



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

**CASE NO. 1574/2022**

In the matter between:

**GARTH PETERSEN**

**First applicant**

**SARAH-JANE PETERSEN**

**Second applicant**

**and**

**KHAYALETHU WISEMAN GQOSHA**

**First respondent**

**BUFFALO CITY METROPOLITAN MUNICIPALITY**

**Second respondent**

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**JUDGMENT**

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**LAING J**

[1] This is an application for an order evicting the first respondent and other occupiers from a residential property situated at 28 Bonnie Doon Place, Bonnie Doon, East London ('the property').

**Applicants' case**

[2] The previous owner of the property was a Mr Colin Kriel. As security for various loans that he had obtained, Mr Kriel registered six mortgage bonds against the property. A creditor, Shumayela Properties (Pty) Ltd ('the company'), subsequently instituted action proceedings under case number EL 835/2016 and obtained judgment against him, whereupon the company made application for execution against the property in terms of rule 46(1), read with rule 46A, of the Uniform Rules of Court ('URC'). The court granted an order to that effect, subject to any rights that the first respondent had as occupier of the property.

[3] The applicants purchased the property from Mr Kriel on 12 February 2021 after concluding negotiations with the attorneys for the judgment creditor (i.e., the company). The transfer of the property was registered on 28 July 2021.

[4] As a backdrop to the above, there had been a dispute about Mr Kriel's prior sale of the property to the first respondent. This had formed the subject of action proceedings brought by Mr Kriel under case number EL 381/2019, in terms of which he had sought the cancellation of the sale and the first respondent's eviction from the property. The first respondent had denied the existence of the sale but had argued that he was entitled to occupation. This was because the parties had entered into a separate agreement in terms of which Mr Kriel had allegedly granted the first respondent the right to occupy the property, pending the repayment of a loan.

[5] The applicants pointed out that the first respondent had failed to register any right against the property. There was no impediment to the purchase thereof.

[6] In accordance with the agreement of sale concluded with Mr Kriel, the applicants were entitled to vacant occupation of the property on the date of registration of transfer. Despite the applicants' delivery of a notice to vacate on 4 August 2021, the first respondent refused to cooperate and relied on the right of occupation allegedly granted

to him by Mr Kriel. He, furthermore, refused access to the property for purposes of the first applicant's investigation of a possible water leak. He also refused access when the first applicant attempted to do so in the company of a police officer on 19 August 2021.

[7] The applicants, in desperation, found alternative accommodation for the first respondent and offered to pay four months' worth of rental and the removal costs, but to no avail.

[8] A subsequent account from the second respondent indicated that water consumption at the property had increased substantially, confirming their suspicion of a possible leak. The applicants were liable for the charges but were unable to address the problem without the first respondent's cooperation.

[9] On 2 November 2021, the applicants instituted urgent application proceedings against the first respondent under case number EL 1281/2021. The matter was struck off the roll and subsequently re-enrolled, whereafter it was dismissed on 9 June 2022.

[10] Pending finalisation of the dispute with the first respondent, the applicants have been constrained to secure rented accommodation at considerable expense. They have also placed their belongings in storage. The second applicant previously operated her legal practice from home but has been unable to do so properly from temporary premises. The applicants and their children have lived in a state of limbo for well over a year and the uncertainty, overall, has taken an emotional toll on the family.

[11] In the meanwhile, municipal rates and service charges continue to accumulate to the first applicant's account, without benefit of access to or use of the property. The applicants' request that the first respondent settle such expenses was refused. When the first applicant was afforded an opportunity to gain limited access to the property on 4 April 2022, he was charged an amount of R 2,500 by the attorneys for the first respondent as an inspection *in loco* fee. The property was in considerable disrepair,

with a collapsed wooden deck, exposed electrical wiring, cracked and broken windows, and damaged guttering.

[12] Mr Kriel's supporting affidavit accompanied the application, explaining how the first respondent came to be in occupation of the property. The first respondent had previously lent Mr Kriel a considerable amount of money to lease fuel storage tanks situated at the Black Sea port of Novorossiysk in Russia. Subsequently, Mr Kriel permitted him to take occupation of the property on or about 29 February 2016, allegedly in anticipation of the first respondent's purchase thereof. A dispute arose regarding compliance with the terms of the deed of sale and continued occupation of the property. The first respondent asserted that Mr Kriel had permitted him to take occupation as security for repayment of the loan. Mr Kriel denied this and instituted action proceedings for cancellation of the deed of sale and eviction of the first respondent. These were withdrawn after the attachment of the property by Shumayela Properties (Pty) Ltd.

### **First respondent's case**

[13] The first respondent raised two points *in limine*: the first pertained to compliance with the regulations for the Justices of the Peace and Commissioners of Oaths Act 16 of 1963; the second pertained to the impact of the applicants' earlier application proceedings (case number EL 1281/2021), to the effect that the dispute was now *res judicata*. These will be dealt with later in the paragraphs that follow.

[14] In his answering affidavit, the first respondent averred that he had entered into a verbal agreement with Mr Kriel to take occupation of the property as security for the loan that he had provided. He and his family consequently moved to the property on or about 29 February 2016.

[15] Subsequently, on or about 25 April 2016, Mr Kriel had informed him that he was in arrears with mortgage bond repayments and had requested that he conclude a deed of sale regarding the property so that Mr Kriel could 'buy time' from the relevant bondholder. The first respondent did so and continued to remain in occupation.

[16] Whereas the first respondent admitted that the applicants are the owners of the property, he asserted that he was entitled to the benefits of a lien or pledge in relation thereto. He contended that the court had already made such a determination in the earlier application proceedings. Mr Kriel had neither cancelled the underlying verbal agreement nor repaid the loan. The first respondent, so he argued, was entitled to remain in occupation. This would come to an end if either Mr Kriel or the applicants settled the outstanding amount owed.

[17] Turning to Mr Kriel's supporting affidavit, the first respondent indicated that the second applicant had introduced him to Mr Kriel, who had presented to him a business opportunity. This had resulted in the first respondent's provision of a loan in the amount of US\$ 86,500. The terms of the loan were recorded in a written agreement and are not entirely relevant for immediate purposes, save to state that Mr Kriel was required to repay double the value of the loan within 30 days, together with payments linked to the supply of fuel stored at Novorossiysk. The first respondent provided a further loan, such that Mr Kriel's liability amounted to US\$ 249,550 plus interest of 15% per annum, calculated from 23 September 2015.

[18] Mr Kriel's failure to repay the loan precipitated the onset of financial difficulties for the first respondent. His house was attached by a judgment creditor, prompting his negotiation with Mr Kriel for the possible purchase of the property for what was owed in terms of the loan. They failed to agree on the purchase price, however, and the deal fell through. Nevertheless, the first respondent alleged that he and Mr Kriel concluded a verbal agreement in terms of which he would take occupation of the property, pending

Mr Kriel's repayment. The first respondent would not be liable for occupational rental or rates and service charges.

[19] The first respondent confirmed that the subsequent conclusion of a deed of sale for the purchase of the property was a sham. It was done merely to ease some of the pressure on Mr Kriel in relation to his mortgage bond repayments. The first respondent's occupation of the property arose by reason of the verbal agreement with Mr Kriel. He denied that he was an unlawful occupier.

### **In reply**

[20] The applicants pointed out, in reply, that the court had never made a finding in the earlier application proceedings on the existence or otherwise of a lien or pledge in favour of the first respondent. The court had merely dismissed the application because of a successful special plea of *lis pendens*, with reference to Mr Kriel's action proceedings.

[21] Furthermore, the applicants argued that the debt owed by Mr Kriel to the first respondent became due on 23 September 2015. In the absence of any interruption, the debt had run to prescription.

[22] Regarding the verbal agreement to the effect that the first respondent took occupation of the property to secure his loan to Mr Kriel, the applicants contended that this was not competent without the bondholder's consent.

### **Main issues to be decided**

[23] The first respondent's points *in limine* must be considered. The argument made regarding *res iudicata* requires closer examination.

[24] If the court is satisfied that there is no basis for the above, then it will be necessary to decide whether it would be just and equitable to order the first respondent's eviction from the property. This will entail, *inter alia*, the determination of whether he is indeed an unlawful occupier, which will, in turn, depend on the merits of his claim to the benefits of a lien or pledge, as alleged.

[25] The following paragraphs deal with the points *in limine*.

### **Compliance with Act 16 of 1963**

[26] The first respondent argues that the first applicant's founding affidavit does not comply with the regulations to Act 16 of 1963 since the commissioner of oaths failed to insert the place and date of the declaration. To that effect, regulation 4(1) provides that:

'...Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.'<sup>1</sup>

[27] It is not disputed that there was non-compliance. The applicants subsequently filed, in reply, an affidavit by the commissioner of oaths in question, Ms Kerri de la Querra, who confirmed that she had commissioned the first applicant's founding affidavit on 9 September 2022 at her offices, situated at 32 Pearce Street, Berea, East London.

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<sup>1</sup> Regulation 4(1) of the Regulations Governing the Administering of an Oath or Affirmation, published in terms of GNR 1258 of 21 July 1972.

[28] As the legal representative for the first respondent acknowledged in argument, non-compliance with the regulations is not fatal. In *S v Munn*,<sup>2</sup> Van den Heever observed that:

'Compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith, subject only to defences such as duress and possibly undue influence. Where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator...'<sup>3</sup>

[29] In the present matter, the first respondent asserted that it was unlikely that the founding affidavit had been signed and commissioned on 9 September 2022. This was because the applicants had already brought an application for leave to appeal against the judgment in the earlier application proceedings (case number 1281/2021) and only withdrew it a week later, on 16 September 2022. The later date was also when the notice of motion was dated.

[30] The first respondent has, however, not alleged duress or undue influence or any other irregularity regarding the first applicant's affidavit. He has also not disputed where it was commissioned. Whether it was signed and commissioned on 9 or 16 September 2022 is entirely irrelevant. Nothing turns on the point and the court is satisfied that there has been substantial compliance with the regulations.

### **Res iudicata**

[31] The first respondent's next point is that the present application flounders on the principle of *res iudicata*. The requirements for a successful defence to that effect were set out in *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International*

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<sup>2</sup> 1973 (3) SA 734 (NC).

<sup>3</sup> At 737. See, too, *S v Msibi* 1974 (4) SA 821 (T).



*Liquor Distributors (Pty) Ltd*,<sup>4</sup> where the Supreme Court of Appeal listed them as ‘*idem actor, idem reus, eadem res and eadem causa petendi*’.<sup>5</sup> The court went on to hold that:

‘This means that the exception can be raised by a defendant in a later suit against a plaintiff who is “demanding the same thing on the same ground” (per Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A), at 562A); or which comes to the same thing, “on the same cause for the same relief” (per Van Winsen AJA in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A), at 472A-B...); or which also comes to the same thing, whether the “same issue” had been adjudicated upon (see *Horowitz v Brock* 1988 (2) SA 160 (A), at 179A-H). The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the court been finally disposed of in the first action?’<sup>6</sup>

[32] The principle operates to bring litigation to an end after a matter has already been decided. A final judgment must be given effect, even where it is wrong.<sup>7</sup> In *Molaudzi v S*,<sup>8</sup> the Constitutional Court explained that:

‘...The underlying rationale of the doctrine of *res iudicata* is to give effect to the finality of judgments. Where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts.’<sup>9</sup>

[33] It is common cause that the parties and the relief sought in both the earlier and the present application are the same. The first respondent argued that Hartle J dismissed the earlier application because she found that the premise upon which the applicants had relied was not true and that they had withheld critical information. No mention had been made of the first respondent’s occupation of the property by reason

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<sup>4</sup> 2001 (2) SA 232 (SCA).

<sup>5</sup> At 239.

<sup>6</sup> *Ibid.*

<sup>7</sup> RC Claassen, *Claassen’s Dictionary of Legal Words and Phrases* (LexisNexis, July 2022 – SI 25).

<sup>8</sup> 2015 (8) BCLR 904 (CC).

<sup>9</sup> At paragraph [16].

of his claim to a lien or pledge that had allegedly arisen from Mr Kriel's indebtedness. Consequently, he argued, the applicants had failed to prove that he was an unlawful occupier.

[34] The first respondent raised, furthermore, the application of the *Henderson* principle as considered in *Democratic Alliance v Brummer*,<sup>10</sup> within the context of the defence of issue estoppel. This requires elaboration.

[35] In *Royal Sechaba Holdings (Pty) Ltd v Coote and another*,<sup>11</sup> the Supreme Court of Appeal discussed the principle of issue estoppel, remarking that it could be invoked successfully in situations where the relief sought or cause of action was not the same as that in the case already decided. This was because the common law requirements for *res iudicata* had been relaxed by the courts in appropriate circumstances.<sup>12</sup> Provided that the parties were the same and the issue to be decided was the same, the defence of *res iudicata* was still available. It has become customary, however, to refer to the defence, when used in such situations, as 'issue estoppel', applying the corresponding terminology that is used in English law.<sup>13</sup>

[36] Returning to *Brummer*, mentioned by the first respondent, a full bench explained that issue estoppel had 'taken root in our law as a subsidiary of the principle of *res iudicata*'.<sup>14</sup> Wille J observed as follows:

'...Issue estoppel applies where an issue of fact or law was an essential element of a prior final judgment. The issue cannot be revisited in subsequent proceedings before another court even if a different cause of action is relied upon or different relief is claimed.<sup>15</sup> Our courts have recognised that a strict application of issue estoppel could result in unfairness in some unusual

<sup>10</sup> 2021 (6) SA 144 (WCC).

<sup>11</sup> 2014 (5) SA 562 (SCA).

<sup>12</sup> At paragraph [12]. See, too, *Boshoff v Union Government* 1932 TPD 345; *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A); *Smith v Porritt and others* 2008 (6) SA 303 (SCA); and *Hyprop Investments Ltd and others v NSC Carriers and Forwarding CC and others* 2014 (5) SA 406 (SCA).

<sup>13</sup> *Smith v Porritt*, *supra* n 12, at paragraph [10].

<sup>14</sup> *Brummer*, *supra* n 10, at paragraph [72], *per* Gamble J, writing for the majority.

<sup>15</sup> *Smith v Porritt*, *op cit*.

circumstances, but this is typically applied in cases where the nature of the issue is in dispute or at least open to some doubt...

...Issue estoppel applies when different relief based on different causes of action is sought in the subsequent case, if it involves the determination of the same issue of fact or law.<sup>16</sup> I take the following from *Ekurhuleni*, where it was held that-

“the submission that *res iudicata* does not apply because of the lack of sameness in the cause of action is misconceived. Sameness is determined by the identity of the question previously set in motion.”<sup>17</sup>

...Issue estoppel developed precisely because requiring sameness between the two causes of action allows parties to relitigate the same issue by garbing these up in different causes of action. The authority not to apply issue estoppel for reasons of justice and equity needs to be evaluated with reference to the *Henderson*<sup>18</sup> principle. This principle provides, *inter alia*, that when a given matter becomes a subject of litigation-

“the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.”

...This doctrine has been fully assimilated into our law. The doctrine applies equally to pure claims of *res iudicata* and to claims based on issue estoppel...<sup>19</sup>

[37] The *Henderson* principle must not be confused with issue estoppel. Whereas Wille J’s point was that the former must inform the application of the latter, the concepts are distinguishable. As this court understands it, the *Henderson* principle requires a party to present his or her case in its entirety, rather than subsequently attempt to litigate aspects of it that were previously omitted. In contrast, issue estoppel is a defence (derived from the principle of *res iudicata*) that can be raised when the same issue has already been adjudicated to finality between the same parties.

<sup>16</sup> *Aon South Africa (Pty) Ltd v Van den Heever NO and others* 2018 (6) SA 38 (SCA), at paragraph [40].

<sup>17</sup> *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA), at paragraph [31].

<sup>18</sup> *Henderson v Henderson* (1843) 3 Hare 100 ([1843-1860] All ER Rep 378), at 114-115 (Hare).

<sup>19</sup> *Brummer, supra* n 10, at paragraphs [26] to [29], *per* Wille J, dissenting.

[38] The first respondent contended, with reference to the above principles, that the applicants were precluded in the circumstances from instituting another application against him, based on the same relief and the same cause of action. They ought to have placed all relevant information before the court in the earlier application to demonstrate that the first respondent was an unlawful occupier. That issue, i.e., whether he was an unlawful occupier, was the same in both the earlier and the present application.

[39] The applicants, in turn, focused on the basis upon which Hartle J dismissed the earlier application. They asserted that the court found that the first respondent had successfully raised a plea of *lis pendens* regarding the action proceedings brought by Mr Kriel against the first respondent (case number EL 381/2019). Consequently, they argued, the court held that the parties should involve themselves in such proceedings, which entailed a determination of the first respondent's reliance upon a lien or pledge in relation to Mr Kriel's indebtedness. Hartle J was unable to make a finding on whether the first respondent was an unlawful occupier, pending finalisation of the action proceedings. Once a determination had been made, the applicants could approach the court afresh.

[40] Furthermore, the applicants pointed out that Mr Kriel had subsequently withdrawn the above action proceedings. There had, moreover, been no counterclaim. The litigation had come to an end. The only avenue open to the applicants, consequently, was the institution of the present application proceedings.

[41] It is necessary, at this stage, to consider more closely the decision handed down in the earlier application.<sup>20</sup> After considering the facts placed before her, including the applicants' failure to have laid bare every legally relevant detail, as well as the first

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<sup>20</sup> *Petersen and another v Gqosha and another* (EL 1281/2021) [2022] ZAECELLC 12 (9 June 2022), accessed on 17 April 2023 at <http://www.saflii.org.za/za/cases/ZAECELLC/2022/12.html>

respondent's vagueness regarding the basis for his claim to the lien or pledge, Hartle J held as follows:

'...In my view all the elements of a successful plea of *lis pendens* avail the first respondent in the circumstances and given his reservations that the applicants purported to defeat his right of retention by purchasing the property from Colin Kriel whilst knowing full well that he was claiming a lien or pledge over it (a concern not unreasonably held by him), it appears to me to be appropriate that the applicants involve themselves in the finalization of the pending action. No doubt the matter can also be resolved earlier by the debt which is the subject matter of the pledge or lien being settled or secured to the first respondent's satisfaction.

...In given circumstances, a court can and should stay eviction proceedings if the outcome of other proceedings impacts the merits of the eviction or, if factual disputes raised on the papers can only be resolved by oral evidence. Either or both situations apply *in casu*. *I cannot determine the issue whether the first respondent is an unlawful occupier on motion (especially since the applicants have not entirely taken this court into their confidence) neither can I find that the pending litigation between Colin Kriel and the first respondent is legally irrelevant.* To the contrary, and according to the doctrine of notice, the applicants at the time they bought the property, on their own showing, knew that the first respondent claimed a "lien" (or pledge) and in the result that right of retention ought to prevail against them as successors in title if the court in the pending action finds in the first respondent's favour in this regard.

...I have considered ordering a stay of these proceedings, but my concern is that the premise for the application set forth by the applicants in the papers is not a true one and that critical information has been withheld from the court. The launch of the present application was also unnecessary in the light of the pending litigation in East London Case No. 381/2019 which ought to dispose of the question whether the first respondent's right of retention on the basis contended for can prevail against the owner's *rei vindicatio*.<sup>21</sup>

[42] The court subsequently dealt with the applicant's non-compliance with the procedural requirements set out in section 4(2) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ('PIE'). Thereafter, Hartle J remarked that:

'...By the first respondent's own admission, his primary concern is his contention that he is not an unlawful occupier within the meaning of the definition in the PIE Act. Once that issue has been

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<sup>21</sup> At paragraphs [30] to [32], emphasis added, footnotes omitted.

resolved the applicants can approach the court afresh, alternatively can seek a directions order in the pending action to be served timeously before the hearing.<sup>22</sup>

[43] This court agrees with the first respondent that Hartle J dismissed the earlier application because the premise upon which the applicants had relied was not true and that they had withheld critical information. The decision, however, clearly reveals that the court made no determination whatsoever regarding the issue of whether the first respondent was an unlawful occupier. Hartle J merely held that the first respondent's plea of *lis pendens* had merit. The action proceedings, pending at the time, could have been decisive.

[44] Ultimately, the first respondent's legal representative conceded during argument in the present matter, when pressed by this court, that no determination had been made of the issue in question. This was an important concession, correctly made.

[45] The special plea of *res iudicata* is only available when a court in an earlier case between the same parties has already granted or refused the same relief premised on the same cause of action. To put it more elementarily, the same thing must have already been decided on the same grounds. Alternatively, a party may invoke issue estoppel purely on the basis that the same issue has already been determined, notwithstanding the fact that the usual requirements for *res iudicata* have not been met. Crucially, the special plea, however it is framed, depends on a prior adjudication that is, at the very least, dispositive of the issue in question.

[46] In the present matter, it cannot be argued that the decision of Hartle J disposed of the issue of whether the first respondent is an unlawful occupier. That issue remains very much alive. Consequently, the first respondent's point *in limine* fails. The court is satisfied that the application has successfully navigated the perils of *res iudicata* and that it is necessary to investigate the merits of the matter in the paragraphs that follow.

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<sup>22</sup> At paragraph [35].

## Discussion

[47] The merits of the application will be discussed in the paragraphs that follow, in accordance with the various issues that have emerged.

### *Dispute of fact*

[48] At the heart of the first respondent's defence is his reliance on a lien or pledge over the property, derived from a verbal agreement with Mr Kriel to the effect that he could take occupation as security for the loan. In contrast, Mr Kriel has denied the existence of such agreement and asserted that the first respondent's occupation merely came about in anticipation of the purchase of the property.

[49] Where the material facts are in dispute and where no request has been made for the matter to be referred for oral evidence, the principles in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* apply<sup>23</sup> where Van Wyk J, writing for the full bench, held that:

'where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.'<sup>24</sup>

[50] A court may, however, reject the respondent's version when his or her allegations are patently implausible. The authority for this is the oft-quoted decision in *Plascon-Evans Paints v Van Riebeeck Paints*,<sup>25</sup> where the erstwhile Appellate Division, *per* Corbett JA, held as follows:

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<sup>23</sup> 1957 (4) SA 234 (C).

<sup>24</sup> At 235.

<sup>25</sup> 1984 (3) SA 623 (A).

'...In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...'<sup>26</sup>

[51] In the present matter, there is no clear indication that the first respondent's allegations are so far-fetched or untenable as to persuade the court to reject them. From the papers, both Mr Kriel and the first respondent are experienced businesspeople with healthy appetites for risk. The prospect of failure in a deal involving the lease of fuel storage tanks at Novorossiysk appears not to have deterred either of them. It is common cause, moreover, that Mr Kriel was experiencing financial difficulties at the time. A temporary arrangement for the first respondent to take occupation of the property as a guarantee for repayment of the Novorossiysk loan, followed by the conclusion of a contrived deed of sale to stave off the bondholder, is not completely implausible. To this must be added, for further consideration, the unlikelihood of Mr Kriel's version that he blithely permitted the first respondent to take occupation before the proper formulation and conclusion of a deed of sale that astutely addressed the terms of prior occupation and protected the former's rights overall. If done correctly, then the resulting deed of sale would also have served to prevent the need for Mr Kriel's subsequent action proceedings (case number EL 381/2019).

[52] The court is persuaded, consequently, to accept the first respondent's version that the lien or pledge, as claimed, arose from the averred agreement. This, however, is where difficulties for the first respondent begin to arise.

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<sup>26</sup> At 634F-635C.



*Lien or pledge*

[53] A lien can be described as a right of retention or *ius retentionis*. It is defined as the right to retain physical control over another's property, whether movable or immovable, to secure payment of a claim relating to the expenditure of money or something of monetary value by the possessor on that property until the claim has been satisfied.<sup>27</sup> It is not the first respondent's case that he has spent money or done work on the property, in accordance with a contractual obligation towards Mr Kriel or otherwise. On the strength of the definition alone, the first respondent does not have a lien.<sup>28</sup>

[54] A pledge, on the other hand, is a limited real right of security in a movable asset. It is created by delivery of the asset to the pledgee, pursuant to an agreement between him- or herself and the owner of the asset, to secure the fulfilment of an obligation to the pledgee by the pledgor or a third party.<sup>29</sup> The pledgee enjoys a preference in relation to the proceeds of the pledged asset in a sale of execution. Importantly, the subject matter of a pledge must be a movable asset.<sup>30</sup> A pledge must, accordingly, be distinguished from the concept of mortgage, which refers to a real right of security in the immovable asset of another, created by registration in the deeds registry pursuant to an agreement between the parties. The right serves to secure an indebtedness due to the creditor, usually described as the principal obligation.<sup>31</sup> It cannot be said that the first respondent in the present matter enjoys the benefits of either a pledge or a mortgage.

[55] If the first respondent has neither a lien nor a pledge, then what right does he enjoy? At best, he has (or had, as shall be explained) a contractual right against Mr Kriel to continue to occupy the property until Mr Kriel has (or had) fulfilled his obligation to

<sup>27</sup> TJ Scott, 'Lien', *LAWSA* (LexisNexis, vol 26(1), 3ed, 2020), at paragraph 292.

<sup>28</sup> See *United Building Society v Smookler's Trustees & Golombick's Trustee* 1906 TS 623, at 631; *Van Niekerk v Van den Berg* 1965 (2) SA 525 (A), at 538-541; *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (A), at 270F; and *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A), at 85E-F.

<sup>29</sup> M Dendy, 'Mortgage and pledge', *LAWSA* (LexisNexis, vol 29, 3ed, 2020), at paragraph 405.

<sup>30</sup> *Oertel v Brink* 1972 (3) SA 669 (W), at 674A-B.

<sup>31</sup> M Dendy, *op cit*, at paragraph 326.

repay the loan. The right was, of course, subject to the continued existence of such obligation. The applicants have, however, pleaded prescription.

### *Prescription*

[56] In terms of section 10(1), read with section 11(d), of the Prescription Act 68 of 1969, a debt shall be extinguished by prescription after the lapse of three years. Under section 12(1), prescription shall commence to run as soon as the debt is due. Furthermore, under section 14(1), the running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.

[57] Here, the first respondent's loan to Mr Kriel consisted of various tranches, the last of which having been released on or about 23 September 2015. In the most favourable scenario for the first respondent, the running of prescription was interrupted on 29 February 2016, when Mr Kriel tacitly acknowledged his liability by permitting the first respondent to take occupation. The latter had, accordingly, until 28 February 2019 to recover his loan, failing which the provisions of section 10(1) of the above Act would take effect. The first respondent has not refuted the allegation that he has taken no steps to enforce his claim against Mr Kriel. This much was acknowledged by his legal representative in argument. In the circumstances, Mr Kriel's debt to the first respondent must be deemed to have become extinguished by prescription. To put it another way, Mr Kriel's obligation has fallen away. Commensurately, the first respondent no longer has any right to occupy the property.

### *Rule 46A*

[58] The first respondent has raised certain contentions within the context of rule 46A of the Uniform Rules of Court ('URC'). The rule in question provides for judicial oversight in relation to execution against residential immovable property, so that the constitutional right to adequate housing is protected.<sup>32</sup>

[59] It appears to be the first respondent's argument that once the property was declared executable, as was done by Zilwa J on 12 January 2021 upon application made by Mr Kriel's judgment creditor, Shumayela Properties (Pty) Ltd, the property could not be alienated in any manner other than a sale in execution. This was because only the court had authority to control the way execution, as a process of court, should be carried out. The first respondent also argued that the applicants failed to heed the condition imposed by Zilwa J to the effect that the sale of the property was subject to any rights which the first respondent may have as an occupier.

[60] The decision in *Graham v Graham*,<sup>33</sup> as cited by the first respondent, is authority for the proposition that execution is a process of the court, and that a court has inherent authority to control its own process, subject to such rules as there are.<sup>34</sup> This was confirmed in *Strime v Strime*,<sup>35</sup> similarly cited. This court respectfully agrees with the above, which is, in any event, entrenched under section 173 of the Constitution.

[61] The order made by Zilwa J, however, was clearly pursuant to an application brought by the judgment creditor in terms of rule 46A, which serves as a safeguard against the abuse of a judgment debtor's constitutional right to adequate housing. It declared the property to be specially executable, authorised the issuing of a writ of execution, set a reserve price, and stipulated that the conditions of sale were to indicate that the sale was subject to the first respondent's rights as an occupier. Importantly, the order did not prescribe the way the property was to be sold. It simply granted authority

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<sup>32</sup> DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 20, 2022), at D1-632H.

<sup>33</sup> 1950 (1) SA 655 (T).

<sup>34</sup> At 658.

<sup>35</sup> 1983 (4) SA 850, at 852A. See, too, *Windybrow Theatre v Maphela and others* (2016) 37 ILJ 2641 (LAC), at paragraph [14].

for execution against the property in circumstances where it was used for residential purposes, as envisaged in terms of rule 46A. Whether the property was sold by public auction or consequent to negotiations between the judgment creditor's attorneys and private purchasers, as was the situation here, is immaterial.

[62] In relation to the argument that the applicants failed to heed the condition imposed by Zilwa J, it may well be so that Mr Kriel and the applicants did not specifically record the above condition in the subsequent deed of sale. That does not mean, however, that the transaction should be treated as invalid. The first respondent has brought no counterapplication to set aside the sale of the property. Moreover, the condition in question merely stated the obvious: that the sale was subject to any rights that the first respondent may have as an occupier. The decision in *Firstrand Bank Ltd v Mgedesi*,<sup>36</sup> mentioned by counsel for the applicants, indicates that the subject matter of a rule 46A application does not relate to the rights of an occupier who is not the judgment debtor. He or she enjoys separate but comprehensive legislative protection under PIE.<sup>37</sup>

### *Eviction proceedings*

[63] The applicants have expressly brought the application for eviction in terms of section 4(2) of PIE. The sheriff served notice of the proceedings on both respondents on 23 January 2023, in anticipation of the hearing on 16 February 2023 and as required under section 4(2), read with section 4(5).

[64] The seminal decision of the Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker and Bosch v Jika*<sup>38</sup> highlighted the main objectives and principles of PIE. These

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<sup>36</sup> 2019 JDR 2252 (MN).

<sup>37</sup> At paragraph [15].

<sup>38</sup> 2003 (1) SA 113 (SCA).

have been summarised as follows, *inter alia*:<sup>39</sup> PIE applies to all unlawful occupiers, irrespective of whether their occupation of the land was previously lawful; the effect of PIE is to delay or suspend the exercise of a landowner's full proprietary rights until a determination has been made on whether it is just and equitable to evict the unlawful occupier and under what conditions; provided that all the procedural requirements have been met, a landowner is entitled to approach a court based on ownership and the occupier's unlawful occupation, the occupier's bearing an evidential onus in this regard.<sup>40</sup>

[65] Both the applicants and the first respondent have referred to *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others*.<sup>41</sup> In that matter, Wallis JA dealt with an application brought by a private party for the eviction of the unlawful occupiers of a dilapidated building situated in Doornfontein, Johannesburg. The court held that, regarding the relationship between sections 4(7) and 4(8) of PIE, there were two enquiries. The first was whether it was just and equitable to grant an eviction order, having had regard to all relevant factors, which included whether there was alternative land or accommodation, to be assessed against the protection given to the landowner under section 25 of the Constitution. The second was what justice and equity demanded in relation to the date of the implementation of any order granted and what conditions should be attached thereto.<sup>42</sup> Furthermore, in relation to onus, the court held that, where section 4(7) applied, it was the duty of the applicant to demonstrate that he or she had complied with the relevant notice requirements, that the respondents were in unlawful occupation, and that sufficient information had been presented to satisfy the court that it would be just and equitable to grant the order sought.<sup>43</sup>

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<sup>39</sup> DE van Loggerenberg, *op cit*, at D9-1 to D9-3.

<sup>40</sup> *Ibid.* The learned writer observed that the Supreme Court of Appeal did not decide whether the ultimate onus lay with the landowner or the occupier. However, the Constitutional Court held, in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), at 235F-G, that, although it was incumbent on the parties to make all relevant information available to the court, technical questions regarding onus should not play an unduly significant role in the enquiry.

<sup>41</sup> 2012 (6) SA 294 (SCA).

<sup>42</sup> At paragraph [25].

<sup>43</sup> At paragraph [30].

[66] In the present matter, the applicants contended that a court must grant the order if the provisions of section 4 of PIE had been met. The first respondent argued that the provisions had not been met and that he has a valid defence.

[67] There is no dispute that the sheriff served notice of the proceedings on the respondents. It is common cause, too, that the applicants did not obtain the directions of the court for the contents and manner of service of the section 4(2) notice. In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and others*,<sup>44</sup> Brand AJA held as follows:

‘...The Act [PIE] has its roots, *inter alia*, in 26(3) of the Constitution, whereby “no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances”. Accordingly the purpose of section 4(2) is clearly to afford the respondents in eviction proceedings a better opportunity than they would have under the Rules to put all the circumstances that they allege to be relevant before the court.’<sup>45</sup>

[68] In the present matter, the section 4(2) notice was preceded by the applicants’ notice of motion and accompanying affidavits, served on 19 September 2022. The first respondent filed his notice of opposition on 28 September 2022. The section 4(2) notice itself was comprehensive. It set out the date upon which the application would be heard, the nature of the relief sought, and the grounds relied upon by the applicants. It explained that the first respondent would be entitled to appear before the court on the above date to defend the case and to state the reasons why he should not be evicted, as well as his right to legal representation. It invited the first respondent to file an affidavit that dealt with his personal circumstances, including whether the property was occupied by elderly or disabled persons, children, or whether it pertained to a household headed by women. It also invited the first respondent to deal with his right to housing, and whether he would be rendered homeless and whether alternative accommodation was or could be made available. The notice indicated that the above information was necessary to assist the court in deciding whether the order should be granted.

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<sup>44</sup> 2001 (4) SA 1222 (SCA).

<sup>45</sup> At paragraph [20].

[69] It can hardly be said that the above notice does not comply substantially with the requirements of section 4 of PIE. This is not a matter involving a group of destitute and disempowered respondents, where socio-economic circumstances render them particularly vulnerable to the litigation conducted by the applicants. The first respondent is, by his own account, a businessperson of considerable experience and ability. He is legally represented. Eviction proceedings have been pending since at least 25 March 2019, when Mr Kriel's attorneys indicated that their client had cancelled the deed of sale and demanded that the first respondent vacate the property. This was followed shortly afterwards by Mr Kriel's action proceedings (subsequently abandoned) for, *inter alia*, the eviction of the first respondent, which, in turn, was followed by the applicants' ill-fated earlier application proceedings before Hartle J. For the first respondent to suggest that he has not been afforded an opportunity to put all relevant circumstances before the court is simply not correct. No prejudice has been caused by the applicants' failure to have obtained the court's directions for the contents and manner of service of the section notice. It would serve absolutely no purpose to issue such directions at this stage.

[70] The court has already found that the first respondent no longer has any right to occupy the property. He has enjoyed the continuous use thereof without payment of rental, rates, or service charges, notwithstanding the prescription of Mr Kriel's obligation to repay the loan. This remained the position after the registration of transfer on 28 July 2021, almost two years ago. The applicants, in contrast, have been compelled to secure rented accommodation and the storage of household effects at considerable cost. They have lived in a state of limbo and uncertainty. The emotional toll that this has had on them, as well as their children, has never been refuted. The second applicant has, moreover, been unable to operate her legal practice properly.

[71] The papers intimate that the second applicant appears to have been involved in the conclusion of the original business arrangement between the first respondent and Mr Kriel. The papers also suggest that both applicants were aware of the dispute

between the two businesspeople and the potential risks involved at the time of the purchase of the property. The overall impression, however, is that the conduct of the first respondent has been far from reasonable and cannot escape criticism. He has allowed the property to fall into a state of neglect and disrepair, obstinately refused access, and rendered very little cooperation in attending to as minor a problem as a water leak. Moreover, the charging of an 'inspection *in loco*' fee to the first applicant for limited access to his own property on 4 April 2022, smacks of nothing less than cynicism.

### **Relief and order to be made**

[72] Despite the applicants' invitation to do so in the section 4(2) notice, the first respondent has not placed any evidence before the court that an eviction order would affect any elderly or disabled persons who may currently reside at the property. He has not made mention of any children. Such information is within the exclusive knowledge of the first respondent. It cannot be expected of the applicants to have attempted to establish such details when the first respondent has consistently refused access to the property and acted in a hostile manner towards them.

[73] The first respondent has, moreover, rejected the applicants' offer of four months' rental in relation to alternative accommodation, and the costs of storage. Quite what more could have been expected of the applicants is hard to say.

[74] In the circumstances, the court is satisfied that it would be just and equitable to order the eviction of the first respondents and any other occupiers from the property. Mindful of the history of this matter, the respective circumstances of the parties involved, and the possibility that, at some point, the vacation of the property would be necessary, it would seem just and equitable that the date for the implementation of the order is not delayed for longer than required. The court is not of the view that any conditions need to be attached to the order.



[75] The only remaining issue is that of costs. There appears to be no reason why the usual order should not follow to the effect that the applicants are entitled to recover the expenditure incurred in pursuit of their application.

[76] The following order is made:

- (a) the application is granted and the first respondent and all other persons occupying the property through or under him are hereby evicted from 28 Bonnie Doon Place, Bonnie Doon, East London;
- (b) the first respondent and the above persons are ordered to vacate the property within 60 days of the date of this order;
- (c) if the first respondent and the above persons fail to vacate the property as ordered, then the sheriff is authorised and directed to implement and give effect to the order forthwith; and
- (d) the first respondent is ordered to pay the costs of the application.

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**JGA LAING**  
**JUDGE OF THE HIGH COURT**

APPEARANCE

For the applicants:           Adv S Collett  
  Instructed by Van Rensburg & Associates

For the respondents:        Mr L Godongwana  
  Instructed by Godongwana Ngonyama Pakade Attorneys

Date of hearing:               16 February 2023.

Date of delivery  
of judgment:                 25 April 2023.