IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. 08/18662

DATE:02/06/2011

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
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In the matter between:

UNITED APOSTOLIC FAITH CHURCH Plaintiff

and

BOKSBURG CHRISTIAN ACADEMY Defendant

JUDGMENT

WILLIS J:

[1] The Plaintiff claims an order that "the school or any person claiming occupation through or under it, be ordered to forthwith vacate the immovable property described as erf 1029, Boksburg North and situated at 24 Paul Kruger Street, Boksburg North to restore vacant possession thereof to the plaintiff" together with costs. In addition, the plaintiff seeks an order that, in the event that the defendant or any other person claiming occupation refuses to vacate the premises as ordered by the court so to do, the sheriff may effect an eviction.

[2] The plaintiff originally approached the court by way of motion proceedings but, by reason of the disputes of fact, the case was referred to trial. I think it will simplify matters if, as a general rule, I refer to the plaintiff as "the church". It will appear later that the "defendant" has, in fact, no legal personality. It therefore, cannot be evicted. I shall, however, in order to facilitate the reading of this judgment, refer to what several witnesses described as "The Boksburg Christian Academy" as "the school". Mr Barry Peter Hill and his wife, Brenda, have been operating a school known as the "Boksburg Christian Academy" on the premises in question since 1999. They have applied the "ACE" system of education. "ACE" stands for "Accelerated Christian Education". Mr Hill is an engineer. His wife is a teacher. In 2000 Mr and Mrs Hill were ordained as elders of the church. They have since left the fold and worship elsewhere.

[3] It is common cause that the school remains in occupation of the property despite having been given notice by the church to vacate on 6 March 2007, having been requested by the local church council to do so on 10 November, 2006. After various attempts, involving attorneys acting for both the church and the school, had failed to negotiate a settlement between the parties a further letter was sent to the school on behalf of the church on 28 November 2008 advising the school to vacate the premises by 31 December 2007. The school has pleaded that it is entitled to remain in occupation until it has been paid the sum of R1 937

900- together with VAT and has counterclaimed for payment of this amount. In this regard the school relies on an agreement, alternatively an enrichment lien. The curial theatre of conflict in this matter has focused on a number of issues which are reasonably discrete.

[4] Accordingly, I shall depart from the usual judicial practice of enumerating all the relevant facts in the case and then, at the end, applying to law to those facts before making an order. It seems to me that the issues will be easier to follow if I deal, *seriatim*, with the facts and the law in regard to each separate issue, insofar as this is reasonably possible. Where there has been any conflict between the church's version of events and that of Mr and Mrs Hill, I have referred that of the church, on a balance of probabilities. Mr and Mrs Hill were evasive witnesses, contradicting themselves and each other on several occasions. The church's witnesses all impressed me with their longsuffering candour.

[5] The first issue relates to the question of the ownership of the immovable property in question. The church has alleged its ownership of this property in Boksburg. In addition, the church has alleged and led evidence on the fact that, according to it, the school has no right, recognized in law, to occupy the property.

[6] In support of the allegation that it is the registered owner of the immovable property in question, the church produced in evidence a copy of a title deed, the currency and validity of which were not challenged by the school, in which the registered owner is described as "*The General Governing Council of the United Apostolic Faith Church, its successors in title or assigns*". The date of registration was 14 June 1945.

[7] Pastor William John Anstruther, who testified on behalf of the church, gave evidence that ever since he had first gone to this particular property in the early 1960's, it has been known and understood by all concerned to have been owned by the United Apostolic Faith Church in South Africa. He had known personally a certain Pastor Brooke who had been instrumental in acquiring the property in 1945. Pastor Anstruther has held the highest office in the church, having been the General Overseer from 2004 to 2007. Pastor Anstruther had, himself, been the local pastor at this church for many years. Pastor Russell Thomas Peters, who is the current General Overseer and who was general secretary of the church for more than ten years, similarly gave evidence to the effect that "for as long as anyone can remember, the property has belonged to the church" and that the church has provided ministry to its followers in that area from these premises upon which has stood a church building which everyone agrees is "very old".

[8] It is clear from the evidence as a whole that, as is the case with so many institutions in South Africa, including churches such as the Anglicans, Methodists, Congregationalists, as well as certain banks and insurance houses, the United Apostolic Faith church had its origins in England, eventually acquiring administrative autonomy from the parent body in the United Kingdom of Great Britain and Northern Ireland. From the evidence of Pastors Anstruther and Peters as well as various documents put before me, including the present constitution of the church which contains a narrative of certain key historical events that the United Apostolic Faith Church was originally incorporated in England in 1927 having jurisdiction over the fellowship of the assemblies of its followers in the United Kingdom of Great Britain and Northern Ireland, Canada and Southern Africa. In 1951 the church in Southern Africa gained administrative autonomy from this body incorporated in England. Since then, its constitution has been revised in 1983 and in 1993. The latest version reflects the racial integration of what were previously segregated divisions within the fellowship of the faithful.

[9] The church's current constitution provides that its name shall be the United Apostolic Faith (SA Region) and that it shall be a body corporate with perpetual succession, capable of suing and being sued in its own name, and of acquiring rights and incurring obligations separately and distinctly from its members. The constitution furthermore pertinently

provides that the church shall have the power to own land and buildings, to incur obligations and to acquire assets separately from its members.

[10] With regard to immovable property, the constitution provides that land and buildings of the church shall be vested in a board of trustees, which shall be appointed by the executive council of the church which shall at all times act only as directed by the executive council. The constitution furthermore provides that all immovable property owned by the church shall be registered in the name of the church. The constitution provides that the executive council shall have the power of attorney to acquire by lease or purchase, immovable property. The undisputed evidence is that the executive council of the church has resolved to bring these proceedings on behalf of the church and in its name.

[11] Moreover, it was the undisputed testimony of Pastor Anstruther that the church has always enjoyed the ability to incur obligations separate from its members and operates its own bank account. It is clear that the church is indeed a *universitas* capable of acquiring rights and obligations separate from its members. It is also capable of suing and being sued and suing in its own name.

[12] Counsel for the school, Mr *Botha*, submitted that the church had

failed to establish *locus standi in judicio*. To the extent that ownership of the property was a question separate from *locus standi*, he submitted that the church had failed to prove its ownership of the property. He placed strong reliance on the following provisions of Section 16 of the Deeds Registries Act, 1937:

> Save as otherwise provided in this Act or in any other law, the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the Registrar…

Mr Botha submitted that the plaintiff did not prove its alleged ownership of the property and therefore it is not entitled to an eviction order.

[13] He submitted that the church would have to go back to the highest governing body of the United Apostolic Faith Church in England and seek to get their approval for the eviction order alternatively seek their approval for the transfer from the English church (or its governing body) into the name of the United Apostolic Faith Church in South Africa.

[14] This argument cannot hold water. It is instructive to read what the then Appellate Division of the Supreme Court of South Africa decided in the case of *Group Areas Development Board v Hurley N.O.*[1] although the

[1] 1961 (1) SA 123 (A)

Group Areas Development Act, No. 69 of 1995, of unhappy memory, is a feature of our law which many would rather forget. It held that where immovable property had been registered in 1923 and 1925 respectively in the name of "the Right Reverend Bishop Dellalle, O.M.I., Roman Catholic Bishop in Natal for the time being, or his successors in office", the bishop and his successors held the property in a representative capacity on behalf of the Roman Catholic Church which was the juristic person that was the real owner.[2]

[15] Upon a proper understanding of the facts and the law pertaining to the situation *in casu*, the highest governing body of the church in South Africa at any particular time has always had authority to exercise the rights and duties relating to ownership of the property and which flow from the registration in the name of "the General Governing Council of the United Apostolic Faith Church, its successors in title or assigns" in 1945. The church has been properly cited as the plaintiff. It is the owner of the property in question and has *locus standi in judicio*.

[16] Even if it is accepted that ownership of the property remains vested in the English church or the General Governing Council thereof in a representative capacity, this does not mean that the church in South Africa cannot apply to court for an eviction order. In *Buchholtz v*

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[2] At 128B read with 130E-H

Buchholtz[3] Botha J (as he then was) held that a person in *bona fide* possession of immovable property acquires a right *in rem* which gave rise to the right to apply for an eviction order. Botha JA went so far as to distance himself from the impression that may have been created by a series of cases decided in what was then the Natal province to the effect that either transfer or cession was necessary to give rise to a right to apply for an order for ejectment.[4] The church is clearly the *bona fide* possessor of the property and, as such, entitled to apply for the ejectment of others occupying it.

[17] The *Buchholtz* judgment is binding upon me, unless, of course, I am persuaded that it was clearly wrong.[5] I am not. In any event, if it be assumed that transfer or cession is indeed a necessary requirement for

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[3] 1980 (3) SA 424 (W)

[4] At 424H-425D. The Natal cases were *Nicholas v Wigglesworth* 1937 NPD 376 at 380; *Jadwat and Moola v Seedat* 1956 (4) SA 273 (N) at 276 and *Kanniapen v Govender* 1962 (1) SA 101 (N) at 104.

[5] In *Rex v Faithfull & Gray* 1907 TS the court said: "Of course, in ordinary circumstances the court will abide its decisions; *stare decisis* is a good rule to follow. But where a court is satisfied that its previous decision was wrong, and more particularly where the point was not argued, then I think it is not only competent for the court, but it is its duty in such a case not to abide by its previous decision, but to overrule it." This *dictum* was expressly approved in *Harris & Others v Minister of Interior & Another* 1952 (2) SA 452 (A) at 453. The *Harris* case was deeply concerned with the question of precedent (see p452B-454C). See also *Fellner v Minister of Interior* 1954 (4) SA 523 (A), another case which was much concerned with the question of precedent. Coetzee J (as he then was) seems to have enjoyed giving an overview of the topic, while being astute to not "re-inventing the wheel" in *Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) 149 (T) at183I-187H. In that judgment Coetzee J refers to Professor Ellison Kahn's "fascination" with the subject and the "vast mass of judicial material" which he contributed to the subject in the *South African Law Journal* and elsewhere (see 184G-185D). A single-judge court must follow a decision of a two-judge (or more) court in its own division or in a division having co-ordinate jurisdiction. See *South African Farmers' Representatives v Bonthuys* 1930 CPD 132 at 135; *Ex parte Hamer* 1946 OPD 163 at 169; *Hughes v Savvas and Hira* 1931 TPD 396 at 241 and Hahlo, H.R and Kahn, E. 1960. *The Union of South Africa, the Development of its Laws and Constitution.* Cape Town: Juta & Company at p30.

person to seek the ejectment of persons occupying immovable property, then it is clear, on a balance of probabilities, that the church in South Africa (or its governing body) must, by necessary implication have taken cession from the church in England (or its governing body) of all rights in respect of immovable properties owned in South Africa. Accordingly, the church, in seeking the eviction which it does is acting in conformity with the line of cases, which in the absence of a transfer of ownership to the applicant having taken place, require that there should at least have been a cession of rights.

[18] I shall move on to consider the question of the lease agreement upon which the school relies. Although an earlier document had been signed, the document upon which the school relies for its occupation of the property is one described as a "memorandum of agreement between Boksburg Christian Academy and New Life Christian Fellowship leadership and the UAFC (United Christian Faith Church) leadership". It was signed in January 2005. It provides that "this supersedes the last agreement". It was signed on 17th January, 2005 by Barry Hill as "administrator", Brenda Hill as "principal" and Gary Baxter as "board member". It seems that the impression that was intended to be conveyed was that these persons signed on behalf of the school. Gary Baxter gave evidence for the church. Barry and Brenda Hill were the only witnesses for the school. The document was also signed by Pastor Rolf Dieter

Gericke “on behalf of NLCF and the UAFC Church”. He is recorded as having signed the document on 18th January, 2005. It is common cause that at the time when he signed the document, Rolf Gericke was the pastor of the church at Boksburg North operating from the premises where the dispute has been focused. No one else signed the document, apart from the persons mentioned in this paragraph. Mr Hill was the author of the document. He has approached Pastor Gericke to sign because he was the pastor of the church at Boksburg North at the time. Mr Hill had not sought approval from the executive council of the church. Pastor Gericke regrets having signed the document. He attributes his action to immaturity, naivety and enthusiasm at the time.

[19] The clause in this document upon which the school relies reads as follows: “Should the school be required to move by the Church, then the buildings erected by the school shall be purchased from the school at an agreed reasonable amount, depending on the going rate per m^2.” It was apparent during the evidence of Barry and Brenda Hill that they could not make sense of these words. Neither could anyone else. Despite much questioning from both sides of the respective witnesses, it was clear that there was never any meeting of minds on what had been intended or agreed to between the church and the school in regard to this clause.

[20] Accordingly, I conclude that this clause could not have given rise to

a contract with certain or ascertainable terms and on this ground alone the clause is void for vagueness.[6] I am mindful of the fact that, although the focus in this case has been this particular clause, that focus should not obscure the fact that the case has been concerned with the enforceability of the agreement as a whole.[7] I also have not lost sight of the following extract from the author SJ Cornelius to which counsel for the school referred me:

> While keeping in mind the presumption in favour of validity, a term to which no sensible meaning can be ascribed, is considered to be void for vagueness. This can only occur if all the rules and presumptions of interpretation have been exhausted, without success, in an attempt to ascribe some sensible meaning to that term.[8]

[21] This, in my view, makes it unnecessary to consider the estoppel point raised by the school. The church has taken the point that Pastor Gericke had no authority to sign any agreement of lease in respect of the premises. The church has claimed, correctly, that only its executive council could approve or agree to any lease of the premises to anyone else. Pastor Gericke has never even been a member of the church's

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[6] See, for example, *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 563D and 567C.

[7] See *Namibian Minerals* case (*supra*) at 563D.

[8] *Principles of Interpretation of Contracts in South Africa* (2002), p 184.

executive council. Whether or not Pastor Gericke as Pastor had ostensible authority to sign on behalf of the church becomes irrelevant in the light of the finding as to vagueness. Besides, it is clear that no one – not even Pastor Gericke himself - represented to the Hills that Pastor Gericke had authority to sign a lease agreement of the premises with them. In any event, it is not probable, in the light of the evidence as a whole, that Mr and Mrs Hill could have believed that Pastor Gericke had authority to bind the whole church by way of a lease agreement in respect of the premises. Significantly, Mr Hill agreed that he had sight of and had perused the title deed in question before he prepared the document for signature. In that document he would have seen that it was the "governing council" (or its equivalent) of the church and not "the pastor for the time being" who had authority over the property in matters pertaining to its ownership.

[22] One hardly needs to be well acquainted with the Christian religion to know that, ordinarily, when it comes to matters temporal, pastors and priests (the clergy) have to operate within a definite hierarchy of authority: in matters pertaining to the administration and control of church property, both movable and immovable, the clergy cannot act autonomously. In my view, the case of *Glofinco v Absa Bank Ltd t/a United Bank*[9] makes it clear that, even if the agreement were not void for

[9] 2002 (6) SA 470 (SCA) at paragraph [15]

vagueness, the Hills would not have been entitled to assume that Gericke had authority to enter into it. Ordinarily, it is no more believable that a local pastor has authority to enter into a lease agreement in respect of the premises at the church where he ministers than judge has authority to enter into lease agreements pertaining to High Court buildings. Besides, the evidence of Pastor Gericke is that the Hills were given a copy of the constitution of the church when they were ordained. The Hills denied having received a copy of the church's constitution contemporaneously with their ordination. According to Pastor Anstruther who ordained them, the presentation of a copy of the constitution has always been the standard procedure for newly ordained elders.

[23] Counsel for the school considers that it is a matter of particular importance that Hammond Pole, a firm of attorneys acting for the church at the time, addressed a letter to the school's attorney on 25 April 2007 in which (so counsel submitted) "their client clearly relied on the terms of the agreement of the lease". This is not correct. On 13 March 2007, Pastor Gericke wrote a letter to the school advising it that the local church (i.e the church in Boksburg North) had unanimously decided at two meetings held on 18 February and 11 March 2007, "after much consideration, prayer and fasting" to call upon the school to vacate the premises by the end of June, 2007.

[24] This was met by a letter dated 26 March 2007 from Leon van Rensburg, the attorneys acting for the school, in which they advised that the school was "not prepared to vacate the school at all". In this letter the attorneys relied on the document in contention. The letter from Hammond Pole dated 25 April was in response to this letter from Leon Van Rensburg. Clearly the response of Hammond Pole was to say, in effect, "even in terms of the document which your client relies, the school may be required to move by the church and our client is relying on this clause". The immediately preceding underlined words are the *ipsissima verba* used by Hammond Pole in their letter.

[25] As Lord Steyn said in *R v Secretary for the Home Department, ex parte Daly,*[10] "In law, context is everything". This was approved by the Supreme Court of Appeal in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd.*[11] I see no merit in the submission that the church is stopped from protesting the invalidity of the document in question.

[26] I turn now to consider the question of enrichment. To do so, it is necessary to delve into the facts in some detail. Mr and Mrs Hill started the school in January 2005. They had five pupils. They rented premises elsewhere in Boksburg initially. Later in the year Mr Baxter's wife and Mrs Hill met each other after an interval of many years at a school

[10] [2001] 3 All ER 433 (HL) at 447 a

[11] 2003 (1) SA 155 (SCA) at para [1]

reunion celebration in Newcastle. The conversation turned to religion. Mrs Baxter described how she was very happy at the church. Mrs Hill became interested and began attending services there with her husband. On the property in question there was, in addition to the church building, a house which had been used as a manse which had been built in 1910. It had fallen into disrepair. The Hills mooted the idea that the house be converted into classrooms for the school. The church was delighted, considering this to be part of their ministry and contributed funds towards the cost of renovation and conversion. Mrs Baxter who, like Mrs Hill, is also a school teacher joined the school as one of its teachers. Mr and Mrs Baxter sent their children to the school although they no longer do so. The school began to draw pupils from the among the children of parents belonging to the church. The school was registered to teach pupils from grades 1 to 7. The Hills paid no rentals for the use of this building initially.

[27] Matters progressed well. A highly successful seminar was held in the Drakensberg in 2002 at which the Hills and various members of the church including Pastors Anstruther and Gericke, together with their wives, were present. It was decided to try to expand the mission of providing the ACE system of education in Boksburg. During 2003 and 2004 two face-brick buildings, totaling 280 square meters in size were erected on the premises as classrooms. In addition, money was spent on

some external paving, the erection of eight carports and an additional room which was added on to the old house. Although, around this time of expansion, there was an agreement that the school would pay R800- per month to the church as rental, the church subsidized this with a subvention of at least R1000- per month. It is also clear that the school paid for much of the materials that were used to erect the additional classrooms.

[28] During 2005 relations between the church and the school began to sour. The detail is unimportant. Parents who were members of the church began to withdraw their children from the school. Whereas in the early 2000s most of the pupils were the children of church members this now applies to a handful of cases only. The school now has 113 pupils and 14 teachers as well one or two supporting staff (i.e. staff who do not teach). The church in the meantime has grown considerably from around 200 members at the beginning of the millennium to around 500 now, necessitating the holding of two full morning services on Sundays. The church has approved plans for a new church building and for this reason, in particular wants the school to vacate the premises. All old structures will be demolished to make way for the new church buildings, plans for which were submitted in evidence during the trial. It has irked the church that it has had to meet the costs of this litigation out of its building fund for the new church building.

[29] Apart from making some unconvincing generalized statements, the Hills led no evidence to show what they had spent on the structures that have acceded to the property in question. Despite several invitations and opportunities to do so, they failed to rise to the challenge. They also failed to lead any evidence as to the extent to which the value of the property had been increased by these improvements.

[30] It is well settled law that a *bona fide* possessor who has effected improvements on the property of another would be entitled to compensation for such improvements. The claim is founded on enrichment for payment of the necessary and useful expenses which the *bona fide possessor* has expended on the owner's property.[12] The *bona fide possessor's* claim is restricted to necessary or useful improvements it had effected to the owner's land. That means that the *bona fide possessor* can only claim the actual expenses incurred in relation to the improvements or the value by which the land was improved as a result of such improvements, whichever is the lesser.[13] It is now trite law that the

[12] See *Lechoana vs Cloete and Others* 1925 AD 536 at 546.

[13] See *Lechoana v Cloete and Others* (*supra*) at 555; *Nortje and Another v Pool N.O.* 1966 (3) SA 96 (A) 106 at 124A-C and 130E-F; *Eduan Hoogtes (Pty) Ltd v Charin Electronics (Pty) Ltd* 1973 (2) SA 795 (T) at 796F-G.

maximum a party can recover under an enrichment action is the lesser of the impoverishment of that party or enrichment of the other. [14]

[31] It is also well settled law that a *bona fide* occupier will have a right of retention of the property until the occupier has been compensated for the useful or necessary improvements that had been made to the property. The right is however qualified to the extent that the improvements must, on the facts, be useful or necessary and properly quantified. The onus is on the *retentor* to establish these facts. [15] A right of retention will only however exist where the *retentor* in fact has a claim founded in enrichment against the owner. Without any unjustified enrichment, neither a claim nor a right of retention can prevail.[16]

[32] The school has not discharged the onus satisfy any of the essential elements of a claim founded in enrichment. There has been no attempt

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[14] See *Kudu Granite Operations (Pty) Ltd v Caterna Limited* 2003 (5) S A 193 (SCA) at 202G-H (paragraph [17]); *Mndi vs Malgas* 2006 (2) SA 182 (E) at 188C-D (paragraph [22]).

[15] See *Business Aviation Corporation v Rand Airport Holdings* 2006 (6) SA 605 (SCA) where it was held that the right of retention would endure until the occupier had been compensated; *Palabora Mining Company Ltd v Coetzer* 1993 (3) SA 306 (T) at 309C-D regarding the general principles; *Heckroodt N.O. v Gamiet* 1959 (4) SA 244 (T) at 246D-247A; *Wynland Construction (Pty) Ltd v Ashley–Smith en Andere* 1985 (3) SA 798 (A) at 812F-G regarding the incidence of the onus.

[16] See *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander* 1996 (4) SA 19 (A) at 29I-J; *Sandton Square Finance (Pty) Ltd v Vigliotti* 1997 (1) SA 826 (W) at 831A-B.

to show that the improvements were either necessary or useful, especially in light of the evidence by the church's witnesses that the intention is to demolish all the structures and to build an entirely new church sanctuary.

[33] The Hills engaged the services of Mr Hill's brother, an architect, and quantity surveyors to estimate the replacement value of these improvements at the time when they undertook their respective exercises. Neither the architect nor the quantity surveyors were called to testify. Besides, the documents which they have prepared do not assist in determining either of these two critical issues: (i) by how much has the value of the property increased as a result thereof and (ii) how much did the school actually spend on these improvements?

[34] Accordingly, the school has no right to remain in occupation of the premises as *retentor* and its claim for compensation must fail.

[35] The question of eviction is a sensitive issue in prevailing South African law. Counsel for the parties were in agreement that the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No.18 of 1998 (commonly known as "PIE") do not apply by reason of the fact that PIE applies to the eviction of persons from their homes. I agree with counsel for the church that it is apparent

from various provisions of the Act itself that the intention was clearly to limit its application to firstly natural persons and secondly to properties that form the homes of such persons. This intention can be gleaned, *inter alia*, from the following provisions:

(i) The second part of the preamble which states that "no one may be evicted from their home, or have their home demolished without an order of court". An artificial person cannot occupy a home; and

(ii) Section 1(i) defines "buildings or structure" to "include any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter". In *Ndlovu v Ngcobo, Bekker v Jika*[17] the Supreme Court of Appeal ("the SCA") expressed the view that having regard to the history of the enactment which has its roots in Section 26(3) of the Constitution (which is concerned with rights to one's home) as well as the preamble to PIE (which emphasizes the rights to one's home and the interests of vulnerable persons), the description of buildings listed and the fact that one is ultimately concerned with "any other form of temporary or permanent dwelling or shelter", the ineluctable conclusion was that, subject to the *eiusdem generis* rule, the term was used exhaustively. The SCA was therefore of the opinion that it followed that buildings or structures that do not perform the function of a dwelling or shelter for humans, do not fall under PIE and since

[17] 2003 (1) SA 133 (SCA)

juristic persons do not have dwellings, their unlawful possession is similarly not protected by PIE.

[36] From the unchallenged evidence of Mr Baxter, in particular, it seems that the residents of Boksburg are spoilt for choice of Christian schools including those applying the ACE system of education in the near vicinity. It is clear from the evidence that the school is situated in a relatively middle class area and that most of the inhabitants are in the middle income bracket. It is also apparent that none of the learners apparently hail from indigent households. Out of a total of 113 learners, only two receive partial financial assistance from the School. The fact that the learners are expected to pay school fees as well as their own text books, indicates that the tuition of these learners does not come free or cheaply to their parents. Apart from the private schools (including specifically Christian schools and schools providing the ACE system, it emerged from the evidence of several of the witnesses that there are also a number of state schools in the neighbourhood.

[37] In the recent and as yet unreported judgment of the Constitutional Court in the case of *Governing Body of Juma Musjid Primary School and Others v Ahmed Asruff Essay N.O.and Others*[18] the question of eviction in relation to a school arose. The Constitutional Court was alive to the

[18] (Case CCT 29/10 [2011] ZA CC 13)

question whether the common law remedy of *rei vindicatio* ought to be developed in circumstances where learners' right to a basic education was likely not to be given effect to as a result of an eviction. It would appear that the Constitutional Court strove to strike a balance between the right to a basic education on the one hand and property rights on the other.[19] Within the context of the facts of that particular case, the court found that the common law remedy of *rei vindicatio* had to be developed, and, in appropriate circumstances curtailed where the exercise of that remedy may negatively impair learners' rights to a basic education. The Constitutional Court found, however, that there is no primary positive obligation on the private land owner to provide basic education to learners being taught on private land owned by such owner. That primary positive obligation rests on the national and provincial governments. [20]

[38] The Constitutional Court decided that the land owner had a negative duty not to impair the learners' right to a basic education.[21] The content of this negative duty was that once the owner had allowed the school to be conducted on its property, the owner should minimize the potential impairment of the learners' right to a basic education.[22] The court found

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[19] See paragraph [7] of the judgment.

[20] See paragraph [57] of the judgment.

[21] See paragraphs [59] and [60] of the judgment.

[22] See paragraph [62] of the judgment.

that the land owner had acted reasonably in seeking the eviction of the public school from its premises in that particular case. The Constitutional Court took into account the fact that the application for eviction was lodged in July 2008 and that the land owner did not seek to evict the school with immediate effect. The Court also took into account the lengthy and protracted negotiations that were conducted with the MEC in order to conclude a formal lease agreement between the land owner and the provincial educational department, which negotiations all came to naught. The Constitutional Court found that it could not have been expected of the land owner to continue with the negotiations indefinitely.[23] Having considered the matter carefully the countervailing rights, the court concluded that the eviction of the school was just and equitable in the circumstances.[24]

[39] Against the background of the facts in this particular case and the Constitutional Court's judgment in the *Juma Musjid* case, I am satisfied that it will be appropriate to order the eviction of the school with effect from 31 July 2011. This will enable pupils to complete their second term this academic year with the minimum of disruption and to start school elsewhere in time for the beginning of the third term for most schools in the area. Sight should also not be lost of the fact that, in terms of section

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[23] See paragraph [64] of the judgment.

[24] See paragraph [72] and [73] of the judgment.

15 of our national Constitution, we have freedom of religion in South Africa. The church also has rights.

[40] In the answering affidavit deposed to by Mr Hill and in the plea it is expressly denied that the defendant has legal personality, with capacity to sue and be sued. Three different versions of the constitution of the school, all drafted by Mr Hill between September 1999 and September 2009, were presented in evidence before me. None of them has anything remotely resembling the standard clause establishing legal personality. In the 1999 version Mr Hill is designated the "owner". In the 2006 and 2009 version it is Mrs Hill who is so described. It is difficult to make sense of what was intended by the constitution but it is difficult to avoid the clear impression that an attempt was being made to disguise the fact that the school was in fact Mr and Mrs Hill and that there interests would prevail, come what may. It is also clear from Mr and Mrs Hill that 'the school" is, for all practical purposes, the two of them acting in concert together. As there is no juristic personality known as the Boksburg Christian Academy no order can be made against it or, if it can, it will be entirely toothless. Perhaps this is what Mr and Mrs Hill intended all along. Nevertheless, the law does not readily countenance facile evasions of justice.

[41] I agree with Mr *Verster* who appeared for the plaintiff that Rule 14(2) of the High CourtRules which provides that a partnership, a firm or an association may sue or be sued in its name, is a procedural aid to assist a plaintiff to cite certain parties that do not have any existence separate from their members or owners and that it does not operate to constitute an unincorporated association a *persona* in law, or to vest it with *locus standi* when none exists.[25]

[42] I also agree with counsel for the church's submission that an unincorporated entity has no existence on its own, cannot own property and has no *locus standi* to sue or be sued in its own name. I furthermore concur with his submission that Rule 14 does not apply to a true *universitas* or juristic person having legal personality with perpetual succession and the capacity to acquire rights and to incur obligations and own property apart from its members.[26]

[43] Ordinarily, the primary source for determining the question of personality of an association will be its constitution. It provides evidence of the intention of the members who contracted to form the association. What the intention of the founding members was, is a factual question

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[25] See *Parker v Rand Motor Transport Co. and Another* 1930 AD 353 at 358; *Ex-TRTC United Workers Front v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB) at paragraph [16].

[26] See *Ex-TRTC United Workers Front v Premier Eastern Cape* (*supra*) at paragraph [15].

and, where the constitution is equivocal, or where there is no written constitution, it may be determined by reference to other considerations, such as the nature of the association, its objects and its activities.[27] I accept the submission of counsel for the school, who relied on the authors Cilliers Loots & Nel to submit that it is not always necessary that an association's constitution should state that it has the characteristics of a *universitas* and that this may be a matter of inference.[28]

[44] Notwithstanding these late protestations on behalf of the school that it would be a mistake to infer that the school is not a *universitas personarum* with full legal capacity to litigate in its own name and to

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[27] See *Bantu Callies Football Club (also known as Pretoria Callies Football Club) v Motlhamme and Others* 1978 (4) SA 486 (T) at 489; *Ahmadiyya Anjuman Ishati–Islam Lahore (SA) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855 (C); *Interim Ward S 19 Council v Premier, Western Cape Province and Others* 1998 (3) SA 1056 (C) at 1059 H to 1061 A-B.

[28] *The Civil Practice of the High Courts in South Africa*. Volume 1. (2009) p 174 to 177, especially at 175 where the following is said: "it is not necessary that the constitution should state that the association is a *universitas*, or that it contains an express provision enabling it to sue or be sued. The existence of the characteristics of a *universitas* can be a matter of inference. If the constitution of an association makes it clear that the association has the characteristics of a *universitas*, then that is decisive of the issue. It has been held that if the constitution is not clear, then the Court can have regard to the activities of the association to determine whether it is a *universitas*."

acquire rights and obligations separately from its members, the answering affidavit filed on behalf of the school as well as the plea expressly deny any such juristic personality.

[45] It would seem that in the absence of the procedural aid of Uniform Rule 14(2), the Plaintiff would have been constrained to cite and join each individual forming part of the association. The rule thus simplifies the method of citation by enabling such a body of persons to be sued in the name which it normally bears and which is descriptive of it. It ensures that a plaintiff's claim is not defeated by technical defenses in regard to the citing of a party.[29] Rule 14(2) is, however, a procedural aid only. It cannot vest legal personality where it does not exist.

[46] From the evidence, including the affidavits in the original motion proceedings as well as the motion proceedings, it is clearly apparent that Mr and Mrs Hill are the directive minds behind the school. Both Mr and Mrs Hill at all times attended the trial proceedings and gave testimony on behalf of the school. They are undoubtedly acutely aware of the relevant issues and actively participated in the current proceedings. From the evidence of Mrs Hill it emerged that when the first request was communicated that the school should vacate the property, a meeting of parents and members was called and they were informed of that

[29] *De Meillon v Montclair Society of the Methodist Church of Southern Africa* 1979 (3) SA 1356 (D) at 1369D-E; *Ex-TRTC United Workers Front* case (*supra*) at paragraph [14]; *Cupido vs Kings Lodge Hotel* 1999 (4) SA 257 (E) at 263B-C and 264B.

intention. It seems that none of any subsequent communications regarding the eviction of the school were sent to the parents or to anyone else for that matter. It further transpired from her evidence that no one other than herself and her husband knew, authorized or ratified the institution of the counterclaim by the school.

[47] In its declaration, the church has sought the eviction of the school and all and any persons claiming occupation through or under it. I agree with Mr *Verster* that this relief would include each and every member or office-bearer of the school whose name is known or who otherwise becomes known. Even if I am wrong in this regard, I also agree with Mr *Verster* that as the identities, role and offices of Mr and Mrs Hill in relation to the school are known and since they have actively participated in the proceedings, there can be no prejudice if the relief claimed in prayers 1 and 2 of the plaintiff's declaration is amplified and amended, even at this late stage by specifically including them (Mr and Mrs Hill) by name in addition to the school and/or any other person who may claim occupation of the property through or under them in the relief claimed.

[48] If the question of the eviction order pertaining to Mr and Mrs Hill is straightforward in as much as they could never have been under any *bona fide* illusion that if the church succeeded in this action they would have to vacate the premises, the issue of costs is not. During the course

of argument Mr *Verster* accepted that the question of costs is not that straightforward. Mr and Mrs Hill may have been under the impression that as the relief was being sought against the "Boksburg Christian Academy" they could not be ordered to pay the costs of suit.

[49] The plaintiff has given an undertaking that it will serve a notice upon Mr and Mrs Hill indicating that it will seek an order that they pay the costs of these proceedings. This notice is one contemplated in Rule 14(5)(d), read with Rule 14(10)(a) and Form 8 of the First Schedule to the Rules. Accordingly no order as to costs may be made at this stage. Once there has been compliance with the Rules Of Court in this regard, the matter may be set down for hearing on the question of whether a costs order should be granted against Mr and Mrs Hill.

[50] Judgment is given in favour of the plaintiff. The order of the court is as follows:

(i) Barry Peter Hill, Brenda Jenifer Hill and any person claiming occupation through or under them, are to vacate the immovable property described as Erf 1029 Boksburg North and situated at 24 Paul Kruger Street, Boksburg North ("the property") by no later than 31 July 2011 and to restore vacant possession thereof to the plaintiff;

(ii) In the event that the said Barry Peter Hill, Brenda Jenifer Hill or any person claiming occupation through or under them, refuses to vacate the property immediately or to restore vacant possession thereof to the Plaintiff, that the Sheriff of the High Court is authorized and directed to forthwith evict any such persons from the property and to hand possession of that property to the plaintiff.

(iii) The order provided for in paragraph (ii) immediately above may not be effected before 1 August 2011;

(iv) The determination of the appropriate order as to costs in these proceedings is postponed *sine die*.

DATED AT JOHANNESBURG THIS 2ND DAY OF JUNE, 2011

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N.P. WILLIS
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: M. W. Verster (Attorney)

Attorneys for the Plaintiff: BMV Attorneys

Counsel for the Defendant: Adv. *J.J. Botha*

Attorneys for the Defendant: Leon J. J. Van Rensburg

Dates of hearing: 18-21st ; 28th & 29th April, 2011
Date of judgment: 2nd June, 2011