

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/2648

DATE:23/09/2011

REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

YOUSUF GUMAN N.O.
(in his capacity as executor of the late
estate Guman, no. 21765/05)

Applicant

and

FAWZIA ANSARI

First Respondent

**THE FURTHER OCCUPIERS OF STAND 306/0,
ACTIONVILLE, EXTENSION 2 TOWNSHIP,
BENONI, commonly known as
306 PATEL STREET, ACTONVILLE,
EXTENSION 2, BENONI**

Second Respondent

J U D G M E N T

MBHA, J:

[1] The applicant seeks an order for the eviction of the first respondent and anyone occupying and claiming occupation under or through her, from the residential premises and immovable property situated at Erf 306 Actionville, Extension 2 Township, Benoni, and commonly known as 306 Patel Street, Actonville ("*the property*"). This application is in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 as amended ("*the PIE Act*").

[2] The property is the main asset in a deceased estate. The previous owner, the father of the applicant, died on 28 August 2005 without a last will and testament and accordingly his estate must be distributed to the intestate heirs in terms of the Intestate Succession Act, No. 81 of 1987.

[3] The first respondent is currently in occupation of the property and has been for the past 53 years. She has occupied and possessed the property in terms of the deceased's consent.

[4] It is not disputed that upon the applicant's appointment as executor of his late father's estate, he attended a meeting with the first respondent and attempted to put in place a lease agreement with her, pending the final valuation of the property and the possible sale thereof and the finalization of the estate. The first respondent refused to enter into a lease agreement.

[5] The applicant has further attempted to resolve the matter by offering the property to the first respondent to purchase for R150 000,00, subject to the Master's approval. However, the first respondent was unwilling to purchase the property for that amount and instead offered to purchase the property for R75 000,00.

[6] The first respondent raises three defences namely:

- 6.1 that the property was orally bequeathed to her by the deceased;
- 6.2 that the applicant must accept her offer to purchase the property for R75 000,00; and
- 6.3 that she has an improvement lien of approximately R70 000,00 in respect of the property and is entitled to remain in possession thereof until she has been paid out for such lien.

[7] During argument Ms Gordon, representing the first respondent, conceded that the allegation that the property was orally bequeathed to the first respondent by the deceased could not be sustained. This concession is,

in my view, well made as the first respondent accepts that the deceased died intestate and as such his estate must be distributed to the intestate heirs. Furthermore, the first respondent has never laid any claim of ownership of the property on the basis of an oral bequest of the property to her by the deceased. In any event, the fact that the first respondent offered to purchase the property for R75 000,00 flies in the face of her claim of ownership to the property.

[8] The second defence that the applicant must accept the first respondent's offer to purchase the property for R75 000,00, was likewise not pursued during argument. The applicant has a valid offer from a third party to purchase the property for an amount of R280 000,00. It is trite that the applicant, in his capacity as executor, must finalise the estate in the best interests of the intestate heirs.

[9] The first respondent contends that she is a *bona fide* possessor of the property and that she has incurred necessary expenses for the maintenance and improvement of the property as a result of which the owner of the property has been enriched in respect of the overall value of the property. She accordingly contends that she has a valid enrichment claim against the estate for R70 000,00.

[10] The first respondent has set out the nature and the costs of the improvements to the property, which amount to approximately R70 000,00, and contends that she is entitled to retain possession or occupation of the

property until she has been duly compensated for those expenses (improvement lien).

THE APPLICABLE LAW

[11] A lien (right of retention, *ius retentionis*) is the right to retain physical control of another's property, whether movable or immovable, as a means of securing payment of a claim relating to the expenditure of money or something of monetary value by the possessor (termed "*retentor*" or "*lien holder*", while exercising his or her lien) on that property, until the claim has been satisfied. See *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (AD) at 270E.

[12] A person who has spent money or done work on another person's property generally has a right of retention over that property, operating against the entire world. This right may be either a real lien, a salvage and improvement lien, or an enrichment lien. The lien enables the retentor to retain possession of the property in question until the expenditure on the property has been compensated. See *Syfreys Participation Bond Managers Ltd v Estate and Co-operative Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W) at 109H.

[13] A lien for the recovery of necessary expenses is traditionally called a salvage lien or a lien for repairs, while the one for the recovery of useful

expenses is termed an improvement lien. If successfully raised, the owner may not recover possession of the property from a person who is lawfully in possession and who has an underlying valid enrichment claim, unless and until the defendant has been compensated. See *Singh v Santam Insurance Ltd* 1997 (1) SA 291 (SCA).

[14] Most importantly, a lien does not entitle the possessor the use of the object: he or she is entitled to hold it as security only. Thus a lien provides a dilatory defence against a *rei vindication* and would not enable the first respondent to claim ownership to the property.

[15] To successfully raise the defence of a lien, the defendant must allege and prove:

- 15.1 lawful possession of the object;
- 15.2 that the expenses incurred were necessary for the salvation of the thing or useful for its improvement;
- 15.3 the actual expenses and the extent of the enrichment of the plaintiff. Both have to be given because the lien covers the lesser of the two amounts only;
- 15.4 that the plaintiff's enrichment is *iniusta* (unjustified); and
- 15.5 that there was no contractual arrangement between the parties (or a third person) in respect of the expenses.

See *Wynland Construction (Pty) Ltd v Ashley-Smith and Smith* 1985 (3) SA 798 (AD); *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 (4) SA 19 (SCA); *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) All SA 236 (A); 2001 (3) SA 482 (SCA).

[16] The general principle that applies to (real) security that in the absence of an agreement to the contrary, the secured party is not permitted to use the encumbered asset for his or her benefit, also applies to liens. See *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health and fitness Centre* 1997 (1) SA 646 (C) 654A-C

[17] In my view the improvement lien raised by the first respondent does not constitute a valid defence for the following reasons:

17.1 It is clear from the annexures which the first respondent attaches as alleged proof of monies spent that all alleged purchases were made following the applicant's appointment as the executor of the estate and following being informed that she is not the owner of the property in terms of the Intestate Succession Act. In spite of being informed that she will have to vacate the premises, or alternatively purchase the premises at a market-related price, the first respondent continued to effect renovations to the property.

17.2 The first respondent alleges that she has an enrichment claim against the estate for R70 000,00. However, whilst alleging that the property's true value is R75 000,00, she then alleges that

her improvements are worth R70 000,00. Accordingly, it remains unclear how the estate has been enriched and for what amount. In any event, the granting of the relief on the notice of motion does not extinguish her enrichment claim against the estate, if she indeed has such a claim; and

17.3 Most importantly, the first respondent's occupation of the property is without the executor's permission and is unlawful. As such, the first respondent is precluded from using the property for her own benefit while asserting her so called defence of an improvement lien.

[18] In case I am wrong in my finding as aforesaid, and assuming that the first respondent does have a valid improvement lien and is thus entitled to retain possession or occupation of the property until she has been duly compensated for her expenses, the applicant has furnished security to the first respondent for any enrichment lien successfully proven within the prescribed time limits in terms of the Uniform Court Rules and subject to the court granting an eviction order against her. The security provided is a Hyundai i10 motor vehicle, 2010 model with registration letters and numbers ZSD 369 GP.

[19] It is trite law that the owner of the property which is subject to a right of retention, may defeat the lien by furnishing adequate security for payment of the debt secured. See *Hochmetals Africa (Pty) Ltd v Otari Mining Co. (Pty) Ltd*

1968 (1) SA 571 AD at 582 and *Astralita Estates (Pty) Ltd v Rix* 1984 (1) SA 500 (C) at 503D.

[20] The mere offer or giving of security by the owner, does not, however, confer any right of possession to the owner, but the court may, in its discretion, order cessation of possession against provision of security. See *Mancisco and Sons CC (in liquidation) v Stone* 2001 (1) SA 168 (W) at 174H. Whether a court will exercise its discretion to order restoration of the property to its owner depends on the particular facts of each case. Tindall J expounded this principle as follows in *Spitz v Kesting* 1923 WLD 45:

“The court, in exercising its discretion, will have regard to what is equitable under all the circumstances, bearing in mind that the owner should not be left out of his property unreasonably and on the other hand should not be given possession if his object is, after getting possession, to delay the claimant’s recovery of expenses.”

[21] In *Mancisco and Sons CC (in liquidation) v Stone (supra)* at 175A-C 176C-D a full bench held that, in exercising its discretion, the court will not make an order conferring on the owner a greater right of possession than he has in terms of the law, nor diminish the lien holder’s right of retention, i.e. by ordering the furnishing of such substituting security for less than the amount of the detentor’s claim. The equitable nature of this process of substitution of security for the lien in question is evidenced by the fact that the court must seriously consider any objection raised by the detentor on the one hand, while on the other hand assessing the *bona fides* of the lienholder and the cogency of his or her evidence in respect of the circumstances that allegedly caused

the relationship of lienholder *vis-à-vis* owner, as well as the extent of the claim protected by the lien.

[22] The applicant has failed to make the necessary allegations to uphold the alleged defence of an improvement lien. Accordingly the defence does not pass muster.

[23] The deceased died in August 2005 and clearly the first respondent's intransigence has affected the winding-up of the deceased estate. The intestate heirs are being prejudiced for as long as first respondent remains in unlawful occupation of the property.

[24] The first respondent is currently employed as a cashier and as she has offered to purchase the property for R75 000,00, it is clear that she cannot by any means be described as a poor and a needy person. She is the sole resident at the property and her two children have reached the age of majority. The court is satisfied that all the necessary requirements for her eviction from the property in terms of the *Pie* Act, have been met. The court will provide her with sufficient time to seek suitable alternative accommodation.

[25] I am satisfied that the applicant is entitled to the relief that he seeks.

[26] In the circumstances I make the following order:

1. The security provided by the applicant dated 30 August 2011 is a valid and sufficient security.
2. The first respondent and any parties occupying and claiming occupation under or through her shall be evicted from the residential premises, the buildings erected on and the immovable property described as Erf 306 Actionville, Extension 2 Township, and commonly known as 306 Patel Street, Actonville.
3. The first respondent and any parties occupying and claiming occupation under or through her are directed and ordered to vacate the property within six (6) months after the service on her of the aforesaid eviction order.
4. In the event of the first respondent and/or any party occupying and/or claiming occupation under or through her failing and/or refusing to vacate the property on or before the date or period ordered in paragraph 3 above, that the Sheriff of the above honourable court is directed, authorised and empowered to:
 - 4.1 enter onto the immovable property and carry out the aforesaid eviction order and remove from the property all persons occupying the property within one week after the

date or period ordered in respect of paragraph 3 above
alternatively as soon as reasonably possible thereafter;

4.2 take such steps as may be necessary to prevent the re-
occupation of the buildings erected on the property and/or
the property;

4.3 take such steps as may be necessary to immediately seal
all entrances to the buildings erected on the property as
well as to the property itself in order to prevent the re-
occupation thereof;

4.4 that the Sheriff of the above Honourable Court is directed,
authorised and empowered to enlist and engage the
services and assistance of any person or persons he or
she considers necessary, expedient or desirable,
including but not limited to the South African Police
Services, to assist him in carrying out the order as set
forth above.

5. The first respondent is ordered to pay the costs of the
application.

B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR APPLICANT	:M STRYDOM
INSTRUCTED BY	:ABBA PARAK INC ATTORNEYS
COUNSEL FOR 1 ST RESPONDENT	:C GORDON
INSTRUCTED BY	:MF MARTINS COSTA ATTORNEYS
DATE OF HEARING	:31 AUGUST 2011
DATE OF JUDGMENT	:23 SEPTEMBER 2011