IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

REPORTABLE: ***NO***
OF INTEREST TO OTHER JUDGES: ***NO***
REVISED:
DATE: *8 SEPTEMBER 2021*

CASE NO: 18/44242

In the matter between:

FAUSTO GIUSEPPE DI TRAPANI	Applicant
And	
HAOTIAN WU	1ST Respondent
ILLEGAL OCCUPANTS OF PORTION 2 OF ERF [....] BEDFORDVIEW EXTENSION [....] TOWNSHIP REGISTRATION DIVISION I.R , THE PROVINCE OF GAUTENG (also known as [....] D[....] Place, Concord Road, Bedfordview)	2ND Respondent
CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	3RD Respondent

Coram: **Majavu AJ**
Heard: 11 June 2021
Delivered: 8 September 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 8 September 2021

Summary: Pursuant to a lease agreement (in respect of residential premises) cancelled by lessor due to non-payment of rental by lessee, lessor seeks to evict defaulting lessee and the latter resists such by asserting a *lien* in respect of expenditure for improvements. Have the prescripts in terms of the PIE Act been satisfied? Were such improvements useful and/or necessary? Found such improvements effected without lessor's consent and in any event, luxurious. Has a lien been established? Further found that no proper *lien* has been established, applicant made a case for relief sought. Respondents to be evicted and ordered to pay costs.

ORDER

(a) the first and second respondents should vacate from the above mentioned premises, portion erf [....], Bedfordview Extension [....], better known as [....] D[....] Place, concord Road, Bedford View, voluntarily by no later than 8 December 2021, failing which the Sheriff of the court be and is hereby authorised to take all necessary steps to give effect to this order, including but not limited to, and enlisting the services of the South African police service to ensure the execution of this order.
(b) the first and second respondents are ordered to pay the costs of this application, on a party and party scale, including the costs consequent upon the employment of counsel, the one paying the other to be absolved.

Majavu AJ

Introduction
[1] The applicant, being the lawful registered owner of portion 2 of erf [....], Bedfordview Extension [....] Township, otherwise known as [....] D[....] Place, Concord Road, Bedfordview ("the premises"), seeks an eviction order against the first and second respondents.

[2] The premises being used by the respondent as the primary residence triggered an application in terms of section 4(2) of the Prevention of Illegal Eviction

From and Unlawful Occupation of Land Act[1], which Sutherland J authorised on 28 February 2018.

[3] The first and second respondent's resist this application and raise a *lien* as a defence, which according to them, entitles them to remain in possession of the premises until they have been fully compensated for the improvements, which they allege to have affected that in the same premises. The third respondent did not participate in these proceedings, and by implication, abide the order which I will make. For ease of reference, I will refer to the first and second respondents as "the respondents", mindful that the second respondents have not been specifically named.

Issues for determination

[4] It appears to me that the issues have crystalized as follows:

(i) whether the respondents are indeed illegal occupiers;

(ii) whether there has been compliance with the statutory prerequisites for an eviction in respect of premises used as a primary residence;

(iii) whether or not the respondents have indeed established a *lien* which entitles them to remain in occupation until the collateral issue of compensation for improvements has been resolved.

[5] There appears to be no doubt that statutory prescripts, have indeed been successfully complied with by the applicant. It is common cause that the applicant's ownership is firmly established and in the result, not placed in dispute.

[6] It is also common cause that the respondents are indeed *occupiers* of the said premises. It is the unlawfulness or otherwise of their occupation which falls for determination. Needless to say, the respondents take the view that they are *lawful*

[1] Act 19 of 1998

occupiers, pursuant to a lease agreement[2] concluded between them and the applicant, *albeit*, its initial tenure has expired, however, their continued occupation was to a large extent, permitted by the applicant until the lease was cancelled when the respondents failed to remedy the breach. The issue that muddied the waters, in the manner of speak, *is*, the subsequent dispute regarding compensation for the improvements effected by the respondents, or whether or not such could be off set from the purchase price which the applicant would accept. In any event, the sale of the property is not central as the applicant denies that it even had any such discussions with the respondents. Similarly, the respondents do not persist with the intended sale as alleged. Thus, compensation (in the face of an eviction) is the only issue, hence the mounting of a *lien by the* respondents. I shall return to this aspect later.

[7] An answer to the second requirement would be determinative of this application. It is for that reason that I will focus largely in the examination of that aspect.

The lease agreement

[8] The lease agreement would commence on 1 March 2010 for a period of sixty (60) calendar months and terminate on 28 February 2015. The respondent should pay a monthly rental in the amount of R 20,000 for the term of the lease period, which excludes water and electricity consumption ("consumables"). Such a rental to be payable on the first day of every month. There was also provision for an annual escalation at the rate of 20%, as well as a securing deposit of R20,000 to be payable upon acceptance of the terms thereof. On termination, the applicant may at his discretion applied the deposit and interest thereon, towards the payment of all amounts for which the first respondent is liable under the lease agreement, including but not limited to a rental, consumables and/or the costs of repairing the damage is to the premises and/or replacing lost keys. Most importantly, for present purposes, the applicant warranted that the property is duly furnished and that the first respondent would be responsible for the good working order of all the appliances at the property, having been so inspected, prior to occupation and confirmed to be fit

[2] lease agreement concluded on 3 February 2010, read with the addendum thereto, which provided that the lease would expire on 28 February 2020.

for purpose, by both parties. This would be supported by the necessary inventory confirming same. Lastly, the first respondent would be liable for damages of the interior and exterior of the premises including, *inter alia* all doors, windows, carpets tiles *et cetera*.

[9] Later, on or about 3 February 2010 the parties concluded an *addendum* to the original lease agreement, whose material times can be briefly summarised as follows; the lease agreement would commence on 1 March 2010 and would expire on 28 February 2012, effectively reducing the original term by three years. It further provided that the first respondent would "open" a consumables account directly with the relevant authority, the municipality and provide the applicant with proof thereof. Allied to that, the first respondent undertook to pay for such consumables as they fell due, failing which, that would be regarded as a breach of the terms of the *addendum*, which, if un remedied as prescribed, could lead to a cancellation of the lease agreement. The *addendum* further contemplates a renewal period of a further two years, at the sole discretion of the applicant.

[10] Notably, neither the original lease agreement nor the *addendum*, made any provision for effecting/ or authorizing any improvements by the respondents, instead, *clause 12 unequivocally prohibits such*. I will return to that aspect later.

[11] Over the years, the respondents made erratic payments, resulting in the amount of R 114 000,00 being in arrears in respect of rental. This prompted in the applicant calling on the respondents to rectify the breach. This was done on 11 July 2018. The respondents have failed to heed the notice and the arrear rental amount remains unpaid. In the result, the applicant proceeded to cancel the lease agreement, as he was entitled to do, however, the respondents refused to vacate, hence this application, to have them evicted. The applicant asserts that the respondents are illegal occupiers of his premises.

Why are the respondents resisting this application?

Lien

[12] Simply put, a *lien* is a right of retention. It can also be mounted as a defence by the *lien* holder against vindicatory action by the owner, until the latter has fully compensated the former for effected necessary and useful improvements. This seems to be what the respondents in this case places reliance on. It also emanates from an agreement between the lien holder and the other party (the debtor), in this case, the applicant. This, in my view, provides a useful starting point to contextualise the issues and ultimately an issue for determination in this matter.

[13] Much of the background facts are commons cause and will thus not be repeated. The respondents aver that the original idea was what is colloquially referred to as a *"rent to buy"* type of arrangement. This, they say, was evidenced by the deletion of clauses 24, 27, 28 and 30 of the original agreement be deleted. To the contrary, this is not borne out by the facts; instead, this bolsters the contention of the applicant, to the extent that he strongly denies having entertained any discussion with the respondents for the sale of the premises.

[14] With this understanding, the first respondent avers further that he and his family took occupation and assert quite firmly, that he then commenced with the renovations of the premises *with the permission of the applicant*[3].

[15] According to the respondents, the expended an amount of R1.5 million in "renovating and peppering the premises" with the express permission of the applicant and the underlying intention being that at some point, they would purchase the property. This is denied by the applicant.

[16] The renovations included enclosing the balcony for an amount of R320 000,00 paving and waterproofing for an amount of R200,000, a further amount of R 143,520,00 rent was spent on kitchen appliances.

[17] Over and above these improvements, the respondents spent a further amount of R 4 218,88 for granite tops. Later, a further amount of R 246 500 was spent on

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[3] In paragraph 8 of the answering affidavit *" 8. Subsequent to the conclusion of the agreement of lease, my family and I took occupation of the premises with the intention to purchase the property and with permission of the applicant during the subsistence of the agreement of lease, I commenced to renovate and better the property" (accentuation) read with paragraph 9.*

other kitchen appliances, as well as a water purifier, exclusive booster, silver taps and installation thereof, in the amount of R 5 164. All of these improvements were supported by invoices and other vouchers. Nothing turns on this as the amounts *per se*, as the applicant bears no knowledge and thus unable to admit and deny. Instead, the applicant's contention is that *firstly,* he never authorised those improvements and *secondly*, given the nature of the description and aesthetics, those could hardly be said to have been necessary for the purposes for which the premises were rented. They are quite luxurious. In fact, the applicant avers that upon taking occupation, the premises, including all the appliances, were habitable and fit for purpose. The fact that the respondents wanted to add a different *look and feel* aesthetically, cannot and does not give rise to a *lien*, as contended by the respondents.

[18] The respondents also suggested that due to the fact that they are of Chinese origin, their command and understanding of the English language is poor and thus could have led to a misunderstanding of the terms of both agreements. They said that, at all material times, they believed that they were allowed to effect the improvements which they did, as it was their intention to purchase the property at some point in the future. Quite frankly I fail to see how and on what basis it could be found to be reasonably true, that they concluded such an agreement without understanding its full import. It is also clear that the improvements effected were quite elaborate and luxurious.

[19] The respondents also confirm that they have paid the arrear amount in full into their attorneys trust account and will continue to do so on a month-to-month basis until the finalisation of this matter. Conceivably, the original arrear amount has increased significantly and the applicant continues to be without the corresponding rental amount, while the respondents remain in occupation and instead pay the rental amount over to their attorneys, for safekeeping in the trust account.

[20] The respondents make it plain that they are withholding the payment of the rental amount as security for the recovery of the improvements (amount) which they have effected, with the applicant's permission, on their version. They further allege that they were deceived by the applicant, who lured them to believe they would be spending money on a property <u>they would own</u>, hence they expended so much

money on improvements. It seems plain that, should the sale not proceed (as is most likely), the respondents would be uncontestably out of pocket. This seems to be the *gravamen* of the matter. (emphasis added)

[21] It is further common cause that the parties are not *ad idem* with regard to the purchase price, which has resulted in the sale not being concluded. Other than to state that the parties seem to be in disagreement with regard to whether the value of the improvements should be offset from the purchase price, I do not regard their differences to be most relevant for purposes of the issue for determination before me. Whatever the parties' respective views on the appropriate purchase price, as well as the resultant sale agreement may be, I will confine myself to the application before me and the relief sought and weighing it against a defence (*lien)* mounted by the respondents.

Evaluation

Applicant's version

[22] The applicant denies ever having any discussion with the respondents about selling the property as he acquired it for investment purposes. The estate agents (Jawitz Properties, through Mr Greg Simpson and not the applicant's mother as averred) indeed secured a *tenant not a purchaser*, this was 19 January 2010. This resulted in the reference to potential sale of the property being deleted in the subsequent *addendum* on 2 February 2010. This is makes commercial sense and indeed in line with the applicant's contention. It would make no commercial sense for any owner to allow a tenant to effect such material improvements on a property leased of such a short period, 24 months, reduced from the original 60 months. It is more probable that the applicant did not consent to such improvements

[23] In fact, clause 12 of the lease agreement (the original agreement) and the *addendum*, expressly prohibits any unauthorized alterations and improvements[4].

[4] "12 ALTERATIONS AND IMPROVEMENTS

the LESSEE shall not alter or interfere with the electrical or other installations on the premises, nor carry out any alterations, additions or improvements to the premises. Should the LESSEE make any alterations or improvements on the premises, structural or otherwise, with or without the consent of the LESSOR, he shall in any event receive no compensation therefore and shall either at his own expense remove same

[24] It is also common cause that the applicant resides in Canada and thus could not practically be expected to notice such improvements as and when they were effected. At best, the applicant's agents failed him.

[25] It also appears to be counter intuitive that if indeed the applicant intended to sell the premises to the respondents, why would he not accept an offer in the amount it is alleged to have demanded, namely R3.6 million and persist with an arrangement to receive a paltry amount of R20 000 per month? It would appear to make business sense, especially for the owner who resides beyond the borders of South Africa to accept his asking price and pocket a lump sum. This observation lends credence to the version of the applicant, which I readily accept and dismiss that of the respondents.

Respondent's version

[26] The respondents aver that they concluded a lease agreement, with the intention to buy the leased premises. They laboured under the impression that they could affect improvement, which they did, as they would ultimately own the property. The existence of the lease agreement is not in dispute. The very lease agreement makes no provision to authorize the respondents to effect any improvements. To the contrary, clause 12 prohibits that in no uncertain terms and it goes further to state that such a lessee, in the position of the respondents, would be precluded from receiving compensation for such.

[27] They also allege that they were misled by the applicant's mother into believing that they could purchase the property and by implication, could effect such improvements and/ alterations to the appliances, contrary to what was ordained in the lease agreement. In order to explain their way out of this express provision, belated reliance is placed on the lack of proficiency in English, being Chinese nationals. The confirmatory affidavit by the applicant's mother has not been gainsaid. I accordingly find this contention is simply unmeritorious and falls to be dismissed. When one has regards to the offers to purchase, which they rely upon, as well as

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immediately upon request by the LESSOR, making good all damage, or leave them should the LESSOR so require, becoming the property of the LESSOR…."

set-off, which they seek to invoke in order to re-negotiate the purchase price, the only inescapable conclusion is that they are skilful business people (at least the first respondent) and language proficiency not a bar at all.

[28] The fact that the respondents are paying monthly rental to their lawyer's trust account is an acknowledgement that they cannot occupy the premises without the concomitant payment of rental. However, the basis of such occupation fell away when the lease agreement was cancelled. Mindful of that, the respondents seem to suggest that until they are fully compensated for the value of the improvements, or what they have expended, they are entitled to remain in occupation in perpetuity. I do not agree.

[29] In this case, a protectable *lien* has not been established. Any hope of such has been fully dealt with by clause 12 of the self-same agreement. Put differently, in this case, the defence of a *lien* has not been established. The respondents are clutching on straws. First they tried the *"rent to buy"* approach, later, *"English proficiency deficit"*, then *"being misled by the applicant's mother"*, *"hoping to stay at the premises while paying rent to their lawyers, until this matter is resolved",* etc.

Conclusion

[30] In the above reasons, I find that the respondents are indeed unlawful occupiers.

[31] I further find that the statutory prescripts in terms of s4(2) of the PIE Act have been complied with.

[32] Assuming that the respondents rely on debtor/creditor lien, such would have to be rooted in contract, either expressly or impliedly. In this case, the contract excludes such performance, which gave rise to the resultant expenditure by the *lien holder*. In any event, even if I am wrong, the respondents not even allege the existence of such contract. They make a bold assertion that the expenses incurred increased the value of the property. In such a case, they a court would still have a discretion to limit compensation to the amount by which the value of the property has

been increased or the amount of expense incurred by the respondents, whichever, is the lesser[5].

[33] Further assuming that the respondents' actual expenses are true, which is still not readily admitted by the applicant, there appears to be no credible evidence that the value of the property was increased. A bold suggestion seems to be that, if the respondents expended in excess of R1 million on the aesthetics and some appliances, which may be removed, as demanded by the applicant, so as not to retain the "enrichment", it necessarily follows that the value of the said property has been so proportionately increased. That is an over simplistic argument, which I do not agree with. To amplify this assertion, the respondents compare the original purchase price which was R2.3 million, against the applicant's asking price in the amount of R3.3 million and arithmetically argue that, at the very least, the value of the property has been increased by approximately R700 000,00. At first blush, that may appear to be the case, however absent any empirical evidence to support that assertion, it cannot be readily accepted that such an increase in the value establishes a *lien* worthy of protection or solid enough to resist the relief (*rei vindicatio*) sought by the applicant. These improvements, are neither necessary nor useful, in the absence of evidence or even allegations for that matter, that the original appliances are neither fit for purpose, or are in a state of disrepair which renders them non-functional. They would most certainly be appealing to the eye and make for a good fashion statement. The applicant has thrown down the gauntlet to the respondent and allowed them to remove such, without causing damage to the original structure. This offer has not been taken up by the respondents.

[34] Consequently, and as a matter of law, I find that the respondents have not established facts surrounding a debtor/creditor *lien.* I further find that clause 12 of the lease agreement contains a *Shifren* clause, which specifically states that no enrichment claim or claim lies for improvements of the said property. I have already found that reliance on the lack of proficiency in English is a nonstarter. This was so

[5] Fletcher and Fletcher v Bulawayo Water Works Co Ltd 1915 (A.D.) 636 at 648, 656-657, 664-665.

because the version of the respondents is palpably uncreditworthy and far-fetched. I refer to the *NDPP v Zuma*[6], per Harms DP, who *inter alia* said the following:

> *" [26] motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-evidence rule that were in motion proceedings dispute of fact arise on the affidavits, a final order can only be granted if the facts are varied by the applicant's (Mr Zuma) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of our uncreditworthy denials, raises fictitious dispute of fact, is palpably impossible, far-fetched or sought clearly untenable that the court is justified in rejecting them merely on the papers."*

[35] In this case, I am persuaded that the above *dictum* captures the version of the respondents accurately; hence I considered and made the determination on the papers.

[36] I find that the applicant has made out a case for relief sought, having complied with the applicable statutory prescripts.

[37] It may well be that respondents have a claim, which they can still pursue separately, if they are so advised. It is a matter which I take no further.

Costs

[38] On costs, there is no reason to depart from the general rule that costs should follow the result.

Order

[39] In the circumstances I make the following order;

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[6] NDPP v Zuma 2009 (2) SA 277 (SCA)

(i) the first and second respondents should vacate from the premises situated at Portion 2 of erf [....], Bedfordview Exrension [....] Township, better known as [....] D[....] Place, Concord road, Bedfordview, voluntarily by no later than 8 December 2021, failing which the Sheriff of the court be and is hereby authorised to take all necessary steps to give effect to this order, including but not limited to, enlisting the services of the South African Police Service ("the SAPS") to ensure the execution of this order.

(ii) the first and second respondents are ordered to pay the costs of this application, on a party and party scale, including the costs consequent upon the employment of counsel, the one paying the other to be absolved.

Z M P MAJAVU
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	11 June 2021
JUDGMENT DATE:	8 September 2021
FOR THE APPLICANT:	Adv Van der Merwe
INSTRUCTED BY:	CMM Attorneys Inc.
FOR THE RESPONDENTS :	Adv WJ Scholtz
INSTRUCTED BY:	SKV Attorneys Inc.