**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 2025-207539

In the matter between: -

**JAMES CLIVE PEARS** Applicant

and

**CLUB C99 BAR LOUNGE (PTY) LTD** First Respondent
**FLATROCK BODY CORPORATE** Second Respondent

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***Coram*:** Van Zyl, AJ
**Heard on:** 6 May 2026
**Judgment:** : 27 May 2026

**Summary:** Eviction from commercial premises – similar application previously brought upon cancellation of written lease agreement – court then finding that tacit relocation had occurred – further application for eviction subsequently brought upon cancellation of tacit lease not precluded by doctrine of *res iudicata* – contractual arrangement between the parties prevents reliance by the lessee upon enrichment lien as defence to eviction – lessee bound under the terms of lease agreement to comply with conduct rules issued by body corporate from time to time – lessee not immune to future amendments to these rules

## ORDER

1. The first respondent (together with all those occupying under it) is evicted from the commercial premises situated at Shop [...] F[...], [...] B[...] Street, Cape Town.

2. The first respondent (together with those occupying under it) is ordered to vacate the property and restore possession thereof to the applicant by no later than **20:00 on Sunday, 31 May 2026**.

3. Should the first respondent (and anyone occupying under it) fail to vacate the property as ordered in paragraph 2, the Sheriff of the Court or his lawfully appointed deputy may carry out this eviction order forthwith, and hand vacant occupation of the premises to the applicant.

4. The first respondent shall pay the costs of this application on the scale as between attorney and client.

## JUDGMENT

**VAN ZYL, AJ:**

**Introduction**

1. "*Please don't stop the music*", sings Rihanna. The applicant disagrees. He seeks the first respondent's eviction from the commercial premises[1] of which he (the applicant) is the registered owner, namely Shop [...] in the Flatrock

[1] The provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 do not apply.

Sectional Title Scheme in Buiten Street, Cape Town. The first respondent operates what it calls a "*disco club / bar lounge enterprise"* from the premises. The applicant says it is a nightclub, but in the end not much turns on the label.

2. The first respondent opposes the application on various grounds.[2] The second respondent (the body corporate) has delivered an affidavit and a notice of intention to abide. It confirms the averments concerning it made by the applicant in his founding affidavit.

3. This is not the first face-off between these parties in this court. I set out the chronology of events culminating in the present application.

**Background**

*The written lease agreement*

4. On 17 July 2023 the applicant and the first respondent concluded a written lease agreement in respect of the premises. The first respondent would occupy the premises for two years at a monthly rental of R 32 000,00 (excluding VAT), subject to an annual escalation of 6%. I refer to the clauses relevant for present purposes.

5. Clause 6.1, read with clause 1.14 of the schedule to the written agreement, describes the "Permitted Purpose" off the premises as "BAR LOUNGE".

6. Clause 6.2 provides that the first respondent may not use the premises in a manner that is unlawful, constitutes a nuisance, or which is contrary to the body corporate's conduct rules as referred to in clause 7 of the written agreement. In terms of clause 6.4 the first respondent must comply with all applicable laws, rules, regulations and licences in using the premises, including those which the applicant, as owner, is required to observe.

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[2] The application was originally brought on an urgent basis, but given the path that the litigation took, urgency is no longer an issue.

7. Clause 7.1 of the written agreement provides that the landlord of the premises (that is, the applicant) or his letting or managing agent may from time to time publish conduct rules in order to regulate the conduct of lessees. It is common cause between the parties that the body corporate's conduct rules (at least the rules as they stood at the time of the conclusion of the lease agreement), and which are binding on the applicant, are by virtue of clause 7.1 binding on the first respondent. Clause 7.2 provides that the first respondent, as tenant, shall ensure that its representatives comply with any such conduct rules as contemplated in clause 7.1.

8. In relation to alterations to the premises, clause 15.1 of the lease provides that the first respondent may not make any alternations to the premises, whether interior or exterior, without the applicant's written consent. Under clause 15.5, the applicant may on termination of the lease elect to retain any improvements made to the premises, or he may request the first respondent to remove them and reinstate the premises to their prior condition. Clause 15.7 provides that the applicant shall not be obliged to pay compensation to the first respondent for any alternations made (including fittings and fixtures) by the first respondent to the premises in fitting them out for their desired use, whether or not such alterations were made with the applicant's consent.

9. Clause 29 covers breach by the first respondent. The applicant may cancel the lease in the event of the first respondent failing to pay the rent, or if it breaches any of the other terms of the lease ("*all of which are deemed to be material*").

10. Should either party have to take legal action against the other because of a breach of the agreement, the unsuccessful party is liable (under clause 30) for legal costs on the scale as between attorney and client.

*The litigation before the Honourable Justice Ndita*

11. The first respondent took occupation of the premises on 1 August 2023.

Problems quickly arose between the parties. On 8 October 2024 the applicant cancelled the lease because of the non-payment of rental, and for trading contrary to the terms of the lease. On 30 October 2024 he made application for the first respondent's eviction.

12. The application came before Ndita J.[3] She declined to evict the first respondent because she found, on the first respondent's version, that in December 2024 (after cancellation of the written lease) the parties had concluded a tacit lease[4] upon the same terms as the written lease. In her words: "… *the inference to be drawn from all the facts is that the provisions of the cancelled agreement were incorporated into the new agreement mutatis mutandis. (Fiat SA v Kolbe Motors 1975 (2) SA 129).*"

13. The parties both accepted that this was the position, and the judgment stands.

*The amended conduct rules*

14. On 24 March 2025 (after argument of the application before Ndita J, but before delivery of judgment) the body corporate adopted amended conduct rules under section 10(2)(b)[5] of the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA). These rules were approved by the Community Schemes Ombud Service (CSOS) on 5 June 2025, as required by section 10(5) of the STSMA, which provides as follows:

"*(5)(a) If the management or conduct rules contemplated in subsection (2) are substituted, added to, amended or repealed, the developer or the body corporate*

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3 See *James Clive Pears v Club C99 Lounge (Pty) Ltd*, unreported judgment under case number 23527/2024 delivered on 25 June 2025 (*coram* Ndita J) para 34.

4 There was thus a tacit relocation of the lease.

5 "*(2) The rules must provide for the regulation, management, administration, use and enjoyment of sections and common property, and comprise- … (b) conduct rules, as prescribed, which rules may, subject to the approval of the chief ombud, be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, and which rules may be substituted, added to, amended or repealed by special resolution of the body corporate, as prescribed: Provided that such conduct rules may not be irreconcilable with any prescribed management rule contemplated in paragraph (a).*"

*must lodge with the chief ombud a notification in the prescribed form of such substitution, addition, amendment or repeal.*

*(b) The chief ombud must examine any proposed substitution, addition, amendment or repeal referred to in paragraph (a) and must not approve it for filing unless he or she is satisfied that such substitution, addition, amendment or repeal is reasonable and appropriate to the scheme.*

*(c) If the chief ombud approves the substitution, addition, amendment or repeal of rules for filing, he or she must issue a certificate to that effect.*

*(d) A substitution, addition, amendment or repeal of rules contemplated in paragraph (a) comes into operation on the date of the issuing of a certificate contemplated in paragraph (c) or the opening of the sectional title register for the scheme, whichever is the latest*."[6]

15. The amended conduct rules therefore came into operation on 5 June 2025.

16. On 25 March 2025 the body corporate's attorneys gave the applicant notice of his breach of the conduct rules (at that stage in unamended form) due to the first respondent's trading as a nightclub instead of a bar lounge as permitted under the lease agreement. The body corporate also objected to unauthorised renovations and alterations to the premises, including signage installed, without the body corporate's consent. It complained, in addition, about noise emanating from the premises outside of its permitted trading hours, and the risks posed by loitering, and disorderly conduct at the entrance adjacent to the residential sections of the scheme.

17. Rules addressing these concerns, and in particular the concern relating to the nature of the first respondent's operations, were carried forward into the amended conduct rules. Rule 12(6) of the amended rules prohibits the operation of "*clubs, bars, hookah lounges or similar night establishments*" within the scheme.

18. Rule 12(10)(a) of the amended rules further prohibits an owner or occupier of a commercial section in the scheme from using the section to "*without*

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6 My emphasis.

*limitation … operate a business in the scheme which is primarily in the nature of a nightclub, club, nightlife venue, entertainment venue, hookah lounge, pub, bar, gentleman's club, sports café or of which business such activities form an essential or substantial part*".

19. Rule 12(10)(b) of the amended rules prohibits an owner or occupier of a commercial section from selling "*…bottled alcoholic beverages or any other intoxicating liquor by retail or 'Off-Consumption'*".

20. Rule 12(10)(c), in turn, prohibits an owner and occupier from operating "*…a business that involves loud music or an excessive noise, such as, without limitation, a disco*". Whatever one calls the first respondent's operation, it is clear from the papers that it falls squarely within these prohibitions.

21. On 23 April 2025 the body corporate's attorneys reiterated its concerns to the applicant and the first respondent, and indicated that penalties would be imposed on the applicant if the situation was not remedied.

*The cancellation of the tacit lease, and the institution of the present application*

22. On 30 June 2025 the applicant gave the first respondent notice of its breach of the tacit lease.[7] The breaches concerned clauses 6.2 and 7 of the lease because of the first respondent's breaches of the amended conduct rules 12(6) and 12(10)(a) to (c), as well as a breach of clause 29 of the lease for failure to pay rental. The first respondent was given 20 business days to cease trading, failing which the applicant would cancel the lease. The arrear rental was paid but the other breaches went unremedied.

23. On 28 July 2025 the body corporate's attorneys sent a further notice of a breach of the conduct rules to the applicant, calling on him to remedy these within 7 days, or face penalties. A letter in the same terms was sent on 9 September 2025, and on that day the body corporate issued the first penalty

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7 Judgment under the first eviction application had by then been delivered, on 25 June 2025.

invoices to the applicant.

24. In September 2025 the applicant and the representatives for the first respondent conducted negotiations for the sale of the premises to the first respondent or to its proprietor, Mr Gold, but no agreement could be reached.

25. On 30 September 2025 the applicant accordingly cancelled the lease by way of a written notice of cancellation, and called on the first respondent to vacate the premises within 20 days, failing which an eviction application would follow. The first respondent replied to the breach notice, stating that the applicant should have known of the businesses prohibited by the conduct rules before he rented the premises to the first respondent. The first respondent reminded the applicant that the body corporate had objected to its liquor license application, but that the objection had been overruled. It complained that the applicant was raising the same arguments as had been raised before Ndita J, and insisted that the first respondent was using the premises for the purpose stipulated in the lease agreement. It thus disputed the cancellation of the lease. These sentiments foreshadowed the defences that have been raised the proceedings now before me.

26. The applicant instituted the present application for eviction in November 2025, and enrolled it for hearing on an urgent basis. It was, however, struck from the roll for lack of urgency.[8] The merits of the application were not considered at the time.

27. The first respondent is still in occupation of the premises.

*The body corporate*

28. In its affidavit, the body corporate indicates that it has received numerous complaints from residents of the scheme who are affected by the first respondent's operations, in particular by the noise emanating from the

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8 *Pears v Club C 99 Bar Lounge (Pty) Ltd and another* [2025] ZAWCHC 603 (10 December 2025).

premises outside the permitted trading hours of its liquor license. It appears from an annexure to the application that served before Ndita J (and to which the first respondent's counsel referred me) that the body corporate objected to the grant of an event liquor licence to the first respondent in August 2023, and in such objection raised various concerns about the first respondent's use of the premises. A subsequent "Inspectorate Report" prepared at the behest of the Western Cape Liquor Authority in March 2024 emphasizes these concerns, and concludes that the first respondent's proprietor is not a "*responsible trader or a fit and proper person to hold a liquor licence*". A licence was nevertheless granted.

29. The body corporate says that its insurance cover is at risk of being voided if the premises is operating as a nightclub, because nightclubs pose a high fire risk. At present the first respondent is not considered as a nightclub for purposes of the body corporate's insurance, but future cover may be declined should the use of the premises as such continue. Penalties of more than R900 000,00 have since been levied against the applicant, as owner of the premises.

30. In the course of argument, the first respondent's counsel referred me to a supplementary affidavit deposed to by the first respondent's proprietor in anticipation of the hearing in November 2025. The affidavit refers to email correspondence between the applicant and the first respondent's proprietor, Mr Gold, from which it appears that the applicant, in 2024 at least, did not agree with the body corporate's concerns. He said, for example: "*These people are insane! Who complains like this after a fit-out before the business is even open? Why didn't they just tell us this from the get go??*".

31. The first respondent accordingly asserts that these proceedings are in reality instigated by the body corporate, and that there is no basis to evict it from the premises. This argument suggests too, as I understand it, that the body corporate tailored its amended conduct rules specifically to drive the first respondent out of the premises. I shall revert to this issue in due course.

**The applicable law in relation to eviction**

32. As indicated, this is a commercial lease. The common law therefore applies.[9]

33. All that an owner such as the applicant claiming eviction under the common law must aver and prove is his ownership, and that the occupier is in possession. However, if the owner alleges more than is necessary to vindicate his property (i.e., that the lease has been properly terminated in accordance with any applicable notice period), then he must show that the termination was lawful and that any right of occupation has come to an end.[10]

34. Once ownership and unlawful occupation are alleged, the lessee bears the onus of setting up a right of occupation.[11]

**The first respondent's defences**

35. The first respondent admits the applicant's ownership of the premises. It remains in occupation of the premises. The requisites for ejectment are therefore met insofar as these aspects are concerned.

36. The first respondent nevertheless raises various defences to the application. I discuss these in what follows.

*Res judicata*

37. The requirements for *res iudicata* are well-established. The doctrine prevents the same parties from re-litigating the same issue that has already finally been decided by a court of competent jurisdiction:[12]

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9 See Bradfield and Lehman *Principles of the Law of Sale and Lease* (3ed, Juta) at pp165-166.

10 *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2017 (3) SA 128 (SCA) para 24.

11 *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (In liquidation) and another* 2018 (4) SA 433 (SCA) para 3.

12 *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and others* 2020 (1) SA 327 (CC) paras 69-71. My emphasis.

*"[69] Res judicata strictly means that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties. In Evins, Corbett JA stated that:*

> *"Closely allied to the 'once and for all' rule is the principle of res judicata which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the exceptio rei judicatae vel litis finitae. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions."*

*[70] In essence, the crux of res judicata is that <u>where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed. The underlying rationale for this principle is to ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes</u>.*

*[71] The requirements of res judicata, although trite, can be summed up as follows: (i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) concerning the same subject-matter, or thing… the defence of res judicata requires that a party must establish that the present case and the previous case are based on the same set of facts that have been finalised by a competent court or tribunal by the same parties on the merits of the same cause of action."*

38. The doctrine has three key elements. The first is that the previous judgment must have been a final one. The original case must have concluded with a final judgment on the merits, not an interim or procedural ruling. The second element is that the same parties must have been involved. The parties in the second case must be the same as, or in privity with, the parties in the original case. Third, the same cause of action must have been involved, in connection with the same subject-matter.

39. The ambit of the *exceptio res iudicata* has been extended by the relaxation, in appropriate cases, of the common law requirement that the relief claimed or

the cause of action be the same. This means that the "same issue" question is whether an issue of fact or law was an essential element of the previous judgment.[13] The defence remains that of *res iudicata*.[14] The relevant principles are set out as follows in *Democratic Alliance v Brummer*:[15]

"*[12] The nature of a plea of issue estoppel has been explained by this court on numerous occasions. The explanation in Smith v Porritt is worth reiterating.*

> *'Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio rei judicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed it has become common place to adopt the terminology of English law and to speak of issue estoppel. … The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. … Relevant considerations will include questions of equity and fairness not only to the parties themselves but to others. …*

*[13] The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous court is before another court for determination. This is so because if the same issue (eadem quaestio) was not determined by the earlier court, an essential requirement for a plea of res judicata in the form of issue estoppel is not met. There is then no scope for upholding the plea. It does not, however, necessarily follow, that once the inquiry establishes that the same issue was determined, the plea must be upheld. That is so because the court considering the plea of issue estoppel is, in every case, concerned with a relaxation of the requirements of res judicata. It must therefore, with reference to the facts of the case and considerations of fairness and equity,*

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13 *Ascendis supra* para 97 (first judgment).
14 *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another* 2014 (5) SA 297 (SCA) para 10.
15 [2022] ZASCA 151 (3 November 2022) paras 12-13. My emphasis.

*decide whether in that case, the defence should be upheld.*"

40. The first respondent contends that the applicant is precluded by virtue of issue estoppel from obtaining relief in this application, because:

    40.1 This is an application brought by the same applicant against the same respondents as in the previous matter.

    40.2 The claim in the previous matter was, as it is now, for the ejectment of the first respondent.

    40.3 The issues raised in the previous application for the ejectment of the first respondent are the same issues raised in the application now before this court.

41. The first respondent argues further that, should this court find that the issues raised in the previous application have not been finally decided, then the previous judgment must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. The previous case was brought on an identical basis, and on the same facts. This new application is thus a re-litigation of the same case previously before this Court.

42. A consideration of the applicant's case makes it plain that *res iudicata* does not apply in the present matter, whether in its original format or in its issue estoppel cloak. The issues in this application were not the same ones as featured before Ndita J. At a basic level, the applicant relies on the first respondent's breach of a different lease agreement, that is, the tacit lease as opposed to the written lease that served before Ndita J. She did not consider or determine the validity of the cancellation of the tacit lease: she could not have done so, because the cancellation only occurred on 30 September 2025, after her judgment had been handed down in June 2025. She also did not consider the first respondent's defence to the effect that it had an enrichment lien arising from improvements made to the premises.

43. In *Ascendis* the Constitutional Court remarked: [16]

> "*The Court in Bisonboard held that it is a well-established principle of our law that there is a distinction between causes of action on the one hand and legal proceedings on the other. The result of this distinction is that it is not the legal proceedings that will be terminated by res judicata, but the individual causes of action that have been decided. The High Court appears to have found that the proceedings were res judicata on the basis that the legal proceedings have a similar outcome. This is clearly wrong. The applicant relied on different causes of action and on the strength of that, the matter could not have been res judicata.*"

44. The fact, moreover, that the question of the first respondent's breach of certain clauses of the lease agreement was considered previously (by Ndita J) does not mean that the consideration of an alleged repeat of those breaches (or an allegation of other breaches) is precluded. The "new" breaches are not simply a repeat of the "old" ones. They are different complaints, based upon different facts. In the premises, *res judicata* does not assist the first respondent.

*The amended conduct rules*

45. The first respondent argues that the applicant should have known, when concluding the lease, what the first respondent's operations entailed. The applicant therefore has himself to blame for his troubles with the body corporate.

46. The first respondent contends further that the amended conduct rules may not be applied retrospectively. Its argument boils down to the contention that, because the amended rules were not in place when the lease was concluded, they do not apply to the first respondent at all.

47. Neither of these contentions advances the first respondent's case.

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16 *Ascendis supra* para 66 (my emphasis).

48. Whether or not the applicant knew the nature of the business when the lease was concluded is irrelevant. It does not estop the applicant from applying to eject the first respondent because of the latter's breach of the conduct rules applicable at any given time.

49. It is not the applicant's case that the amended rules apply retrospectively. They apply prospectively, to ongoing conduct which took place and which continues to take place after they have come into effect. There is no dispute between the parties that conduct rules exist to regulate the conduct of owners and tenants in a scheme in a scheme. The rules may be amended from time to time (as reflected in clause 7 of the lease agreement) to cater for conduct not regulated in the past. This does not vitiate or undermine tenants' rights. The first respondent's argument to the effect that its alleged rights under the lease (that is, to operate its establishment in circumstances prohibited by the conduct rules) cannot supplant the conduct rules. The parties' respective obligations under the lease, read with the conduct rules, were not frozen in time the moment when the lease was concluded.

50. There is a suggestion in the answering papers that the amended rules were not validly adopted by the body corporate. The amended rules were, however, approved by CSOS, and their approval stands until set aside. The same applies to the adoption of the amended rules by the body corporate. The first respondent has made no effort to challenge either of these decisions in the appropriate forum, or to mount a collateral challenge as part of these proceedings.[17]

51. I wish to revert to the first respondent's submission (referred to earlier in this judgment) to the effect that these proceedings are in reality driven by the body corporate, and that this is unlawful. There is, on the facts, no case made out in support of this contention on the papers, but one should in any

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[17] See, for example, *Body Corporate of the Paddock Sectional Title Scheme No 249-1984 v Nicholl* 2020 (2) SA 472 (GJ) where the respondent instituted a counter-application challenging the validity of the conduct rules.

event not lose sight of the body corporate's obligations in the greater context of sectional title scheme regulation.

52. The functions and powers of bodies corporate are set out in sections 3 and 4 of the STSMA. The goal of these provisions is to ensure that bodies corporate control, manage, and administer the common property for the benefit of all owners, and also ensure the enforcement of management and conduct rules for the harmonious co-existence of the owners in the scheme.

53. Owners, in turn, must under section 13 of the STSMA "*use and enjoy the common property in such a manner as not to interfere unreasonably with the use and enjoyment thereof by other owners or other persons lawfully on the premises*", and "*not use his or her section or exclusive use area, or permit it to be used in a manner or for a purpose which may cause a nuisance to any occupier of a section*".

54. Regulation 30 to the STSMA obliges bodies corporate to ensure compliance with the act and its regulations, by taking reasonable steps to ensure that a member or any other occupier of a section does not use either the common property or a section unreasonably so as to interfere with other persons lawfully on the premises.

55. It is to this end that a body of owners in a sectional title scheme is allowed to make its own rules or alter or amend existing rules so long as any amendments are approved by the CSOS. Owners are bound by these rules.[18] I have already referred to the relevant provisions of section 10 of the STSMA. Apart from voicing suspicions, the first respondent does not make out a case that the body corporate in the present instance unreasonably singled out the first respondent, driving it out of the scheme by amending the conduct rules. What the body corporate did was to respond to the needs of its members as set out in its papers. There is, as matters stand, nothing wrong with its conduct in this regard.

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[18] *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and others* 2019 (4) SA 471 (SCA) para 19.

56. What the first respondent effectively argues is that its conduct must be tolerated by the body corporate until the tacit lease has run its course. It must also be compensated for the loss that it will sustain due to the implementation of the amended rules. These are untenable submissions which ignore the express agreement in the lease that conduct rules may be made "from time to time", and that the first respondent is expected to adhere to them.

57. The first respondent is, on the papers, in admitted in breach of clause 7 of the lease due to its failure to comply with the amended rules, which bind all owners and tenants. On its own version it operates as an establishment which does not conform to the requirements posed by the amended conduct rules. The fact that it has a liquor licence (despite the body corporate's objections) does not override the provisions of either the lease or the conduct rules. The applicant was entitled to cancel the lease on this basis alone.

58. The first respondent is also in breach of the unamended conduct rules, due to its past unauthorised renovations and alterations of the premises (also done in breach of clause 15.1 of the lease). These predate the amended rules. The applicant would have been entitled to cancel based on these breaches, which existed at the time of cancellation, but which were not expressly relied on.[19] The same goes for the many complaints from residents of the scheme who are affected by the first respondent's operations. This is a nuisance irrespective of whether the first respondent is a bar lounge or a nightclub, and constitutes a breach of clause 6.2 of the lease. The first respondent does not deny the allegations made in this respect. In fact, the denials raised in the answering affidavit are generally broad and devoid of detail, to such an extent that *Plascon Evans*[20] cannot come to the first respondent's rescue.

*Does the first respondent have an enrichment lien?*

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19 See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 SCA at 299F-G.

20 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G-635C. The applicant seeks final relief on motion.

59. The first respondent argues that it may rely on an enrichment lien in opposition to the application for its eviction from the premises.

60. Enrichment liens are regarded as limited real rights which are enforceable against the owner of the thing. In *United Building Society v Smookler's Trustees and Golombick's Trustee*,[21] the court held that:

> *"Now a jus retentionis for necessariae or utiles impensae may well be, and we think is, a real right. No doubt it is not possession in the legal sense, but it is a right to exclude everyone else from possession during continuance of a certain state of things. It is therefore a right to exclude the world from the enjoyment of one of the most important of the privileges which accompany dominium."*

61. In cases where it is argued that necessary expenses were incurred without the owner's permission or agreement (which is what the applicant alleges), the lien arises from enrichment.[22] To rely on a lien, the first respondent[23] needs to prove the following:

    61.1 Lawful possession of the property.

    61.2 That the expenses incurred were necessary or useful for the improvement of the property.

    61.3 The actual expenses incurred, and the extent of the applicant's enrichment.

    61.4 That there was no contractual arrangement between the parties in respect of the expenses.

62. The first respondent contends that all four requirements are met in the present case.

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21 1906 TS 623 at 632.

22 *Brooklyn House Furnishers v Knoetze and Sons* 1970 3 SA 264 (A) at 270F-271D.

23 The onus rests upon the first respondent to prove that the applicant has been enriched: see *Rhoode v De Kock and another* 2013 (3) SA 123 (SCA).

63. The applicant points, however, to the elephant in the room: clause 15.7 of the lease provides that he is not obliged to compensate the first respondent for the improvements it contends it effected to the premises, whether those improvements were effected with or without the applicant's consent. Clause 15.5, in addition, provides that the applicant may elect whether to retain the improvements or to require their removal on termination of the lease. It is common cause between the parties that these clauses, which were part of the written lease, remained in place upon the tacit relocation of the lease. There was, thus a contractual arrangement in place between the parties in respect of the expenses, which means that the first respondent has not satisfied the fourth requirement for the establishment of an enrichment lien.

64. The first respondent has, in any event, not met the other requirements for the establishment of an enrichment lien. It says that it has spent "approximately R5 million" to improve the premises, but its actual expenses and the extent of the applicant's enrichment are neither alleged nor proven. The lien would cover only the lesser of these two amounts.[24]

65. In the absence of the necessary facts to ascertain what the position is, the first respondent has not established that it has such a lien. As stated in *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and another*,[25] a right of retention does not exist in a vacuum, but serves as reinforcement of an underlying claim. There can thus be no question of either a direct or indirect enrichment lien of there is no unjust enrichment of the owner.

**Conclusion and costs**

66. The applicant has made out a case for the relief that it seeks, and the first respondent has failed to demonstrate that it has any right to remain in the property.

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24 *Rhoode v De Kock and another* 2013 (3) SA 123 (SCA) paras 13-16.
25 1996 (4) SA 19 (A) at 26J-27A.

67. The applicant is the successful party, and there is no reason to depart from the general rule that costs should follow the event. As agreed between the parties under the lease agreement, such costs are to be paid on the attorney and client scale.

**Order**

68. In the premises it is ordered as follows:

1. **The first respondent (together with all those occupying under it) is evicted from the commercial premises situated at Shop [...] F[...], [...] B[...] Street, Cape Town.**

2. **The first respondent (together with those occupying under it) is ordered to vacate the property and restore possession thereof to the applicant by no later than 20:00 on Sunday, 31 May 2026.**

3. **Should the first respondent (and anyone occupying under it) fail to vacate the property as ordered in paragraph 2, the Sheriff of the Court or his lawfully appointed deputy may carry out this eviction order forthwith, and hand vacant occupation of the premises to the applicant.**

4. **The first respondent shall pay the costs of this application on the scale as between attorney and client.**

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**P. S. VAN ZYL**
**Acting Judge of the High Court**

**Appearances**:

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|---|---|
| **For the applicant:** | Mr G. Quixley |
| Instructed by: | Rebello Karsten Inc. |
| | |
| **For the first respondent**: | Mr D. Petersen |
| Instructed by: | A Fotoh & Associates Inc. |
| | |
| **For the second respondent**: | Ms L. Liebenberg |
| Instructed by: | Albertus J Agulhas Inc. |