REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 32366/2020

REPORTABLE: ***NO***

OF INTEREST TO OTHER JUDGES: ***NO***

REVISED:

6th October 2022

In the matter between:

MARSCHALL, FRANZ	Applicant
and	
SCHLEYER, BARBARA	First Respondent
SCHLEYER, ALBERT	Second Respondent
ALL OTHER PERSONS HOLDING TITLE TO THE IMMOVABLE PROPERTY SITUATE AT [....] R [....] AVENUE, CHARTWELL, GAUTENG, UNDER THE CONTROL AND AUTHORITY OF THE FIRST AND/OR SECOND RESPONDENTS	Third Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Fourth Respondent

Coram: Adams J

Heard: 03 October 2022

Delivered: 06 October 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to *SAFLII*. The date and time for hand-down is deemed to be 14:00 on 6 October 2022.

Summary: Opposed PIE Act eviction application – lease agreement lawfully cancelled as a result of breach – lien over property not proven – a lessee of rural land does not have an improvement lien over the land – onus on unlawful occupier to demonstrate the existence of circumstances meriting the limitation of the owner's right to possession of his property – application for the eviction from granted

ORDER

(1) The first, second and third respondents and all other occupiers of the applicant's property, being Holding [....], Chartwell Agricultural Holdings, Registration Division JQ, Gauteng Province, measuring 3,0215 (three comma nought two one five) hectares ('the applicant's property'), known as and situate at [....] R [....] Avenue, Chartwell, Gauteng, be and are hereby evicted from the said property.

(2) The first, second and third respondents and all other occupiers of the premises shall vacate the applicant's property on or before the 30th of November 2022.

(3) In the event that the respondents and the other occupiers of the premises not vacating the applicant's property on or before the 30th of November 2022, the Sheriff of this Court or his/her lawfully appointed deputy, duly assisted insofar as may be necessary by the South African Police Service, be and is hereby authorized and directed to forthwith evict the respondents and all other occupiers from the said property.

(4) The first, second and third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's cost of this opposed application.

JUDGMENT

Adams J:

[1]. The applicant is the owner of Holding [....], Chartwell Agricultural Holdings, Registration Division JQ, Gauteng Province, measuring 3,0215 (three comma nought two one five) hectares ('the applicant's property' or simply 'the property'). From about 1995, the first and second respondents leased the property from the applicant for the purpose of running a bed and breakfast guesthouse. In this opposed application, the applicant applies for an order evicting from the said property the first, second and third respondents, whom the applicant alleges are unlawful occupiers of same.

[2]. It is the case of the applicant that during 2019 he lawfully cancelled the lease agreement with the first and second applicants because they were in breach of material terms of the lease agreement in that they were in arrears with payment of the rental due in terms of the said lease. The first and second respondents deny that the lease was lawfully cancelled. In any event, so they claim, they have a lien in respect of the property, which entitled them to remain in occupation. They have also raised a preliminary point in limine of *lis alibi pendens*. Accordingly, these are all of the issues which are required to be considered in this opposed application.

[3]. I deal firstly with the legal point *in limine*.

[4]. A plea of *lis alibi pendens* is based on the proposition that the dispute *(lis)* between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation.

[5]. It is trite that here are three requirements for a successful reliance on a plea of *lis pendens*. They are that the litigation is between the same parties; that the cause of action is the same; and that the same relief is sought in both. See: *Nestlé (South Africa) (Pty) Ltd v Mars Incorporated*[1], in which the SCA (per Nugent JA) held at para 17 as follows:

> 'There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.'

[6]. The first and second respondents rely on the applicant's action in the Pretoria High Court, in which he claims arrear rental and related damages, as well as holdover rental, from the first and second respondents, who, in the same action, have preferred a counterclaim for a refund of the monies expended by them to effect certain improvements to the applicant's property whilst they were in occupation thereof. The first and second respondents contend that this matter, which is presently before me, cannot proceed as another court is already seized with the same issue.

[7]. There is no merit in this contention by the first and second respondents for the simple reason that the relief sought by the applicant in these two proceedings are not the same. The matter before me is an eviction application based on the *rei vindicatio*, whereas the action in the Pretoria High Court is a claim for money. That, in my view, is the end of the point *in limine*. As correctly pointed out in her heads of argument by Ms Ipser, who appeared on behalf of the applicant, the cancellation of the lease agreement and the consequent unlawfulness of respondents' occupation of the property, is a tangential issue in the action. Similarly, a finding by this court that the first and second respondents are in lawful or unlawful occupation of the property will not determine or dispose of the issues to be determined by the Pretoria High Court. The cause of action and the relief sought in the two actions differ in material respects.

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[1] *Nestlé (South Africa) (Pty) Ltd v Mars Incorporated* 2001 (4) SA 542 (SCA);

[8]. In any event, a court retains a discretion whether to uphold a plea of *lis pendens* even if the requirements are satisfied. I am of the view that this case is one such matter in which I should exercise my discretion in favour of not upholding the plea. I do so for the simple reason that, in my judgment, justice and equity require that this application be adjudicated by this court, because, as things stand, the applicant, as the owner of the property, is being arbitrarily deprived of his ownership rights and the enjoyment of his property.

[9]. For these reasons, the first and second respondents' plea of *lis alibi pendens* should fail.

[10]. That brings me to the issue relating to the unlawfulness of the first and second respondents' occupation of the property.

[11]. On 2 October 2019, the applicant addressed to the first and second respondents a letter of demand, demanding payment from them of arrear rental of R201 666 by the end of October 2019. Certain other breaches of the lease agreement were also pointed out to the first and second respondents, and they were placed on terms to rectify their breaches of the lease, failing which, so the demand read, the lease agreement would be cancelled.

[12]. The arrear rental was not paid and none of the undertakings requested by applicant were furnished by the end of October 2019, and the applicant, as he was entitled to do, consequently cancelled the lease agreement on 8 November 2019. It has to be accepted as a fact that, at the time the demand was made, the first and second respondents were in arrears with payment of the rental. They failed to comply with the demand timeously – of the R201 666 demanded, the first and second respondents only paid the sum of R49 833.30 and only on 11 November 2019, therefore after the lease agreement had already been cancelled. In my view, this then means that the breach has been established as well as the valid cancellation of the agreement as a result of the breach. And, in that regard, the respondents' supposed justification for the non-payment of the arrear rental is irrelevant.

[13]. There were also other breaches, notably the fact that the first and second respondents had entered into unauthorised long subleases, on the basis of which the applicant was entitled to cancel the agreement. The defence by the first and second respondents based on the supposed invalidity of the cancellation is therefore without merit and should be rejected.

[14]. The next question is whether the first and second respondents are entitled to remain in the property on the basis that they have a lien over the property for certain improvements effected.

[15]. The Deeds Office description of the property is that it is an agricultural holding. In terms of the Town planning regulations and bylaws, the property is zoned as 'agricultural land with consent use to operate a guest house'. This makes the property rural land as against urban land.

[16]. Ms Ipser drew my attention to article 10 of the Roman Dutch *Placaaten* of 1658, which has been accepted into our law (*Spies v Lombard*[2]), in terms of which a lessee of rural land does not have an improvement lien over the land and is not entitled to remain on such land until he is compensated for the improvements allegedly made to the land by him. He may only institute a claim for compensation after vacating the land. This is still an accepted principle of our law, and in that regard, see *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd*[3].

[17]. That is the death knell for the first and second respondents' defence on the basis that they enjoyed a lien in respect of the property. Moreover, the first and second respondents failed to prove in this application the amount that they would be entitled to in respect of the alleged improvements. All they did was simply to refer to improvements effected by them and then to aver that they are owed approximately R4 350 000, without giving any more details and particulars of how this sum is arrived.

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[2] *Spies v Lombard* 1950 (3) SA 469 (A);

[3] *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* [2007] 1 All SA 421 (SCA);

[18]. The point is simply that there is not sufficient evidence placed before the court to make a finding that first and second respondents have a lien over the immovable property. As was held by Cloete JA in *Rhoode v De Kock*[4], in which the appellant similarly sought to claim a lien on the strength of unsubstantiated allegations of expenditure and improvement, 'to enforce a lien in these circumstances would in my view be to allow an abuse of the process of court.' The court refused to uphold the alleged lien.

[19]. I am therefore of the view that the first and second respondents do not have a lien over the immovable property arising from the alleged improvements made to it.

[20]. The last issue which I need to address relates to whether or not it would be just and equitable to evict the first and second respondents, as well as the third respondent, from the applicant's property. In that regard, I interpose here to mention that there were a number of persons, who, presumably as part of the group of persons described as the third respondent, deposed to 'answering affidavits', although they did not formally deliver notices of intention to oppose the application. In these affidavits, these individuals – Johanna Semata, Sihle Mpofu, Penjani Chisi, Charity Nkhambule, Debra Louise Rosz, Sithembiso Ncube and Rachid Laquiman (seven in total) – complain that they have not been properly served with the PIE Act eviction application, although they clearly are all aware of the said application and were afforded an opportunity to place before court whatever relevant facts they would have wanted to. It is also instructive to note that their affidavits were deposed to during July 2021, and they had all the time in the world to intervene in these proceedings. I therefore do not make anything of their objection – if indeed there is one – that they were not properly served with the application.

[21]. In most of the affidavits, these individual make the very bald statement that '[i]n the event of an eviction, [they] would be destitute and homeless', without giving any further details and particularity. I will revert to these averments shortly.

[22]. The first and second respondents' case, regarding the just and equitable consideration, is to the effect that their personal circumstances, including their

[4] *Rhoode v De Kock* 2013 (3) SA 123 (SCA) at paras 13 to 17;

advanced ages, mean that they are, for all intents and purposes unemployable outside of the guesthouse. This, so they argue, means that their eviction would not be just and equitable. The property, so they say, is their primary residence, where they have resided in since about 1995.

[23]. Section 4(7) and (8) of the PIE Act provides as follows: -

> '(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.
>
> (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine
>
> > (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
> >
> > (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).'

[24]. In deciding whether eviction would be just and equitable, the court is required to consider 'all the relevant circumstances', to include the factors specified in these sections. The weight to be afforded to those circumstances, the determination of such further circumstances as might be relevant and the weight to be afforded to

them, as also the balance ultimately struck, are matters left entirely to the judgment and discretion of the court[5].

[25]. The onus of demonstrating the existence of circumstances meriting the limitation of the owners right to possession is on the unlawful occupier. The Supreme Court of Appeal held in *Ndlovu v Ngcobo; Bekker and Another v Jika*[6]:

> 'Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide.'

[26]. With these general principles in mind, the very first observation which needs to be made is the fact that the first and second respondents are not your proverbial 'persons of straw'. As correctly pointed out by the applicant, they seem to be the beneficial owners of a property in the Sabie, Mpumalanga, area, from which they earn rental income. I therefore have no doubt that the first and second respondents are unlikely, *nay* very unlikely to be rendered homeless as a result of their eviction from the property.

[27]. As regards the third respondents alluded to above, they were required, as per *Ndhlovu* (supra) to demonstrate the existence of circumstances meriting the limitation of the owner's right to possession. They failed to do so – their bald and unsubstantiated claims that the eviction would render them destitute and homeless are wholly inadequate for the aforegoing purpose.

[28]. In all of these circumstances, I am of the view that the eviction of the first, second and third respondents will be just and equitable. I am also of the view that all of the respondents should be afforded until the end of November 2022 to vacate the

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[5] *City of Cape Town v Rudolph* 2003 (11) BCLR 1236 (C);

[6] *Ndlovu V Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA), [2002] 4 All SA 384 (SCA) par 19;

property. They have, after all, been in unlawful occupation of the property since at least 2019 whilst these eviction processes have been ongoing. In the interim, they have not paid to the applicant any rental, which places an undue financial burden on him.

[29]. Accordingly, the relief sought by the applicant should be granted.

Costs

[30]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[7].

[31]. I can think of no reason why I should deviate from this general rule.

[32]. I therefore intend awarding costs against the first, second and third respondents in favour of the applicant.

Order

[33]. Accordingly, I make the following order: -

> (1) The first, second and third respondents and all other occupiers of the applicant's property, being Holding [....], Chartwell Agricultural Holdings, Registration Division JQ, Gauteng Province, measuring 3,0215 (three comma nought two one five) hectares ('the applicant's property'), known as and situate at [....] R [....] Avenue, Chartwell, Gauteng, be and are hereby evicted from the said property.
>
> (2) The first, second and third respondents and all other occupiers of the premises shall vacate the applicant's property on or before the 30th of November 2022.

[7] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

(3) In the event that the respondents and the other occupiers of the premises not vacating the applicant's property on or before the 30th of November 2022, the Sheriff of this Court or his/her lawfully appointed deputy, duly assisted insofar as may be necessary by the South African Police Service, be and is hereby authorized and directed to forthwith evict the respondents and all other occupiers from the said property.

(4) The first, second and third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's cost of this opposed application.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON:	3rd October 2022
JUDGMENT DATE:	6th October 2022 – handed down electronically
FOR THE APPLICANT:	Advocate Melanie Ipser
INSTRUCTED BY:	Schliemann Incorporated, Somerset West , Cape Town
FOR THE FIRST, SECOND AND THIRD RESPONDENTS:	Advocate Gayle Hardy
INSTRUCTED BY:	Claudia Privato Incorporated, Randburg