

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case no: 33906/2023

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO
DATE: 29 July 2024

In the matter between:

LEGACY BUSINESS FINANCE (PTY) LTD
(Registration Number: 2018/592880/07)

and

ISAAQ JACQUES
(Identity Number: 7[...])

FIRST THE RESPONDENT

CITY OF THSWANE LOCAL MUNICIPALITY

SECOND RESPONDENT

JUDGMENT

K STRYDOM, AJ

Introduction

1. The applicant, has applied for the eviction of the First the Respondent and other occupiers (hereinafter referred to as “The Respondent”) from a property, located in Woodhill.
2. It is common cause that the Applicant is the registered owner of the property, that an agreement was concluded in terms of which The Respondent had to pay rent

and that he had ceased making rental payments. He justifies the failure to affect rental payments on the fact that the agreements underlying the right of the Applicant to demand rent, were simulated. The exact defence in this regard will be fully discussed below.

3. The basis for The Respondent' opposition to eviction, evidenced by his practice note and heads of argument, is essentially twofold, consisting of a:

- 3.1. Point *in limine*: Non joinder of his mother, who is also an occupant of the property; and

- 3.2. Substantive argument: The applicant's ownership of the property is invalid/unlawful as same was achieved as a result of simulated transactions.

4. As to the remainder of the requirements for eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), no information was provided that would indicate that it would not be just and equitable to order eviction of The Respondent. I also did not understand during argument that this was in dispute.

Point in limine: Non-joinder

5. The Respondent alleges that the Applicant was aware that his mother and minor daughter resides at the property with him. This assertion was not seriously contested by the Applicant.
6. On the 17th of June 2023, in compliance with the provisions of section 4(2) of PIE the applicant brought an *ex-parte* application for leave to serve a written and effective notice of the application launched against the Respondent. In terms of the order granted, notice of the application was to be brought to the attention of the Respondent and to "*all occupiers of the property*" by erecting a notice board in close proximity to the entrance of the property and to attach the notice to the notice board and by leaving a number of notices on the property.

7. The applicant duly erected the billboard and gave notice as authorised. On the 8th of March 2024, the Respondent's attorney informed the Applicant that the billboard would be removed as their "...client, his mother, his one minor daughter who permanently resides with him, as well as our client's domestic worker (read all other occupiers) have taken proper notice of the notice board...."
8. Despite this, the Respondent argues that his mother was a necessary party who should have been joined in these proceedings. It is argued that as neither her identity, nor the basis on which she holds possession of the property, are discernable from the present notice of motion or founding affidavit, the relief sought against her as occupier cannot be granted.
9. Much was made of the fact that, in support of this point *in limine* counsel for the Respondent relied on the judgment in *Gerber v Chris Vlok Property Services Tshwane CC*¹ - which he had authored whilst acting in this division. In principle, the fact that counsel authored a judgment whilst, proverbially, donning another hat, is not a bar to such counsel's subsequent reliance thereof. There are no allegations of impropriety vis-à-vis the authoring of that judgment, nor was it made in relation to any parties or issues in the present application. However, it is important to note that when it comes to the interpretation as to the applicability and binding nature of such a judgment, counsel cannot submit any binding interpretations as to applicability or principle that are not evident from the judgment and reasoning thereto itself. The normal principles pertaining to the interpretation of judgment and orders apply.
10. I need only to refer to two extracts from that judgment to exemplify that (a) the facts therein were dissimilar to those *in casu* and, more importantly, that (b) it is not authority for the proposition that eviction orders cannot be granted against occupiers whose identities and basis for possession of the property are not evident from the papers:

¹ *Gerber v Chris Vlok Property Services Tshwane CC* (49324/2020) [2021] ZAGPPHC 339 (20 May 2021)

“(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.”

*“(17) Even if it was historically competent and permissible for courts to grant eviction orders against ‘persons who hold possession through or under a the 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.”*

11. In is evident that the facts in *Gerber* are not the same as those *in casu*. In *Gerber* there was no proof that the affected parties had any knowledge of the proceedings. *In casu* a large billboard frustrated the Respondent to the extent that his attorneys removed it after explicitly confirming all occupiers, and pertinently, his mother, are aware of the notice. I pause at this juncture to point out that it is factually incorrect to state that the Respondent’s mother’s identity and basis for occupation were not discernible from the papers. The deponent to the founding affidavit clearly states that “...*the First Respondent is not the only occupant of the Property and that the First Respondent’s minor children and his mother also reside in the Property.*”² [Underlining my own].

² Founding affidavit para 5.24, CL 01-12

12. Furthermore, *Gerber* cannot be interpreted to provide a peremptory list of requirements to be met before service on unnamed occupiers would meet the requirements of notice in terms of PIE. In fact, in *Gerber*, the learned Acting Judge referenced (with approval), the case of *City of Cape Town v Yawa and Others*,³ where Budlender AJ, having assessed the same legal precedence as the Acting Judge in *Gerber* had, explained the correct approach:

*“Mr Arendse for the applicant referred me to *Communicare v The Persons Whose Identities are Unknown to the Applicant but who unlawfully occupy the remainder of the consolidated farm*In that matter Rogers AJ stated (at paragraph 9):*

“I do not believe that these cases should be regarded as laying down an immutable rule that an application directed at unnamed the Respondents is always permissible. It seems to me that our procedural law would be sadly lacking if that were the case. What is an owner to do where his land is illegally occupied by persons whose identities he cannot ascertain?”

Rogers AJ pointed out that in the Kayamandi case, Conradie J had held that the Prevention of Illegal Squatting Act 52 of 1951 provided an adequate alternative remedy. That Act has (thankfully) been repealed, and that remedy is therefore no longer available. He concluded that “the persons in occupation of land can be viewed as an ascertainable group, even though their names might not be known. Through the process of service more information concerning the identities of the group may become known. In the ordinary course no relief would be granted against unlawful occupiers under s 4 of PIE (the Act) until notice has been given by a method approved by the court. When the eviction proceedings ultimately serve before the court, it will be necessary to assess the adequacy of the notice and whether an effective order against sufficiently identified parties can be granted. Each case must depend on its own facts.”

³ *City of Cape Town v Yawa and Others* (395/04) [2004] ZAWCHC 5; [2004] 2 All SA 281 (C) (29 January 2004)

Rogers AJ proceeded to examine the facts in relation to each of the the Respondents who had not been named or identified in the founding papers, and made orders in respect only of those who had subsequently been sufficiently identified by reference to their names or where they lived.

It seems to me that this approach is consistent of that of Ngwenya J in the Monwood case, where he held that "each case will have to be considered on its merits".

I therefore accept that the fact that the individuals comprising the twentieth the Respondent have not been identified is not of itself an absolute bar to these proceedings." [Underlining my own]

13. I agree with Budlender AJ that the predominant consideration is whether there was adequate and effective notice to such occupiers who would be affected by an eviction order. This purposive approach is in line with the reasoning of the Supreme Court of Appeal in the case of *Unlawful Occupiers, School Site v City of Johannesburg*⁴. In that matter the Section 4(2) notice was defective, and the grounds of the application stated in the notice were insufficient to meet the requirements of section 4(5)(c). Despite these shortcomings, the Court held:

*"Nevertheless, it was clear from the authorities that even where the formalities required by statute were peremptory it was not every deviation from the literal prescription that was fatal. Even in that event, the question remained whether, in spite of the defects, the object of the statutory provision had been achieved."*⁵

"The question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the the Respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the

⁴ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA),

⁵ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA), 200F-G para 22

*application papers? Or if on the day of the hearing the the Respondent appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) should still be regarded as fatally defective? I think not."*⁶

*"The purpose of s 4(2) to afford the the Respondents in an application under PIE an additional opportunity, apart from the opportunity they already had under the Rules of Court, to put all the circumstances they alleged to be relevant before the court."*⁷

[Underlining my own]

14. Counsel for the Applicant also drew the Court's attention to the fact that in Gerber, the Court cited only a portion of the following passage from *Kyamandi*⁸:

"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 and all be bundled off the property on the authority of a writ addressed to only one of them".

15. This passage is in fact immediately preceded by the following:

*"To the extent that subtenants, quests and family are made to obey an order which is not granted against them by name I suppose that it may be regarded as an exception to the general rule that an order operates only against the person to whom it is addressed..."*⁹ [Underlining my own]

16. Given that PIE, as a procedural safeguard was enacted after *Kyamandi* was decided, it is not necessary to determine what weight should be attached to the musings of Conradie J in this regard. It is sufficient to note that the probable basis for the "exception" was that such parties would not be unknown, faceless persons who have rights of occupation distinct from those of the lessee. This is a matter of

⁶ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA), 200F-G para 24

⁷ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA), 200F-G para 23

⁸ *Kayamandi Town Committee v Mkhwaso and others* 1991 (2) SA (C) p 635 I-J

⁹ *Kayamandi Town Committee v Mkhwaso and others* 1991 (2) SA (C) p 635 H-I

common sense as their occupation would be based on their relationships (or in the case of tenants, contracts) with the person against whom the eviction order was sought.

17. *In casu*, the Respondent's mother is not a "faceless," unnamed person whose right to occupation is based on different rights or interests than his. Nor are her rights affected without her knowledge. To the contrary, it is clear that she is aware of these proceedings, was intimately acquainted with the basis (as will be elucidated under the discussion of the merits) upon which it is brought and understood that she too would be evicted if the application succeeded. There is no indication that she has been unable to bring any further relevant facts to this Court's attention which would influence it in deciding whether or not the eviction would be just and equitable.

18. The point *in limine* therefore stands to be dismissed.

Substantive argument

Background

19. The Respondent was the registered owner of the property before it was transferred to and registered in the name of the Applicant pursuant to a Sale of Property agreement concluded between The Respondent and the Applicant in 2022.

20. For the sake of brevity, the essential facts underscoring the current ownership of the property by the Applicant, are as follows:

20.1. The Respondent was the sole member of a closed corporation, JCS Construction Consultants ("JCS"), through which he, as an engineer, provided consulting and civil engineering services to the construction industry. As a result of an acrimonious divorce, the Respondent decided to transfer his membership interest in JCS to his mother, to insulate his interests in JCS from creditors, and ensure that he continued to earn an income should he be sequestrated.

- 20.2. As a result of the financial impact of COVID on the profitability of JCS and resultantly on his and his mother's earnings, in 2020, the Respondent approached the Applicant for a loan. According to him, he did not intend to apply for a loan on behalf of JCS and had, in fact, required a personal loan to cover his and his mother's daily living expenses.
- 20.3. The Applicant was not inclined to grant a personal loan and instead offered to grant a loan to JCS, conditional on the following:
- 20.3.1. The Respondent's mother (as sole member of JCS) had to sign an acknowledgement of debt and repayment agreements which reflected that Legacy Equity advanced the loan to JCS.
 - 20.3.2. The Respondent and his mother had to sign suretyship agreements for the debts of JCS.
 - 20.3.3. The Respondent also had to register a covering mortgage over the Woodhill property as security for the due fulfillment of JCS' obligations under the acknowledgements of debt and repayment agreements.
- 20.4. Once the conditions were met, the Applicant paid the loan amount of R 2 000 000-00 into the account of JCS.
- 20.5. During 2021, the Applicant advanced loans to the value of R600 000-00, R100 000-00 and R1 500 000-00 to JCS. To this end, the Respondent's mother signed a further acknowledgement of debt on behalf of JCS and also registered a covering bond over a property she owned in Hoekwil. The repayment date for these loans was 31 May 2022.
- 20.6. The loans remained unpaid and, in August 2022, the Respondent and his mother signed an acknowledgement of debt (AOD) to the Applicant in the amount of R5,529,162.68. In terms of the AOD they reached an agreement in terms of which the Woodhill property, as well as a property

in Witbank held by his mother through another closed corporation, Prop Corp, would be sold to the Applicant. The agreement provided that:

- 20.6.1. The sale was *"...as part of the fulfilment of JCS Constructions obligations toward Legacy Equity in terms of an acknowledgement of debt signed on 17th November 2020, 30th of May 2021 and 3 December 2021."*
- 20.6.2. The applicant provided the Respondent with *"...a call option to purchase the Woodhill Property (irrespective of the property being transferred into its name) from LBF This option will laps on the 31st of November 2022. Should JCS Repay the amount due to LBF before 31" of November 2022, I.J Collins can purchase the property from LBF...."*
- 20.6.3. In determining the value of the property as payment for the debts of JCS, the actual nett average price of the property would be used and set off against the remainder of the loan amount due to the Applicant.
- 20.6.4. The Respondent would be responsible for some of the costs relating to affecting the transfer.
- 20.6.5. Similar provisions applied to the Sale of Prop Corp's Witbank property by the Respondent's mother
- 20.7. The Respondent subsequently, on 22 August 2022, signed a "Sale of Property" agreement for the Woodhill property. The property was duly transferred to the Applicant. (The Witbank property followed suit)
- 20.8. The sale of these properties did not expunge the full debt of JCS and, in July 2023, the Applicant instituted action against the Respondent, his mother and JCS, for the payment of the outstanding due amount, as well as costs relating to the transfer of the properties. This action has been

defended by the Respondent. He has also counterclaimed for the setting aside of the transfer based on the same arguments as elaborated on below.

21. The thrust of the Respondent' argument is that the loan agreements between the Applicant and JCS, were simulated agreements aimed at circumventing the provisions of the National Credit Act. He alleges that the Applicant was at all times aware that the loans were in fact requested for use by himself and his mother personally. He states that: *"JCS was never to (and never did) receive any of the borrowed money and it was at all times made clear to the Legacy Equity that the JCS would not be the party repaying the loans, as it had no income at the time."*
22. Simply put, he argues that, as the loans were in fact loans to natural persons, the Applicant had to be a registered credit lender in terms of the NCA. As it was not registered as such, the loan agreements are void. As a result, all the agreements based on these loan agreements – including personal suretyships, acknowledgements of debts as well as the sale and transfer of the property – are null and void, alternatively voidable and stand to be set aside.
23. In the heads of argument, it is submitted that the Respondent' case *"...is that the underlying causa for the transfer of the property into the name (of the Applicant) is impeachable because it came about because of the conclusion of credit agreements that fall foul of the provisions..."* of the NCA.

Validity of the transfer of the property

24. The starting point to a determination herein, lies not with whether or not the agreements were simulated, but with whether such a finding would have any effect on the Applicant's ownership of the property.
25. Counsel for the Respondent correctly indicated that in South African law the abstract system of transfer of property is applicable. Under the abstract system there is no need for a formally valid underlying transaction, provided that the

parties are ad idem regarding the passing of ownership.¹⁰ Despite this, the argument, that as a result of simulation of the underlying agreements, the transfer of the property was invalid, was persisted with.

26. The SCA dealt conclusively with this issue in *Absa v Moore*,¹¹ where it held:

“[27] The distinction is an important one. Where a transaction pursuant to which property is to be transferred is simulated – where all parties intend to disguise the true nature of the transaction – the transferor and transferee may well intend to transfer ownership. And since a valid transaction is not required for a transfer to be effected, the transfer itself may not be impeached. I shall deal with the legal principles when considering the Moores’ understanding of their contracts with Mr Kabini and Brusson and accordingly their intention. Suffice to say for the moment that it is only where the parties do not intend to change the ownership of the property, but have been misled into purporting to do so, or for some other reason that vitiates their intention to transfer property, such as undue influence or duress, that the transfer will be of no effect.”

27. The debate surrounding whether or not the loan agreements (and all the subsequent agreements) are simulated, is a red herring when considering this pronouncement. A finding that the loan agreements were simulated would not render the transfer of the property impeachable. The nature of any underlying agreement (or causa then) is only relevant to the extent that it could possibly evidence that there was no intention to transfer the property.

28. The Respondent did not allege that he did not intend to transfer the property to the Applicant. On personal perusal of both the conditional counterclaim to the action for repayment of the remainder of the loan, as well as the answering affidavit herein, I could find no allegation that there was no intention for transfer to take place. In his counterclaim, the Respondent relies on the same grounds as those *in casu*, (that the NCA was circumvented) in praying for an order to set aside the transfer of the property.

¹⁰ *Meintjies NO v Coetzer and Others* 2010 (5) SA 186 (SCA).

¹¹ *Absa v Moore* [2015] ZASCA 171; 2016 (3) SA 97 (SCA) (26 November 2015)

29. Similarly, it is not alleged that the Applicant mislead him, unduly influenced him or perpetrated fraud in relation to the transfer of the property.

30. If there was no fraud, undue influence or misleading, under which circumstances then could the transfer be vitiated? In *Knox v Mofokeng and Others*, the position was correctly described as follows:

“[19] The principles of the common-law pertaining to the abstract theory for the passing of ownership have been stated as follows by Brand JA in Legator McKenna Inc v Shea (above) at paragraph 22 (and referred to with approval by Shongwe JA in Meintjes NO v Coetzer (above) at paragraph 8):

“In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so-called real agreement or ‘saaklike ooreenkoms’. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. ... Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement.”

This implies that the transferor must be legally competent to transfer the property, the transferee must be legally competent to acquire the property and that the golden rule of the law of property that no one can transfer more rights than he himself has also apply to the real agreement. See Badenhorst, Pienaar & Mostert (5th edition) Silberberg and Schoeman’s the Law of Property” [Underlining my own]

31. No case has been made out *in casu* that any of the underlined requirements for a real contract were not met. The transfer of the property therefore also cannot be impeached on the basis of a defect in the real agreement.
32. An oblique reference to the need for judicial oversight per Rule 46A was made in the Respondent's heads of argument. This was not vociferously argued during the hearing of this application. Nothing turns on this submission. Naturally, the need for judicial oversight as referenced applies to sales in execution – which this was not.
33. My findings in this regard effectively dispose of the substantive defence raised by the Respondent, however, for the sake of dealing with the conspectus of the argument raised, I will briefly address whether the agreements *in casu* were simulated.

Simulated agreements?

34. Accepting, for the sake of argument, that the Applicant knew that the loans would be used by the Respondent and his mother for their personal expenses, does the granting of the loans to a company, JCS, render the agreements simulated? Or differently put, does the fact that the Applicant chose to not grant a loan to a natural person in order to avoid compliance with the provisions of the NCA, render the agreement between it and JSC simulated?
35. To my mind, the Respondent's argument is predicated on a (common) incorrect interpretation of a portion of the reasoning in *Commissioner for the South African Revenue Service v NWK Ltd*, where it was stated that:

"If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated."¹²

36. In *Roshcon (Pty) Limited v Anchor Auto Body Builders CC and Others*, the SCA explained the misconception :

¹² *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA)

“[14] I agree with the court a quo that parties may arrange their affairs to avoid statutory prohibitions, provided their arrangement does not result in a simulated transaction and is consequently in fraudem legis “

....

[35] It appears that in some circles this, and particularly the statement that ‘If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated’, has been understood to condemn as simulated transactions any and all contractual arrangements that enable the parties to avoid tax or the operation of some law seen as adverse to their interests. But that fails to read this sentence in the context of both the particular paragraph in the judgment and the entire discussion of simulated transactions that precedes it. If it meant that whole categories of transactions were to be condemned without more, merely because they were motivated by a desire to avoid tax or the operation of some law, that would be contrary to what Innes J said in Zandberg v Van Zyl in the concluding sentence of the passage quoted above, namely that:

‘The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.’

That was manifestly not Lewis JA’s intention.”

[36] The problem with general statements of this type is apparent from those by Cloete J in Nedcor Bank Ltd v Absa Bank Ltd, about floor plan agreements being simulated transactions. My colleague rightly holds those statements to be incorrect, based as they are, not on a consideration of a particular agreement in its own commercial context, but on generalisations about the nature of such agreements. For the avoidance of doubt, for so long as our law does not recognise a pledge of movables without delivery of the item pledged to the pledgee and its continued possession thereafter by the pledgee, commercial arrangements directed at finance houses securing their interests by taking

ownership of the property that is the subject of a financing agreement, serve an entirely legitimate commercial purpose. Lewis JA recognised that in her acceptance that the transactions described in S v Friedman Motors (Pty) Ltd and Conhage, served legitimate commercial purposes.

[37] For those reasons the notion that NWK transforms our law in relation to simulated transactions, or requires more of a court faced with a contention that a transaction is simulated than a careful analysis of all matters surrounding the transaction, including its commercial purpose, if any, is incorrect. The position remains that the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated.”

37. If one accepts that the Applicant *in casu* knew the loan amounts were intended for the personal use of The Respondent, what effect does this knowledge have on the validity of the loan agreement itself? As indicated in *Roshcon supra*, parties are entitled to structure “..their affairs to avoid statutory prohibitions..” provided that this does not result in simulated transactions.

38. In determining whether a party structuring its affairs to avoid statutory provisions, is guilty of simulating such agreements, regard must be had to the general principles relating to simulated agreements as set out in paragraph 37 of *Roshcon supra*. The analysis in *Roshcon* provides a useful example for the assessment *in casu*:

“[33] In the income tax cases, the parties seek to take advantage of the complexities of income tax legislation in order to obtain a reduction in their overall liability for income tax. There are various mechanisms for doing this, but they all involve taking straightforward commercial transactions and adding complex additional elements designed solely for the purpose of claiming increased or additional deductions from taxable income, or allowances provided for in the legislation. The feature of those that have been treated as simulated transactions by the courts is that the additional elements add nothing of value to the

underlying transaction and are very often self-cancelling. Thus in Erf 1383/1 Hefer JA said that ‘there is a distinct air of unreality about the agreements’. In Relier Harms JA referred to the ‘unusual and unreal aspects’ of the transactions. The analysis by Lewis JA of the transactions in NWK clearly demonstrated that a range of unrealistic and self-cancelling features had been added to a straightforward loan. They served no commercial purpose, were based on no realistic valuation of the different elements of the transaction and were included solely to disguise the nature of the loan and inflate the deductions that NWK could make against its taxable income. In those circumstances the courts stripped away the unrealistic elements in order to disclose the true underlying transaction.”

39. In *Rock Foundation Properties CC and Another v Dosvelt Properties (PTY) Ltd and Another*,¹³ Opperman J provided a practical approach to determining whether agreements are simulated:

“A simulated transaction is a dishonest transaction in terms of which the parties intend a legal effect which is different to the terms that the agreement expresses (‘Consideration 1’), which the parties dress up in a guise (‘Consideration 2’) and which is created for the purpose of deceiving (by concealing) the real transaction (‘Consideration 3’). A party claiming simulation must satisfy the court that there is a real intention, definitely ascertainable, which differs from the simulated intention. The court must be satisfied (‘Consideration 4’) that there is some unexpressed agreement or tacit understanding between the parties that is not borne out by the terms of the agreement or some secret understanding between them. If this were not so, it could not find that the ostensible agreement is a pretense.

As part of the inquiry, the Court must determine whether the real nature and implementation of the contracts are consistent with their ostensible form .”

¹³ *Rock Foundation Properties CC and Another v Dosvelt Properties (PTY) Ltd and Another* (20/28515) [2022] ZAGPJHC 1018 (21 December 2022)

40. Much was made of the fact that the Applicant was, or should have been, aware that the loan amounts, despite being paid into the bank account of JSC, were utilized for some of the Respondent and his mother's personal expenses. It is common cause that the Applicant, in all likelihood wary of the provisions of the NCA, declined to enter into a loan agreement with natural persons. As security for the amounts advanced, however, it required surety from the Respondent personally. There is nothing unusual about such an arrangement. Unlike loans to natural persons under the NCA, there is no obligation on a lender loaning money to a company to perform investigations into affordability or purpose of such loans. On the Respondent's own version, he derived his income from JSC. The fact that he utilized money from the bank accounts of JSC for his personal expenses is between him and his bookkeeper. It would not make commercial sense for the Applicant to refuse to loan money to a company in every instance where the directors and employees use the company's bank account as their own "piggy bank".
41. Lenders, on a daily basis, loan money to companies and require surety from natural persons. The applicability of the provisions of the NCA form part of lenders' overall determination on the viability of loans. On the Respondent's version the Applicant is in the business of granting loans, but is not a registered credit provider in terms of the NCA. Clearly then, the Applicant is not in the business of granting loans to natural persons or entities that fall under the ambit of the NCA.
42. All the agreements between the Applicant and the Respondent are exactly what they purport to be: e.g. a loan to a company for which a natural person stands as surety; a subsequent acknowledgement of debt by the surety; a sale of property agreement in partial fulfilment of an acknowledgement of debt by said surety. All of the agreements were given effect to exactly as contemplated in the agreement. The only "secret" agreement alleged by the Respondent is that all parties knew that he (and/or his mother), and not JSC, would probably benefit from the loans and be liable to repay the loans. To my mind, this was not a well-kept secret. From the inception of the agreements it was foreseen that the Respondent could possibly be held liable for repayment – hence the suretyship agreement.

43. As such, even if my findings under the heading “*Validity of the transfer of the property*” *supra*, were incorrect, I in any event find that the agreements between the parties resulting in said transfer were not simulated agreements. As such the provisions of the NCA do not come into play.

Staying of the eviction order

44. The Respondent has requested that, in the event that this Court find in favour of the applicant, the eviction order be stayed pending the outcome of the action instituted by the Applicant. As previously discussed, in his counterclaim, he has asked that the transfer of the property be set aside on the basis of the same arguments advanced herein.

45. The argument in this regard was not fully expanded on in the papers. At the hearing hereof, following enquiry from the Court as to the basis for such relief, a terse submission was made that reliance is placed on the *lis pendens* doctrine.

46. The applicability of the doctrine *in casu* is questionable: As opposed to cases where *lis pendens* is raised a defence, *in casu*, the Respondent has not argued that I should not decide the matter – instead he merely asks that my decision be implemented at a later stage.

47. The rationale for the *lis alibi pendens* is to avoid multiplicity of actions,¹⁴ where the same question is decided on by separate Courts.¹⁵ At its heart lies the need for legal certainty in disputes. It is therefore raised as a defence or point *in limine* with a view to a Court staying its decision on an issue pending the determination of the same issue by another Court at a later stage.

48. That is not what I am asked to do here. Having made my determination, the fact that the Respondent will again in future attempt to argue for different outcome on the same issue, has no effect on the present finding. I am appreciative of the fact that, given the alleged “sameness” of the issue, this Court’s finding regarding the

¹⁴ *Bafokeng Tribe v Impala Platinum Limited and Others* 1999 (3) SA 517 (BHC) at 566B-C

¹⁵ *Eksteen v Road Accident Fund* (873/2019) [2021] ZASCA 48

validity of the transfer of the property has a clear and definitive effect on a future court's ability to make a determination of the Respondent's counterclaim. Had the Respondent properly raised *lis pendens* and requested that the determination of the present application be stayed *in toto*, a full enquiry and argument could have been made to determine the "sameness" of the question and the appropriateness of this Court deciding on the validity of the transfer of the property. This was not how the matter was pursued by the Respondent. Litigants are entitled to determine the course of action they wish to follow in litigation, and it is not for the Court to second-guess such elections by a litigant. The relief sought by the Respondent does not fall within the ambit of the *lis pendens* doctrine. The fact that this Court's determination in the eviction application may result in a plea of *res iudicata* to the Respondent's counterclaim in the action, does not, under the circumstances, negate the finding made.

49. Although not pertinently advanced by the Respondent, I will also consider whether the eviction proceedings should be stayed by virtue of the discretion afforded to this Court to make a just and equitable order in terms of Section 4(7) of PIE, which states that:

"... 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 land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

50. Courts have in the past, on the basis of Section 4(7) frequently made orders staying evictions for a set period of time. Usually this is done to afford the occupiers time to make alternative arrangements for housing. However, such determinations are to be made on information placed before the Court. As was stated in *Port Elizabeth Municipality v Various Occupiers*:¹⁶

¹⁶ 2005 (1) SA 217 (CC)

“[32] The obligation of the court is to ‘have regard to’ the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfill its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation of the enquiry, not its subject matter. What the court is called upon to do is to decide whether, bearing in mind the value of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their home. Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place.”

51. *In casu*, no information relating to hardship, or any other circumstances was placed before this Court. In fact, it appears that, *in casu*, one is not deciding on the eviction of an indigent occupier – by all accounts the Respondent finds himself living in a home on a luxury estate at present. As the state of his affairs are within his intimate knowledge, one would have expected him to bring any relevant information to the attention of this Court that would make the stay of the eviction for a set time period just and equitable. Save for his reliance on the purported illegality of the transfer of the property, no information or circumstances have been brought to the attention of the Court that would justify a stay of the eviction under Section 4(7)
52. Even if there were factors present which could have warranted a stay of the eviction proceedings, there is no correlation between a just and equitable timeframe and the undetermined future date for the hearing of the action and counterclaim.

53. I have however taken note of common knowledge practicalities relating to moving and will be virtue thereof, afford the Respondent the 60 days contended for in the Applicant's draft order to vacate the property.

ORDER

54. As a result, the following order is made:

1. The First Respondent, his mother, Elizabeth Helena Collins and the minor children of First Respondent, all currently residing with him at the property situated at ERF 4[...] P[...], NO: M[...] AVENUE, WOODILL GOLF ESTATE, PRETORIA ("the property") are hereby evicted from the property.
2. The First Respondent, his mother, Elizabeth Helena Collins and the minor children of First Respondent, all currently residing with him at the property, are ordered to vacate the property within 60 (sixty) days of this order being granted, failing which the Sheriff for the area within which the property is situated is authorized to evict the First Respondent and all persons holding under him from the Property.
3. The First Respondent is ordered to pay the Applicant's costs of this application on a High Court scale, with counsel fees determined at Scale B.

K STRYDOM
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION PRETORIA

Date of hearing: 8 May 2024

Date of judgment: 29 July 2024

Appearances:

For the Applicant:

Adv C Jacobs, instructed by Van der Walt attorneys

For the The Respondent:

Adv A Vorster, instructed by Strydom Bredenkamp Inc