



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 26037/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 21 APRIL 2022

SIGNATURE

In the matter between:

GEIGER ENTERPRISE (PTY) LTD

Applicant

and

CRESTAR PRINTERS & PUBLISHERS (PTY) LTD

Respondent

J U D G M E N T (In Leave to Appeal)

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

- 1.1 The respondent in the main application, Crestar Printers & Publishers (Pty) Ltd (Crestar) has, by its own admission, been in occupation of Section 4 in a scheme known as Sunderland Ridge Ext 29 as well as the exclusive use area known as Garden 3 in the same scheme. It is a commercial property in a light industrial area (the premises).
- 1.2 Crestar is a printing and publication company and it has launched business rescue proceedings some time ago. These have been kept in abeyance since February 2021. The business rescue proceedings also halted the recovery by writ of execution of Crestar's principal creditor, being the owner of the primary printing press which has been installed at the premises.
- 1.3 Crestar's previous right of occupation of the premises terminated when its lease agreement with the previous owner, Napaj Property Investment and Development (Pty) Ltd (Napaj) was cancelled due to Crestar's non-payment of rental, as long ago as November 2019.
- 1.4 After hearing an opposed motion on 8 March 2022, this court granted a written judgment and an eviction order in favour of Geiger Enterprise (Pty) Ltd (Geiger) on the basis of it being the new owner of the premises, having bought same from Napaj.
- 1.5 Based on concessions made in open court during the hearing of the main application to the effect that, should the court find against Crestar, it would have to vacate the premises immediately and that no extension of time need to be granted, Geiger removed Crestar's equipment from the premises after service of the eviction order. As this was done without a writ or the intervention of the sheriff, the urgent court granted repossession of the premises whereafter Crestar launched the present application for leave to appeal the eviction order.

[2] The application for leave to appeal

Seven points have been raised in Crestar's application for leave to appeal to a full court of this division. I shall deal with each of them as succinctly as possible hereunder.

[3] Failure to decide the existence or not of sectional Title Plan SS331/2020 in the Scheme Known as Sunderland Ridge Ext 29. (paragraph 1.1 of the notice of application for leave to appeal).

3.1 Crestar alleges that this court failed to decide the point raised, namely the *"the Respondent's case was that such a plan [Sectional Title Plan No 331/2020] does not exist and the Applicant did not produce a copy of such a plan. Accordingly the "best evidence" to which the court referred in paragraph 4.5 of its judgment, has not been produced"*.

3.2 In paragraphs 4.3 and 4.4 of the judgment I referred to the fact that the only basis upon which Crestar made the allegation that the sectional title scheme referred to in the title deed and notarial session of exclusive use of the garden, did not exist, was a somewhat inconclusive "Windeed search", being a printout from a data search conducted by Crestar. Nothing more was produced to substantiate this denial of existence. It is also not clear whether the point is now that there is no sectional title scheme in existence or merely that the plan to such a scheme does not exist.

3.3 On the other hand, the "best evidence" on which this court relied in paragraph 4.5 of the judgment, being the target of Crestar's complaint, was an original title deed which had been produced in court, which had been signed and stamped by the Registrar of Deeds, with title no ST 47106/2020 as well as a Notarial Cession of Exclusive Use Rights, both referring to Sectional Title Scheme "Sunderland Ridge Ext 29".

- 3.4 At the hearing of the application for leave to appeal, Adv Beaton SC, who appeared for Crestar, conceded that the regime by which immovable property was registered in South Africa is a tightly regulated regime and that a title deed in respect of a sectional title property can only be issued and registered once a sectional title scheme is in existence and has been registered by the same Registrar of Deeds. Adv Basson, appearing for Geiger, pointed out that such a scheme can only be registered once a sectional plan has in turn been approved by the Surveyor General's office. Both this concession and pointing out are a correct reflection of the state of our law. See in this regard Parts II and III of the Sectional Titles Act 95 of 1986, and in particular section 7 (Approval of draft sectional plans by the Surveyor- General), Section 12 (Registration of Sectional Plans and opening of Sectional Title Registers) and the effect of the division of a property into sections, capable of separate ownership as provided for in section 13 (Effect of registration of section plans) of that Act.
- 3.5 When faced with the question on what basis, in view of the provisions such as those referred to above, a title deed issued by the Registrar of Deeds should not have been accepted by this court as the "best evidence" that a scheme and a plan identified as SS 331/2020 existed, Adv Beaton SC responded that the "title deed might be wrong".
- 3.6 In paragraph 4.6 of the judgment, this court relied on a "fresh" conveyancer's certificate, issued by a conveyancer which confirmed the contents of title deed ST 47106/2020, reflecting Geiger as the owner of Sectional 4 "*as shown and more fully described on Sectional Plan SS 331/2020*". A conveyancer, being also an admitted attorney and officer of the court, has various statutory obligations when confirming ownership and existence of a sectional title to the Registrar of Deeds in terms of section

15 B of the Sectional Titles Act. The contents of such a certificate must also in all respects reflect the contents of the records held by Deeds Office. In circumstances where, as in the present case, a separate certificate has been prepared by a conveyancer for litigation purposes, no reasons have been advanced why the court should not have accepted same as corroboration.

- 3.7 The last point raised by Adv Beaton SC in this regard is that, despite the fact that the aforementioned documents and their compliance with statutory provisions overwhelmingly point to the existence of a sectional plan, a copy thereof had to have been produced by Geiger. He says once this had been produced, the point would have been abandoned. No reference was made in this argument to the plans already annexed to the founding affidavit and referred to in paragraph 4.4 hereunder. In the circumstances of this case, where the Surveyor General had been satisfied as to the existence of a plan, the Registrar of Deeds has been so satisfied, a conveyancer had confirmed the existence of registration of a unit in a scheme in terms of a plan and where Section 15 B(2) of the Sectional Titles Act does not even in the circumstances where a plan has so been identified consider it necessary “*to annex a diagram to any sectional title deed under which a unit or an undivided share ... is held*”, then I find Crestar’s insistence on the production of a copy of a plan by Geiger, merely in order to reply to Crestar’s reliance on a tentative “Windeed Search”, untenable.
- 3.8 Adv Beaton SC correctly conceded that the applicable standard of proof is that of a balance of probabilities. I find no reasonable prospect that another court would, on appeal, find that it is more probable than not, that no sectional title scheme as reflected in records of the Deed Office exists. Accordingly this point does not justify the granting of leave to appeal.

- [4] *“The court misconstrued the point raised by the Respondent. It was the Respondent’s case ... that it did not occupy the premises in respect of which the Applicant asserted ownership since those did not exist”* (paragraph 1.2 of the notice of application for leave to appeal).
- 4.1 Crestar conceded that it still occupied the same premises that it had rented from Napaj and that it had not moved from it.
- 4.2 Crestar could also not deny that Napaj had sold those premises to Geiger.
- 4.3 None of these three parties were in any doubt as to the identity of which premises were being referred to. They were, in addition to the Deeds Office description, described and identified by Crestar’s then Chief Financial Officer in the prior litigation referred to in paragraph 2.4 of the judgment.
- 4.4 Even the specific buildings (being numbers 6, 7 and 8 at the specific address) have been identified. This aspect has been dealt with in paragraph 2.5 of the judgment. In those portions of the Surveyor General’s plans which have been annexed to the founding affidavit when the previous misdescription of the premises in the lease agreement (which predated the title deed) had been corrected, these three buildings are listed as forming part of the same section 4 to which Crestar’s previous Chief Financial Officer had referred to. This description accords with the Notice of Motion.
- 4.5 The allegation of the purported “non-existence” of the premises, is solely based on the denial of it constituting a sectional title unit. This denial is again, based on Crestar’s denial of the existence of a sectional title plan. The denial of the existence of the plan is in turn (only) based on an uncertified printout from a commercial data capture facility which is not that of the Deeds Office. The printout even contains the disclaimer: “*This*

report contains information gathered from the Windeed database and we do not make any representations about the accuracy of the data displayed ...”.

4.6 This court found in paragraph 4.5 of the judgment that reliance on evidence of this nature was contrary to the “best evidence rule”. Crestar contends that this court has not sufficiently assessed the point raised by it and, has it done so, it would have found that Geiger “... *had not established ownership of the premises occupied by the Respondent and this is the finding that a court of appeal would probably make*”. On the basis as set out earlier in this paragraph, I find no reasonable prospect of that happening.

[5] Negative inference resulting from the timing of raising the defence of a lien (paragraph 2.1 of the notice of application for leave to appeal).

5.1 The argument was that it would be reasonable for an adjudicator of facts to expect someone faced with the onslaught of an eviction application, to raise the shield of a lien in excess of R8 million at the first possible instance. Crestar countered that it could not have raised this shield before because it had been contractually prevented from doing so by virtue of the terms of its lease agreement with Napaj and therefore no negative inference could be drawn from the timing of raising a lien. Adv Basson pointed out that a lien diminishes the value and benefits of enjoyment of the property by a new owner. This would have been of particular concern for Geiger who had bought the property for R15 million and who might be faced with a claim by an erstwhile tenant of more than half that amount. One would have expected the lien to have featured at the time of the new owner’s very first request to vacate the premises.

- 5.2 Crestar's argument that it could only attempt to resurrect its shield of protection from its contractual death during the present litigation only resulted in this court applying careful scrutiny thereto. This is what was stated in paragraph 5.1 of the judgment. Upon a reading of the judgment, it is clear that the perceived negative inference went no further than that.
- 5.3 The enforcement of the lien insofar as it may exist and the veracity, merits or lack thereof were fully considered, irrespective of the timing issue. It was in the end not rejected due to the timing of when it was raised, but due to the lack of merit or proof of the requirements for such a lien. There are therefore no grounds upon which leave to appeal should be granted in this regard.
- [6] The issue of prescription (paragraph 2.2 of the notice of application for leave to appeal).

Although the issue of prescription was referred to in passing in paragraphs 5.3 and 5.4 of the judgment, no finding of prescription had been made and, consequently, no decision in this regard exists which could be susceptible to an appeal.

- [7] The availability of a lien to only a bona fide occupier
- 7.1 Crestar stated in the notice of application for leave to appeal that this court erred in finding that a lien is only available to a *bona fide* occupier. Crestar further stated that "*existing law is to the contrary*".
- 7.2 In argument, Adv Beaton SC conceded that the statement that existing law is to the contrary is incorrect. The existing law is divided on the point as to whether a *mala fide* occupier may also exercise a lien.

- 7.3 The cases affording a *mala fide* occupier also a lien vary in their application, depending on the facts of each case. It was for this reason that, after referring to the availability of a lien limited to a *bona fide* occupier (only) in paragraph 5.4 of the judgment and the contractual death of a lien in paragraph 5.5 of the judgment, this court went on to consider the consequences of the lien, insofar as it may otherwise exist (from paragraph 5.6 of the judgment).
- 7.4 It is therefore, both on the facts of this case and the way they have been considered in the judgment, not necessary that the legal issue of whether a *mala fide* possessor can acquire a lien or not or whether a contractually precluded lien (which may be personal in nature) may be resurrected against subsequent purchasers (which may be the raising of a real right), need to be determined on appeal. Crestar was not non-suited on either of these grounds.
- [8] Tendered removal of improvements (paragraph 2.4 of the notice of application for leave to appeal).
- 8.1 The allegation made by Crestar is that this court erred in having found that Geiger had tendered the removal of all improvements while the tender did not include the upgraded electrical system.
- 8.2 The contention is not correct. The tender was initially for the removal of all items. This was referred to in paragraph 5.6 of the judgment. Geiger has conceded that the electrical installation might be difficult or even impossible to remove. The consequence hereof was dealt with in paragraph 5.6 of the judgment.

- 8.3 In the circumstances where the contention relied on as a ground for the application for leave to appeal is factually incorrect, Crestar is then not entitled to leave to appeal in respect of this point.

[9] The usefulness of the electrical upgrade

- 9.1 It is common cause that when Crestar rented the property, it was fully functional and no electrical upgrade was necessary or contemplated. It was only Crestar who, for purposes of running its large printing machines, wanted to upgrade or amend the electrical installation. This was initially funded ½ : ½ by Napaj and Crestar, but later Napaj had been fully recompensed by Crestar due to the fact that it was Crestar and not Napaj who wanted these amendments done.
- 9.2 Geiger's new proposed tenant does not need nor insist on these electrical installations effected by Crestar, hence the tender for the removal.
- 9.3 The fact that the electrical installations effected by Crestar cannot be removed and that it cost Crestar R4,1 million to install them, does not automatically equate to the installation having increased the value of the premises. The installation may not be "useful" in the full sense of the word. The fact that it may be capable of being used does not mean that it might not come with adverse consequences. It might carry a too high voltage or wattage, it might be more expensive to run, it might require more maintenance or it might not be suitable to the specific requirements of Geiger's proposed new tenant.
- 9.4 Crestar furnished no particularity substantiating its allegation of usefulness. More importantly, no particularity was furnished as to what extent the alleged usefulness would have increased the value of the premises (if at all). In paragraph 7 of its answering affidavit, Crestar alleged

that its claim is for an “enrichment lien” yet Adv Beaton SC had to concede, during the argument relating to this point during the application for leave to appeal, that no attempt had been made to value the property or the enhanced installation. Apart from pure argument, no evidence had been placed before the court indicating by what amount Geiger had allegedly been enriched, if at all. This aspect, which resulted in the lien, even if it existed, not being upheld, has been dealt with in paragraphs 5.9, 5.10 and 5.11 of the judgment.

9.5 Based on the lack of evidence produced by the party seeking to enforce an enrichment claim by remaining rent-free in a commercial property, I find no reasonable prospect that a court of appeal would be “*likely to differ on this aspect*” (as put by Crestar in its notice of application for leave to appeal).

[10] Crestar has not in its notice of application for leave to appeal contended that the question whether a contractually precluded lien could be “resurrected” against a subsequent title holder is one which would qualify as a “compelling reason” as contemplated in Section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013. In any event, on the facts of this case, I am of the view that it is not such a reason.

[11] Costs

As already stated before, during the argument of the main application, the timing of vacating the premises came up, should the court find against Crestar. The court was not informed at the time whether the large printing machine had already been removed by the owner thereof and how long the process of vacating the premises might take. The court was also mindful of the preceding litigation prompted by the fact that Geiger had a prospective

long-term tenant which it was fearful of losing and to which it wished to urgently grant occupation of the premises. The response then given by Adv Beaton SC was that, should the court find against Crestar, no further extension of occupation need to be given. This was dealt with in paragraph 7 of the judgment. Since the order had been served however, the premises had not been vacated, despite Geiger's best efforts to have this implemented. During the argument of this matter and the debate about vacation of the premises not having taken place, Adv Beaton, SC on behalf of Crestar (and without any apparent input from Crestar or its attorney) indicated that a condition of the granting of leave to appeal (should it be ordered) could be that Crestar pay the amount of monthly rental previously tendered. However, that amount had previously only been paid for two months whereafter Crestar again defaulted. No answers could also be given to the court as to what would happen should a business rescue practitioner be appointed nor was anything tendered in respect of the arrears. This tender of monthly payments, if it was in fact a tender, appears to be a transparent attempt to remain in the premises at all costs. I consider this approach to be a factor to be considered in the exercise of a court's discretion in relation to the issue of costs. Another factor to be considered in respect of the scale of costs to be awarded, is the manner in which a party conducts its litigation. It was at all times clear that the issue of the identity of the premises is nothing but a red herring and a cynical approach to litigation, if not a downright attempt at abusing the process of the court. The arguments referred to in paragraphs [2] and [3] above illustrate this. As a final underlining of this inappropriate approach to litigation, Crestar yet again refused to tell the court what the description of the premises it occupies is, if not that reflected in Geiger's title deed. At no stage did Crestar abandon this line of argument, in fact, it formed the more persistent and substantial part of the basis upon which it sought leave to appeal.

Exercising this court's discretion, I find that the same scale of costs as in the main application, would be justified in these circumstances.

[12] Order

The application for leave to appeal is dismissed with costs on the scale as between attorney and client.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 19 April 2022

Judgment delivered: 21 March 2022

APPEARANCES:

For Applicant:

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