THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 5150/2018

Before the Hon. Mr Justice Bozalek
Hearing: 27 November, 6 December 2018, 13 and 14 February 2019
Delivered: 28 March 2019

In the matter between:

SIVALUTCHMEE MOODLIAR N.O. ***1st Applicant***

GORDON NOKHANDA N.O. ***2nd Applicant***

and

THE OCCUPIERS OF ZONNEKUS MANSION,
CHANDOS CLOSE, WOODBRIDGE ISLAND, MILNERTON ***Respondents***

JUDGMENT

BOZALEK J

[1] This is an application in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ('PIE') in which the applicants, the joint liquidators of a property owning company, Zonnekus Mansion (Pty) Ltd (in liquidation) ('Zonnekus'), seek the eviction from a property of all the present occupiers.

[2] The property is a large and historic homestead on Woodbridge Island, Milnerton. It was formerly the holiday home of Sir De Villiers Graaf, MP and was acquired by Zonnekus some 20 years ago. The respondents are all the occupiers of Zonnekus Mansion and were originally listed as: Mr Gary van der Merwe; his wife and son; Mr DT Nkhoma, the property manager; Mr A Fanaroff, his wife and two children; Mrs Fern Cameron, Mr van der Merwe's mother and her partner; Mr T Dunn, an attorney practising under the name and style of TJC Dunn Attorneys and Wild Olive Enterprises (Pty) Ltd ('Wild Olive') (formerly Bank On Assets Global (Pty) Ltd ('BOAG'), a company having its registered address at the premises.

[3] Only Mr van der Merwe actively opposes the eviction order for reasons which will become apparent later. The application was launched on 23 March 2018 and was followed, on 10 April 2018, by the applicants' application in terms of section 4(2) of PIE to authorise service of the notice.

[4] On 13 April 2018, JMB Gillan Attorneys filed a notice stating that they would forthwith act as attorneys of record for *'the respondents'* i.e. by implication all of them. On the same day, those attorneys filed a notice of intention to oppose the application in terms of section 4(2) on behalf of Mr van der Merwe alone.

[5] On 16 April 2018, by agreement between the parties it was ordered that both the main application and the section 4(2) application would be postponed for hearing to 7 August 2018. On the latter date, the matter was postponed to 12 November 2018 pending the outcome of an application for leave to appeal against the dismissal of a business rescue application in respect of Zonnekus and was again postponed for this reason. That application was dismissed, however, as was a subsequent application for leave to appeal

to the Constitutional Court.

[6] Argument was heard on 27 November 2018 and on the resumed dated of 6 December 2018. The applications were then postponed to 13 February 2019 when argument was concluded.

Brief History

[7] Zonnekus was placed into liquidation at the behest of a creditor, Standard Bank, on 11 September 2014 which order was made final on 28 October of the same year. Zonnekus had, however, became embroiled in litigation as early as August 2013 when a provisional preservation order in terms of section 163 of the Tax Administration Act, 28 of 2011, was granted against it and others in favour of SARS. The preservation order was obtained pending the outcome of an action by SARS against Mr van der Merwe and related parties, presumably in relation to alleged tax debts. That litigation has yet to come to court. That order was made final, by agreement, on 19 March 2014.

[8] Since Zonnekus was placed into final liquidation in October 2014, four different business rescue applications were launched by various parties associated with Mr van der Merwe. None of these business rescue applications succeeded but leave to appeal were sought in all of them and, in several cases, were followed by petitions for leave to appeal to the Supreme Court of Appeal and applications for leave to appeal to the Constitutional Court. What must be borne in mind is that whilst any business rescue application was outstanding, or an appeal against the dismissal of any such order was pending, the applicants as joint liquidators of Zonnekus were precluded in law from taking any further steps to wind up the company.

[9] The last such application for leave to appeal to the Constitutional Court against the dismissal of one of the four business rescue applications was dismissed on 12 November 2018, thereby clearing away for the hearing of this application.

[10] In the same period, Zonnekus has been involved in further litigation, notably a contempt application by Mr van der Merwe and two others in their capacity as trustees of Zonnekus' sole shareholder against a range of parties including the present applicants and the Commissioner for SARS. It is not necessary to describe that litigation in any further detail.

The applicants' case

[11] The applicants' case is that as joint liquidators they are under a statutory obligation to realise the assets of Zonnekus for the benefit of creditors and that the occupiers are in unlawful occupation of the property, its primary asset, inasmuch as none of them occupy pursuant to a lawful lease agreement or have any title to the property. Their case is further that the property will not be an attractive buy for potential purchasers should Mr van der Merwe and other occupiers not vacate the property. Without an eviction order, the liquidators cannot guarantee vacant occupation to any potential purchaser. Their case is further that the property will fetch a higher price should it be sold with vacant occupation and in turn this would be to the advantage of the creditors of Zonnekus.

Mr van der Merwe's case

[12] Mr van der Merwe, who argued his case in person, raises four defences. Firstly, he contends that the peremptory requirements of section 4(2) of PIE, which requires service of a notice upon all the occupiers, have not been met. On this ground alone he seeks a

dismissal of the application and an order that the applicants pay costs *de bonis propriis*. The second point which he raises is the argument that the preservation order in terms of section 163 of the Tax Administration Act precludes the applicants from '*dealing in the property'*, which would encompass an application such as the present for the eviction of the occupiers. Mr van der Merwe's third procedural defence is that the present application is incompetent in that it was brought at a time when an appeal was pending against a business rescue application with the result that the applicants were precluded from launching any such proceedings. He also contends that the applicants were never properly authorized to bring these proceedings, inter alia for want of a creditor's resolution to that effect. Finally, at a substantive level, Mr van der Merwe contends that he occupies the property pursuant to a valid lease agreement and that on an application of the *Plascon Evans* principle, the applicants are not entitled to the final relief they seek in the face of his averments in this regard.

[13] I shall deal with these defences in the sequence set out.

Compliance with section 4(2) of PIE

[14] In terms of section 4(2) of PIE, the Court must serve written and effective notice of the proceedings on any alleged unlawful occupiers as well as the Municipality having jurisdiction at least 14 days before the hearing of proceedings for an eviction order.

[15] Unusually, in the present instance the notice required by section 4(2) and which the applicants sought in the interlocutory application launched in April 2018, has not been authorised by Court. This is so because the section 4(2) application was opposed by Mr van der Merwe and, for reasons best known to him and the applicants, was postponed in tandem with the main application and never separately determined. In one of Mr van

der Merwe's affidavits, he challenges the applicants to effect service in terms of section 4(2) of PIE on other occupiers and warns them that they must not look to him to give notice of the application to other occupiers.

[16] As I have stated, Mr van der Merwe argues that the requirements of section 4(2) are peremptory and that the application must be dismissed for non-compliance with this requirement. However, even accepting that these statutory formalities are peremptory, it is not every deviation that is fatal and the question is whether, in spite of any defects, the object of the statutory provision has been achieved. See in this regard *Unlawful Occupiers School Site v City of Johannesburg*.[1] Before considering this question closer regard must be had to the position of each of the occupiers, bearing in mind that the purpose of section 4(2) is to afford the occupiers of properties subject to an application for eviction under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all relevant circumstances before the Court.

[17] As has been indicated the main application was served on 26 March 2018, although not by the Sheriff. Receipt of the papers was vouched for under the stamp of TJC Dunn Attorneys. That firm of attorneys practises from the property and more often than not represents Mr van der Merwe and his associated companies and entities in litigation. Nonetheless, no response was forthcoming to the notice of motion.

[18] On 10 April 2018, the section 4(2) application was served but again not through the office of the Sheriff and it is unclear upon whom at the property those papers were served. Nonetheless, three days later JMB Gillan Attorneys filed a *'notice of appointment of attorney of record'* on behalf of *'respondents'* who had been cited as *'the occupiers of*

[1] 2005 (4) SA 199 (SCA) para [22].

Zonnekus Mansion'. On the same day those attorneys filed a notice of intention to defend the section 4(2) application on behalf of Mr van der Merwe alone. On 6 June 2018, the JMB Gillan Attorneys withdrew and since then the proceedings have been opposed by Mr van der Merwe alone and legally unrepresented. However, after the matter, part-heard, was postponed on 6 December 2018 for hearing to 13 February 2019, a notice of set down to which was attached a notice of motion was served on the respondents through the Deputy Sheriff. That service is described in detail in an affidavit by the applicants' attorney, Ms A Spies. The notice of set down states that on the postponed date the Court would be asked to grant an eviction order against all the occupiers of the property on the grounds set out in the annexed original notice of motion. In her affidavit, Ms Spies describes how, on 7 December 2018, she instructed the Sheriff to serve the notice of set down and annexure on all the parties listed as occupiers in the annexure to the original notice of motion, plus a number of others. The attorney explains that at the hearing on 27 November 2018 the Court had expressed concern that, although the eviction application was opposed by Mr van der Merwe, the other respondents might not be aware of the eviction application. She added that the purpose of the affidavit was to address the Court's concerns in that regard. The attorney specifically requested the Sheriff to read out the contents of the notice of set down over a loudspeaker if personal service could not be effected on all the parties mentioned above. Mr van der Merwe was present and requested the attorney to leave the property immediately.

[19] After half an hour, the Sheriff reported to Ms Spies that he had served the notice personally on Mr van der Merwe and that the latter had advised that: his wife no longer resided there, that certain other members of his family were not present but that he would accept service of the notice on their behalf; that he served the notice on Mr Nkhoma who

advised that another party with the same surname was no longer residing there; Mr van der Merwe further advised that Mr Fanaroff and his family were no longer resident on the property; that Mr van der Merwe's mother was not currently present but that he would accept service on her behalf; that the notice was served on Mr Dunn personally and on Mr van der Merwe as representative of Wild Olive. Finally, the Sheriff reported that he was told by Mr van der Merwe that no other persons occupied the property and in view of the above he was advised by Mr van der Merwe that it was not necessary to read the contents of the notice out over the loudspeaker. Returns of service by the Sheriff vouching for all this information were furnished.

[20] On the basis of these allegations and the returns of services, the applicants' attorney alleged that all occupiers are aware of their eviction application and the fact that the hearing would resume on 13 February 2019. None of this material was disputed by Mr van der Merwe.

[21] The position regarding service on the individual occupiers is therefore as follows:

1. Mr van der Merwe has had effective notice since he instructed attorneys to represent him at an early stage and he has argued the matter in court throughout;
2. Mr Dunn has had effective notice because a receipt stamp shows that his firm received the original papers on 26 March 2018; he has been present in court virtually throughout the proceedings and he was personally served with the notice of motion and notice of set down on 10 December 2018;
3. Mr David Nkhoma was on the list of occupiers on whose behalf the initial attorneys once acted and he received personal service on 10 December 2018;

4. Mr Allan Fanaroff, his wife and two children had left the property by 10 December 2018;
5. Mrs Fern Cameron (Mr van der Merwe's mother) was one of the occupiers on whose behalf the initial attorneys acted and service on her behalf was accepted by Mr van der Merwe on 10 December 2018;
6. Wild Olive – was one of the occupiers on whose behalf the initial attorneys acted and service on its behalf was accepted by Mr van der Merwe on 10 December 2018;
7. Any and all other persons occupying the premises – to the extent that they occupied the premises in April 2018 the initial attorneys acted on their behalf. In addition, Mr van der Merwe accepted service on behalf of his children Richard and Candice van der Merwe whilst the Sheriff was advised by him that his wife/ex-wife no longer occupied the property;
8. The Sheriff was further advised that a certain Mr Wizard Nkhoma no longer occupied the property and service was accepted by Mr van der Merwe on behalf of Mr John Cameron, apparently his father in law, and Ms Angelique Aspeling, apparently Mr van der Merwe's partner, also on 10 December 2018.

[22] In addition, it is unlikely that Mr van der Merwe, as the person clearly in overall control of Zonnekus Mansion, would not have informed most if not all other occupants of the application for eviction given that those occupying the property appeared to form a relatively small and closely interlinked circle at which he was the centre.

[23] The unusual situation in the present matter is that no section 4(2) notice has ever been formally authorised by the Court for service on the occupiers, normally a

peremptory requirement. The object of such a notice is to afford the respondents under threat of an eviction application an additional opportunity to put all relevant circumstances before the Court.

[24] In *Unlawful Occupiers School Site v City of Johannesburg* (supra) Brand JA stated as follows:

> *'[22] As the appellants also correctly pointed out, it was held in Cape Killarney Property (at 1227E - F) that the requirements of s 4(2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved…*
>
> *[23] The purpose of s 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court (see Cape Killarney Property Investments at 1229E - F). The two subsections of s 4(5) that had not been complied with were (a) and (c). The object of these two subsections is, in my view, to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case. The question is therefore whether, despite its defects, the s 4(2) notice had, in all the circumstances, achieved that purpose. With reference to the appellants who all opposed the application and who were at all times represented by counsel and attorneys, the s 4(2) notice had obviously attained the Legislature's goal. However, there were also respondents who did not oppose and who might not have had the benefit of legal representation. It is with regard to these respondents that the question arises whether the s 4(2) notice had, despite its deficiencies achieved its purpose.'*

[25] The sentiments in the *Unlawful Occupiers School Site* case were echoed in *Moela v Shoniwe*[2] by Streicher JA who stated as follows in para 9:

> *'... However, the object of s 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful occupier is aware of his rights referred to in s 4(5)(d). It may well be that that object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by s 4(2) had not been authorised by the court. That may, for example, be the case if at the hearing it is clear that written and effective notice of the proceedings containing the information required in terms of s 4(5) had in fact been served on the unlawful occupier and municipality 14 days before the hearing…'*

[26] In the present matter not only was the notice of motion served on all the respondents setting out the relief sought but it further set out the grounds on which the application was based in the following terms:

> *'1.1 (t)he applicants are the duly appointed liquidators of Zonnekus.*
>
> *1.2 Zonnekus is the registered owner of the property. The respondents reside in the property.*
>
> *1.3 the respondents do not occupy the property on any lawful basis.*
>
> *1.4 the applicants are under a statutory obligation to realise the assets of Zonnekus including the property, for the benefit of creditors.*
>
> *1.5 the respondents were advised by letter dated 8 August 2017, delivered to them by way of email and service by the Sheriff, that they were required to vacate the property by 8 September 2017.*
>
> *1.6 Notwithstanding due and reasonable notice the respondents have failed and/or refused to vacate the property and are accordingly in unlawful occupation thereof.'*

[27] Apart from certain procedural issues, the section 4(2) notice which the applicants intended to have authorised by the Court for service on the occupiers contained little

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[2] 2005 (4) SA 357 (SCA).

more information than that contained in the notice of motion. The section 4(2) notice would have advised the respondents that they were entitled to enter an appearance to oppose the main application, to appear at court to defend the matter on the date of the hearing and to place all relevant circumstances before the Court for it to consider whether the proposed eviction was just and equitable, and finally, that they could apply for legal aid. This last piece of information was the only material difference between the notice of motion and the proposed notice in terms of section 4(2).

[28] When one has regard to section 4(5) of PIE, which sets out the requirements to be addressed in a section 4(2) notice, it is clear that all were met by the original notice of motion save for that contained in 4(5)(d), namely, advising that the alleged unlawful occupiers had the right to apply for legal aid. In the circumstances of the present matter, it is most unlikely that this omission would have made any meaningful difference. All the occupiers occupy or reside in or around one luxurious dwelling on an exclusive piece of real estate on Woodbridge Island. All are connected to, or serve the interests of, Mr van der Merwe who actively opposed the eviction application at all stages.

[29] In the present case it is common cause that on 26 March 2008, the notice of motion was served on the City of Cape Town, the municipality having jurisdiction. Not having received a section 4(2) notice made no material difference as far as the City was concerned.

[30] In the circumstances, I am satisfied that written and effective notice of the proceedings was given both to the respondents/occupiers and to the Municipality and that, notwithstanding the failure by the applicants to serve a section 4(2) notice on the respondents, the object of those statutory provisions have been achieved.

[31] I might add that my view may well have been different had the applicants not effected the comprehensive service of the notice of motion and the notice of set down through the Sheriff on all parties on 10 December 2018.

The Preservation Order/Locus Standi defence

[32] Mr van der Merwe emphasised that the genesis of the eviction application was an order for the preservation of assets obtained by SARS pursuant to the provisions of section 163 of the Tax Administration Act, 28 of 2011. On the extended return day, the provisional order was replaced by an amended order which was taken by agreement. He contended that since that order was taken by agreement it could not be varied without the consent of all parties thereto; furthermore, that the effect of the final order was that the applicants were interdicted from dealing with, encumbering or disposing of the property pending the outcome of the action to be brought by SARS in respect of its tax claim against Mr van der Merwe and associated parties.

[33] Section 163 of the Tax Administration Act provides *inter alia* as follows:

> *'(1) A senior SARS official may, in order to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.*
>
> ...
>
> *(9) The court which made a preservation order may on application by a person affected by that order vary or rescind the order or an order authorising the seizure of the assets concerned or other ancillary order if it is satisfied that*

–

(a) ...

(b) ...

(10) *A preservation order remains in force-*

(a) *pending the setting aside thereof on appeal, if any, against the preservation order; or*

(b) *until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt.*

...

(12) *Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the relevant preservation order.'*

[34] Accordingly any such preservation order precludes *'any person ... from dealing in any manner with the assets to which the order relates'* and that preservation order remains in force until the assets to which the order is subject are no longer required for the purposes of the satisfaction of the tax debt, an eventuality which is yet to occur.

[35] Mr van der Merwe pointed out furthermore that the applicants were not involved in the preservation proceedings and that the final order was *'agreed to'* in order to preserve the status quo which existed at the time of its granting. He argued further that the present application is a preliminary step to the selling of the property which would constitute *'dealing in the property'*, conduct which is prohibited by the order and that furthermore that the tax action brought by the tax authority is still pending.

[36] The order in question is indeed recorded as having been taken by agreement and provides that pending the final determination of an action to be instituted by the Commissioner for SARS the respondents, the first of which was Mr van der Merwe, are interdicted from *'dealing with, disposing of or encumbering'* a range of properties

including Erf 13098, Milnerton, Western Cape, being the property in question.

[37] The case for the applicants in regard to this defence is twofold. Firstly, it contended that the limited purpose and effect of section 163 of the Tax Administration Act does not detract from the powers of the applicants as liquidators of a company in liquidation to recover and reduce into possession all the assets and property of the company, movable and immovable, in satisfaction of the costs of the winding up and the claims of creditors. Secondly, it is contended that the applicants expressly sought and were granted an order by the High Court authorising them to sell the property in question.

[38] In *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others*[3] it was held that the fundamental purpose of insolvency litigation is *'to secure the realisation of the remaining assets of the insolvent and the distribution of the resulting amounts amongst creditors in accordance with the order of preference laid down by law'*. Wallis JA went on to state:

> *'Although the Master plays a vital role in overseeing the process of winding up an estate, the process is nonetheless creditor-driven. It is the majority of creditors in number or value of claims that have the right to elect trustees or nominate liquidators. They have the right to take decisions in respect of the manner in which the assets falling into the estate, or constituting property of the corporate body, in winding-up are to be dealt with. The logic of this is obvious. It is the creditors who stand to lose as a result of the insolvency. They are the best judges of their own interests and they are the people best situated to instruct the trustee or liquidator how to go about the process of liquidation or winding-up.'*

[39] Furthermore, in terms of section 386(1)(e) of the Companies Act, 61 of 1973 ('the 1973 Companies Act') the liquidator has the power to take measures for the protection

[3] 2017 (3) SA 95 (SCA) at para [55].

and better administration of the affairs and property of the company. In terms of section 386(5) a Court may, if it deems fit, grant leave to a liquidator to *'do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets'*.

[40] On 15 December 2014, the High Court authorised the liquidator to sell the property inter alia in the following terms:

> *'It is ordered:*
>
> 1. *That the applicants are authorised to bring this application in terms of section 386(5) of the 1973 Companies Act No 61 of 1973 …; and*
> 2. *That the applicants are authorised in terms of section 386(5) of the 1973 Companies Act No 61 of 1973 … to exercise the following powers in relation to the administration of Zonnekus Mansion (Pty) Ltd (in liquidation) ('Zonnekus');*
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> *2.1 to be empowered to institute or defend such actions or other legal proceedings as may be necessary;*
>
> *…*
>
> *2.8 to sell any movable or immovable assets of Zonnekus by public auction, public tender or private contract and to give delivery or transfer thereof;*
>
> *2.9 to elect whether or not to cancel any lease agreement entered into by Zonnekus lessee prior to its liquidation;'*

[41] Mr van der Merwe criticised the manner in which this order was obtained on an ex parte basis but the fact remains that the order stands and has not been directly challenged by him at any stage.

[42] What is also material is that section 391 of the 1973 Companies Act requires a liquidator to proceed forthwith to recover and to reduce into possession all the assets and property of a company in liquidation for distribution to creditors and he has no discretion

about the performance of his duties.[4]

[43] A situation analogous to the interplay between a preservation order in terms of section 163 of the Tax Administration Act and the winding up order was addressed by the Supreme Court of Appeal in *Commissioner, South African Revenue Services v Van der Merwe NO and others*.[5] The matter concerned an appeal to the Supreme Court of Appeal against a High Court order that the Commissioner clear certain imported equipment under its custody and control for release to the trustees of an importer company which had since been placed into liquidation. The Commissioner had refused to do so because the company was unable to pay the value added tax and duties that were payable in respect of the equipment's importation. The principal question in the appeal was whether a trustee could take possession of and deal with the property concerned under insolvency law, or instead was prevented from doing so by a statutory *'embargo'*, namely various provisions of the Custom and Excise Act, 91 of 1964 and the Value Added Tax Act, 89 of 1991, in favour of the Commissioner. It was held that section 47 of the Insolvency Act, 24 of 1936 preserved the common law position that a trustee had to realise all the assets of an insolvent – including those subject to a lien. The following reasoning in the *Commissioner, South African Revenue Services (supra)* judgment is relevant to the present matter:

> *'[20] The important aspect of these provisions is that they are all addressed to the ordinary situation where goods are brought into the country and attract the liability to pay customs duty. They are directed at the obligation of the importer and others liable to pay duty, and do not address the special situation of insolvency. That is not surprising because that is dealt with in*

[4] Blackman, Commentary of the Companies Act [the 1973 Act], Vol 1 14 – 378 and the authorities referred to therein.
[5] [2017] 2 All SA 335 (SCA) para [20].

> *the Insolvency Act, a general statue intended to deal with all cases of insolvency. In brief, when one looks at the liability to pay customs duty in the ordinary course, one looks to the provisions of the Customs Act alone. When insolvency intervenes one turns to the Insolvency Act'.*

[44] In my view, by analogous reasoning this principle also applies to section 163(1) of the Tax Administration Act.

[45] To put the matter beyond any doubt an order granted by the High Court on 15 December 2014 specifically authorised the liquidators to sell *'any immovable or movable assets'* of Zonnekus. Furthermore, it would appear that on 21 April 2017 the attorneys representing the Commissioner for SARS advised the applicants that they could proceed with dealing with the Zonnekus property and that there was no need for a formal application for variation of the preservation order. This appears from the judgment of Slingers AJ who heard the contempt application in terms of which, inter alia, Mr van der Merwe unsuccessfully sought to hold the Commissioner, the applicants and the applicants' attorney in contempt of Court for breaching the preservation order by inter alia procuring a buyer for three of Zonnekus' properties in circumstances such as the present without taking any steps to vary the terms of the preservation order.

[46] In my view, the provisions of the 1973 Companies Act and the duties imposed upon the applicants to liquidate and wind-up the estate of the company in liquidation, if necessary by selling the company's fixed properties, take precedence over the provisions of the preservation order. That order was sought at the behest of the Commissioner of SARS who/which has specifically consented to the properties being sold if needs be. The fact that the preservation order was taken *'by agreement'* does not, in my view, as Mr van der Merwe contended, mean that it could only be varied by agreement. In any event that

issue is a red herring. The antecedent question is whether that order allows for the sale of the properties and in my view for the reasons furnished above, it does. For all these reasons Mr van der Merwe's defence to the eviction application based on the terms of the preservation order has no merit.

[47] The first leg of the third procedural defence raised is that the present application is incompetent because at the time it was launched section 131(6) of the Companies Act, 71 of 2008 suspended the liquidators' powers.

[48] Section 131(6) of the Companies Act dealing with business rescue provisions provides that:

> *'If liquidation proceedings have already been commenced by or against the company at the time an application is made …, the application will suspend those liquidation proceedings until -*
>
> *(a) the court has adjudicated upon the application; …'*

[49] Given that the effect of an application for leave to appeal is, ordinarily, to suspend the order appealed against, liquidation proceedings are also suspended pending the outcome of such application for leave to appeal against the refusal of a business rescue application.

[50] As stated earlier, since the granting of the final liquidation order in respect of Zonnekus, Mr van der Merwe, or interests closely associated with him, have launched a total of four business rescue applications. All of them were unsuccessful but they were the subject of applications or petitions for leave to appeal which had the effect envisaged in section 131(6).

[51] Mr van der Merwe contended that when the present application was launched on 23 March 2018, the liquidation proceedings were suspended by an application for leave to appeal against the dismissal of the third business rescue application. That application was dismissed on 9 September 2016 by the Western Cape High Court. It was common cause between the parties in the present application that the last day for filing an application for leave to appeal against that decision was 10 November 2016 but such application for leave to appeal was filed one day late on 11 November 2016.

[52] For reasons which have not been explained, that application for leave to appeal remained dormant until 21 March 2018 when an application for condonation for its late filing was brought. That application, together with the application for leave to appeal, was heard on 4 May 2018. Condonation for the late filing was granted but the application for leave to appeal was dismissed.

[53] Mr van der Merwe's argument in these proceedings was that the granting of condonation nonetheless regularised the late filing of the application for leave to appeal retrospectively, so to speak, with the result that when the present eviction application was thereafter launched on 23 March 2018, the liquidators' powers were suspended and the application was incompetent.

[54] In my view this argument misconstrues the effect of condonation, more specifically in the contention that condonation has retrospective effect. This misconception is illustrated by the case of *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*[6] which dealt with the effect of the late filing of an application for leave to appeal. That matter involved an interpretation of the terms of section 18 of Superior Courts Act,

[6] 2016 (3) SA 110 (GJ)

10 of 2013. The legal question that arose was whether the service of an application to condone the late filing of a petition to the Supreme Court of Appeal had the effect of suspending the judgment against which leave to appeal was sought. The Court held that it did not, stating that the failure to serve an application for leave to appeal within the prescribed limit resulted in the lapsing of the right to apply for leave to appeal, and that only on the granting of condonation would it be revived. The Court observed, in para 13, that *'the failure to serve notices of appeal or court records within the prescribed periods is commonplace. The result of such failures are that the appeals lapse and require condonation to revive them'*. The Court quoted with approval from various cases which emphasised that failure to comply with rules relating to the lodging of appeal caused such appeals to lapse and to require condonation in order to revive the appeal. It held that in the case before it that the late launching of an application for leave to appeal had caused the appeal to lapse and in the absence of condonation the order made by the Court a quo was no longer suspended. In paragraph 15, the Court referred to the underlying principle and stated as follows:

> *'The inherent logic of the position is unassailable. It can be tested by asking what were to happen if many months or years were to pass before an application for condonation is lodged. It is untenable that upon the service of a condonation application the judgment would then be suspended.'*

[55] What Mr van der Merwe argues for is in effect a broad interpretation of the order for condonation which would treat the application for leave to appeal as having been timeously served. By its very nature this is not what a condonation order entails. Rather, it recognises that the application was brought out of time and, for the purposes of that application alone, it condones this fact and allows the Court to entertain the application.

What it does not do is create the fiction that the application was in fact timeously lodged and that any lawful consequences which followed as a result, prior to condonation being granted, are extinguished or reversed. In the result, for these reasons the argument that the present eviction application does not constitute competent proceedings must be rejected.

[56] As a second leg, Mr van der Merwe advanced the further argument that the applicants had failed to secure a resolution from the creditors and members of Zonnekus at the second meeting of creditors on 24 February 2014 inter alia authorizing them to institute legal action in respect of any matter affecting the company or to sell any of its movable or immovable property. They were thus obliged to apply to the Master for such direction and, failing that, only then to approach the Court for such authority. It appears to be common cause that the applicants did not approach the Master for such directions.

[57] The argument proceeds that the applicants accordingly lacked the authority to bring the present proceedings (and to sell the property). There are several difficulties with this argument, all revolving around an order made by Davis J on 15 December 2014 in terms of sec 386(5) of the 1973 Companies Act (quoted above) granting the applicants extensive powers in the winding up of Zonnekus. These included the power *'to institute or defend such actions or other legal proceedings as may be necessary'* and to *'sell any immovable or movable assets of Zonnekus by public auction … or private contract'*.

[58] Mr van der Merwe sought to counter the terms of this order by contending that its provisions were of a temporary nature and intended to be of force and effect only until the presentation of the draft resolution to members and creditors at the general meeting on 24 February 2014. Firstly, this argument overlooks the fact that the order was granted

some ten months after the meeting in question. Secondly, the order made by Davis J is clear and it stands. It is thus not for this Court, purporting to act as a court of appeal of review, to ignore the terms of that order or find that it was not competent or binding. If he considered that order was not competent, it was open to Mr van der Merwe to challenge it directly at that time.

The respondents' substantive defence i.e. that he occupies the property in terms of a lease

[59] Mr van der Merwe averred in his opposing affidavit that *'in or about 2013'* he entered into a '*verbal rental agreement'* with Zonnekus for the entire property for a period of nine years and eleven months commencing on 1 March 2014 coupled with a right to sub-lease the property. He avers further that it was agreed that he would pay R3 570 000.00 cash in advance for the entire period of lease which amounted to R30 000.00 per month for 119 months. He *'or someone on his behalf'* made 14 payments *'which included his rental due'* between 2 December 2013 and 1 August 2014 totalling R4 689 514.00. He annexed copies of bank statements reflecting the deposits.

[60] In the applicants' replying affidavit they dismiss the claimed lease as a post-eviction application fabrication. They cite, in short, the following reasons for this allegation:

1. After their appointment in or about September 2014, the applicants were presented with a lease in respect of the property purportedly concluded between Zonnekus and BOAG (now known as Wild Olive) on 1 April 2014. That lease agreement was in writing;
2. In terms of that lease agreement the rental had been paid upfront for a year i.e.

until 30 March 2015. The applicants were suspicious of this transaction and of the validity of the lease agreement as a whole;

3. In February 2016 the applicants instructed their attorneys to demand payment of arrear rental in terms of the BOAG lease agreement, without conceding the validity thereof, but no response was received to the letter of demand;
4. The applicants consequently cancelled the BOAG lease agreement in May 2016; at that time Mr van der Merwe made no mention of there being any sublease agreement between himself and BOAG and made no mention of any purported lease agreement between Zonnekus and himself;
5. The applicants cited email correspondence with Mr van der Merwe in March 2017 in which Mr van der Merwe made no reference to the existence of any head lease between himself and Zonnekus despite the fact that it would have been highly relevant;
6. When the applicants' attorneys wrote to the respondents in September 2017 demanding that they vacate the property, their then attorney, Mr Dunn, replied and raised a number of issues but made no mention of a lease agreement between Mr van der Merwe and Zonnekus. The notice to vacate was sent by ENS on 8 August 2017 and the letter from TJC Dunn Attorneys was dated 5 September 2017. It was contended on behalf of the applicants that this was an ideal opportunity to raise the matter of Mr van der Merwe's alleged lease of the property with Zonnekus.

[61] In my view it is unnecessary to deal with the dispute of fact which has arisen relating to the existence of the alleged nine year oral lease and why Mr van der Merwe's reliance on the alleged '*verbal lease agreement'* is misplaced. Nonetheless, for the sake

of completeness, I will do so in due course. The reason is that both the interim and later final preservation orders made in terms of section 163 of the Tax Administration Act interdicted Zonnekus from *'dealing with, disposing of encumbering ... any assets of which it is the owner or to which it has any rights'.* The interdict in question was expressly stated in the order to apply to the property which is the subject of this application. The final order, taken on 19 March 2014, confirmed the interdict in relation to the property. Mr van der Merwe states in his opposing affidavit that he entered into the alleged verbal rental agreement on 1 March 2014, in other words six months after the provisional preservation order was granted and whilst it was still in force. The alleged date of conclusion of the agreement was, incidentally, some three weeks prior to the order being made final. The result is that even if Mr van der Merwe's statement that he purported to enter into this lease agreement with Zonnekus (and made the payments in question) is accepted, the agreement is void and unenforceable. The further consequence is, of course, that Mr van der Merwe and all other occupiers have no substantive defence to the eviction application since they have no right or title to occupation of the property.

[62] In the result, Mr van der Merwe's substantive defence cannot stand.

[63] It is trite that in motion proceedings seeking final relief, an applicant cannot succeed in the face of a genuine dispute of fact that is material to the relief sought. But, as was pointed out by Cameron JA in *SA Veterinary Council and another v Syzymanski*[7], Corbett CJ in *PlasconEvans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd*[8] *'amplified'* the ambit of uncreditworthy denials that would <u>not</u> impede the grant of relief. The learned judge extended them beyond those *'not raising a real genuine or bona*

[7] (79/2001) [2003] ZASCA 11 (14 March 2003).
[8] 1984 (3) SA 623 (A).

fide dispute of fact', to allegations or denials that are *'so far-fetched or clearly untenable that the Court is justifying in rejecting merely on the papers'*.

[64] Mr van der Merwe's averments relating to the alleged nine year lease amount to a denial of the allegation in the applicants' founding affidavit that *'the occupiers of the Mansion did not occupy it on the basis of the valid lease agreement, by any other arrangement reached with the liquidators, or any other right in law to do so'*. It would be an overstatement to say that Mr van der Merwe's allegations as regards the existence of a lease are a bald denial. However, no objective proof of the existence of any such lease nor any prior reference to it in his lengthy legal travails with the applicants is mentioned. The term of the lease, nine years and eleven months, is fortuitously one month less than a lease that would be required to be recorded in writing and no explanation for this unusual term is furnished. The only details furnished by Mr van der Merwe relating to the alleged lease, apart from its main terms, are his assertions that such agreed rental was paid in advance (again with no explanation for this arrangement), and the furnishing of the dates of payment and bank statements allegedly substantiating such payments. When regard is had to these bank statements, however, there is no indication that the payments were even made by Mr van der Merwe. More importantly, not one of these payments reflects that such payment was in lieu of rental. On the contrary, several of them indicate that the payment was for something completely different. The descriptions or explanations recorded in the bank statements include: *'refund', 'consult fees', 'settlement'* and four instances of these payments being described as *'loans'*.

[65] In my view when regard is had to the entire manner in which Mr van der Merwe dealt with this alleged lease agreement i.e. the lack of any proof or even a prior reference

thereto, the unexplained prepayment of rental, the fact that none of the alleged payments are reflected as *'rental'* and the prior, contradictory reliance by Mr van der Merwe on a lease with BOAG, the dispute of fact relied on must be regarded as falling into that category described as so *'far-fetched or clearly untenable that the Court is justified in rejecting (it) merely on the papers'*.[9] For these additional reasons, Mr van der Merwe's substantive defence would, in any event, not stand.

Would eviction be just and equitable and the operative date?

[66] Mr van der Merwe conceded that if the Court should not uphold any of his substantive or procedural defences it would be just and equitable for the Court to order the eviction of the respondents from the premises. In other words, he conceded that it was not necessary for this issue or the effective date of eviction to be argued. This concession was well made since there is nothing in the papers to suggest that any of those respondents who remain in occupation of the property would have any difficulty in securing alternative accommodation at fairly short notice. There is no suggestion that any respondent/occupier is impecunious or that there is a shortage of accommodation which might apply to them. In my view allowing the applicants at least two months to vacate the property would be just and equitable.

[67] In the circumstances and for these reasons the following order is made:

It is ordered that:

1. The respondents (more fully described in annexure 'A' hereto) and all those holding title under them ('the occupiers'), vacate the premises known as Erf 13898, Milnerton, situated at Chandos Close, Woodbridge Island,

[9] Drawing on the minority judgment of Botha AJA in *Associated South African Bakeries (Pty) Ltd v Oryx en Vereinigte Backereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 924(a) cited in *SA Veterinary Council* at paragraph 24 and footnote 14.

Milnerton, also known as ‘Zonnekus Mansion’ (‘the property’) by no later than 31 May 2019;

2. Should the occupiers fail to vacate the property by 31 May 2019, the Sheriff within whose jurisdiction the property is situated, shall evict the occupiers from the property by no later than 15 June 2019;

3. The costs of this application, including the costs of all postponements to date hereof, shall be costs in the liquidation of Zonnekus Mansion (Pty) Ltd.

BOZALEK J

For the Applicant	*:*	*Adv R Van Rooyen*
As Instructed by	*:*	*Edward Nathan Sonnenbergs* *Ref: Ms A Spies*
For a Respondent	*:*	*Mr G van der Merwe (In Person)*