REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **43782/2011**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

Haywood, Mari, N.O.	First Applicant
FirstRand Bank Limited t/a RMB Private Bank	Second Applicant
And	
Charilaou , Nicos	First Respondent
Charilaou, Xenia N.O.	
(Obo The Melal Family Trust)	Second Respondent
Stellios, Sissou N.O.	
(Obo The Melal Family Trust)	Third Respondent
The Best Trust Company (JHB) (Pty) Ltd, N.O. (Obo The Melal Family Trust)	Fourth Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Van der Linde, J:

Introduction: procedural history

[1] This is an application by the respondents for leave to appeal against a judgment and order I made on 29 April 2016, the effect of which included evicting the first and second respondents from residential property at Kyalami Agricultural Holdings. The property belongs to an insolvent company, of which the first respondent is the sole shareholder and director.

[2] Sometime after the insolvent company had acquired it, the insolvent company bonded the property for the first respondent's commercial debt facility with the second applicant bank. The first respondent fell into arrears, and the bank obtained summary judgment against him. The property was declared executable. At the sale in execution the property was bought in by the first respondent's family trust. The trust defaulted, the sale in execution was cancelled, and the property was against sold in execution, this time to White Rock Trading (ty) Ltd. Before transfer could be given, the owner company was liquidated. White Rock Trading (Pty) Ltd then offered to buy the property for R4,8m (substantially more than the R3,35m for which the family trust had bought it).

[3] The first respondent claimed an improvement lien to secure his continued occupation of the property; the liquidator and the bank brought an application to substitute security for the lien and to evict the first respondent and his family trust so that vacant possession can be given to the purchaser of the property.

[4] The judgment and order was given on the basis that the application was unopposed. This happened because although appearance to defend the eviction application had been noted, the parties agreed, and Keightley, J ordered, that the respondents would deliver their answering affidavits before 15 April 2016. In accordance with Practice Manual 9.9.4, the

matter thereafter remained on the unopposed roll. No answering affidavit was filed by 15 April 2016, and the matter was thus called as an unopposed matter on Monday, 25 April 2016.

[5] Counsel for the applicants advised that a colleague was present, representing the respondents, and that the respondents would ask for a postponement to apply for leave to file their answering affidavits out of time, since these had not been filed before 15 April 2016, in accordance with the court order.

[6] Counsel for the respondents then rose, and told the court that she had been briefed to ask for a postponement so as to apply for leave to file answering affidavits. No explanation from the Bar for the failure to have filed answering affidavits by 15 April 2016 was tendered, nor was application made then for the court to receive any affidavit. Counsel for the applicants opposed the application for a postponement, amongst others pointing to the particular history of the matter.

[7] I reserved judgment until Friday, 29 April 2016 when I made the order I did on the basis of the applicants' papers only. Although I did not express this in my brief judgment, it is implicit that I refused the application for a postponement made from the Bar for lack of an explanation for failure to have complied with the Keightley, J order.

[8] The respondents thereafter gave notice of their application for leave to appeal. When the respondents' application was called on Friday 20 May 2016, counsel for the respondents (applicants for leave to appeal), who had not appeared on the previous occasion, explained that there had been a substitution of the respondents' attorneys. She apologised to the court and her opponent that she had not yet been fully briefed; and said that – perhaps because she had not been fully briefed - she was under the impression that an answering affidavit had actually been handed up to the court.

[9] I did not recall that occurring on 25 April 2016, and there was no such affidavit in the court file when I considered the judgment. Counsel appearing for the applicants, who also did not

appear on the previous occasion, could not assist. The court file, which was then scrutinised by both counsel, confirmed that there was no answering affidavit in it.

[10]Counsel for the respondents then said that she would have to apply for a postponement of the application, so that she could consider her position; and in particular, so that she could take instructions on whether to apply for the handing up of the answering affidavit. The postponement application was unopposed, and after hearing counsel and their availability, I postponed the application for leave to appeal to Wednesday, 25 May 2016 at 09h30. I directed the respondents to file whatever papers they were advised to file by end of business on Monday, 23 May 2016, and I directed the respondents, jointly and severally, to pay the costs of 20 May 2016.

[11]This judgment on the application for leave to appeal is therefore more lengthy than is usually the case, but this has been brought about by having to deal with the application for the admission of the new material and, as it happened, the new material itself.

[12]The formal substitution of attorneys took place on 23 May 2016. On that day an amended Notice of Application for Leave to Appeal was also filed, supported by an affidavit of the first respondent dated 20 May 2016. In the amended notice, notice is given that application will be made at the hearing of the leave to appeal application, *"… to admit the answering affidavit that counsel at the postponement had been instructed to hand up but failed to mention or hand up to the Honourable Judge; and for the contents to be considered in the application for leave to appeal as part of the grounds for the postponement."*

[13]In the first respondent's affidavit of 20 May 2016 supporting the amended notice, he says that he was let down by his previous attorneys and advocate. He did not know that the agreement that he would file an answering affidavit by 15 April 2015 had been made an order of court; but in any event he *"… didn't manage to do an affidavit as agreed in the correspondence due to everything coming at me at once, with parents, my ill health, and my financial troubles."*

[14]Elsewhere in the affidavit he says, *"At the time of deposing to this Affidavit I have not had the opportunity to establish from the previous Advocate as to exactly why they did not file the answering affidavit within the period that was agreed upon or why they did not explain to me about the court order of the 8th of April."*

[15]Attached to this affidavit is an answering affidavit that appears to have been served on the applicants' attorneys on 22 April 2016, that is the Friday before the Monday, 25 April 2016, when the matter was first called. The answering affidavit is also dated 22 April 2016. The affidavit deals with the applicants' founding affidavit.

[16]There is one paragraph that deals with condonation, but it does not refer to the court order of 8 April 2016:

"Condonation

This application was served on me in around January 2016. Thus this answering affidavit is a number of months late. The reason for the lateness is the fact the (sic) I had to leave the country due to the ill health of my parents in Greece and I had no choice but to attend to them to see that they are well taken care of as they are pensioners and there is no one else who I could have shifted that responsibility to as I am the only son. Greece as well known has experiences (sic) a severe economic crisis so people in Greece are having trouble dealing with their own affairs never mind assisting others. This trip also put a severe dent in my finances and made it difficult for me to instruct attorneys and counsel."

[17]When application for leave to appeal was heard on Wednesday, 25 May 2016, it appeared that the respondents' answering affidavit had been served on the applicants' attorneys the previous Friday afternoon, 22 April 2016. On the following Monday, 25 April 2016, when the matter was moved, counsel for the respondents did not ask to hand up the answering affidavit but, after the hearing at which judgment was reserved, counsel gave her opponent a copy. The answering affidavit was therefore never filed in court.

The facts

[18]The essential facts that are asserted in the applicants' founding affidavit are these. The first applicant is the sole liquidator of Zalvest Ten (Pty) Ltd (in liquidation)("the insolvent company"). The second applicant, RMB Private Bank, is the first respondent's banker. The first respondent is a businessman who lives at 2…. P….. Street, B……, K….. A….. H…….. The insolvent company owns this property, having acquired it in 1998, and the first respondent is the sole shareholder and director of the insolvent company.

[19]The second, third and fourth respondents are the trustees of the Melal Family Trust, the second respondent being the first respondent's wife who lives with him at the Kyalami property.

[20]The first respondent had a loan facility of R3,8m with RMB Private Bank, for which the bank exacted a suretyship from the insolvent company, and also a bond over the property, which it registered on 20 March 2005. The loan was repayable in 20 years. In due course the first respondent fell into arrears, and on 25 August 2009 summary judgment was granted against the first respondent as well as the insolvent company, and the property was declared executable "immediately".

[21]The property was not then sold because the first respondent had made proposals to pay the debt. On 10 July 2010, unbeknown to RMB, the insolvent company was deregistered for failing to submit annual returns. The sale in execution was held on 18 October 2011, and the property was sold for **R3 530 000**[1] to the Melal Family Trust (the second to fourth respondents being the trustees, and the second respondent being the first respondent's wife). However, since the insolvent company had been deregistered, transfer could not be effected, and on 26 June 2012 Heaton-Nicholls, J confirmed a rule nisi restoring the insolvent company to the company register.

[1] Page 60, clause 10.

[22]Still transfer could not be effected, because the Melal Family Trust defaulted by failing to provide guarantees, failing to pay attorneys' fees and failing to sign transfer documents. The sheriff then applied under rule 46(11) to set aside the sale. The Melal Family Trust opposed the application, filing an affidavit in which the second respondent said (amongst other things) that on behalf of the Melal Family Trust she had spent money on repairs and improvements amounting to **R2 635 564**, and claiming an improvement lien on behalf of the Melal Family Trust.

[23]The matter came before Claassen, J who on 14 October 2014 dismissed these contentions, and issued an order cancelling the 18 October 2011 sale in execution, declaring that the property could again be put up for sale in execution, and directing the Melal Family Trust to pay the costs of the application. The second sale in execution then took place on 19 November 2013 to White Rock Trading (Pty) Ltd for **R3 950 000.**[2]

[24]However, in the meantime, unbeknown to RMB, on 14 November 2013, the Melal Family Trust applied for and obtained a provisional winding up order of the insolvent company before Tuchten, J in the North Gauteng High Court, Pretoria. A provisional liquidator was appointed, and thereafter the provisional order was extended on five occasions. In December 2014 RMB applied for leave to intervene because it disputed the veracity of the claim of the Melal Family Trust against the insolvent company. By agreement such leave was granted and the provisional liquidation order was confirmed on 15 April 2015.

[25]The sale to White Rock Trading (Pty) Ltd could no longer proceed. However, on 15 April 2015 the provisional liquidator received a fresh offer from White Rock Trading (Pty) Ltd to purchase the property for **R4 800 000**, and on 19 June 2015 (before the first applicant was appointed on 28 September 2015 as final liquidator), he accepted the offer.[3]

[26]However, on 24 June 2015 the respondents' previous attorneys wrote: *"Note that our clients hold a builders lien over the property and as such will not be vacating the property until the*

[2] Page 125 paragraph 11.
[3] Page 132 clause 2.

lien in the amount of R2 635 564 plus interest thereon has been paid." The first respondent's claim to lawful occupation of the property is a lease with the insolvent company and a builder's lien.

[27]After some exchanges a lease agreement was put up by the respondents' previous attorneys but it has, *ex facie* its express terms, expired on 31 October 2012.

[28]The liquidator requested the respondents' previous attorneys to provide documentation substantiating the alleged lien. Eventually, as will appear below, documents were submitted. In the meantime, when the sheriff executed a writ in respect of the summary judgment against the first respondent on 7 August 2015, his return was one of *nulla bona.* Soon thereafter, on 12 August 2015 the respondents' previous attorneys wrote to the applicants' attorneys, attaching documents that were said to substantiate the claimed lien.

[29]The first applicant then resolved to bring the present application, and RMB agreed to put up the security which was ordered a substituted security for the claimed lien. The main application was brought on 11 December 2015. It was served on 11 January 2016, and on 14 January 2016 appearance was entered into on behalf of all but one of the respondents, the exception being one of the three trustees, The Best Trust Company (JHB)(Pty) Ltd. In fact, it turned out that the fourth respondent had earlier, on 29 July 2015, resigned as trustee.

[30]On 29 February 2016 the application under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ("PIE") was launched, advising the respondents that the application for their eviction would be heard on 8 April 2016; and on 4 March 2016 Fourie, AJ directed service on the first to third respondents (i.e. the first respondent and then the two remaining trustees), the local authority, and the first to third respondent's attorneys. That service took place.

[31]It is just before 8 April 2016 that the parties' attorneys agreed the draft order that the respondents were to file their answering affidavits before 15 April 2016, which Keightley, J then made the contentious order of court that was not complied with.

The parties' submissions

[32]The respondents' counsel (applicant for leave to appeal) commenced by applying for admission of the first respondent's affidavit of 20 May 2016, with its attachment of the late answering affidavit of 22 April 2016. She stressed the passages in the 20 May 2016 affidavit in which the deponent said that he had been let down by his advocate in not bringing the answering affidavit to the court's attention; that he had been let down by his attorney in not telling him that the agreement reached in correspondence between the attorneys had been made a court order (he was apparently aware of the agreement itself); and that he did not depose to an affidavit in the time agreed because of the difficulties with his parents, his own ill-health, and his financial troubles.

[33]The respondents' submission was that under s.173 of the Constitution this court had the power to regulate its own proceedings and this included the power to admit evidence at the stage of an application for leave to appeal. It was submitted that in any event, since the appeal court had the power to admit further evidence, and since this court has to assess whether there are reasonable prospects of success, it followed that this court should assess all the evidence which will serve before the appeal court, including then the evidence contained in the further affidavit.

[34]Further, it was submitted on the basis of Pitje v Shibambo and Others[4] that this court should have played an inquisitorial role concerning alternative housing for the first respondent and his family before issuing the eviction order; and that there is a reasonable prospect that an appeal court would do so.

[35]For the applicants (respondents in the leave to appeal) it was submitted, with reference to sections 17 and 19 of the Superior Courts Act 10 of 2013 that this court was *functus officio* and thus could not receive further evidence; that only the court of appeal could do that; and

[4] Pitje v Shibambo and Others [2016] ZACC 5.

that in any event, even if the affidavit were admitted, it does not make out a proper case for a postponement, and also does not disclose a defence to the claim.

[36]In this latter regard it was submitted that the defence concerning the lien had been abandoned but was bad in law in any event; and that the October 2012 lease relied on by the first respondent is demonstrably not bona fide since in his affidavit of July 2013 he relied on the earlier lease despite the fact that the October 2012 lease, if it were true, would then already have been *in esse*.

[37]Concerning the court's discretion under PIE, the applicants submitted that s.4(6) and not s.4(7) applied because the six months' referred to the period during which the first respondent was an unlawful occupier, and not the entire period of his occupation. The applicants submitted that in any event it was up to the first respondent to place relevant facts before the court that would enable the court to determine whether it was just and equitable to issue the eviction order.

[38]Finally, it was submitted that the test in applications for leave to appeal is now more onerous, and reference was had to the unreported judgment of Bertelsmann, J sitting in the Land Claims Court in Cape Town, in The Mont Chevaux Trust v Tina Goosen and Others, case no LCC 14R/2014, 3 November 2014. That case laid stress on the words in section 17(1)(a) of the Superior Courts Act, namely that the appeal *"would have a reasonable prospect of success."*

Discussion

[39]In making the order I did, I adopted the approach that it was imperative to underscore that court orders should be complied with.[5] I adopted the attitude that when a court order has not been complied with, specifically against the background of this case which was stressed by counsel for the applicants, any application for any relief by the non-adherent party should

[5] Compare Clipsal Australia (Pty) Ltd and Others v Gap Distributors and Others, 2010 (2) SA 289 (SCA) at [20] to [22].

commence – *ante omnia*, as it were - with an explanation for the non-compliance. That was absent in this case. The question is whether there is a reasonable prospect of success, meaning that another court would have allowed the postponement, or would have adopted a different approach before issuing the eviction order than the one which I did.[6]

[40]I should point out that no submissions were made that paragraph 1 of the order I made had a reasonable prospect of success of being overturned on appeal. That would accordingly deal with the respondents' claim to a lien and no further attention need be paid to this aspect.

[41]On the parties' submissions regarding the application for leave to appeal, in my view the correct approach to paragraph 2 of the order I made, is as follows. First, as regards the application to admit the answering affidavit that was filed on the applicants' attorneys on the Friday, 22 April, 2016: this court is *functus officio*, having given a judgment in the matter. It cannot be admitted so as to come to a different judgment than the one I reached.

[42]However, I believe that I can and should admit it for the purpose of assessing whether there is a reasonable prospect of success on appeal. The respondents have said that they intend applying for the admission, on appeal, of that very affidavit; and if the appeal court does admit the affidavit, then at least potentially the affidavit will play a role in the result to which the appeal court will come. The appeal court will itself decide whether to admit it for purposes of the merits of the appeal, if the matter goes that far. The decision to admit the affidavit now at this stage for this limited purpose does not, in my view, foreclose the exercise of that power.

[43]The affidavit broaches two broad topics. The one is the failure to have filed the answering affidavit in time, and the other is the merits of the resistance to the eviction. On the first

[6] In my view I gave a default judgment, on the unopposed motion court roll, without hearing the respondents on the merits. It seems to me, in view of subsequent developments referred to above, that the judgment I gave is in any event potentially liable to be set aside, whether under rule 42(1)(a) or under the common law; compare De Wet and Others v Western Bank Ltd, 1979 (2) SA 1031 (AD) at 1041 C, 1042 G – H; Naidoo v Matlala, NO 2012 (1) 143 (GNP) at 152 H to 153 A.

issue, the relevant paragraph has been quoted above. It is in my view too sparse by far to constitute an acceptable explanation for failure to have complied with the court order. It is exceedingly vague. One does not know precisely when the first respondent was in Greece, and it is unlikely that it was when he agreed to file his answering affidavit by 15 April 2016.

[44] Moreover, the explanation of not being in funds is not credible; in his attorney's letter of 6 April 2016[7] his attorney wrote that the affidavit was admittedly late for not having been in funds; but that that issue had been resolved, which is why they were agreeing to file their answering affidavits before 15 April 2016.

[45]When regard is had to the preceding background, the inference is rather that the first respondent was deliberately delaying matters.

[46]But had the affidavit been handed up, the court would have been obliged to consider not only the quality of the explanation for the failure to have complied with the court order, but also the merits of the defence that was put up in the answering affidavit. Generally, a poor explanation for failure to have complied with the court order can, as it were, be saved by a good defence, and it then becomes necessary to consider the answering affidavit.

[47]The affidavit relies squarely on the alleged improvement lien.[8] The first respondent says, *"The security offered by the bank is no security at all"*.[9] More importantly, the first respondent is not at all averse to the residential property being transferred to the new purchaser: *"We would like an order that the bond in favour of FNB is deregistered and thus when the property (sic) transferred that the full payment gross of any debt is paid to me."*[10]

[48]And again: *"The improvements are evident for anyone to see (Annexure A) and the documentation for this real right is attached as Annexure B. If the trustees wish to sell the property the second applicant must put up proper, unconditional guarantees for the amount of the lien. I will then consent to a sale of the property to White Rock or whomever the First*

[7] Pages 216, 217 of the paginated papers.
[8] Paragraph 5.
[9] Paragraph 8.
[10] Paragraph 9.

Respondent wishes so long as it is for a reasonable price. I am wholly wishing to cooperate with the trustees and to bring the matter to an end. I will clearly not consent to something which fails to honour our lien."[11] The affidavit then quotes and discusses some reported judgments over a number of paragraphs purportedly in support of the lien.

[49]There is also an attack on the price at which the property was sold.[12]

[50]In view of the paragraph 1 of the court order being unimpeached, coupled with the respondents' concession that a third party institution like a bank can quite validly put up security for an alleged lien,[13] this part of the affidavit therefor does not take the matter any further.

[51]Then follows an attack on the *bona fides* of the liquidator.[14] One basis is that the liquidator has sold the property for under market value. Another is that the liquidator is favouring one creditor above another. This part too of the affidavit is so vague that no credible reliance can be placed on it.

[52]There is then a section headed, *"Non-compliance with the PIE Act"*.[15] It contains only broad statements of non-compliance particularly for not having "cited" the municipality, and not having served on the municipality by the sheriff. As has been pointed out, whether or not this was strictly necessary, it has occurred. There is also an assertion that the service on the respondents (meaning himself and his wife, and Stellios Sissou) of the PIE notice did not take place in accordance with the court rules. But not only were the respondents al represented by an attorney after such service (on whom service also took place), the respondents' counsel did not argue this as a point in respect of which there was a reasonable prospect of success on appeal.

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[11] Paragraph 11.
[12] Paragraph 26, 27.
[13] Compare Manisco & Sons CC (In Liquidation) v Stone, 2001 (1) SA 168 (W); Pheiffer v Van Wyk and Others, 2015 (5) SA 464 (SCA).
[14] Paragraph 31 and following.
[15] Paragraphs 36 to 45.

[53]Finally, there are two paragraphs in the affidavit relying on the provisions of s.4(7) of PIE; but they merely state those provisions, and do not explain how they find application in this case. On this aspect the following considerations are relevant.

[54]First, the main application for the eviction was launched on 11 December 2015; I take that to be the date on which the proceedings were *"initiated"* for the purposes of ss.4(6) and (7) of PIE. The liquidator mailed the letter demanding that the first respondent vacate the property on 2 July 2015.[16] This was within six months, and so the question of *"just and equitable"* should be determined under s.4(6), not s.4(7). That simply means that except where land is sold in a sale in execution pursuant to a mortgage, the question whether the local authority can make other land available, does not come into the equation.

[55]Second, and in any event, apart from the fact that the local authority was in fact served, the first respondent is plainly not within the category of the poorest of the poor. It is only in those cases that the local authority need be joined in the proceedings.[17]

[56]Third, the property involved here was in fact sold at a sale in execution (the second one) on 19 November 2015.[18] The liquidation of the insolvent company prevented registration of transfer to White Rock Trading (Pty) Ltd being effected[19] but thereafter White Rock Trading (Pty) Ltd offered to the provisional liquidator to buy the property, and that offer was accepted. Accordingly, in all but in name this is a sale in execution pursuant to a mortgage in which event too, s.4(7) of PIE would not apply.

[57]Fourth, it was argued that the court should have investigated further what the first respondent and his family's housing needs were when they had to vacate the property. But the first respondent, on his own argument, intimated a willingness to vacate the property – provided only that it was sold at a *"right"* price, and his lien was compensated. The sale of

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[16] Page 21, paragraph 53.
[17] So held by the full court of this division in Unlawful Occupiers of Erf [2…][V…] v Kganyago, KJ and Another, [2016]ZAGPJHC46(31 March 2016) at [14]; [20]; [23] – [27].
[18] Page 16 paragraph 31.
[19] Page 18, paragraph 39.

the property was in fact pursuant to the bank calling up its bond and obtaining summary judgment on that debt, as well as an order declaring the property executable.[20]

[58] Fifth, the first respondent had full opportunity to place all the circumstances concerning his access to housing before the court, represented as he was at all times by an attorney, but has declined to do so.

[59] In conclusion, the first respondent's actions are those of a debtor persistently seeking to evade payment of an admitted, lawful and legitimate judgment debt, to the detriment of the financial institution and the creditors of the estate of the insolvent company.

[60] In my view there is accordingly no reasonable prospect of success on appeal. For these reasons I make the following order:

(a) The application to amend the grounds upon which leave to appeal are sought, is granted.

(b) The application for leave to appeal is dismissed with costs.

WHG van der Linde
Judge, High Court
Johannesburg

Date of argument: 25 May, 2016
Date of judgment: 31 May, 2016

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[20] Page 50, "FA6".