

SOUTH AFRICA / JUDGMENT

Head and Another v Morris N.O and Others - Appeal (A91/2022) [2023] ZAWCHC 343 (28 December 2023) [2023] ZAWCHC 343

COURT

Western Cape High Court, Cape Town

BEFORE

Ndita, Nuku, Lekhuleni

CASE / FILE NUMBER

A91/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Appeal

case no: A91/2022

Court

a quo case no: 17004/20

In

the matter between

ARCHER

COLLIER HEAD

First

Applicant

VOLAWORX

33 CC

Second

Applicant

and

TERRENCE

KEVIN MORRIS N. O

First

Respondent

ASHWIN

HIRJEE TRIKAMJEE N. O

Second

Respondent

PATIENCE

FORTUNATE DIHEDILE

TAKALO

N. O

Third

Respondent

NEDBANK

GROUP LTD

Fourth

Respondent

Delivered:

28 November 2023

JUDGMENT

NDITA, J

- [1] This is an appeal against the judgment and order of the court a quo authorising the eviction of the Appellants and all those occupying property known as Erf 4[...], Hout Bay, Cape Town, situated at 1[...] V[...] Rd, Hout Bay, Cape Town, Western Cape Province (“the property”) in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (“PIE”). The First and Second Appellants were further ordered to pay the costs of the eviction application jointly and severally, on a punitive scale. The appeal is before this court with the requisite leave of the court a quo. The First and Second Appellants were the First and Second Respondents and the Respondents, the First to Fourth Applicants in the court a quo.
- [2] The Respondents, as provisional trustees of the insolvent estate of Mr Matthew Paul Machin (“Mr Machin”), brought an application seeking an order evicting the Appellants and all those occupying under their auspices from the property within one month of the granting of the order. The Appellants opposed the application on the basis that they are not unlawful occupiers as envisaged in the PIE Act as they had consent to occupy the premises. It is common cause that the property was previously owned by Mr Machin in his personal capacity until he was sequestered and his estate wound up. The eviction order that the Respondents sought was granted by the court a quo on 19 September 2019. This is an appeal, with the requisite leave of the court a quo against the aforesaid judgment and order.

The Parties

- [3] The First Appellant, Mr Archer Collier Head, is an adult male currently in possession of and residing at the property. The Second Appellant is Valoworx 33 CC, a Close Corporation duly registered in terms of the laws of the Republic of South Africa with its registered address at 323 Lynnwood Road, Menlo Park, Pretoria Gauteng. Its sole member is Ms Antoinette Grace Head ("Ms Head"), the First Appellant's mother whose residential address was 20 Eagle Avenue, Kenrock Estate, Hout Bay, Cape Town. It is common cause in these proceedings that Ms Head has passed away.
- [4] The First to Third Respondents are Insolvency Practitioners, and duly appointed provisional trustees of the estate of Mr Machin. They were appointed as such by the Master of the High Court on 12 November
2019. The Fourth appellant is Nedbank LIMITED ("Nedbank"), a company with limited liability duly incorporated and registered in accordance with the company laws of the Republic of South Africa. The Fourth Respondent is also a bank, and is duly registered as such in terms of the provisions of the Banks Act, 94 of 1990, with its principal place of business at 135 Rivonia Road, Sandton, Johannesburg, Gauteng.

Factual

background

- [5] The facts relevant for the determination of this appeal are largely undisputed and may be summarised thus: The First Appellant has been in occupation of the property from January 2011, allegedly in terms of a rental agreement entered into between the Second Appellant and Mr Machin prior to his estate being placed under sequestration. In the founding affidavit, the First Appellant asserts that "I represent and am duly authorised to act on behalf of Valoworx ("the tenant"). In short, according to the First Appellant, the actual tenant is in terms of the lease agreement, the Second Appellant. Thus, the Second Appellant was joined in these proceedings. It is not in dispute that since the sequestration of Mr Machin, the First Appellant has not paid any rental.
- [6] The personal estate of Mr Machin was placed under provisional sequestration on 14 August 2013, through an order of the KwaZulu-Natal High Court, Pietermaritzburg. The First to Third Respondents, as earlier alluded to, were appointed as provisional trustees on 19 August 2013. In their capacity as such, and in pursuance of their duties, the First to Third Respondents approached the KwaZulu-Natal High Court Division seeking an extension of their powers to include authority to sell the property that is the subject matter of this appeal. It is common cause that a final order of sequestration was granted on 5 September 2014.
- [7] The property was acquired by Mr Machin on 19 July 2005. A covering bond was registered over it in favour of Nedbank for a capital sum of R3 450 000.00 with an additional sum of R345 000.00. Pursuant to the sequestration, as of 18 October 2018, the insolvent estate was

indebted to the City of Cape Town municipality in an amount of R846 779.44. The aforesaid indebtedness arose from, and relates to municipal rates, water consumption and wastewater rates, and increases on a monthly basis. The consequence of the monthly increases is the reduction of the realisable free funds available to settle claims of creditors of the insolvent estate.

- [8] Regarding the Appellants' alleged illegal occupation of the property, in the founding affidavit deposed by the First Respondent, the Respondents aver that the First Appellant has been in occupation of the property since January 2011 but Mr Machin did not provide them with any lease agreement to this effect. It however, is common cause between the parties that the First Appellant has, since the granting of the order of final sequestration in August 2013, not paid any rental or other monies in lieu of his occupation of the property. According to the Respondents, it transpired during January 2019 when the First Appellant submitted a claim that he has a retention lien for improvements he alleges he effected on the property in the total amount of R2 505 471 .08 (two million five hundred and five thousand four hundred and seventy-one Rand eight cents) over the property when

he submitted a claim against the insolvent estate. The First Appellant lodged his claim by completing the prescribed Form C and

also deposed to an affidavit in support of the claim. In the affidavit filed in support of the claim, the First Appellant explains

that since he and his family occupied the property in 2011, he has been forced to effect certain improvements to make it habitable as it was in a very poor state of repair. The relevant part reads thus:

"6. Attached find invoices totaling R2 505 471.08 (two million five hundred and five thousand four hundred and seventy-one rand and eight cents) excluding interest, being the amount of my lien claim (as is reflected on Form C – which is the proof of my claim to be submitted to liquidators of the Estate of Matthew Paul Machin).

...

9. In order to protect my rights I have erected a sign at the main gate of the property which reads "Property held under retention".
10. I will not allow access to the property until such time as I receive a guarantee of payment acceptable to me in an amount equivalent to my lien claim."
- [9] Responding to the First Appellant's lien claim, the Respondents' attorney of record wrote a letter to First Appellant on 24 January 2020 wherein he/she denied the existence of any improvement lien by him. However, subsequent thereto Nedbank provided the Appellants with a payment guarantee in respect of the amount of the lien.

[10] The Respondents' attorneys, in a letter dated 24 January 2020, caused a letter of demand to be served on the First Appellant. In the aforesaid letter, the Respondents primarily sought that the First Appellant provide access to the property in order that Nedbank's valuer could assess the market value of the property in anticipation of a sale on auction. Nedbank's decision to sell the property was, according to the Respondents due to indebtedness arising from the mortgage bond registered over the property. They further allege that the sale of the property was a way of mitigating the damages. In addition, Nedbank undertook to provide the First Appellant with a guarantee for payment of monies found to be due as a result of a legally enforceable and duly quantified lien arising out of alleged improvements. Given that the issue of the lien is pertinent to these proceedings, I find it necessary to quote copiously from the aforesaid letter.

"9. This guarantee to be provided by the bank on behalf of the Trustees shall only remain effective and enforceable in circumstances where Mr Head and Volaworx 33 CC institute legal proceedings by the issuing of summons for repayment of any monies lawfully found to be expended on the property for purposes of necessary improvements, within 30(thirty) calendar days from the date of signature of the guarantee by the bank, and will obviously be limited to the averred R2 505 471, 08, together with interest and costs associated with the obtaining of a judgment therefore issued by a duly competent court.

11. In the circumstances, we are instructed to demand, as we hereby do, that you revert to us no later than seven calendar days from date of service of this letter, either accepting or declining the guarantee in substitution of your still to be proven lien.
12. Take further note that should your Mr Head and/or Valoworx decline to accept the guarantee we hold instructions to immediately proceed with the necessary court proceedings in enforcing same. The contents of this letter will be brought to the attention of the presiding officer, and an adverse costs order shall be sought."

[11] The Respondents attached to the above letter the guarantee proposal referred to therein for consideration by the Appellants. Neither the First nor the Second Appellant responded to the guarantee proposal. The Respondents sent another letter to the Appellants on 17 March 2020 wherein they granted the Appellants an opportunity to purchase the property and should they not be so inclined, then the Respondents demanded further to access it for the purposes of marketing and advertising for the intended auction. The Appellants were further advised as follows:

"6. Kindly take further note that in the absence of your written intention to purchase the property by no later 27 March 2020, our clients demand that you and all other occupants occupying the property vacate the said property by no later than 30 April 2020.

7. Should you, or any other occupants of the property, refuse to vacate the property by 30 April 2020, we hold instructions to immediately commence with eviction proceedings."

- [12] In response to the letter referred to above, the First Appellant wrote a letter to the Fourth Respondent alleging that the amount of the lien had over time increased to a sum of R3 500 000,00 (three million five hundred thousand Rand). Upon receipt of the amended amount, Nedbank recorded that it bound itself to any amount proven by the First Appellant. Nedbank also offered the First Appellant the opportunity of purchasing the property, and if so inclined, to provide the attorneys with a proposal by 27 July 2020. When it became apparent that no offer was forthcoming, the Respondent initiated the present eviction proceedings against the First Appellant and those occupying under him.

The Appellant's answering affidavit.

- [13] The First Appellant in the answering affidavit explains that on or about 11 January 2011, Mr Machin, in his personal capacity, and the Second Respondent, Valoworx, duly represented by his mother, Ms Head, concluded a written lease agreement ("the original lease agreement") in respect of the property. The terms of the agreement were that the Second Respondent would, from 1st February 2011 to 31st January 2012, pay R38 000,00 (thirty-eight thousand Rand) per month at the offices of Lola Kramer Properties, Hout Bay. In terms of clause 8(a) of the lease agreement, the landlord would pay all rates, taxes and levies due in respect of the premises, but should these be increased from time to time so as to exceed the amounts payable on the commencement date, the monthly rental would also be increased from with effect from the date upon which such increases became effective by one twelfth of the amount thereof.
- [14] The Second Appellant had an option to renew the lease agreement, subject to the Landlord's consent. He states that during January 2012, Mr Machin approached Ms Head and informed her that he would no longer be the Second Appellant's landlord, and the new landlord would then be Ventimix (Pty) Ltd ("Ventimix"). According to the First Appellant, at that stage, he and his family were already in occupation of the property, having moved in with their parents at the commencement of the original lease agreement. The terms of the agreement between Mr Machin and Ventimix were, according to the First Appellant, unknown to him and his mother. The First Appellant states that Ventimix represented by Mr Machin and the Second Appellant concluded an oral agreement in terms of which Ventimix would be the tenant and the Second Appellant would be the sub-tenant. The material terms of the sublease agreement, were, according to the Appellants as follows:

14.1 The monthly rental amount and the terms would remain the same as in the original lease agreement, except that payment was to be made to Ventimix from February 2012 onwards;

14.2 The First Appellant and his family would continue residing on the property through the Second Respondent;

14.3 Payment of the arrear rates, taxes and water ("municipal charges") owed to the municipality would be paid by Mr Machin or Ventimix;

14.4 The payment of all future municipal charges would be made by Mr Machin or Ventimix but would not be paid by the Second Respondent.

[15] The Respondents avers that the above terms are encapsulated in an email exchange of 31 January 2012, between him and Mr Machin which reads thus:

“Hi archar, apologies for the delay in taking the money from you. Lol. Can you please remit the rent for February to the account below. I will handle shaun [sic] Kramer and the matter of deposits etc from here on, will call you later to discuss the strategic position.

regards,

matthew”

On the same day at about 03:22, Mr Machin wrote an email to the First Appellant explaining as follows:

“Its all covered. Your mum is subleasing from Ventimix which is the new leaseholder . . . she must have forgot [sic] to tell you.”

[16] The above email is preceded by an email from Yumna Van Schalkwyk on 31 January 2012 at 12:50 wherein she forwards Ventimix’s banking details to Mr Machin. The CIPC search of 09 April 2021 reflects that Yumna Van Schalkwyk is the director of Ventimix. Subsequent to the above correspondence between the parties, it appears that no rental payment was made by the Appellants because on 14 March 2012, June Marks Attorneys wrote to the First Appellant the following email:

“Dear Mr Head

Re: M P Machin/Ventimix (Pty) Ltd

The rental sum of R38. 000.00 is currently owing to our clients with an additional R38.000.00 due on April 7th. We are writing to inform you that our clients made you a formal offer by email to delay eviction proceedings. This offer being the payment of R76 000.00 on March 25th with the next payment due on May 7th.

Our instructions, in the event of you breaching our clients offer are to apply for the immediate eviction and removal of all parties at the property

Please be guided accordingly.”

[17] The First Appellant avers that the foregoing emails came about because after the original lease agreement terminated by effluxion of time, and the new agreement was entered into, there was confusion with regard to who would be making payment to Ventimix. According to him, it is this confusion that resulted in the letter from June Marks Attorneys being referred to him personally instead of the Second Appellant.

- [18] It is undisputed that the property's utilities account was in significant arrears. According to the First Appellant when they moved into the property, the arrear amount exceeded an amount of R200 000,
00. To this end, he attached a municipal invoice of April 2011 which reflects that a sum of R279, 195.16 was owing and payable. He further states that he complained a lot to Mr Machin at every instance the water was disconnected, and Mr Machin would arrange that it be reconnected within a few days. In support of this averment, the Appellant attached a copy of an order from the Magistrate's Court, Cape Town, granted in favour of the Second Appellant, directing the City of Cape Town restore the water supply at the report.
- [19] Regarding the rental agreement between Ventimix and the Second Appellant, the First Appellant admits that no rental payments were made to Ventimix. According to his evidence, this was so because Mr Tony Mostert, a liquidator involved in the sequestration of Mr Machin, advised that Mr Machin's dealings prior to the sequestration were shrouded in controversy and that any rental paid to Ventimix would be perpetuating fraud. Furthermore, so alleged the First Appellant, he was paying Mr Machin's outstanding obligations to the municipality in respect of the water and electricity. In addition, there were also numerous pending costs for upkeep, for example, the thatch roof.
- [20] Insofar as breach of the lease agreement with Ventimix is concerned, the First Appellant states that there is no 'unremedied' breach. Furthermore, there has been no correspondence or any indication or communication to the effect that the lease agreement between Mr Machin and Ventimix had been changed or altered in any way. Similarly, there have been no changes to the agreement between Ventimix and the Second Appellant, as well and the trustees of Mr Machin's estate have not informed him otherwise. For this reason, so alleges the First Appellant, the lease agreement between Ventimix and Mr Machin remains in place, and so does the sub-lease agreement between the Second Appellant and Ventimix. It therefore follows, so avers the First Appellant that the Appellants are not unlawful occupiers and there is therefore no basis to evict them as the lease agreement had not been terminated. The First Appellant emphatically denies that he or members of his family has ever been in unlawful occupation of the subject property.
- [21] Regarding the retention lien, the First Appellant reiterates that its current value is R3 500 000, 00 excluding interest. He further states that he has already handed over the vouchers supporting his claim and should it be necessary, he will be able to account for the difference between the January 2019 figure and the current figure.
- [22] To the extent that the Respondents allege that they afforded the Appellants an opportunity to purchase the property, the First Appellant states that he has been residing at the property for more than 10 years with his family. In addition, he has made numerous offers to the

purchase the property which have been ignored by the Respondents. He further explains that his mother, Ms Head, who was the sole member of the Second Appellant passed on 19 August 2018, and left the Second Appellant to him in her will. He therefore is the de facto member of the Second Appellant. However, all the improvements effected on the property were done so by him in his personal capacity and the lien is his, not the Second Respondent's.

The Respondent's replying affidavit

[23] In reply to the First Appellant's answering affidavit the Respondents deny that the First Appellant is authorised to act on behalf of the Second Appellant, a Close Corporation. Moreover, the First Appellant's assertion to the effect that his mother signed the lease agreement is untrue as it is clear from the document that the First Appellant signed it. Nonetheless, so continue the Respondents, all the factual averments relating to the purported lease agreement are irrelevant when regard is had to the following common cause facts:

23.1 the Respondents are lawful and registered owners of the immovable property described and referred to in this application;

23.2 the Appellants have been in beneficial occupation of the property since 2011 already;

23.3 the Respondents obtained authorisation by an Order of Court to sell the specific immovable property;

23.4 the Appellants have not made any payments in respect of rental of the immovable property or their tenancy thereat, at least from the time that the estate of Mr Machin was finally sequestrated;

23.5 since the final order of sequestration was issued, the Respondents have not received any payment from the Appellants in lieu of their occupation of the premises;

23.8 that the Respondents intend selling the immovable property on auction as a sale in execution consequent upon the mortgage bond registered and held in favour of the Fourth Respondent, Nedbank.

23.9 Nedbank has provided the Appellants with a payment guarantee in respect of all amounts which are proven to be necessary improvements to the immovable property.

[24] The Respondents retort to the Appellant's allegations relating to the existence of a lease agreement by stating that even if that was the case, the Appellants failed to provide a single proof of payment in respect of rental after the lapse of the agreement. Neither have they provided proof of the amounts they allege were paid to the City of Cape Town municipality.

[25] Before distilling the issues for determination on the merits, I deem it prudent to deal with two preliminary issues raised by the Respondent, namely, first, the Applicants' non-compliance with the Rules regarding their notice of appeal and their subsequent application for condonation thereof, second, whether the Appellants' grounds of appeal are irregular.

Condonation

[26] The Appellants brought an application for condonation for the late filing of the notice of appeal. It is common cause that the leave to appeal was granted by the court a quo on 7 February 2021. The Applicants were required to deliver their notice of appeal by 3 February 2022. Instead, the aforesaid notice was delivered on 12 April 2022, and filed the condonation for the late filing on 9 May

2022. In short in the affidavit in support of the condonation application, the period for which an explanation was required runs from 3 February 2022 to 12 April 2022. As the notice of appeal was delivered without a request for condonation the Applicants were also required to explain the period between 12 April to and 9 May 2022.

[27] The First Appellant, in his affidavit explains that after he learned that leave to appeal had been granted, and from 30 January 2022, he had consultation with the managing partner of his attorneys of record and an issue of the fees for prosecuting the appeal was discussed. According to the First Appellant, the draft notice of appeal was ready by 31 January 2022, but because no agreement was reached regarding the fees, the notice was not issued until about 13 February 2022 when he fell ill. It transpired on 20 February 2022, through a home test Covid-19 test that he had contracted the disease. From then onwards, he struggled with ill-health, and on 16 March 2022, he slipped a disc in his lower back due to a very severe cough. The First Appellant asserts that his doctor advised him that the slip had caused what is known as Sciatica, as such he was under severe pain for a considerable period. He however, recovered during the first week of April 2022, but still suffered from 'long Covid' effects.

[28] Notwithstanding his compromised health, the First Appellant states that he, on 11 April 2022, addressed the issue of fees with Mr Simon Dippenaar ("Mr Dippenaar"), the managing partner of his attorneys of record's law firm, Simon Dippenaar & Associates. He further avers that "without going into too much detail, there was disagreement between Mr Dippenaar and myself on various aspects relating to be paid. In short, I felt the sum of money Mr Dippenaar required upfront was exorbitant, whilst Mr Dippenaar felt that he needed to be covered adequately." Nonetheless, on 12 April 2022, they reached a temporary fee structure arrangement. However the issue arose again on 18 April 2022 as they had to grapple with the remainder of the fees. The tense situation was exacerbated by receipt of a letter from the Respondents' attorney pointing out that the notice of appeal was filed out of time and that they (the Appellants) were required to file a condonation application.

[29] The upshot of the foregoing is that the Appellants, due to a disagreement relating to legal costs, as well as the First Appellant's contracting Covid-19 and developing Sciatica, they were unable to file the notice of appeal within the requisite time frame. Thus, he seeks

condonation. According to the Appellants, the denial of an opportunity to successfully prosecute the appeal would be highly prejudicial to them, whereas the granting of condonation will not materially prejudice the Respondents. In addition, as set out in the notice of appeal, they have bona fide defences against the Respondents' claims.

[30] The Respondents vehemently opposed the application stating that the explanation proffered by the Appellants did not cover the entire period of the delay and that they (the Appellants) and their legal representatives were moved to file the condonation application only when the Respondents' attorney indicated that he would proceed to apply for their eviction.

[31] The legal principles applicable to an application of this nature are restated in *Grootboom v National Prosecuting Authority and Another* 2014(2) SA 68(CC) as follows:

"[50] In this Court, the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may be justifiably left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

- [32] Counsel for the Respondents strenuously contended that seeing that the 10 (ten) week delay of non-compliance in delivering a notice of appeal, coupled with a further 3.5 (three and a half) weeks delay in filing the condonation application was explained in a terse manner by the Appellants, the application ought to be refused.
- [33] It indeed is so that the period of non-compliance has not been fully explained by the Appellants. Furthermore, it cannot be disputed that there delay impacts negatively on the administration of justice. However, in my view, upon the conspectus of all the issues that this court must consider, the overriding fact is that it is in the interests of justice that the issues raised by the Appellants in the notice of appeal must be considered, more particularly, the issue concerning the powers of provisional trustees to institute the eviction proceedings. Moreover, the delay is not inordinately long. As such I hold that the Appellant's non-compliance with the Rules with regard to the filing of the notice of appeal as well the condonation application must be condoned.

Scope of the grounds of appeal

- [34] Counsel for the Respondents raised a further preliminary point to the effect that the Appellants have approached this court on incorrect or inappropriate grounds of appeal in that the court a quo granted the requisite leave on one single narrow aspect, namely, the issue of termination of the right of occupation. According to this contention, the rest of the grounds of appeal reflected in the notice of appeal need not be considered as the scope is limited to the single issue.
- [35] Counsel for the Appellants retorted to this contention by stating that nowhere in the order of the court a quo is it stated that leave to appeal is limited. Furthermore, so continued the argument, in the ordinary course, where leave to appeal is limited, and the order itself indicates the point of adjudication on appeal. In the matter at hand, the order simply indicates that leave to appeal is granted to the Full Court.
- [36] It is clear from the foregoing contentions that this issue turns on the interpretation of the order of Myburgh AJ. The approach in such a case is explained in in Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v v Lutchman N.O. and Others 1088/2020, 1135/2020 [2022] ZASCA 66 (10 May 2022)

“[44] [T]he now well-established test on the interpretation of court orders is that the starting point is to determine the manifested purpose of the order, and that in interpreting the order the court's intention is to be ascertained primarily from the language of the order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. The manifest purpose of the order is to be determined by also having regard to the relevant background facts which culminated in it being made.”

[37] In considering the order issued by the court a quo, it must be emphasised that that court acknowledged that there was a reasonable possibility that another court would reach a different conclusion in respect of one aspect but did not specifically limit the determination of the matter on appeal to that one aspect. It held thus:

”I do not think that there is any merit in the first ground of appeal”.

The court a quo did not refuse leave to appeal in respect of other aspects raised in the notice of appeal, in fact it did not deal with the other grounds of appeal and simply held that:

“Given my finding, it is not necessary to deal with the third to fifth grounds of appeal raised by the [appellants] as a finding in the favour of the [appellants] on the termination issue, will be dispositive of this case.”

[38] In light of the foregoing declaration, there is in my view, no basis for interpreting the order as excluding those grounds in respect of which no finding was made. Furthermore, there clearly was no intention to limit the appeal court to the determination of the issue in respect of which there was a reasonable prospect of success.

[39] Counsel for the Respondents referred the court to Harlech-Jones Treasure Architects CC and Others v University of Fort Hare 2002

(5) SA 32 (E) at 51I-52A wherein the Court considered whether the limitation on the grounds of appeal was an absolute bar against the appellants invoking further grounds of appeal. Kroon J said the following:

“In our judgment, it is clear that the power of the Supreme Court of Appeal, when hearing an appeal, to permit argument on grounds of appeal, on which leave was refused, is derived, not from the fact that it is the forum hearing the appeal, but from the fact that it is the forum that, in terms of the Act, is empowered to adjudicate upon a petition for leave to appeal refused by the Court of Provincial or Local Division. A Full Court of Provincial Division is not so empowered and the fact that it is the forum hearing the appeal does not give it the power to entertain grounds of appeal in respect of which leave to appeal was refused.”

[40] The issue referred to in Harlech-Jones finds no application in casu as no leave to appeal was refused in respect of any of the grounds in the notice of appeal. In my judgment therefore, all the issues raised by the Appellants in the notice of appeal fall to be determined by this court.

Issues

for determination

[41] Flowing from the foregoing summary of the salient facts, the issues for determination are the following:

41.1 Whether the Appellants had consent to occupy the property or whether the lease agreement which they claim entitled them to occupy the property came to an end when the estate of Mr Machin was finally sequestrated.

41.2 Whether the lease agreement, if found to exist was properly cancelled.

41.3 Whether sufficient security to secure the First Appellant's lien had been given by Nedbank.

41.4 Whether the First to Third Respondents, as provisional trustees, were authorised to initiate the eviction proceedings. Put in another way, whether the order of the KwaZulu-Natal Division of the High Court authorising the First to Third Respondents to sell the property was sufficient authority to initiate the present eviction proceedings.

41.5 Whether the eviction of the Appellants is just and equitable.

Valuation

[42] The Respondents in these proceedings sought the eviction of the Appellants, relief that is final in its nature, therefore, the court a quo determined this matter in accordance with the rule in *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620: The factual disputes in the present matter revolve around the issue of whether the Appellants had consent to occupy the property or whether they are unlawful occupiers. The Appellants allege that they had consent to occupy the property through a lease agreement entered into by the Second Appellant, first with Mr Machin, and second with Ventimix. The Respondents deny lawfulness of the occupation and state that the Appellants had "been in beneficial occupation of the property since January 2011 already".

Were the Appellants unlawful occupiers?

[43] It is trite that the grant or otherwise of an application for eviction in terms of the PIE is predicated upon a threefold enquiry. First, it is determined whether in fact the occupier has any extant right in law to occupy the property, i.e. is the occupier an unlawful occupier or not. If she or he has such a right, then the matter is finalised and the application must be refused. Second, it must be considered whether or not it is just and equitable that the occupier indeed be evicted. Thirdly, and in the event it is indeed held that it is just and equitable that the occupier be evicted, then the terms and conditions of such eviction fall to be determined. It is well to remind oneself that the PIE Act defines an unlawful occupier as a person who occupies land without the express or tacit consent of the owner. In *Davidan v Polovin N.O. and Others* [2021] 4 AII SA 37 (SCA) at paragraphs 11-12 the Court explains thus:

"[11] The jurisdictional requirement to trigger an eviction under PIE is that the person sought to be evicted must be an unlawful occupier within the meaning of PIE at the time when the eviction proceedings were launched. Section 1 of PIE defines an unlawful occupier as 'a person who occupies land without the express or tacit consent, of the owner or person in charge or without any other right in law to occupy such land'. Consent is defined as 'the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question.'

- [12] The starting point is to establish whether the appellant is an unlawful occupier under PIE. The key question is whether the appellant enjoyed a right of occupation? PIE applies not only to occupants who occupied land without the initial consent of the owner or person in charge, it also applies to occupants who had consent to occupy but such consent was subsequently terminated. In both instances the occupants would be unlawful occupiers within the meaning of PIE. Consent in eviction applications is a valid defence.”
- [44] In this matter the finding that must first be made in determining whether the Appellants are unlawful occupiers is whether or not an oral lease agreement can be inferred from the circumstances. Having regard to the facts in this matter, the question is then whether the facts establish a lease agreement between the Second Appellant and Ventimix. The answer to that question is a resounding yes. This I say, because the Respondents themselves do not deny it, instead they rely on the Appellant’s failure to pay the monthly rental. Second, the email communication between Mr Machin and the First Appellant refers to a lease agreement between the Second Respondent and Ventimix as well payment of monthly rental as well as the provisioning of the latter’s banking details. Furthermore, the fact of the existence of the lease agreement, as at 14 March 2012, is confirmed by correspondence received by the First Appellant from attorneys then representing Mr Machin, a letter addressed to the First Appellant from June Marks Attorneys advising him that “the rental sum of R38 000.00 is currently owing to our client”. As correctly contended by counsel for the Appellants, the words used in the letter are unequivocal evidence of a lease agreement. This is further acknowledged by the Respondent’s averments in the replying affidavit where they stipulate that in beneficial occupation of the premises since 2011 “the Respondents have not made any payments in respect of the rental of the immovable property or their tenancy thereat, at least from the time that the estate of Mr Machin was finally sequestrated”. In addition, the Respondents assert that they the Respondents) have not “received any payment from the respondents (appellants)” and therefore for this reason, their occupation of the property has been rendered unlawful. The Respondents also acknowledge that notwithstanding their allegations to the effect that the Appellants have not paid rental, they did not receive any lease agreement from Mr Machin.
- [45] All of the foregoing facts give rise to an ineluctable conclusion that the Appellants had consent to occupy the property based on a lease agreement between Ventimix and the Second Appellant as alleged by the First Appellant. That means the Appellants were not unlawful occupiers as their occupation was in terms of the lease agreement or with the consent of the owner and they can only be said to be unlawful occupiers if the owner revoked the consent or terminated the agreement.

Was the lease agreement between the parties terminated?

- [46] It is common cause that the Appellants remain in occupation of the property. In the event of a lease agreement, or indeed any consent to occupy a place, it is incumbent upon an owner vindicating the property to allege that such agreement or consent has been terminated. In the case of a lease agreement, it is imperative that the defaulting party be placed in mora, and thereafter cancelling should the lessor so choose. This requirement is restated in *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 F-G as follows:

“If he concedes in his particulars of claim that the defendant has an existing right to hold (e.g. by conceding a lease or a hire-purchase

agreement, without also alleging that it has been terminated: *Boshoff v Union Government* 1932 T.P.D. 345 at p 351; *Henning v Petra Meubels Beperk*, 1947 (2) SA 407 (T) at p 412) his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination, which has taken place, then ex facie the statement of claim he must at least prove the termination, which might in the case of a contract, also entail proof of the terms of the contract.”

- [47] Determining whether there has been cancellation of the lease agreement is a question of fact as was held in *Kragga Kamma Estates v Flanagan* [1994] ZASCA 137; 1995 (2) SA 367 (A) at 374 D-G to the following effect:

“however, on the assumption that the first defendant had to be placed in mora (ex persona), the question for decision is whether this was done. If the demand for payment did not have this effect, an essential prerequisite to the plaintiff’s right thereafter to cancel would be missing. So we must examine the terms of the demand . . . whatever its form, the demand had to be unambiguous, and indicate a fixed date, reasonable in the circumstances, for performance (Nel v Cloete 1972 (2) SA 150 (A) at 159H). And, of course, it had to indicate that the creditor wished to receive his money (Dugan v Estment 1910 TPD 998 at 1001); that the debtor was required to perform (Afred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977

- (4) SA 310 (T) at 351H); and he must have been placed on terms to do so (*Johannesburg City Council v Norven Investments (Pty) Ltd* 1993 (1) SA 627 (A) at 633 E). Whether this has been done is a question of fact for the decision of the Court (*Wessel’s Law of Contract* (2ed) volume 11 paragraph 2893).”

- [48] In the context of PIE, as in casu, it is trite that in the event that a lease agreement is in place, such lease agreement must be terminated before it can be said that such a person is in unlawful occupation, section 1 stipulating that an unlawful occupier is “a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land”.

- [49] In this matter, the Respondents do not allege that the consent the Appellants had to occupy the property was ever terminated. Instead, the First Appellant was on 27 March 2020, invited to purchase the property failing which he would have to vacate the property. The First Appellant alleges that he made several offers to purchase the property which were ignored

by the Respondents. In any event, nothing much turns on those offers as the bottom line is that it is clear from the papers that the Appellants had consent of the owner to occupy the property as I have already found. There is nothing in the Respondents' papers indicating that such consent was ever revoked or the lease agreement terminated. What is clear is that such consent was not terminated at any stage during their occupation of the property. Until the consent is terminated, it cannot be said that the Appellants are unlawful occupiers. It follows that on this basis alone, the appeal ought to succeed.

[50] I now turn to consider the application of the Rental Housing Act.

The Applicability of the Rental Housing Act

[51] In light of the findings I have already made, namely, that a lease agreement between Ventimix and the Second Appellant which was never terminated was in existence, it is not strictly necessary to make a determination of whether the Rental Housing Agreement applies to the facts in casu. However, I do so for the sake of completeness.

[52] Even if I may be wrong on the findings of the existence of a lease agreement between Ventimix and the Second Appellant, based on the fact that the Appellants remained in occupation after the original lease agreement had terminated by effluxion of time, the agreement in terms of section 5(5) of the Rental Housing Act 50 of 1999 ("the Rental Housing Act") became a month to month lease agreement.

[53] Section 5(5) provides that:

"(5) If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention of either party to terminate the lease."

[54] The presumption in section 5(5) is, in the circumstances applicable to the original lease agreement between the Second Appellant and Mr Machin, which had expired by effluxion of time as the Appellants remained in occupation after the expiration of the agreement without any objection from the owner of the property. In addition, the original agreement falls squarely within the definition of section 1 of the Rental Housing Act which defines an agreement of lease as follows:

"an agreement of lease concluded between a tenant and a landlord in respect of a dwelling for housing purposes."

[55] An unlawful occupier for the purposes of PIE is one who occupies without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land. In the circumstances, even if my finding to the effect that there was a rental agreement between Ventimix and the Second Appellant is wrong, the result is the same in that in terms of the presumption in section 5(5) the Appellants ought to have been issued with a notice to terminate the month to month agreement which the original agreement had

morphed into, as the Appellants remained in occupation of the premises with the express, alternatively tacit consent of Mr Machin. The Respondents do not allege that the original agreement was terminated, thus, on this basis too, the Appellants are not unlawful

occupiers.

Did the provisional trustees have authority to bring the eviction proceedings?

[56] One of the grounds of appeal raised by the Appellants is that the Respondents, as provisional liquidators, did not have authority to bring the eviction proceedings. It is not in dispute that the challenge to the provisional trustee's authority was raised for the first time during the application for leave to appeal. Counsel for Respondents bemoaned the fact that the Appellants did not raise this point during the initial hearing. Counsel for the first Respondents specifically objected to the new ground on the basis that the appellant seeks to introduce a new case on appeal, to the prejudice of the Respondents. According to this contention, it is impermissible for the Appellants to do so. It therefore seems prudent to first consider whether the new ground of appeal challenging the authority of the liquidators, raised *ex post facto*, should be considered during the present appeal proceedings.

[57] Notwithstanding the fact that it was raised for the first time in the application for leave to appeal, as I have said, the court *a quo* considered it, and held thus:

"15. The question of authority is a new point raised on appeal. However, it was dealt with comprehensively by counsel for the liquidators and hence prejudice should not arise if considered in this application."

16. . . .

17. Rule 7 has thus provided a specific mechanism for a challenge to authority and the belated taking of the point illustrates why this rule is necessary. A challenge to authority is most efficiently dealt with at the commencement of the proceedings and not as far down the track as an appeal.

18. I am of the view that the respondents should have made use of Rule 7 and not raised the question of authority in the manner they did."

[58] The court *a quo* then concluded that in the light of the fact that the issue of authority was not raised in accordance with the provisions of Rule 7(1), there were, on this ground, no prospects of success.

[59] Counsel for the Appellants argued that the basis on which the court *a quo* found that the above ground of appeal was unmeritorious is erroneous as rule 7(1) has no application in the present proceedings. Counsel for the Respondents strenuously objected to the determination of the issue of the authority of liquidators on the basis that the Appellants, by so doing, are materially prejudicing the Respondents as this is an *ex post facto* raised on appeal. Furthermore, so goes the contention, it is impermissible for the Appellants to raise such a

material issue during the leave to appeal proceedings and subsequently on appeal.

[60] It is trite that a court of appeal ascertains whether the court a quo came to the right conclusion on the basis of the case that served before it. The overriding principles applicable in the present circumstances are set out in *Paddock Motors (Pty) Ltd v Igesund* 1976

(3) SA 16 (A) at 24B-C, the Court stated the following:

“If e.g., the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality and may lead to a wrong decision. It follows that the court cannot be confined in all circumstances to the issues of law explicitly raised in the special case. This does not mean that the Court will always be free to enlarge the issues, whether mero motu or at the request of a party. The question of prejudice may arise, e.g., where a party would not agreed on material facts, or on only those stated in the special case, had he realised that other legal issues, not stated in the special case, were involved. In the present instance such considerations do not arise as the question the appellant now seeks to raise was actually part of the special case when the facts were agreed upon . . . Moreover, the contention as to the fulfilment of the “condition precedent” turn on the proper construction of the contract, which is also basic to the adjudication upon the other two points of law.”

[61] The above principles are restated in *Donnelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 380H-381B as follows

“Secondly, it is clearly a wholly new line of defence now being taken. It was not mentioned in the summary judgment proceedings, nor in the plea. It was never referred to in evidence or argument at the trial. Its mere novelty, of course, is no ground per se for rejecting it. However, generally speaking, a Court of Appeal will not entertain a point not raised in the court below and especially one not raised on the pleadings in the court below. In this regard I need do no more than to refer to Herbstein and Van Wissen The Civil Practice of the Superior Courts in South Africa 3rd ed at 736-7. In principle, a Court of Appeal is disinclined to allow a point to be raised for the first time before it. Generally, it will decline to do so unless

- (1) the point is covered by the pleadings;
- (2) there would be no unfairness to the other party
- (3) the facts are common cause or wellnigh incontrovertible; and
- (4) there is no ground for thinking that other or further evidence would have been produced that could have affected the point.”

(See also *Bank of Lisbon and South Africa v The Master and Others* 1987

(1) SA 276 (A) at 290 A-H; *Nedbank Ltd v Cooper* NO 2013 (4) SA 383)

[62] Likewise, in *Fischer v Ramahlele* 2014

(4) SA SCA 614 at 620 the Court explained thus:

“[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even when the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for (i) it is impermissible for a party to rely on a constitutional complaint that was not pleaded. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.”(Footnotes omitted)

[63] Finally, the Constitutional Court in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another (Mighty Solutions)* 2016 (1) SA 621 (CC) para 34, added a further requirement, namely, that it must be in the interests of justice that the new point of law be entertained.

[64] In the matter at hand, although the new point of law raised by the Appellants is not foreshadowed in the pleadings, it cannot be said that the Respondents have not had an opportunity to meet this new contention. As earlier pointed out by Myburgh AJ, the matter was fully and fairly ventilated during the application for leave to appeal, and therefore no prejudice is occasioned by it being considered on appeal. I now turn to do so.

[65] Counsel for the Appellants contended that the Respondents, as provisional trustees, did not have authority to bring the eviction proceedings against the Appellants. According to this contention, the authority of the provisional trustees to institute legal proceedings is precluded by section 18(3) of the Insolvency Act 24 of 1936 (“the Insolvency Act”) which, in peremptory terms provides that provisional trustees may only do so with the authority of the court. The Appellants further contend that in the absence of an order in compliance with section 18(3), the proceedings in pursuit of their eviction constitutes a nullity, and that on this ground alone, the appeal ought to succeed.

[66] Section 18(3) provides as follows:

“(3) A provisional trustee shall have the powers and duties of a trustee, provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings, and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and conditions as the Master may direct.”

[67] The Respondents on the other hand rely, for the requisite authority upon the order of Bezuidenhout J, issued in the KwaZulu Natal High Court authorising the provisional trustees to sell the property in question.

[68] It is common cause that the Respondents obtained an order to sell the property through the order of Bezuidenhout J, dated 18 September 2018, which reads thus:

“IT IS ORDERED THAT

- (a) The Applicants be and are hereby granted leave to bring and prosecute this application to its finality and to appoint attorneys and counsel for such purpose and to pay the costs incurred in respect of Application from the proceeds of the sale of the immovable properties belonging to the insolvent estate of Mathew Paul Machine on the scale as between attorney and client.
 - (b) The Applicants be and are hereby authorised to sell the following immovable properties registered in the name of the aforementioned insolvent under the deeds mentioned hereunder, by tender, private treaty or public auction;
 - (i) Erf 2[...] M[...] Strand in the City of Cape Town, Cape Division, Western Cape Province in extent 944 (Nine Hundred and Fourty Four) square metres, held under Deed of Transfer T11[...].
 - (ii) Erf 4[...] Hout Bay in the City of Cape Town, Cape Division, Province of the Western Cape in extent 6402 (Six Thousand Four Hundred and Two) square metres, held under Deed of Transfer T57[...];
 - (c) The costs of this application shall be costs in the administration of the insolvent estate of Mathew Paul Machin on the scale as between attorney and client.”
- [69] It is easily discernible from the above order that all that it materially authorises is the sale of the property by the trustees. The question is whether by obtaining authority to sell the property, it can be said that the Respondents were authorised to bring the eviction proceedings. The issue therefore turns on the interpretation of section 18(3) of the Insolvency Act.>
- [70] To this end, it was argued on behalf of the Respondents that it is clear from the wording of section 18(3) and from several authorities that the purpose of obtaining authority to institute proceedings is to protect the creditors and the concursus against frivolous or ill-conceived litigation. Therefore, whether the trustee or liquidator has authority is relevant only in relation to liability, as between himself and the estate of the company, for the costs of the proceedings. As such, the Appellants have no authority to challenge the liquidators’ authority. In addition, so goes the contention, whether the trustee or liquidator has authority is relevant only in relation to liability, as between himself and the estate or company, for the costs of the proceedings. Relying on *Patel v Paruk’s Trustees* 1944 AD 469 at 475, Mr Buizedenhout further argued that courts have repeatedly espoused the view that the

existence of authority therefore is not something which another party to the proceedings can successfully challenge. To this end, the following was said in Patel:

“The original proviso, prohibiting the trustee from instituting or defending any legal proceedings without the prescribed consent, was enacted, as between trustee and the creditors, in order to protect the estate from being dissipated in litigation. The Legislature could not have intended that steps taken by a trustee to institute or defend proceedings must necessarily be a nullity because the prescribed consent has not been obtained.”

Further authorities relied upon by the Respondents for this contention are, inter alia, Waisbrod v Potgieter and Others 1953 (4) SA 502 (W); Sifris & Miller NO v Vermuelen Bros 1973 (1) SA 729 (T) and Lynn NO and Another v Coreejes and Another 2011 (6) SA 507 (SCA).

- [71] According to the Respondents, their contention also finds support in the following remarks made by the Supreme Court of Appeal in a matter aimed at consideration of the authority of a trustee as contemplated in the Trust Property Control Act 57 of 1988, in Lupacchini NO and Another v Minister of Safety and Security 2010 (6) SA 457 (SCA) at 731:

“And although a trustee of the kind that is now in issue might share some characteristics of a trustee in insolvency, they do not altogether coincide. One distinction that immediately comes to mind is that the acts that were in issue in these cases were capable of being performed with the authorisation of the creditors, from which it is plain that the restriction existed in the interest of creditors. But as Goldblatt J said in Simplex, s 61 ‘is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of the trustee.’”

- [72] The Respondents further argued that the decision in Lynn NO and Another v Correejes and Another 2011

- (6) SA 507 (SCA) as putting an end to the Appellants’ contentions when it held that:

“Our courts have held that if a liquidator litigates without the prescribed authority the court may refuse to allow him his costs out of the company’s assets and he may have to pay such costs himself. The litigation is not a nullity, it merely has potential adverse costs implications for the liquidator. And there is ample authority that a person against whom the unauthorised liquidator is litigating may not object to such lack of authorisation, for it is a matter between the liquidator and the creditors.”

- [73] The Respondents conclude in argument that in light of the foregoing authorities, the Appellants understandably did not raise the issue of authority in the initial proceedings as they legally, simply did not have authority to do so.

- [74] Retorting to these contentions, it was submitted on behalf of the Appellants that the clear wording of section 18 (3) to the effect that “... without authority of the court or for the purpose of obtaining authority he shall not bring or defend any legal proceedings” demonstrates that the interpretation proffered by the Respondents is unsustainable. According to the Appellants, this much is clear from the Supreme Court of Appeal’s reference to section 18(3) in Bester NO v Gouws 2020 JDR 2772 (SCA) at paragraph [7] as “the necessary power to institute legal proceedings in terms of section 18(3)”. According to the

Appellants, the authorities relied upon by the Respondents are not applicable in the circumstances of the present matter as none of them makes reference to section 18(3) of the Insolvency Act. Furthermore, so continues the argument, even though in *Lupacchini NO and Another*, the court had regard, by way of comparison to the provisions of section 18(3) of the Insolvency Act, the matter involved the situation of a final trustee in the context of section 73, and not a provisional trustee subject to a specific statutory restriction.

[75] Mr Wilkin, who represented the Appellants, retorted to these contentions by pointing out that the wording of section 18(3) is peremptory and leaves no room for any other interpretation. Besides, so continued the argument, some of the cases relied upon by the Respondents to found the authority to institute legal proceedings bear no relevance in *casu* as they refer to final trustees, as opposed to provisional trustees. More particularly, in *Patel*, the court referenced the provisos as contained in section 73, which permit the bringing of application by ‘final’ trustees. Similarly, in *Waisbrod* the liquidator’s authority to institute proceedings was by a resolution of creditors and no reference was made to section 18(3).

[76] According to further argument advanced on behalf of the Appellants, the institution of these proceedings by the provisional liquidators without the authority of the court renders them a nullity that cannot be ratified afterwards. This contention is premised on *Harrington v Fester and Others* 1980 (4) SA 424 (C) wherein a sale agreement had been entered into without with section 18 (3) and the court held thus:

“In my opinion, the agreement resulting from the offer “D” was void. Section 18 (3) of Act 24 of 1936 as amended is couched in imperative terms: “. . . without the authority of the Court or Master (the

provisional trustee) shall not sell . . . (and) . . . such sale shall furthermore be after such notice (etc) as the Master may direct”. “Where a provisional trustee attempts to effect a sale, such sale may be interdicted (Ex parte Van der Merwe 1922 JDR 128). Both Mars and Smith in their works on the law of insolvency seem to regard s 18(3) as laying down a peremptory prohibition, and to my mind the word “shall” in the subsection or “shall not” in a statute normally carry with them the result that, if the injunction or prohibition be not obeyed, nullity follows (Steyn Uitleg van Wette 4th ed at 201 paras (1) and (2))”.

[77] It is clear from the foregoing that the matter turns into the interpretation of section 18(3) of the Insolvency Act. The principles relating to interpretation of statutes are restated in *Natal Joint Municipality Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) as follows:

[18] . . . The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each

possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so would in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one in fact they made. The inevitable departure is the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[78] It must be stated from the outset that the Respondents’ contention to the effect that section 18(3) does not preclude provisional trustees from bringing legal proceedings and that the Appellants are precluded from successfully challenging the aforesaid trustees to bring legal action is not sustainable. This I say because this interpretation is without a doubt contrary to the clear wording of the statute which is peremptory. This much is clear from the acknowledgment by the Supreme Court of Appeal in *Bester NNO v Gouws and Others* (851/2019) [2020] ZASCA 174 (17 December 2020) that pursuant to the granting of a provisional sequestration order, the appellants;

“ [7] On 17 August 2012, the appellants also obtained an order granting them the necessary power to institute legal proceedings in terms of s 18(3) of the Act.”

[79] It indeed is so, as correctly contended by counsel for the Appellants that section 18(3) unambiguously stipulates that a provisional trustee is not authorised to bring or defend any legal proceedings without first obtaining the authority of the court. Consequently, legal proceedings brought by the provisional trustees without authority are a nullity. The reason is not far to find. At the provisional sequestration stage, nothing is cast in certainty and the provisional insolvent is entitled to the protection of the court, thus the need for judicial oversight where litigation is concerned. This is aptly stated in *Harrington v Fester and Others* 1980 (4) SA 424 (C) thus:

“In my opinion the agreement resulting from the offer “D” was void. Section 18(3) of Act 24 of 1936 as amended is couched in imperative terms; ‘... without the authority of the Court or Master, (the provisional trustee) shall not sell ... (and) ... such sale shall furthermore be after such notice (etc) as the Master may direct”. Where a provisional trustee attempts to effect a sale such sale may be interdicted (Ex parte Van der Merwe 1922 JDR 129). Both Mars and Smith in their works on the law of insolvency seem to regard s 18(3) as laying down a peremptory prohibition; and to my mind, the word “shall” in the sub-section has that effect. The words “shall” or “shall not” in a statute normally carry with them the result that, if the injunction or prohibition be not obeyed, nullity follows (Steyn Uitleg van Wette 4th ed 201 paras (1) and (2)).”

[80] Any interpretation which holds otherwise would be in direct contrast to the intention of the statute. As articulated by Fleming AJ, in *Ex parte Serfontein: in re Insolvente Boedel Schoeman* 1978 (1) SA 246 (O) at 250B, to grant a provisional trustee power to realise assets may have an adverse effect in that creditors may be deprived,

to a large extent of their say in the administration of the estate. The imperative terms of section 18(3) are intended to prevent

provisional trustees from alienating assets of any kind without the input of creditors. (See also Catherine Smith, *The Law of Insolvency* 3rd ed 1988). Also they may have a different view regarding the intended court proceedings. Flowing from this reasoning, it follows that the unauthorised institution of the proceedings by provisional trustees must be a nullity that cannot be validated by a subsequent order of court, contrary to the contentions advanced on behalf of the Respondents. I am fortified in reaching this conclusion by the judgment in *Simplex (Pty) Ltd v Van der Merwe and Others* NNO 1996(1) SA 111 (W) at 114D-H where the court considered a sale by the trustee contrary to the provisions of section 6(1) of the Trust Property Control Act 57 of 1988 held thus:

*“To hold that the agreement had a ‘latent validity’ which could at the instance of the respondents be ratified would mean in effect that the agreement was not an agreement of sale but an option given to the respondents. This could never have been the intention of the parties. Either there was an immediate valid and binding agreement of sale or there was no agreement at all. It was never the intention of the parties to have a limping contract which would only become whole upon approval by a duly authorised trustee or the Master or the beneficiaries or the Court. The respondents further attempted to draw an analogy between their position and that of a liquidator or trustee in insolvency who litigates without the consent of the creditors (for example *Patel v Paruk’s Trustee* 1944 AD 469; *Waisbrod v Potgieter and Others* 1953(4) SA 502 (W); *Sifris & Miller NNO v Vermuelen Bros* 1973 (1) SA 729 (T). This analogy at first deemed appropriate but on due consideration is not apposite. The cases cited deal with locus standi in judicio and are not of application to a contractual situation. Further, as I have already said, s 6 (1) is not only to protect beneficiaries but has a wider and more public purpose. The final submission made on behalf of the respondents was that the Court has overriding discretion to ‘validate retrospectively acts performed as a trustee by one not duly so appointed. This argument was based on an order granted by Galgut J, in *Retchel v Wernich and Others* 1962(2) SA 155 (T) at 161-2. That judgment was not concerned with the type of problem as exists in this case and the order was merely granted in relation to executory acts performed by the administrator of the trust. No third party rights were involved. In my opinion, the Court cannot validate which are expressly prohibited by statute. To do so would be to arrogate to this Court the power to override legislative acts.”*

[81] Regarding the court a quo’s finding to the effect that the Appellants ought to have invoked the provisions of Rule 7(1) of the Uniform rules of court, it must be stated from the outset that that ruling is erroneous. Rule 7(1) provides thus:

“Power of attorney

Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone to act on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable to do so the court may postpone the hearing of the action or application.”

- [82] It is plain from these provisions that Rule 7(1) does not deal with the decision to institute legal proceedings of the nature envisaged in *casu*, it deals with the power of legal representatives to represent their clients. It allows any litigant to request such a power of attorney and bears no reference at all to the decision of the juristic person or the provisional trustees to institute proceedings. The institution of legal proceedings by provisional trustees is governed by section 18(3) of the Insolvency Act as set out in this judgment. It therefore would have been procedurally incorrect for the Respondents to invoke Rule 7(1).
- [83] As can be discerned from the foregoing, it is my judgment that the Respondents, as provisional trustees were not authorised to bring the eviction proceedings through the order of Bezuidenhout J. The inevitable result is that the proceedings before the court *a quo* were never properly authorised and are a nullity which cannot be ratified by a subsequent court order as I have held in this judgment. As was held by the Court in *Swart v Starbucks and Others* 2017(5) SA 370 at paragraph [34], the only proceedings a provisional liquidator can institute without authority are proceedings where he or she seeks such authority.
- [84] The issue that must still be considered is that of the improvements lien on the basis of which the First Appellant claims the right of occupation. I turn now to do so.

The lien

- [85] It is common cause between the parties that the Appellants have been occupying the property without paying rental since at least 2012. The converse of the Respondent's concession that the Appellants have not been paying rent in lieu of their occupation is an indication of their recognition that there was a lease agreement as I have already found. In any event the court *a quo* also made no finding with regard to the existence or non-existence of any lease agreement. It based its finding on the fact that the Appellants were unlawful occupiers on the basis that their version to the effect that they are not obliged to pay rent on the basis of a retention lien as untenable.
- [86] The court *a quo* found that Nedbank had found sufficient security in the form of the guarantee. Again, strictly speaking, it is not necessary to determine this issue in the light of the finding that I have made to the effect that Appellants are not unlawful occupiers in that there was a lease agreement in place which was not lawfully cancelled. However, I do so in the event that the above finding is found to be wrong.

[87] According to the court a quo, the furnishing of the guarantee by Nedbank defeated any right the Appellants may have had for remaining in the property based on their entitlement to do so based on the lien. It indeed is so that the Appellants relied also on the lien for the continued occupation such that they put up signs on the property indicating their right to do so through a retention lien. The provisioning of a guarantee by Nedbank constitutes an unequivocal acknowledgment of the fact that the First Appellant effected the necessary and/or useful improvements it alleges; thus the right of retention is uncontested. Put differently, the First Appellant was, as a bona fide possessor, who was in possession of the leased property, entitled to retain it until his claim for compensation had been satisfied. (See *Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA) at paragraph [6]. However, the Supreme Court of Appeal in *Pheiffer v van Wyk* 20015 (5) SA 464 (SCA) at para 13 (also referred to by the court a quo) held as follows:

“A lien may be defeated by the owner of the property against whom an enrichment action lies by furnishing security for the improvement

effected, which can take place in the form of either a payment into court or the furnishing of a banker’s guarantee.

[21] And further that 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 had, he must vacate the property.”

[88] The guarantee in the sum of sum of R2 506 471, 08 (two million five hundred and seventy one rand and eight cents) appears to have been signed on behalf of Nedbank by Mr Dirk Coetzee and the First to Third Respondents on 08 January 2021. It would “only become effective and enforceable upon Valoworx or Head obtaining final judgment by instituting legal action proceedings against the trustees, in their duly appointed capacities on behalf of the insolvent estate, within no more than thirty days from the date of issuing of this performance guarantee”.

[89] Counsel for the Appellants, contended, correctly in my view that in the circumstances the guarantee lapsed on 8 February 2020 and at the time of the hearing of this matter there was no guarantee in place. However, the Respondents issued a final guarantee dated 13 July 2020 containing similar provisions. The present proceedings were, according to the Registrar’s date stamp on the notice motion issued on 17 November 2020. That in essence suggests that at the time of the institution of the proceedings, there was no guarantee in place.

[90] Whereas, the court a quo rightly applied the legal conclusion that an improvement lien may be dispensed with if the court is satisfied that sufficient security has been provided for any prospective claim, it is my judgment that because the guarantee had by the time the proceedings were instituted lapsed, no security had been furnished. It follows that this is yet another basis on which the appeal should succeed.

Conclusion

[91] I have in this judgment held that the Appellants are not unlawful occupiers as defined in PIE. They occupied the property on the basis of a rental agreement between Ventrimix and Second Appellant. I further held that even if they did not, the presumption in section 5(5) of the Rental Housing Act applied after the expiration of the lease as they remained in the premises with the tacit consent of the erstwhile owner which had never been revoked or the agreement cancelled. I also found that the First to Third Respondents did not have authority to initiate the present proceedings and that the lien that had been provisioned by the Fourth Respondent had expired. I also held that by the time these proceedings were instituted, the guarantee issued by the Fourth Respondent had expired and therefore the First Respondent's lien had not been dispensed with.

[92] For all of these reasons, it follows that the appeal must succeed. In the result, the following order is issued:

92.1 The appeal is upheld with costs including costs of two counsel where employed.

92.2 The order of the court a quo is set aside, and substituted with the following:

‘The application is dismissed with costs including costs of two counsel where employed’.

I concur.

NUKU, J

LEKHULENI, J

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