Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38683/2020

1.	REPORTABLE: YES / NO
2.	OF INTEREST TO OTHER JUDGES: YES/NO
3.	REVISED.

....
DATE SIGNATURE

In the matter between:

JENNIFER ANN KNUTTEL N.O. First Applicant
(In her capacity as a duly appointed and authorised trustee of the Knuttel Family Trust, IT 3753/96)

SARAH ANN KNUTTEL N.O. Second Applicant
(In her capacity as a duly appointed and authorised trustee of the Knuttel Family Trust, IT 3753/96)

FRANZ JOSEF KNUTTEL N.O. Third Applicant
(In his capacity as a duly appointed and authorised trustee of the Knuttel Family Trust, IT 3753/96)

and

ZOBEIDA BHANA First Respondent

(ID Number […])

FAZEL BHANA	Second Respondent
THE UNLAWFUL OCCUPIERS OF UNIT […]	Third Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Fourth Respondent

***Summary**: Practice – procedure – Regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation requiring signature by deponent to declaration in presence of a commissioner of oaths – deponent infected with COVID19 unable to sign Founding Affidavit in presence of commissioner of oaths –Held, signature appended to Founding Affidavit during WhatsApp video call between deponent and commissioner of oaths, together with ancillary precautionary measures testified to, constituted substantial compliance with Regulation 3(1)*

*Eviction – occupier of property relying on enrichment lien against application in terms of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE Act") for eviction – Held, (**obiter** paragraphs [9] and [10] following **Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd 1997 (1) SA 646(C) at 654D**), due to the principle that lienholder not entitled to make use of property subject to lien during exercise of lien, general defences to applications for eviction in terms of PIE Act upholding a right to occupy property not generally available to a **retentor** who exercises a **ius retentionis** founded on enrichment over immovable property*

*Possession – immovable property – right to occupy property pending transfer conferred on purchaser in terms of Agreement Of Sale – purchaser informally granting right of pre-transfer occupation of property to non-party to Agreement Of Sale – Held (paragraph [100] following **De Jager v Harris N.O. and The Master 1957 (1) SA 171 (SWA) at 175C-E**), no independent possessory right in favour of informal occupier of property – informal occupier's occupation of property derived from overarching right of possession conferred on purchaser in terms of Agreement Of Sale - informal occupier's occupation of the property not a relinquishment of the purchaser's possession*

*Contract – term – applicability to non-party to a contract - term of Agreement Of Sale requiring written consent of seller to purchaser for any improvements to property pending transfer – Held (paragraphs [97], [98], [99], [100], [101], [102] and [103] following **African Films Trust, Ltd. v. Reid and Dunye 1918 WLD 22 at 23-24** and **De Jager v Harris N.O. and The Master (supra)**), term also applicable to non-party informal occupier of property – non-party informal occupier of property effecting improvements to property without written consent of seller – purchaser defaulting and seller cancelling Agreement Of Sale and claiming re-delivery of property from purchaser – Held (paragraph [102] following **Palabora Mining Co Ltd v Coetzer 1993 (3) SA 306 (T) at 309F-H**), enrichment lien set up by non-party informal occupier of property foiled by non-compliance with term of Agreement Of Sale requiring written consent of seller to improvements*

*Enrichment lien – exercise of – possession required of a lienholder known as **possessio naturalis** – comprises both a physical and a mental element – in order to preserve the security, the required elements of **detentio** and **animus possidendi** must exist simultaneously from moment of exercise of lien – cancellation of Agreement Of Sale by seller due to purchaser's breach– purchaser initially resisting claim for re-delivery of property by exercise of enrichment lien – one month later in Answering Affidavit to application for eviction, purchaser switching hats as lienholder with informal occupier of property – Held (paragraph [87]), element of **animus possidendi** over property absent from non-party occupier's claim to lien for the initial period when purchaser was exercising same lien – Held accordingly (paragraphs [92] and [93]), enrichment lien exercised by informal occupier of property could not have been in existence at time seller was entitled to vacant possession of property*

***Ius retentionis** – cannot exist in isolation – serves as a reinforcement of an underlying claim – Held (paragraph [107]), no right of retention of property can exist in the absence of proof of such underlying claim*

In answer to an application brought by the applicants, who are trustees of the Knuttel Family Trust ("the trust"), in terms of the Prevention Of Illegal Eviction From And Unlawful Occupation Of Land Act,19 of 1998 (the PIE Act") for the eviction of the first, second and third respondents from an immovable property that the trust had sold to the First Respondent, the first, second and third respondents submitted in limine that the applicants' Founding Affidavit did not conform to Regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation, which requires the deponent to have signed the Founding Affidavit in the presence of the Commissioner of Oaths.

At the time of deposing to the Founding Affidavit, the deponent was infected with COVID19, which made it impossible for her to sign the Founding Affidavit in the presence of the Commissioner of Oaths. The applicants' attorney had arranged for the deponent to sign the Founding Affidavit during a WhatsApp video call with the Commissioner of Oaths. The applicants' attorney gave a first-hand account in an Affidavit of the measures taken by him and the deponent to satisfy the Commissioner of Oaths that the counterpart in the WhatsApp video call was the deponent.

Held, that the steps taken to satisfy the Commissioner of Oaths as to the identity of the deponent, together with all the other precautionary measures testified to, constituted substantial compliance with Regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation.

Turning to the merits, the First Respondent had taken occupation of the property sold to her by the trust pending transfer thereof into her name. The Agreement Of Sale forbade improvements to the property pending transfer into the First Respondent's name, unless consented to in writing by the trustees of the trust.

To the knowledge of the trustees, the First Respondent purchaser of the property, who lived in another property in the same complex as that sold to her by the trust, informally allowed her son, the Second Respondent, to occupy the property.

During the course of his informal occupation of the property, the Second Respondent, without him or his mother the First Respondent obtaining the prior written consent of the trustees, effected certain improvements to the property, allegedly with the oral consent of the trustees to the Second Respondent.

When the trustees at a later stage cancelled the Agreement Of Sale due to the First Respondent's material breaches thereof, the First Respondent resisted the trustees' accompanying demand for return of vacant possession of the property, inter alia on the basis of an enrichment lien for the cost of the improvements, which the First Respondent claimed had been effected at her expense.

Later, however, in the Answering Affidavit in opposition to the urgent application brought by the trustees for the eviction of all parties occupying the property, the First Respondent switched hats as lienholder with the Second Respondent, who then alleged that it was he who had effected the improvements to the property at his cost.

The Second Respondent informal occupier of the property sought to avoid the requirement of written consent of the trustees to the improvements by claiming that the contractual embargo on improvements to the property without their written consent did not extend to him as a non-party to the Agreement Of Sale. He then also relied on the oral consent that he alleged the trustees had given him for the improvements.

There was a lack of any satisfactory evidence to substantiate the cost of the improvements to the Second Respondent and the level of utility thereof to the trust. The evidence was also duplicitous as to whether the cost of the improvements had been incurred by the First Respondent or the Second Respondent.

*Held (**obiter**), notwithstanding the trust's resort to the PIE Act as a mechanism for claiming eviction of all occupiers from the property, due to the principle that a lienholder is not entitled to make use of the property subject to the lien during the exercise of the lien, the general defences available to eviction applications in terms of the PIE Act were not available to the Second Respondent as a **retentor** exercising a right of retention founded on enrichment (paragraph [104]).*

Held further, that the informal right to occupy the property that was granted by the First Respondent to the Second Respondent did not confer an independent possessory right on the Second Respondent, whose occupation of the property remained subject to the overarching possessory right afforded to the First Respondent in the Agreement Of Sale, which right the First Respondent did not relinquish through allowing the Second Respondent to informally occupy the property.

Accordingly held, the effecting of the improvements to the property without the required written consent of the trustees as prescribed by the Agreement Of Sale, which would have been inimical to the exercise of an enrichment lien in respect of the improvements by the First Respondent, was equally inimical to the exercise of the same lien by the Second Respondent (paragraph [105]).

*Held further, the initial claim to the lien by the First Respondent had the effect of depriving the Second Respondent of the necessary **animus possidendi** required to*

*accompany his **detentio** of the property at the crucial moment when the trust seller became entitled to vacant possession thereof. This absence of **animus possidendi** ie. the act of possessing the property as an expression of an intention to exercise an enrichment lien, was eclipsed by the First Respondent's exercise of the same lien at the moment when the seller trust became entitled to vacant possession of the property. Held accordingly, there was no evidence of a lien exercised by the Second Respondent.*

Held, finally, a right of retention of property serves as reinforcement of an underlying claim of which there was no satisfactory evidence by the Second Respondent. Held accordingly, the right of retention claimed by the Second Respondent existed in isolation unaccompanied by the required proof of an underlying claim to sustain the right (paragraph [107]).

Application for eviction upheld.

JUDGMENT

KATZEW, AJ:

INTRODUCTION

[1] This is an application by the applicants in their capacities as trustees in a trust for eviction of the First Respondent, and through her the Second Respondent and his Family, from a property belonging to the trust, in terms of the Prevention Of Illegal Eviction From And Unlawful Occupation Of Land Act, 19 of 1998 ("**the Act**").

[2] By way of introduction, the relief sought in the **Notice Of Motion** was formulated by the applicants at a time when the First Respondent was

contending for a right to occupy the property belonging to the trust, *inter alia* by virtue of an alleged extant agreement of sale of the property to her by the applicants, which included certain provisions for her to occupy the property ahead of transfer thereof into her name.

[3] It is not in dispute that during this period of agreed pre transfer occupation of the property by the First Respondent, she occupied the property through her son the Second Respondent and his Family, with the knowledge of the applicants.

[4] The application for eviction was premised on the basis of the First Respondent's refusal to acknowledge the validity of two notices to her, firstly of the applicants' cancellation of the agreement of sale of the property to her, and secondly, of the applicants' demand for vacant possession thereof, that were both given before the application was launched.

[5] In the midst of this dispute surrounding the validity of the cancellation of the agreement of sale and of the concomitant right of the applicants to be provided with vacant possession of the property, the applicants were obliged to resort to **the Act** in order to secure vacant possession of the property via the eviction therefrom of the First

Respondent, and through her, the Second Respondent and his Family.

[6] Subsequent to the filing of all the competing papers in the application, and some three and a half months after the cancellation of the agreement of sale, the First Respondent, in her and the Second Respondent's counsels' heads of argument, acknowledged for the first time that the cancellation of the agreement of sale of the property to her by the applicants was lawful. This concession had the effect of eclipsing the allegation of an extant agreement of sale of the property as a basis for the First Respondent's resistance to the applicants' claim for vacant possession thereof.

[7] This concession notwithstanding, the First Respondent did not back down on her refusal to provide vacant possession of the property to the applicants. The reason herefor is that she has at all material times since the delivery of the **Answering Affidavit** identified with the Second Respondent's contention that he holds an enrichment lien over the property for the cost occasioned to him of alterations and improvements that he claims to have effected to the property, allegedly with the oral consent of the applicants. In one of the anomalies of the application, the First Respondent had previously

contended for the same lien, but in her name, between notice of cancellation of the Agreement Of Sale and the delivery of the **Answering Affidavit**.

[8] The matter accordingly distils to an application for eviction from the property of the First Respondent, and through her the Second Respondent and his Family, which the First Respondent and the Second Respondent now contest on the basis of a right of retention (*ius retentionis*) in favour of the Second Respondent arising out of the alleged unjust enrichment of the applicants by the cost occasioned to the Second Respondent of effecting the improvements to the property and of the alleged increase in value of the property as a result of the improvements.

[9] Despite the applicants' resort to the **Act** as a procedural mechanism for the eviction from the property of the First Respondent, and through her the Second Respondent and his Family, the principles relating to eviction claims are not applicable *in casu*. If the First Respondent and the Second Respondent fail to discharge the onus resting on them to prove the enrichment lien set up by the Second Respondent as a basis for denying vacant possession of the property to the applicants, there will be no other issues on the merits that will

influence the decision of the Court to grant the eviction orders as sought in the Notice Of Motion.

[10] Neither for that matter have the First Respondent and the Second Respondent proffered any meaningful defences in terms of the **Act** to the application for the First Respondent's, and through her the Second Respondent's and his Family's, eviction from the property.

[10.1] It is common cause that the First Respondent lives with her Family in other premises in the same complex as the property, and therefore does not require the property for her own accommodation.

[10.2] In paragraph 83 of the **Answering Affidavit**, the Second Respondent confines the inconvenience that would be posed to him and his Family by eviction from the property to the December 2020 holiday period, which has already passed.

[10.3] Although the First Respondent's and the Second Respondent's counsel conclude their heads in paragraph 85 by pointing out that the applicants do not explain anywhere or argue why it would be just and equitable for the Court to

order the eviction from the property of the First Respondent, and through her the Second Respondent and his Family, the argument was not seriously pursued, and neither is there any scope for pursuit of such an argument.

[10.4] A further consideration is that while a lienholder is entitled to retain possession of the property as security for his claim against the owner of the property, he is not entitled to make use of the property during the exercise of the lien (see in this regard ***Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd***[1]).

[10.5] This has the result that the Second Respondent is not entitled to set up a right of occupation of the property during the exercise of his alleged enrichment lien.

[10.6] This issue has been neutralized *in casu* by agreement between the parties in a Court Order referred to later on in the judgment for the First Respondent, and through her the Second Respondent and his Family, pending final disposal of the application, to remain in occupation of the property on certain terms and conditions as set out in the order.

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[1] 1997 (1) SA 646 (C) at 654D

[11] There are two ancillary issues raised by the First Respondent and the Second Respondent in the application. The pursuit of these issues, after the First Respondent's concession of the primary relief sought in paragraph 2 of the Notice Of Motion that the agreement of sale was lawfully cancelled by the applicants prior to the launch of this application, is anomalous to say the least. However, the First Respondent and the Second Respondent have chosen not to abandon these issues, even after the First Respondent had conceded the primary relief in the Notice Of Motion, with the result that the Court is required to consider them. The issues are as follows:

[11.1] whether the applicants have duly authorised these proceedings; and

[11.2] whether there was substantial compliance with the requirements for the commissioning of the oath to the **Founding Affidavit**.

[12] The following are sub-issues under the issue of the alleged lien in favour of the Second Respondent:

[12.1] Given that a right of retention can never exist in isolation, but always serves as reinforcement of an underlying claim, has

the Second Respondent tendered satisfactory evidence of an underlying enrichment action against the applicants?

[12.2] Is the Second Respondent as a non-party to the agreement of sale of the property between the applicants and the First Respondent bound by the clause therein (of which the Second Respondent was aware at all material times) prohibiting alterations to the property during the pre-transfer occupation of the property without the written consent of the applicants?

BACKGROUND FACTS

[13] The background facts to the application are that the applicants, trustees in the Knuttel Family Trust, sold Portion 31 of Erf […] Houghton Estate Township, Registration Division I.R. Province of Gauteng Measuring 494 square metres Held under Deed of Transfer T32153/1998 ("the Property") to the First Respondent in terms of an Agreement Of Sale dated 30th January 2020. The conventional description of the Property is […], Houghton Estate, Johannesburg.

[14] In terms of certain provisions of the Agreement Of Sale, the First Respondent took occupation of the Property pending transfer into her

name. It is not in dispute that the applicants were at all material times aware that the First Respondent occupies the Property through her son, the Second Respondent, and his Family.

[15] The evidence deposed to by the Second Respondent in the **Answering Affidavit**, and confirmed by the First Respondent in a **Confirmatory Affidavit**, indicates that the Second Respondent and his Family's occupation of the Property through the First Respondent was a private arrangement between the First Respondent and the Second Respondent. The arrangement never assumed any formal contractual status. Until novation of the relevant terms of the Agreement Of Sale by the order of the Honourable Dippenaar, AJ which is referred to in more detail later on in the judgment, The First Respondent remained the occupier of the Property in terms of the Agreement Of Sale and exclusively liable for payment of occupational rent to the applicants and other monthly expenses relating to the Property to the Homeowners Association of the complex wherein the Property is situate.

[16] Accordingly, despite the Second Respondent's physical occupation of the Property with his Family through the First Respondent, there was never any direct contractual nexus between the applicants and the

Second Respondent. (Much was made hereof in argument, especially in relation to whether the restriction in clause 3 of the Agreement Of Sale on the right of the First Respondent to effect improvements to the Property unless authorised in writing by the applicants, extended to the non-party Second Respondent.)

[17] The occupation of the Property by the First Respondent on this basis endured for a period of exactly 9 months before the applicants cancelled the Agreement Of Sale on 30th October 2020 due to un-remedied breaches by the First Respondent. Pursuant to the notice of cancellation, the applicants demanded from the First Respondent to be provided with vacant occupation of the Property by 5th November 2020.

[18] In response to the notice of cancellation of the Agreement Of Sale and the notice to provide vacant occupation of the Property to the applicants by 5th November 2020, the First Respondent's attorney wrote to the applicants' attorney advising that the First Respondent would not be providing vacant occupation of the Property to the applicants on 5th November 2020 as demanded, or at all, for the following two reasons:

[18.1] the Agreement Of Sale was never lawfully cancelled; and

[18.2] the First Respondent has an enrichment lien over the Property in lieu of the cost to her of improvements she had effected to the Property, which had considerably enhanced the value of thereof.

[19] As a result of this recalcitrant approach adopted by the First Respondent to the notice of cancellation of the Agreement Of Sale and to the notice to provide vacant occupation of the Property to the applicants by 5th November 2020, on 24th November 2020 the applicants launched an *ex parte* application to the Court for leave to initiate eviction proceedings against the First Respondent and the Second Respondent in terms of the **Act**. On the same day, namely 24th November 2020, the Honourable Wright, J granted the *ex parte* application and made the following order:

*"1. The form and contents of the notice in terms of Section 4(2) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998, which is annexed to the applicants' ex parte Notice of Motion as Annexure **"XA"** ("the Notice") is authorised.*

2. The applicants are authorised and directed to serve the

Notice together with a copy of this order on the respondents at the addresses set out in the Notice and in accordance with the provisions of rule 4(1) of the Uniform Rules of Court.

3. Costs of this application will be costs in the cause."

[20] Armed with this order, the applicants pursued the application for the eviction of the First Respondent and the Second Respondent from the Property on an urgent basis. Within little more than two weeks from date of authorisation, the application for eviction was set down for hearing on the urgent roll of 15th December 2020 before the Honourable Dippenaar, AJ.

[21] By this stage, the full set of competing papers in the application had been filed.

[22] The urgency in the matter must have been defused by agreement between the applicants and the First Respondent and the Second Respondent because, without pronouncing on any aspect of the application including whether it was indeed urgent, the Honourable Dippenaar, AJ postponed the application as per the following order:

"1. The application is postponed sine die and will be set down in due course on the opposed motion roll;

2. Pending final disposal of the application or until such other time as otherwise ordered by the Court:

2.1 the first and second respondents shall not effect any further improvements and/or renovations and/or alterations and/or additions to the Property without the written consent of the applicants;

2.2 the first and second respondents shall maintain the Property in its current condition;

2.3 the first and second respondents shall jointly and severally the one paying the other to be absolved, make payment of the levies due to the home owners association as well as all consumption charges relating to the property within 7 days of presentation by the applicants of the applicable vouchers and/or invoices evidencing the levies and consumption charges;

3. Pending the hearing of the application the first and second respondents shall jointly and severally the one paying the other to be absolved, make monthly payments of R35 000,00 to the applicants, the first payment to be made on or before the 1st day of each succeeding month, it being recorded that the applicants accept the payments without prejudice to its rights;

4. The applicants shall deliver their heads of argument by no

later than 25 January 2021;

5. The first and second respondents' heads of argument shall be delivered by no later than 5 February 2021;

6. The costs of the hearing of 15 December are reserved."

[23] Pursuant to this order, the applicants and the First Respondent and the Second Respondent exchanged heads of argument with competing submissions on the following defences raised by the First Respondent and the Second Respondent in the **Answering Affidavit**:

[23.1] The application was not urgent when it came before the urgent Court.

[23.2] The applicants in their capacities as trustees of the Knuttel Family Trust did not authorise the institution of the proceedings.

[23.3] The **Founding Affidavit** was not signed by the deponent in the presence of the Commissioner Of Oaths, which is in conflict with the Regulations Governing the Administering of an Oath or Affirmation.

[23.4] The Agreement Of Sale was not lawfully terminated in terms of its cancellation provisions due to an omission by the applicants to deliver a notice to the First Respondent in terms of clause 11 of the Agreement Of Sale calling upon the First Respondent to remedy her breach of the Agreement Of Sale under pain of cancellation.

[23.5] With the oral consent of the applicants, the Second Respondent had effected improvements to the Property at a cost to him of R1 265 000.00 (significantly it was no longer the First Respondent who had effected the improvements to the Property, as had initially been indicated in the First Respondent's attorney's letter written in response to the applicants' demand to the First Respondent to be provided with vacant occupation of the Property by 5th November 2020 – more will be said hereon later on in the judgment), which improvements have also considerably enhanced the value of the Property, and which have accordingly conferred an enrichment lien over the Property on the Second Respondent (once again the change of lienholder needs to be emphasized) pending compensation by the applicants to the Second Respondent for their enrichment at his expense.

[24] Urgency remains an issue only to the extent of the costs of the day in the urgent Court on 15th December 2020.

[25] It is the view of the Court that the replacement of the unsigned **Confirmatory Affidavit** that was before the Court on 22nd April 2021 with the signed version thereof on 29th April 2021, overcame the only point of real substance in the defence raised by the First Respondent and the Second Respondent that the applicants as trustees had not authorised the institution of the proceedings.

[25.1] On 29th April 2021 I received a copy of the signed **Confirmatory Affidavit** that reflected that the Third Applicant had signed the **Confirmatory Affidavit** on 13th December 2020, which was two days before the matter came before the Honourable Dippenaar, AJ in the urgent Court.

[25.2] The signed **Confirmatory Affidavit** was delivered to me by hand under cover of a letter from the applicants' attorney confirming that the attorney for the First Respondent and the Second Respondent had been copied in on the letter, together with the signed **Confirmatory Affidavit**.

[25.3] In the view of the Court, the receipt of the signed **Confirmatory Affidavit** by the Third Applicant resolved the defence of alleged lack of authority of the Knuttel Family Trust to have instituted these proceedings.

[25.4] Although not expressly stated in the **Confirmatory Affidavit**, the Third Applicant by way thereof clearly associated himself with the application and ratified the institution of the proceedings.

[25.5] The First Respondent's effective consent to the relief sought in paragraph 2 of the Notice Of Motion is at any event completely at odds with any objection by the First Respondent and the Second Respondent, via the same Attorney, to the validity of the authorization of the proceedings.

[26] As already stated, by the time of the hearing of the matter, the defence that the applicants had not lawfully cancelled the Agreement Of Sale on 30th October 2020 had been abandoned by the First Respondent in paragraph 5.3 of the **First And Second Respondent's Heads Of Argument** dated 24th February 2021.

[27] Before the commencement of argument at the hearing of the matter on 22nd April 2021 Mr. Hollander, who appeared with Mr. Hoffman on behalf of the First Respondent and the Second Respondent, confirmed to the Court that the defence to the application had been reduced to the following three issues:

[27.1] the authority of the applicants to have instituted the proceedings;

[27.2] whether the **Founding Affidavit** complies with the Regulations Governing the Administering of an Oath or Affirmation; and

[27.3] whether the Second Respondent has an enrichment lien over the Property in lieu of the cost to him of improvements effected by him to the Property, which have also considerably enhanced the value of thereof.

[28] As already pointed out, the Court regards the delivery of the signed **Confirmatory Affidavit** by the Third Applicant after the hearing as being dispositive of the defence referred to in paragraph [23.2] above that the applicants in their capacities as trustees of the Knuttel Family Trust had not authorised the institution of these proceedings.(This is

apart from the anomalous persistence by the First Respondent and the Second Respondent with formal objections through the same Attorney simultaneous with a concession by the First Respondent to the primary relief sought in the Notice Of Motion.)

[29] There are accordingly only two defences left for the Court to consider, namely the question whether the extraordinary steps taken for the commissioning of the oath of the deponent to the **Founding Affidavit**, who was infected with the COVID19 virus at the time, constituted substantial compliance with the requirements for the commissioning of oaths, and whether the Second Respondent has an enrichment lien over the Property which lawfully defied the applicants' right to vacant occupation of the Property on 5th November 2020, when this was demanded by the applicants from the First Respondent.

WAS THERE SUBSTANTIAL COMPLIANCE WITH THE REQUIREMENTS FOR THE COMMISSIONING OF THE FOUNDING AFFIDAVIT?

[30] This is essentially a point *in limine* by the First Respondent and the Second Respondent, the nub of which is that the husk of the

application in the form of the **Founding Affidavit** ought to be disregarded by the Court, due to an irregularity that occurred in the deposition thereto.

[31] The ultimate objective of the point was never clarified to the Court.

[31.1] The statement in paragraph 33 of the **First And Second Respondent's Heads Of Argument** that "It is settled law that an applicant must stand or fall by its founding affidavit." alludes to the requirement that an applicant's case must be made out in the founding affidavit.

[31.2] It does not necessarily follow that a case will fail because of an impinged founding affidavit.

[31.3] There may be cases where all the evidence in a founding affidavit is common cause, and the Court looks only to the answering affidavit to resolve the issues in the case.

[31.4] The fact of the impingement of a founding affidavit will then only be relevant to the requirement in Uniform Rule Of Court 6(1) that every notice of motion must be supported by a founding affidavit, and the procedural consequences that

would follow the impingement of the founding affidavit.

[32] In this regard, it is important to note that by the time of commencement of argument in the matter on 22nd April 2021 (and from as far back as 24th February 2021), the applicants' cause of action, namely cancellation of the Agreement Of Sale giving rise to a right to demand re-delivery of the Property via the eviction orders claimed in the **Notice Of Motion**, was no longer in dispute.

[33] Indeed, the applicants were left with nothing more to prove on the merits, and the burden of proof and the evidentiary burden had both shifted to the First Respondent and the Second Respondent to prove that, notwithstanding the lawfulness of the applicants' demand to the First Respondent to be provided with vacant possession of the Property, the First Respondent is entitled to retain possession of the Property through the Second Respondent by virtue of an enrichment lien in favour of the Second Respondent for the amount spent by him on improvements to the Property, which have also considerably enhanced the value thereof and for which the applicants need to compensate him in order to obtain possession of the Property.

[34] Before entering the merits of this point *in limine*, the Court needs to

consider the practical effect thereof in the determination of the application, which may have a bearing on costs.

[35] The point was taken in the **Answering Affidavit** on 8th December 2020. At that juncture all five defences referred to in paragraphs [23.1] to [23.5] above were being pursued.

[36] The abandonment by the First Respondent on 24th February 2021 of the defence referred to in paragraph [23.4] above that the Agreement Of Sale had not been lawfully cancelled, left the applicants with an onus of proof only in relation to their authority to have instituted these proceedings. It is clear now that this onus was discharged as long ago as 13th December 2020, and certainly on 24th February 2021 when the First Respondent effectively conceded the relief sought in paragraph 2 of the Notice Of Motion.

[37] That left urgency (paragraph [23.1] above) and the assertion by the First Respondent and the Second Respondent of the enrichment lien in favour of the Second Respondent (paragraph [23.5] above) as the sole defences for the applicants to contend with, apart of course for the point *in limine* concerning the oath to the **Founding Affidavit**.

[38] As has already been pointed out, the defence to the urgency of the

application is only of relevance to the allocation of the reserved costs of the hearing of 15th December 2020 as per paragraph 6 of the order of the Honourable Dippenaar, AJ set out in paragraph [22] above.

[39] This leaves the defence of the assertion of the enrichment lien in favour of the Second Respondent as the only defence on the merits of the application.

[40] This defence is in the nature of a confession and avoidance by the First Respondent and the Second Respondent. If this were a trial, the First Respondent and the Second Respondent would have the duty to begin leading evidence.

[41] The effect hereof is that the contents of the **Founding Affidavit** are entirely dispensable for the purpose of deciding the merits of the application.

[42] The only conceivable remnant of relevance of the point *in limine* is its targeting of the **Founding Affidavit** for elimination as the peremptory support for the **Notice Of Motion** as contemplated by Uniform Rule Of Court 6(1), the only conceivable objective whereof could be the rendering of the **Notice Of Motion** as fatally defective for want of a founding affidavit to support it.

[43] I say “could be” instead of “is” the rendering of the **Notice Of Motion** as fatally defective, because nowhere do the First Respondent and the Second Respondent express this as their objective in the taking of the point *in limine.* In any event, as will be shown hereunder, such objective would be fundamentally flawed, because it overlooks the passage that this matter has taken through the Court.

[44] As already stated, before the delivery of the **Notice Of Motion** and **Founding Affidavit**, the application had commenced *ex parte* under the same case number for authorisation of a notice to be served on the First Respondent and the Second Respondent in terms of section 4(2) of **the Act**.

[45] The *ex parte* application, which was the forerunner to the **Notice Of Motion** in which *inter alia* the eviction of the First Respondent and the Second Respondent from the Property is claimed, is supported by a document described as **Founding Affidavit In The *Ex Parte* Application In Terms Of Section 4(2) Of The Prevention Of Illegal Eviction From And Unlawful Occupation Of Land Act, 19 Of 1998** deposed to by Trevor Simon, the attorney within the applicants’ attorney of record appointed to deal with the matter.

[46] The result is that if the **Founding Affidavit** attached to the **Notice Of Motion** were to be struck down pursuant to the point *in limine*, regard can be had to this earlier affidavit by Mr. Simon as the required supporting affidavit for the **Notice Of Motion** as contemplated by Uniform Rule Of Court 6(1). All the parties to the application are cited in Mr. Simon's affidavit, together with an overview of the relief sought by the applicants in the **Notice Of Motion**.

[47] Therefore, regardless of the outcome of the point *in limine*, the sole conceivable effect thereof, namely the rendering of the **Notice Of Motion** as fatally defective for want of a supporting affidavit as contemplated by Uniform Rule Of Court 6(1), cannot be achieved.

[48] It follows that in the context of these proceedings, the practical effect of the point *in limine* is conclusively considered to be moot. Indeed, from a purely procedural point of view, the Court is of the view that this point *in limine* should have been abandoned when the First Respondent conceded the lawful cancellation of the Agreement Of Sale. The First Respondent and the Second Respondent must have realized at that point that, but for the authorization of the proceedings by the applicants, there was very little, if anything at all, of the contents of the **Founding Affidavit** in dispute. They should have also

realized that the effective concession of the primary relief sought in paragraph 2 of the Notice Of Motion rendered any objection to the authority to launch the proceedings as anomalous and in fact an irregular step in the proceedings.

[49] Notwithstanding the futility of the point regarding the commissioning of the **Founding Affidavit**, the issues raised thereby are in general highly relevant amidst the raging COVID19 pandemic. The Court accordingly considers itself duty bound to make a reasoned finding on the formal status of the **Founding Affidavit**, despite the absence of any practical consequences thereof in the context of these proceedings.

[50] For a start, with the benefit of hindsight, the Court respectfully points out that suitable latitude in the administering of an oath for an affidavit or affirmation by a deponent infected with COVID19 ought to have been included in the Judge President's Consolidated Directive (18 September Consolidated Directive) In Re: Court Operations In The Pretoria And Johannesburg High Courts During The Extended Covid-19 National State Of Disaster. Paragraph 4.4.3 of this directive, which confers a discretion on a Judge who believes that hearing a matter in open Court poses risk of infection to resort to video conferencing for

the taking of evidence, clearly foretells of a preparedness to break with the requirement of person to person presence for the administering of an oath.

[51] Turning specifically to the requirements for oaths, section 10(1)(b) of the Justices Of The Peace And Commissioners Of Oaths Act 16 of 1963 provides for the Minister of Justice to make regulations prescribing the form and manner in which an oath or affirmation shall be administered and a solemn or attested declaration shall be taken, when not prescribed by any other law. The regulations that were made by the Minister in this regard are the Regulations Governing The Administration Of An Oath Or Affirmation, which were published under GN R1258 in GG3619 of 21st July 1972.

[52] Regulation 3(1) of these regulations states:

(Emphasis added)

> *"(1) The deponent shall sign the declaration in the presence of the commissioner of oaths."*

[53] Non-compliance with the regulations does not *per se* invalidate an affidavit. The Full Court in ***S v Munn***[2] confirmed at 734H that the

[2] 1973 (3) SA 736 (NCD)

regulations are directory only and that non-compliance with the regulations would not invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent's signature to an affidavit.

[54] The Full Court in ***S v Munn*** (*supra*) at 737F-H held that the purpose of obtaining the deponent's signature to an affidavit is primarily to obtain irrefutable evidence that the relevant deposition was indeed sworn to.

[55] In a separate **Affidavit** the applicants' attorney, Mr. Trevor Simon, gave a detailed explanation of the steps taken by him in cooperation with a named commissioner of oaths to ensure substantial compliance with the requirement in regulation 3(1) that the deponent sign the **Founding Affidavit** in the presence of the Commissioner Of Oaths, which, as already stated, was physically impossible due to the infection of the deponent, the First Applicant, at the time with the COVID19 virus.

[56] The argument on behalf of the First Respondent and the Second Respondent did not touch on the steps taken by Mr. Simon, the Commissioner Of Oaths and the First Applicant to ensure substantial

compliance with the required formality that the **Founding Affidavit** be signed in the presence of the Commissioner Of Oaths.

[57] Although not challenged in argument, suffice to say that Mr. Simon confirmed in the **Affidavit** that he E-mailed the unsigned draft **Founding Affidavit** to the deponent, the First Applicant, with instructions to read, initial and sign it before E-mailing it back to him. He then engaged the services of a commissioner of oaths who, in Mr. Simon's presence in the office of the commissioner, spoke to the First Applicant in a video WhatsApp call. Having identified the First Applicant as the person she professed to be, the commissioner then posed the usual questions, before she administered the oath in the conventional way, except that the deponent's initialling and signature had been appended before the link-up.

[58] The main contentions of the First Respondent and the Second Respondent appear to be that there was no confirmatory affidavit by the Commissioner Of Oaths and that there was no case made out in the founding papers for the Court to develop the law towards the relaxation of the requirement of physical person to person presence for the administration of an oath by a commissioner to a deponent.

[59] There is nothing in Mr. Simon's **Affidavit** that strikes as being hearsay requiring of independent confirmation by the Commissioner Of Oaths.

[60] A finding by this Court that there was substantial compliance with the requirement for person to person presence in the administration of the oath for the **Founding Affidavit** would not constitute development of the law. The case of ***S v Munn*** (*supra*) found as far back as 1973 that the requirement of person to person presence between a commissioner and a deponent is not peremptory, and can be relaxed upon proof on the facts of substantial compliance with the requirement.

[61] The evidence of Mr. Simon in the **Affidavit** constitutes the required standard of irrefutable proof that the **Founding Affidavit** was sworn to by the First Applicant in the prescribed manner, albeit not in the physical presence of the Commissioner Of Oaths.

[62] It needs to be pointed out that judicial recognition has been given to the relaxation of the requirement of person to person presence for the administering of an oath in ***Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perle***[3] where

[3] 2017 (1) SA 236 (GJ)

the Honourable Satchwell, J allowed the use of video link to lead evidence in a civil matter from witnesses who were abroad. The learned Judge administered the oath to them virtually before their evidence was led.

[63] The point arose pertinently for decision in Canada in the matter of ***Rabbat et al v Nadon et al***[4] wherein the Superior Court of Justice – Ontario in paragraph [4] of the Judgment permitted the virtual commissioning of affidavits "given the restrictions in place due to COVID-19". The order given by the Court reads as follows:

> *"Any affidavit for use on the motion may be sworn electronically or by e-mail using any reasonable method by which the person commissioning the affidavit can be satisfied of the identity of the deponent, that the deponent has read and understood the contents of the affidavit and is solemnly swearing or affirming as the case may be. The deponent and the person commissioning the affidavit need not be physically in each other's presence."*

[64] The Court is accordingly of the view that there was substantial compliance with regulation 3(1) of the Regulations Governing The Administration Of An Oath Or Affirmation as published in GN R1258 in GG3619 of 21st July 1972 in the commissioning of the **Founding**

4 2020 ONS 2933

Affidavit.

HAVE THE FIRST RESPONDENT AND THE SECOND RESPONDENT DISCHARGED THE BURDEN OF PROVING THAT THE SECOND RESPONDENT HAS AN ENRICHMENT LIEN OVER THE PROPERTY?

[65] The relevant events begin on 30th October 2020 when the applicants through their attorney Fluxmans in writing cancelled the Agreement Of Sale of the Property that had been concluded with the First Respondent exactly nine months earlier on 30th January 2020.

[66] Included in the Notice Of Cancellation dated 30th October 2020 was a notice to the First Respondent to provide vacant occupation of the Property to the applicants by no later than Thursday 5th November 2020.

[67] Instead of providing vacant occupation of the Property in answer to the applicants' demand, the First Respondent instructed her attorney SWVG INC. to write to the applicants' attorney as follows on 6th November 2020:

"Dear Sirs

RE: ZOBEIDA BHANA // THE KNUTTEL FAMILY TRUST (REG NO. IT3753/1996)

1. We have been instructed by Zobeida Bhana ("our client") who has presented us with correspondence addressed by you to our client as well as correspondence from her erstwhile attorneys.

2. We have not managed to comprehensively consult with our client but will be doing so early next week, whereafter a detailed response to your correspondence will be forthcoming.

3. At this juncture our client and his family will not be vacating the premises and insofar as the content of your various correspondence is concerned, our failure to deal with same at this juncture is not to be construed as an admission as to the correctness thereof.

4. You can however assure your client that a comprehensive communication will be sent to yourselves early next week."

[68] The First Respondent then instructed her attorney to elaborate *inter*

alia as follows on 10th November 2020:

"1. …

2. …

3. Your client would no doubt have instructed you that during our client's occupation of the property, with your client's knowledge, consent and agreement our client made vast improvements to the property, which improvements totalled approximately R1 265 000,00. This included inter alia, waterproofing, repairing the pool, fixing damaged windows and shutters and renovating the kitchen.

4. Given the vast improvements to the property, our client holds a lien over same in the amount that the work attended to by our client has improved the property and increased its value. We have engaged with a property valuator to determine the value of the property which we should have in hand shortly.

5. Notwithstanding the above, our client would prefer to take a pragmatic approach, rather than litigating which will take months if not years to finalise and as your client would be well advised.

6. Accordingly, our client on a without prejudice basis proposes as follows:-

6.1 Our client will make payment of any and all arrears in regard to occupational rent as well as the occupational rental due for December 2019 and January 2021, within three days of signature of an agreement;

6.2 Without admission that your client has properly terminated the sale of property agreement, same is to be reinstated and our client afforded until 31 January 2021 to procure the guarantees for the balance of the purchase price.

7. The above is to be recorded, should your client agree to same, in a short addendum and sent to us for consideration.

8. We are also mandated to meet with you and your client should the need arise and in order to expedite the conclusion of the addendum.

9. We await to hear from you and in the interim all our client's rights are reserved."

[69] As at 10th November 2020, five days after the notice to provide vacant occupation of the Property to the applicants, the First Respondent was therefore disputing the validity of the applicants' cancellation of the Agreement Of Sale of the Property, and was in addition asserting an enrichment lien for improvements to the Property at a cost to her of R1 265 000,00, which she further contended had increased the value of the Property.

[70] The First Respondent relied on these contentions on 10th November 2020 for her refusal to provide vacant occupation of the Property to the applicants.

[71] There is no reference at all to the Second Respondent in this correspondence, and nowhere does the First Respondent's attorney profess to be acting for the Second Respondent as well as for the First Respondent.

[72] The only oblique reference to someone other than the First Respondent appears in paragraph 3 of the First Respondent's attorney's first letter, which I extract for emphasis as follows:

> *"At this juncture our client and <u>his</u> family will not be vacating the premises …"*

[73] The *"our client"* extracted therein clearly refers to the already identified Zobeida Bhana in paragraph 1 of the same letter, leaving "*his*" the only misleading word in paragraph 3. The reference thereto is however neutralised by the use of the word *"her"* in paragraph 1 of the same letter.

[74] There was no explanation by the attorney or anyone else on behalf of the Second Respondent in any of the papers before the Court to disturb the inference that the attorney was only acting for the First Respondent in these exchanges of correspondence.

[75] In this regard, the Court has relied on a strictly literal interpretation of letters written by an attorney. There is no reason for the Court to infer otherwise than that the attorney was acting at all material times in the correspondence for the client he professed to be instructed by, namely the First Respondent.

[76] In a **Confirmatory Affidavit** deposed to by the First Respondent on 8th December 2020, which was little more than a month after she was required to provide vacant occupation of the Property to the applicants, she confirmed the following allegation in the **Answering Affidavit** deposed to by her son the Second Respondent also on 8th

December 2020:

> *"17.2 My mother* [the First Respondent] *did not receive this letter* [the Notice Of Cancellation dated 30th October 2020 which included the notice to provide vacant occupation of the property to the Applicants] *and* [the Agreement Of Sale] *was not properly cancelled by the Applicants, whether as contemplated by* [the Agreement Of Sale] *or at all."*

[77] The first time the First Respondent relented and conceded the validity of the cancellation of the Agreement Of Sale by the applicants was in the **First And Second Respondent's Heads Of Argument** signed by junior counsel for the First Respondent and the Second Respondent, Mr Hoffman, on 24th February 2021. The following appears in paragraph 5.3 thereof:

> *"5.3 That the agreement of sale was not properly cancelled. The Respondents do not persist with this ground of opposition."*

[78] The legal effect of this concession, made more than three months after the notice of cancellation on 30th October 2020 and the concomitant demand by the applicants to be provided with vacant

occupation of the Property by 5th November 2020, is that as at 6 November 2020 when the First Respondent's attorney first wrote to the applicants' attorney, the only possible answer that the First Respondent could have had to the applicants' demand to be provided with vacant occupation of the Property by 5th November 2020 was the enrichment lien that she set up in her attorney's letter dated 10th November 2020.

[79] But then the First Respondent in her **Confirmatory Affidavit** dated 8th December 2020 forfeits this defence too, by aligning herself with the following contention of the Second Respondent in paragraph 4.5 of the **Answering Affidavit**:

> *"4.5 … I* [the Second Respondent] *hold a lien over the Property, in that I have expended an amount of approximately R1 216 575,00 effecting improvements and repairs in and to the Property to the knowledge of the Applicants."*

[80] Although there follow ambivalent vacillations in the **Answering Affidavit** and in the **First And Second Respondent's Heads Of Argument** between the lien belonging to both the First Respondent and the Second Respondent (**Answering Affidavit** paragraphs 25, 72.4 and 74.1) (heads paragraphs 5.4 and 31.2), the First

Respondent and the Second Respondent finally settle on the lien being that of the Second Respondent (**Answering Affidavit** paragraphs 48.17 and 77.2.21) (heads, paragraphs 70.4 and 82.3). This approach was maintained by Mr Hollander, lead counsel for the First Respondent and the Second Respondent, throughout the course of his argument at the hearing.

[81] The result hereof is that when the First Respondent's attorney addressed letters to the applicants' attorney on 6th and 10th November 2020 contesting the validity of the applicants' demand to the First Respondent to be provided with vacant occupation of the Property by 5th November 2020, there was no merit in the attorney's contention on behalf of the First Respondent that she was entitled to resist the demand by virtue of the cancellation of the Agreement Of Sale of the Property by the applicants being defective and also due to an enrichment lien asserted by the First Respondent in lieu of the cost to her of improvements effected by her to the Property, that had also increased its value.

[82] On the common cause evidence of the attorney's letters of 6th and 10th November 2020, on the First Respondent's and the Second Respondent's *ipse dixit* in their testimonies in the **Answering**

Affidavit, and on the First Respondent's acceptance in the First Respondent's and the Second Respondent's counsels' heads that the cancellation of the Agreement Of Sale on 30th October 2020 was lawful, these reasons simply never existed at the time, and neither could they have ever existed.

[83] The best-case scenario for the Second Respondent is his assumption of the enrichment lien from the First Respondent about seven weeks later in the **Answering Affidavit**, which by the furthest stretch of the imagination cannot possibly constitute an answer to a lawful claim by the applicants to the First Respondent for vacant occupation of the Property made seven weeks earlier.

[84] Indeed, by virtue of this finding by the Court that the First Respondent had no legal basis for defying the applicants' notice to provide vacant occupation of the Property on 5th November 2020, the Second Respondent's right to occupy the Property through the First Respondent similarly expired at the same time.

[85] It is therefore clear that as from 30th October 2020, the Second Respondent could not claim that he and his family

"occupy the Property pursuant to an extant agreement

> *between the Trust and my mother* [the First Respondent]*."*Per the Second Respondent in paragraph 46.3 of the **Answering Affidavit** deposed to over a month later on 8th December 2020*.*

What's more, this evidence by the Second Respondent, confirmed by the First Respondent, is also in direct conflict with the First Respondent's subsequent concession of the lawfulness of the cancellation of the Agreement Of Sale with effect from 30th October 2020.

[86] It is equally clear that on 10th November 2020, which was 5 (five) days post the expiry of the legally valid deadline for the First Respondent to provide vacant occupation of the Property to the applicants, the only lien set up over the Property was that of the First Respondent in her attorney's letter dated 10th November 2020, which, to the extent that it may have been valid, was extinguished by express abandonment of the lien by the First Respondent in the **Answering Affidavit** on 8th December 2020.

[87] That being so, and accepting that for the purpose of this application the Court must determine the competing rights and obligations of the parties as at 5th November 2020 when the applicants lawfully

demanded vacant possession of the Property from the First Respondent, the Court finds that the First Respondent did not have the right to resist the applicants' demand to be provided with vacant occupation of the Property by 5th November 2020. In addition, the Court finds that on the evidence of the letters written by the attorney then professing to act only for the First Respondent, the Second Respondent played no role in the resistance of the applicants' demand for vacant possession of the Property at that stage.

[88] As at 5th November 2020, without notice of any *ius retentionis* specifically by the Second Respondent setting up an enrichment lien for the cost of the improvements to the Property which had purportedly also enhanced the value thereof, the Second Respondent and his Family were legally obliged to vacate the Property under the demand to the First Respondent for vacant occupation of the Property by 5th November 2020.

[89] Assuming the validity of the enrichment lien set up for the first time by the Second Respondent on 8th December 2020 in the **Answering Affidavit**, which this Court is not required to decide but upon which the Court will express certain views, possession of the Property by the Second Respondent as at 30th October 2020 or 5th November

2020 was not enough to ground his alleged enrichment lien – possession required by a lienholder is known as *possessio naturalis* which comprises both a physical and a mental element, the latter being an intention to hold the property as against the owner's claim to preserve as security for a claim against the owner. In ***De Jager v Harris N.O. and The Master*** [5] Hofmeyr, J at 178H-179A cites Innes, CJ in ***Scholtz v Faifer***,[6] as follows in support of this requirement of possession for a lienholder:

> *"A highly authoritative expression of the law on this point is to be found in the Full Bench decision of Scholtz v Faifer … at pp. 246, where Innes, C.J., with the concurrence of the two other Judges is reported to have said the following:*
>
> *"The possession which must be proved (by a lienholder) is not possession in the ordinary sense of the term – that is possession by a man who holds pro domino, and to assert his rights as owner. The whole question is discussed by Voet (41.2.3), and he calls that kind of possession "natural possession", as distinguished from juridical possession …*
>
> *But to this natural possession, as to all possession, two elements are essential, one physical, and the other mental. First there must be the physical control or occupation – the*

[5] 1957 (1) SA 171 (SWA)

[6] 1910 T.P.D. 243

> *detentio of the thing; and there must be the animus possidendi – the intention of holding and exercising that possession".*"

[90] At some point in the hiatus of one month between the First Respondent's notice of setting up a lien on 10th November 2020 and 8th December 2020 when the **Answering Affidavit** was delivered, the First Respondent and the Second Respondent evidently switched hats as lienholder.

[91] Without any evidence of when the switch actually took place, the earliest date in evidence, which is 8th December 2020, will be accepted. By this time the applicants had already been entitled to vacant occupation of the Property as against both the First Respondent and the Second Respondent for over a month from 5th November 2020.

[92] There is no evidence by or on behalf of the Second Respondent of an intention by him to hold the Property and exercise that possession for the assertion of the enrichment lien between 5th November 2020 and 8th December 2020 (when he expressed that intention for the first time).

[93] For this reason alone, the applicants' right to the vacant occupation of the Property, which they were entitled to from as far back as 5th November 2020, remained undisturbed by the Second Respondent's assumption of the role of lienholder for the first time on 8th December 2020 in the **Answering Affidavit**.

[94] This conclusion effectively disposes of the defence referred to in paragraph [23.5] above whether the Second Respondent has a valid enrichment lien over the Property as against the applicants.

[95] The applicants' counsel Mr Mÿburgh in his argument against the validity of the lien set up by the First Respondent and the Second Respondent in favour of the Second Respondent, focussed on the following extract from clause 3 of the Agreement Of Sale:

> *"… in the event that the* [First Respondent] *wishes to make any alterations or renovations to any of the improvements on the property or construct and install any additional improvements on the property, the* [First Respondent] *shall first obtain the* [applicants'] *written consent thereto …"*

[96] It is not disputed that the Second Respondent was aware of this clause in the Agreement Of Sale.

[97] Mr Mÿburgh contends that because the First Respondent occupied and exercised her possessory right to the Property through the Second Respondent and his Family, the First Respondent had no independent rights of occupation or possession of the Property. The possessory right he is asserting to the Property in the purported exercise of the enrichment lien claimed by him is in fact the First Respondent's right, which is inter alia governed by clause 3 of the Agreement Of Sale, which limited the right to effect improvements to the Property to authorization in writing by the applicants. *Ergo*, the improvements were effected in defiance of the requirement of the written consent in clause 3 of the Agreement Of Sale, from which it follows that no lien can be asserted in respect thereof. For this submission, Mr Mÿburgh relied on the following extract from the judgment of the Honourable Mahomed, J in ***Palabora Mining Co Ltd v Coetzer***:[7]

> *"There is a third difficulty with the respondent's defence to the claim for ejectment, based on a right of retention. It arises from clause 7 of the lease which provides:*
>
> *"The lessee shall not make any alterations or additions to the premises … without the prior written permission of the lessor … Any alterations or additions hereinbefore*

[7] 1993 (3) SA 306 (T) at 309F-H

mentioned will become the property of the lessor, without payment or compensation to the lessee."

It is not contended by the respondent that he received any such "written permission" from the applicant to effect the "alterations or additions to the premises". No right of retention can, in these circumstances, be successfully invoked."

[98] The Court agrees with this submission, and is fortified in doing so by the Second Respondent's awareness at all material times of the requirement for the First Respondent to obtain the written consent of the applicants for the effecting of any improvements to the Property prior to registration of transfer, although his awareness is not crucial to the submission. However, the Second Respondent's awareness of the requirement of the applicants' written consent for the improvements to the Property is certainly compelling, and supplies an additional basis for holding the Second Respondent to the requirement of the written consent for improvements. This is manifest from the following extract from the judgment of Ward, J in ***African Films Trust, Ltd. v. Reid and Dunye***:[8]

"In this matter the real question at issue is whether Dunye knew of the terms of the contract between Reid and the

[8] 1918 WLD 22 at 23-24

> *African Films Trust, Ltd. . Now on the facts disclosed in the affidavits I am unable to come to the conclusion that he did know. It is true he has been a cinematograph operator for a number of years, and that he went with Reid to Hopson, the applicants' manager in order to obtain films, and that he was then and there informed that he would have to get all his films from the applicants' company. At the same time the particulars of Reid's contract with the Films Trust may not have been known to him although the fact of Reid's deliberate breach of his agreement makes the circumstances suspicious. There may be a collusive arrangement between Reid and Dunye, but on the affidavits I am not prepared to say that fraud has been proved. The interdict will be discharged and the applicant company left to its remedy by way of action. …"*

[99] It follows herefrom that a third party with knowledge of the terms of a contract between two other parties, may be held bound by those terms.

[100] *A fortiori* this principle would be applicable to a case like the present where the terms whereto the third party Second Respondent is held bound actually govern his occupation of the Property. In this sense the position of the Second Respondent and his Family is not unlike the position of the nominal tenant in ***De Jager v Harris N.O. and The Master*** (*supra*) where the lessor in the nominal lease arrangement

with the occupier was held to retain all the possessory rights to the property through the third party to whom he had handed over the certain limited occupational rights. The relevant extract from the judgment of Hofmeyer, J is reported as follows at page 175C-E:

> *"The applicant in his further affidavit amplified his allegations regarding his possession of the property. He states that he took possession of the property upon the date of the deed of sale and never relinquished such possession. Since he could not occupy the property personally he let the property as stated above and for the purposes of retaining his right of retention over it. The property is still occupied by the said tenant at the nominal rental mentioned and is still cared for by the tenant."*

[101] These facts resonate with the arrangement described by the Second Respondent (and confirmed by the First Respondent) as follows in the **Answering Affidavit**:

> *"46.3 We are not in "unlawful occupation" of the Property. We occupy the Property pursuant to an extant agreement between the Trust and* [the First Respondent].
>
> *46.4 The Trust gave the First Respondent and me the express and explicit permission to occupy the*

Property."

[102] The First Respondent being in the position of the primary occupier and possessor of the Property in terms of the Agreement Of Sale while it was extant with the overarching right to a *ius retentionis* in respect thereof (coupled of course with her initial assertion of the right) arising out of any alterations and additions that would have been lawfully carried out, the Second Respondent and his Family's limited occupation rights through the First Respondent cannot possibly extend beyond those of the First Respondent. That would include the limitation imposed on the right of occupation by clause 3 of the Agreement Of Sale that improvements could only be effected with the written consent of the applicants. Following the *ratio* of the judgment of the Honourable Mahomed, J in ***Palabora Mining Co Ltd v Coetzer*** (*supra*), any right of retention that the Second Respondent may have had in respect of improvements effected by him to the Property would have been defeated by the provisions of clause 3 of the Agreement Of Sale.

[103] It goes without saying that the finding that the First Respondent possessed the Property through the Second Respondent subject entirely to the terms of the First Respondent's possessory rights as

contained in the Agreement Of Sale leaves no scope for the Second Respondent's contention that he received oral consent for the improvements to the Property effected by him, which would of course be dependant for enforceability on independent occupation and possessory rights outside of the Agreement Of Sale, which simply do not exist.

[104] As an alternative argument to the oral consent, and on the assumption that the Second Respondent was at the relevant time bound by the requirement of consent in writing for the improvements effected to the Property, the First Respondent's and the Second Respondent's counsel submit in their heads of argument that the principle enunciated by the Honourable Mohamed, J in ***Palabora Mining Co Ltd v Coetzer*** (*supra*) that an occupier of property who effects alterations or additions thereto in contravention of a term of the contract for his occupation forfeits his right to retention, is not part of our law. For this submission they rely on paragraphs [32] to [36] of the judgment in ***Business Aviation Corporation (Pty) Ltd And Another v Rand Airport Holdings (Pty) Ltd***[9] where the Honourable Mahomed, J in ***Palabora Mining Co Ltd v Coetzer*** (*supra*) is criticised for having found that the provisions of Placaeten of 1658

[9] 2006 (6) SA 605 (SCA)

and 1659 that lessees of rural property have no right of retention to the leased property apply with equal force to lessees of urban property. This adverse finding in no way impinged on the *ratio* by the Honourable Mohamed, J, found elsewhere in the judgment of ***Palabora Mining Co Ltd v Coetzer*** (*supra*), that a party who effects alterations or additions to a property in contravention of an express term in a contract prohibiting such conduct forfeits his right to retention of the property.

[105] Counsel for the First Respondent and the Second Respondent placed great store on the judgment in ***Standard Kredietkorporasie Bpk v Jot Motors (Edms) Bpk h/a Vaal Motors***,[10] for their submission that even a *mala fide* possessor is in certain instances entitled to exercise an enrichment lien. The facts of that case are, however, clearly distinguishable from those *in casu*. The party referred to as a *mala fide* possessor was a motor car repairer who successfully exercised a repairer's lien over the vehicle against the hire purchase owner of the vehicle with full knowledge that the hire purchase purchaser who had brought the car in for repairs had in the hire purchase agreement undertaken not to raise any lien against the hire purchase owner of the vehicle. The repairer's possession of the vehicle was independent

[10] 1986 (1) SA 223 (A)

of the possessory right conferred by the hire purchase agreement on the hire purchase purchaser and, notwithstanding the repairer's knowledge of the restriction imposed in the hire purchase agreement on the exercise of a lien by the hire purchase purchaser, the repairer was held entitled to raise his repairer's lien against the hire purchase seller. The repairer was not in breach of the contract in terms whereof he had acquired possession of the vehicle from the hire purchase purchaser, unlike the Second Respondent who was in breach of the terms of the Agreement Of Sale governing his occupation of the Property via the possessory right conferred in the Agreement Of Sale on the First Respondent, and also unlike the lessee in ***Palabora Mining Co Ltd v Coetzer*** (*supra*) who had similarly breached the lease which conferred the right of possession of the property therein on him.

[106] Despite these findings against the Second Respondent, it still needs to be considered whether he has tendered satisfactory evidence of an underlying enrichment action against the trust. For this he would need to show that he in fact effected useful or necessary improvements to the Property and furthermore that he was impoverished by the undertaking and that the applicants were correspondingly unjustly enriched thereby.

[107] It is re-emphasised that a right of retention can never exist in isolation, but always serves as reinforcement of an underlying claim. A perfunctory test of the Second Respondent's alleged claim against the trust reveals inherent vulnerabilities therein.

[108] Firstly, in a claim against the trust for compensation for the improvements, the Second Respondent would need to prove that he effected the improvements. In paragraph 19 of the **Answering Affidavit**, he states the following:

> *"19. I've spent approximately R1 216 575,00 effecting improvements and repairs to the Property, to the knowledge of the Applicants. I annex hereto an invoice from Golden Acre Renovations setting out the work done and the cost marked Annexure **"AA4"**.*

[109] Annexure **"AA4"** is an Invoice made out by Golden Acre Renovations to Z. Bhana, the First Respondent, and not to the Second Respondent.

[110] The payment date reflected on the Invoice is 17th June 2020. There is no evidence of payment of the amount due of R1 216 575,00, let alone of by whom the payment was made. Proof of impoverishment

of the lienholder is an element of a claim for unjust enrichment, which is missing from the **Answering Affidavit**.

[111] In paragraph 22 of the **Answering Affidavit** it is alleged that as a result of the improvements and repairs effected by the Second Respondent to the Property, the value of the Property has increased from R4 900 000,00 (i.e. the purchase price agreed to by the First Respondent for the Property) to R6 450 000,00, for which the Second Respondent relies on an unsworn statement described as XState Property Valuations annexed as **"AA6"** to the **Answering Affidavit**.

[112] Quite apart from the absence of any testimony under oath of the required level of expertise to satisfy the Court of the increase in the value of the Property as a result of the improvements claimed by the Second Respondent, the Second Respondent eclipses any possibility of proving an increase in value of the Property by the following statement made by him in paragraph 26.3 of the **Answering Affidavit**:

> *"26.3 Thirdly, even if my mother and I were evicted from the Property, there is no guarantee the Property would be sold, whether within a reasonable period or at all. The Property was on the market for*

> *approximately six months prior to my mother making an offer to purchase it."*

[113] An increase in value of a property unaccompanied by evidence of impoverishment of the party who has effected the improvements which have led to the alleged increase in value of the property is not a valid basis for the exercise of an enrichment lien. There is therefore no need for the Court to have regard to the unsworn evidence of the increase in value of the Property without proof of impoverishment of the Second Respondent via expenditure by him on the improvements, which, as already pointed out, is not to be found in the **Answering Affidavit** (see in this regard ***Rhoode v De Kock***[11]).

[114] Secondly, and most importantly, there is no evidence before the Court of a required standard of expertise to prove the level or levels of utility of the different species of improvements effected to the Property, without which the Court is unable to assess whether the nature of the various improvements effected to the Property indeed give rise to a valid claim for compensation for enrichment sufficient to ground the exercise of an enrichment lien (*vide* ***Rhoode v De Kock***[12]).

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[11] 2013 (3) SA 123 (SCA) at 127F-128A

[12] (*supra*) at 127F-128A

[115] The Court will therefore have no regard to the evidence of the Second Respondent tendered as proof of his potential claim against the applicants intended to underscore the enrichment lien claimed by him over the Property. The result is that the enrichment lien set up by the Second Respondent is in isolation and without any proof of an underlying claim for unjust enrichment to underscore the assertion of the lien.

COSTS

[116] In paragraphs 172 to 174 of the **Applicants' Heads Of Argument**, the applicants' counsel contends for a punitive costs order against the First Respondent, the Second Respondent and the Third Respondent. The difficulty for the applicants is that in the **Notice Of Motion**, the applicants only seek costs against the First Respondent in paragraph 6 thereof.

[117] The only questions left to decide therefore are the liability for the reserved costs of the day in the urgent Court on 15th December 2020 and the scale of the costs to be awarded against the First Respondent.

[118] There is no reason to deprive the applicants of their costs of the day

in the urgent Court on 15th December 2020. It is suggested by the First Respondent's and the Second Respondent's counsel in their heads of argument that all costs incurred until the applicants had properly authorised the initiation of the legal proceedings should be borne by the applicants.

[119] There is no merit in the suggestion. The facts demonstrate conclusively that the First Respondent should never have contested the cancellation of the Agreement Of Sale in the first place, which could have avoided the application altogether. This is particularly so in view of the fact that the First Respondent initially claimed the enrichment lien herself and then abandoned it about a month later, which of itself rendered the whole defence based on the enrichment lien as fruitless.

[120] An analysis of the facts of the case show clearly that the First Respondent raised two spurious defences in her attorney's letters of the 6th and 10th of November 2020 in order to defeat the applicants' right to vacant possession of the Property as demanded by them on 5th November 2020.

[121] This is an eminently suitable matter for the imposition of the highest

level of punitive costs on the First Respondent.

Accordingly, the following is ordered:

1) It is declared that the Agreement Of Sale that was concluded between the Knuttel Family Trust and the First Respondent on 30th January 2020 was validly cancelled by the Trust on 30th October 2020.

2) The First Respondent, the Second Respondent and the Third Respondent constituted by all persons who occupy […], Houghton Estate, Johannesburg ("the Property") through the Second Respondent, are evicted from the Property.

3) The First Respondent, the Second Respondent and the Third Respondent occupiers of the Property through the Second Respondent are ordered to vacate the Property by 30th September 2020.

4) If the First Respondent and the Second Respondent fail to pay any of the amounts provided for in paragraphs 2.3 and 3 of the Order of the Honourable Dippenaar, AJ on 15th December 2020 on due date, the eviction of the First Respondent, the Second Respondent and the Third Respondent occupants of the property through the Second Respondent from the Property is to operate forthwith.

5) Should the First Respondent, the Second Respondent and the Third Respondent occupiers of the Property through the Second Respondent fail to vacate the Property on or before 30th September 2021, or if the First Respondent and the Second Respondent fail to make the payments as per paragraphs 2.3 and 3 of the Order of the Honourable Dippenaar, AJ dated 15th December 2020 on due date, the Sheriff of the Court or his lawfully appointed Deputy are authorised and directed to evict the First Respondent, the Second Respondent and the Third Respondent occupiers of the Property through the Second Respondent forthwith.

6) The First Respondent is ordered to pay the costs of this application, including the reserved costs of the hearing on 15th December 2020, on the scale as between attorney and client.

S M KATZEW
Acting Judge of the High Court of South Africa

DATE OF JUDGMENT: 26th August 2021.

DATE OF HEARING: 22nd April 2021.

APPEARANCES:

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For First Respondent, Second Respondent and Third Respondent:	Mr L. Hollander with him Mr J. Hoffman
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