

**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: A3004/2021**

**COURT A QUO CASE NO: 1269/2017**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: YES

REVISED: NO

**28 March 2022**

In the matter between:

**SITHOLE SAM**

Appellant

and

**LEMPE BONGIWE SHEILA N.O**

First Respondent

**UNLAWFUL OCCUPANTS OF ERF [....]**

Second Respondent

**EMFULENI LOCAL MUNICIPALITY**

Third Respondent

**JUDGMENT**

**Mdalana-Mayisela J et Ossin AJ**

## INTRODUCTION

[1] The appellant, Sam Sithole, appeals against the whole of the judgment and order handed down by the Additional Magistrate on 28 November 2019 in the Magistrates' Court, Vanderbijlpark.

[2] The subject matter of the judgment was an eviction application instituted by Sheila Bongiwe Lempe in terms of which Ms Lempe sought the eviction of the appellant, Ms Monotsi Acinah, and all unknown occupiers (cited as the first to third respondents respectively in the court *quo*). The Emfuleni Local Municipality was cited as the fourth respondent ['the municipality']. The learned Magistrate granted the eviction orders sought by Ms Lempe.

[3] Before us is Mr Sithole's appeal of the court *a quo*'s judgment and orders. Ms Acinah did not oppose the eviction application and has not appealed against the judgment. In this appeal, Ms Lempe (the successful applicant in the court *a quo*) is the first respondent, "all unknown occupiers" the second respondent, and the municipality, the third respondent. We will continue to refer to Mr Sithole as the appellant, and Ms Lempe as the first respondent.

[4] In the court *a quo*, the appellant was represented by Hlatshwayo-Mhayise Inc. This same firm of attorneys represents the appellant in this appeal. This firm submitted the practice note and heads of argument in the appeal, and Mr Hlatshwayo argued the appeal on behalf of the appellant.

[5] In the court *a quo*, the first respondent was represented by Legal Aid's Vereeniging Office. The appellant's notices of appeal and set down were served at that Legal Aid office. Legal Aid did not, however, submit a practice note and heads of argument for this appeal, and there was no representation by Legal Aid on behalf of the first respondent at this appeal. Accordingly, at the commencement of argument before us, we enquired with the appellant's attorney as to whether he was aware of Legal Aid's position. The matter was stood down and enquiries made with Legal Aid. On resuming the hearing, appellant's attorney informed us that the Head of Legal Aid

at its Vereeniging Office had advised him that the first respondent would not be participating in this appeal, and that she would abide by the decision of the appeal court.

[6] In this appeal, the appellant also applies for condonation for the late filing of the appeal record. Rule 27(3) of the Uniform Rules of Court provides that the court may, on good cause shown, condone any non-compliance with these rules. The notice of appeal was filed on 15 January 2020. The appellant applied for the transcription of the record on 10 February 2020. He was advised late in September / October 2020 that the company called Inlexso would assist with transcription of the record. He paid for the transcription of the record on 8 December 2020. He received the record on 14 December 2020. The cause for the delay is attributed mainly to the lockdown which commenced from 27 March 2020 due to COVID19. We are satisfied that the appellant has shown good cause for the delay in filing the record, and the late filing thereof is condoned.

[7] The first respondent is the biological daughter and executrix of the estate of the late Molahlehi Daniel Lempe [‘the deceased’]. Mr Lempe died on 19 June 2005. The first respondent was appointed executrix of the deceased’s estate in May 2016 under Letter of Authority number 010390/2016. Presumably, the delay in her appointment had something to do with the deceased dying intestate and her age at that time.

[8] The deceased is the registered owner of immovable property described as Erf [....] Bophelong Extension 15 held under title deed number T[....] [‘the property’]. The property is situated within the locality of the municipality.

[9] On 21 January 2018, the first respondent launched an application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1988 as amended (“the PIE Act”), for an order evicting the appellant, Ms Acinah, and all unknown occupiers from the property. No relief was sought against the municipality, and it was cited merely because of its potential interest in the matter.

[10] In terms of its 28 November 2019 order, the court *a quo* ordered the appellant, Ms Acinah and all those occupying through them, to vacate the property by no later than 28 February 2020, and that if they did not vacate the property by that date that the Sheriff was authorised to evict them on 30 March 2020. The appellant was also ordered to pay the costs of the application on an attorney and own client scale. The appellant is appealing against these orders.

[11] After all the affidavits in the application had been exchanged, a judicial pre-trial conference was convened on 23 May 2019. Pursuant thereto the parties were directed to file supplementary affidavits addressing three issues: (1) the date of occupation of the property by the appellant and Ms Acinah; (2) where the deceased was residing after the alleged sale from 2002 until his death; (3) the improvements to the property which were allegedly made by the appellant and whether they were made whilst the deceased was still alive.

[12] The first respondent filed a supplementary affidavit as directed. The appellant also filed a supplementary affidavit in which he attached a valuation certificate for the property prepared by one Peter Mabelane and a copy of a letter from the Legal Practice Council confirming that attorney Mmoleli Mosala was struck from the roll of attorneys on 4 September 2015.

[13] The appellant then applied in the court *a quo* for the application to be referred to oral evidence. This application was granted. Two issues were referred to oral evidence: (1) the existence of a deed of sale purportedly concluded between the appellant and the deceased in terms of which the deceased sold the property to the appellant, and (2) improvements made to the property by the appellant. The first respondent and the deceased's brother, Daniel Tshepo Mothabane, testified for the first respondent, and the appellant was the only witness who testified in his defence.

#### FIRST RESPONDENT'S EVIDENCE

[14] The first respondent's evidence is contained in the founding, replying and supplementary affidavits, as well as the oral evidence of the first respondent and Mr Mothabane. We summarise the relevant aspects immediately below.

[15] The appellant and the deceased entered into an oral lease agreement in terms of which the appellant rented a back room on the property ['lease agreement']. After the conclusion of the lease agreement, the appellant and his wife moved to the property and occupied a shack at the back of the main house. The deceased resided in the main house and provided the appellant with a key to the main house so that he would have access to a toilet.

[16] In 2005 the deceased fell ill. He passed away on 19 June 2005.

[17] In 2005 after the deceased's funeral, the appellant stopped paying rental fees for leasing the property. The first respondent terminated the lease agreement, and the appellant and his wife were given two months' notice to vacate the property. They refused to do so. They then informed the first respondent that they had purchased the property from the deceased. The first respondent then requested them to furnish proof of purchase of the property to her. They were unable to do so. The appellant and his wife then moved into the main house without the first respondent's consent.

[18] In 2007 the appellant started to effect improvements to the property. He commenced with erecting a fence wall around the property. Mr Mothabane told the appellant to stop erecting the wall because the property belonged to the estate of the deceased. The appellant ignored Mr Mothabane's demand and continued to effect the improvements. Mr Mothabane then sought the intervention of the area councillor to resolve the issue. The appellant was called to attend a meeting with the councillor, but he did not show up. Mr Mothabane then sought the intervention of the ANC branch without success. He then reported the matter to the housing department where he was advised to seek assistance at the Legal Aid office.

[19] The first respondent then approached Legal Aid office. Legal Aid delivered a letter to the appellant and his wife on 11 July 2016. In this letter the appellant and his wife were given 30 days' notice to vacate the property. They refused to vacate the property. They continue to reside on the property without her consent to this day.

[20] The appellant and his wife have not paid rent in respect of their occupation of the property since June 2005. They also failed to pay rates and taxes for the property. In terms of the municipal account statement attached to the founding affidavit there is an outstanding amount owed of R38 600.00.

#### APPELLANT'S EVIDENCE

[21] The appellant's evidence likewise emanates from his answering and supplementary affidavits, and his oral evidence. We summarise this evidence below.

[22] In his answering affidavit the appellant alleged that the deceased sold the property to him in October 2002 for R11 000.00. This transaction was conducted through the deceased's attorneys, Mmoleli Attorneys. The appellant paid the deceased's attorneys the R11 000.00, and in the appellant's presence, the deceased's attorneys then paid over this amount to the deceased. The property could not, however, be transferred into the appellant's name because of the arrear rates and taxes owed to the municipality. The appellant then made arrangements with the municipality to pay off these arrears at R30.00 per month.

[23] The appellant further asserted in his answering affidavit that he regards the property as his, and it no longer forms part of the deceased's estate. He renovated the main house on the property, which was originally an RDP house, by making it a bigger house. As a result of these renovations, the value of the property has increased from R150 000.00 to R300 000.00.

[24] In his evidence in chief the appellant testified that he bought the property from the deceased for R11 000.00 in October 2002. He met the deceased at his tuck shop and the deceased informed the appellant that he was selling his house. The deceased and the appellant then entered into an oral agreement for the sale of the property. On 3 January 2005 the appellant moved to the property and the deceased vacated the property. The appellant paid R4 500.00 to the deceased at the property on 4 January 2003. On 5 January 2003 they went to sign the written agreement of sale at the office of the appellant's attorneys, Mmoleli Attorneys. On the same day after signing the agreement, the appellant and the deceased went to Standard Bank

where the appellant paid the outstanding amount of R6 500.00 to the deceased. The attorneys were not present when the appellant made payment of the above two amounts to the deceased.

## ONUS OF PROOF

[25] It is common cause that the deceased is the registered owner of the property, and that the first respondent is the executrix of his estate. The first respondent asserts that the appellant and his wife concluded a lease agreement with the deceased in respect of which they rented a back room on the property. After the deceased passed away, the appellant and his wife breached the lease agreement by failing to pay rent for occupying the property. The first respondent terminated the lease agreement and gave the appellant and his wife notice to vacate the property. The appellant and his wife refused to vacate the property, they remain in occupation of the property without the first respondent's consent or having any right in law to do so, and they have become unlawful occupiers of the property.

[26] On the other hand, the appellant denies that a lease agreement was ever concluded. He further denies that he and his wife are unlawful occupiers of the property. He asserts that he occupied the property pursuant to an agreement concluded with the deceased in terms of which the deceased sold the property to the appellant. He further asserts that the property could not be transferred into his name because of the outstanding debt owed to the municipality. Additionally, he claims that he made some improvements to the property. The appellant bears the onus to prove that a valid sale agreement in respect of the property was concluded between him and the deceased. We deal with the sale agreement and improvements to the property under the grounds of appeal below.

[27] Section 26(3) of the Constitution of the Republic of South Africa, 1996 provides that no one may be evicted from their home or have their home demolished without a court order authorising such eviction after having due regard to 'all the relevant circumstances'. The PIE Act amplifies this by providing that a court may not grant an eviction order unless the eviction sought would be 'just and equitable' in the circumstances. The first respondent bears the onus to establish that the appellant

and his wife are unlawful occupiers. She is further required in terms of the PIE Act to satisfy the court that the eviction would be just and equitable. The appellant bears the evidentiary burden to demonstrate that the eviction would likely render him and other occupiers homeless. The state is obliged to take reasonable measures to provide alternative accommodation to the occupiers where the eviction would likely render them homeless.

## APPELLANT'S GROUNDS OF APPEAL

[28] There are two grounds upon which the appellant contends the learned Magistrate erred, and which constitute his defence to the eviction application.

[29] First, the appellant relies on a deed of sale concluded between himself and the deceased in respect of which the property was sold to the appellant. The appellant contends that this deed of sale is binding on the first respondent as executrix of the deceased's estate and affords him a complete defence to the eviction orders. The appellant asserts that the learned Magistrate ignored this defence completely.

[30] Second, the appellant made huge improvements to the property. These improvements constitute a lien in favour of the appellant. This lien is a valid defence against the eviction order. The appellant asserts that the learned Magistrate ignored these improvements and the lien defence in his judgment.

[31] We deal with each of these grounds in more detail below.

## FIRST GROUND OF APPEAL: THE ALLEGED EXISTENCE OF AN AGREEMENT OF SALE

[32] The first respondent testified that the deceased did not inform her or other family members that he sold the property to the appellant. Her position was that the property had not been sold to the appellant, and that no agreement of sale had been concluded between them.

[33] Although the appellant in his answering affidavit alleged that he had concluded an agreement of sale with the deceased in respect of the property, he did not attach it to his answering affidavit. In her replying affidavit, the first respondent challenged the appellant to produce a copy of the agreement of sale. As previously indicated, the parties were afforded an opportunity to file supplementary affidavits. The appellant's supplementary affidavit likewise did not attach a copy of the agreement of sale.

[34] During cross examination of the first respondent, appellant's attorney, Mr Hlatshwayo, put the appellant's version to her that there was no agreement of sale:

And we admit that there is no sale agreement between Sam Sithole and the owner of the house. There is no sale agreement. Do you understand that?

I put it to you that there is no sale agreement. You agree?

[35] In his oral evidence, the appellant testified that he and the deceased concluded an agreement of sale in respect of the property through Mmoleli attorneys, and that these attorneys prepared the agreement of sale in 2002/2003. The appellant testified that he did not have a copy of the agreement of sale because the attorney, Mr Mmoleli, had been struck from the roll of attorneys. The appellant later in his evidence undertook to vacate the property if he was compensated for the improvements he had made to the property.

[36] From the above, the appellant had not produced in evidence (whether in his affidavits or oral evidence) the alleged agreement of sale, and that in fact, according to the appellant, he was not able to obtain a copy of the said agreement.

[37] It therefore comes as somewhat of a surprise that the appellant attached to his notice of appeal a document which purports to be an agreement of sale entered into between him and the deceased in respect of the property. This document is annexure J to the notice of appeal. The notice of appeal was drafted by Hlatshwayo Mhayise Inc. The relevant portion of the notice of appeal reads as follows:

[Appellant] handed in the deed of sale entered into between himself and the owner of the house [the deceased]. The [first respondent] is the executrix in the aforesaid estate and the sale agreement is binding in law against the executrix.

The Honourable Magistrate erred in ignoring...the deed of Sale between the [appellant] and the deceased, to the court and same was admitted in evidence. The deed of sale [is] a good defence to the eviction order, the deed of sale is enclosed **Annexure J.**

[38] A similar position is taken in appellant's practice note and heads of argument before us. Both these documents were drafted by Hlatshwayo Mhayise Inc.

[38.1] In the appellant's heads of argument the following is stated under the heading COMMON CAUSE EVIDENCE BETWEEN THE PARTIES: "*[Appellant] produced the deed of sale dated 2003 between himself and the deceased.*" Thereafter the heads continue as follows:

Can the court grant an eviction order in the presence of a valid deed of sale?

The existence of the deed of sale between the [appellant] and the owner of the house [the deceased], is a good common law defense to an eviction order.

In view of the deed of sale alone, the Honourable Magistrate should have dismissed the application.

[38.2] The appellant's practice note goes even further in its criticism of the learned Magistrate, when the following is stated:

Appellant had a sale Agreement with the deceased. The magistrate saw it, did not criticize the sale agreement, but said nothing about the sale agreement in his written judgment. He should not have granted the eviction order.

[39] From the appellant's heads of argument and practice, as well as in argument before us, the appellant relies in this appeal on a document critical to his case which he and Mr Hlatshwayo insist was led in evidence before the learned Magistrate.

[40] Because we were not able to locate in the record any reference to annexure J (the agreement of sale), we requested Mr Hlatshwayo to refer us to the relevant passages in the record which reflect this document having been handed in as evidence in the court *a quo*. Mr Hlatshwayo then referred us to an extract from the appellant's oral evidence which was to the effect that the appellant and the deceased had signed a written agreement for the sale of the property. However, this extract in no way assisted us as there was clearly no reference made to a specified document handed in as evidence not least annexure J. Mr Hlatshwayo eventually conceded that annexure J does not in fact appear in the record.

[41] It is obvious that in the absence of an application to introduce new evidence on appeal, no reliance may be placed on annexure J in this appeal. The appellant did not make such an application. The appellant's attempt to rely on annexure J is inexcusable. What makes matters worse is that in his notice of appeal, heads of argument, practise note and argument before us the appellant and Mr Hlatshwayo were highly critical of the learned Magistrate's failure to have regard to annexure J in his judgment and in granting the eviction application. It is regrettable that an officer of the court conducted himself in this way.

[42] The contents of annexure J are also instructive. Annexure J is a four-page document headed "*DEED OF SALE*". It reflects the sale of the property by the deceased to the appellant for an amount of R17 000.00.

[42.1] Clause 11 of annexure J this document records that "*All payments shall be made at Hlatshwayo-Mhayise Inc Vereeniging.*"

[42.2] Clause 18 provides that the deceased's "*conveyancers shall attend to the registration of the transfer of the above property into the name of [the appellant]. HLATSHWAYO-MHAYISE INCORPORATED of*

*VEREENIGING or their associates are authorized to attend to the necessary registration.”*

[42.3] The signature portion of annexure J reflects a manuscript insertion purporting to be the signature of the deceased in the space provided for the seller, and a signature, purporting to be that of the appellant, in the space provided for the purchaser. Provision is made for the signatures of two witnesses for each of the seller and the purchaser. There is what appears to be a signature of the same person in the space provided for one of the two witnesses.

[42.4] The date of the seller and purchaser’s purported signatures is blank. In this regard all that is reflected is “*THUS DONE AND SIGNED at .....ON THIS .....DAY OF .....2003.*”

[43] We question the authenticity of annexure J.

[43.1] First, it is immediately apparent that the appellant’s attorneys played some role and had some input in the production of annexure J as they are not only named as the deceased’s conveyancers but are also identified as the party to whom payments under the deed of sale are to be made. There is no explanation given as to why, if this is so, annexure J could not have been made available at the time when the eviction application served before the court *a quo* especially because the very same attorneys, Hlatshwayo-Mhayise Inc, represented the appellant in the court *a quo*. The sudden appearance of a deed of sale in this appeal is curious (to say the least).

[43.2] Second, the contents of annexure J contradict the appellant’s evidence before the court *a quo* in several material respects which include the following: (1) a difference in the purchase price - R11 000 was the evidence in the court *a quo* but R17 000 in the deed of sale; (2) a difference in regard to whom the payment must be made – in the court *a quo* in his oral evidence the appellant testified that the amount was paid in two instalments

in cash to the deceased, whereas the deed of sale requires payment to be made to Hlatshwayo-Mhayise Inc; (3) a difference in the date when the agreement of sale was concluded – the appellant’s evidence in the court *a quo* was that the agreement was signed on 5 January 2003 at Mmoleli Attorneys’ office, in the answering affidavit he mentioned October 2002, but annexure J reflects 2003 without a complete date and at Hlatshwayo-Mhayise Inc.

[44] We therefore reject any reliance on annexure J. On the evidence before the court *a quo* there was no evidence of a written agreement of sale in respect of the property. That being the case, section 2(1) of the Alienation of Land Act, 1981 then comes into play. It provides that “*No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by both parties thereto or by their agents acting on their written authority.*” The appellant failed to discharge the onus that a valid sale agreement was concluded between him and the deceased in respect of the property. In the absence of a valid written agreement of sale, this ground of appeal is rejected.

[45] Apart from there being no written agreement of sale, there are several material inconsistencies in the appellant’s evidence before the court *a quo*, which also negate the appellant’s defence and this ground of appeal.

[45.1] In his answering affidavit the appellant alleged that the sale was concluded through the deceased’s attorneys, Mmoleli Attorneys of Van der Bijl Park. He further alleged that he paid these attorneys the R11 000.00, and that these attorneys, in his presence, then paid this amount to the deceased. In his oral evidence, however, the appellant testified that he paid the deceased the purchase price of R11 000.00 in two instalments on different dates and at different places without his attorneys being present. He further testified that Mmoleli Attorneys were his attorneys (not the deceased’s) and that he had paid these attorneys R2000.00 for their services.

[45.2] There is also an improbability in his oral evidence where he said that the deceased gave him the key to the property on the 3<sup>rd</sup> of January before payment of the purchase price and conclusion of the written agreement of sale, and the deceased vacated the property same day. The learned Additional Magistrate correctly rejected the version of the appellant on the sale agreement as false.

## SECOND GROUND OF APPEAL: THE ALLEGED IMPROVEMENT LIEN

[46] The appellant contends that the improvements which he made to the property give rise to a lien in his favour, and that the existence of this improvement lien is a valid defence against the eviction order. In respect of this ground of appeal, he submits in his heads of argument that “*Bona fide improvements made to the house constitutes a lien, and an alleged unlawful occupier cannot be evicted until the value of the improvements is paid to him by the owner of the house.*”

[47] Appellant asserts that the learned Magistrate did not refer to the improvements in his judgment, and that the learned Magistrate erred in this regard. In fact, the learned Magistrate did refer to the appellant having made improvements to the property, but the learned Magistrate did not address the improvements in the context of the defence raised by the appellant. This does not, however, mean that the learned Magistrate’s judgment was incorrect. It appears to us that the learned Magistrate did not refer to the improvements as constituting a defence simply because it does not. In our view, and for the reasons that follow, this lien defence is not a valid defence to the eviction order either on the law, the facts or both.

[48] It is common cause that the appellant made some improvements to the property. However, the nature of the improvements and timing thereof is not clear because the appellant gave different versions in his evidence. Nor did the appellant lead any evidence as to the value of these improvements.

[49] In his answering affidavit the appellant alleged that he built a garage and house with face brick, extended the kitchen and dining room, inserted two doors, and

built a sitting room. He did not state in his answering affidavit when he effected these improvements.

[50] In his oral evidence the appellant testified that the original house consisted of a kitchen, dining room, toilet, and one bedroom. He extended the property by building a single garage and two rooms and these were the only improvements made. He in fact denied that he extended the kitchen and the dining room. In his supplementary affidavit the appellant attached a valuation certificate which purported to pertain to the property. Under the heading '*description of improvements*', this certificate states that the main house has 2 bedrooms, 1 bathroom, a lounge, a dining room and a kitchen, and the outbuilding has a double garage attached to the house. In his oral evidence the appellant denied that he built a double garage.

[51] Regarding the timing of the improvements, in his oral evidence the appellant testified that the deceased gave him permission to effect improvements on the property at the time when they concluded the agreement of sale in 2003, and whilst the deceased was still alive. The appellant did not however provide any proof of this alleged improvements agreement. On the other hand, the first respondent and the deceased's brother disputed in their oral evidence that any improvements were effected in 2003. They testified that the appellant commenced with improvements in 2007 after the deceased's death, and that this was done without the first respondent's consent.

[52] Apart from the unsatisfactory nature and at times contradictory evidence by the appellant regarding the alleged improvements, the appellant failed to prove the value of such improvements. Instead, during his oral evidence he undertook to vacate the property if he was awarded R300 000.00 as compensation for the improvements. Even if the lien defence was available to the appellant as a defence to the eviction order (which in our view it is not), the appellant made no attempt to quantify the improvements, and did not institute any proceedings (by way of a counter-application or otherwise) to recover the costs of such improvements.

[53] We now address the legal position. The appellant relies on an improvement lien as his defence against the eviction. An improvement lien is a real lien that arises

by operation of law (See *Wille's Principles of South African Law*, 9<sup>th</sup> Edition 661). The basic principles relevant to real liens, and in particular improvement liens, are expounded as follows:

A real lien is afforded a person who has expended money, or labour with monetary value, on another's property, without any applicable prior contractual relationship between the parties. The expenditure in question has to be incurred while the person asserting the lien is in possession of the subject matter. Such liens are classified according to the type of expenditure incurred by the lien holder in respect of another's property.

It is well established that the expenditure which may be incurred in this regard may be classified under the following three heads: *impensae necessariae* (necessary expenses), that is expenses necessary for the preservation or protection of another's property or, stated negatively, expenses without which the property would either depreciate or perish; *impensae utiles* (useful expenses), that is expenses which enhance the market value of the property, although they are not necessary to preserve or protect it; and *impensae voluptuariae* (luxurious expenses), that is expenditure that does not preserve the property concerned, or increase its market value, but merely gratifies the caprice or fancy of a particular person.

A lien for the recovery of *impensae necessariae* is traditionally called a salvage lien or a lien for repairs, while one for recovery of *impensae utiles* is termed an improvement lien.<sup>1</sup>

[54] An improvement lien only affords security for the recovery of useful expenses. The value of an improvement lien is made not with reference to the actual expenses incurred but with reference to the increase in the market value of the asset in question.

[55] As we have already commented above, the appellant's evidence as to the improvements made by him on the property is far from satisfactory and contradictory.

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<sup>1</sup> Law of South Africa (First Reissue), Vol 27, paragraph 297

Nor is there any evidence which suggests that in the particular circumstances, the expenses incurred were useful. The appellant did not assert at any stage that useful expenses had been incurred.

[56] In respect of the market value of the property, the evidence regarding this aspect is in our view also unsatisfactory. The appellant failed to produce credible evidence proving the nature of the improvements and the expenses incurred by him in this regard. He did not attach receipts or invoices or any form of documentary evidence proving the costs for labour and material or any other work that was allegedly carried out in relation to the improvements. All that is before us on the record is the appellant's bald assertion that these expenses cost him R150 000.00.

[57] But in any event, the actual cost of expenses is not the test. What one must look at is the increase in market value of the asset because of the expenses incurred. The valuation certificate attached to the appellant's supplementary affidavit does not assist his case on this score. On its face, that certificate was prepared by one Peter Mabelane, in his capacity as professional valuator. However, there was no affidavit before the court *a quo* from Mr Mabelane, and he did not give any oral evidence. The certificate itself purports to place a market value of R350 000.00 on the property. For the appellant's purpose he is required to prove both the market value of the property prior to incurring the useful expenses and the market value because of such expenses. The appellant not only failed to prove what the market value of the property was prior to incurring the expenses, he contended that he expended R300 000.00 in respect of expenses and that he requires to be compensated for that amount. Quite clearly the appellant's claim in this regard is neither supported by the evidence nor competent in law.

[58] From the first respondent's point of view, the market value of the property is in the region of R120 000.00 as appears from the municipal account. The first respondent disputes the market value to be R300 000 to R350 000.00. The appellant has not discharged the onus of proving the original market value and the current market value.

[59] The appellant and his wife have been in occupation of the property since June 2005. The evidence reflects that he has been operating a hair salon and tavern on the property without the first respondent's consent. No rent has been paid to the first respondent. He and his wife are in unlawful occupation of the property.

[60] We are of the view that the court *a quo* did not err, and its judgment cannot be assailed. We will therefore dismiss the appeal. Since the first respondent did not participate in the appeal, there will be no costs order in respect of the appeal.

[61] There is one further aspect which we deem advisable to address. This pertains to the vacation of the property by the appellant and Ms Acinah. In order for there to be no ambiguity regarding this aspect, and because the appellant and his wife have been in unlawful occupation of the property for a very long period of time, have been living there rent free and have been given more than ample time to vacate the property we will make an order which confirms that they are to vacate same by 30 April 2022, and that the Sheriff be ordered to evict them in the event that they do not do so.

[62] We accordingly make the following orders:

[62.1] The appeal is dismissed.

[62.2] Sam Sithole, Monotsi Acinah and all persons occupying through them, are to vacate the property Erf [...] Bophelong Extension 15 by 30 April 2022.

[62.3] In the event of the persons referred to in 62.2 above do not vacate Erf [...] Bophelong Extension 15 by 30 April 2022, the Sheriff of the court is ordered and authorised to immediately evict the said persons from the property.

MMP Mdalana-Mayisela J  
Judge of the High Court

Gauteng Division

I agree

T Ossin  
Acting Judge of the High Court  
Gauteng Division

**(Digitally submitted by uploading on Caselines and emailing to the parties)**

Date of delivery: 28 March 2022

Appearances:

|                            |                        |
|----------------------------|------------------------|
| On behalf of the Appellant | Mr M D Hlatshwayo      |
| Instructed by:             | Hlatshwayo-Mhayise Inc |

|                               |               |
|-------------------------------|---------------|
| On behalf of the Respondents: | No appearance |
|-------------------------------|---------------|