IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 82446/2016

In the matter between:

LEHUMO BENJAMIN BOSHOGA	**FIRST APPLICANT**
SONTO JOHANNA BOSHOGA	**SECOND APPLICANT**

And

TJ MMAKOLO	**FIRST RESPONDENT**
UNLAWFUL OCCUPIERS PORTION [….],	
GAUTENG PROVINCE	**SECOND RESPONDENT**
CITY OF TSHWANE METROPOLITAN CITY	**THIRD RESPONDENT**

JUDGMENT

RANCHOD J:

[1] The applicants, who are the registered owners of certain immovable property, seek an eviction order against the first and second respondents and a punitive costs order against the first respondent. The first respondent resists the application on the basis that he has a lien for improvements he made to the property, which was a vacant stand when he occupied it.

[2] At the commencement of the hearing before me applicants' counsel pointed out what was said in the replying affidavit - that not only did the first respondent deliver his notice to oppose late but also delivered his answering

affidavit 27 days after the application was served on him the second time. In fact, says first applicant, the notice to oppose and the answering affidavit were delivered late simultaneously. In the replying affidavit the applicant objects to the late delivery of the answering affidavit, more so because no application for condonation has been made by the first respondent. In spite of being alerted to this issue the first respondent also failed to deliver any heads of argument in accordance with the practice directive of this court and failed to provide any satisfactory explanation for these failures. Rule 27(3) of the Uniform Rules of Court provides: 'The court may, on good cause shown, condone any non-compliance with these rules.' The respondent has not applied for condonation at all.

[3] A further issue needs to be mentioned. At the commencement of the hearing first respondent's counsel wanted to hand up a 'supplementary affidavit' from the bar. Applicant's counsel objected again on the grounds that there was no explanation by the first respondent about why any new facts contained in the supplementary affidavit were not dealt with in the answering affidavit and, no application was before the court for permission to file a further affidavit. It bears noting that the supplementary affidavit was served on the applicants' attorneys on 20 October 2017 but was not filed at court, hence not 'delivered' within the meaning of the Rules, nor was it accompanied by an application to permit the filing of a further affidavit.

[4] However, as the applicants wished to reach finality on the matter counsel for the applicant was prepared to have the matter proceed on the papers, including the answering and supplementary affidavits. I ruled accordingly but the flagrant disregard of the rules and the practice directive by the first respondent must be deprecated and the court will show its displeasure by making an appropriate costs order as also the submissions regarding these two issues took up some time before the matter could be heard on the merits.

[5] It was agreed between the parties that the application may be decided on the papers without referral to oral evidence on any disputed facts.

<u>Background facts</u>

[6] The first applicant says he and the second respondent are married to each other in community of property and are "co-owners" (I presume he means 'joint owners') of Portion 3 of [….], Pretoria (the property). The first applicant purchased the property when it was still a vacant stand from the third respondent on 19 January 1999 in terms of a written deed of sale. The property was eventually transferred to the applicants on 29 May 2009, i.e. more than ten years later. The delay appears to have been caused primarily by the third respondent.

[7] The applicants aver that the first respondent occupied the property without their consent,. built rooms on it and rented them o t to the second respondents, thereby deriving an income from the letting of the rooms. The first respondent admits it and **say** she also commenced building a house for himself and his family on the property.

[8] The applicants aver further that the first and second respondents are in unlawful occupation of the property within the meaning d fined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). On 17 January 2017 the applicants obtained an order from this court authorising a notice in terms of **s 4(2)** of the PIE Act which called upon first and second respondents to show cause on 17 February 2017 why an order for their eviction should not be granted. The second respondents have not opposed it. The third respondent was cited as the local authority responsible for providing alternative accommodation to the second respondents in the event that the eviction order is granted. It has not entered an appearance to oppose the relief sought by the applicants.

[9] The first applicant says in early 2ooe he was walking past the property when he noticed some people erecting a fence and digging foundations on the property. He was informed by them that they were working for the 'owner' of the property a Mr Mmakola. He knew Mmakola as they both lived in Mamelodi. It is not in dispute that the Mr Mmakola referred to is the first respondent. The first applicant complained to a Mr Frank Nemakwarami, Acting General Manage:r Legal Services, of the third respondent on 2 March 2006 by email. Mr Nemakwarami undertook to take up the matter with the first respondent. A few days later, says first respondent, he received a call from a Mr Molekwa of attorneys Rorich Wolmaransand Luderitz who said he was acting for the first

respondent and wanted to know if he would be interested in selling the property to the first respondent. He told Mr Molekwa he was not. Mr Molekwa then proposed that he should compensate the first respondent for the fence he erected on the property. First applicant refused as his stance was that the first respondent had erected it without his permission so he (first respondent) could either remove it or donate it (presumably to first applicant himself).

[10] First applicant says a day or two thereafter, the first respondent came to see him and offered to buy the property. The first applicant again refused the offer. He **says** first respondent then **asked** him to pay for the fence and he refused, repeating that he could either remove or donate it. In the meantime Mr Nemakwarami informed the first applicant that he had met with the first respondent and his attorney and informed them that the property had been sold to the applicants in January 1999 and told them to remove the fence. The first respondent agreed to do so. Mr Nemakwarami said it was he who provided the first respondent and his attorney with the first applicant's phone number.

[11] On 14 March 2006 Nemakwarami wrote to first respondent appealing to him to remove the fence and to stop the illegal construction on the property. Nemakwarami emailed a copy of the letter to the first applicant and a copy is attached to the founding affidavit as 'LBB5'. The first respondent continued with the illegal construction.

[12] First applicant says he again approached Nemakwarami who referred him to the third respondent's Informal Settlement, Land Division Management and Community Liaison to whom Nemakwarami had written a memorandum dated 25 April 2006 and requested it to assist in 'honouring the deed of sale and to enforce the right of an owner of the property to have fee *(sic)* ownership without any sort of invasion.' A Mr Fenyane of the aforementioned department informed first applicant that he should institute eviction proceedings against the first respondent as he refused to cooperate.

[13] First applicant says he then sought legal advice from attorney Mphahlele, who advised him that they could not institute eviction proceedings as the applicants were not as yet the registered owners of the property even though they had purchased it. Upon enquiry, his attorney was informed by third

respondent's attorneys that the registration papers for the transfer of the property into the applicants' names had been lodged at the Deeds Office on 30 August 2006.

[14] In the meantime, Mr Nemakwarami informed applicants' attorneys that the reason why third respondent's Building Control Department could not take action against first respondent was because the property had not yet been registered into applicants' names. First applicant decided to wait until the registration took place. It eventually took place three years later on 29 May 2009.

[15] The first applicant thereafter navigated between three firms of attorneys from then on to pursue the eviction matter. On 4th June 2013 he received a letter from Danie Kolver attorneys who made the same proposal that was previously made by the first respondent himself and Mr Molekwa of Rorich Wolmarans & Luderitz; i.e. that he sell the property to the first respondent. In the letter it is further stated that the first respondent only learned ten months after he erected the fence and building on the property that he (first respondent) was not the owner of the property. It was also further alleged that the first respondent was paying rates and taxes on\ the property. First applicant found this strange as he was himself paying rates\and taxes on the property since it was registered into his and his wife's names

[16] First applicant's then attorney, Mr Lephoko replied to Attorney Kolver and informed him that the applicants were not prepared to sell the property to the first respondent. Notwithstanding that, Kolver attorneys wrote four further letters requesting the applicants to sell the property to the first respondent. Mr Lephoko gave the same responses as before.

[17] The applicants then launched the present eviction application through their current attorneys of record.

[18] The first respondent deposed to an answering affidavit. He says he is in control of the property as 'landlord to 11 lawful lessees/tenants of rooms on the property'. They are the second respondents.

[19] First respondent approached the third respondent in 1998 with a view to purchasing an erf in Moretele View. During 2005, having noticed that Erf 128 had been sub divided, he applied on 9 March 2005 to purchase portion 3 of the erf.

He reapplied on 7th May 2005. (He does not explain why he reapplied in two months' time.) He received a letter dated 18 May 2005 from the third respondent informing him that the property will be sold by way of public tender. I shall assume that the third respondent made an error as it is common cause that it had already been sold on 19 January 1999 to the first applicant.

[20] First respondent says that 'in the firm belief that any tender by myself would be accepted, I then put up a fence on the street side and also put a Zozo wooden moveable hut on the property in which I slept.' Why he had this firm belief and proceeded to occupy the property is not explained.

[21] The first respondent goes on to say that in 2006 he applied for water and electricity services to be provided to the property by third respondent but was supplied with a water connection only. He then erected two rooms on the property. He again applied for electricity (he does not say when) and it was supplied by third respondent. He then housed two employees in the two rooms free of charge.

[22] During 2008 and 2009 first respondent had another nine rooms built on the property and rented them out to tenants. In 2010 he completed building a house on the property for his family which, he says, was never occupied because he ran out of cash. A copy of the third respondent's Building Control department's completion certificate is attached indicating approval of the construction of the foundations, the structure and the roof at various stages. Oddly, it is dated 26 February 2010 but it is stated that the inspections were done thereafter i.e. July, August and December 2010.

[23] First respondent says he heard nothing from the third respondent (he does not say what he was expecting to hear about) until 2012 when the electricity supply to the property was disconnected. He found a rates and taxes account affixed to the front gate addressed to the first applicant showing an arrear amount of about R3 700.00. He says he paid R1 800.00 on 12 February 2012 on the arrear account after receiving advice from his then attorney, Mr Molekwa, and the electricity was reconnected.

[24] The first respondent continues that 'during 2013' he approached Attorney Danie Kolver 'to enquire about this LB Boshoga.' Why he did not do so in

February, 2012 is not stated. His attorney established through a Deeds Office search that the applicants purchased the property on 19 January 1999 and became registered owners in 2009, which, he says, was about 1O months after he paid the arrear rates and taxes.

[25] The first respondent **says** he was 'flabbergasted' that nobody at any stage prevented him from erecting the improvements on the property and the third respondents had not informed him during his dealings with it in 2005 and 2006 that the property had been sold to the applicants.

[26] The first respondent 'categorically' states that at no stage prior to 2013 was he aware of the applicants' ownership of the property. He says he 'at all relevant times honestly believed that third respondent would grant me the right to purchase the property' because it had supplied him with water and electricity. He says he was also not informed by third respondent 'as owner' when he was building in 2005 and 2006 that he was not going to become owner of the property or that he was erecting improvements without the right to do so. Clearly, the first respondent considers himself to be the victim in this saga.

[27] In July 2013 first respondent informed the applicants through his attorney that if they persisted with their demand that he vacate the property, he would have an enrichment claim against them. *In casu* the first respondent resists the eviction claim on the basis that he has a lien for the improvements effected by him on the property.

The Law

[28] A right of retention (ius retentiones) or lien is the right to retain physical control of another's movable or immovable property as security for payment of a claim for money or labour expended on that property. Liens arise by operation of law[1]. There are two main kinds of lien, viz salvage and improvement liens and debtor and creditor liens. The former are based on the principle of unjust enrichment and they are often referred to as 'enrichment liens'[2].

[29] In this matter the respondent relies on an improvement lien. An

[1] Wille's Principles of South African Law, 9th Edition 661 (Footnotes omitted).
[2] Ibid p662.

improvement lien affords security for the recovery of useful expenses[3]. The learned authors of Willa's *Principles of South African Law* say -

> 'Recognition of an improvement lien lies in the discretion of the judge based on e.g. the financial position of the owner; whether the owner intends to 1,1se the property personally or intends selling it; whether the improvement can be removed without damage and, whether the owner would himself have made the improvement: . . . .'[4]

[30] The following conditions must be present for a lien to arise. First, a person must have expended money or labour on property belonging to another. Secondly, the retentor must retain possession of the property. Thirdly, a lien extends only over property or part thereof on which money or labour has been expended and does not cover other property of the debtor which happens to be in possession of the lienholder[5].

[31] Furthermore:

31.1 The protection afforded by a lien is extremely limited: the retentor merely has a defence against the rei vindicatio of the owner[6].

31.2 The owner of the property burdened by a lien may defeat the lien by furnishing adequate security for payment of the debt secured[7].

31.3 The court will take all the circumstances into account in exercising its discretion to order restoration of the property[8].

31.4 A lien holder does not have the right to commercially exploit the object of the lien.

31.5 The availability and extent of a claim for unjustified enrichment depends, firstly, on how the law classifies the possessor or occupier who made the improvements and, secondly, on the kind of improvements (i.e. necessary, useful or luxurious) that was made[9].

[3] Ibid p662.
[4] Footnote89 at p662 and the cases cited there.
[5] Ibid p664 (Footnotes omitted).
[6] Ibid p664 (Footnotes omitted).
[7] Ibid p665 (Footnotes omitted).
[8] Ibid p665 (Footnotes omitted).

[32] In Wille's *Principles of South African* Law[10] reference is made to De Vos *Verrykingsaanspreeklikheid* 245-7 who defines (for the purposes of the law of enrichment) a bona fide possessor as someone who possesses (either directly or indirectly) property of which he believes he is the owner; a mala fide possessor, on the other hand, acts as if he were the owner, while knowing that he is not. An occupier is someone who does not have the animus domini but nevertheless occupies the property because it is in his interest to do so. Occupiers are divided into lawful occupiers (i.e. those who have the right to occupy the property), bona fide occupiers (i.e. those who believe themselves to be lawful occupiers, but are not) and mala fide occupiers **(i.e.** those who occupy property as if they are lawful occupiers, but know that they are not).

[33] The learned authors of *Wille's Principles of South African Law* submit that 'useful improvements' must be taken to mean improvements which increase the market value of the property[11].

Discussion

[34] It is common cause that the applicants are the registered owners of the property and that the first and second respondents are occupying it without the applicants' consent.

[35] The first applicant says that on 25 May 2004, at his specific request, the third respondent's general manager of water and sanitation wrote an internal memorandum to its legal services department and requested the latter to provide a water connection to the property at the cost of the buyer of the property. First applicant **says** the sewerage and water connections were made by third respondent and he paid for them. This was in 2004. The respondent is therefore being untruthful when he says he paid for the water connection. (He does not say anything about the sewer connection).

[36] The first respondent denies that he is in unlawful occupation of the property but fails to give any legal basis on which he occupies the property. He

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[9] Ibid pp1074-5 (Footnotes omitted).
[10] Ibid pl075, footnote 153.
[11] Ibid p1075, footnote 155 and the cases cited there.

was erroneously told by the third respondent in May 2005 that the property would be sold by public tender when in fact it had already been sold to the first applicant in 1999. Instead of waiting for the tender process to take place the respondent decided to occupy the property, on his own version, in the belief that he would become the owner. This belief is totally unreasonable as there was nothing to indicate that he would be the successful bidder. However firm his belief, it did not entitle him to erect a fence and foundations and take occupation of the property.

[37] The first respondent denies that he at any stage had any direct dealings with the first applicant as averred by him. I reject his version and accept that of the first applicant that he had contacted the first applicant and offered to buy the property which offer was rejected by the latter.

[38] The first respondent is also not being truthful when he says he only learned in 2013 that the first applicant was the owner of the property. He alleges he consulted with Mr Molekoa of Attorneys Rorich Wolmarans & Luderitz only in 2013. However, already in 2005 in a letter dated 21 September, Mr Molekoa wrote to the third respondent to enquire when and to whom the property was sold, at what price and how it was sold. He states in the letter that his client is T.M Mmakola. The initial 'T' is in all probability a typing error because even on 14 March 2006 the third respondent wrote to the first respondent confirming a meeting between 'your attorney Mr Molekoa of Rorich, Wolmarans & L:uderitz was present, yourself and Mr Nemakwarami of this office was *(sic)* present.' Significantly, it is stated further in the letter -

> 'You will recall that it was indicated to you that Portion [….] View has been sold to Mr Benjamin Boshoga by the Municipality on 19 January 1999.'

Clearly, the first respondent was aware at least in 2005 or at the latest, in 2006 that the first applicant was the own r of the property.

[39] In the same letter it is stated further

> 'In the meeting you also agree *(sic)* that you will remove the fence that you have illegally erected on the property.

> It has now come to our attention that you have not yet removed the fence. Please remove the fence within 21 days of the receipt of this letter, failure thereto the Municipality will remove the fence.
>
> Mr Benjamin Boshoga also complain (sic) that there is an illegal construction taking place in his property and it is believed by him that you are the one responsible for such an activity.
>
> We appeal to you that if you are responsible for the foundation digging on the property, please rectify the situation, or **we will** have no choice but to instruct our Land Invasion Department to take action against you.'

[40] At the latest by March 2006, the first respondent was told in no uncertain terms that his construction activities were illegal and that he was to desist from continuing to do so. The first respondent could therefore never have been under the impression that he was the owner of the property as he knew that the applicants were the owners in March 2006 already.

[41] It is noteworthy that the municipal account reflecting the arrear rates that the first respondent has attached to his answering affidavit is in the name of the first applicant. The first respondent could therefore have been under no illusion that the first applicant was the owner of the property as rates on a property are levied against the owner. (The Deed of Sale between the third respondent and the first applicant. The second applicant became joint owner by virtue of the marriage in community of property.)

<u>The Lien</u>

[42] The first respondent admits that the applicants are the registered owners of the property and that he is in unlawful possession thereof. He refuses to hand over the property to the applicants and resists the eviction application on the basis that he has a lien on the property because of the improvements he has effected on what was a vacant stand.

[43] The first respondent in my view is a mala fide possessor of the property as he acquired possession of the property in an unlawful manner. However, as is pointed out by Daniel Visser; *Unjustified Enrichment,* 2008, 608-609:

> 'The position regarding the rights of mala fide possessors who have improved the property that they possessed remains uncertain. Many pronouncements of the courts and academic commentators are to the effect that a mala fide possessor should be, and probably is, in exactly the same position as a bona fide possessor when it comes to claims for compensation for improvements in respect of the property that they possessed. Some sources indicate, however, that a distinction should be made between necessary and useful improvements.'

[44] In his answering affidavit the first respondent refers to himself as 'either as bona fide or mala fide occupier of the property,' and therefore he has an unjust enrichment claim against the owner for 'necessary and useful improvements as well as luxurious improvements if the latter is accepted by the owner.' He says he has a right of legal retention of the property until he gets paid before he can be evicted from the property.

[45] The first respondent has failed to set out ·the details regarding the 'necessary and useful improvements.' He therefore sought to do so in the supplementary affidavit to which he attached a valuation report from UniqueCo Property Valuers who valued the property (including the improvements made by the first respondent) at R1 100 000.00 of which the land value was stated to be R230 000.00 as at November 2016.

[46] First respondent says R1 100 000.00 less the land value of R230 000.00 reflects the improvements he made to the property in the amount of R870 000.00.

[47] Insofar as proof of actual expenses incurred for the useful improvements is concerned the first respondent says it is 'somewhat more difficult to deal with as I lost the invoices and slips of material I purchased and further by reason thereof that the labour and material was purchased cash by myself.'

[48] However, says first respondent, he made notes in his own handwriting of the 'labour and expenses' he incurred and attached three pages of the notes to the supplementary affidavit. The total of these expenses is reflected as R997

978.14. These are the only notes he has and is the best evidence he is able to provide in respect of the useful improvements. He also incurred building plans and registration expenses totalling RS 782.25. He says he has received rental income of R249 904.04 from the property which he agrees must be deducted from the useful expenses amount. The value of the lien therefore is the lesser of the following two calculations:

(a) The market value as calculated above, i.e. R870 000.00 less the rental income of R249 904.04 leaves a figure of R620 095.96; or

(b) The actual useful expenses of R997 98.14 plus the building plans expenses of R5 782.25 less rental income of R249 904.04 which leaves a net figure of R753 856.35.

The lesser of the two amounts is thus R620 095.96 which represents the value of his lien over the property he says.

[49] The difficulty I have with the calculations is that the useful expenses allegedly made are not supported by any invoices or receipts or other documentary evidence. All that the first respondent has are his own notes merely reflecting totals of numerous items purchased from various suppliers. He does not even have any receipts to show the amounts he paid for labour expended on the structures put up on the property. In other words there is insufficient evidence about the amount for which the lien is to serve as security. This finding does not preclude a later successful claim by the first respondent where acceptable evidence regarding the alleged useful expenses incurred by him is presented.

[50] Having said that, I have a more fundamental difficulty with the first respondent's assertion that he incurred necessary or useful expenses in view of the fact that the property was a vacant stand when he unlawfully took possession of it. Far from the expenses being necessary or useful they were incurred by him to earn an income. A court cannot countenance such unlawful conduct. Indeed, in my view, in these circumstances the first respondent cannot rely on an alleged lien to prevent being evicted from the property.

[51] In *Weilback en ·n Ander v Grobler* 1982(2) SA 15 OPA Flemming J discussed the various instances in which a claim for compensation arises and

then said (I quote from the English translation of the headnote) -

> '(5) It appears as if it must now be accepted, as most modern writers suggest, that a *ma/a fide* occupier can also have a claim for compensation for useful improvements {except perhaps if he came into occupation in an unlawful manner). The *mala fide* possessor could still have a belief in the regularity of the effecting of the improvement, if e.g., he is busy and intends acquiring ownership by prescription, .<u>but the person who takes possession surreptitiously will realise that he ought not to effect the improvement.'</u> (My underlining.)

[52] Should this be a case where the applicants should furnish security for the claimed lien pending any enrichment claim that the first respondent may institute? I do not think so. As I said, the first respondent clearly knew shortly after he erected a fence and commenced digging for foundations to be laid on the property that the first applicant was the owner of the stand. He nevertheless continued to build on it. The applicants are now faced with improvements on the stand that they had not agreed to. The first respondent acted in an unlawful manner and even in these proceedings has been untruthful to the court. He may, if he is so advised, have an action for unjust enrichment but he cannot retain possession of the property on the basis of a lien.

[53] The first respondent does not live *on* the property. He derives an income from letting out rooms on the property. In these circumstances I see no reason why the order for the eviction of the respondents should not be granted.

[54] The applicants seek a punitive costs order on the attorney and client scale. In my view such an order is justified given the conduct of the first respondent both towards the applicants and towards this court.

[55] An order is granted in terms of the notice of motion as follows:

1. That the first and second respondents and any person occupying through them the property known as Portion [….], Province of Gauteng, are evicted from the said property.
2. That the first and second respondents and any person occupying

through them the property known as Portion [….], Province of Gauteng, are ordered to vacate the said property within thirty (30) days of this order.

3. That In the event that the first and second respondents fail or refuse to vacate the property within thirty (30) days of date of this order, the Sheriff of this court or his/her deputy with the assistance of the members of the South African Police Services are authorised and ordered to evict the first and second respondents and any person occupying the property through them.

4. That the first respondent is ordered to hand over the property known as Portion [….] Province of Gauteng to the applicants within thirty (30) days of this order.

5. That the first respondent is ordered to pay the costs of this application on the scale of attorney and client, including the costs of the *ex parle* application made on 17 January 2017.

N. RANCHOD

JUDGE OF THE HIGH COURT

<u>Appearances:</u>

Counsel on behalf of Applicant : Adv. R.B Mphela

Instructed by : Tsebane Molaba Inc.

Attorneys Counsel on behalf of First Respondent: Att. S.J.R Vorster

Instructed by ; Danie Kolver Attorneys

Date heard : 24 October 2017

Date delivered ; 7 March 2018