

SOUTH AFRICA / JUDGMENT

Adendorff N.O v Savrez Trading (Pty) Ltd and Another (Reasons) (2025/080510) [2025] ZAWCHC 286 (9 July 2025) [2025] ZAWCHC 286

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

2025/080510

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 2025-080510

In the matter between:

HUBERT PAUL FLEISCH ADENDORFF N.O. (trustee for the time being of the Adendorff Trust (IT 11635/99) and SAVREZ TRADING (PTY) LTD Applicant First respondent JAMES OPENSHAW ZERVAS Second respondent

REASONS

DELIVERED ON 9 JULY 2025

VAN ZYL AJ:

Introduction

1. On 11 June 2025 I granted the following order in the urgent court:
 1. The respondents' application for a postponement is dismissed.
 2. The applicant's application is dealt with as urgent in accordance with the provisions of Rule 6(12), and the applicant's non-compliance with regular service, notices, and timelines is condoned.

3. Pending the final resolution of arbitration proceedings to be instituted by the first respondent within 30 (thirty) days from the date of this order:

3.1. It is declared that the applicant [having paid to the trust account of DELBERG ATTORNEYS the amount of R1 500 000.00 (one million five hundred thousand rand)], has provided sufficient substituted security for an alleged builders' lien exercised by the first respondent over the immovable property described as 1[...] H[...] Street (Erf 1[...]), Springfield, Somerset Lakes Estate, Somerset West, Western Cape Province ("the property").

3.2. The continuous duration of the substituted security is conditional upon punctual compliance by the first respondent with the following procedural and substantive matters:

3.2.1. The applicant and the first respondent must, within 7 (seven) days from the date of this order, reach an agreement regarding the person to be appointed as arbitrator. If no agreement can be reached, then:-

- a) after the lapse of 7 (seven) days, but within 10 (ten) days from date of this order, the first respondent must request the President for the time being of the South African Institute of Architects ("SAIA") to nominate 2 (two) suitably qualified arbitrators who must have at least 10 (ten) years' experience as arbitrators; and
- b) Miltons Matsemela Attorneys ("MMA"), with contact person Izak Venter, must within 3 (three) days from the date of the nomination referred to in subparagraph (a) select one of the arbitrators nominated by the SAIA to serve as arbitrator.
- c) In the alternative to sub-paragraphs
 - (a) and (b), and if the SAIA or MMA is unwilling, unable or non-responsive to nominate or select (as the case may be) an arbitrator as set out above within a period of 3 (three) days after having been requested to nominate or select (as the case may be) then, within 3 (three) days after such failure to nominate or select (as the case may be) the first respondent must request the Chairperson of the Cape Bar Council to nominate 2 (two) suitably qualified arbitrators with at least 10 (ten) years' experience as arbitrators; and
 - d) MMA, with contact person Izak Venter, must within 3 (three) days from date of the nomination referred to in sub-paragraph (c) select one of the arbitrators nominated by the Chairperson of the Cape Bar Council to serve as the arbitrator.

3.2.2 The first respondent must make initial payment of fees and costs which may be payable to the arbitrator, on demand, for purposes of instituting the arbitration.

3.2.3 The first respondent must serve and file its Statement of Claim in the arbitration within 30 (thirty) days from the date of this order.

3.2.4 The applicant (through its attorneys of record, Delberg Attorneys) must be copied into, and receive copies of, all correspondence and documents submitted to all of the individuals or entities referred to in paragraphs 3.2.1, 3.2.2 and 3.2.3.

3.3 If the first respondent fails to comply with any timelines or dates or other requirements as set out in paragraph 3.2 (including all sub-paragraphs) (or such extended dates as the parties may agree upon), then the applicant shall be released from the security set in the amount of R1 500 000.00 (one million five hundred thousand rand) and Delberg Attorneys shall be entitled to make payment of said amount to an account nominated by the applicant.

4. The first respondent is ordered, within 2 (two) days from the date of this order, to:

4.1 remove its security guard(s)/employee(s)/agent(s) stationed at the property, and hand over and grant unrestricted possession of and access to the property to the applicant; and

4.2 provide the applicant with all keys, access control equipment, and related items and devices required for access to the property.

5. In respect to the further conduct of the arbitration proceedings and following compliance with paragraphs 3 and 4 (including all sub-paragraphs):

5.1. The applicant must file its Statement of Defence and Counterclaim (if any) within 15 (fifteen) days after receipt and filing of the first respondent's Statement of Claim.

5.2. The applicant and the first respondent must hold a pre-arbitration conference with the appointed arbitrator within 10 (ten) days after the close of pleadings, failing which either party may request the arbitrator to nominate a date and time suitable to the arbitrator for when the pre-arbitration conference will take place. At such pre-arbitration conference the parties must agree on the further timelines for the conduct of the arbitration and, failing agreement, the arbitrator must appoint such dates.

6. If the first respondent fails to comply with any timelines or dates or other requirements for and in relation to the effective management of the arbitration, as set out in paragraph 5 and/or as may be agreed to between the parties and/or as determined by the arbitrator, then the applicant may request the arbitrator formally to consider and issue an interim award or notice recording such non-compliance and the effect thereof, whereafter the applicant shall be released from the security set in the amount of R1 500 000.00 (one million five hundred thousand rand), and Delberg Attorneys shall be entitled to make payment of said amount to an account nominated by the applicant.

7. The respondents, jointly and severally, the one paying, the other to be absolved, shall pay the applicant's costs in the urgent application, as well as the costs of the respondents' application for postponement, on the scale as between attorney and client. These costs will include the costs consequent upon the employment of both senior and junior counsel on behalf of the applicant, as well as travelling and accommodation costs.

2. These are, briefly, the reasons for the grant of the order.

3. The applicant trust has one trustee, and I refer to the applicant interchangeably as "it" or "he".

The respondents' application for postponement

4. The application was instituted on 30 May 2025 and served on the respondents via email on the same day.[1] Late in the afternoon before the hearing of the application, the respondents caused an application for postponement to be emailed to the applicant. The Court was provided with a copy on the morning of the hearing.
5. Having heard argument and having considered the matter, I concluded in the exercise of my discretion that a postponement should not be granted. There are many authorities dealing with postponement applications. Suffice it to say that the respondents' application was far removed from the standard set out in *Myburgh Transport v Botha t/a SA Truck Bodies*: [2]

"1. The trial Judge has a discretion as to whether an application for a postponement should be granted or refused.

2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial

reasons.

...

5. A Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.
6. An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made.
7. An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.
8. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.
9. The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

10. Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. ...”
6. In the application, the respondents failed to give an adequate explanation for their failure to deliver opposing papers to the main application. They made bald averments that the second respondent was in Australia, had to attend to his son's golf tournament, had meetings, and had to collect his daughter from school in the afternoons. It was further alleged that the respondents were unable to provide their attorneys with financial instructions sooner, but they nevertheless attached a payment confirmation from a South African bank account. Notably, they failed to disclose any defence to the relief sought in the main application, other than making an unsubstantiated allegation that the applicant was seeking to pierce the corporate veil.
7. The respondents had been aware of the pending application for ten days. They had legal representation. No proper explanation was given for the failure to act sooner. The application for a postponement had the hallmarks of an attempt to delay the proceedings. No good or strong reasons were provided in support of the request for a postponement, and no full and satisfactory explanation was given of the facts that gave rise to the application. As postponement applications go, it was vague and sketchy, and the supporting affidavit had not been properly commissioned as contemplated in the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.
8. The respondents did not tender the costs that would be occasioned by the suggested postponement.[3]
9. The prejudice that the applicant was suffering in not having access to and possession of his property far outweighed any prejudice to be suffered by the respondents in proceeding with the matter. As appears from what is set out below on the merits of the main application, the respondents’ lien over the property was sufficiently secured by the amount of R1,5 million held in trust. The respondents said that they wanted the dispute giving rise to the exercise of the lien (whatever that dispute might be, as the respondents had not told either the Court or the applicant what it entailed) resolved by arbitration, but failed to take any steps to commence with arbitration proceedings. The applicant was compelled to ask the Court to make an order in that respect, which was done.
10. The respondents gave no indication at all as to what the nature of their defence to the applicant’s claims would be, or what the disputes were that supported the respondents’ lien over the property.[4] There was thus nothing upon which the Court could exercise its discretion to conclude that it would be in the interests of justice to delay the hearing of the application. There was nothing upon which to consider that the postponement would not

simply be kicking the ball to another judge who would have to deal with the same situation a week down the line.

11. I accordingly refused the postponement application.

The main application

12. A residential immovable property situated in Somerset West is at the core of these proceedings. The disputes between the parties have been ongoing for a period of almost two years. The present application is the fourth one that the applicant has been compelled to institute against the respondents in relation to the property. The second respondent has at all relevant times been the first respondent's sole director and representative.
13. In July 2023 the parties concluded two written agreements, in terms of which:
 - 13.1. The applicant purchased the property from the first respondent for the sum of R999 500,00; and
 - 13.2. The parties concluded a building agreement in terms of which the first respondent would construct a dwelling on the property for the sum of R1 500 500,00.
14. The applicant has paid the sum of R2 205 451,50 to the first respondent pursuant to the conclusion of the agreements.

The previous litigation between the parties

15. During 2024 it came to the applicant's attention that the first respondent had sold the property to a third party, despite the existence of the agreements and the fact that the applicant has paid the purchase price in full). In March 2024 the applicant therefore instituted an urgent application to interdict the transfer of the property to the third party. The parties agreed to the terms of an order at the time,[5] in terms of which the first respondent would repay the applicant the amount paid under the agreements, and costs, failing which the transfer of the property would be interdicted.
16. The first respondent failed to comply with the terms of the order, and in September 2024 the applicant instituted an urgent application and obtained an order[6] to compel the first respondent to comply with the terms of the agreements and to obtain registration of transfer of the property. The balance outstanding under the agreements, namely R294 548,50, was paid into the applicant's attorneys' trust account pending the completion of the building work on the property.
17. The first respondent again failed to comply with the order and failed to have the property transferred into the applicant's name. It also came to the applicant's knowledge that the first respondent had allowed unknown third parties to take occupation of the property

18. The applicant therefore instituted an urgent contempt application which was set down for 10 February 2025 . The parties, once again, agreed to the terms of an order[7] in terms of which the first respondent would comply with the order in accordance with a specified timeline. The respondents were ordered to give notice to the occupants to vacate the property by 30 April 2025.
19. The property was transferred into the applicant's name on 5 May 2025.

The events leading up to the present application

20. On 29 April 2025 the applicant's attorneys wrote to the respondents' attorney to inform the respondents that the applicant would be taking possession of the property once transfer had been given, and that the parties should meet at the property on 2 May 2025 to compile a detailed list of all buildings works not yet completed.
21. The applicant attended the property on 2 May 2025 (before transfer, and without a response from the respondents or their attorney) to view the property. The occupants who should have vacated by the end of April 2025 were still in occupation of the property. They informed the applicant that they had been told by the respondents that they could remain in occupation of the property until their own property (also being built by the first respondent in the estate) was complete.
22. Whilst at the property the applicant noticed worrisome electrical connections. He could not gain access to the inside of the property to see what the situation was.
23. On 6 May 2025 the respondents' attorney replied to the applicant's attorneys' correspondence of 29 April 2025. He said that, according to the first respondent, the applicant was indebted to the first respondent in the sum of R1 467 000,00 (being R500 000,00 in respect of variation orders issued, R592 000,00 in respect of enlarging the structure, and R375 000,00 in respect of VAT on the purchase price). The first respondent accordingly had a builder's lien over the property and, until payment was received, the first respondent would enforce the lien and refuse the applicant access to the property.
24. This correspondence came as a shock to the applicant, because the first respondent has never previously mentioned or demanded payment in any amount, or indicated that the applicant would not be granted possession and control of the property because of funds that were owing. The applicant trust denies that it is indebted to the first respondent in any of the amounts claimed.
25. In terms of the building agreement (which the applicant subsequently cancelled), any dispute in respect of monies owed must be resolved by way of arbitration. This provision survived the cancelled agreement.

26. On 8 May 2025 the applicant's attorneys wrote to the respondents' attorney, confirming that the applicant disputes any indebtedness to the first respondent and that the lien is disputed, but that the applicant had nonetheless paid the sum of R1.5 million into his attorneys' trust account to serve as security for any amounts that the first respondent may be entitled to upon arbitration.
27. On 15 May 2025 the applicant's attorneys wrote to the respondents' attorney again, and attached proof of payment of the R1.5 million into their trust account. They confirmed that the amount was formally tendered to serve as security for any amount which may be due to the first respondent upon arbitration.
28. On 20 May 2025 the respondents' attorney replied that the first respondent was not obliged to accept the substituted security and would not waive its alleged lien over the property. He stated that the first respondent would institute arbitration proceedings. The first respondent stationed a guard at the property, preventing access thereto by the applicant or any third party.
29. On 22 May 2025, the applicant cancelled the building agreement (after demand was made to comply) given that the building works were incomplete and posed serious safety concerns. It transpired that the necessary completion certificates had not been issued in respect of the electrical installation, the plumbing, the roof structure, and other aspects, and the municipality had not issued an occupancy certificate. The applicant was unable to insure the property until an occupancy certificate had been issued.

In fact, on 13 May 2025 and again on 19 May 2025 the building inspector for the area wrote to the applicant, stating that no occupancy certificate had been issued, that a building inspector would be sent to the property and, should there be a transgression, the owner (being the applicant) would be served with a notice to comply. It appears that the respondents had been informed of this situation during February 2025 already.

30. On 16 May 2025 the building inspector inspected the property. In correspondence dated 26 May 2025 the municipality confirmed that no occupancy certificate would be issued until amended building plans had been submitted – the dwelling had therefore not been constructed in accordance with the approved plans. A transgression notice was issued to the applicant on 3 June 2025 because the property was being occupied unlawfully in the absence of an occupancy certificate. It was confirmed that the continued occupation without the certificate constituted a criminal offence.
31. The applicant subsequently obtained a report from an expert to the effect that the electrical installations at the property did not comply with the relevant regulations, presented an immediate danger of electrocution, fire, or serious property damage, was unlawful and had to be decommissioned immediately.

32. As the property had already been transferred to the applicant, the risks and responsibilities in respect thereof rested on the applicant. He could not mitigate such risks as he had no access to the property.
33. The applicant's trustee is 75 years old, and the applicant purchased the property as a retirement dwelling. His previous residential dwelling was sold in April 2025 and he was living with a friend, with his furniture in storage. He cannot afford alternative accommodation, given that R1.8 million (the security tendered plus the balance owing under the building agreement) is in his attorneys' trust account. He has already spent more than R800 000,00 in legal fees, combating what appears on the papers to be frankly abusive conduct by the respondents.
34. Given the historical conduct of the respondents in respect of the property, I agreed with the submission by counsel for the applicant that the respondents – for an unexplained reason - wished to delay the applicant taking possession of the property for as long as possible. There was no reason not to grant the relief sought by the applicant.
35. Where a debtor/creditor or enrichment lien is claimed (the respondents have not indicated the nature of the lien upon which they rely),^[8] and sufficient security has been tendered,^[9] there exists no basis for the respondents to continue retaining occupation of the property, whether physically or otherwise, such as by denying access through a guard at the property. This Court had a discretion^[10] to grant access and occupation to the applicant, and to cause the security to be preserved pendente lite:

“[20] It follows that the conclusion reached in the Bombay Properties case, that in the case of a jus retentionis based on an enrichment lien the court does not have a discretion to deprive the lien holder of his possession or that the substitute security for such a lien would be meaningless, is clearly wrong. The Sandton Square Finance case made it clear that the court does have a discretion in respect of an enrichment lien. Quite clearly once it is established that a court has a discretion in relation to a debtor/creditor lien, there is no reason why such a distinction should not extend to the enrichment lien. On appeal counsel for Pheiffer did not persist with the argument that the approach in Sandton Square was wrong. It would consequently be untenable to allow substitution of security in the one case (debtor/creditor lien) but not in the other (enrichment lien).”

- ^[21] The principle articulated in the Sandton Square Finance case is sound and based on considerations of equity and justice. I do not agree with the contention that the security tendered by the third respondent is meaningless. In my view once Pheiffer has fully quantified and proved his claim, he will be entitled to payment in respect of the improvements to the property. As soon as sufficient security has been tendered, Pheiffer has no basis to continue occupying the property. As the court below rightly held, he must vacate the property.”^[11]

36. This took care of the declaratory relief sought, which was a necessary pronouncement for the ancillary orders sought relating to access and control, but also occupancy, which an owner with a real right is entitled to even without establishing irreparable damage, inconvenience, or the lack of alternative remedies - typically in the nature of a rei vindicatio.
37. The chronology of events is clear from the facts set out above. I agreed that the application was sufficiently urgent for hearing on the urgent roll. There was an ongoing violation of the applicant's rights,[12] and the respondents had not given any indication of a desire speedily to resolve the issues between the parties – not even at the hearing of the application.
38. The terms of the order to be granted were debated during argument. The only real opposition raised by the respondents' counsel was the potential prejudice to the respondents should the applicant's attorneys be permitted to release the substituted security to the applicant in the event that the respondents did not comply with the timeframes for instituting and prosecuting the arbitration proceedings. No objection was raised to the amount of the substituted security or to its holding in the applicant's attorneys' trust account pending the finalisation of the arbitration proceedings, or to the suggested timeframes. The relief sought by the applicant was therefore changed[13] to reflect that the arbitrator would decide whether the respondents had breached the terms of the court order, and not the applicant or his attorneys.

Costs

39. The applicant was successful, and there was no reason why costs should not follow the event. [14]
40. In *Public Protector v South African Reserve Bank*[15] the Constitutional Court stated as follows in relation to punitive costs orders:

“More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.”
41. An extended meaning was given to the concept of “vexatious” in *Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and another*: [16]

“... in appropriate circumstances the conduct of a litigant may be adjudged ‘vexatious’ within the extended meaning that has been placed upon this term in a number of decisions, that is, when such conduct has resulted in ‘unnecessary trouble and expense which the other side ought not to bear (In re Alluvial Creek 1929 CPD 532 at 535).”

42. I was inclined to grant costs on the scale as between attorney and client given the conduct of the respondents which caused the institution of these proceedings, and the nonchalant manner in which they treated the litigation between them and the applicant.

Order

43. In the circumstances, I granted the order referred to at the outset of these reasons.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the applicant:

Mr J. Roux SC and Ms S. Bosch, instructed by Delberg Attorneys Inc.

For the respondents:

Mr D. Whitcomb, instructed by RC Smith & Associates Inc.

- [1] It was also served by the Sheriff on the second respondent on 30 May 2025 and on the first respondent on 2 June 2025.

- [2] 1991

- (3) SA 310 (NmS) at 314G-315I.

- [3] Shilubana and others v Nwamitwa

- [2007] ZACC 14; 2007 (5) SA 620 (CC) para 12: “A standard way to mitigate prejudice to other parties is for the party asking for the court’s indulgence to postpone a hearing – particularly one requested at the last minute – to offer, or to be ordered, to pay the costs of the postponement.”

- [4] T.A.M-W v C.M.M

- [2025] ZAWCHC 217 (23 May 2025) para 3: “Tellingly however, and contrary to clear Constitutional Court authority (the highest court in South Africa), and despite the respondent having devoted 21 paragraphs to his reasons for requesting a postponement, nowhere did he provide even a brief outline of his defence to the contempt application itself, save for a bare denial...”

- [5] Granted on 19 March 2024 under case number 4914/2024.

- [6] Granted on 10 September 2024 under case number 11573/2024.

- [7] Granted on 10 February 2025 under case number 11573/2025.

- [8] See Blair Atholl Home Owners Association (NPC) v Meyer and another [2023] ZAGPPHC 2055 (22 December 2023) para 31, with reference to Sandton Square Finance (Pty) Ltd v Vigliotti 1997 (1) SA 826 (W) and Pheiffer v Van Wyk 2015 (5) SA 464 (SCA).
- [9] In the present matter, security was tendered in an amount greater than the amount claimed, with proof that it has been paid into an attorney's trust account.
- [10] Astralita Estates (Pty) Ltd v Rix 1984 (1) SA 500 (C) at 503B-E.
- [11] Pheiffer v Van Wyk 2015 (5) SA 464 (SCA) paras 20-21. Emphasis supplied.
- [12] See South African Breweries (Pty) Ltd v Minister of Corporative Governance and Traditional Affairs and Another
- [2021] 4 All SA 189 (WCC) paras 15-16; 22-23.
- [13] Further minor amendments were made to the reliefs sought in the notice of motion.
- [14] See Sackville West v Nourse and another 1925 AD 516.
- [15] 2019
- (6) SA 253 (CC) para 223. Emphasis supplied.
- [16] 1997
- (1) SA 157 (A) at 177D.

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