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[3] **THE SUPREME COURT OF APPEAL**

[4] **REPUBLIC OF SOUTH AFRICA**

[5] **JUDGMENT**

[6] Case No 426/09
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[8] In the matter between:

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[10] **ANSELMO INACIO DE FREITAS DE AGUIAR**
Appellant

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[12] and

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[14] **REAL PEOPLE HOUSING (PTY) LIMITED**
Respondent

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[17] **Neutral citation:** *De Aguiar v Real People Housing* (426/09) [2010] ZASCA 67 (24 May 2010)
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[19] **Coram:** MTHIYANE, VAN HEERDEN, MLAMBO and SHONGWE JJA and GRIESEL AJA
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[21] **Heard:** 4 May 2010
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[23] **Delivered:** 24 May 2010
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[25] **Summary:** Application for leave to adduce further evidence – requirements restated – whether lessee entitled to rely on enrichment lien for expenses in respect of necessary and useful improvements.

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[29] **ORDER**
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[32] **On appeal from:** South Gauteng High Court (Johannesburg) (Bhana AJ sitting as court of first instance):

[33] (a) The appeal is dismissed with costs.

[34] (b) The order of the high court is varied by substituting a period of 60 days for the period of 120 days in para 1 of the order.

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[36] **JUDGMENT**
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[38] GRIESEL AJA (MTHIYANE, VAN HEERDEN, MLAMBO and SHONGWE JJA concurring):

[39] The sole issue for determination in this appeal is whether or not leave should be granted to the appellant to adduce further evidence so as to enable him to rely on an alleged improvement lien as a defence to a claim for his eviction from certain premises. If leave is refused, it is common cause that the appeal should fail.

[40] The present respondent (as applicant in the court below) obtained an order in the South Gauteng High Court, Johannesburg for the eviction of

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the appellant (respondent in the court below) and all those who occupy the premises described as 90 Main Road, Walkerville, Meyerton (the property) by virtue of his occupation.

[41] Most of the relevant facts are uncontentious and can be briefly stated. The appellant's father acquired the property as vacant land in 1970, later erecting a family home and other improvements thereon during the early 1980s. The appellant and his family have been in occupation of the property ever since. During November 1997 the property was sold in execution to First National Bank (FNB) after the appellant's father ran into financial difficulties. FNB subsequently sold the property to the respondent, who took transfer thereof during May 2001. On 14 May 2001, the respondent concluded a written lease with the appellant in respect of the property at a monthly rental of R9 795.04. In breach of the lease, however, the appellant failed regularly to pay the rental due and as at 15 April 2006 he was in arrears in a total amount in excess of R130 000. The respondent accordingly instituted action against the appellant in the Vereeniging magistrate's court for recovery of the arrears and cancellation of the lease. It simultaneously commenced eviction proceedings out of the same court. Both the action and the application were opposed by the appellant.

[42] On 25 April 2006 the parties reached a settlement of their disputes and entered into a written 'settlement agreement' which was made an order of court. In terms of the settlement, the lease was cancelled and the respondent agreed to sell the property to the appellant at a purchase price of R1,5 million, which had to be paid, alternatively secured by

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acceptable bank guarantees, on or before 31 May 2006. Clause 1.4 of the settlement agreement provides as follows:

[43] 'In the event that the defendant fails to meet the conditions mentioned in 1.3 above [ie payment or securing of the purchase price], the defendant has agreed to vacate the premises on or before 30 June 2006.'

[44] It was also recorded that the agreement constituted 'a full and final settlement of the disputes between the parties'.

[45] The appellant failed to pay or secure the purchase price by due date, with the result that he became obliged to vacate the property on 30 June 2006. He refused to do so, which led to the launching of the application for eviction in the court below, based squarely on the undertaking contained in clause 1.4 of the settlement agreement.

[46] In his answering affidavit filed in opposition to the claim for eviction, the appellant raised numerous issues, none of which amounted to a valid defence in law and none of which requires judicial attention at this stage. The learned judge in the court below rightly rejected the appellant's opposition to the order sought and found that the respondent's right to seek eviction arose out of the 'self-standing settlement agreement' entered into between the parties. He accordingly granted an eviction order, affording the appellant a further 120 days to vacate the premises.

[47] The appellant filed a notice of application for leave to appeal against the eviction order, raising a number of grounds of appeal. Those grounds

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all fell away, however, and were overtaken by a notice styled 'Supplementary Grounds for Leave to Appeal', supported by a supplementary affidavit, in which the appellant – now represented by a new legal team – claimed to be entitled to rely on an enrichment lien over the premises, based on 'considerable amounts of money' allegedly expended by him and his father in respect of 'necessary and useful improvements' to the property. This was an entirely new point, which was neither foreshadowed in the evidence on record at that stage nor supported by such evidence. The appellant accordingly sought leave to appeal so as to enable him to apply to the court hearing the appeal for leave to lead further evidence relating to such expenses and improvements.

[48] In the event, the application for leave to appeal was dismissed by the court below, but was subsequently granted by this court on petition. Pursuant to that order, a substantive application for leave to adduce further evidence was delivered on behalf of the appellant, which is what is before us at this stage. Should such leave be granted, the respondent wants the matter to be remitted to the high court for that court to determine whether, having regard to the evidence adduced by the appellant, he is entitled to rely on a lien as a right to retain possession of the property.

[49] Legal position

[50] In terms of s 22(a) of the Supreme Court Act 59 of 1959 this court

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(and a high court) is afforded power –

[51] '. . . on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; . . . .'

[52] These provisions have been the subject of judicial scrutiny on innumerable occasions over the years and although the requirements have not always been formulated in the same words, the basic tenor of the various judgments throughout has been to emphasise the court's reluctance to reopen a trial:[1] in the interests of finality, the court's powers should be exercised sparingly and further evidence on appeal should only be admitted in exceptional circumstances.[2]

[53] It is incumbent upon an applicant for leave to adduce further evidence to satisfy the court that it was not owing to any remissness or negligence on his or her part that the evidence in question was not adduced at the trial.[3] Furthermore, inadequate presentation of the litigant's case at the trial will only in the rarest instances be remediable by the adduction of further evidence at the appeal stage.[4] It is thus clear

[1] Erasmus *Superior Court Practice* A1-55 – A1-56 (Service Issue 33).

[2] *Colman v Dunbar* 1933 AD 141 at 161; *S v N* 1988 (3) SA 450 (A) at 458E; *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) para 43.

[3] *Simpson v Selfmed Medical Scheme & another* 1995 (3) SA 816 (A) at 824J.

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that the test is a stringent one. As pointed out by Corbett JA in *S v N*:[5]

[54] 'A study of the reported decisions of this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused: and that where relief has been granted the evidence in question has related to a single critical issue in the case.'

[55] While pointing out that it is undesirable to lay down fixed rules as to when the court ought to accede to the application of a litigant desirous of leading further evidence upon appeal, this court as well as the Constitutional Court has in a series of decisions laid down certain basic requirements. The formulation that is perhaps the most often quoted is that of Holmes JA in *S v De Jager*:[6]

[56] '(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

[57] (b) There should be a *prima facie* likelihood of the truth of the evidence.

[4] *R v Carr* 1949 (2) SA 693 (A) at 699.

[5] Footnote 2 above at 458I–459A.

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[6] 1965 (2) SA 612 (A) at 613B. See also the cases referred to in footnote 2 above as well as *Loomcraft Fabrics CC v Nedbank Ltd & another* 1996 (1) SA 812 (A) at 824H–825D; *S v M* 2003 (1) SA 341 (SCA) para 16; *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) para 33; and *President of the Republic of South Africa & others v Quagliani, and two similar cases* 2009 (2) SA 466 (CC); [2009] ZACC 1 para 70.

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[58] (c) The evidence should be materially relevant to the outcome of the trial.'

[59] Applying the foregoing principles to the evidence before us, I am of the view that the present application cannot succeed.

[60] Evidence materially relevant to the outcome

[61] Starting with the last requirement first, counsel for the respondent strongly relied on the terms of the settlement agreement concluded between the parties on 25 April 2006. He pointed out that it contains an unequivocal undertaking by the appellant to vacate the property on or before 30 June 2006, should he be unable to pay or secure the purchase price by that date.[7] It contains no room for an unexpressed *reservatio mentalis* that would entitle the respondent to evade his contractual undertakings. The settlement agreement formed an independent basis for the respondent's application for eviction, as the learned judge in the court below rightly found. This finding, which has not been assailed on appeal on behalf of the appellant, is dispositive of the matter. As correctly submitted by counsel for the respondent, the appellant's purported reliance on an enrichment lien is incompatible with the undertaking to vacate the property. The appellant has not sought – either in the answering affidavit or in his supplementary affidavit – to assail the validity of the settlement agreement or to qualify the undertaking contained therein. In the result, no amount of further evidence relating to improvements can avoid the consequences of this undertaking or affect

[7] Para 4 above.

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the outcome of the application.

[62] In the light of this conclusion, it is not strictly necessary to deal with the other requirements. It is, in any event, clear to me that the application does not comply with any of the other requirements applicable to applications of this nature, as I shall briefly demonstrate.

[63] A reasonable explanation

[64] From the affidavits filed on behalf of the respondent in the application for leave to adduce further evidence it is evident that the only reason why evidence in support of the alleged lien was not placed before the court earlier was due to the fact that he was allegedly unaware of the judgment of this court in *Business Aviation Corporation (Pty) Ltd & another v Rand Airport Holdings (Pty) Ltd.*[8] In that case – an action by a lessor for the eviction of the lessees from an urban property – the lessees relied on an enrichment lien as they had expended money on necessary and useful improvements to the property for which they had not been compensated. The lessor met the lessees' defence with the contention that the lien purportedly relied upon had been abolished by two Placaeten, promulgated by the Estates of Holland in 1658 and 1696 respectively. On appeal to this court it was held that the provisions of article 10 of the Placaeten had never applied to urban leases, with the result that the Placaeten did not provide an answer to the lessees' reliance on an enrichment lien. It was this perceived 'fundamental

[8] 2006 (6) SA 605 (SCA).

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change' in the law of which the appellant claims to have been unaware and on which he now seeks to rely. The appellant cannot say why his erstwhile legal representatives did not inform him of his rights, but he surmises that this must be due to the fact that they had been equally ignorant of the said judgment and its effect on the rights of lessees.

[65] In my opinion, the appellant's explanation does not withstand scrutiny, nor does it excuse his failure to invoke the purported lien at an earlier stage:

(a) First, the decision in *Business Aviation Corporation* was handed down in this court on 30 May 2006. There is simply no explanation – apart from pure speculation on the appellant's part – as to why his former legal team would have been unaware of that decision when the present matter came to be argued before the court below exactly one year later, on 30 May 2007. Whatever the true reason may be, it is clear to me that this is not one of those 'rarest instances' where the respondent should be permitted to take shelter behind the perceived inadequate presentation of the defence case.[9]

(b) Second, the *Business Aviation* decision did not create new law, as suggested by the appellant; it merely clarified the common law

[9] *Carr's* case, *supra*.

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position as it had existed for many years. Nothing prevented the appellant, if so advised, from relying on an improvement lien when deposing to his answering affidavit. This is all the more so, seeing that the appellant alleges that he effected improvements to the property, not only in his capacity as lessee, but also as a lawful occupier. The *Business Aviation* decision did not in any way affect the rights of lawful occupiers to rely on enrichment liens.

[66] A *prima facie* likelihood of the truth of the evidence

[67] In his answering affidavit in the main application the appellant made mention of various improvements effected to the property over the years, making it clear that it was *his father* who had developed the property and paid for the various improvements. Thus, although the appellant was clearly alive to the issue of improvements when deposing to his answering affidavit, no mention was made of any improvements for which the appellant himself can claim credit. In his supplementary affidavit, however, the appellant claims that *he and his father* had spent 'a substantial amount of money on useful and necessary improvements to the premises'. Any improvements effected by his father are, of course, completely irrelevant to a consideration of the lien on which the

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appellant seeks to rely. Moreover, any improvements effected before 2001, when the respondent became the owner of the property, are equally irrelevant, because the respondent could not have been enriched by such improvements.

[68] As to the details regarding exactly which improvements they were, when they were effected and at what cost, the appellant is exceedingly vague. More importantly, the appellant does not presently have the necessary evidence available to establish the enrichment lien on which he wishes to rely; such evidence must still be found. According to him, it has been 'very difficult . . . to track down the builders' who carried out the improvements in question. He has also experienced difficulty finding 'any records of such transactions and in most instances payment took place in cash transactions the records of which have been disposed of'. This court is therefore quite unable to evaluate the cogency of the evidence that the appellant proposes to place before the high court, should leave be granted. Such evidence as has been adduced by the appellant, in the form of a report prepared by an architect, Mr John Cornish, has persuasively been refuted on behalf of the respondent. On the basis of information supplied by the appellant, Mr Cornish drew a schedule, illustrated by an aerial photograph, of improvements the appellant claims to have made after 1 August 2001. With reference to building plans obtained from the local authority, however, it was demonstrated by the respondent that most of the improvements claimed by the appellant have in fact been in existence at least since October 1985 and therefore could not have been improvements effected by him

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after August 2001.

[69] Moreover, it is clear from what is set out above that the new evidence does not relate to a 'single critical issue', as required. Instead, it is envisaged that, should the matter be remitted to the high court and referred for the hearing of oral evidence, the appellant 'will be able to call many witnesses, including the builders (with subpoenas *duces tecum* for documents) as well as many of my family members who were aware that I was paying for the improvements to be effected and witnessed the building operations'. Thus, what the appellant contemplates is a full-scale new trial, spanning a lengthy period of time and involving a multitude of witnesses and documents, much of which will be strenuously contested by the respondent, as appears from the affidavit filed in opposition to the present application. This is a compelling consideration *against* granting the relief sought.[10]

[70] Conclusion

[71] To sum up, I am of the view that the appellant has not satisfied any of the requirements for leave to adduce further evidence. In the circumstances, the application for leave to adduce further evidence is without merit. It follows that the appeal falls to be dismissed with costs.

[72] Counsel for the respondent has asked us to vary the order of the court below in one respect: as mentioned earlier, the court below

[10] Cf *Metrorail supra loc cit*; *S v N supra* at 459A–B.

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afforded the appellant a period of 120 days to vacate the property. Counsel asked that this period be substituted with a period of 30 days. In the light of the fact that the appellant has had a further period of almost three years since the date of the order by the high court in which to arrange his affairs, I am inclined to accede to this request. However, in my view, a fair compromise would be to allow the appellant a period of 60 calendar days from the date of this order to vacate the property.

[73] It is ordered:

[74] (a) The appeal is dismissed with costs.

[75] (b) The order of the high court is varied by substituting a period of 60 days for the period of 120 days in para 1 of the order.

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[77] B M GRIESEL
Acting Judge of Appeal

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[80] APPEARANCES

[81] FOR APPELLANT: George Kairinos

[82] Instructed by: Harry Goss Attorneys, Bedfordview

[83]
McIntyre & Van der Post, Bloemfontein

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[86] FOR RESPONDENT: Dirk Vetten

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[88] Instructed by: Martini-Patlansky, Houghton, Johannesburg

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