REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

10/5/2022 — DATE

SIGNATURE — AJ

CASE NUMBER: 33104/2021

In the matter between:

ARIANO 424 CC — **Applicant**

and

JAN GERHARDUS CHRISTOFFEL GOUWS — **1st Respondent**

CITY OF TSHWANE METROPOLITAN MUNICIPALITY — **2nd Respondent**

JUDGMENT

(The application was heard in open court but the judgment is delivered electronically by uploading it onto Case Lines to the electronic file of the judgment and delivered to the parties on Case Lines and Email.)

[1] This is an application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1988 (hereafter referred to as the "PIE" Act) for the eviction of the 1st respondent from the property situated at Plot 51, Kleinfontein, Kungwini, Gauteng (*"the property"*). The 1st respondent defended the application while the 2nd respondent filed no intention to oppose or opposing papers. No relief is sought against the 2nd respondent.

[2] The property is owned by the applicant known as *Ariano 434 CC* (the "CC") and both the 1st respondent and Me Zania Gouws (*"Zania"*) reside in separate dwellings on the property. Zania Gouws and the 1st respondent shared the same family home until she moved out into one of the chalets of the guest house for reason of the prevailing circumstances as a result of the on-going divorce litigation and protection orders against one another.

[3] The 1st respondent is residing in what was the then matrimonial home on the property after Zania moved into one of the guesthouse cottages on the property. The business of the guesthouse known as *"Ambers & Grace Guest Farm"* is conducted by the 1st applicant and Zania is the sole member of the CC. The CC also conducts business in exotic bird breeding and alpaca farming. The bird breeding and the alpaca farming was previously conducted through an entity known as ***Makarios (Pty) Ltd*** as a universal partnership between Zania and the 1st respondent, but after another salvo fired in the on dragging divorce litigation, they settled the issue of the universal partnership on 6 November 2019. Zania then became the exclusive owner of the breeding and farming activities and that she would buy out the 1st respondent for 50% of the universal partnership's value as determined by a forensic auditor.

[4] The 1st respondent was the sole member of 100% of the applicant CC since May 2005 but he transferred his 100% membership to Zania during March 2018. Although the parties differ from the reason for the transfer, the end result is that the 1st respondent no longer has any say in the CC. It is of no rele-

vance now whether the transfer was for reason of a *donation* or *purely a business decision in order to afford both parties the best possible tax benefit in the future.*

[5] The parties were embroiled in another court saga on 26 November 2019 in a Rule 43 application in the on-going divorce action where, together with other prayers granted, the 1st respondent was ordered to pay 50% of the water and electricity of the property, the property now owned by the applicant CC. There was no order made against Zania in respect of any *pendente lite* payments towards the 1st respondent.

[6] The applicant CC formally notified the 1st respondent on 11 July 2019 to vacate the house on or before the end of August 2019. The 1st respondent did not comply with the notice and this ultimately led to the current application before this court. The 1st respondent's continued presence and occupation of the former matrimonial home is the issue before this court.

[7] It has to be remembered that the above actions are not the only salvos in the on-going divorce battle but that the parties obtained protection orders against the other in the Magistrate's Court. These orders are of no direct interest to the present application because Zania is not a part to the present application.

LEGAL ASPECTS:

[8] The respondent avers that there is a bona fide and material dispute of facts and that the matter be referred to evidence. See Rule 6(5)(g) of the Uniform Rules of Court ("The Rules"). Mr Haskins referred the court to several cases in

this regard. The test is whether the dispute which allegedly arises from the affidavits is material which cannot be decided without hearing oral evidence, and if so, the court has a discretion as to the future proceedings and may:

(i) grant or dismiss the application;

(ii) order that oral evidence be heard; of

(iii) order that the parties go to trial.

See **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 93) SA 1155 (T) at 1162**

[9] The court may grant an order on motion proceedings if the facts averred by the applicant's affidavit that have been admitted by the 1st respondent together with the facts alleged by the 1st respondent, justifies such an order. **See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (2) ALL SA 366 (A).**

[10] Motion proceedings is by nature a robust procedure and a court may proceed on the correctness of averments made by an applicant which are admitted by a respondent and/or when the averments made by a respondent are far-fetched or clearly untenable and to be rejected by the court, an order may be granted. **Plascon-Evans supra 368.**

[11] The 1st respondent admits that he transferred his 100% membership in the applicant CC to Zania. It is immaterial in this application whether the transfer was because of a donation or for future tax relief for the parties; the fact remains that Zania is now the sole member of the CC's membership. The underlying causa is not the issue for this court to decide. The parties in the settlement before Ranchod J on 6 November 2019 agreed to such transfer above and it was made an order of court. The attempt now to question the transfer causa has no merit. This, my view, does not amount to a bona fide material dispute of fact.

[12] The other differences between the versions of the parties are the normal *"he says she says"* and do not merit any referral to oral evidence. The argument on behalf of the 1st respondent that a material dispute of fact exists cannot succeed.

LIEN:

[13] The 1st respondent's point is that he has a lien against the property owned by the applicant CC for certain improvement that he as a bona fide possessor effected to the property and that he is therefore entitled to occupy the property. The improvements were made over a period of 13 years from 2005 until 2017 as alleged by the 1st respondent.

[14] The flaw in this argument in my view is that the improvements made by the 1st respondent between 2005 and 2017 as averred in his answering affidavit was when he was the sole member of the applicant CC then and therefore not a bona fide possessor as required from the person effecting improvements to the property of another person.

[15] The 1st respondent, in order to successfully ward off the applicant's CC relief sought, must allege and prove that:

(i) He was in lawful possession;

(ii) The expenses incurred were necessary for the salvation for the property or useful for improvements;

(iii) Actual expenses and the extent of the enrichment of the CC;

(iv) The CC's enrichment is *iniusta* (unjustified); and

(v) There was no contractual arrangement between the CC and himself in respect of the expenses.

See **Harms, Amler's Precedents of Pleadings 6th ed p 226.**

[16] The 1st respondent avers in his answering affidavit that his 100% membership in the CC was transferred to Zania and that he has a loan account in the CC. See par 5.7 of the answering affidavit. To aver on the one hand the existence of a lien and on the other hand that the loan account in the CC is inter alia for the improvements is to wear the same hat for different purposes. There is no indication what these improvements were and/or the value thereof and when and what was improved. The vague and unsubstantiated averments fall short of what one would have expected to be mentioned. The present averments amount to vague general statements without any substance. The 1st respondent cannot have his cake and eat it.

[17] The 1st respondent's averment in his answering affidavit (par 5.13-5.18) with regard to the alleged lien falls far short of the above requirements. Mr Haskins did concede during arguments that the 1st respondent faces a very difficult onus in this regard and it was not taken further. If the *causa* of the transfer of the membership by the 1st respondent to Zania is disputed, it should be addressed in the divorce matter. I am satisfied that this lien-argument should fail.

[18] The third point taken on behalf of the 1st respondent is the whether the 1st respondent can claim occupation from the CC for an alleged reciprocal spousal duty of support towards him by Zania. He however in his answering affidavit in par 21.5 admits that Zania does not owe him any form of support. Support can include providing adequate housing available to the party in need of support, but on his own version he does not require any support.

[19] Section 26(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides that no-one may be evicted from their home without an order of court after considering all the relevant circumstances. This is not an

absolute right but may be limited in terms of Section 36 of the Constitution. The 1st respondent is not destitute at all. There is no reason why he is entitled to remain on the premises.

[19] There is no legal *nexis* between the 1st respondent and the CC in my view that can allow the 1st respondent to continue his occupation of the former matrimonial home particularity in view thereof that the CC gave him notice during 2019 to vacate the home. In the Rule 43 application in late 2019 no need for spousal maintenance was alleged or proved by the 1st respondent against Zania.

[20] The 1st respondent's occupation of the property did not start as a result of his marriage to Zania but he occupied it since 2005 when he was the sole member of the CC. When he transferred his 100% membership to Zania he merely continued occupying the home and was then given notice by the CC to vacate. His occupation was not because of marriage but because of the earlier legal bond between himself and the CC. The case law referred to on behalf of the 1st respondent on this aspect, **Buck v Buck 1974 (1) SA 609 (R) & Du Plessis v Du Plessis 1976 (1) SA 284 (W)** does not support this view.

[21] The 1st respondent did not aver or prove that Zania is the alter ego of the applicant CC. The so-called piercing of the corporate veil is a difficult obstacle for the 1st respondent to overcome. The matter before the court can be distinguished from **Cattle Breeders Farm (Pty) Ltd v Veldman 1974(1) SA 169 (RAD)** in that in this matter the 1st respondent's initial occupation was forthcoming from his membership of the CC but when it was transferred to Zania, this legal bond was ended. His occupation did not arrive from the marriage with Zania during 2009.

[22] The 1st respondent does not give any indication of his income to enable the court to determine whether he falls within the ambit and protection of the

Extension of Tenure of Security Act 62 of 1997 (ESTA) and/or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE). The current application is however brought in terms of PIE, but the 1st respondent elected not to disclose any information of his income or other relevant aspects that can assist the court in deciding the matter.

[23] The 1st respondent has no involvement in any of the applicant CC's business. He fails to set out any compelling reason why he should be allowed to continue occupation of the home despite being given notice to vacate the home during 2019. He does not indicate that he is in dire straits to remain in occupation of the home because of lack of income or other compelling reasons. He merely avers that he is entitled to a reciprocal spousal duty for support by Zania as a consequence of their marriage. In my view that is insufficient for the court to find in his favour.

[24] The present marriage, although in on-going litigation between the parties, does not automatically entitle him to rely on the reciprocal duty without any proof that he is in need thereof. His continued presence is not essential for any of the business of the CC. He has not made out any case for assistance from the court to allow him to remain on the property.

[25] In view of the above I am satisfied that the Applicant CC has made a case for the relief of eviction of the 1st respondent sought.

COSTS:

[26] Costs remains in the discretion of the court. The normal order is that costs follow success unless the court decides contrary. I am of the view that both parties may in one way or another be responsible that the divorce matter is in a Stalingrad mode. The matter should have been resolved earlier and I deem it fair that each party pays their own costs of this application.

The following order is made:

1. The first respondent and all persons holding under him be evicted from the property situated at Portion 51 of the farm Kleinfontein, Kungwini, Gauteng Province (hereafter referred to as the "property");

2. That the 1st respondent vacate the property within 30 (thirty) days of this order being granted, failing which the Sheriff for the area within which the property is situated be authorised to evict the 1st respondent and all persons holding under him;

3. That each party pay her/his/its costs of the application.

J HOLLAND-MUTER
10/5/2022
Acting Judge in the Pretoria High Court.

Matter heard on 10 April 2022 and judgment delivered on 10 May 2022.

TO: **APPLICANT:**

Attorney of record:

CLARKS ATTORNEYS –

Ref: Ms E ERASMUS- eerasmus@clarks.co.za

Counsel: Adv S Mentz- mentz@gkchambers.co.za

1st RESPONDENT:

Attorney of record:

COUZYN HERTZOG & HORAK INC

Ref: Mr Oosthuizen-anneliem@couzyn.co.za

Counsel: Adv M Haskins – haskins@lawcircle.co.za