 JULY 2016

Summary: Lien-Right of Ownership-Eviction

ORDER

The respondent and all those claiming occupation through, by or under it from Portion 11 (a portion of Portion 1) of Erf [1.... A.....] Township,

Registration Division I.R, The Province of Gauteng and situated at 1.... R.... R....., A..... E..... 1, S..... (the property) are to vacate the property within five court days of the date of this order. The Sheriff or anyone acting under his/her authority is to give effect to paragraph 1 above by removing the respondent or anyone occupying the property on behalf, or with the authority, of the respondent should they not vacate the property within five court days of this order. The South African Police Services is to furnish the Sheriff or his/her authorised agent with any assistance s/he requires in giving effect to this order. The respondent is to pay the costs of this application.

JUDGMENT

Vally J

Introduction

[1] Portion 1 of Erf 1.... A..... Ext 1 Township is a piece of real estate located in the upmarket suburb of A..... It is to be found in the northern part of Johannesburg. The applicants who are married to each other owned this entire piece of real estate until they decided to sub-divide and sell portions of it. It was sub-divided into four parts, namely: Portions, 1, 10, 11 and 12. The applicants have sold portions 10 and 12. They continue to own Portions 1 and 11. Their residential home is located on Portion 1. Portion 11 is a vacant piece of land. It is not clear from the papers whether it has been registered as a separate piece of real estate or

whether it is still registered as part of Portion 1. However, for purposes of resolving the dispute between the parties this fact is of no moment. Portion 11 is the portion that forms the subject matter of this application. The respondent is a property developer. It is in possession of Portion 11.

[2] Relying on their rights of ownership the applicants primarily seek the eviction of the respondent from the property. They also seek a prohibitory interdict restraining the respondent or anyone acting under its authority from using the property for any purpose whatsoever.

[3] The respondent's occupation of the property arises from an agreement it concluded with the applicants on or about 5 February 2014. The agreement is referred to as "the development agreement". The applicants and the respondent concluded the agreement in order for the applicants to monetise the value of Portion 1 by sub-dividing it into four portions. Portions 10, 11 and 12 were to be sold off by the applicants. The respondent was, in terms of the agreement, to find the purchasers for the three Portions. The respondent found purchasers for Portions 10 and 12. The applicants, the respondent and the respective purchasers of Portions 10 and 12 have concluded agreements allowing the respondent to build residential homes on Portions 10 and 12 for the purchasers of those Portions. The construction has been completed. In the meantime Portion 11 remains a vacant piece of land.

[4] As from February 2014 the respondent has had occupation of Portions 10, 11 and 12. While it was busy constructing the residential homes on Portions 10 and 12, it utilised Portion 11 to hold rubble and store building equipment. This was with the knowledge and consent of the applicants. During these building works Portions 10, 11 and 12 constituted a single building site. Nevertheless, sometime in 2014 various disputes between the applicants and the respondent arose.

[5] The respondent claims to have found a purchaser for Portion 11 too, but the applicants have refused to accept the offer it has procured from the purchaser. They have refused to conclude the same construction agreement concluded with regard to Portions 10 and 12. Instead they have elected to invoke clause 8.2 of the development agreement. They claim that because the respondent has failed to install an electric fence and increase the height of a wall they are under no duty to accept any offers the respondent brought for Portion 11. The respondent has in turn invoked the arbitration clause in the agreement. The arbitration proceedings have yet to commence.

[6] More importantly, the respondent claims that while performing the construction work on Portions 10 and 12 it made improvements on Portion 11 and has yet to be reimbursed for those improvements. These included readying each of Portions 10, 11 and 12, including the common areas, for the required municipal approvals, installing and providing municipal

services connections and installing services in the form of electrical cables, sewer connections, water piping along the driveway, as well as conduits for the provision of CCTV and an intercom. It went on to procure and obtain the necessary Regulation 38 certificate. It claims that as a result of the work it has done Portion 11, which prior to the work was a vacant piece of real estate with no infrastructure for services, is now a vacant piece of real estate with considerable infrastructure. Construction of a residential home on Portion 11 would be considerably cheaper because of the work done on it by the respondent. Consequently, the applicants as owners of Portion 11 have been enriched due to the respondent's work and efforts on it as the market value of Portion 11 has increased substantially as a result of the improvement thereon.

[7] It claims that it has yet to be reimbursed for these improvements and until it has it claims the right to retain possession of 11 as a lien. It formally informed the applicants of this on 2 February 2015. It claims to have taken steps to perfect its lien over Portion 11 by erecting a fence around it and by placing a note on the fence reading:

"Purple Fountain Properties 118 (Pty) Limited has a lien on this property. Access is forbidden without permission."

[8] The claims the respondent seeks to vindicate against the applicants are the subject of the arbitration proceedings. They are captured below in [19].

The law

[9] A lien is really a right of retention by a *bona fide* possessor of property belonging to another and no more.¹ There are two types of liens that feature in this case: an enrichment lien and a debtor-creditor lien.

[10] An enrichment lien is a right of a possessor to retain a property of another in circumstances where the possessor has expended money or labour on that property and has yet to be compensated for that expenditure.² However, no enrichment lien will exist against an owner of a property unless such owner has been enriched at the expense of the possessor claiming such lien. Thus, for the lien to be valid the possessor must establish on a balance of probabilities that the owner was enriched as a result of an expenditure incurred by the possessor.³ The lien based on the improvement of a property was held to be a real right vested in the possessor (lienor, lienholder or detentor) – the reason being that it derives not from contract but is rather based on the enrichment of the owner (lienee or owner).⁴ The lien serves as no more than security for the possessor's claim and as such the possessor is not entitled to use that property or to gain any benefit therefrom.⁵

¹ A thoughtful summary of the law concerning liens as well as of the different types of liens available is to be found in *Guman NO v Ansari and others* [2011] JOL 27841 (GSJ)

² *Brooklyn House Furnishers (Pty) Limited v Knoetze and Sons* 1970 (3) SA 264 (A) at 270E-F

³ *United Building Society v Smookler's Trustees*, 1906 T.S. at p. 627; *Anderson & Co v Pienaar & Co.*, 1922 T.P.D. 435 at p. 438; *Land Bank v Mans*, 1933 CPD at p. 24.

⁴ *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co. Ltd.* 1960 (3) SA 642 (A) at 657F-G; *Smookler's Trustees (supra)* at 632

⁵ *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre* 1997 (1) 646 SA at 654A-C

[11] Our law also recognises a debtor-creditor lien. This lien is one that is derived from contract; it is a lien *ex contractu*. It is only available to parties to a contract. In terms of this lien the lienholder has a personal right (as opposed to a real right) against whoever is claiming the return of the property possessed by the lienholder. To defeat a *rei vindicatio* the lienholder will have to establish that she “*has incurred expenditure on the property in pursuance of a contractual obligation existing between*”⁶ herself and the owner. This lien has been usefully described as”

“Now the debtor and creditor liens extend to all the expenses which the person who claims the lien has incurred upon the property under the contract, express or implied, which he has made with the owner. But, on the other hand, such liens (or, to speak more exactly, such liens so far as they cover expenses which are not shown to be either *necessariae* or *utiles*), as they spring out of the soil of contract, so they are confined within the limits of contractual privity.”⁷

[12] It is a lien that does not have to arise from a necessary expense incurred by the *bona fide* possessor (“*necessariae*”), or one that increased the value of the property (“*utiles*”). However, it is one that is restricted to the contractual terms (“*confined within the limits of contractual privity*”).

[13] The law also recognises that a *bona fide* possessor claiming a lien can, if the facts of the case allow, elect to rely on either of the two species of lien, i.e. if the expenditure was incurred in terms of a valid contract (a debtor-creditor lien), which expenditure also increased the value of the

⁶ *The Law of South Africa, Vol 15, Part 2 (Second Edition)* p 31, par 50

⁷ *Smookler's Trustees and Golombick's Trustee (supra)* at 628 (Citations omitted)

property (enrichment lien). However, the evidence she relies on for either case is different. The position is well summed up in the following *dicta*:

“Rights of retention are broadly classified as enrichment (preservation or improvement) liens or as debtor and creditor liens. The former are real rights, the latter not. An enrichment lien is a form of security for the payment of expenses which were necessarily incurred by one party for the preservation or protection of someone else's property (*impensae necessariae*) or usefully incurred for its improvement, i.e the enhancement of its market value (*impensae utiles*). It is immaterial whether the work was done in terms of a contract and, if so, whether the contract was with the owner of the property. The party who did the work may retain possession of the property in respect of which his work was done against the true owner, against his counterpart in contract (if there is one) or against anyone else who claims it from him, until he has been reimbursed for his expenditure or the amount by which the owner has been enriched, whichever figure is the lesser.

For expenditure in respect of improvements which were neither necessary nor useful, i.e expenses classified as *impensae voluptuariae*, he will not enjoy a right of retention at all unless the expenses were incurred in terms of an agreement. In that event he may enjoy a debtor and creditor lien against the other contracting party.

A debtor and creditor lien is available to anyone who, in terms of an agreement, has performed work pertaining to someone else's property, irrespective of whether the work was necessary, useful, enhanced the value of the property concerned or was trifling. A debtor and creditor lien, being a contractual remedy and not a real right, is maintainable by the one party to a contract against the other who may or may not be the owner of the property. Unlike an enrichment lien it is not limited in its scope: it secures the full extent of the agreed remuneration, regardless of his own actual expenditure or the other side's actual enrichment.”⁸

[14] Finally, in the case of the debtor-creditor lien the *bona fide* possessor has to show that the benefits it is claiming are those that fall within the ambit of the contract; it has to be the “*agreed remuneration*” for the work done. If not, there is no valid lien.

Has the respondent established that it holds a valid lien

⁸ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 84J-85F (Citations omitted)

[15] The respondent relies on four claims to establish its case that it holds a valid lien. These claims are the subject of the arbitration proceedings it has instituted. It is necessary to examine each of the four claims in detail to see if any of them provide grounds for the respondent to hold a valid lien over Portion 11.

The first claim

[16] For this claim the respondent relies on the provisions of clause 5.6 of the development agreement. In terms of these provisions, the applicants and the respondent agreed that the applicants would contribute a maximum of R100 000.00 to the costs of installing connections for municipal services to Portions 10, 11 and 12. The applicants' contribution was to be on a "*Rand for Rand*" basis, which was understood to be in the region of R200 000.00. Should these costs exceed R200 000.00 the respondent would carry the liability for the excess amount as the applicants' liability was capped at R100 000.00. While the respondent is entitled to recover fifty percent of the costs, up to a maximum of R100 000.00 from the applicants, it is nevertheless necessary for it to quantify the amount it has paid out for these connections. This it does not do. Nor does it say which of the costs relate to Portion 11 and which to the other portions. In other words, it does not spell out the actual connections located on Portion 11.

The second claim

[17] The second claim is for the amount of R169 000.00. The respondent claims this amount for procuring the Regulation 38 certificate in respect of the development. It claims that the certificate was to be procured by the applicants and their failure to do so forced it to act so that the development could proceed. The respondent does not say how much of the R169 000.00 it claims relate to Portion 11. Nor does it furnish any detail as to when it paid this amount and to whom. This lack of detail is the principal complaint of the applicants. They maintain that without this detail they cannot assess whether the disbursement of the amount was necessary or that the amount was reasonable. The respondent does not deny that the payment was made with regard to the entire development and was not based on the development of Portion 11 only.

The third claim

[18] The third claim is for damages the respondent allegedly suffered as a result of the applicants' decision to cancel the development agreement. It is for the amount of R1 390 800.00. The claim is largely for a loss of profit, however, it is not one specific to Portion 11. Being one for damages in general and not one based on any improvements to Portion 11 it cannot form the basis of the lien. Our law does not provide for a lien to be a security for a damages claim.

The fourth claim

[19] The fourth claim is for "*work and/or improvements*" to Portion 11.

The respondent claims that it should be compensated for providing “a communal gate”, constructing “a driveway”, “a boundary wall” and “an electric fence”, and finally installing “an intercom”. The claim is for a total of R541 000.00 and is made up of the following:

[19.1] the provision of services, including the provision of electrical cable along the driveway, sewer connections, water piping along the driveway as well as conduits for the provision of CCTV and intercom - R233 000.00

[19.2] The installation and/or improvement of the driveway on the property – R62 000.00

[19.3] The installation of a communal gate – R12 000.00

[19.4] The installation of a boundary wall – R168 000.00

[19.5] The installation of the intercom – R5 500.00

[19.6] The installation of storm water layoff and/or layouts – R45 000.00

[19.7] The installation of an electric fence – R15 000.00

[20] In this case, the respondent had from the inception of the dispute claimed a valid lien on the basis that the applicants were enriched by the money and efforts it invested in preparing Portion 11 for development and for sale, and it has yet to be compensated for its expenditure. It relies on the same species of lien in its answering papers to defeat the *rei vindicatio*. In its heads of argument the respondent makes it unambiguously clear that it relies on the enrichment lien only.

[21] It is really the fourth claim⁹ only that the respondent can rely upon for its claim that it holds a valid enrichment lien over Portion 11. The applicants aver, in reply, that these connections form part of the development of Portions 10 and 12. The respondent filed a further affidavit in response to the reply, but it failed to deny the applicants' averment and to provide any particularity of the claim for the amount it expended for any connections that were installed on Portion 11. Thus, save for the boundary wall¹⁰, none of these items have been located on Portion 11. As for the boundary wall this is as much part of Portions 10 and 12 as it is part of Portion 11. The respondent has already been compensated for it by virtue of what it received from the sale of Portions 10 and 12. And, if it has not been adequately compensated it must point out what portion of the inadequate

⁹ See [19] above

¹⁰ See [19.4] above

amount is due for the improvement of Portion 11. The respondent is unable to provide this detail. In other words, it is unable to specify what share of the amount expended for the boundary wall should be accorded to Portion 11. It therefore cannot be found that the applicants have been enriched at the expense of the respondent by virtue of the respondent's expenditure in constructing the wall separating Portions 10 and 12 from Portion 11. In my view, on these facts, it would be incorrect to hold that by virtue of their ownership of Portion 11 the applicants have been enriched by the construction of a wall separating Portions 10 and 12 from Portion 11, and that this enrichment has been at the expense of the respondent who has yet to be compensated for whatever efforts and disbursements it expended. In short, the respondent has failed to show that the applicants have been unjustly enriched by virtue of the expenditure it disbursed over Portion 11, which resulted in the improvement as well as the increase in value of Portion 11. It has made a bald allegation claiming that applicants have been unjustly enriched by the disbursements it expended over Portion 11 but has failed to demonstrate the quantum of the enrichment. It is therefore not entitled to retain possession of Portion 11 as security for its claims against the applicants.

[22] Realising the difficulty faced by the respondent in establishing a valid enrichment lien, counsel for the respondent, Mr Bishop, contended

that the respondent did not rely on the enrichment lien only but also on the debtor-creditor lien.

[23] The respondent effectively jettisoned its original defence to the *rei vindicatio* and has, by dint of a somersault, hastened towards an entirely new defence, one that was not foreshadowed in its answering affidavit.

[24] While claiming that the respondent had no intention to abandon its reliance on the enrichment lien, Mr Bishop however, made no effort to persuade this court that the respondent succeeded in proving that it holds a valid enrichment lien. Instead he concentrated on showing that the respondent had made out a case for holding a valid debtor-creditor lien. On this score, Mr Bishop acknowledged that nowhere in the papers is there any indication by the respondent that the respondent relies on a valid debtor-creditor lien. He contended, however, that the respondent was entitled to rely on the debtor-creditor lien if the facts averred in the respondent's affidavits supported the case for such a lien, even though the respondent did not specifically identify its reliance on such a lien. Counsel for the applicants, Mr Gilbert, protested at this stance adopted by the respondent claiming that it unfairly ambushed the applicants. He asked that the court ignore this shift on the part of the respondent and hold the respondent to the only case it made out in reply and in its heads of argument. Mr Gilbert contended that the applicants would have brought

different evidence to the hearing had they been informed that the respondent intended to make out a case for a debtor-creditor lien.

[25] The respondent relied on a number of authorities to support its contention that despite the fact that it did not identify the debtor-creditor lien as its defence to the *rei vindicatio*, it is nevertheless entitled to rely on this defence if the facts supporting it are spelt out in its papers. Its argument is that whether it holds a valid debtor-creditor lien is a matter of law, and a party is entitled to raise any legal point open to it regardless of whether or not it was identified in the affidavits. All that is required is that the facts supporting the legal proposition it contends for are presented in its affidavits.

[26] The principle adopted by our law on this issue is captured in the following *dictum*:

“While it is so that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically raised in the papers, provided that all relevant facts are before the court, this will not be allowed if it causes prejudice to the other party.”¹¹

[27] This principle is consistent with our constitutional values and has been endorsed by the Constitutional Court:

“The law on pleading and raising a point not covered in the pleadings is settled. However, it needs to be remembered that pleadings are for the court and the court is not for the pleadings. A court is bound to consider

¹¹ *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at [28]. See also: *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 285; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324H-I; *McDonald t/a Sport Helicopter v Huey Extreme Club* 2008 (4) SA 20 (C) at 26B-C

the substantial issues between the parties if the issues in dispute are clear, and in the absence of prejudice technical objections ought not to be upheld.”¹²

[28] This principle, in my judgment, is really of no assistance to the respondent. This is because firstly, it failed to place all the facts it is required to do in order to establish a debtor-creditor lien and secondly, even if it could be found that it placed sufficient facts to rely on a debtor-creditor lien, it cannot gainsay the applicants’ contention that by only identifying its reliance on the debtor-creditor lien at the hearing of the matter it has prejudiced them to such an extent that they would not be afforded a fair hearing. They were required to meet one case all along only to find that they were confronted with a completely different case at the hearing. It was submitted on their behalf that, had the respondent identified its reliance on a debtor-creditor lien, they would have placed different evidence before this court to show that there is no evidential basis for holding that the respondents are entitled to rely on such a lien. In other words, they would have produced evidence to show that the respondent did not perform its obligations in terms of the development agreement, and that in fact the respondent was fully compensated for all its efforts by the disbursements paid out in terms of the development agreement. In short, had the respondent spelt out its reliance on the debtor-creditor lien at the outset, and had it averred all the facts it relies upon in the answering affidavit, the applicants would have been able to respond appropriately thereto.

¹² *Pilane and another v Pilane and another* 2013 (4) BCLR 431 (CC) AT [107]

[29] For this reason I have come to the conclusion that the respondent is not entitled to rely on a debtor-creditor lien.

[30] In the event the respondent were to be allowed to rely on the debtor-creditor lien to defeat the *rei vindicatio* it has not made out a case for such a lien. It did not present all the facts necessary to establish the lawfulness of its possession on the ground that it holds a valid a debtor-creditor lien. All the respondent did was to broadly identify the facts it relied upon for the enrichment lien and then attached its statement of claim in the arbitration proceedings. It now asks this court to treat the allegations in the statement of claim as if they constitute evidence and as if they are averments made under oath in an affidavit. The problem for the respondent though is that those allegations are bald statements of fact (*facta probanda*), and the evidence (*facta probantia*) supporting them, by its own version, will still have to be presented at the arbitration hearing. The respondent has consistently refused to furnish this evidence to the applicants on the basis that it will only be furnished at the arbitration hearing. This unfortunately does not suffice if the respondent is to successfully resist the *rei vindicatio* of the applicants. This court cannot accept that the respondent has established a valid debtor-creditor lien by placing only *facta probanda* without any supporting evidence before it. To defeat a *rei vindicatio* with a debtor-creditor lien the *bona fide* possessor must put up detailed credible evidence supporting all the facts it relies

upon. These, at the very least, should consist of evidence of the nature and details of the contract, its performance in terms of the contract (when, where and how it performed), details of the breach of the contract by the owner of the property (who obviously would be the party seeking the *rei vindicatio*), the exact amount outstanding and how that amount has been computed. It is important that the exact outstanding amount be presented as it affords the owner an opportunity to defeat the lien by offering alternative security. Anything short of this would be oppressive to the owner. It would prevent her from taking the necessary steps to regain the fruits of her ownership without prejudicing the interests of the *bona fide* possessor who claims the right to hold on to the property by virtue of having a debtor-creditor lien. Our law, as stated almost a hundred years ago is:

“It is suggested that there is a very great hardship in these cases on the owner of goods who finds himself confronted with charges of which he knew nothing. To a certain extent there is a hardship, but where people entrust their property to other persons they very often do suffer damage. But the duty of an owner who is confronted by a claim for a lien is quite simple. If he contests the lien he is entitled to demand particulars to show that the claim is of no substance; he is entitled to get his goods on giving security.”¹³

[31] The first claim is supposed to arise purely from clause 5.6 of the development agreement. It is supposed to be a debt that arises from the performance of the respondent of its obligations in terms of the development agreement. But the respondent does not provide any details about its disbursements for Portion 11 in terms of the development agreement. The respondent does not furnish any evidence as to whom it

¹³ *Anderson (supra)* at 438

paid, for what the payment was made, how much it paid and whether the payments arose as a result of it performing its obligations in terms of the development agreement. As a result, I hold that the respondent has, even if it was allowed to rely on a debtor-creditor lien, not established that it validly holds such a lien over Portion 11.

[32] None of the other claims were brought on the basis of it performing in terms of the development agreement. Furthermore, they lack the detail necessary to show that it has a claim in contract. That detail may be provided at a later stage, perhaps in the arbitration proceedings, but it is not there at the moment.

Conclusion

[33] I hold that the respondent is not entitled to exercise any lien over Portion 11.

Interdictory relief

[34] The respondent admits that even after claiming to exercise a lien over Portion 11 it made use of Portion 11 by storing rubble on it “*from time to time*”, and that it only removed the rubble, again only “*from time to time*”, when the applicants complained about it. It is clear from this that the respondent has benefitted from the usage of Portion 11. But this is precisely what it is not allowed to do if it was merely possessing it as security for payment of an enrichment claim or for payment of a debt. As a

result the applicants seek a prohibitory interdict against it. There can be no doubt that they would be entitled to it. However, it is really an alternative claim to the vindicatory one. Put differently, if the respondent is evicted from Portion 11 there is no need to grant the prohibitory interdict.

Order

[35] The following order is made:

1. The respondent and all those claiming occupation through, by or under it from Portion 11 (a portion of Portion 1) of Erf 1..... A..... Township, Registration Division I.R, The Province of Gauteng and situated at 1..... R..... R....., A..... Extension 1, S..... (the property) are to vacate the property within five court days of the date of this order.
2. The Sheriff or anyone acting under his/her authority is to give effect to paragraph 1 above by removing the respondent or anyone occupying the property on behalf, or with the authority, of the respondent should they not vacate the property within five court days of this order. The South African Police Services is to furnish the Sheriff or his/her authorised agent with any assistance s/he requires in giving effect to this order.
3. The respondent is to pay the costs of this application.

Vally J

Date of hearing: 18 May 2016

Date of judgment: 28 July 2016

For the applicant: Adv B M Gilbert

Instructed by: Fluxmans Inc

For the respondent: Adv A Bishop

Instructed by: Dewey Hertzberg Levy Inc