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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 49324/2020

REPORTABLE: No

OF INTEREST TO OTHER JUDGES: No

REVISED: Yes

Date: 20 May 2021

In the matter between:

TABITA GERBER

APPLICANT

and

CHRIS VLOK PROPERTY SERVICES TSHWANE CC

RESPONDENT

Coram: A Vorster AJ

Heard: 18 May 2021

Judgment handed down electronically on 20 May 2021 by uploading the judgment onto <https://sajustice.caselines.com>

ORDER

1. The respondent is ordered to forthwith deliver the property, [...]Street, [...], Pretoria, to the applicant.
2. Should the respondent fail to deliver the property, the sheriff for the area in which the property is situated is ordered and directed to evict the respondent and eject it from the property.
3. The respondent is ordered to pay the cost of the application on an attorney and client scale.

JUDGMENT

A Vorster AJ

Introduction

- (1) The applicant is the owner of a residential property situated in Pretoria. The respondent is in possession of the property. The applicant reclaims possession of the property with the rei vindicatio. The applicant approached the court by way of motion proceedings. The respondent opposes the relief on the basis that it should be allowed to retain the property until its claims for expenses incurred in effecting 'useful improvements' had been satisfied.
- (2) There are peripheral issues to be decided separately, namely:
 - whether the applicant made out a case in her founding affidavit;
 - in the event of the applicant being successful with her claim against the respondent, whether she is also entitled to an order vindicating her property

from unnamed respondents, cited as ‘all persons who hold possession under the respondent’.

Did the applicant make out a case in her founding affidavit?

- (3) In her founding affidavit the applicant alleges that she is the owner of the property, that the respondent is in possession of the property, that possession is against her will, and unlawful. In its answering affidavit the respondent complains that the applicant failed to take the court into her confidence by not disclosing certain antecedent agreements, which at some stage entitled it to possession, and precipitated the effecting of ‘useful improvements’ to the property. The respondent contends that this information belonged in the founding affidavit because it points to the respondent’s defense of ius retentionis. The applicant dealt with the facts upon which the respondent relied to support its defense in her replying affidavit and disavowed any reliance on a retention lien.
- (4) The general proposition that all the necessary allegations upon which the applicant relies must appear in her founding affidavit, and not in her replying affidavit is sound. Mandatory precedent is replete with underpinnings for the proposition, but it will suffice to refer to **Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and Others** 2013 (2) SA 204 (SCA) at para [26]. The Constitutional Court expanded on the principle in **Molusi and others v Voges NO and Others** 2016 (3) SA 370 (CC) at para [37]. The Court held that a case made in the notice and pleadings, may not be different from the case made at trial.
- (5) The question is therefore whether the applicant makes all the necessary allegations upon which she relies in her founding affidavit, and whether the case made in the notice and founding affidavit, was different from the case made at the hearing of the application. The first question should be answered in the affirmative and the second in the negative.
- (6) The applicant reclaims possession of her property with the rei vindicatio, and places reliance on her ownership, and the respondent’s possession of the property. To succeed with her claim, she must allege and prove ownership of the property [see **Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd** 1993 (1) SA

77 (A) at 82 & **Concor Construction (Cape) (Pty) Ltd v Santambank Ltd** 1993 (3) SA 930 (A)], and that the respondent was in possession of the property at the time of the institution of the proceedings [see **Graham v Ridley** 1931 TPD 476 & **Chetty v Naidoo** 1974 (3) SA 13 (A)]. Because possession of the applicant's property by the respondent would be prima facie wrongful, it is not necessary for the applicant to allege or prove that the possession is wrongful or against her wishes. The fact that she did so did not draw any onus (see **Chetty v Naidoo** supra & **Singh v Santam Insurance Company Limited** [1997] 1 All SA 525 (A), 1997 (1) SA 291 (SCA)).

- (7) There is no duty on the applicant to deal with any anticipatory defenses, such as the respondent's defense of ius retentionis, in her founding affidavit. A founding affidavit is to plead the case put forward by the applicant and if the answering affidavit raises a defence to which the applicant must respond, the response belongs in a replying affidavit. Not only is this the proper approach under the Uniform Rules of Court, it enables the replying affidavit to focus on points actually raised by the respondent, rather than trying to anticipate points that may not be raised at all or, if raised, formulated differently from the way they were anticipated.
- (8) The respondent, relying on a right, which in this instance is ius retentionis, to possess the applicant's property, must in its answering affidavit allege and prove the right [see **Woerman NO v Masondo** [2002] 2 All SA 53 (A), 2002 (1) SA 811 (SCA)]. Should the applicant refute the right, she must deal with the factual bases for the refutation in her replying affidavit.
- (9) In argument the applicant's Counsel persisted with the applicant's reliance on the rei vindicatio and there is accordingly no merit in the respondent's complaint.

Is the applicant entitled to vindicate her property from unnamed respondents?

- (10) The applicant not only claims return of possession of her property from the respondent, but also from 'all persons who hold possession under the respondent'. The applicant claims consequential relief that those persons be evicted with the respondent, should the respondent fail to return possession of the property to the

applicant. The identities of those persons are not discernable from the papers, and the court is not informed on what bases those persons hold possession under the respondent, or the causa for their occupation or possession of the property. More pertinently, there is nothing in the papers to suggest that the application was served on or brought to the attention of anyone else than the respondent.

- (11) There is an important policy consideration why the relief against ‘all persons who hold possession under the respondent’ cannot be countenanced. Eviction orders should not be granted against ‘faceless’ respondents who are not a clearly discernable group. Eviction orders should also not be granted against respondents in the absence of proof that notice of the proceedings had been given to them by methods prescribed by the Uniform Rules of Court or approved by Court.
- (12) The judgments of **Kayamandi Town Committee v Mkhwaso & Others** 1991 (2) SA 630 and **City of Cape Town v Yawa and Others** **City of Cape Town v Yawa and Others** (395/04) [2004] ZAWCHC 5; [2004] 2 All SA 281 (C) (29 January 2004) and **Illegal Occupiers of Various Erven Philippi v Monwood Investment Trust Company (Pty) Ltd** (2002) 1 All SA 115 (C), three eviction and property related matters, significantly examine the situation where an applicant does not have the identity of all respondents involved in a matter and set out the underlying principles pertaining to court orders.
- (13) In **Kayamandi** Conradie J stated that:
“a failure to identify defendants or respondents would seem to be destructive of the notion that a Court’s order operates only inter partes An order against respondents not identified by name (or perhaps by individualised description) in the process commencing action or (in very urgent cases, brought orally) on the record would have the generalised effect typical of legislation. It would be a decree and not a Court order at all” (page 634 F-I).
“But I consider that it is a far cry to say that persons who independently happen to occupy the same property and who may have quite different rights and interests can all be bundled off the property on the authority of a writ addressed to only one of them” (page 636).

- (14) Ngwenya J in **Monwood** held that:

“The parties in legal proceedings must be clearly identified. There are serious difficulties when the applicant, as is the case here, does not have the requisite details of the respondents. The respondents did not and do not have the particulars of the appellants. Regrettably, our rules of procedure here do not assist us at all as to what to do when faced with this dilemma. Therefore, each case will have to be considered on its own merits.” (page 121)

“Furthermore, the defective service I have referred to above in some detail and the failure to properly identify the appellants before the magistrate are important requirements in bringing a party before court and thus to satisfy the requirements of the audi alteram partem.” (page 123)

- (15) In **Yawa** Budlender AJ endorsed the legal principle in **Monwood** and **Kayamandi** that the effect of orders relating to faceless respondents amount to decrees and not orders.
- (16) Should the persons be natural persons and the consequential relief is granted, without proper notice and without clearly identifying them, they will forfeit the procedural protection and judicial oversight of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act**, No. 19 of 1998. In **Molusi** supra at para [39] the Constitutional Court demands a departure from the common law principles and practices of land law. At para 39 on pages 853 & 854 the Court held that:
- “The pre-reform-era land law reflected the common-law based view that existing land rights should be entrenched and protected against unlawful intrusions. The land reform legislation – ... – changed that view. It highlights the reformist view that the common law principles and practices of land law ... in eviction cases, need to change.”*
- (17) Even if it was historically competent and permissible for courts to grant eviction orders against ‘persons who hold possession through or under a respondent’, without proper notice and without clearly identifying them, such practices can no

longer be accepted without due regard to the objective, normative value system established by the **Constitution**. In consideration of the authorities quoted and the lack of particularity in the papers relating to persons who 'occupy under the respondent', and in the absence of proof that they have knowledge of the proceedings, I am not prepared to grant any relief that will operate against them.

Background facts

- (18) The relevant facts in this matter are either common cause or not disputed on any credible grounds. The applicant is the owner of a residential property situated at [...] Street in [...], Pretoria. The applicant lives in the United Kingdom. The property stood empty since November 2016 and placed on the market to be sold since that date. In 2017 the property was burgled and completely ransacked. Everything was stolen, from the electrical and plumbing fittings to the doors, gate motors, and even the kitchen sink and front door.
- (19) On 13 January 2017 the applicant executed letters of authority to a certain Mr. Dunbar to 'act on my (her) behalf in all matters of the said property (sic)'. Dunbar negotiated a lease agreement with a certain Mr. Vlok, the deponent to the answering affidavit who is a member of the respondent. On 29 January 2017 the applicant and Vlok signed a written lease agreement in terms of which he rented the property from the applicant. Vlok signed the agreement on 28 January 2017 and the applicant countersigned the agreement on 29 January 2017. Although not expressly stated it would seem that subsequent to the conclusion of the lease Vlok did not take possession and occupation of the property, the respondent did.
- (20) The duration of the lease agreement was a period of one year, with an option to buy the property during the validity period of the lease. The agreement specified that Vlok was not permitted to carry out any alterations, additions, or improvements to the property, without the prior approval of the applicant. The agreement contained a clause which specified that all fixtures stolen during the burglary were to be replaced with the same or similar fixtures. The clause did not specify who should replace the fixtures but according to Vlok, the understanding

was that he would, and the applicant would reimburse him. Vlok ultimately replaced the fixtures and was reimbursed by the applicant from funds she received from her insurance.

- (21) When Dunbar negotiated the lease, Volk indicated that he intended operating a restaurant from the property. Dunbar cautioned Vlok that the property was zoned residential and provided Vlok with the property's zoning certificate. Vlok was undeterred by this advice and was adamant that he would be successful in applying to the local authority, being the City of Tshwane, to have the property rezoned from residential to business. Vlok indicated that if he was unable to do so he would nonetheless buy the property. On 2 February 2017 the applicant executed a written consent, authorizing Vlok to apply to the local authority to have the property rezoned from residential to business.
- (22) After the applicant executed the consent, the respondent, who was not a party to the lease agreement, applied to the local authority to have the property rezoned. Before approval was obtained, the respondent started carrying out structural alterations and modifications to the property to realize its development goals of converting the residential property into a restaurant.
- (23) The application for rezoning of the property was ultimately unsuccessful or not prosecuted to fruition, and at some stage, the exact date does not appear from the papers, the local authority changed the rating category of the property from residential to 'non-permitted use' or 'illegal use', and levied rates accordingly. This change in rating category was ostensibly because the respondent operated a restaurant from the property, which use was contrary to the provisions of the local authority's town planning scheme. The effect of this categorization by the local authority is that not only did the applicant as owner of the property lost the benefit of a rebate, but also became liable to pay a higher rate.
- (24) The lease agreement expired without Vlok exercising his option to buy the property. After expiry of the agreement Vlok negotiated with the applicant, through Dunbar, to buy the property. Vlok was presented with a draft sale agreement in February 2018 in which he was cited as the purchaser. Vlok requested Dunbar to substitute him as the purchaser with the respondent. On 13 March 2018 the

respondent, and the applicant, represented by Dunbar, concluded a written sale agreement. The agreement provided for the respondent to pay occupational rent and provide a guarantee for the purchase price before 31 May 2018. The respondent also assumed responsibility to pay all municipal debts.

- (25) The respondent did not provide the guarantee, fell in arrears with the occupational rent, and neglected to pay the municipal debts. Due to the breach the applicant cancelled the agreement on 24 June 2020.

Does the respondent have an improvement lien for expenses incurred in converting the residence into a restaurant?

- (26) It is not disputed that either Vlok or the respondent incurred expenses in carrying out structural alterations and modifications to the property to convert it from a residential property to a restaurant. It is further common cause that there was no agreement between the applicant and / or Vlok and the respondent relating to these alterations and modifications. There is a factual dispute as to whether the applicant was aware of the fact. However, on the facts of this case the applicant's knowledge is not germane to the enquiry as to whether Vlok and / or the respondent have an improvement lien for these expenses. The central question is whether the expenses may be recovered on the basis that the alterations and modifications were necessary and / or useful.
- (27) The general legal principals relating to an enrichment lien was described in **Business Aviation Corporation (Pty) Ltd and another v Rand Airport Holdings (Pty) Ltd** 2006 (6) SA 605 (SCA) as follows:
- bona fide possessors have an enrichment claim for the recovery of expenses that were necessary for the protection or preservation of the property (*impensae necessariae*), as well as for expenses incurred in effecting useful improvements to the property (*impensae utiles*);
 - bona fide possessors, who are still in possession of the leased property, have an enrichment lien (*ius retentionis*) that allows them to retain the property until their claims for compensation had been satisfied.

- (28) In **Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons (1970) 3 SA 264 (A)** the following was stated:

“n Retensiereg, jus retentionis , is die reg wat die besitter van 'n saak van iemand anders, waaraan hy geld of arbeid bestee het, verkry om die saak in sy besit te hou totdat hy volgens ooreenkoms of, waar daar geen ooreenkoms was nie, vir sy werklike uitgawes of arbeid, maar hoogstens tot die mate van die eienaar se verryking, behoorlik vergoed is.

Retensieregte vir bewaring en verbetering van die saak is saaklike regte en ontstaan nie uit ooreenkoms nie. Hulle is gefundeer op die beginsel 50.17.206 dat jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiores . Waar daar geen verryking vir die eienaar van die saak is nie, kan geen sodanige retensiereg tot stand kom nie. “

- (29) The aim of the ‘improvements’ carried out by the respondent was to convert the residential property into a restaurant. In terms of zoning of the property in the **Tshwane Town Planning Scheme**, 2008 (revised 2014) the use of the property is restricted to residential. In terms of section 26 of the **Spatial Planning and Land Use Management Act**, No. 16 of 2013 the Scheme, which is an adopted and approved land use scheme, has the force of law, and all landowners and users of land are bound by the provisions of the Scheme.
- (30) Having regard to the zoning of the property, and the force of the Scheme, the property may only be used for residential purposes. Any alternative use, such as a restaurant, will only be permitted if application was successfully made to the local authority in terms of the **City of Tshwane Land Use Management By-laws** to allow for rezoning of the property, or a consent use, which represent the granting of development rights without changing the formal zoning of the property.
- (31) It is common cause that the rezoning of the property from residential to business (restaurant) was not approved or not prosecuted to fruition, and there is no evidence that the local authority consented to the use of the property as a restaurant. The fact that the local authority changed the rating category of the property from residential to 'non-permitted use' or 'illegal use' points indubitably to

the opposite. The use of the property as a restaurant is not permitted and illegal. The consequences of the non-permitted and illegal land use do not only attach to the respondent but also the applicant.

- (32) The applicant, as owner of the property, is rendered liable to criminal prosecution. Bylaw 36 of the **City of Tshwane Land Use Management By-Law**, 2016 provides as follows:

'(1) An owner and/or other person are guilty of an offence if such owner or person:

(a) contravenes or fails to comply with a:

(i) ...;

(ii) provision of the Land Use Scheme or amendment scheme;

(iii) uses land or permits land to be used in a manner other than permitted by the Land Use Scheme or amendment scheme;

(iv) ...;

(v) ...;

(b) alters or destroys land or buildings to the extent that the property cannot be used for the purpose set out in the Land Use Scheme or zoning scheme;

(c) ...;

(d) ...; or

(e) ...

(2) An owner who permits land to be used in a manner contemplated in subsection (1) and who does not cease such use or who permits a person to breach the provision of subsection (1) is guilty of an offence and upon conviction is liable to the penalties contemplated in subsections (3) and (4).

- (3) *Any person convicted of an offence in terms of this By-law, shall be liable to a fine not exceeding R5 000 or as may be determined by a Court of Law or to imprisonment for a period not exceeding 12 months or both such fine and such imprisonment.*
- (4) *A person convicted of an offence under this By-law who, after conviction, continues with the action in respect of which he/she was so convicted, is guilty of a continuing offence and liable to a fine not exceeding R5000, or upon conviction, to imprisonment for a period not exceeding three months or to both such fine and imprisonment, in respect of each day for which he/she has so continued or continues with such act or omission.'*
- (33) The applicant also attracts civil liability for the punitive rates imposed on the property as a result of it being categorized as non-permitted use [see **City of Tshwane v Marius Blom & GC Germishuizen Inc and Another** (433/2012) [2013] ZASCA 88; [2013] 3 All SA 481 (SCA); 2014 (1) SA 341 (SCA) (31 May 2013)].
- (34) It is perverse and absurd for the respondent to contend that the 'improvements' carried out in converting the property from a residence to a restaurant are useful. Not by furthest stretch of the imagination can it be accepted that expenses incurred in altering the property to the extent that it cannot be used for the purpose set out in the land use or zoning scheme could in any shape or form enrich the applicant. It is inimical and contrary to the law that the respondent should be allowed to benefit from conduct which gives rise to an illegality.
- (35) For the applicant to extract any value from the property, whether by sale or lease, and exonerate herself from criminal and civil liability, she will have to restore the property to a residence, by removing all the structural changes carried out by the respondent. She needs to act post haste before the local authority institute criminal proceedings against her, and she must mitigate the deleterious effect of the imposition of punitive rates by ensuring that the property is no longer used contrary to the **Tshwane Town Planning Scheme**. I cannot conclude that the

‘improvements’ are useful. The contrary is true, the ‘improvements’ detract from the value of the property and create a liability for the applicant.

- (36) As a result, the respondent’s defense of ius retentionis cannot defeat the applicant’s claim for return of her property. The respondent should forthwith surrender possession and deliver the property to the applicant.

Costs

- (37) The applicant contends that punitive costs should be awarded on an attorney and client scale. In **Public Protector v South African Reserve Bank** 2019 (6) SA 253 (CC) at para 8, Mogoeng CJ in the majority judgment noted that ‘[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.’ In the minority judgment Khampepe J and Theron J further noted that ‘a punitive costs order is justified where the conduct concerned is “extraordinary” and worthy of a court’s rebuke’. Both judgments referred to **Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others** (2016) 37 ILJ 2815 (LAC) at para 46, in which the Labour Appeal Court stated:

“The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.”

- (38) To determine whether the respondent should pay costs on an attorney and client scale it needs to be established whether the respondent’s opposition was frivolous and vexatious and amounted to an abuse of the court process.
- (39) The respondent never had a realistic chance of defeating the applicant’s claim based on an alleged ius retentionis. The ‘improvements’ precipitated an illegality, and the respondent could not in good conscience have believed that the ‘improvements’ were useful. It should have been apparent to the respondent that the only conceivable outcome for the applicant would be to remove the

improvements and restore the property to a residence. To persist with a completely untenable defense is prima facie frivolous and vexatious.

- (40) What compounds the criticism of the respondent's conduct is that the applicant, notwithstanding the absence of a legal requirement to do so, offered to set security for the respondent's claim, on condition that the respondent voluntarily vacates the property. It is apparent from the respondent's conduct that it had no intention to resolve the disputes with the applicant amicably, but was intent on retaining unlawful possession of the property for as long as possible. The cumulative effect of the respondent's conduct, namely, to refuse to entertain bona fide attempts to settle the disputes, and to persist with an unsustainable defense, amounts to an abuse of the court process and calls for a cost order on an attorney and client scale.

Conclusion

- (41) For these reasons the following order is made:
- (41.1) The respondent is ordered to forthwith deliver the property, [...] Street, [...], Pretoria, to the applicant.
 - (41.2) Should the respondent fail to deliver the property, the sheriff for the area in which the property is situated is ordered and directed to evict the respondent and eject it from the property.
 - (41.3) The respondent is ordered to pay the cost of the application on an attorney and client scale.

A. VORSTER AJ
Acting Judge of the High Court

Date of hearing: 18 May 2021

Date of judgment: 20 May 2021

Counsel for the applicant: Adv. J. Stroebe

Instructed by: Van Rensburg Koen & Baloyi Attorneys

Counsel for the respondent: Adv. W. Pretsch

Instructed by: M.J. Lombard Incorporated