
SOUTH AFRICA / JUDGMENT

Bethlehem and Others v Zwiegers and Another (43334/2018) [2020] ZAGPJHC 112 (7 May 2020)

[2020] ZAGPJHC 112

COURT

South Gauteng High Court, Johannesburg

BEFORE

Lapan

CASE / FILE NUMBER

43334/2018

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 43334/2018

In

the matter between:

BETHLEHEM,
LAEL
IRENE First
Applicant
COHEN,
NINA Second
Applicant
LEWIS,
DAVID
HARRIS Third
Applicant
MORRIS,
BRETT
ANTONY Fourth
Applicant
WYNCHANK,
DORA SOULEIKA REBECCA MASCHA Fifth
Applicant
and
ZWIEGERS,
WILLEM BAREND
JOHANNES First
Respondent
CITY
OF
JOHANNESBURG Second
Respondent

JUDGMENT

Lapan AJ:

INTRODUCTION

- [1] The applicants seek the eviction of the first respondent from certain immovable property described as [...] Parkview Township, Registration Division IR, Gauteng, situate at [...], Parktown, Johannesburg (property).
- [2] The applicants acquired the property at a sale in execution held on 19 July 2018 and became the registered owners of the property on 21 June 2019. The first respondent has been in occupation of the property since 1 April 2016.
- [3] The first respondent opposes this eviction application on two grounds:
- [3.1] the property is res litigiosa as it is the subject-matter of an action brought by the first respondent against the applicants claiming the setting aside of the sale and transfer of the property to the applicants and obtaining transfer of the property to the first respondent; and

[3.2] in the alternative, the first respondent claims to have an improvement lien over the property entitling him to remain in occupation until compensated for his actual expenses incurred in improving the property. The first respondent claims to have incurred expenses in excess of R1.6 million for useful and necessary improvements effected to the property.

[4] Before considering the issues, the facts are set out below. These facts are largely common cause or not in dispute. For convenience, the first respondent is referred to as the respondent. The second respondent has not participated in these proceedings.

THE FACTS

[5] In 2004, a group of individuals, including the applicants, agreed to subdivide certain land, being Erf [...] Parkview, into several portions to be acquired by each of them for purposes of erecting a home thereon and reserving a portion for use as a communal area. In 2005, a company known as Erf [...] Parkview Home Owners Association (Pty) Ltd was formed (company).

[6] Ms Veronica Guedes (Guedes) acquired a subdivided portion of Erf [...] Parkview being the property more fully described above. Guedes lent money from ABSA Bank Limited (ABSA) and Ms Clara Almeida (Almeida) presumably to finance the development of the property. The loans were secured by the registration of two mortgage bonds over the property in favour of ABSA and Almeida.

[7] In June 2015, after Guedes had fallen into arrears with her repayment obligations, Almeida brought an application against Guedes claiming payment of the outstanding balance of the loan and an order declaring the property specially executable. The respondent represented Guedes in the application. At that stage, the respondent was a practicing attorney with his own law firm. The respondent was subsequently suspended from practice and is awaiting the outcome of proceedings to have him struck off the roll of practicing attorneys. Nothing turns on this fact other than to indicate that the respondent is legally trained and versed in the law.

[8] On 11 December 2015, after all affidavits had been filed in the application brought by Almeida and before the matter had been heard, the respondent concluded an agreement with Guedes in terms of which he acquired the property, pursuant to an alleged instalment sale agreement as contemplated in the Alienation of Land Act, 68 of 1981 (sale agreement). Clause 24 of the sale agreement is relevant and summarised below as it relates to the respondent's alternative defence based on an improvement lien.

[9] In terms of clause 24 of the sale agreement, Guedes consented to the respondent improving and renovating the property, at the risk of Guedes up to the date of transfer of the property, on which date the risk will pass to the respondent, as the purchaser. Clause 24 provides further that, should the sale agreement be cancelled or not proceeded with for any reason, Guedes will refund to the respondent all of his expenses incurred for such improvements. Clause 24 provides further (in manuscript) that, in such event (presumably in the event of

the sale agreement being cancelled or not proceeded with), Guedes may market and sell the property and settle the amount owed to the respondent from the proceeds of the sale.

- [10] The respondent avers that he incurred expenses in the amount of R1 615 333.41 in order to make useful and necessary improvements to the property which were required to make the property habitable. After making such improvements, he took occupation of the property on 1 April 2016 and has remained in occupation ever since.
- [11] After Almeida obtained a money judgment against Guedes and an order declaring the property specially executable, a sale in execution of the property was arranged for 22 June 2017.
- [12] On 19 June 2017, the respondent brought an urgent application to interdict the sale of the property, claiming that he was entitled to acquire the property pursuant to the sale agreement and in terms of section 22 of the Alienation of Land Act. On 21 June 2017, an order was granted by Brenner AJ interdicting the sale of the property other than in terms of the order (Brenner order).
- [13] In terms of the Brenner order, the two mortgagees, Almeida and ABSA, were directed to provide certificates of balance to the respondent and, within 30 days thereafter, the respondent was required to make the payments required to be made in terms of section 22 of the Alienation of Land Act, failing which Almeida could arrange another sale in execution of the property.
- [14] ABSA provided a certificate of balance in June 2017, and again in June 2018 at the respondent's request, and Almeida furnished a certificate of balance in July 2017. The respondent failed to make the necessary payment arrangements. Acting in terms of the Brenner order, Almeida arranged another sale in execution which was scheduled to take place on 19 July 2018.
- [15] On 7 May 2018, ARS Projects CC (ARS), obtained a money judgment against Guedes and an order declaring the property specially executable. ARS also made arrangements for a sale in execution of the property which was scheduled for 19 July 2018.
- [16] On 4 July 2018, the respondent brought an urgent application to interdict the sale in execution and the matter was set down for hearing on 17 July 2018. At the hearing, the urgent application was struck from the roll for lack of urgency.
- [17] On 18 July 2018, the respondent brought an urgent application to sequester the estate of Guedes and the matter was set down for hearing on 24 July 2018. At the hearing, the application was struck from the roll for lack of urgency.

- [18] In the meantime, on 14 July 2018, the applicants concluded a partnership agreement in anticipation of acquiring the property at the sale in execution to be held on 19 July 2018. In terms of their agreement, the purpose of the partnership was to ensure that, after acquiring the property, they would sell or let the property to a purchaser or tenant endorsed by the partnership with a view to vetting the persons who will reside on the property.
- [19] On 19 July 2018, the applicants acquired the property by public auction and, in terms of the conditions of sale, they became entitled to take possession of the property. On 31 July 2018, the applicants gave notice to the respondent to vacate the property but the respondent failed to do so.
- [20] On 31 October 2018, the respondent instituted an action in this court, under case no.2017/21832, against the applicants, Guedes, Almeida, ABSA, the company, the Registrar of Deeds and the Sheriff (action). In the action, the respondent claims the setting aside of the transfer of the property to the applicants and an order directing the sheriff to take steps to transfer the property to the respondent pursuant to the sale agreement.
- [21] The applicants did not refer to the action in their founding affidavit. After it was pertinently raised in the answering affidavit, the applicants stated, in their replying affidavit, that the applicants had excepted to the summons and were awaiting a hearing in due course. At the hearing of this application, both parties' representatives advised that the action is still pending.
- [22] On 20 November 2018, the applicants brought this application to evict the respondent from the property. A notice was served on the respondent, duly authorised by the court in terms of section 4(2) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (PIE Act).

THE ISSUES

- [23] Two issues arise for

determination:

[23.1] whether the property is res litigiosa and, if so, whether this entitles the respondent to remain in occupation of the property until the final outcome of the action; and

[23.2] in the alternative, whether the respondent has an improvement lien over the property for the useful and necessary improvements effected to the property entitling him to retain occupation until compensated

for such improvements.

REQUIREMENTS FOR EVICTION

- [24] In terms of section 4(1) of the PIE Act, the applicants may bring an eviction application for the eviction of an unlawful occupier if they are the owners, or persons in charge, of the

land.

[25] Consideration must be given to whether the applicants had the necessary standing to bring this application when they did, in November 2018, by being the “persons in charge” of the property since the applicants became the registered owners subsequent thereto, on 21 June 2019.

[26] The SCA has endorsed the following dictum with regard to persons other than the registered owner being the “person in charge” of property:

“[w]here someone other than the registered owner is the “person in charge” (i.e. the person with the right to determine who stays on the property) it is the consent of such person rather than the registered owner which is ... relevant.”[1]

[27] Based on this dictum, the person in charge is the person with the right to determine who resides on the property. The rights of an owner, who has bare

dominium over the property, must yield to the limited real rights in the property held by another person.[2] The right of lien arising from useful and necessary improvements made to property is a real right available against the whole world and ousts the owner’s right of possession.[3]

[28] When the applicants brought this application in November 2018, their claim to possession was based on clause 6 of the conditions of sale in execution of the property. Clause 6 provides that the applicants are entitled to take possession after signature of the conditions of sale, payment of the deposit and securing the balance of the purchase price and that, upon taking possession, the property shall be at the risk and profit of the applicants.

[29] On 19 July 2018, the applicants signed the conditions of sale and paid/secured the deposit and, by 30 August 2018, they had secured, by way of bank guarantees, payment of the balance of the purchase price. Having complied with the conditions of sale, the applicants were entitled to take possession of the property prior to the date of transfer pursuant to clause 6 of the conditions of sale.

[30] In Testa it was held that the sheriff does not take possession of the property upon attachment where he does not take physical control of the property. Therefore, the sheriff’s attachment of immovable property by notice does not dispossess the possessor who, in that case, was the appellant asserting a right of retention based on a lien.[4]

[31] The court held that the appellant, as lienholder, lost its possession of the property on the date of sale in execution by virtue of the sheriff’s actions in selling the property, accepting payment from the purchaser and permitting the purchaser to take possession by changing the locks on the property. The sheriff was found to have acted bona fide in doing so as he was acting on instructions from the bank to sell the property in execution, knowing of the lienholder’s claim and intending to let him benefit from the sale.[5]

- [32] It is important to note that, in the present matter, the respondent did not assert a right of lien over the property at any time prior to opposing this eviction application.
- [33] In the first and second urgent applications brought on 19 June 2017 and on 4 July 2018, respectively, the respondent relied exclusively on a right to take transfer of the property pursuant to the sale agreement.
- [34] In the third urgent application brought on 18 July 2018 for sequestration of the estate of Guedes, the respondent alleged a right to repayment of a portion of the purchase price paid to Guedes in the sum of R983 600.00. Although he mentioned having incurred expenses in excess of R1.6 million to improve the property, he did not assert a right of retention over the property.
- [35] In fact, the respondent pertinently stated, in paragraph 26.3 of his supporting affidavit filed in the sequestration application, that: “I hold no security for my claim”.
- [36] It is clear from the aforesaid that, at the time of the sale of the property to the applicants on 19 July 2018, the respondent had not relied on the existence of a lien nor did he notify the sheriff thereof. Had he done so, the sheriff would have considered him a preferent creditor and proceeded with the sale in execution, in terms of rule 46, with due regard to his claim for payment and his right of retention over the property.
- [37] In terms of rule 46(5) of the Uniform Rules, when execution is levied against the immovable property of a judgment debtor, the sale in execution is subject to any claim preferent to that of the execution creditor and must proceed in accordance with the procedure set out in rule 46. The claim of a lienholder over immovable property is one of the claims that is preferent to that of the execution creditor.[6]
- [38] The respondent asserted his right of retention for the first time in this eviction application and this belated attempt at claiming a right of possession over the property does not assist the respondent. On the authority of Testa, the sheriff transferred possession of the property to the applicants when he sold the property to them on 19 July 2018, accepted their payment of the purchase price and thereupon permitted them to take possession of the property in terms of clause 6 of the conditions of sale.
- [39] Accordingly, the applicants became the “persons in charge” of the property as envisaged in the PIE Act, at the time when they brought this eviction application in November 2018 and, therefore, they had the necessary standing.
- [40] On 28 November 2018, this application was served on the respondent personally and, on 24 December 2018, an order was granted by Francis J authorising service of a notice in terms of section 4(2) of the PIE Act which notice was served on the respondent on 11 January 2019 (section 4(2) notice).

[41] In the section 4(2) notice, the date of the hearing was reflected as being 28 January 2019 but since the hearing did not proceed on this date, the applicants were required to amend the date prior to service, as directed in the order granted by Francis J. There is no evidence that this was done.

[42] The respondent did not take issue with the incorrect date in the section 4(2) notice. The respondent filed an extensive

answering affidavit with voluminous annexures comprising the 3 urgent applications, the summons and particulars of claim in the action and various documents purporting to prove the expenses incurred by him to improve the property. At the hearing of this application, the respondent was represented by counsel. In the circumstances, the respondent had received sufficient and effective notice of his intended eviction and had an opportunity to put forward his defences. Therefore, the section 4(2) notice achieved its objective.[7]

[43] In terms of section 1 of the PIE Act, an “unlawful occupier” is someone who occupies the land without the express or tacit consent of the owner or person in charge of the property, or without any other right in law to occupy such land. The respondent does not have the express or tacit consent of the applicants, as the “persons in charge”, to be in occupation of the property.

[44] The respondent relies on an alleged right in law to occupy the property arising from the action which created a *res litigiosa*, alternatively, from an improvement lien. These claims are considered, in turn, below.

RES LITIGIOSA

[45] The issue is whether the property is *res litigiosa* due to the action instituted by the respondent on 31 October 2018 and, if so, whether this entitles the respondent to remain in occupation of the property pending the outcome of the action.

[46] It is convenient to also address, under this heading, the applicants contention that the sale agreement is void *ab initio* since it was concluded at a time when the property had become *res litigiosa* as it was the subject of the application brought by Almeida against Guedes for payment of the balance of the loan (Almeida application).

[47] In my view, the applicants’ contention is incorrect for the following reasons:

[47.1] the doctrine of *res litigiosa* applies where the ownership of property is the subject of litigation;

[47.2] even if the property is *res litigiosa*, the sale and transfer thereof to third parties is not precluded; and

[47.3] the Brenner order gave effect to the sale agreement, permitting the respondent to take transfer of the property pursuant to the sale agreement and upon making payment of all amounts due.

[48] In Roman-Dutch law, a thing becomes *res litigiosa* (the subject of litigation):

“... at the time when there arises a judicial enquiry concerning dominium or the right of ownership of it. Therefore, if there is no dispute about the dominium, but only about a servitude, or any other right over a thing, then the right which has been subjected to judicial decision becomes litigiosum, but the thing itself does not, and therefore it can be freely alienated.”[8]

[49] This dictum makes it clear that the property must be the subject of litigation concerning ownership, or the right of ownership, to be considered *res litigiosa*. If it is not, then the property may be freely alienated without regard to the pending litigation.

[50] Furthermore, the doctrine of *res litigiosa* applies in the context of successive sales of the same property which is the subject of litigation regarding its ownership. The intention of the doctrine is to protect the rights of the first purchaser who is contesting ownership of the thing, in the pending litigation, and who may well be the recipient of a meaningless judgment granted in his favour should the property have been sold and transferred to a third party *pendente lite*.

[51] The principle which underlies the doctrine of *res litigiosa* was stated succinctly as follows:

“... to protect the thing itself, for otherwise the judgment would be a mockery and the suitor who vindicated would be in a worse position,

as the *res litigiosa* had been transferred to a man other than the one against whom the action was brought.”[9]

[52] The law has evolved since the above decision and, in modern law, the doctrine of *res litigiosa* does not prevent or preclude transfer of the property to a third party *pendente lite*. However, the transfer to a third party is subject to the right of the first purchaser (the non-alienating litigant) to set aside such transfer and to obtain registration of ownership in his name should he succeed in the pending litigation. More on this later.

[53] Applying the above principles in the present matter, the Almeida application did not concern a dispute regarding the ownership of the property. Almeida sought to obtain a money judgment against Guedes and an order permitting execution against the property since she was one of the mortgagees in respect of the property. In view thereof, the property had not become *res litigiosa* at that time, as the applicants contend. This is consistent with the Brenner order which permitted the respondent to enforce the sale agreement provided that he makes arrangements to pay the amounts due in terms of section 22 of the Alienation of Land. If he did not, the Brenner order directed Almeida to arrange another sale in execution.

[54] When the respondent instituted the action in October 2018, seeking to enforce his right to ownership of the property in terms of the sale agreement, the property became *res litigiosa* upon service of the summons on the defendants as ownership of the property was being claimed by the respondent based on the sale agreement and the property was the subject of

a second sale to the applicants in July 2018. Accordingly, the second sale to the applicants is not precluded but it is subject to the respondent's right to acquire ownership should he succeed in the action.

[55] Since the validity of the sale agreement is an issue that will arise for determination in the action, it is not intended to pre-judge the outcome thereof and, for purposes of this application, it will be assumed (without deciding) that the sale agreement was validly concluded.

[56] The respondent contends that, since the property had become *res litigiosa* prior to the transfer thereof to the applicants in June 2019, the sheriff had an obligation to transfer the property to the respondent rather than to the applicants. This contention is flawed and not in accordance with our law.

[57] Our law provides that, even where property is *res litigiosa*, this does not prevent it from being alienated provided that such alienation is subject to the rights of the non-alienating party to take transfer of the property upon success in the pending litigation. Since a third party who acquires ownership of property cannot acquire greater rights than the alienating party, if the non-alienating party succeeds in the lawsuit, it will be entitled

to take transfer of the property from such third party.[10]

[58] Furthermore, the rights of the non-alienating party may not be adversely affected by alienating or otherwise dealing with the

property in such a way that it precludes transfer of the property to the non-alienating party upon succeeding in the lawsuit.[11] An action concerning the ownership of immovable property is an action in rem (or a real action) and the property becomes *res litigiosa* when summons is served. [12]

[59] Applying these principles, the property became *res litigiosa* when the respondent brought the action on 31 October 2018 claiming ownership of the property and, in particular, when summons was served on the defendants (probably in November 2018). Although the property was not *res litigiosa* when it was sold to the applicants in July 2018, it became *res litigiosa* prior to transfer thereof to the applicants in June 2019. In view thereof, the applicants' right of ownership is subservient to the respondent's right to acquire ownership of the property should he succeed in the action. This gives effect to the principle underlying the doctrine of *res litigiosa* and ensures the protection of the respondent's right which he is seeking to vindicate in the action.

[60] There is no allegation that the property will be altered or developed by the applicants to such an extent that it might lose its character and prejudice the respondent's right to take transfer should it succeed in the action. The partnership agreement makes it clear that the applicants intend to do no more than sell or let the property to suitable persons. In view thereof, the applicants, as the owners of the property, were entitled to acquire the property even if the property is *res litigiosa* but subject to the respondent's right to take transfer

should he succeed in the action.

- [61] If the applicants are entitled to deal with the property as the owners thereof then they are entitled to be in occupation of the property in circumstances where they have not consented to the occupation of the property by the respondent, as envisaged in the definition of “unlawful occupier” in the PIE Act.
- [62] For these reasons, the respondent’s first defence based on *res litigiosa* must fail.

IMPROVEMENT LIEN

- [63] The respondent’s second defence is that he is exercising an improvement lien which entitles him to remain in occupation of the property until compensated for his actual expenses incurred. The person who asserts a lien bears the onus of proving its existence.[13]
- [64] As already dealt with above, the respondent has, belatedly, asserted an improvement lien over the property after the property had been sold and possession given to the applicants in terms of the conditions of sale. Accordingly, the respondent lost the right to possession and is not entitled to assert a lien over the property. This is so because “[t]he right of lien exists only if the lien holder is in possession of the thing to which his or her claim relates and (subject to certain exceptions) for so long as he or she retains possession thereof.”[14]
- [65] Apart from the loss of possession as aforesaid, the respondent’s claim to a right of lien suffers from other fundamental flaws and, for the sake of completeness, these are dealt with below.
- [66] The respondent alleges that he attempted to lay claim to the property and requested the sheriff to transfer the property to him, in July 2018, but without success. He brought the action claiming transfer of the property pursuant to the sale agreement, alternatively, for confirmation of the lien based on the useful and necessary improvements made to the property prior to taking occupation thereof on 1 April 2016.
- [67] The respondent may have been able to exercise a debtor and creditor lien against Guedes, in terms of clause 24 of the sale agreement, as Guedes consented to the respondent incurring expenses to improve and renovate the property, “at the risk of [Guedes] up to the date of transfer on which date the risk will transfer to the [respondent]”. It is not clear what is meant by making improvements “at the risk of the seller up to the date of transfer” and thereafter passing the risk to the purchaser. What is clear from clause 24 is that it provides (in manuscript) that, if the sale agreement does not proceed, the property may be sold and the respondent reimbursed from the proceeds of that sale. This indicates that Guedes had a contractual obligation to compensate the respondent for the improvements made by him to the property.

- [68] A debtor and creditor lien arises where a person has incurred expenditure on the property of another pursuant to a contractual obligation between himself and the person in possession of the property. A debtor and creditor lien is security for a personal action which the creditor may bring against the debtor and, therefore, the respondent is only entitled to enforce a debtor and creditor lien against Guedes as security for his claim arising from clause 24 of the sale agreement.
- [69] As against the owners of the property, the respondent bears the onus of proving the existence of an improvement lien which is a real right that will avail against the applicants. [15]
- [70] In his answering affidavit, the respondent states that he incurred useful and necessary expenses, in the amount of R1 615 333.41, to make the property habitable and that these expenses were incurred prior to taking occupation of the property on 1 April 2016. The respondent does not allege nor prove that he was in possession of the property prior to 1 April 2016 while making these improvements.
- [71] In relation to a salvage or improvement lien, the Appellate Division (as it then was) held that the right of retention is only available if the property was improved whilst it was in the possession of the person claiming a right of retention.[16]
- [72] As stated by Schutz JA:
- “[w]hat the law requires for a lien is that the outlay should occur while the party claiming it is in possession of the subject-matter.”*[17]
- [73] Schutz JA held further that a lien is not somehow “completed” by subsequently acquiring possession of the property and that recognising such a principle would seem to be an invitation to self-help.[18]
- [74] In the present matter, the respondent admits that he incurred expenses to make useful and necessary improvements to the property prior to taking occupation on 1 April 2016. In the absence of proof that he had possession of the property whilst making those improvements, the respondent fails to establish an essential element to substantiate his right of retention. The respondent is not entitled to subsequently take possession of the property after effecting the improvements to complete his alleged lien as this would amount to self-help.
- [75] Since the respondent states that he incurred the claimed expenses, in the amount of R1 615 333.41, before taking occupation of the property on 1 April 2016, this fact alone is dispositive of his second defence and his claim to a right of lien.
- [76] In relation to his alleged improvement lien, the respondent relies on a valuer’s opinion stating that the expenses incurred by him had improved the value of the property by an amount of R1.9 million. This means, so the respondent contends, that the applicants have been enriched by the increased value of the property. The respondent’s contention fails at the first hurdle as all the improvements were effected by him before taking possession of the

property. A further difficulty with the respondent's contention relates to the underlying claim based on enrichment and in respect of which the lien serves as security.

- [77] Bearing in mind that a lien is accessory to the main obligation, in this case a claim based on enrichment, if there is no enrichment of a person then any claim based on enrichment falls away and so too the lien. [19]
- [78] The applicants acquired the property at the public auction held on 19 July 2018 and paid the realisable value obtainable for the property, in the amount of R2 610 000,00. The applicants were also required to pay all amounts outstanding in respect of levies, rates and taxes, water and electricity consumed in respect of the property. The respondent fails to prove in what way the applicants were enriched, since they had given value for the property and paid all of the aforesaid amounts in order to acquire ownership of the property.
- [79] In my view, the applicants have not been enriched by acquiring the property and paying all amounts due in terms of the conditions of sale. If the applicants have not been enriched, any claim based on enrichment falls away and any improvement lien similarly falls away.
- [80] For the above reasons, the respondent's second defence must fail.

JUST AND EQUITABLE

- [81] Eviction may ensue only if it would be just and equitable to both parties and after considering relevant circumstances as contemplated

in section 4(8) of the PIE Act which is the applicable provision since the respondent was in occupation for more than six months prior to this application.[20]

- [82] In determining whether it is just and equitable to evict, the court must have regard to "the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and constitutional values, so as to produce a just and equitable result".[21]
- [83] The applicant correctly contends that even if the respondent had been exercising an improvement lien, it does not entitle the respondent to make use of the property for his own benefit. This is what the respondent has been doing since taking occupation of the property on 1 April 2016. The respondent has been living on the property without paying rent, levies, rates and taxes or paying for his consumption of water and electricity.
- [84] If the status quo is allowed to continue it would be wholly unfair to the applicants and will, eventually, deplete the applicants' resources as they would be required to carry the costs of the maintenance and upkeep of the property in circumstances where they are unable to have the use or enjoyment of the property. Allowing the respondent to continue in occupation in such circumstances places an untenable burden on the applicants who will derive no benefit from their ownership of the property.

- [85] In addition, the applicants will be unable to mitigate their losses by selling or letting the property to third parties because they would be unable to give vacant possession of the property to a prospective purchaser or tenant for as long as the respondent remains in occupation.
- [86] As to whether consideration should be given to the possibility of the respondent being rendered homeless as a result of his eviction, the respondent made no submissions in this regard.
- [87] There is merit in the applicants' submission that the respondent is not a man of straw, having regard to the expenses incurred by him, in excess of R1.6 million, to improve the property and to make part payment of the purchase price in the amount of R983 600.00. Furthermore, the respondent has incurred the cost of litigating in several high court proceedings initiated by him in his efforts to acquire the property and he continues so to litigate. The only conclusion to be drawn from these facts is that the respondent will be able to find alternative accommodation in the event of his eviction from the property.
- [88] For the above reasons, the eviction application succeeds and the respondent is required to vacate the property.
- [89] The only remaining issue relates to the costs of this application including Part A authorising service of the section 4(2) notice. There is no reason why the costs of this application should not follow the event.
- [90] The following order is made:
1. The first respondent and all those who occupy the property by, through or under him, is/are evicted from the property described as [...] Parkview Township, Registration Division IR, Gauteng, situate at [...], Parktown, Johannesburg;
 2. The first respondent and all those who occupy by, through or under him, are ordered to vacate the property on or before 30 June 2020. Should the national COVID-19 lockdown restrictions preclude eviction on or before the aforesaid date, then the aforesaid date shall be revised to be a date which is 30 (thirty) days after the date on which such restrictions are lifted.
 3. In the event that the first respondent and all those who occupy the property by, through or under him, do not vacate the property on or before the date set out in the preceding paragraph, the Sheriff of the Court, or his lawfully appointed Deputy, is authorised and directed to evict the first respondent and all those who occupy the property by, through or under him, from the property.
 4. The first respondent is directed to pay the costs of this eviction application including the costs incurred in Part A hereof.

AJ LAPAN

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT: Mr C van der Merwe

APPLICANT'S ATTORNEYS: Vermaak Marshall Wellbeloved Inc

COUNSEL FOR THE FIRST

RESPONDENT: Ms L Mpahlwa

FIRST RESPONDENT'S ATTORNEYS: Mr Zwiegers was not represented by attorneys

DATE OF HEARING: 27 February 2020

DATE OF JUDGMENT: 07 May 2020

[1] Hendricks v Hendricks 2016

(1) SA 511 (SCA) para [9].

[2] Ibid in para [10].

[3] United Building Society v Smookler's Trustee and Golombick's Trustee 1906 TS 623 (at p 632).

[4] Builder's Depot CC v Testa 2011

(4) SA 486 (GSJ) para [11].

[5] Ibid in para [12].

[6] Erasmus Superior Court Practice, Vol 2, p D1-617 and the authorities referred to therein.

[7] Theart and Another v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd 2010 (3) SA 327 (SCA) para 12.

[8] Blue-Cliff Investments (Pty) Ltd and Another v Griessel and Others 1971

(3) SA 93 (C) at 95F-G.

[9] Ibid at 95E.

[10] Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council 1986 (2) SA 656 (C) at 659 et seq and the authorities referred to therein.

[11] Ibid

[12] Ibid

[13] Singh v Santam Insurance Ltd [1996] ZASCA 92; 1997

(1) SA 291 (A) at 294I.

[14] Badenhorst et al, Silberberg and Schoeman's The Law of Property 5th ed, p 416, para 17.5.4.

[15] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993

(1) 77 (A) at 85G – H.

[16] Van Niekerk v Van Den Berg 1965 (2) SA 525 (A) at 539C-E.

[17] Singh (supra)

[1996] ZASCA 92; 1997 (1) SA 291 (A) at 295J

[18] Ibid at 296B.

[19] Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en Ander 1996

(4) SA 19 (A) at 26J – 27A.

[20] City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012

(6) SA 294 (SCA).

[21] Port Elizabeth Municipality v Various Occupiers

[2004] ZACC 7; 2005 (1) SA 217 (CC) para [36].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2020/112.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bethlehem-and-others-v-zwiegers-unknown-topic-agpjhc-2020--6a3ea51c3b1caa91298125eb>

Prepared on 11 October 2026 · Esheria