188/92

Case No. 249/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GOUDINI CHROME (PTY) LIMITED Appellant

and

MCC CONTRACTS (PTY) LIMITED Respondent

CORAM: HOEXTER, NESTADT, EKSTEEN, NIENABER JJA et NICHOLAS AJA

DATE HEARD: 14 SEPTEMBER 1992

DATE DELIVERED: 28 SEPTEMBER 1992

J U D G M E N T

NIENABER JA:

The appellant, applicant in the court below, sought an urgent order evicting the respondent from a property on which the latter, by agreement, had been excavating chrome ore. The respondent resisted the application on a variety of grounds, one of which was that it enjoyed a debtor and creditor lien over "the works" for which it had not yet been paid in full. This defence in turn gave rise to a number of subsidiary disputes, some of which were decided in favour of the one and some in favour of the other party. The upshot of the proceedings before Labuschagne J in the Witwatersrand Local Division was that the application for eviction failed with costs. Hence the present appeal which is brought before this court with leave of the court below.

More than half the shares in the appellant were owned by Canadian Gold SA (Pty) Ltd (hereinafter referred

to as "Canadian Gold"), a company incorporated with limited liability according to the laws of the Republic of South Africa. In 1989 Canadian Gold decided to develop a mine for the extraction of chrome ore on a certain property in the Zeerust area described as "Remaining Extent of the farm Goudini 30, Registration Division J P Transvaal measuring 2109,4681 hectares." At that stage the property, to the knowledge of the respondent, was still registered in the name of a certain De Waal. Canadian Gold called for tenders from several contractors to do the excavation work. The respondent was one of them. It was eventually agreed between Canadian Gold, represented by one of its directors, a certain Doyle, and the respondent, represented by its managing director, Hayes, that respondent would move its equipment on to the property and would commence operations, even though a formal contract had not yet been prepared and signed. The respondent did so in

January 1990. Thereafter the respondent was regularly paid for its work by Canadian Gold in terms of payment certificates approved by it.

In April 1990 the appellant, not Canadian Gold, entered into an agreement with a company based in Luxembourg, one of the major commodity dealers in Europe, to supply it with at least 200,000 tons of chrome ore extracted from the mine on the property. Negotiations with a view to a formal comprehensive contract with the respondent continued in the mean time. In June 1990 one McGrath, who had replaced Doyle as the managing director of the appellant (and who was also a director of Canadian Gold), suggested to the respondent that the appellant be substituted for Canadian Gold as the contracting party as it was the actual operating company. This was one of several matters yet to be settled. On 9 July 1990 the property was sold by De Waal to the appellant and transfer was eventually passed to it on 14 August 1990.

Towards the middle of August 1990 McGrath instructed the respondent to submit all draft payment certificates prepared by it to the appellant and not to Canadian Gold - which the respondent thereafter did. All payments to the respondent continued to be made by Canadian Gold. A formal written agreement was never concluded. Disputes about a number of matters eventually led to the respondent discontinuing work in October 1990 and reducing its staff and equipment on site. It had until then been paid in the region of R3,5 m for work done. According to the respondent it was still owed a balance in excess of R1,3 m. It was for the payment of that amount that the respondent maintained a presence on the property and claimed a lien over the works. The works at that stage consisted in the main of a stockpile of excavated material containing some chrome ore and one or two open pits (depending on which version is preferred) which the respondent had excavated to reach a chrome reef

on the property. By remaining in occupation of certain portions of the property the respondent effectively prevented the appellant from continuing mining operations on it through another contractor. It was that fact which prompted the urgent application.

What is to be extracted from this resumé is the following:

(a) The appellant claimed to be the owner of the property.

(b) The respondent conducted mining operations on it.

(c) It did so in terms of an oral agreement with Canadian Gold. The understanding was that a formal agreement was to be finalized, possibly with the appellant instead of with Canadian Gold.

(d) The arrangement between Canadian Gold and the appellant in terms of which the latter took over control of the project was never explained by the appellant on the papers.

(e) The respondent nevertheless continued to be paid for its work by Canadian Gold and not by the appellant.

(f) Negotiations broke down and to all intents and purposes the respondent ceased its operations on the property.

(g) The respondent continued to maintain a presence on the property through one or two of its employees in order to protect what it proclaimed to be a common law lien over the works.

In essence the appellant's cause of action for the eviction of the respondent was the **rei vindicatio**. A number of issues arose before the court **a quo**. These were, in the main: (i) whether the appellant had established its ownership of the property concerned - the court **a quo** found that it had; (ii) whether the respondent was entitled to rely on a debtor and creditor lien against the appellant on the basis that the latter was substituted for Canadian Gold as the true contracting

party during the interim period while a formal contract was being negotiated - the court **a quo** found that it was not so substituted; (iii) whether the respondent's admitted debtor and creditor lien against Canadian Gold extended to the appellant, a non-contracting party, on the ground that the appellant was aware of, consented to and authorised the respondent to conduct its excavating activities on the appellant's property - this was essentially the issue on which the court **a quo** found in favour of the respondent; and (iv) whether the respondent had lost its debtor and creditor lien through the temporary absence of its employees from the property - on which issue the court found that it had not. The respondent accordingly succeeded in the court below.

Some subsidiary issues fell away before the matter reached this court. Others were abandoned in the course of argument and need not be mentioned. But on the other hand a completely new issue emerged before this court, on

facts not ventilated in the court below, namely, whether a cession by the respondent to the Standard Bank of South Africa Ltd of its claim for payment for the work done jeopardized any lien it may otherwise have had against the appellant.

I deal with these issues in turn.

The first pertinent one is whether the appellant had proved its title to the property. Since its claim was vindicatory in its nature ownership was an essential averment and had to be adequately proved by it (**Ruskin NO v Thiergen** 1962 (3) SA 737(A) at 744A-B). Failure to adduce proper proof would result in the failure of vindicatory proceedings irrespective of a detentor's own entitlement to occupation (Van der Merwe **Sakereg** 2nd ed 348). The best evidence of ownership of immovable property is the title deed to it (**R v Nhlanhla** 1960 (3) SA 568 (T) 570D-H; **Gemeenskapsontwikkelingsraad v Williams and Others** (1) 1977 (2) SA 692 (W) at 696H;

Hoffmann and Zeffertt **The South African Law of Evidence** 4th ed 391-2). A title deed conforms to the preconditions specified for a public document (cf Hoffmann and Zeffertt **op cit** 150; Schmidt **Bewysreg** 3rd ed 331). A public document is admissible in evidence, according to s 18 of the Civil Proceedings Evidence Act 25 of 1965, if a copy thereof is produced which purports to be signed and certified as a true copy or an extract from the relevant register by the officer to whom custody of the original is entrusted.

In the instant case McGrath, in the appellant's founding affidavit, made the positive averment that the appellant was the owner of the property described and annexed "a copy of the title deed ... marked 'BM.2'." Annexure BM.2 is a photocopy of the original title deed relating to the property, issued and signed by the registrar of deeds. The copy was not, however, certified by him. In its answering affidavit to this allegation

the respondent denied knowledge of the appellant's averment and added: "It will be submitted at the hearing that the applicant has not produced admissible evidence of the allegations herein." Notwithstanding this challenge McGrath, in the replying affidavit, did not seek to meet or remedy the point that the copy was not certified. His reply was that the respondent's objection was not clear. It is not, I think, unfair to infer from that response that the significance of the point escaped the appellant.

The court **a quo** overruled the respondent's objection. It held, on the strength of certain **obiter dicta** in **Gemeenskapsontwikkelingsraad v Williams and Others** (1) **(supra** 701C-F; 702D-E) that there was "no reason to come to the conclusion that it is unsafe to accept the uncertified copies of the title deed..." - firstly because the application was brought as a matter of urgency; secondly because the photocopy of the title

deed, although not certified, quite evidently was a copy of the document "officially signed and registered by the Registrar of Deeds" and corresponded, in its details, with its description in the notice of motion and founding affidavit; and lastly because McGrath asserted under oath that the appellant was the registered owner of the property. None of these reasons is convincing and counsel for the appellant advisedly did not seek to rely on any of them. Instead he referred to **Commercial Union Assurance Co of SA Ltd v Van Zyl and Another** 1971 (1) SA 100 (E) where Eksteen J at 105A-E remarked:

> "Generally, in motion proceedings, the documents annexed to an affidavit are tendered as evidence in support of certain allegations contained in the affidavit itself, or as evidence to prove that certain steps had been taken. In any event such documents can only be tendered as evidence, and as such are subject to the same rules of evidence governing their admission in trial proceedings. These rules require that, in respect of the kind of documents we are dealing with in the present case, only the original documents will be admissible in evidence unless reasons are advanced why secondary evidence of their contents should be admitted. Therefore, although it might not be necessary to annex the original documentary evidence to

> affidavits filed in the office of the Registrar in motion proceedings, the originals must be available for inspection in Court when the matter is called, not only at the request of the other side but also when required by the Court. In certain cases it may even be the duty of the Court to see the original evidence before giving judgment in a matter. In the present case the original documents, although all were in applicant's possession, were not available in Court when called for, and I considered it necessary and proper that they should be placed before the Court."

In the the court below, so counsel assured this court, the original title deed was available but was not called for; in this court the original was called for but was not available. Counsel for the appellant was eventually driven to apply from the bar that further evidence in the form of the original title deed be received in evidence as part of the record. The application was opposed. In order to obviate delay, in the event of the application being sucessful, a procedure similar to that sanctioned in the **Commercial Union Assurance Co** case (**supra** at 104G) was thereupon suggested

from the bench, namely that judgment be withheld until the original document was produced. The appellant was accordingly placed on terms to present the original title deed for inspection by the respondent and to report back to this court. A report has now been submitted to this court in which the respondent expresses itself satisfied that annexure BM.2 is indeed a true copy of the original title deed. No cogent reason has been suggested why this fact should not be received into the record: the application to do so is a narrow one, relating only to the production of a public document; the respondent's objection to it is entirely technical; and the delay resulting from the application caused the respondent no prejudice at all. To the extent that it is necessary to do so, an order allowing the application is accordingly made. The problem of due proof of ownership has thus been overcome; but it does have certain cost implications for the appellant to which I shall presently revert.

A further objection by the respondent to the application as such was that it was fundamentally flawed because it omitted to mention, as a prelude to the recovery of possession from the respondent, that the appellant had terminated its arrangement with Canadian Gold in terms of which the latter occupied the premises and permitted the respondent in turn to do so under colour of right. According to this argument the applicant was obliged to make out the case in its founding affidavit that as between it and Canadian Gold it was entitled to be revested with possession of the property; and since it failed to do so that the application should also fail.

To this contention there are several answers both of fact and of law. On the facts the appellant never parted with possession of the premises in favour of Canadian Gold; Canadian Gold did not occupy the property in terms of an arrangement with the appellant; and its relation-

ship with Canadian Gold consequently could not constitute a bar which had to be removed before the appellant could recover occupation from the respondent. On the contrary it was Canadian Gold and not the appellant which canvassed the respondent and put it in possession of the property in January 1990, at a time when the respondent knew full well that Canadian Gold was not itself the owner thereof. The appellant appeared on the scene some four months later and became the registered owner of the property only in August 1990. The appellant, in short, did not create the situation in consequence of which Canadian Gold put the respondent in possession; it inherited it. And in any event it is common cause that the respondent discontinued its operations during November 1990 leaving only a few of its employees in attendance on the property in order to protect its professed lien. Factually, therefore, the situation differs totally from the prototype suggested by the

respondent's counsel in argument, where an owner enters into a hire purchase or lease agreement with a second party who surrenders occupation to a third party from whom the owner seeks to recover possession by the **rei vindicatio**. If an owner, in his particulars of claim or founding affidavit alleges, in addition to his ownership, the agreement in terms of which his counterpart is in occupation, it is incumbent on him to make the further allegation that the agreement is invalid or has expired or has been terminated. Otherwise his cause of action is incomplete and excipiable. But that is a matter of pleading, not substance. **Henning v Petra Meubels Beperk** 1947 (2) SA 407 (T) on which counsel for the respondent relied in support of this leg of their argument, was decided on exception on a set of facts which differed completely from the present case. This is not, therefore, in the words of Jansen JA, in **Chetty v Naidoo** 1974 (3) SA 13 (A) at 21G, a case where

"a plaintiff who claims possession by virtue of his

> ownership must **ex facie** his statement of claim prove the termination of any right to hold which he concedes the defendant would have had but for the termination ...".

Henning v Petra Meubels Beperk (supra) which has in any event been overtaken by later decisions of this court, does not, as a matter of fact, support counsel's contention. And as a matter of law the position was stated in the following terms, again by Jansen JA, in **Hefer v Van Greuning** 1979 (4) SA 952 (A) at 959E-H:

> "So is daar al ten onregte gesê dat 'n eienaar nie sy saak van 'n ander kan opeis as hy reeds self besit aan enigiemand afgestaan het nie, tensy 'he can show that his reversionary right to possession is injured by the trespass'. Die verweerder sou hiervolgens hom op 'n **jus tertii** kan beroep al het hy self geen oorspronklike of 'n van die derde afgeleide saaklike of persoonlike reg om te besit wat hy teen die eienaar kan afdwing nie, omdat die eienaar hom van die reg om te besit (soms die **jus possidendi** genoem - vgl CP Joubert 1962 SALJ 130-1) sou ontdoen het en nou daarsonder sit (Vgl bv **Thomas v Guirguis** 1953 (2) SA 36 (W) te 38 - waar oa by E-F 'n verkeerde vertolking aan **Voet** 6.1.3 geheg word; **Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another** 1972 (2) SA 464 (W) te 480D-F; **Jadwat and Moola v Seedat** 1956 (4) SA 273 (N) te 276A.) Maar die ware posisie is dat 'n eienaar op grond van sy eiendomsreg bevoeg is om met die **rei vindicatio** sy saak van enigeen op te eis wat hom nie

> op 'n reg, wat teen die eienaar geld, kan beroep om die saak te hou nie."

The objection is without merit.

The real question in this appeal is whether - to quote from the above **dictum** - the respondent is invested with "'n reg wat teen die eienaar geld ... om die saak te hou" - in this case a right of retention. And with that question the focus shifts from possible deficiencies in the appellant's case to the merits of the respondent's defence.

Rights of retention are broadly classified as enrichment (preservation or improvement) liens or as debtor and creditor liens. The former are real rights, the latter not. An enrichment lien is a form of security for the payment of expenses which were necessarily incurred by one party for the preservation or protection of someone else's property (**impensae necessariae**) or usefully incurred for its improvement i.e. the enhancement of its market value (**impensae utiles**) (**United**

Building Society v Smookler's Trustees and Golombick's Trustee 1906 T.S. 623 at 626-629; **Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons** 1970 (3) SA 264 (A) 270F-271D; Van der Merwe **op cit** 713). It is immaterial whether the work was done in terms of a contract and, if so, whether the contract was with the owner of the property. The party who did the work may retain possession of the property in respect of which his work was done against the true owner, against his counterpart in contract (if there is one) or against anyone else who claims it from him, until he has been reimbursed for his expenditure or the amount by which the owner has been enriched, whichever figure is the lesser. (Van der Merwe **op cit** 717).

For expenditure in respect of improvements which were neither necessary nor useful i.e. expenses classified as **impensae voluptuariae**, he will not enjoy a right of retention at all unless the expenses were

incurred in terms of an agreement. In that event he may enjoy a debtor and creditor lien against the other contracting party.

A debtor and creditor lien is available to anyone who, in terms of an agreement, has performed work pertaining to someone else's property, irrespective of whether the work was necessary, useful, enhanced the value of the property concerned or was trifling (Van der Merwe **op cit** at 716). A debtor and creditor lien, being a contractual remedy and not a real right, is maintainable by the one party to a contract against the other who may or may not be the owner of the property. Unlike an enrichment lien it is not limited in its scope: it secures the full extent of the agreed remuneration, regardless of his own actual expenditure or the other side's actual enrichment.

Where someone who has effected necessary or useful improvements to the property of another by agreement is

sued for its return before being compensated for his work, he may defend his possession by either means - against his contractual counterpart, on the basis of his debtor and creditor lien, for his agreed remuneration, regardless of the extent of the latter's enrichment, if owner; and against the owner who is not the contracting party, on the basis of his enrichment lien, for his actual expenses tempered by the owner's enrichment (cf **United Building Society v Smookler's Trustees and Golombick's Trustee (supra** at 631); **Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons (supra** at 276C)).

The respondent was engaged by Canadian Gold to do excavation work for the establishment of a chrome mine on what became the appellant's property. It excavated at least one open pit, exposing a chrome reef, which, so it appears from the appellant's own averments, the latter was able to utilise. As against Canadian Gold the

respondent could have relied on a debtor and creditor lien for payment of the contract price. But the respondent was not sued for eviction by Canadian Gold; it was sued by the appellant. As against the appellant the respondent might conceivably have relied on an improvement lien. But the respondent made no attempt on the papers to prove either the fact or the extent of the appellant's enrichment, nor did it detail its own expenses. Its attempt, in argument before this court, to invoke an improvement lien accordingly cannot prevail (cf **Wynland Construction (Pty) Ltd v Ashley-Smith en Andere** 1985 (3) SA 798 (A) at 812G-813B). Its real defence throughout was a reliance on a debtor and creditor lien.

The function of a debtor and creditor lien is to fortify the claim of a creditor for his agreed remuneration for work done; it is a shield which enables the creditor to withhold return of the finished product

until his claim has been met. His claim accordingly is complemented by his possession (Van der Merwe op cit 713). The loss of either, surrender of detentio by the claimant or surrender of the claim by the detentor, would disturb the correlation and extinguish the lien. One of the disputes before the court below was whether the respondent vacated the premises and had thereby forfeited its lien. But it was never an issue that the respondent was the true creditor entitled to claim payment for the work done by it. It was on that basis that the matter was disposed of in the court below and that heads of argument were submitted by both sides in this court. Some two months before the hearing in this court, however, the appellant gave notice of an application to incorporate fresh evidence into the record. The gist of the proposed evidence was that the appellant's attorney had discovered, more by chance, at least initially, than by design, that the respondent had executed two cessions

in favour of the Standard Bank of South Africa Limited (the "bank"). Both cessions were intended to secure the bank for overdraft facilities which it had granted to the respondent. The one was a cession in respect of all its book debts, the other a cession in respect of "all contracts or other agreements already entered into by the company and which may in the future be entered into by the company as well as any retention monies due or which may become due to the company." The terms of each cession were broad enough to encompass the respondent's claim for payment for work done on the property in question. Both cessions were executed in 1989, well before the present application was launched and the respondent filed its answering affidavit therein. The information which was peculiarly within the respondent's province only came to light after the judgment of the court a quo had been delivered. The appellant's attorney immediately wrote to his opponent on 30 June 1992,

calling attention to the cessions and inviting the respondent to abandon the judgment in its favour and to vacate the property. This suggestion elicited the response that the respondent had "no intention of complying with your client's demands." The respondent filed an answering affidavit to the fresh application in which Hayes, its managing director (who was a signatory to the cessions and the deponent to the respondent's answering affidavit in the main application), admitted that the respondent had ceded its book debts and claims against the respondent to the bank **in securitatem debiti**. He further stated:

> "The respondent, in any event, collected all its book debts itself and what it collected was then deposited into its banking account with the bank. For all intents and purposes, the respondent regarded all debts that had been ceded as aforesaid as being debts owing to the respondent. Accordingly, it simply did not occur to me to inform the respondent's attorneys of the cession. My failure to do so was not motivated by any dishonesty or desire to conceal the true facts."

In the event counsel for the respondent did not oppose the appellant's application and made the concession that the appeal ought to be dealt with on the basis that the cessions had occurred. The concession was correctly made. The exceptional circumstances which are to exist before fresh evidence will be permitted on appeal were clearly present in this case (**Colman v Dunbar** 1933 AD 141, 161-2).

Counsel for the respondent who also appeared for the bank conceded that they were unable to press an application by the bank to intervene as a second respondent in the appeal. This was a transparent attempt to counter the effect of the cession. The attempt was doomed, for the elementary reason, to mention but one, that the bank was never in possession of the subject property and hence could not have exercised a supposed lien. In its capacity as cessionary the bank was the creditor of Canadian Gold for payment of the amounts due

for the work done by the respondent; in its capacity as a money-lending institution it was the creditor of the respondent for payment of the amounts due on overdraft. Neither capacity invested it with the kind of interest that would qualify it to intervene as a new party in the proceedings.

What counsel for the respondent did not concede was that the cession non-suited the respondent. The argument, if my understanding of it is correct, was that a debtor and creditor lien is not restricted in its operation to securing a claim for remuneration for work done; it extends, so it was submitted, to all the respondent's rights which, in the instant case, included its reversionary interest against the bank because the cession was one in **securitatem debiti**. (On the latter point, see **Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd** 1990 (4) SA 798 (A) at 804G-J; **Land- en Landboubank van Suid-Afrika v Die Meester en**

Andere 1991 (2) SA 761 (A) at 771C-G.) The argument is not sound. In the first place the purpose of a debtor and creditor lien is indeed a restricted one, namely to strengthen the creditor's right to remuneration for work done in respect of the property in his possession; and in any event, as far as its reversionary interest is concerned, the respondent's debtor was the bank and not Canadian Gold.

The true position is of course that the cessions divested the respondent of the right to claim its contractual remuneration (**Bank of Lisbon and South Africa Ltd v The Master and Others** 1987 (1) SA 276 (A) at 294C-F). Only the bank could thenceforth, and until the overdraft was repaid, recover payment of any amounts due for work done. That the respondent, as cedent, continued to collect payment of its book debts made no difference: that is frequently a particular term of the arrangement between cedent and cessionary especially where book debts

are ceded (**Bank of Lisbon and South Africa Ltd v The Master and Others (supra)**). In short, having surrendered its claim for payment to the bank the respondent surrendered any lien it may have had against Canadian Gold or, for that matter, the appellant.

The cession in effect disposed of two issues which troubled the court **a quo**: first, whether the three parties concerned, Canadian Gold, the respondent and the appellant, by tacit agreement substituted or co-opted the appellant as a contracting party to whom the debtor and creditor lien then applied; failing which, second, whether a debtor and creditor lien also binds an owner who was not a contracting party, who was accordingly not liable for payment for the work done, but who permitted the retentor to execute the work on his property. I have reservations about both matters, in the first case on the facts, in the second case (in the absence of estoppel or agency) on the law, but in view of the cession it is no

longer necessary to debate these questions. Nor is it necessary, for the same reason, to discuss another issue dealt with by the court a quo (but not pressed by counsel for the appellant in this court), namely whether the respondent, assuming that it did enjoy a lien, forfeited it when its token presence on the premises was temporarily interrupted.

To summarize: The appellant, having bolstered its case on appeal by the introduction of the original title deed, has at last succeeded in establishing its ownership of the property concerned. The respondent, by contrast, has failed to establish that it was "vested with some right enforceable against the owner (e.g., a right of retention or a contractual right)" which entitled it "... to continue to hold against the owner" (**Chetty v Naidoo** (**supra** at 20B-D)). As a result of the cession the respondent disqualified itself from relying on a debtor and creditor lien which it might otherwise have enjoyed.

In the result the appellant is entitled to the relief it sought and the appeal must accordingly succeed.

That leaves the question of costs. Strictly speaking the appellant's cause of action was incomplete and it has only now, on appeal, remedied the deficiency. The respondent was entitled to take the objection it did and, when the appellant failed to produce the original title deed or a certified copy thereof either in its replying affidavit or at the hearing before the court a quo, to persist with the objection until the shortcoming had been rectified. The appellant cannot be faulted (on the authority of the **Commercial Union Assurance Co** case **supra**) for not annexing the original title deed to its answering affidavit, but having elected not to do so it was obliged to produce it at the hearing in order to meet the respondent's challenge. It follows that the appellant is only entitled to its costs up to that point but not thereafter, since it chose to prosecute its case

without admissible evidence relating to an essential element thereof viz. ownership. But the respondent also cannot escape criticism. It could and should have called for the original title deed at the hearing when upon its production it would have satisfied itself that its first objection was without substance. Not having done so it would be wrong to allow the respondent to shelter behind this narrow point in order to evade an order for costs. The respondent, moreover, and as a result of the cession, in fact never had a defence to the appellant's **rei vindicatio**. The information about the cession was pertinent: it should have been disclosed and would doubtless have led to a different result before the court **a quo** if it had been. Even if one accepts the assurance of the respondent's managing director that the information was not wilfully withheld from the court, it merits censure. In all the circumstances, and balancing the shortcomings on both sides, it seems to me that the

fairest order on costs, at least for the period which follows upon the filing of the appellant's replying affidavit, is to make no order at all.

The following order is accordingly made:

1. The application of the Standard Bank of South Africa Limited for joinder in the appeal is refused with costs.

2. The appeal succeeds.

3. The order of the court a quo is set aside and the following order is substituted therefor:

   An order ejecting the respondent and all persons claiming occupation by, through or under the respondent from the Remaining Extent of the farm Goudini 30, Registration Division JP Transvaal measuring 2109,4681 hectares.

4. Subject to paragraph 5 hereof, the respondent is ordered to pay the appellant's costs up to and including the filing of the appellant's replying

affidavit. Thereafter each party is to pay its own costs.

5. Leave is granted to the parties, if so advised, to lodge written submissions to the registrar of the Appellate Division within 14 days of the date of this judgment as to whether the order of the court a quo that certain reserved costs are to be paid by the appellant, should be altered.

P M NIENABER
Judge of Appeal

Hoexter JA]
Nestadt JA] CONCUR
Eksteen JA]
Nicholas AJA]