REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 3406/2022

REPORTABLE: NO OF INTEREST TO OTHER JUDGES: NO JUDGE KUNY 20 November 2022

In the matter between:

CRYSTAL BALL PROPERTIES 27 (PTY) LTD (Reg No. 2005/004960/07)	First Applicant
CRYSTAL BALL PROPERTIES 58 (PTY) LTD (Reg No. 2006/010620/07)	Second Applicant
and	
DZUNISANI ALDWORTH MBALATI N.O.	First Respondent
LINDOKUHLE CHARLENE MBALATI N.O.	Second Respondent
KEVIN KRISHENPAUL SARABJIET N.O.	Third Respondent
DZUNISANI ALDWORTH MBALATI	Fourth Respondent
THE UNLAWFUL OCCUPIERS OF 39 KILLARNEY ROAD, SANDHURST	Fifth Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Sixth Respondent

---

JUDGMENT

KUNY J

The applicants instituted proceedings on 17 February 2022 to evict the Genesis Trust (AGenesis@) and its beneficiaries from a property situated at 39 Killarney Road, Sandhurst (Athe property@). An upmarket residence designed, constructed and decorated in French Chateau style is situated on the property.

Genesis filed a counter-application (when delivering its answering affidavit) for an order directing the applicants to restore the electricity supply to the property.

The first and second applicant, respectively, are the registered owners of the Remaining Extent, Portion 2 and Portion 13, of Erf 28, Sandhurst Township, I.R., Gauteng. These erven comprise the property.

The first, second and third respondent are the trustees of Genesis. The fourth respondent, Dzunisani Aldworth Mbalati, occupies the residence on the property with his wife and two children. They are Genesis' beneficiaries.

On 12 January 2021 the applicants sold the property to Genesis. The agreement was concluded in terms of an offer to purchase that had been given by Genesis and which was accepted by the applicants and signed by the parties on the above date.

The purchase price was R35 million. The offer to purchase required Genesis to pay a deposit of R1 million by 15 January 2021, and a further R2 million by 30 March 2021. The balance of the purchase price of R32 million was payable by 30 June 2021.

Genesis duly paid R1 million on 18 January 2021 and R2 million on 12 March 2021. However, it failed by the agreed date to pay or put up a guarantee for the payment of the balance of the purchase price and transfer costs. On 27 July 2021 the applicants and Genesis concluded a variation agreement in terms of which the date for the payment of the balance of the purchase price was extended to 31 August 2021. Occupational rent, initially set at R100 000 per month, was increased to R120 000 per month.

The following is common cause between the parties:

The conclusion of the agreement for the sale of the property (Athe offer to purchase@) and the variation agreement, extending the date for the payment of the balance of the purchase price.

The fourth respondent and his family took occupation of the property on 20 January 2021.

Genesis made payment of the initial deposit of R1 million and the subsequent amount of R2 million. However, it breached the sale

agreement by failing to provide for the payment of the balance of the purchase price and transfer costs.

Genesis failed to comply with the applicants' demands to rectify its breach. On 25 November 2022 the applicant cancelled the offer to purchase and demanded that Genesis vacate the property by 31 December 2021.

Genesis refused to vacate, claiming to exercise a lien over the property as security for the payment of monies expended on repairs and improvements made to the property after it took occupation.

Genesis has instituted action against the applicants in this court under case number 2022/14827 for the recovery of monies that it expended, allegedly in improving the property. This action is pending.

INTERLOCUTORIES

The third respondent was an independent trustee of Genesis. He filed an answering affidavit on 25 May 2022. In response, Genesis brought an application to strike out his affidavit. This application was settled at the commencement of the hearing on the basis that the third respondent withdrew his affidavit and Genesis withdrew its application to strike out. It was agreed that the parties would pay their own costs. The third respondent has since resigned as a trustee of Genesis.

After filing its answering affidavit, Genesis filed two further affidavits. The first of these, filed on 19 April 2022 (as part of Genesis' reply in its counter-application), was admitted by agreement between the parties. However, the admission of a second supplementary affidavit filed on 21 October 2022, was opposed. During argument, I ruled against the admission of this affidavit. Consequently, the conditional affidavit filed in response to the above supplementary affidavit fell away. I reserved the issue of the costs.

The allegation that the respondents were taken by surprise by the applicants' approach in resisting the lien in the main application cannot be accepted. Genesis indicated in correspondence as early as 12 November 2021 that it intended to rely upon an enrichment lien. The applicants asked for evidence to support the alleged expenditure. However, this was not furnished. The existence of a lien was denied by the applicants in their founding papers and it was also stated that security would be provided in substitution of the alleged lien.

In my view Genesis did not adequately explain the reasons for the late filing of the supplementary affidavit. The affidavit raised an enormous amount of new matter that was not strictly germane to the issues to be decided in the application. I considered the filing of the further affidavit to be prejudicial to the applicants and I accordingly ruled that it should not be admitted. In my view, Genesis and the fourth respondent should pay the costs of this abortive application.

CORRESPONDENCE AFTER GENESIS TOOK OCCUPATION

On 19 January 2021 at 09:47, under the subject APermissions@, Tasha Rossen, the estate agent who facilitated the sale to Genesis, sent the following email to the applicant's representatives (Katy Leo and Chris Holcombe):

Dear Katy and Chris,

Trust you are well and surviving lockdown.

I have been asked by Mr Mbalati to ask for your permission to do some improvements to the home prior to transfer occurring.

In my opinion it will only enhance the home. These improvements will be at his own expense.

1. *Pool fence/net to cover the pool - he has two little boys under the age of five.*

2. *The roof has several sections whereby rain/water is entering - and the stucco is showing all the leaks as is the ceiling. He would like to repair the roof. (I'll send photos on whatsapp)*

3. *He would like to sort out all the damp issues on most of the outer walls - which then means that he will also have to paint the house.*

4. *He would like to redo the stucco in the lower section of the house to lighten up all the dark brown sections.*

5. *He would like to remove all dead or diseased trees. Several conifers are showing signs of beetle infestation which slowly kills them, some of the olive trees have died and so have 2 beechwood trees at the front entrance.*

6. *He would like to landscape the garden and add roses, lavender and other plants as many of the original plants have died.*

7. *He would like to do an extensive upgrade to the security systems. This means more cameras, electric fencing, beams, alarms. Upgrade of guard house.*

8. *Some of the corbels have fallen off so he would like to repair the facade of the house.*

Certain improvements/repairs will be for your cost as they are part of the Offer to Purchase

They have had to repair gas pipes as they were broken and they would not have been able to cook - once I get the receipt, I will forward that to you.

a. *The security roller door upstairs is not working so he would like that to be repaired/ if they decide to upgrade the roller shutter that will be at his own expense but then will need permission.*

b. *Gas compliance and an electrical compliance is for your expense as per the contract.*

Many of the lights in the garden are not working and the electrical cables are cut.

I can arrange to get the compliances done if you would like me to.

Kind regards

Tasha Rossen

In response to the above email on the same date at 12:22 Ms Leo replied as follows:

Hi Tasha,

We don't have any problem with this at all as long as they understand that should the sale/transfer fall through they may be asked to remove some of the stuff, but I would think that would only be the pool fencing.

Please pass on the receipt for the gas repair once received.

I have asked Raphael to get the garden lights sorted, no idea how these have been cut.

Regarding the compliance checks, did you arrange these last time when the lovely PVM was supposed to be purchasing, I'm sure we have had them done before and would like to use the same people? QS electrical?

Kind regards

Katy

On 21 January 2021 at 12:05, Rossen sent an email message to the fourth respondent recording the following:

Dear Aldworth

Trust you are well.

I have spoken to the seller and the sellers representatives.

They are happy to allow you to do any of the changes that we detailed in mail format.
However there is one proviso that if for any reason the sale does not occur, that you will undertake to make good on any of the changes that are not acceptable to them.

I have assured them that the sale will happen. I doubt you will be spending money on an upgrade if you do not intend to purchase the property.

Please send me an undertaking by email that you will be willing to make good should you not go ahead with the purchase.

Kind regards

Tasha Rossen

On 21 January 2021 at 12:08 the fourth respondent responded to the above e-mail (copying in Leo and Holcombe) as follows:

HiTasha

My ethos in life is to keep all my commitments, I do commit that in the unlikely event of the sale not going through I will do good.

At 10:11 (United Kingdom time) on 21 January 2021, Holcombe replied as follows to the above email:

Thank you sir.

Please do also reach out to us if you require anything further.

Having taken instructions from the applicants, Leo responded as follows at 12:44 on 21 January 2021:

Dear Sir,

I hope you and your family are safe and well and enjoying the house. Chris and I both work for the owner and are available should you require any assistance.

I have listed below the works which we have been requested for you to carry out and have noted next to them regarding reinstatement should things not go to plan, which we very much hope they do!

1. *Pool fence/net to cover the pool -* ***reinstatement required***

2. *Repairs to roof -* ***no reinstatement required***

3. *Damp repairs and painting house in white -* ***no reinstatement required***

4. *Redo the stucco in the lower section of the house in white -* ***reinstatement required***

5. *Painting doors and skirting in black -* ***reinstatement required***

6. *Remove all dead or diseased trees. Which include several conifers that are showing signs of beetle infestation, some of the olive trees have died the 2 beechwood trees at the front entrance -* ***no reinstatement required***

7. *landscape the garden and add roses, lavender and other plants -* ***reinstatement required***

8. *Upgrade to the security systems. More cameras, electric fencing, beams, alarms. -* ***reinstatement required***

9. *Upgrade of guard house.* ***reinstatement required***

10. *Repair to the facade of the house. -* ***no reinstatement required***

Wishing you well and thank you for your previous email.

[emphasis added]

On 21 January 2021 at 12:49, the fourth respondent replied as follows to Leo (copying Rossen and Holcombe):

> *Thank you Katy, note all in order.*
> *We will certainly shout should we need help.*

THE OFFER TO PURCHASE

Clause 4.1 of the offer to purchase provides as follows:

4 VOETSTOOTS

4.1 The Seller warrants that as at the date of acceptance of this offer there are no latent defects in the Property known to the Seller and that save for this, the Property is sold voetstoots. The Property is sold subject to all conditions and servitudes mentioned or referred to in its Title Deed and to all such other conditions and servitudes which may be applicable. If the Property has been erroneously described in the Schedule of Particulars, the intention of the parties is to describe the Property as set out in the Title Deed.

Clause 7.1 of the offer to purchase provided that the applicants would give Genesis occupation of the Property on 15 January 2021. Clause 7.4 of the offer to purchase provided as follows:

> If the date of occupation does not coincide with the date of Transfer the party in occupation whilst the Property is registered in the name of the other party shall in consideration therefor, and for the period of such occupancy pay to the Conveyancers, in addition to the costs of electricity, water, sanitation and any other municipal services consumed at or on the Property, occupational interests of *R100 000 (One Hundred Thousand Rand* - payable as follows monthly in advance

from the date of occupation. **No tenancy shall be created by the Trust taking occupation prior to transfer and the Trust shall immediately vacate the property upon termination or cancellation of the agreement** (ie. the purchaser shall not be regarded as a tenant and shall vacate the property if for whatever reason the agreement fails or is terminated and transfer cannot be effected). **The Purchaser shall not be entitled to make any alterations or additions to the Property prior to Transfer**. [emphasis added]

Genesis never at any stage contended that there had been any latent defects in the property that they were unaware of when they took occupation. On the contrary, in paragraph 14 of its answering affidavit Genesis states:

14. From our viewings of the Property, it became apparent that the Property, including the buildings on it, was significantly run down. Many aspects of the Property had been severely neglected, including *inter alia* the following:

14.1 the roof of the main house was leaking. The leaks were causing continuous and significant water damage to the ceiling of the house, as well as damp problems;

14.2 the perimeter walls of the Property were showing visible signs of damp and mould. This was not only unsightly, but also a health hazard;

14.3 the facade of the house was damaged, and in some sections falling apart. It was also coloured very darkly in some areas, which in turn darkened lighting of the interior of the main house;

14.4 the security system was outdated and, in some instances, inoperable;

14.5 the garden had been severely neglected. Many of the plants in the garden, including large trees, had died. Some plants also showed signs of beetle infestation and other disease;

14.6 the swimming pool did not have a cover. This posed a safety risk. The pool pump was also non-functional, and the pool was derelict overall.

The applicants contend that it was on this basis that Genesis made a reduced offer and the reason that the applicants were prepared to accept less than their asking price for the property.

DEFENCES TO EVICTION

Genesis raised two defences to the application for eviction:

> it is was alleged that on or about 30 January 2022 the fourth respondent, acting on behalf of Genesis, concluded an oral lease with Rossen, acting on the applicants' behalf, and this entitled Genesis and it beneficiaries to remain in occupation of the property.
>
> Genesis held an enrichment lien over the property for substantial maintenance work and improvements that it had carried out after occupation commenced.

The defence in relation to the applicants' lack of *locus standi* and the counter-application were abandoned during the course of argument.

Alleged oral lease

The fourth respondent, in the affidavit deposed to by him on behalf of Genesis, alleges that at a meeting held at the end of January 2022, Rossen made a proposal that he rent the property on a month-to-month basis. He states that he immediately accepted this proposal.

In response to these allegations, the applicants state that Rossen met with the fourth respondent on 30 January 2022 only to discuss a potential new offer on the property. They allege the meeting took place after the deed of sale had been cancelled and for the purposes of discussing arrangement to place the house back on the market. The applicants strenuously deny that Rossen concluded a lease with the fourth respondent or indeed, that she had any authority or mandate to do so. The mandate given to Pam Golding was annexed to the reply affidavit as evidence of the fact that no mandate was given to Rossen to conclude a lease over the property on the applicants' behalf. Rossen also confirms this version in a confirmatory affidavit annexed to the applicants' replying affidavit.

The applicants' version is overwhelmingly supported by all the surrounding facts and circumstances. Genesis' version in relation to the conclusion of an oral lease is improbable. I do not consider that a real, genuine or *bona fide* dispute of fact is raised.

In my view however, it is not necessary to deal with this aspect because upon

learning of the alleged oral lease, after Genesis' filed its answering affidavit, the attorneys for the applicants (without any admission that a lease had been concluded), gave two months' notice to Genesis to cancel the alleged lease. In the circumstances, even if a lease had been concluded, it had been cancelled. Consequently, the alleged lease could not serve as a basis for the continued occupation of the property.

Counsel for Genesis conceded at the start of his argument that even if Genesis could establish an enrichment lien, this did not entitle the fourth respondent and his family to the use and enjoyment of the property.[1] Genesis' right of retention was limited to exercising control over the property as security for the payment of the amounts alleged to be due in respect of its enrichment claim. Save for the alleged oral lease, it was conceded that there was no other basis on which the fourth respondent and his family could continue to reside on the property.

In light of this concession, it was conceded that if an oral lease could not be established, the counter-application for an order compelling the restoration of the electricity supply could not succeed.

---

1 Guman NO v Ansari & others [2011] JOL 27841 (GSJ), Gouws and Another NNO v BBH Petroleum (Pty) Ltd 2020 (4) SA 203 (GP)

Alleged enrichment lien

In principle, a lien holder does not acquire an independent cause of action against the owner of property over which such lien is asserted. The lien is dependent on the existence of an underlying enrichment claim.[2] It is said to constitute no more than a defence against the owners' *re vindicatio*. [3]

The court has a discretion to permit a lien holder's possession to be substituted with security for the payment of the alleged enrichment claim if successfully proven.[4]

In argument of the matter, counsel for Genesis contended that the term of the offer to purchase prohibiting the purchaser from making alterations or additions to the property prior to transfer, was invalid. His argument was that it amounted to a forfeiture of the buyers right to be compensated for necessary expenses and improvements and that this was not permitted in terms of section 15(1)(b) of the Alienation of Land Act 68 of 1981 (AThe Act@).

In order to put Genesis' argument in context it is necessary to refer to the following provisions of the Act:

---

2 Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander 1996 (4) SA 19 (A), Sandton Square Finance (Pty) Ltd v Vigliotti 1997 (1) SA 826 (W)

3 First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Services 2002 (4) SA 768 (CC), para 32

4 Sandton Square Finance (Pty) Ltd v Vigliotti (supra) at 831 B-D and 834 B-D, Pheiffer v Van Wyk and Others 2015 (5) SA 464 (SCA)

1 Definitions

(1) In this Act, unless the context otherwise indicates-

A**contract@**:

(a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two installments over a period exceeding one year 2;

(b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take;

'**deed of alienation**' means a document or documents under which land is alienated;

'**purchaser**', in Chapter II, means any person to whom land is alienated under a contract;

'**seller**' means, in Chapter II, any person who alienates land in terms of a contract or any other person to whom the obligation of that person to give transfer of land in terms of a contract has passed;

Section 15(1) under Chapter II of the Act provides:

s15 Invalidity of certain provisions

(1) Subject to the provisions of subsection (2), an agreement whereby-

(a) any person who acted on behalf of the seller in connection with the conclusion of a contract or the negotiations which preceded the conclusion of the contract, is appointed or deemed to have been appointed as the agent of the purchaser;

(b) a purchaser forfeits any claim in respect of-

(I) necessary expenditure he has incurred with or without the authority of the owner or seller of the land concerned, in regard to the preservation of the land or any improvement thereon;

(ii) any improvement which enhances the market value of the land and was effected by him

on the land with the express or implied consent of the said owner or seller;

(c) the liability of a seller to indemnify the purchaser against eviction is restricted or excluded;

(d) the purchaser binds himself in advance to agree to an assignment by the seller of his obligations in terms of a contract;

(e) a purchaser is obliged to accept a loan secured by a mortgage bond arranged on his behalf by the seller or his agent for payment of all the amounts owed by him in terms of the contract; or

(f) a purchaser, if he elects to accelerate the discharge of his obligations in terms of the contract, may not claim that transfer of the land shall be effected against payment of all amounts owing in terms of the contract, or any other agreement of like import, shall be of no force or effect.

Genesis' argument proceeded as follows:

A contract is specifically defined in the Act to be a deed of alienation under which land is sold against payment of an amount of money in more than two installments over a period exceeding one year (ie. a contract for the sale of land on installments).

Section 15(1) uses the generic term Aan agreement@, and properly interpreted is intended to apply to any deed of alienation as defined in the Act. Counsel for Genesis argued that this includes both contracts and deeds of alienation envisaged in section 2(1).

The offer to purchase in terms of which the property was sold to Genesis is therefore Aan agreement@ as envisaged in section 15(1)

and it is regulated by subsections (a) to (f).

The stipulation in clause 7.4 that alterations and additions are not permitted before transfer, falls foul of section 15(1)(b). It is contended that the stipulation amounts to a forfeiture of Genesis' claim for compensation and accordingly, is of no force and effect.

Genesis therefore, is not precluded from pursuing an enrichment claim to recover expenses incurred in maintaining and improving the property and its lien in this regard remains intact.

I cannot agree with the argument advanced on behalf of Genesis in relation to section 15(1). In my view, it fails to apply the cardinal rule of statutory interpretation that from the outset one considers the context in which the provision appears.[5] The term Aan agreement@ therefore must be interpreted in context, not only as it appears in section 15(1), but also in the context of the statute as a whole. The following observations are made in this regard:

Section 15 is in contained in Chapter II of the Act. This Chapter applies specifically to contracts as defined in the Act. It is settled law that headings to the sections in statutes may be brought into account in resolving any doubt raised in the text.[6]

---

5 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC) at para 90, Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 19, Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA) at para 15

6 S v Liberty Shipping & Forwarding (Pty) Ltd 1982 (4) SA 281 (D), p285

Section 15(1) applies to transactions between sellers and purchasers. These parties are defined in the Act, respectively, as any person who alienates land in terms of a contract and any person to whom land is alienated in terms of a contract.

Significantly, the word Aagreement@ is used in the Act only in the definition of contract in section 1, and then again only in section 15(1) and section 29A(7)(a).

It appears from the context of the Act that a deed of alienation can be construed to be a contract and *vice versa*, However, it does not appear that the term Aagreement@ is used anywhere in the Act to refer to a Adeed of alienation@.

In my view, interpreted in its context, the term Aan agreement@ in section 15(1), is intended to refer to an agreement concluded as part of, or pursuant to the conclusion of a contract (i.e. sale of land on installments). If the interpretation contended for by Genesis were correct, every agreement in terms of which land is purchased and sold, would be regulated by subsections 15(1)(a) - 15(1)(f). This plainly could not have been intended. In my view, it would lead to consequences that are not envisaged and could not have been intended by the framers of the statute.

The rational for the use of the term Aagreement@ is clear. It was intended to

ensure that sellers of land on installments could not avoid the effect of section 15(1) by relying on the fact that the contract itself does not contain the invalid term and by relying on an ancillary agreement, concluded for example by an exchange of correspondence, agreeing to such term.

In my view, a contextual analysis of section 15(1) leaves little doubt that subsections (a) to (f) are all provisions that apply only to contracts and not generally to all deed of alienation. Genesis' interpretation ignores the context. Having reached this conclusion, I find that section 15(1)(b) is not applicable to the offer to purchase.

There is also a fundamental non-sequitur in Genesis' argument. It does not follow that because section 15(1)(b) preserves a buyer's right to claim for necessary expenditure and improvements, a seller is therefore not entitled to stipulate in a deed of alienation that the buyer shall not make alterations and additions to the property before transfer takes place. A prohibition of this nature would amount to a drastic incursion into the freedom of parties to contract and would lead to insensible and unbusinesslike results. The logical conclusion to Genesis' argument, that a seller should only allow a buyer to occupy the property after transfer has taken place, in order to prevent alterations from being carried out before transfer, is far fetched and untenable.

In my view, the parties' contractual arrangements preclude Genesis from relying on an enrichment lien. Genesis was not permitted to make alterations and additions to the property before transfer. After taking occupation the

applicants permitted Genesis to carry out the work listed in email correspondence. Genesis agreed that it would bear the cost of the work and improvements and the permission was subject to a condition that reinstatement would take place in respect of certain of the listed items if the sale fell through.

Genesis argues that it agreed to carry the costs of the listed items on the basis that it envisaged becoming the owner of the property. It contends that the applicant should now bear these costs because the sale has been cancelled. This argument carries little sway.

A blanket undertaking was given to pay for the costs of the work permitted by the applicants. There was no agreement that the applicants would assume liability for the costs if the sale was not completed. The offer to purchase was cancelled as a result of Genesis' breach. Restitution of certain of the works was agreed upon. In my view, in these circumstances Genesis cannot be permitted to maintain a right to occupy of the property.

Contrary to the agreement that the work would be limited to the items listed in the correspondence, on 21 January 2022, Genesis proceeded to contract with Kim H, a firm of interior designers, to carry out extensive renovations to the interior and exterior of the property. Kim H, in turn, contracted with Blue Line Design CC to carry out the so called 'bricks and mortar' aspects of the project.

The works commenced on 22 February 2021. Genesis alleges that it expended R14 121 139,30 in respect of all the maintenance and renovation work that it carried out to the property. Over and above this, Genesis alleges that it spent approximately R13 million on furnishing and decorating the residence. It is demonstrated from Genesis' own account of the work and from the annexed quotations that the work commissioned by Genesis was far more extensive than the work that had been agreed to.

The applicants undertook an analysis and identified those items in the quotations furnished by Blue Line that they had consented to, that did not require reinstatement. They also identified work done that arguably was necessary to maintain the property. Without conceding Genesis' enrichment claim, the applicants delivered a payment guarantee for the amount of R733 701,37, in the event that Genesis is successful in its enrichment claim.

The applicants allege that they do not regard the refurbishment and renovations carried out by Genesis as an improvement to the property because they destroyed the French Chateau style of the house. They contend that they will incur substantial expenditure in restoring the house to its original style.

It has been held that an improvement lien will not be allowed where the owner would not have incurred a similar type of useful expense itself.[7] In this

---

7 *FHP Management (Pty) Ltd v Theron NO and Another* 2004 (3) SA 392 (C), at page 405 where the court referred to Scott 'Lien' in Joubert (ed) The Law of South Africa vol 15 1st re-issue (1999) in para 54 para 56

instance, it cannot be doubted that the applicants would, of their own accord, not have carried out the refurbishments undertaken by Genesis to the extent that these altered the character of the house. They elected to sell the house in the condition that it was when Genesis took occupation and have also emphasised the importance of the style of the house.

A summary of my findings are as follows:

Genesis breached the offer to purchase by failing to make payment of the balance of the purchase price and transfer costs.

The term of the offer to purchase that prohibited Genesis from effecting alterations and additions to the property prior to transfer, is valid and binding. This term was breached by Genesis.

Genesis undertook to bear the costs of all the repairs and the additions and alterations that were consented to. It also agreed to reinstate the property in respect of some of the items should the sale not be concluded. Genesis is bound by these undertakings.

Insofar as there may be an enrichment claim, it has been demonstrated in these proceedings that the security provided by the applicants adequately covers such claim, if it exists at all.

Carefully weighing up all the circumstances, I come to the conclusion that

Genesis has not established a right of retention over the property. Genesis did not contend that there were any issues in terms of the Prevention of Illegal Eviction Act, 19 of 1998 that prevented the grant of an eviction order against the fourth and fifth respondent. In my view, the defences raised by Genesis cannot succeed and the applicants have satisfied all the requirements for the grant of an eviction order.

The applicants argued that costs should follow the result and that these should be awarded on an attorney and client scale. They rely on clause 15.3 of offer to purchase as well as the conduct of the respondents in resisting their ejectment from the property. In my view, the clause in question does not compel the court to impose a costs order on a higher scale. It preserves the discretion of the court in relation to the award of costs. I propose in the circumstances to award costs on a party and party scale.

In the circumstances I grant the following order:

1 The first, second, fourth and fifth respondent's application date 21 October 2022 for leave to deliver further affidavits is dismissed.

2 An order is granted evicting the Genesis Trust (IT 1139/2017) and the fourth and fifth respondents from the immovable property situated at 39 Killarney Road, Sandhurst (Athe property@).

3 The above respondents are granted a period of 30 (thirty) calendar days within which to vacate the property after service of this order on the respondents' attorneys of record.

4 The first, second and fourth respondent are ordered to pay the costs of this application on a party and party scale, jointly and severally, the one paying the others to be absolved.

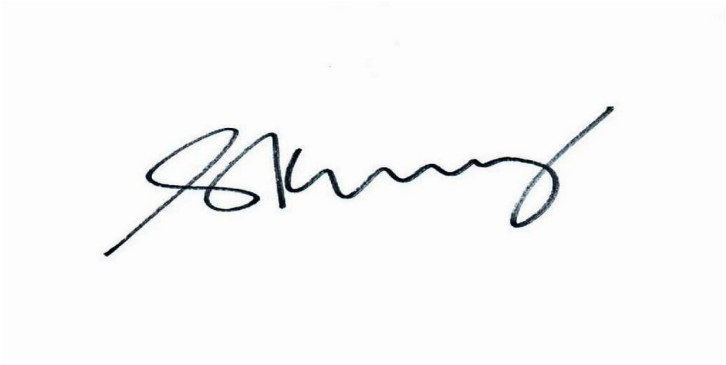
5 The aforesaid costs shall include the costs attendant upon:

5.1 The dismissal of the first, second, fourth and fifth respondents' application to admit further affidavits.

5.1 The filing of the applicants' conditional replying

affidavit dated 31 October 2022 and the qualifying fees of the expert Grant Fraser whose report was annexed thereto.

5.1 The employment of two counsel.



_____
JUDGE S KUNY

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 14 and 15 November 2022

Date of judgment: 20 November 2022

For the Applicants:

Adv PT Rood SC rood@group621.co.za and Adv E Kromhout, kromhout@law.co.za;

Instructed by Lowndes Dlamini Inc, allan@lowndes.co.za; allanpa@lowndes.co.za; greg@lowndes.co.za

For the first, second, fourth and fifth respondents:

Adv A Bester SC andybester@andybester.co.za and Adv R Bosman rossbosman@counsel.co.za;

Instructed by Fairbridges Wertheim Becker. graham.h@fwblaw.co.za

For the third respondent:

Adv C. B. Ellis Cbellis9@gmail.com;

Instructed by GMI Attorneys. RShamout@gminc.co.za