IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE

CASE NO: 21434/11

In the matter between:

MIKARDOW TRADING 19 (PTY) LIMITED
Applicant

and

THE OCCUPIERS: EISLEBEN BUSINESS PARK;
ERVEN 466 AND 467, PHILIPPI, WESTERN CAPE
Respondents

and

THE OCCUPIERS: EISLEBEN BUSINESS PARK;
ERVEN 466 AND 467. PHILIPPI, WESTER CAPE
Applicants

and

MIKARDOW TRADING 19 (PTY) LIMITED

First Respondent

EISLEBEN BUSINESS PARK (PTY) LIMITED

Second Respondent

THE CHAIRPERSON OR EISLEBEN BUSINESS PARK (PTY) LIMITED

Third Respondent

PHILIPPI DEVELOPMENT INITIATIVE

Fourth Respondent

CITY OF CAPE TOWN

Fifth Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Sixth Respondent

JUDGE	**:**	**P.A.L. GAMBLE**
FOR APPLICANT		
(In main application)	**:**	**Adv. E. Fagan SC and L. Wilkin**
INSTRUCTED BY	**:**	ZS Incorporated

FOR RESPONDENT

(In main application) : Adv. W. Vos and R. Garland
INSTRUCTED BY : M.S. Oosthuizen
FOR 2ND AND 3RD RESPONDENT : Adv. J. Muller SC and N. Traverso
INSTRUCTED BY : Norton Rose South Africa
FOR 4TH RESPONDENT : Adv. M. Greig
INSTRUCTED BY: : Webber Wentzel Attorneys
DATES OF HEARINGS : 1 June 2012
DATE OF JUDGMENT : 8 August 2012

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Sixth Respondent

JUDGMENT : 8 AUGUST 2012

GAMBLE, J:

INTRODUCTION

1] There are two applications before the Court in this matter. In the first ("the main application") the registered owner of three properties seeks the eviction from its properties of all persons currently in occupation thereof.

2] In the second application ("the counter application") certain of the occupiers (not all) seek to resist their eviction from the land by way of a collateral challenge which they claim establishes their rights of occupation. To this end they seek the review of the sale of the land to the owner and certain declaratory relief. It is common cause that if the counter application fails the owner will be entitled to an order for eviction.

3] The matter has a long and complex history which I propose to set out firstly in some detail. For the sake of convenience I shall refer to the parties by their abbreviated names or acronyms.

HISTORY OF THE PHILIPPI "HIVE"

4] For more than twenty years a number of small businesses have been run from premises at the corner of Landsdowne and New Eisleben Roads in Philippi on the Cape Flats. The premises, colloquially referred to as "*The Philippi Hive*", consist of a number of single storey buildings and warehouses which

are arranged in the form of what is these days referred to as an office park. For the sake of convenience I shall refer to the premises as "*the Park*".

5] The Park was originally owned by the Small Business Development Corporation ("SBDC"), a commercial entity controlled by the Department of Trade and Industry ("DTI"). The SBDC was subsequently transformed into a new entity called Business Partners Limited ("BPL"). Some eighty tenants, whose businesses ranged from carpentry and joinery workshops to upholstery and metal work, all operated their enterprises under leases with the SBDC, some of which dated back as far as 1992. Towards the end of the 1990's, DTI embarked on a program to dispose of various of its properties on the Cape Flats: the Park was one of these.

6] The erstwhile Minister of Trade and Industry, Mr. Erwin, met representatives of the tenants at the Park during March 1999 and, flowing from this, discussions ensued aimed at facilitating the transfer and ownership of the Park to the erstwhile tenants. From the side of Government there was a firm desire to empower small businesses and to encourage entrepreneurship as part of a long term goal of job creation and poverty alleviation, while giving the stakeholders in such a project ownership thereof.

7] The DTI appointed a firm of local attorneys, Vaveki Ludick, to advise the tenants on the best way to acquire collective ownership and control of the Park. In October 1999 the tenants (then under the umbrella of the "*Eisleben Small Business Park*") drew up a document indicating an

interest to purchase the Park for R1,892m.

THE JULY 2000 PROPOSAL

8] On 12 July 2000 the "*Eisleben Small Business Park Tenants Association*" submitted a formal written offer to purchase the Park to BPL. The offer, which was accompanied by various documents including a valuation report, contained the following material terms and/or allegations:

8.1 The aforesaid Tenants Association was "*a legally constituted body representing the Tenants of the Hive, the Executive having been elected by majority vote and duly mandated to make the offer*";

8.2 The Tenants Association offered to purchase the three erven making up the Park (nos. 466, 467 and 468, Philippi) for R1,89m;

8.3 The purchase was to be made in the name of a company whose shareholders would be tenants of the Park;

8.4 The offer was conditional upon the sourcing of donor funding from certain entities that had already been identified;

8.5 There was to be an appropriate mix of tenants at the Park, who were to be "*groomed and empowered to become shareholders and directors of their own Property Owning Company ensuring the ongoing viability of the project*;

8.6 The offer excluded any debtors or liabilities at the date of transfer;

8.7 A final deed of sale "*was to be drawn up should agreement*

be reached".

9] The proposal to purchase the Park (which for the sake of convenience I shall call "*the July 2000 proposal"*) contained a number of statements of intent which reflected the underlying philosophy of the tenants. In essence, the tenants wanted to own and control the Park for their collective benefit. To this endit was said that:

> *"The above action will change the culture of the tenants to rental payments, who will become the owners of their own business sites. Pride of ownership would prevail".*

This passage contains a somewhat euphamistic reference to the on-going problem of non-payment of rental which existed already at that time.

10] The July 2000 proposal found favour with BPL and in December 2000 it wrote as follows to the erstwhile tenants' representative:

> *"I hereby confirm that the Department of Trade and Industry approved the sale of this project for an amount of R1 890 000 net.*

> *Please advise the writer which company name will be used by the purchaser in order that a Deed of Sale can be drafted that will amongst others contain the following:*
>
> - *provide proof of finance obtained within 45 days of signing the Deed of Sale;*
>
> *provide guarantees for the payment of the purchase price on transfer within 90 days of the signing of the Deed of Sale;*
> *all current and arrear rent will remain payable until date of transfer and is to be*

settled latest by transfer."

PEDI

11] It was envisaged that funding for the purchase would be provided by the Provincial Administration of the Western Cape ("the Province") and to that end a Section 21 company known as the Philippi Development Initiative ("PEDI") wrote to the Province in December 2000 requesting funding. PEDI pointed out that the Tenants Association was not in a position then to take ownership of the Park but that with the assistance of PEDI "*a superb opportunity exists to develop the economic potential of this Section (sic) of the previously disadvantaged community*," and that the property would "*be developed to full potential to the benefit of all tenants.*"

12] At the same time a firm of development consultants, Caleb Consultants, wrote to the Province on behalf of PEDI informing it that the tenants were "*clearly not in a position to take over the property*" and further that it was not a viable proposition to invest public funds in a private project. Caleb suggested that –

> *"PEDI would create a subsidiary PTY company to hold it, with a view to the asset eventually being sold to tenants in a share block scheme."*

13] In June 2002 PEDI's CEO, Mr. Douglas, wrote a detailed letter to Mr. Wareley, the secretary of the Tenants Association, setting out how the property was to be acquired by PEDI and "*how it wishes to establish a*

participatory process with existing tenants and, through that process, to devolve ownership in a manner which accords with PEDI's stated objective of economic empowerment and to develop the land and buildings for the benefit of the new owners of Eisleben Business Park and of the surrounding area."

14] Mr. Douglas recorded the following salient aspects of the project at that stage:

14.1 The Province was prepared to fund PEDI's project at the Park;

14.2 PEDI had to purchase the Park "*as mandated by the tenants*";

14.3 PEDI had established a wholly owned subsidiary, Eisleben Business Park (Pty) Ltd ("EBP"), as the appropriate corporate vehicle to hold the properties making up the Park;

14.4 The properties were to be transferred to EBP whose board was to be "*representative*". Also, the tenants were to establish a so-called "*Management Committee*" which would be trained by PEDI, so as to acquire the requisite skills to administer the Park;

14.5 Ultimately,EBP was to be converted to a share block company thereby effecting transfer of the shareholding in the company to the tenants;

14.6 Most importantly, it was a strict condition of the project that tenants at the Park must have no arrear rentals.

TRANSFER TO EBP

15] EBP had already been incorporated in July 2001 and its entire shareholding was held by PEDI. On 12 September 2002 the three erven making up the Park were ultimately transferred to EBP. At all material times it appears as if the various steps to which I have referred above enjoyed the unequivocal support of the tenants.

16] In his letter of 3 June 2002 Mr. Douglas cautioned that progress in achieving the ultimate goal of the project would be slow. Not only did PEDI want to ensure that the tenants had the necessary training and skills to manage the project before it was handed over to them, but it was critical that the company was financially sound at that time:

> "The ultimate effect of all these arrangements is that, once the property has been transferred to ..[EBP].., it will own the property absolutely and the property will not be encumbered by any mortgage bonds. The company will also not have any private sector debt at that time."

The latter is clearly a reference, yet again, to defaulting tenants.

17] After transfer of the Park to EBP in September 2002 there were various attempts at reaching the ultimate goal of the project – to place the company under the *de facto* control of the tenants - all of which failed for a variety of reasons. But, the persistent problem remained one of non-payment of rental.

18] As early as July 2002 the Tenants Association, in a letter to PEDI complaining about the treatment of defaulting tenants,

made the following proposal:

> "*As this is an Empowerment Project for the previously disadvantaged, the tenants wish to resolve all outstanding rental arrears with Business Partners without any evictions taking place. Otherwise who will be empowered? Those already empowered? Tenants who have rental arrears should sign an acknowledgment of debt to Business Partners with a payment plan. Shares will not be transferred to tenants who do not honour this agreement."*

19] Regrettably, however, the situation went from bad to worse, with EBP getting deeper into debt as it was unable to settle its electricity, rates and taxes and municipal services accounts due to rental defaults. By 2009 there was a complete rent boycott and the electricity supply to the Park was compromised. Water, sewerage and refuse removal was almost non-existent. And then, as is so often the case, a criminal element apparently filled the management void and started demanding protection money from the tenants.

20] In August 2005 the tenants (then under the guise of "*Eisleben Business Park*") wrote to the Board of PEDI in fairly accusatory terms – clearly, there was mistrust on the part of the tenants with the officials of both PEDI en EBP. There was a complaint about the slow progress in placing beneficial ownership and control of EBP in the hands of the tenants and an urgent request was made to PEDI to transfer the shares in EBP to the tenants.

21] Still the matter dragged on without resolution, with various firms of attorneys offering advice to the tenants as to how the

aims of the project envisioned by Mr. Douglas could be implemented. By September 2009 the parties were considering approaching outside agencies for assistance in conflict resolution and mediation.

<u>MR. SAUNDERSON</u>

22] At the monthly meeting of the Board of PEDI on 31 August 2009 Mr. Oscar Saunderson, a property developer who claims to have philanthropic and community interests, addressed the gathering. He informed the Board that he represented the interests of various private businesses in the Philippi area. He addressed the Board in fairly general terms regarding the future of the Park. It bears mention that earlier in that meeting one of the options considered by the Board was to "*sell the entire asset and hand [the] proceeds to identified beneficiaries."*

23] In February 2010 four of the key stakeholders in the project held a strategic planning meeting to consider the way forward. Mr. Wareley was amongst this number. The sale of the Park was one of the options discussed at this meeting. The following month the Board of EBP met, considered the report of the meeting, and looked, *inter alia,* at future options for the Park. It was decided to invite Mr. Saunderson to address the Board in April 2010.

24] At that meeting Mr. Saunderson put up a number of possible solutions which included sourcing, external funding to settle debt, the sale of certain of the individual erven which were still undeveloped, and the sale of the entire project to a developer. Not surprisingly, Mr. Saunderson promoted the third option and indicated that his company was interested in putting an offer to the Board of

EBP in this regard.

25] At a meeting of the Board of PEDI on 4 May 2010 there seemed to be general agreement that the disposal of the Park was the preferred route to follow. The Board resolved to follow a closed tender process and invite proposals from, *inter alia*, the tenants (as a group), and Mr. Saunderson. The call for offers recorded that:

25.1 the non-payment of rentals over a protracted period had resulted in the suspension of municipal services, in particular electricity;

25.2 the Park had accumulated debt of about R3m, which it was unable to service; and

25.3 the Park's assets and environment had been steadily degraded.

THE WATERSTREET OFFER

26] In a letter dated 18 June 2010 Waterstreet Investments (Pty) Ltd, a company controlled by Mr. Saunderson which claimed to have black economic empowerment credentials, put in an offer to purchase the entire Park for R2,5m and to take over EBP's debt. Tenants in good standing were promised a bright future in renovated premises on erf 466 while it was said that erven 467 and 468 would be developed along an "*access park*" concept, meaning that additional premises for more small businesses would be erected, as also a service station.

27] The Waterstreet proposal was discussed

at various subsequent meetings of the Boards of PEDI and EBP, with the latter being guided by the decisions of the former, its parent body. Eventually, at a meeting of PEDI's Board on 3 August 2010, it was decided to accept Waterstreet's proposal for the "*main erf and buildings only*" (i.e. Erf 466). Two weeks later the Board of EBP (with Mr. Wareley absent), met and agreed in principle to accept the Waterstreet offer.

28] On 7 September 2010 the Board of EBP met (again with Mr. Wareley absent) and considered a revised offer by Waterstreet of R4,5m for erven 466 and 467. It resolved to accept that offer subject to the approval of the PEDI Board which was scheduled to meet later that day. At that meeting PEDI's Board accepted the proposal as well.

MIKARDOW

29] A formal deed of sale was prepared and Waterstreet nominated Mikardow Trading 19 (Pty) Ltd as the corporate entity that would hold the land so purchased.[1]

30] Not unsurprisingly, the sale of the Park to Mikardow was met with disapproval by a good number of the tenants who believed that the land, which was destined by the DTI to be effectively owned and controlled by them, was being sold from under their feet. Attitudes hardened and Mr. Saunderson and his associates and employees became *persona non grata* at the Park. There are disputed allegations of death threats and other thuggish behaviour levelled at some of the

1 Subsequently the name of the company was changed to Airport Corridor Mall (Pty) Ltd, but for purposes of this judgment I shall continue to refer to the company as "*Mikardow*".

tenants,and in particular at a shadowy group called "*Kuyasa*", which appears to have assumed the mantle of informal debt-collector.

31] Matters dragged on inconclusively as Mr. Saunderson attempted to gain the confidence of the occupants of the Park. By April 2011 only three of the tenants, Mr. Wareley (an electrical contractor), the local branch of the African National Congress and a dairy, were in good standing. At the same time, EBP had instructed its attorneys to commence eviction steps against some defaulting tenants.

32] On 6 April 2011 the Eisleben Business Park Tenants Association launched urgent proceedings in this Court to interdict the transfer of the three erven in question from EBP to Mikardow. The matter was fiercely opposed by the purchaser but the application soon fizzled out and was withdrawn on 7 June 2011 with each party to bear its own costs.

THE SECOND AGREEMENT OF SALE

33] Undeterred by these developments (or perhaps, rather because of them), Mikardow and EBP then set about concluding a new agreement of sale in respect of the Park. A second agreement of sale was drawn up and signed by the parties on 4 August 2011. This sale was approved by the Board of EBP on the same day with Mr. Wareley dissenting.

34] Throughout, the attorneys who had represented the tenants in the interdict proceedings in April 2011 were kept informed of

these subsequent developments by Mikardow's attorneys, in particular of the sale itself and the lodgement of the transfer at the Deeds Office. No further legal steps were taken on behalf of the tenants and on 8 September 2011 the transfer of erven 466 and 467 to Mikardow was registered in the Deeds Office.

THE PRESENT APPLICATION

35] Since early 2011 Mikardow has been attempting to remove the occupiers from the premises to enable it to commence with alterations, renovations and building work. It was blocked at every turn by groups of angry residents and Kuyasa. This problem persisted after Mikardow took transfer of the land in September 2011 and eventually it approached this Court for urgent relief on 2 November 2011.

36] By that stage the City of Cape Town had stepped in and on 6 October 2011 declared the buildings to be "*Problem Buildings*" under the bylaw of the same name (PG6767; 9 July 2010). The effect of this notice issued by the City is that Mikardow is required to remedy a host of defects forthwith, failing which the City will do so at Mikardow's expense. To effect the repairs Mikardow requires vacant possession of the premises.

37] The ejectment application by Mikardow was resisted by certain of the occupants who launced a counter-application on 16 November 2011. That application, supported by an affidavit by a Ms. Mondell, was aimed at reviewing the first and second sales of the property and procuring certain declaratory orders in favour of the occupiers.

38] On 17 December 2011 both applications were postponed for hearing on 21 February 2012 with a timetable being fixed for the filing of papers. However, on 15 February 2012 the matter was further postponed to 16 April 2012 with a further timetable fixed for the filing of papers, including an amended counter application.

39] On 6 March 2012 a supplementary founding affidavit deposed to by Mr. Wareley was filed (purportedly in terms of Rule 53(4) after receipt of "*the record*"). The affidavit runs to eighty five pages and there are a further four hundred pages of annexures. An amended notice of motion was also filed. The supplementary founding affidavit raised a number of additional grounds of review.

40] On 16 April 2012 the matter was postponed for hearing on 4 and 5 June 2012. At that hearing Messrs. Fagan SC and Wilkin represented Mikardow, Messrs. Vosand Garlandappeared for the occupiers, Messrs. Muller SC and Traverso represented PEDI and EBP and Mr. Greig appeared for The City. The Court is indebted to the legal representatives of all of the parties for their detailed heads of argument and thorough presentations in Court.

THE APPLICATION FOR EVICTION

41] It is trite that to procure an order for eviction an applicant must establish only its title and the fact that the respondent is in

possession of its property. It is then for the occupant to set up a defence (such as a lease) with which to defeat the applicant's claim.[2]

42] In the instant case the occupiers took a host of defences in the opposing papers. These ranged from poor corporate governance in the form of an alleged breach of the provisions of EBP's memorandum and articles of association, which it was said voided the decision of its board in concluding the sale of the land, to non-compliance with the Municipal Finance Management Act no. 56 of 2003, (and the relevant supply chain and procurement provisions of the City of Cape Town, since it was alleged to be ground under the control of the City), as well as an alleged *stipulatio alteri* contained in the deed of sale which was said to have preserved their rights of tenancy.

43] Ultimately, in argument Mr. Vos narrowed the issues considerably and relied only on two defences to the vindicatory claim of Mikardow. Firstly, Mr. Vos said that, through his involvement with the Board of PEDI over the years, Mr. Saunderson had acquired knowledge that the occupiers had a prior right to have the property transferred to them. Accordingly, it was contended that the transfer was defeasible at the instance of the occupiers in terms of the so-called "*doctrine of notice*".

44] Secondly, it was argued that in selling the property to Makardow, EBP had exercised public power. Since it had not exercised this power lawfully, it was said that the transaction was assailable under the Promotion of

2 Matador Buidings (Pty) Ltd v Harman 1971 (2) SA 21 (C) at 24.

Administrative Justice Act no. … of 2000 (“PAJA”).

45] In his argument in reply Mr.Fagan SCneatly summarized the position and pointed out that any public power exercised by EBP in coming to a decision to sell the property (and he disputed that there was any) would have to have been sourced in an empowering provision to render it capable of judicial review. He pointed out that in terms of Section 1(vi) of PAJA, an “*empowering provision”* is defined as “*a law, a rule of common law, customary law, or an* ***agreement****, instrument or other document in terms of which an administrative action was purportedly taken”* (emphasis added).Accordingly, it was argued that the PAJA point would fall away if the agreement relied upon by the occupiers could not be established.For reasons which I will set out later I agree with this submission.

THE DOCTRINE OF NOTICE

46] The so-called doctrine of notice has been considered by the Supreme Court of Appeal in a number of decisions over the last decade and has been a subject of some judicial debate as attempts have been made to extend the ambit of its operation.[3]

47] The approach is usefully summarized by Ponnan JA in Meridian Bay at p8D:

3 Cussons en Andere v Kroon 2001 (4) SA 833 SCA; Bowring N.O. v Vrededorp Properties CC and another 2007 (5) SA 391 (SCA); Spearhead Property Holdings Limited v E and D Motors (Pty) Limited 2010 (2) SA 1 (SCA); Meridian Bay Restaurant (Pty) Limited and Others v Mitchell N.O. 2011 (4) SA 1 (SCA)

> *"14. Under the doctrine of notice someone who acquires an asset with notice of a personal right to it which his predecessor in title has granted to another, may be held bound to give effect thereto. Thus a purchaser who knows that the merx has been sold to another, may, in spite of having obtained transfer on delivery, be forced to hand it over to the prior purchaser. Reverting to my earlier example: if C had purchased with knowledge of the prior sale to B, B would be entitled to claim that the transfer to C be set aside and that the transfer be effected from A to B, or B may perhaps even claim transfer directly from C."*

48] The doctrine is a legal fiction founded primarily in considerations of equity. As Professors McKerron[4] and Lubbe[5] have observed, the doctrine postulates the anomalous situation in which the holder of a personal right (a so-callled *ius ad remacquirendam*) can trump the holder of a real right in the *res*. Application of the doctrine has shifted somewhat from being based on fraud [6] to one being based on knowledge on the part of the transferee [7].

49] The extent of the transferee's knowledge has troubled the courts on occasion: must it be actual knowledge or would *dolus eventualis*suffice? In attempting to resolve that conundrum commentators have

4 1935 SA Law Times vol 4 p175

5 1997 Acta Juridica 246

6 Ridler v Gartner 1920 TPD 249 at 259: "There must be an element of deceit, an element of chicanery in the transaction before the Court will set it aside…"

7 Associated South African Bakeries (Pty) Limited v Oryx and Verenigte Bäckerein (Pty) Limited en andere 1982 (3) SA 839 (A)

grappled with the question of whether the doctrine is founded in delict or property law [8].

50] It is not necessary for purposes of this judgment to enter into that judicial fray since I shall assume that the requisite degree of knowledge on the part of Mr. Saunderson (as "*the guiding mind*" or *"driving force*" behind Watersetreet and Mikardow) was *dolus eventualis*. The question then is whether Mikardow ought reasonably to have foreseen that the occupiers before Court, who rely on the doctrine of notice, had a personal right to acquire ownership in the property sold to it by EBP.

THE PERSONAL RIGHT RELIED UPON BY THE OCCUPIERS

51] In argument Mr. Vos pinned the occupiers' colours to the mast of the July 2000 proposal. Notwithstanding the conditions contained therein, it was argued with considerable conviction that the proposal was an unequivocal offer to BPL to purchase all three erven for R1,89m. It was further argued that BPL accepted the offer in December 2000 and that this was an enforceable *ius ad rem adquirendam* in favour of the tenants.

52] Mr. Fagan SC (with Mr. Muller SC in his slipstream) pointed to a number of facts which flew in the face of this argument, not the least of which was the obvious conditionality thereof. Upon analysis, said Mr. Fagan SC, the occupiers had at best a *spes* to acquire the shares in EBP after fulfillment of certain pre-conditions, which he argued had not been met.

8 Lubbe, *op cit*, at 258; F.D.J. Brand "Knowledge and wrongfulness as Elements of the Doctrine of Notice" (unpublished paper by Brand JA)

MS. MONDELL'S ALLEGATIONS

53] These are motion proceedings and accordingly it was necessary for the occupiers to make out a case for the relief ultimately sought in the founding affidavit in support of the counter application. It is trite that in motion proceedings the affidavits must contain the factual allegations as well as the legal conclusions relied upon: they constitute not only the evidence but also the pleadings.[9]Initially, as I have said, a founding affidavit was deposed to by Ms. Mondell. Later, a supplementary founding affidavit was filed by Mr. Wareley.

54] In the founding affidavit Ms. Mondell -

54.1 sets out the history leading up to the July 2000 offer;

54.2 alleges that the July 2000 offer was accepted by BPL "*in its capacity as agent for DTI*";

54.3 says it was assumed that PEDI would acquire the Park "*as an interim arrangement before the occupants themselves became owners*" thereof;

54.4 maintains that "*the understanding was that EBP was the entity which would hold the Business Park on behalf of the occupants*";

54.5 says that in December 2003 the occupiers formed an NGO "*to take ownership of the Business Park from EBP*" at the suggestion of PEDI;

54.6 says that in 2005 the occupiers formed a new tenants association called the "*Eisleben Business Park Tenants Association*" as they were unhappy with, *inter alia*, the way in which Mr. Wareley had represented them, the

9 Transnet Limited v Rubinstein 2006 (1) SA 591 (SCA) at 600G para 28.

insinuation being that he was conflicted while serving on the Board of EBP;

54.7 complains that there was no strategy to deal with tenants who were in default, the clear acceptance being that there were many such defaulters;

54.8 attacks the validity of the sale of the property by EBP to Mikardow on the basis of –

54.8.1 tender irregularities; and

54.8.2 poor corporate governance and non-compliance with the provisions of the Companies Act of 2008;

54.9 asserts that the second deed of sale (August 2011) gives recognition to the occupiers' "*long standing rights to occupy the Business Park";*

54.10 describes the legal relationship between the occupiers, EBP and the Business Park as "*sui generis*";

54.11 claims that EBP's "*decisions and actions constitute unlawful, unreasonable and procedurally unfair administrative action*" which falls to be set aside under PAJA for want of compliance with a number of procedural aspects, as well as municipal supply chain management policies.

55] It is significant that nowhere in her affidavit does Ms. Mondell assert that the current occupiers (nor for that matter any previous occupiers either) acquired a right to transfer of the properties, nor does she either directly or by implication rely on the doctrine of notice.

MR. WARELEY'S ALLELGATIONS

56] After receipt of the so-called "review

record", the occupiers changed course significantly. No doubt appreciating the tenous nature of the July 2000 proposal and the non-compliance with the various conditions set out therein, reliance on their earlier alleged rights was abandoned and a new agreement was postulated. Mr. Wareley stated that, in light of the history of the matter set out earlier in his affidavit -

> "*it is* ***likely*** *that an agreement was concluded during or about September 2001 between Business Partners Ltd, DTI, PEDI, EBP, the Provincial Government of the Western Cape, the City of Cape Town, and the tenants." (emphasis added)*

57] The material terms of this possible multi-party agreement (which is not alleged to have been reduced to writing) are said to have been express, alternatively implied, alternatively tacit and are said to have included the following:

57.1 the tenants would make an offer to DTI to purchase the Park;

57.2 DTI and/or BPL "*as owner of the Park*" accepted that offer by the tenants;

57.3 the Province would provide funding in the sum of R1,89m to EBP to purchase the Park on behalf of the tenants, and "*as mandated by the tenants*";

57.4 BPL would transfer the Park to EBP which would hold it in trust until the tenants were "*ready to take transfer*";

57.5 at the time of transfer no tenants were to be in arrears with their rentals;

57.6 the tenants would participate in the management of the Park and would have at least two representatives on the Board of EBP;

57.7 PEDI was to perform a "*developmental role"*;

57.8 EBP and PEDI would take steps to transfer PEDI's equity in EBP to the tenants;

57.9 the tenants would hold EBP's property through a share block scheme, with EBP undergoing the necessary corporate conversion to give effect to this, so that EBP would ultimately be owned by the tenants who would operate the company for their exclusive benefit;

57.10 pending the transfer of its equity in EBP to the tenants, the Park would not be sold and EBP would continue to hold the property in trust for the tenants; and

57.11 the transfer of the shareholding would not jeopardize the tenants' security of tenure.

58] The first observation to be made in regard to this wide ranging and far reaching assertion is that it is not made as a positive allegation of fact but rather as a probable conclusion of law based on the background facts and circumstances. While not pertinently saying so,it has the hallmark of an allegation of conclusion of a tacit contract [10].

59] In Gordon Lloyd Page and Associates v

10 Christie's Law of Contract in South Africa 6th ed at 86-93.

Rivera[11], and in circumstances not entirely remote from the present, the Supreme Court of Appeal was required to consider an appeal against the granting of absolution from the instance by the lower court in circumstances where the plaintiff had sued on the basis of a tacit contract with a convent of nuns to develop their property into a shopping complex. Harms JA had the following to say:

> "[11] The tacit agreement was allegedly concluded at the said meeting between Page and Rivera [the developer]. It essentially provided that the proposal was to be put to the respondents on a confidential basis and could not have been used except for the purpose of determining whether a joint venture was viable. As pleaded, the contract was concluded before the proposal was put to Rivera. Since this case is concerned with the test for absolution at the end of a plaintiff's case I am obliged to somewhat to restate the ordinary test for proof of a tacit contract (Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd 1984 (3) SA 155 (A) at 164G-165G; cf Samcor Manufacturers v Berger 2000 (3) SA 454 (T)). It was, at that stage, at least necessary for the appellant to have produced evidence of conduct of the parties which justified a reasonable inference that the parties intended to, and did, contract on the terms alleged, in other words, that there was in fact consensus ad idem. Counsel, having been asked to point to any evidence which justifies the inference that Rivera at the outset of the meeting had an animus contrahendi, was unable to do so."*

60] Then, one must ask oneself why, if there was an allegation by Ms. Mondell in the founding papers of a written agreement

11 2001 (1) SA 88 (SCA) at 95

concluded in July 2000, Mr. Wareley (who had been very much part and parcel of the process all along) relied on a different form of agreement more than a year later? Clearly, the occupiers themselves are not *ad idem* as to what their purported rights are.

61] In any event, I am not persuaded that the allegations made by Mr. Warely, and the facts relied upon by him and the occupiers, justify the reasonable inference that the various parties referred to by him in the supplementary affidavit intended to conclude the contract which may possibly be relied upon. Clearly, the occupiers have not established either an *animus contrahendi*nor *consensus ad idem*on the part of the alleged parties to the "*possible*" agreement.

62] And, as the allegations in both the founding and the supplementary affidavit show, the occupiers assert different forms of ownership which were to form the basis for their effective control of the Park. These range from a shareblock scheme, to individual ownership in the shares in EBP and even joint ownership of the properties. Ultimately, in the notice of motion produced by the occupiers on 5 June 2012 the earlier claim for joint ownership in prayer B6 in the revised notice of motion was abandoned and replaced with an order directing transfer of even 466 and 467 from Mikardo back to EBP. This relief in, and of itself, is meaningless in the absence of any prayer for a declaratory order establishing the rights of the occupiers in relation to EBP.

63] In the circumstances I am not satisfied that the Applicants in the counter- application have established a contractual right of any sort conferring on them the rights of ownership in, or *de facto*control over, the Park.

64] There can be little doubt that Mr. Saunderson must have known that the occupiers wished to gain control of the Park for their own benefit. But such knowledge is not sufficient for reliance upon the doctrine of notice, which requires the purchaser to have had knowledge of the other party's *ius ad rem adquirendam*. If the occupiers themselves are uncertain as to the nature of the contract which they concluded, as also the manner and date of conclusion thereof, how must Mr. Saunderson have known what their contractual arrangement was? Clearly, in such circumstances, the doctrine of notice cannot apply.

65] In light of this finding it is not necessary to consider the further problematic issues such as which tenants are entitled to transfer of the shares in EBP, or whether the suspensive conditions relating to *inter alia*, rent arrears, have been met thereby entitling the counter-applicants before Court to the relief ultimately sought.

THE PAJA ARGUMENT

66] As stated above, the question to be asked when considering whether EBP's decision to sell the Park to Mikardow is capable of review under PAJA, is whether, in so doing, EBP exercised a public power in terms of an empowering provision.

67] Mr. Voswisely did not persist with the argument advanced in the heads that EBP was a "*municipal entity*" as contemplated in the Municipal Systems Act No. 32 of 2000. It was therefore common cause that EBP

was a private entity at the time that it sold the land to Mikardow. The argument, as I understood it ultimately, was that the occupiers had a personal right, enforceable against EBP, to acquire effective control of EBP and thereby be the masters of their own destiny as tenants of the Park.

68] It was argued by Mr. Vos that EBP was a juristic person exercising a public power in terms of an empowering provision, which exercise of power adversely affected the rights of the tenants, and which had a direct external legal effect as contemplated in Section 1(i)(d) of PAJA. The empowering provision relied upon by the tenants was said to be, initially, the agreement contended for by Ms. Mondell (i.e. the July 2000 proposal), alternatively the agreement relied upon by Mr. Wareley in the supplementary affidavit (i.e. the "possible" September 2001 tacit agreement).

69] I have already found that neither of these agreements has been established by the tenants and, accordingly, the main strut upon which any review application would have to be based is missing. In such circumstances the Applicants have no *locus standi* under PAJA and the application must therefore fail on this leg too.

CONCLUSION

70] In light of the foregoing, I am satisfied that there is no defence to the claim for eviction which has been established by Mikardow. It follows that the occupiers must vacate the Park.

71] Due regard being had to the fact that many of the occupiers are conducting small businesses on the premises which no doubt are necessary sources of income to sustain many families on the Cape Flats, I am of the view that they should be given slightly more than the one month's notice suggested by Mr. Fagan SC. Those occupiers who faithfully attended the hearing of this matter early in June 2012 will recall, too, that the Court advised them of the possibility of their eviction and the advisability of seeking alternative accommodation timeously.

72] As far as costs are concerned, a long list of persons were initially cited as applicants in the counter application. At the commencement of the hearing the Court requested Mr. Vos to provide an up-to-date list of precisely who these persons were, in light of the fact that Mikardow had earlier requested the occupiers' attorneys to furnish them with the necessary powers of attorney. Mikardow's tactic had the effect of somewhat reducing the number of counter applicants who ultimately persisted in seeking relief in this matter. In my view it will be fair to all concerned that those persons who are identifiable by the powers of attorney filed at pages 1214-1293 of the record, and who thereby indicated their active persistence in the counterapplication, are to be held responsible (jointly and severally) for the costs of the other parties in this matter.

73] As to the scale of costs, I am not convinced that an award of attorney and own client costs is warranted. It is true that the occupiers have stubbornly resisted giving up occupation of the Park and have put Mikardow to considerable expense in asserting its rights. Some of the occupants have

undoubtedly behaved thuggishly, but on the other hand many believed that ultimately the Park was set up for their benefit. That belief was fairly held in the circumstances that I have described above, but the ultimate end was thwarted by a variety of factors, many of them beyond the control of the occupiers. One can only hope that Mikardow will make good on its promises to provide affordable, revamped business premises for these small traders and artisans in the redevelopment of the Park. Given the amount of work involved and the relative complexity of the matter initially, I am satisfied that the employment of two counsel was warranted.

74] **In the circumstances the following order is made:**

1. The Respondents in convention, including but not limited to the persons named in the list attached to the notice of motion in convention marked “A”, and all those purporting to hold title under them and/or occupying the property known as erven 466 and 467 Philippi (also known as Eisleben Business Park), are ordered to vacate same by no later than midnight on Sunday 30 September 2012.

2. In the event that the said Respondents, or any number of them, fail to vacate the property as aforesaid, the Sheriff of this Court is authorized to evict such Respondents from the property.

3. The counterapplication is dismissed.

4. The costs of both the application and the counterapplication are to be paid jointly and severally, the one paying the others to be absolved, by such of the Respondents in convention as signed powers of attorney, as contained in pages 1214-1293 of the record of proceedings. Such costs are to include the costs of two counsel wherever two counsel were employed.

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GAMBLE, J

ORDER: GAMBLE, J: JULY 2012

In the circumstances I make the following order: