

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 01670/2020

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

SENYATSI ML
SIGNATURE

18-08-2021
DATE

In the matter between:

VISION POINT PROPERTIES CC

Applicant

and

GRACE KELLY MAKUBIRE

First Respondent

GRACE KELLY MAKUBIRE NO

Second Respondent

(In her capacity as executrix in the deceased estate of
Thabane Keipele Modise Leo Makubire)

ALL OCCUPIERS OF ERF 56 STRATFORD TOWNSHIP

Third Respondent

REGISTRATION DIVISION J.R GAUTENG

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 18 August 2021*

SENYATSI J:

- [1] This is an opposed application for eviction of the first respondent and all other occupiers of erf 56 Strattford Township, Registration Division JR Gauteng situated at 6 Nichols Crescent, Strattford Gardens, Broadacres, 2021, Johannesburg.

- [2] The first respondent, Ms Grace Kelly Makubire and her late husband, Thabare Keipele Modise Leo Makubire, lived in the property described above as the owners thereof. The property was funded through a loan secured by mortgage bond passed in favour of Investec Bank ("Investec"). The mortgage bond was registered on 6 November 2006.

- [3] On 29 January 2013, the first respondent's husband died and consequently the first respondent was appointed as an executrix of his estate. It appears from the papers that Investec instituted an action to recover the amount owing to it in June 2013 and judgment was granted in its favour during August 2017 for payment of R4 961 470.67 and the property was declared specifically executable.

- [4] The first and second respondents served an application to rescind the judgment under case number 40411/2015 and the application was dismissed on 6 June

2018. Rule 46A came into operation on 22 December 2017. The property was sold to the applicant by sale in execution of the judgment on 25 August 2018.

[5] Transfer and registration of ownership of the property was effected in favour of the applicant on 30 July 2019. Following the transfer, the applicant commenced with the eviction proceedings on 22 January 2020 and the section 4 (2) of the Prevention of Illegal Eviction Act proceedings was granted on 19 August 2020.

[6] The applicant contends that it has complied with the requirements of Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act"). The respondent's defence is that she has a lien over the property in that the property was sold without a reserve price. The respondent furthermore contends that the property was sold in contravention of section 30 of the Administration of Estates Act which provides as follows:

"s30 Restriction on sale in execution of the property in deceased estates any property in the estate of any deceased person which has been attached whether before or after his death under such writ process; provided that the foregoing provisions of this section shall not apply if such first-mentioned person could not have known of the death of the deceased person."

[7] The issue for determination is whether the respondents' defence can be raised against a *bona fide* purchaser for vindication of its rights by way of eviction.

[8] To consider the defence of lien, it is important to deal with the legal principles pertaining thereto. To successfully raise a defence of a lien, it must be alleged and proved that:

- “(a) a person has possession of the object;
 (b) that the expenses incurred were necessary for the salvage of the property or that it was useful for the improvement of the object (improvement lien).”¹

[9] A real lien (an enrichment lien) is afforded to a person who has extended money or labour on another’s property without any prior contractual relationship between the parties. The lienholder 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.²

[10] In *First National Bank of South Africa Ltd v The Commissioner for the South African Revenue Services and Another*³ it was held that there is no authority for the proposition that a person having a lien over the property of a third party thereby acquires an independent cause of action against a third party owner. The Constitutional Court, in that case, citing *Buzzard Electrical (Pty) Ltd c 158 Jan Smuts Avenue Investments (Pty) Ltd*⁴ confirmed that a lien did not exist in vacuum but to secure or reinforce an underlying claim and that neither a direct nor an indirect enrichment claim could be entertained if there had been no unjustified enrichment of the owner, it constitutes no more than a defence against the owner’s *rei vindicatio*.

¹ See *Pheiffer v Van Wyk and Others* 2015 (5) SA 464 (SCA) para [10]

² Same at para [12]

³ 2002 (4) SA 768 (CC) at para [32]

⁴ [1996] ZACC 13 1996 (4) SA 552 (CC)

[11] The principle is expressed by Eiselen and Pienaar Unjustified Enrichment⁵ as follows:

“The lien or retention right is an ancillary right which supports the main claim, but also dependant on it. In all cases where a party relies on a retention right the onus is that party to prove the existence of the main claim without which it cannot survive.”

[12] In *Singh v Singh Insurance Co Ltd*⁶ in dealing with the salvage lien the court held that it was a remedy which is available to the possessor of property of another. It operates as security for the recovery of necessary expenditure incurred by him in the course of his possession of another's property.

[13] Another instance where a lien can be raised as a defence is an instance where someone who has effected necessary or useful improvements to the property of another by agreement is sued for its return before being compensated for his work, he may defend his possession by either means-against his contractual counter-part, on the basis of his debtor and creditor lien, for his agreed remuneration, regardless of the extent of the latter's enrichment, if owner, and against the owner who is not the contracting party, on the basis of his enrichment lien, for his actual expenses tempered by the owner's enrichment.⁷

[14] The respondent's claim in her answering affidavits is that she has a lien over the property. She contends that the lien stems from the fact that the property was sold without reserve and that it was not sold for an equitable value at sale in execution which took place on 25 August 2018. She further contends that,

⁵ 1999 (Butterworths) 78 para (e)

⁶ 1997(1) SCA

⁷ See *Goudim Chrome (Pty) Ltd v MMC Contracts (Pty) Ltd* 1993 (1) SA 77 (A); (249/91) [1992] ZASCA 186

as the joint co-owner of the property, she was entitled to a larger sum of money for the property. I have not come across any authority for such proposition, especially against a *bona fide* purchaser who purchased the property through a judicial process.

[15] The claim of lien as raised by the respondent is also not supported by any of the authorities already referred to above. She has not averred that she expended expenses on the property of the applicant. It follows, therefore that there is no legal basis to sustain the defence of lien as claimed by the first respondent against the *res vendicatio* of the applicant. Accordingly, her defence must fail.

[16] I hold the view as set out in paragraph [15] above because the sale in execution was not done at the instance of the applicant, but through a court process where Investec was the judgment creditor who exercised its rights as a mortgage bondholder. The applicant is a *bona fide* purchaser who was not involved in the litigation between Investec and the first respondent.

[17] I find it unnecessary to deal with the provisions of Rule 46A of the Uniform Rules, as the application before this court has nothing to do with it.

[18] The applicant has complied with the provisions of s4(a) of the PIE Act. It was authorised by court to issue the eviction proceedings and therefore I am of the view that a proper case has been made out for the relief sought.

[19] Section 4(7) of the PIE Act provides as follows:

“(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an

order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution, pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another owner for relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”

[20] In dealing with the constitutional imperative on whether it is just and equitable to order eviction, the court in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*⁸ held that the court must come to a decision that is just and equitable to all parties.

[21] In our constitutional dispensation, in a wide range of eviction cases, municipalities have been ordered to provide occupiers with emergency accommodation. The critical issues when it comes to eviction is firstly whether an eviction order should be granted, if the order is granted by which date must the property be vacated and thirdly if the property, is not vacated by the date determined by court, when the order may be executed.⁹ The issue of emergency accommodation is not relevant as the case before me does not involve a municipality.

[21] I now deal with the defence raised that s30 of the Administration of Estates Act had not been complied with when the property was sold.

[22] The first respondent was the executrix of the estate of her late husband. She has not adduced evidence on what steps she had taken after her appointment

⁸ 2012 (6) SA 294 (SCA)

⁹ See De Rebus, May 2014: 40

by the Master of the High Court, as an executrix to bring the administration of her late husband's estate to finality. She has also not disclosed evidence of how far she was with the liquidation and distribution account of the said estate. There is also no evidence to suggest that she took any action to protect the interest of creditors and heirs to the estate. Consequently, I hold the view that this defence is intended to delay the vindication of the applicant's right to the property.

[23] The first respondent argued that she was the sole breadwinner and that she relies on her pension of R3200 per month to pay her for her legal fees. She does not disclose the special circumstances that she considers relevant to enable this court to decide on whether it is just and equitable for her and the rest of the respondents not to be evicted from the property.

[24] The balancing act that this court must exercise is that it should also guard and protect the owner of the property as it is innocent party that was never involved in the litigation dispute between the first respondent and Investec Bank.

[25] Section 25 of the Constitution protects the rights of owners of the property and provides that a limitation of these rights in favour of the occupiers will be limited in duration. Once the court decides that there is no defence to the claim of eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order.¹⁰

[26] I have been persuaded to grant the eviction order as no defence exists against the eviction and the applicant has made out a case.

¹⁰ See *Occupiers of Erven 87 & 88 Berea v De Wet NO and Another* (CCT 108/16) [2017] ZACC 18; 2017(8) BCLR 1015 (CC); 2017 (1) SA 346 (CC) (8 June 2017)

ORDER

[27] The following order is made:

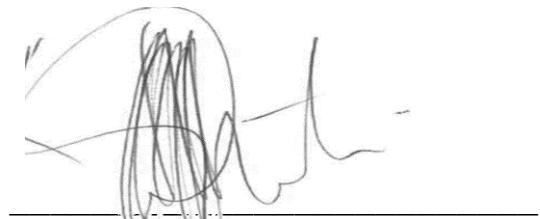
(a) The first, second, third respondents and all those who occupy the undermentioned property by virtue of their occupation thereof, including their family, servants or employees are evicted from property:

Erf 56 Stratford Township; Registration Division: JR Province of Gauteng situated at 6 Nicholas Crescent Stratford Gardens, Broadacres, 2021 ("The Property");

(b) The first, second and third respondents and all those who occupy the property by virtue of their occupation thereof, including their family, servants or employees are ordered to vacate the property within 45 (forty-five) court days following the date upon which this order is granted;

(c) The first, second, third respondents and all those who occupy the undermentioned property by virtue of their occupation thereof, including their family, servants or employees, fail to vacate the Property within 45 (forty-five) court days following the date upon which this order is granted, the eviction order may be carried out, in which event the Sheriff of this court is authorised and directed to forthwith evict the first, second and third respondents and all those who occupy the property by virtue of; through or their occupation thereof; including their family, servants or employees, from the property;

- (d) The Sheriff is authorised and directed to take all legal steps to enforce this Court Order, including enlisting the services of the South African Police Services and a locksmith;
- (e) Should the first, second, third respondents and all those who occupy the undermentioned property by virtue of their occupation thereof, including their family, servants or employees attempt to regain access or possession of the Property after eviction order has been executed by the Sheriff and/or his/her authorised deputy, the applicant shall not need to approach this court for relief and the Sheriff- or his/her authorised deputy is hereby authorised and directed to take all legal steps to enforce this Court Order, including enlisting the services of the South African Police Services and a locksmith and;
- (f) The first, second, third respondents are ordered to pay the costs of this application, the one paying the other to be absolved on a party and party scale.

A handwritten signature in black ink, appearing to be 'Senyatsi ML', written over a horizontal line.

SENYATSI ML

***Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg***

REPRESENTATION

Date of hearing: 28 April 2021

Date of Judgment: 18 August 2021

Applicant's Counsel: Adv B Bhabha

Instructed by: Bruno Simao Attorneys

First, Second and Third Respondent's Counsel: Adv V van der Merwe

Instructed by: KG Tserkezis Attorneys