DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED.

3/8/15
DATE

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 71322/2010

In the matter between:

8/5/2015

G.P. TROSKIE **First Applicant**

S.J. TROSKIE **Second Applicant**

and

LIQUIDATOR OF RSD CONSTRUCTION CC
WILBECAR LIQUIDATORS CC
t/a BUREAU TRUST
GAUTENG RSD CONSTRUCTION CC **First Respondent**

REGISTRAR OF DEEDS **Second Respondent**

ABSA BANK LTD/STANDARD BANK LTD **Third Respondent**

ROOT X AUCTIONEERS **Fourth Respondent**

J U D G M E N T

VAN DER BERG AJ

[1] The applicants (husband and wife) contend that the liquidators of RSD Construction CC (in liquidation) cannot evict them from an immovable property by virtue of a usufruct over the immovable property allegedly granted to them prior to the close corporation's liquidation, and by virtue of an improvement lien they allegedly exercise over structures which had been erected on the immovable property before the liquidation.

[2] When a public auction was scheduled for the sale of the immovable property, the applicants brought the present application, essentially in order to pre-empt an eviction application and to procure immunity against eviction. (The sale did not go ahead.)

[3] The applicants seek the following relief in the notice of motion:

[3.1] An order confirming the existence of a usufruct in favour of the applicants over a portion of the property.

[3.2] An order that the Registrar of Deeds (who was cited as second respondent but did not oppose the application) must effect the registration of such usufruct against the title deed of the property.

[3.3] An order confirming the existence of the applicants' improvement lien over certain structures erected on the

property.

[4] The applicants also seek certain other ancillary and alternative relief which will be dealt with later herein.

[5] The liquidators of the close corporation brought a counter-application wherein they seek an order evicting the applicants from the property. The applicants resist the counter-application on the basis of the alleged usufruct and improvement lien referred to, and in addition they rely on the provisions of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, 19 of 1998 (*"PIE"*).

[6] Before dealing with the facts and main issues raised in this application, it is necessary to get some preliminary issues out of the way.

PRELIMINARY ISSUES

[7] There was a substantive application for condonation for the late filing of the liquidators' answering affidavit and the late bringing of the counter-application. This application was initially opposed. However, at the hearing I was informed that the parties had reached agreement that condonation was to be granted, and that costs of that condonation application be costs in the cause. Insofar as is necessary, I make such an order.

[8] The applicants cited a close corporation as the first respondent and

incorrectly alleged that it was the liquidator of RSD Construction CC (in liquidation).[1] None of the four duly appointed liquidators was cited. The liquidators in their answering affidavit raised the incorrect citation and the non-joinder of the liquidators as a defence. The liquidators however in the same breath brought a counter-application without bringing an application to be joined to the proceedings. The applicants then took the point that the counter-application was for this reason defective. However, all the liquidators had filed affidavits indicating their opposition to the applicants' application and in support of the counter-application. At the hearing the parties informed me that they had agreed that neither party would pursue the respective non-joinder points.

[9] In spite of the agreement, the court must still examine that all necessary parties are before court, as a non-joinder is an issue which the court can raise *mero motu*.[2]

[10] I am satisfied that all parties with an interest in the litigation have knowledge of the application and abide by the outcome.[3] The applicants could have cited RSD Construction CC (in liquidation) as a respondent without citing the individual liquidators *nomino*

---

1 The description of the first respondent in the heading of the notice of motion and founding affidavit does not make sense and is inconsistent with the citation of the first respondent in the founding affidavit.

2 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649

3 *Wholesale Provision Supplies CC v Exim International CC* 1995 (1) SA 150 (T) at 157 H – 158 I

officio.[4] The counter-application would then likewise have been brought in the name of RSD Construction CC (in liquidation). RSD Construction CC (in liquidation) is for all intents and purposes before court, and it will be bound by any order made against it, and the liquidators have authorised the bringing of the counter-application. The reference in argument, affidavits and this judgment to "*the first respondent*" should therefore be seen as actually referring to RSD Construction CC (in liquidation), duly represented by all the duly appointed liquidators.

[11] I am therefore satisfied that both the applications in convention and reconvention can proceed on the merits.

[12] The auctioneer who was initially charged with having the property sold on public auction was cited as the fourth respondent. The first respondent complained that he was cited incorrectly. As the public auction has not taken place and is not imminent, there is no longer any need to join the auctioneer. The fourth respondent did not oppose the application. First respondent abandoned this point.

EARLY HISTORY

[13] The narrative starts in 1976, some 34 years before the application was launched, and some 39 years before the application was argued.

---

4 *Gainsford NNO v Tanzer Transport* 2014 (3) SA 468 (SCA) paragraph [11] to [16], p 473 D – 475 D. Although the court in that matter dealt with the citation of a company in liquidation who engaged in proceedings for the recovery of a debt owed to the company in liquidation, it should equally applicable where relief is sought against a company in liquidation.

At that stage the first applicant's brother, Mr JHW Troskie, was the registered owner of an immovable property known as Plot 166, Rietfontein ("*the property*"). The property is about 22 hectares in size.

[14] In that year an oral agreement ("*the 1976 oral agreement*") was concluded between the first applicant and his brother in terms of which certain rights over the property were granted in favour of the applicants. The first applicant described these rights as a "lifelong usufruct".

[15] The applicants, at their own expense, built certain structures on the property and extensively improved approximately 8 000m² of the property. These structures include a dwelling house, and the applicants have lived there since 1978. From 1978 to date the applicants have also utilised the property for business purposes to generate an income.

[16] The first applicant says they did not find it necessary to have the usufruct registered against the title deed of the property as he trusted his brother.

[17] During 2005 Mr JHW Troskie decided to sell the property and relocate to a smaller dwelling unit. He then concluded a deed of sale with RSD Construction CC in terms of which he sold the property to RSD Construction CC. One Mr JHW Breedt, also a family member, was the sole member of the close corporation.

[18] On 14 June 2005 RSD Construction CC concluded a written agreement ("*the 2005 written agreement*", or "*GP6*", the agreement's attachment number to the founding affidavit) with the applicants, which expressly dealt with the rights granted to the applicants by Mr JHW Troskie.

WRITTEN AGREEMENT AND SUBSEQUENT EVENTS

[19] It is necessary to quote the agreement in some detail:

> "*NADEMAAL **RSD Konstruksie** die eiendom bekend as Gedeelte 166 (gvg 159) van die Plaas Rietfontein no 485, J.Q. gekoop het by die geregistreerde eienaar synde Johannes Hendrik Willem Troskie.*
>
> *EN NADEMAAL Gerhard Troskie 'n woonhuis op vermelde eiendom opgerig het en retensie uitoefen ten opsigte van die verbetering tot die eiendom vir die waarde van sodanige verbeterings.*
>
> *NOU DERHALWE kom die partye as volg ooreen:*
>
> *1* *Gerhard Troskie is die eienaar* [sic] *van 'n tweede woonhuis en aanverwante verbeterings wat op sy uitsluitlike koste op 'n gedeelte van die tweede woonhuis op die eiendom, welke woning met toestemming van J.H.W. Troskie opgerig is.*

2 *Gerhard Troskie en/of sy eggenote beskik oor 'n gebruiksreg van sodanige tweede woonhuis, verbeteringe en gedeelte van die eiendom.*

3 *Die partye kom ooreen dat die waarde van die tweede woonhuis en verbeteringe soos bepaal op datum van ondertekening R750 000,00 (SEWE HONDERD EN VYFTIG DUISEND RAND), beloop.*

4 *Gerhard Troskie is bereid om die skikking van sy regte eienaarskap en verblyfregte van die tweede woonhuis en aanverwante verbeterings aan RSD Konstruksie oor te dra en onherroeplik van sy voormelde gebruiksreg afstand te doen onderworpe aan die volgende voorwaardes:*

4.1 Die vergoedingsbedrag van R750 000,00 (SEWE HONDERD EN VYFTIG DUISEND RAND) hierbo sal binne 'n tydperk van 12 (TWAALF) maande vanaf datum van oordrag van die eiendom in die naam van RSD Konstruksie plaasvind.

4.3 G Troskie sal nieteenstaande die bepalings van Klousules 4.1 en 4.2 [sic-there is no clause 4.2] *hiervan geregtig wees om onverstoord sodanige tweede woonhuis te*

bewoon en die aanverwante verbeteringe te benut vir 'n periode van maksimum 2 (Twee) jaar bereken met ingang van die datum van registrasie van die eiendom in die naam van RSD Konstruksie, welke voortgesette bewoning en gebruik verder daaraan onderworpe is dat:

4.3.1 Geen huurgeld van watter aard ookal aan RSD Konstruksie, J.H.W. Troski [sic] *of enige opvolger in titel betaalbaar sal wees nie.*

4.3.2 G. Troskie slegs aanspreeklik sal wees vir pro-rata betaling van water- en elektrisiteitsverbruik ten opsigte van die tweede woonhuis en verbeteringe soos deur hom geokkupeer.

4.3.3 G. Troskie sodanige woonhuis en verbeteringe redelikerwys gedurende die voormelde okkupasie periode in stand sal hou

4.3.4 G. Troskie oorhoofs toesig sal hou oor die totale eiendom; met dien verstande dat alle redelike arbeids- en instandhou-

dingskoste wat in die verband nodig is, vir die rekening van RSD Konstruksie sal wees.

4.3.5 G. Troskie, by ontruiming van die tweede woonhuis en verbeteringe, sal verseker dat sy werknemers wat tans op die eiendom woon, dit insgelyks ontruim. Sou dit nodig wees om sodanige bewoners en werkers met regsaksie te verwyder sal sodanige koste wees vir die rekening van G Troskie.

4.3.6 Na vermelde 2 (Twee) jaar het Troskie die reg om vermelde verblyftermyn te verleng vir 1 jaar met skriftelike kennis op dieselfde terme en voorwaardes as in paragraaf 4 uiteengesit.

4.4 Indien G.Troskie, in sy uitsluitlike diskresie om welke rede ookal mag besluit om die tweede woonhuis en verberteringe, voor verstryking van die voormelde 2 (Twee) jaar tydperk te ontruim, sal hy verplig wees om RSD Konstruksie kennis van sodanige ontruiming te gee minstens 90 (NEGENTIG) dae voor datum van ontruiming.

4.5 *G. Troskie sal in geregtig wees om, binne 12 (TWAALF) maande na registrasie as gedeeltelike betaling van die vergoedings-bedrag in klousule 4.1 genoem, eienaarskap te aanvaar en okkupasie te neem of te laat neem, van 'n nuwe woonhuis gebou te word in die Bergtuin Dorpgebied waarvan RSD Konstruksie en ontwikkel by dien verstande dat:*

4.5.1 Die berrekeningsbedrag van sodanige Bergtuin woonhuis, welke woning plus minus 165-170 vierkante meter groot sal wees, en welke woonhuis op dieselfde standard [sic] *as die huidige geboude woonhuise in Bergtuin sal voldoen, nie die bedrag van R600 000,00 (SES HONDERD DUISEND RAND), (BTW ingesluit) sal oorskry nie.*

4.5.2 Alle koste verbonde aan die oordrag van sodanige Bergtuin woonhuis in naam van G. Troskie vir die rekening van RSD Konstruksie sal wees.

4.5.3 die R150 000,00 verskil sal betaalbaar wees in soos in paragraaf 4.1

uiteengesit.

5 *Die partye plaas op rekord dat G. Troskie onafhanklik van J.H.W Troskie geregtig sal wees om die regte wat in hierdie ooreenkoms vervat is teenoor CC Konstruksie* [sic-the agreement does end in mid-sentence]"

[20] A mortgage bond in favour of Absa Bank Limited was passed over the property at some stage. Absa Bank Limited was joined as the third respondent but did not oppose the application, although a manager of the third respondent filed a confirmatory affidavit to the first respondent's answering affidavit indicating that the third respondent supported the "application instituted by the liquidators".[5]

[21] The date when the sale agreement between Mr JHW Troskie and RSD Construction CC was concluded does not appear from the papers. Transfer of the property into the name of RSD Construction CC took place on 11 July 2005.

LIQUIDATORS' APPROACH

[22] The above narrative is based on the applicants' version which the

---

5 Absa Bank Limited was correctly cited as the third respondent in the founding affidavit, but for some reason the third respondent is referred to as "*Absa Bank Limited /Standard Bank Limited*" in the heading of the notice of motion and founding affidavit.

liquidators could not dispute. *Mr van der Merwe SC* informed me that the liquidators, for practical purposes, accepted that improvements were made on the property, that some agreement was concluded between the first applicant and his brother (without conceding that a usufruct was granted in terms of that agreement), and that the agreement "GP6" was concluded.

USUFRUCT: GENERAL PRINCIPLES

[23] A usufruct is a personal servitude. A usufruct is a real right in terms of which the owner of a thing confers on the "usufructuary" the right to use and enjoy the thing to which the usufruct relates. It is often constituted over a farm, in which case the usufruct will normally extend not only to all buildings, but also to the livestock, farming equipment and furniture in the homestead.[6]

[24] Personal servitudes are real rights which cannot be transferred.[7] A personal servitude is constituted in favour of the holder in a personal capacity and not in favour of the land. A personal servitude is inseparably attached to the holder of the right and cannot extend beyond his or her lifetime.[8]

[25] A personal servitude can be created by agreement. A duly executed

---

6 Badenhorst, Pienaar & Mostert Silberberg and Schoeman's The Law of Property 5th Ed (2006) at 339; CG van der Merwe, Sakereg 2nd Ed (1989), p 508-509

7 Silberberg and Schoeman's The Law of Property, (supra) at p 338 - 339

8 CG van der Merwe and MJ de Waal 'Servitudes' in Joubert, LAWSA volume 24, 2nd the execution debtor (2010), paragraph 579; Sakereg (supra), p 506

agreement to grant a servitude becomes a real right only when it has been registered, after which it can be exercised against the whole world.[9]

[26] Lord De Villiers CJ in *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd* 1930 AD 169 at 180 said:

> *"That personal rights, jura in personam, are not capable of registration is a truism. The definition of such rights excludes their registration. But that does not apply to the class of personal rights which are known as jura in personam ad rem acquirendam. As contracts, with few exceptions, give rise only to personal rights, this class of right, although relating to immovable property, is a personal right until registration, when it is converted into a real right by such registration. The same applies to burdens upon land, encumbrances of immovable property (onera realia). They are personal until registration, when they become real."*

[27] Someone who acquires an unregistered servitude (i.e. a personal right or a so-called *ius in personam ad rem acquirendam*) in terms of an agreement can claim that the counter-party (more often than not the landowner) should do everything possible to ensure that

---

9 *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 (AD) 267; Silberberg and Schoeman's The Law of Property, (*supra*) at p 334 - 335

registration take place.[10]

[28] An unregistered personal servitude can be enforced against third parties who acquire the property with knowledge of the personal servitude. This is known as the doctrine of notice.[11]

[29] The rights which were allegedly conferred upon the applicants in terms of the 1976 oral agreement or the 2005 written agreement have been described by the applicants as a usufruct. Although these rights may possibly be more accurately described as *usus* or *habitatio*, I will accept for purposes hereof that these rights fall within the definition of a usufruct. Not much in this case turns on this distinction, because *habitatio* and *usus* are also personal servitudes which, when registered, would grant the applicants immunity against eviction.

PARTIES' ARGUMENTS

[30] On the assumption that the 1976 oral agreement was valid, much of the oral argument presented at the hearing revolved around the interpretation of "GP6".

[30.1] The *applicants submitted* that the written agreement

---

10 Silberberg and Schoeman's The Law of Property, (supra) at p 67-68; AJ van der Walt "*Personal Rights and Limited Real Rights: An Historical Overview and Analysis of Contemporary Problems Related to the Registrability of Rights*" (1992) 55 THRHR 170 at 194.

11 Silberberg and Schoeman's The Law of Property, (supra) at p 85 and at 335

showed that RSD Construction CC was aware of the existing usufruct which Mr JHW Troskie had granted to the applicants and that in terms of the doctrine of notice RSD Construction CC (and subsequently the liquidators) was bound to recognise this usufruct. It was then further submitted that the agreement imposed reciprocal obligations on the parties in terms of which applicants would abandon their usufruct against payment of R750 000.00, or in exchange for another property. In that RSD Construction CC has not performed, the abandonment has not taken place.

[30.2] The *first respondent submitted* that the 1976 oral agreement was invalid in that it did not comply with the Alienation of Land Act, 68 of 1981. The first respondent, obviously in the alternative, submitted that the applicants had already abandoned their rights in terms of the agreement, and that the parties' respective obligations in the agreement were not reciprocal.

[31] After judgment was reserved, I invited counsel to submit further written heads on the following issues:

1.1 Whether a usufruct could validly have been granted to the first applicant in terms of the oral agreement alleged in paragraphs 6.3 and 6.4 of the founding affidavit in the light of Janse van Rensburg and

Another v Koekemoer and Others 2011 (1) SA 118 (GSJ) and Felix en 'n Ander v Nortier NO en Andere [1996] 3 All SA 143 (SE).

1.2 Whether the oral usufruct alleged to have been granted to the first applicant could be enforced against the Closed Corporation in the light of the aforementioned authorities.

1.3 Whether any submissions made by in respect of 1.1 and 1.2 above influence the parties' earlier submissions or argument on the interpretation of "GP6" to the founding affidavit.

1.4 Whether any submissions made in respect of 1.1 and 1.2 above influence the parties' earlier submissions or argument on any other aspect.

(The parties had not referred to these two authorities in argument.)

[32] Both counsel accepted the invitation for which I thank them. In the supplementary submissions it was submitted on behalf of the applicants that "GP6" was the source of the usufruct granted to the applicants. I deal later with this submission.

VALIDITY OF 1976 ORAL AGREEMENT

[33] In *Felix v Nortier* it was held that the Alienation of Land Act, 68 of 1981 was also applicable to servitudes over immovable property. In *Janse van Rensburg v Koekemoer* CJ Claassen J held that "*an oral servitude is unenforceable against the successor in title of the servient tenement, even though such successor had notice of the oral agreement. In such cases the doctrine of notice ("kennisleer") finds no application.*"[12] The statement in Christie, *The Law of Contract,* 6th ed, p118, that a usufruct "*probably*" does not constitute an interest in land should therefore be reconsidered.[13]

[34] No evidence or submissions were presented why the usufruct granted by Mr JHW Troskie would not constitute an alienation within the meaning of the Alienation of Land Act, 68 of 1981. I therefore find that the 1976 oral agreement is of no force and effect.

INTERPRETATION OF WRITTEN AGREEMENT "GP6"

[35] It would not be unkind to say that the written agreement "GP6" has been poorly drafted. It records that the first applicant was the owner of the dwelling, which is both legally and factually wrong. The applicants' rights are not defined or described, and are simply referred to as "*gebruiksreg*". There are other patent errors in the

---

12 *Janse van Rensburg v Koekemoer* (supra) at 121 B

13 The learned author refers to *Cowley v Hahn* 1987 1 SA 440 (E) 445–446, but both *Felix v Nortier* and *Janse van Rensburg v Koekemoer* held the judgment in *Cowley v Hahn* to be wrong. I am bound by the decision in *Janse van Rensburg v Koekemoer.*

document.

[36] However, despite its shortcomings, the agreement can be interpreted by applying the principles applicable to the interpretation of contracts as enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).[14]

[37] The written agreement records that certain rights were granted to the applicants by Mr JHW Troskie. It then provides that the applicants will transfer these rights to RSD Construction CC and abandon waive (*"afstand te doen"*) these rights, subject to the condition that they receive payment of an amount of money or another property in exchange.

[38] *Mr van der Merwe SC* correctly pointed out in his additional written submissions that the recordal in paragraphs 2 and 4 is erroneous, because in light of the *Janse van Rensburg v Koekemoer* judgment there was no valid *"gebruiksreg"* that could be waived.

[39] What was granted to the first applicant in terms of "GP6" was the right to occupy the dwelling for a further two year period. After the two year period, the applicants had the right to have extended their stay (*"verblyf"*) for one year by written notice. There is no evidence that such written notice was given, although the applicants are still in occupation of the dwelling.

---

[14] Paragraph [18], at p 603G-604D

[40] The fact that the applicants were granted a right to occupation for a further fixed period, contradicts any interpretation that a lifelong right of *usufruct*, *habitatio,* or *usus* was created in terms of the written document. It was intended that RSD Construction CC would give a counter-prestation for the applicants' abandoning their existing (and ultimately invalid) usufruct, and would grant them a right of occupation for an additional period. It is significant that the case which the applicants made out in their founding affidavit corresponds with this interpretation.

REGISTRATION OF SERVITUDE AFTER LIQUIDATION

[41] The findings that the applicants did not acquire a valid usufruct in terms of the 1976 oral agreement or the 2005 written agreement are dispositive of the relief they seek in respect of a usufruct. It is however desirable to deal with another argument raised by the first respondent, namely that in terms of insolvency law the registration of a personal servitude cannot take place after liquidation.

[42] Upon the liquidation of a corporation, a *concursus creditorum* is instituted. Innes JA described it as follows in *Walker v Syfret NO*:[15]

> "*[T]he hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the*

---

15 *Walker v Syfret* 1911 AD 141 at 166

prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

[43] In *Ward v Barrett NO and Another NO* 1963 (2) SA 546 (A) Steyn CJ said:[16]

> "*At* [the date of the *concursus creditorum*],[17] *the appellant was entitled to claim registration of the notarial bond. But a concursus having supervened, she could not bring an action against the first respondent for specific performance, and the latter had no authority to accede to any such claim, as the interest of other creditors would inevitably have been prejudiced thereby. The appellant's personal right to the registration of a bond could, therefore, not be converted into a jus in rem under a registered bond. .... The mere grant and existence of the power to effect the registration could not and did not change the personal right into a real one."* (own emphasis.)

[44] This principle has been applied to notarial bonds: The holder of a general notarial bond which falls outside the provisions of the Security by Means of Movable Property Act 57 of 1993 does not enjoy a real right of security in assets subject to the bond. A

---

16 At 552H-553A

17 This case dealt with an insolvent deceased estate, and there was no date of liquidation or date of sequestration, but the court held that the same principles apply as in the law of insolvency.

perfection clause can however be enforced at the instance of the bond holder, whereupon the creditor obtains a real right of security. After liquidation or sequestration, the general notarial bond cannot be perfected. In other words, the personal right cannot be converted into a real right after liquidation.[18]

[45] I am mindful that notarial bonds are instruments of security whilst we are dealing with a personal servitude *in casu*. In my view the principle that a personal right cannot be converted into real right after liquidation is however equally applicable. One of the basic characteristics of a real right (as opposed to a personal right) is the fact that it affords a right of preference in the event of insolvency.[19] Should a usufruct now be registered in favour of the applicants, it would diminish the value of the property to the prejudice of the general body of creditors of RSD Construction CC (in liquidation).

[46] There is another reason why the application to compel registration must fail: it is based on the enforcement against the liquidators of either the 1976 oral agreement or the 2005 written agreement, which the applicants cannot do at this stage.

[47] A trustee in insolvency, and thus a liquidator of a company or close

---

18 *First Rand Bank Ltd v Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA) paragraph [31], p 50C-F; *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA); *Ward v Barrett NO and Another NO (supra)*

19 Willis' Principles of South Africa Law, 9th Ed, p 430; *Monica Gezina Cowan NO and Others v Kyalami Estate Home Owners Association and Others* [2014] ZASCA 221 (SCA case number 499/2013) (12 December 2014) at paragraph [9].

corporation in liquidation, is vested with a discretion whether to abide by or terminate an executory contract which had been concluded by the company or close corporation in liquidation before its liquidation (save for certain contracts specifically provided for in the Insolvency Act, 24 of 1936). The liquidators cannot be compelled to render specific performance in terms of a contract which had been concluded by the company or close corporation prior to its liquidation.[20]

[48] An illustration of this principle is the situation where the seller of immovable property is sequestrated or liquidated after the conclusion of sale agreement but the prior to transfer of the immovable property. In such an instance the trustee or liquidator may elect not to perform in terms of the sale agreement, and the purchaser may not demand transfer of the property but must contend himself with a concurrent claim against the insolvent estate for repayment of the amounts already paid and/or for damages.[21]

[49] Accordingly, even if the 1976 oral agreement and/or the 2005 written agreement granted a valid usufruct to the applicants, they will not be able to compel registration of the servitude after liquidation.

---

20 Bertelsmann *et al*, Mars The Law of Insolvency in South Africa, 9th ed, p 222; *Bryant & Flanagan (Pty) Ltd v Muller and Another NNO* 1978 (2) SA 807 (A); *Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd* 2003 (5) SA 189 (SCA), paragraph [6], p 192E

21 *Gordon NO v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A) at 90F-H; *Bryant & Flanagan (Pty) Ltd v Muller and Another NNO* (supra) at 812H – 813 B; *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation)* 1981 (1) SA 171 (A) at 182 D-H

CREATION OF USUFRUCT BY ACQUISITIVE PRESCRIPTION

[50] Alternative to the creation of usufruct by agreement, the applicants submit that a usufruct was created by acquisitive prescription. It is submitted on behalf of the applicants that absent any agreement or consent between the parties, the applicants comply with the requisites of acquisitive prescription.

[51] Section 6 of the Prescription Act 68 of 1969 provides:

> *"... a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of thirty years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessors in title, constitutes an uninterrupted period of thirty years."*

[52] In *Pezula Private Estate (Pty) Ltd v Metelerkamp and Another* 2014 (5) SA 37 (SCA) Brand JA held (references to authorities omitted):[22]

> *"In terms of the Prescription Act 18 of 1943, the use of the property must have been nec vi nec clam nec precario for*

---

22 Paragraph [10], page 40D-G

the period of thirty years. Nec precario, the absence of a grant on request, has been subsumed into sections 1 and 6 of the current Prescription Act by the requirement that the potential acquirer of the servitude must act as though he or she was entitled to exercise the servitudal right. It follows that either express or tacit consent would mean that the alleged acquirer did not act as if he or she was entitled to exercise the servitudal right. The notion of a precarium is based upon the application by one party for a concession which is granted by the other party; that other party reserving at all times the right to revoke that concession as against the grantee in terms of the particular conditions to which the grant is subject. Put differently, a precarium is a legal relationship which exists between parties when one party has the use of the property belonging to the other on sufferance, by leave and licence of the other. Precarium has its origin in the fact of the permission usually being obtained by a prayer."

[53] The applicants on their version used the property with the consent and actual agreement of the owner Mr JHW Troskie. The requirement of *nec precario* was therefore not met for the period 1978 to 2005. Furthermore, in 2005, before a period of thirty years had been completed, the applicants concluded the agreement with the RSD Construction CC in terms of which they were granted the express right to use the property for a further two years. What

happened after that two year period is unclear, but clearly the requirement of *nec precario* was also not met for the period after 2005.

[54] The applicants' reliance on acquisitive prescription must therefore fail.

MORTGAGE BOND

[55] I have found that no personal servitude was validly created, and that no personal servitude can be registered after the liquidation of RSD Construction CC. It is thus not necessary to deal with the interesting questions raised by *Mr Venter* in argument, namely whether a mortgagee can under certain circumstances be subject to the doctrine of notice, and if so, whether proof of negligence is sufficient for a reliance on the doctrine.[23] It may be mentioned *en passant* that the applicants' evidence on these issues seemed rather flimsy.

IMPROVEMENT LIEN

[56] Someone who has a right of retention over an immovable asset belonging to the insolvent estate is obliged to surrender possession of the immovable property to the trustee. In terms of section 47 of the Insolvency Act, 24 of 1936 the creditor will not lose his security

---

23 *United Building Society Limited and Another NO v Du Plessis* 1990 (3) SA 75 (W) is distinguishable, as that case dealt with a registered usufruct which was expressly made subject to a mortgage bond.

by handing over the immovable property to which he has a right of retention if, when delivering the property, he notifies the liquidator of his rights and in due course proves his claim against the estate.[24] (In terms of the common law the creditor loses his improvement lien once he relinquishes possession.[25])

[57] The applicants will therefore not lose any preference they may have had in respect of improvements should the liquidators take possession of the immovable property.

[58] The applicants in prayer 1 seek an order declaring that they have a right of retention over the property. They have no such right. Any claim for improvements should be lodged with the liquidators as required in terms of the insolvency law.

OTHER RELIEF

[59] The applicants also seek an order that should there be an auction for the sale of the property, the applicants' rights in respect of their alleged usufruct should be disclosed to all prospective purchasers, and that such sales be subject to the applicants' usufruct and improvement lien. As pointed out in first respondent's answering affidavit, the applicants in this manner seek to procure a real right in

---

24 Mars The Law of Insolvency in South Africa (supra), p 453-454; *Roux v Van Rensburg NO* 1996 (4) SA 271 (A)

25 Silberberg and Schoeman's The Law of Property, (supra) at p 416

respect of the unregistered usufruct. This they cannot do. In any event, the applicants have not made out a case for this relief.

[60] The applicants (in the alternative) want an order that the first respondent must make an election whether to comply with "GP6", and that the first respondent must at his election ("*na sy keuse*") make payment for improvements to the applicants as a *quid pro quo* for abandoning their rights pertaining to the usufruct and improvements.

[61] The applicants have not made out a case that the liquidators refused or neglected to make an election. On the contrary, it appears that the liquidators have already made an election. The question as to whether or not a liquidator has elected to abide by a particular executory contract is a question of fact.[26] If the liquidator does not make his decision known within a reasonable time, it may be assumed that he is not going to perform in terms of the contract.[27] It can be accepted from the time lapse and liquidators' approach to the application that they do not intend to abide by "GP6".

[62] The applicants cannot approach the court to order the liquidators to make payment. They must utilise the machinery created in the Insolvency Act, 24 of 1936 to pursue their claims. There is no evidence that they have submitted claims, or that the liquidators have

---

26 *Frank v Premier Hangers CC* 2008 (3) SA 594 (C), paragraph [18] at 602G

27 Mars The Law of Insolvency in South Africa (supra), p 223; *Tangney v Zive's Trustees* 1961 (1) SA 449 (W) at 453B

rejected their claims. Needless to say, this is an illiquid claim which cannot be resolved in motion proceedings. The applicants have also not made out a case that an independent valuator should determine the amount of the improvements (as prayed for in the notice of motion).

COUNTER-APPLICATION FOR EVICTION

[63] The applicants' defences to the counter-application for eviction based on usufruct and enrichment lien stand to be dismissed for reasons referred to above.

[64] The applicants also rely on the provisions of PIE in resisting the counter-application.

[65] The first respondent's notice in terms of section 4(2) of PIE stated that application would be made to evict "*all persons occupying the property*" on 3 June 2013 at 10h00. On 3 June 2013 the matter was postponed *sine die*, and not to a specific date. No new notice was served in terms of section 4(2) when the matter was re-enrolled for 23 February 2015. The applicants submitted *in limine* that the first respondent therefore did not comply with the peremptory requirements of section 4(2). *Mr van der Merwe SC* conceded that in the absence of a further notice of the new hearing date being served the first respondent could not in these proceedings obtain an eviction order against any other person apart from the applicants. *Mr Venter* on the other hand conceded that as the applicants participated in the

proceedings throughout, and were always represented at all hearings and were aware of all the court dates, that the point *in limine* could not succeed in respect of the applicants.

[66] The point *in limine* therefore falls away, save that the court cannot make an order for the eviction against any party apart from the applicants.

[67] On the merits the applicants rely on sub-sections (7) and (8) of section 4 of PIE, which read:

> "*(7) If an unlawful occupier has occupied the land for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*
>
> *(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine -*

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in para (a)."

[68] The applicants' occupation of the property is unlawful. PIE does not offer them a complete defence to the eviction application, but serves merely to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions.[28] An eviction order must therefore be granted, and the only question is on what terms it should take place.

[69] The property constitutes the applicants' primary place of residence. The first applicant is 62 years old and the second applicant is 61 year. The applicants have lived on the property since 1978 and they say that they have utilised a part of the property to generate an income. They say they have no alternative accommodation, or an alternative source of income, and that the first applicant has acute heart problems.

[70] Parties relying on the provision of PIE to resist an eviction bear an evidential burden to disclose circumstances relevant to the eviction

---

28 *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) paragraph [15], p 569F-G

order,[29] and must not set out the grounds on which they rely "*baldly, vaguely or laconically*".[30]

[71] The applicants did not disclose their financial position apart from bald allegations that they would not be able to afford alternative housing. The statement that their means of generating income would disappear should they be evicted is likewise a bald allegation without supporting evidence. In fact, there has been very little evidence offered about the businesses which the applicants say they have conducted on the property for close to four decades.

[72] From the little evidence that was offered, it is clear that the applicants "*do not belong to the poor and vulnerable class of persons whose protection was obviously foremost in the Legislature's mind when it enacted PIE.*"[31]

[73] However, it cannot be gainsaid that an eviction order will operate extremely harshly on the applicants, who are elderly people who have lived on the property for about 37 years. They should be granted sufficient time to relocate and plan for their future after the eviction order. The first respondent (through counsel) agreed that the

---

29 *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA), paragraph [19], p 124E-F

30 *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) paragraph [122], p 614A-C

31 *Wormald NO v Kambule* (supra) paragraph [20], p 571E-F. It is for this reason also not necessary to have the municipality joined (nor was it contended by either party that it should be joined): *Premier, Eastern Cape, and Another v Mtshelakana and Others* 2011 (5) SA 640 (ECM), paragraphs [9] to [15], p 645G-646I

eviction be postponed for a period of three months from the granting of the order. Judging by the leisurely pace at which the liquidators prosecuted the counter-application for eviction, there is no urgency in the winding-up. In my view granting the applicants a period of nine months to vacate the property will be just and equitable in the circumstances. The order will determine a specific date when execution of the eviction order can take place as is required in terms of section 4(8)(b) of PIE.[32]

CONCLUSION AND COSTS

[74] There is no reason why costs should not follow the result, and such costs should include the costs of senior counsel.

[75] I accordingly make the following order:

[75.1] The applicants' application is dismissed.

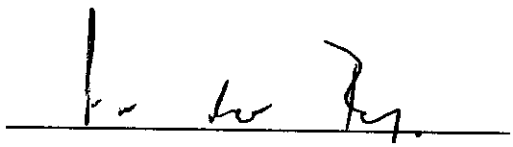
[75.2] The applicants are ordered to vacate the property known as Plot 116 Rietfontein within nine months of the date of this order, failing which the sheriff of the court is authorised to remove the applicants together with their possessions from the said property on 1 March 2016.

[75.3] The applicants are to pay the costs of the application and counter-application, such costs to include the costs of

---

32 *Wormald NO v Kambule* (supra) paragraph [23.2], p 572C.

senior counsel.



VAN DER BERG AJ

Acting Judge of the High Court

APPEARANCES

For the Applicants	:	Adv. J.A. Venter
Instructed by	:	Adriaan Venter Attorneys
For the Respondent	:	Adv. M.P. van der Merwe SC
Instructed by	:	Tim du Toit & Co Incorporated
Date of hearing	:	23 and 24 February 2015
Date of judgment	:	8 May 2015