



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

Case no: 1359/2021

Date heard: 03 December 2021

Date delivered: 15 February 2022

OF INTEREST

In the matter between

**DEPARTMENT OF PUBLIC WORKS AND
INFRASTRUCTURE**

Applicant

AND

WHITTLESEA BUILDERS AND CIVILS CC

First Respondent

WHITTLESEA TYRE REPAIRS AND MOTOR

Second Respondent

DEALERS

FURTHER OCCUPIERS OF THE STRUCTURES

Third Respondent

AND/OR BUILDINGS ON ERF 166, WHITTLESEA

JUDGMENT

GOVINDJEE, J

Background

[1] The first respondent entered into a standard lease agreement with 'The Provincial Government of the Eastern Cape (Department of Public Works)' in October 2008. The property leased is described as Erf 166, Whittlesea (the premises). The lease commenced on 27 August 2008 and terminated on 27 August 2009. The agreement was then extended on at least four occasions, most recently for the period between 3 September 2013 and 2 September 2015.

[2] The first respondent fell into arrears with payment of its monthly rental and signed an acknowledgement of debt during August 2012, including a commitment to repay the arrears by means of monthly instalments. These payments were not maintained, and notice was given to the first respondent on 17 March 2016 to vacate the premises, which it claims was not received.

[3] The first respondent remains in occupation of the premises and has sublet various portions of the premises to no less than seven individuals, who operate various types of businesses on the property.

[4] The second respondent entered into a lease agreement with the 'Department of Roads and Public Works Eastern Cape Provincial Government' on 2 September 2013. The lease was to terminate on 31 July 2016. The property is described in this agreement as 'Erf 166 Main Road, situated in the Lukhanji Municipality, Division of Whittlesea, Eastern Cape Province'. The second respondent fell into arrears and Zoleka Bula, representing the second respondent, signed an acknowledgment of debt in favour of the applicant on 9 March 2016. The applicant alleges that it cancelled that lease agreement on 19 September 2016 and gave notice to the second respondent to vacate the premises. Despite this, the second respondent remains in occupation. Other than claiming that the first respondent never received notice of cancellation, this is admitted by the respondents.

[5] During March 2021, the respondents were given further notice to vacate the structure and / or buildings situated on the premises. The first respondent denies

receiving this notice, even though it was signed for.¹ The applicant seeks an order for cancellation of the lease agreements, and eviction of the respondents from the structures and / or buildings on the premises.

- [6] The respondents raised three main grounds of opposition, detailed as follows:
- i) The applicant lacks locus standi to institute the proceedings. There is no legal entity by the name of the 'Provincial Department of Public Works'. The department is supposed to be represented in legal proceedings by the executing authority, who is its member of executive council for public works, who is accountable for the applicant in the provincial legislature in terms of section 4A of the State Liability Act, 1957 ('SLA').² At best for the applicant, it is the premier, who is not party to the proceedings, who has the right to institute the claim in terms of the SLA. The applicant has failed to establish a nexus between its right to institute the proceedings given that the property is registered in the name of the government of the province of the Eastern Cape, whose executing authority is the Premier, and not the applicant.³
 - ii) Paragraph 5.1 of the lease agreement provides that 'The property may only be used for single residential purposes for private occupation'. As such, the applicant's contention that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998⁴ was inapplicable could not be accepted.
 - iii) The land was leased as vacant land, and the respondents effected improvements thereon, apparently with full knowledge of the applicant, so that an enrichment lien was created. The respondents were therefore entitled to remain in occupation of the property until they had been compensated for the improvements by the applicant.

¹ P 81 of the index.

² Act 20 of 1957.

³ The issue of the applicant's locus standi to litigate in its own name, in the context of eviction, was left open in *Department of Public Works v M S Moos Construction CC* [2006] SCA 63 (RSA) at para 11.

⁴ Act 19 of 1998.

Locus standi

[7] The first respondent admits that ‘On or about 2007, the Department of Public Works of the South African Government (“the Applicant”) issued my business with a right to occupy and develop a vacant land for business use’. Both the first and second respondents admit the description of the applicant and there is no dispute on the papers that the lease agreements that were previously concluded between the parties were concluded with the applicant as the lessor. Indeed, it is apparent from the lease agreements attached in respect of both the first and second respondents, as well as from the subsequent addendums, that the contracting party (lessor) was the applicant, variously described as:

- The Provincial Government of the Eastern Cape (Department of Public Works);⁵
- The Eastern Cape Provincial Government (Department of Roads and Public Works);⁶
- The Department of Public Works, Eastern Cape Provincial Government;⁷
- The Department of Public Works;⁸ and
- Department of Roads and Public Works.⁹

[8] The letters addressed to the respondents to vacate emanated from the ‘Province of the Eastern Cape: Roads and Public Works’, or the Office of the State Attorney, acting on behalf of the applicant.

[9] ‘Provincial department’ is defined in the Public Finance Management Act 1 of 1999 (‘PFMA’) to include ‘a provincial department listed in Schedule 2 to the Public Service Act, 1994’. That schedule lists the applicant as a provincial department and confirms that it is headed by the ‘Head: Public Works and Infrastructure’. The suggestion that no such legal entity exists, is accordingly erroneous.

⁵ P 95 of the index.

⁶ P 41 of the index.

⁷ P 96 of the index.

⁸ P 110 of the index.

⁹ P 111, 112, 113 of the index.

[10] Thandolwethu Manda, as Head of Department (“HOD”) for the applicant, is the accounting officer envisaged in the PFMA. His authority stems from s 38 of the PFMA, and includes responsibility for the effective, efficient, economical and transparent use of the resources of the applicant. S 38 of the PFMA confirms the HOD’s duty to take appropriate steps to collect all monies and / or revenue due to the applicant and that he is responsible for the management, including the safeguarding and maintenance of the assets, of the applicant.¹⁰ The applicant is described in the papers as being the department under whose custodianship certain State-owned land resorts. The respondents admit this description.

[11] In *Farocean Marine v Minister of Trade and Industry*,¹¹ the Supreme Court of Appeal confirmed that proceedings on behalf of the State may be commenced both in the name of the State or the Government and in the name of a nominal plaintiff or applicant, usually the Minister as the embodiment of a (national) Department.¹² Proceedings may also be commenced by the administrative head of a department.¹³

[12] The submissions and authorities relied upon by the respondents in respect of the State Liability Act, 1957¹⁴ appear to be misplaced. That legislation is concerned with the *liability* of the State, indicating the required citation when proceedings are instituted against a national or provincial department.

[13] In *Distcor Export Partners and Another v The Director-General of the Department of Trade and Industry*, the Supreme Court of Appeal stated as follows:¹⁵ ‘There is no statutory provision on how the State may initiate proceedings...Although proceedings may, as commonly happens, be commenced in the name of the Government of the Republic of South Africa, the government may also sue through a nominal plaintiff or applicant, usually the ministerial head of a department. According to the appellants the latter practice is so inflexible that it precludes the administrative head of a department from instituting action on behalf of a department of State. In my view the practice is more relaxed.

¹⁰ Ss 38(1)(c) and (d) of the PFMA.

¹¹ 2006 SCA 165 (RSA).

¹² Para 8.

¹³ *Ibid*, with reference to *Distcor Export* paras 6,10.

¹⁴ Act 20 of 1957.

¹⁵ [2005] ZASCA 13 at paras 5, 6.

It is a matter of authority...Particulars of claim alleging that an administrative head of a department sues on behalf of the government may elicit a puzzled request for further particulars on the scope of his authority but if authority can be satisfactorily established that is the end of the matter.'

[14] In *MEC: Department of Public Works & Infrastructure: Free State Province v Tuscaloosa 21 (Pty) Ltd*,¹⁶ the court seemed to accept that it was appropriate for a Provincial Department of Public Works and Infrastructure to launch proceedings involving property that had been leased on behalf of another provincial governmental department (the Department of Cooperative Governance and Traditional Affairs).¹⁷ Proceedings on behalf of the State may be commenced both in the name of the State or Government and in the name of a nominal plaintiff or applicant. In the case of a national Department, it is usually the Minister who serves as nominal plaintiff or applicant.¹⁸ Proceedings may also be commenced by the administrative head of a department.¹⁹ There is, however, no basis (and certainly none emanating from the SLA, as argued) for suggesting that this is obligatory.

[15] In this instance, the application has been launched by the 'Department of Public Works and Infrastructure' in its own name, and not through a nominal citation. Manda was duly authorised to depose to the founding affidavit and to take the necessary steps to launch the application. The applicant remains the Department and the remarks in cases such as *Distcor* about the locus standi of nominal plaintiffs / applicants are therefore inapposite. The essential locus standi enquiry is whether the applicant has a sufficient interest in the proceedings.²⁰ Given the nature of the various agreements entered into between the parties, as detailed above, and the purpose of the application, this cannot be gainsaid. The respondents admit the description of the applicant on the papers, including that '[I]t is . . . the Department

¹⁶ Unreported case no 3778 / 2017 (High Court of South Africa, Free State Division, Bloemfontein) para 9.

¹⁷ The distinction between the Provincial Department of Public Works and Infrastructure instituting action in its own name, as opposed to the MEC instituting action as a nominal applicant, as appears to have been the case, seems, with respect, to have been overlooked.

¹⁸ *Farocean Marine (Pty) Ltd v Minister of Trade and Industry* [2006] ZASCA 137 at para 8.

¹⁹ *Ibid.*

²⁰ *Distcor supra* para 7; *Farocean Marine supra* para 8.

under whose custodianship certain State-owned land resorts.²¹ To suggest that the proceedings had to have been launched by the MEC, alternatively the Premier, because of the provisions of the SLA is untenable.²² I am satisfied that the applicant's right to institute the present proceedings has been established

The use of the property

[16] The respondents do not deny that the structures on the premises are commercial in nature and income generating.²³ Mr Nobatana nevertheless persisted in his submission that the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 1998 ('PIE')²⁴ was applicable.

[17] This submission was based on the inclusion of paragraph 5.1 of the lease agreement, which states:

'The Property may only be used for single residential purposes for private occupation.'

The ostensible reason for this is provided in paragraph 5.2, namely to enable the lessor to terminate the lease agreement with immediate effect in the event that the property is used for any other function without prior written approval.

[18] The argument cannot be accepted. PIE flows directly from s 26(3) of the Constitution, which provides that no person may be evicted from their home or have their home demolished, without an order of court granted after consideration of all relevant circumstances. While PIE provides for the prohibition of unlawful eviction and arbitrary deprivation of property, its preamble further confirms that the context in which it applies is eviction from a 'home' or demolition of a person's home. As a result, it is during the course of a 'residential' eviction that PIE provides for special consideration to be given to the rights of the elderly, children, disabled persons and, particularly, households headed by women.

²¹ Respondent's counsel's heads of argument, by contrast, suggests that there is no law or document to support the allegation that land that is registered in the name of the Province of the Eastern Cape vests with the applicant.

²² It might be added that such an approach would render the notion of locus standi unnecessarily formalistic and technical: see *Jacobs v Waks* 1992 (1) SA 521 (A).

²³ Paras 14 and 15 of the founding affidavit and the responses thereto.

²⁴ Act 19 of 1998.

[19] It appears to be clear that it is the use to which the property is put that determines whether or not PIE is applicable. In *Ndlovu v Ngcobo; Bekker v Jika*,²⁵ the Supreme Court of Appeal confirmed that PIE has to be employed in all instances where persons are evicted from homes, shelter, residential accommodation (including leases) and dwellings. In this case, there is no suggestion in the opposing papers that the structures on the premises served as housing or were utilised for that purpose.

[20] The insertion of a clause restricting the lessee to private residence was probably erroneously included in this instance. It is certainly no longer apposite given the use to which the property has subsequently been put, the nature of the first and second respondents' enterprises and the parties' understanding that the property was now utilised for commercial premises. The mere inclusion of such wording in the lease agreement cannot, on its own, result in the protection offered by PIE becoming applicable prior to eviction. As Muller *et al* have confirmed, where rental premises are employed for business, trade, industrial or commercial purposes, PIE would be inapplicable given that s 26(3) of the Constitution, linked to access to adequate housing, is not at stake.²⁶

The creation of an enrichment lien

[21] The first and second respondents argued that they enjoyed a real right of retention over the property given the improvements that had been effected. The answering papers reflect the contention that the first and second respondents developed vacant land for business use, from as early as 1992 and on an ongoing basis.²⁷

[22] Liens are known and often described as a 'right of retention'. An improvement lien is one for useful expenses that enhance the market value of property, even if these improvements were not necessary to protect it. Together with salvage liens,

²⁵ 2003 (1) SA 113 (SCA).

²⁶ G Muller *et al Silberberg and Schoeman's The Law of Property* (6th Ed) (2019) (LexisNexis) 500.

²⁷ Pp 85, 122-123 of the answering affidavits.

they are frequently referred to as ‘enrichment liens’, being based on the principle that no one should be unjustifiably enriched at the expense of another.²⁸

[23] Courts enjoy an overriding discretion whether or not to recognise a lien. This is based on determining a fair and equitable outcome, even if the normal requirements of enrichment liability and liens are met.²⁹

[24] The first difficulty for the first and second respondents is their reliance on the development of vacant land in order to support their right of retention.³⁰ The lease agreements that they entered into subsequently with the applicant clearly related to ‘property’, defined to include ‘the Buildings and all other improvements to or upon the Property’. ‘Buildings’ was defined to mean ‘the house and outbuildings situated on the Property’. In other words, in terms of the lease agreement, the applicant let and the first and second respondents hired ‘property’ as described on the terms and conditions contained in the lease agreement, which was not vacant land.³¹

[25] A related difficulty stems from the agreed terms and conditions of the original lease agreements, coupled to subsequent addendums and extended on various occasions. In particular:

‘14. Alterations, Additions and Improvement

14.1 The Lessee shall not make any alterations or additions to any of the buildings, the property, or any part thereof, without the Lessor’s prior written consent, but the Lessor shall not withhold its consent unreasonably to any such alterations or addition which is of a minor nature and not structural.

14.2 If the Lessee does alter, add to, or improve the Property in anyway, whether in breach of §14.1 or not, the Lessee shall, if so required in writing by the Lessor, restore the property on the termination of this lease to its condition as it was prior to such alteration, addition or improvement having been made. The Lessor’s requirement in this regard may be communicated to the Lessee at any time, but not later the 21st (twenty first) day after the Lessee had delivered up the Property pursuant to the termination of this lease; and this clause shall not be construed as excluding any other or further remedy which the Lessor may have in consequence of the breach by the Lessee of §14.1.

14.3 Save for any improvement, which is removed from the Property as required by the Lessor in terms of §14.2, all improvements made on or to the Property shall belong to the

²⁸ There is a key distinction between an enrichment lien, as described, and a ‘contractual lien’, when a claim to right of retention originates in contract.

²⁹ *Fletcher and Fletcher v Bulwayo Waterworks Col Ltd; Bulwayo Waterworks Co Ltd v Fletcher and Fletcher* 1915 AD 636 648; R Brits *Real Security Law* (2016) (Juta) 493.

³⁰ P 85, 123 of the index. The first and second respondents suggests that they developed vacant land (in the second respondent’s case that it was Ms Bula’s father who did this) by having services installed and constructed buildings on the erf, including the building from which it operates.

³¹ The wording and definitions contained in the lease agreement with the second respondent is slightly different, but the effect is the same.

Lessor and may not be removed from the Property at any time. *The Lessee shall not, whatsoever the circumstances, have any claim against the Lessor for compensation for any improvement or repairs to the Property, nor shall the Lessee have a right of retention in respect of any improvements.*' (Own emphasis).³²

[26] In terms of an addendum signed by the first respondent on 27 August 2008, the following was recorded:

- '1. The installation of water and electricity will be the responsibility of Whittlesea Builders & Civil CC.
2. Only temporal structures may be constructed on erf 166.
3. Whittlesea Builders and Civil CC should inform the Department of any new developments or temporal structures to the site.
4. The escalation rate shall be 10% per annum.'

As Mr Gajjar for the applicant pointed out, these terms were incorporated in the last extension of the lease agreement concluded on 3 September 2013 between the applicant and first respondent.

[27] Glover confirms that parties are at liberty to agree expressly in their contract on what rights to removal and what compensation in the absence of removal the lessee may have.³³ In these circumstances, the contractual provisions agreed to between the parties, quoted above, appear to be fatal to the defence of an enrichment lien.³⁴

[28] I might add that I am unconvinced that the position would have been different even if this had not been the case, and would not be inclined to exercise a discretion in favour of the respondents.³⁵ This is because, firstly, it is for a lessee claiming a lien to allege and prove that improvements were in fact made.³⁶ This includes alleging

³² Similar wording is reflected in the lease agreement entered into with the second respondent, save that 'Property' is replaced by 'Premises' and compensation may be claimed for improvements made with the Lessor's prior written consent: p 144 of the Index, clauses 11.1-11.3 of the lease agreement.

³³ G Glover *Kerr's Law of Sale and Lease* (4th Ed) (2014) (LexisNexis) 554. See *Bowhay v Ward* 1903 TS 772 for an example of an agreement between the parties favouring the lessor and prohibiting removal of improvements altogether.

³⁴ Also see LTC Harms *Amler's Precedents of Pleadings* (9th Ed) (2018) (LexisNexis) 249: it is for the parties relying on the lien to allege and prove that there was no contractual arrangement between the parties in respect of the expenses.

³⁵ As Brits has noted, restriction on ownership imposed by an enrichment lien should be treated as an 'exceptional privilege that the law offers an improver and therefore the lien should be interpreted restrictively [by] giving the owner the benefit of the doubt unless equity clearly dictates that the retentor should be allowed to retain [a] hold over the property: Brits *supra* 556.

³⁶ Glover *supra* 562; Harms *supra* 249. This assumes that the respondents are not *mala fide* occupiers, given that their lease periods have been cancelled, or that, even if they are *mala fide* occupiers, they may nevertheless, in principle, have a claim to exercise a lien: Brits *supra* 503.

and proving that the expenses were useful for the property's improvement. The respondents should also have alleged and proved the actual expenses and the extent of the enrichment of the applicant, since a lien only covers the lesser of these two amounts.³⁷ This has not occurred.

[29] Secondly, the first and second respondents both referred to correspondence pertaining to the late Mr Bula, in the context of the development of vacant land some years ago. A similar claim was made in *De Aguiar v Real People Housing*.³⁸ Griesel AJA, for a unanimous court, held that:³⁹

'...the appellant made mention of various improvements effected to the property over the years, making it clear that it was *his father* who had developed the property and paid for the various improvements....no mention was made of any improvements for which the appellant himself can claim credit...Any improvements effected by his father are, of course, completely irrelevant to a consideration of the lien on which the appellant seeks to rely.'

[30] The respondents in this case encounter the same obstacle. There is also a complete dearth of detail relating to the alleged improvements themselves.⁴⁰ In *Rhooode v De Kock*,⁴¹ evidence estimating what improvements would cost was held to be irrelevant for purposes of establishing that the appellant had actually expended anything in money or materials. The Supreme Court of Appeal added as follows:⁴²

'...one does not know what the appellant's actual expenses were. In addition, there is no acceptable evidence that the value of the property was increased. The opinion expressed by Van der Spuy is of no assistance as neither the factual foundation nor his motivation therefor are set out...The criticism by the respondent's counsel of the answering affidavit on this aspect as containing 'vague, bald, terse, sketchy and insufficient allegations' is entirely justified.'

³⁷ Harms *supra* 249.

³⁸ 2011 (1) SA 16.

³⁹ Para 18.

⁴⁰ *De Aguiar supra* para 19.

⁴¹ 2013 (3) SA 123.

⁴² Para 13 *et seq.*

[31] The same may be said in this case, and the conclusion of Cloete JA in *Rhooede* is equally applicable (substituting the respondents in the present matter for the appellants in the quotation to follow):⁴³

‘The present is not a case where it is common cause or cannot on the papers be disputed that the property has been increased in value...Here, there is not even a *prima facie* case for the respondents to meet. The appellant’s case amounts to this: “I have made alterations and additions to the respondents’ property. I have produced no acceptable evidence to establish whether the property has been improved in value, nor have I disclosed what I expended in money or materials. But I wish to resist an application for ejectment until compensated for an amount that I have not begun to quantify.” To enforce a lien in these circumstances would in my view be to allow an abuse of the process of the court.’

[32] In these circumstances I am satisfied that the applicant has made out a proper case for the relief that it seeks. It would, in my view, be just and equitable for the respondents to be afforded a period of 30 days within which to vacate.

Order

[33] The following order will issue.

- a. The first, second and third respondents (the respondents) are evicted from the structures and / or buildings on Erf 166, Whittlesea, situated in Main Road, Whittlesea (the premises).
- b. The respondents shall vacate the premises within 30 days of service of the order on them.
- c. The Sheriff of this Honourable Court, and where necessary, with the assistance of members of the South African Police Service, shall execute the eviction order in the event that the respondents fail to voluntarily vacate the premises within 30 days after service of the order on them.

⁴³ Para 17. The most that the first respondent says is that the deponent to its answering affidavit requested a property evaluation ‘...to determine the value thereof *in order for the rental amount of the land only to be determined*’ (own emphasis).

- d. The costs of the application shall be borne by the first and second respondents, jointly and severally, the one paying the other to be absolved.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

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