REPORTABLE

CASE NO.: SA 14/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between

SOUTHERN ENGINEERING First Appellant

JAN JONKER INVESTMENTS EIGHT (PTY) LTD Second Appellant

and

COUNCIL FOR THE MUNICIPALITY OF WINDHOEK Respondent

CORAM: Maritz JA, Strydom AJA *et* O'Regan AJA

Heard on**:** 07/07/2010

Delivered on: 07/04/2011

APPEAL JUDGMENT

O'REGAN AJA:

1]The respondent, the Council for the Municipality of Windhoek, successfully approached the High Court for an order declaring that it had cancelled a lease agreement, and for an order of eviction against the first appellant, Southern Engineering. The two appellants now appeal to this Court to have the orders made by the High Court set aside.

Factual Background

2]The case has a long history. In 2002, the Municipality of Windhoek and the Ministry of Trade and Industry approved a joint venture project with Ramatex Textiles Namibia (Pty) Ltd and its two subsidiaries Rhino Garments (Pty) Ltd and Thai Wah Garments (Pty) Ltd in terms of which textile and garment factories were to be established in Windhoek that would train and employ 4000 Namibian citizens. For its part, the City of Windhoek provided 50% of the infrastructure costs (the other 50% was provided by the Ministry) and it also made land available for the factories. The land in question in this case, 7.6 hectares situated on the outskirts of Windhoek ("the leased property"), was made available at a nominal rental to Rhino Garments (Pty) Ltd through a 99-year lease ("the lease agreement") concluded on 13 March 2002. The lease agreement was endorsed by a resolution of the Windhoek Municipal Council on 27 March 2002 but was never registered with the Registrar of Deeds.

3]The terms of the lease agreement provided that Rhino Garments (Pty) Ltd would not, without the prior written consent of the Municipality, cede or assign any of its rights or obligations under the agreement or sublet or give up possession of the leased property to any third party. Moreover, Rhino Garments (Pty) Ltd undertook not to use the leased property or permit it to be used for any purpose other than garment manufacturing.

4]The garment manufacturing enterprise was not a success and by March 2005, Rhino Garments had ceased operations on the leased property.

According to the Municipality, Rhino Garments was in material breach of many of the provisions of the lease agreement.

5]On 21 June 2005, Arthur Preuss, who was cited as seventh respondent in the High Court proceedings but who is not a party to this appeal, obtained a default judgment against Rhino Garments. On 18 July 2005, the Deputy Sheriff for the District of Windhoek (cited as sixth respondent in the High Court proceedings and again not a party to the appeal) purported to attach the right, title and interest of Rhino Garments in the lease agreement and thereafter published notice of an intended sale in execution of the right, title and interest in the lease agreement to take place on 8 December 2005. The sale in execution did not proceed. According to Mr Preuss, in the affidavit he lodged in the High Court, the sale was not held because he had been informed that the lease agreement had been cancelled.

6]On 25 November 2005, the Chief Executive Officer of the Municipality wrote to Rhino Garments demanding that they rectify their material breach of the lease agreement within 30 days, which Rhino Garments failed to do. So on 3 January 2006, the Chief Executive Officer wrote to Rhino Garments to the effect that "the lease agreement is cancelled with immediate effect". The first letter was sent to the registered offices of Rhino Garments, but the second letter, the cancellation notice, was sent to the address where Rhino Garments' administrative office had been situated, but by the time the letter was sent Rhino Garments was no longer trading. There is thus a dispute as to whether the letter was ever received by Rhino Garments. On 16 January 2006, the

management committee of the Council was informed of the cancellation of the lease and the cancellation was minuted and tabled in the full Council later that month.

7]On 27 November 2006, Rhino Garments was provisionally liquidated. In the application for provisional liquidation, the applicant (Mr Preuss) stated that the lease agreement had been cancelled. Provisional liquidators were appointed on 13 December 2006, and, on 1 June 2007, Rhino Garments was wound up. The liquidators were aware that the City had purported to cancel the lease. On 9 October 2007, the liquidators sent a notice to all creditors giving notice of its intention to consider offers for the purchase of "rights, title and interest in the buildings" erected on the land which is the subject of the lease agreement. On 23 October 2007, the liquidators wrote to the City stating that they elected "to the extent possible" to exercise their right to continue the lease agreement.

8]On 31 October 2007, the Chief Executive Officer of the Municipality of Windhoek replied to the letter of 9 October 2007 stating that the lease with Rhino Garments had been cancelled eighteen months before. The liquidators were also informed that neither the property nor the improvements on the land were assets in the estate of Rhino Garments and that any alienation of the land, the property or the improvements thereon, or of the lease agreement or rights or interests in the lease agreement would be null and void.

9]On 5 November 2007, Mr Jacobs on behalf of Southern Engineering, the first appellant, wrote to the Municipality's chief executive officer and stated

that Southern Engineering was the successful tenderer in the liquidation process in regard to Rhino Garments' rights and title in the lease agreement, and to the buildings on the leased property. He further stated that they had taken possession of the leased property on 30 October 2007 and had paid N$6,8 million to the liquidators. Mr Jacobs further stated that he was not aware of the cancellation of the lease agreement until 1 November 2007

10]On 12 November 2007, the Municipality's Chief Executive Officer wrote to the joint liquidators and copies of the letter were sent to, amongst others, Southern Engineering. In the letter, he stated that the Municipality had noted the presence of the first appellant on the leased property during a site inspection on 8 November 2007 and that the liquidators did not have the right to sell the buildings or the right and title in the lease. On 15 November, the first appellant wrote to the Municipality stating that it was in possession of the leased property that it had obtained lawfully and in good faith.

11]On 1 February 2008, the Municipality wrote to the first appellant asking it to vacate the leased property, which they failed to do. On 14 April 2008, the Council of the Municipality by resolution ratified the cancellation of the lease that had been contained in the letter of the Chief Executive Officer dated 3 January 2006. After several further exchanges of correspondence, the Municipality launched proceedings in the High Court on 28 April 2008 seeking an order confirming that the lease contract with Rhino Garments had been cancelled, an eviction order against first and second appellants and an order granting the Municipality leave to institute legal proceedings against first

appellant to recover a fair and reasonable amount for the duration of the first appellant's unlawful occupation of the leased premises.

12]The main issue before the High Court was whether the lease agreement had been cancelled by the Municipality or not. The High Court held that the Municipality had done everything it could to communicate the notice of cancellation to Rhino Garments and that in the circumstances it deemed the notice to have been brought to the attention of Rhino Garments. The High Court also held that although communication of cancellation is ordinarily desirable, it is not necessary to communicate a cancellation if the contracting party has made it impossible for the other party to communicate with it. In the view of the High Court, the conduct of Rhino Garments had made it impossible for the Municipality to communicate the cancellation. In regard to the question whether the Chief Executive Officer had had authority to cancel the lease, the High Court held, relying on *Potchefstroomse Stadsraad v Kotzé,* 1960 (3) SA 616 (A) and *Walvis Bay Municipality and Another v Occupiers of the Caravan Sites at Long Beach Caravan Park, Walvis Bay,* 2007 (2) NR 643 (SC), that the authorization could not be questioned. I return to this issue later. Accordingly, the High Court granted the relief sought by the Municipality. Its order read as follows:

> "1. The cancellation of the lease agreement concluded between the applicant and Rhino Garments Namibia (Pty) Ltd on 13 March 2000 is confirmed;
> 2. The third respondent (Southern Engineering) is evicted with immediate effect from the portion of the land previously leased in terms of the lease agreement concluded on 13 March 2000 between the applicant and Rhino Garments Namibia (Pty) Ltd, presently in liquidation;

3. The applicant (Council for the Municipality of Windhoek) is granted leave to institute legal proceedings against third respondent to recover a fair and reasonable amount from the third respondent for the duration of third respondent's unlawful occupation of the leased premises on Farm 466."

13]It is against this order that the appellants appeal.

Appellants' submissions

14]In this court, the appellants argued, amongst other things, that:

(a) the Municipality had not validly cancelled the lease agreement because the Chief Executive Officer of the Municipality had not been duly authorized to cancel the agreement and the City's purported ratification of the cancellation in April 2008 was invalid as it would affect the rights of third parties;

(b) even if the Chief Executive Officer was authorized to cancel the lease agreement, the cancellation of the lease agreement was never validly communicated to Rhino Garments and therefore the lease agreement had never been cancelled;

(c) that the assignment of the lease by the liquidators to Southern Engineering was valid and that Southern Engineering had purchased the property *bona fide* for value from the liquidators and that its title to the property could not thus be assailed by the Municipality.

Respondent's submissions

15]The respondent raised the following arguments, amongst others, on appeal:

(a) Rhino Garments had repudiated the lease agreement, which was then cancelled once the repudiation was accepted;

(b) the notice of cancellation was sufficiently communicated to Rhino Garments in January 2006, and if it was not, the cancellation took effect at the latest once the liquidators, who stepped into the shoes of Rhino Garments, had knowledge of the notice to cancel;

(c) the Municipality had validly ratified the cancellation of the lease agreement in April 2008;

(d) the liquidators could not cede the rights and interests in the lease to Southern Engineering without the consent of the Municipality which was not given; and

(f) Southern Engineering was not using the property for a purpose contemplated in the lease agreement and therefore the liquidators could not validly cede the rights in the lease to Southern Engineering.

16]The respondent also raised a new point on appeal based on section 37(2) of the Insolvency Act, 24 of 1936, which is rendered applicable to the liquidation of companies by section 339 of the Companies Act, 61 of 1973. Section 37(2) provides that if a trustee does not inform a lessor within three months of appointment that he or she intends to continue with the lease, the lease will be deemed to have terminated three months after the trustees were appointed. The respondent argued that, as "liquidator" is defined in the

legislation to include "provisional liquidator", the provisional liquidators had had three months from the date of their appointment on 13 December 2005 within which to notify the City of their intention to persist with the lease. As they had failed to do so, the lease had automatically terminated on 12 March 2007 in terms of both section 37(2) of the Insolvency Act and clause 23 of the lease, which contained a similar provision.[1]

Issues for determination in this appeal

17]Three issues arise for determination:

(a) Was the lease agreement cancelled by the Municipality?

(b) Was the High Court correct in ordering the eviction of the first appellant from the leased premises?

(c) Was the High Court correct to make an order granting the Municipality leave to sue Southern Engineering?

I shall deal with each in turn.

Cancellation of the lease

18]Three issues arise in relation to determining whether the lease was validly cancelled: the first is whether the purported ratification of the Chief Executive Officer's cancellation of the lease agreement by the City on 14 April 2008 was valid; the second is whether there was adequate notice of the cancellation to the lessee (Rhino Garments) and the third is whether, if the agreement was not cancelled by the Municipality, it terminated by effluxion of time in terms of

1 Clause 23 provides: "The insolvency of either the City or the Company shall not terminate this agreement. However, the trustee of the Company's insolvent estate shall have the option to terminate this agreement by notice in writing to the City. If the trustee does not within three months of his appointment as trustee notify the City that he/she desires to continue with the agreement on behalf of the estate, he/she shall be deemed to have terminated the agreement at the end of the three months."

the provisions of section 37(2) of the Insolvency Act.

(a) Ratification of the cancellation of the lease

19]On 27 November 2005, the Chief Executive Officer of the Municipality wrote to Rhino Garments requiring it to rectify its material breaches of the lease agreement within 30 days and on 3 January 2006, the Chief Executive Officer wrote to Rhino Garments purporting to cancel the lease agreement because the material breaches had not been rectified. The Municipality's Management Committee passed a resolution on 16 January 2006 noting that the lease agreement had been cancelled from 3 January 2006 and those minutes were approved in a resolution passed by the Municipal Council on 25 January 2006. It may well be that by approving the Municipal Committee minutes in this way, the Municipal Council tacitly ratified the cancellation of the lease agreement. It is not necessary for us to decide this question, however, because on 14 April 2008, the Council of Windhoek passed a resolution expressly ratifying and approving the cancellation of the lease agreement with Rhino Garments on 3 January 2006 with effect from that date.

20]The appellants argue that the Chief Executive Officer was not duly authorized to cancel the lease on 3 January 2006, and that the subsequent ratification of 14 April 2008 is not valid for two reasons. First, they argue that the lease could not lawfully be cancelled on 3 January 2006 because Rhino Garments' right, title and interest in the lease agreement had been attached by that date with the consequence that any cancellation of the lease would be a nullity. As the cancellation was a nullity, it could not subsequently be

ratified. They also argue that the ratification of the cancellation would constitute a fraud on creditors given that Rhino Garments was in liquidation and for that reason too would be a nullity. Secondly, they argue that a valid ratification may not interfere with the vested rights of third parties. Because Southern Engineering had been assigned Rhino Garments' rights, title and interest in the lease agreement by the liquidators, any subsequent ratification of the purported cancellation of the lease agreement would be invalid.

21]It is clear that the cancellation will not be valid despite subsequent ratification by the Council, if the circumstances are such that the cancellation would have been a nullity from the start even if it were to have been done by the Council at that time, for it is not possible to give legal effect to a nullity by ratification.[2]

22]Was the cancellation on 3 January 2006 a nullity from the outset because, as the appellants argue, the lease had been attached and therefore the Council was not permitted to cancel the lease without first setting aside the attachment? The appellants rely on the criminal prohibition contained in section 36(c) of the High Court Act, 1990 for this submission. That section provides that:

> "Any person who …
> (c) being aware that goods are under arrest, interdict or attachment by order of the court, makes away with or disposes of those goods in a manner not authorized by law, or knowingly permits those goods, if in his or her possession or under his or her control, to be made away with or disposed of

2 AJ Kerr *The Law of Agency* 3rd ed (1991: Butterworths) at 97.

in such a manner; …
shall be guilty of an offence …"

23]The first question is what had been attached. The return on the Writ of Execution stated that the Deputy Sheriff had "seized and laid under judicial attachment the Defendant's right, title and interest in the lease agreement entered into between the City of Windhoek and the Defendant". It is clear from the return that what had been attached was whatever right, title and interest the Defendant (Rhino Garments) had in the lease agreement as at the date of the attachment, 18 July 2005.

24]Does the attachment of such right, title and interest affect the rights of the other party under the lease agreement? In particular, does the attachment prevent the other party to the lease agreement exercising its contractual rights in respect of the lease agreement? Counsel for the appellants argued that, given the provisions of section 36(c) of the High Court Act, the effect of the attachment was to deprive the Council of its right to cancel the agreement and that any purported cancellation would be a nullity.

25]There is a flaw in this argument. Section 36(c) refers to "goods" not to "incorporeal property." It is not clear if the use of the term "goods" in the subsection includes within its scope attached rights in a lease agreement as the term "goods" often denotes corporeal property only. However, assuming in favour of the appellants that the term "goods" does include incorporeal property, such as the attached rights in the lease agreement, section 36(c) only prohibits the disposition of attached goods in a manner "not authorized

by law".

26]If Rhino Garments was in material breach of the lease (as is not disputed on the record before us), the Council would have been entitled to cancel the lease in terms of its contractual rights. If it elected to do so, that cancellation would be a cancellation "authorized by law" as contemplated by section 36(c).

27]The attachment of Rhino Garments' interest in the lease agreement cannot increase the rights and title that Rhino Garments may have under the lease. Nor, in the absence of any express wording in the statute, may the attachment of Rhino Garments' rights in the lease agreement deprive the Council of its rights under the lease agreement.

28]The appellants argue that cancellation by the City after the liquidation of Rhino Garments would be a nullity because it would prejudice the creditors in the estate. However, it is clear that a lessor's right to cancel a lease agreement survives the liquidation of the lessee. As Friedman J stated in *Smith and Another v Parton NO,* 1980 (3) SA 724 (D) at 729 D – E:

> "Once one accepts, therefore, that the only real basic principle is that the contract survives the insolvency, then it seems to me to follow inevitably that the accrued right to cancel survives. Where the creditor decides after insolvency to exercise his right of cancellation against the trustee; he elects to exercise a right which he has and which has survived the insolvency."

29]The liquidation of the insolvent company thus does not deprive the lessor of an accrued right to cancel the lease agreement. Consequently, section

36(c) of the High Court Act did not preclude the cancellation of the lease and the cancellation when it took effect does not impermissibly prejudice creditors. Accordingly, the argument that the cancellation of the lease was a nullity because it would constitute a prejudice to creditors in the concursus cannot be accepted.

30]In the circumstances, appellants' argument that the ratification of the cancellation of the lease agreement was a nullity must be rejected.

31]Did the purported ratification on 14 April 2008 interfere with the vested rights of third parties? The rule was succinctly stated by Harms JA in *Smith v Kwanonqubela Town Council,* 1999 (4) SA 947 (SCA) at para 12:

> "… ratification cannot affect vested rights previously acquired by third parties… and a person ratifying cannot by his unilateral act bridge the interval so as to prejudice others, not parties to the transaction…".

32]What rights had Southern Engineering acquired in the lease agreement? There is a dispute of fact on the record as to whether Mr Jacobs and Southern Engineering were aware of the cancellation letter of 3 January 2006.

33]But the deed of sale (furnished at a very late stage of the proceedings)[3] entered into between the liquidators and Mr Jacobs, the proprietor of Southern Engineering, casts light on the transaction. It provided that the purchaser purchased the "rights, title and interest, *such as they may be*, in the

3 Despite repeated requests by the City prior to the launch of the proceedings in the High Court, the deed of sale was only disclosed as an annexure to a supplementary affidavit lodged by Mr Jacobs in response to the Replying Affidavits.

Agreement of Lease between the City of Windhoek and Rhino Garments Namibia (Pty) Ltd dated 13 March 2002, a copy of which is attached" (emphasis added). Clause 3 of the agreement provided that "the sellers give *no guarantees as to the good standing or existence of the Lease Agreement* and the Purchaser has undertaken the risk of cession of the Lease Agreement into his name, and will bear the costs thereof." (emphasis added) The final clause in the agreement stated that "the sellers have undertaken not to deal with the purchase consideration for a period of 14 days … as completion of this Agreement may be prevented by an order of the High Court…".

34]The unusual terms of the deed of sale make clear firstly that the purchaser was provided with a copy of the original lease agreement; and secondly that the seller had specifically refused to warrant that the lease agreement remained in existence. Moreover, no doubt because of the uncertainty of the existence of the lease agreement, the parties considered that the deed of sale might be prevented by High Court order.

35]It follows that the purchaser, Mr Jacobs of Southern Engineering, was aware at the time that he signed the deed of sale that what he was purchasing might, in the view of the seller, not exist. The terms of the deed of sale do not therefore support the claim that Southern Engineering or Mr Jacobs were unaware of any uncertainties concerning the existence of the lease. It is also clear that Mr Jacobs would have known from the terms of the lease agreement (which was annexed to the deed of sale), that the leased property had to be used for the specific purpose of garment manufacturing, a term of

the lease with which it appears he could not comply.

36]In addition, Mr Jacobs and Southern Engineering would have been aware of the provision in the lease that the lease could not be assigned without the written consent of the Council. Section 37(5) of the Insolvency Act makes clear that such a clause binds the trustee of an insolvent estate. Southern Engineering would thus have been aware that they could not be assigned the rights, title and interest in the lease without the permission of the Municipality. It is no doubt for this reason that clause 3 of the deed of sale stated that "the purchaser has undertaken the risk of cession of the Lease Agreement into his name, and will bear the costs thereof".

37]Section 82(8) of the Insolvency Act provides protection to the *bona fide* purchaser of property from an insolvent estate where the sale is in contravention of the requirements of section 82.[4] Although section 82(8) probably has no direct application in this case, the jurisprudence developed under it as to what constitutes a purchase in "good faith" is helpful. In considering this question in *Mookrey v Smith NO and Another,* 1989 (2) SA 707 (C), a full bench of the Cape High Court held that:

> "I do not consider that a purchase of estate assets can be said to be *bona fide* unless he believes that the trustee is acting within the scope of his authority in selling the estate assets…. It is at least as important to the proper administration of the Act and the estates of solvent debtors that the trustee should not exceed his authority as it is that creditors should not be prejudiced.

4 Section 82(8) provides: "If any person other than a person mentioned in subsection (7) has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section … the purchase of other acquisition shall nevertheless be valid …".

> Indeed, for a trustee to exceed his authority will in most cases create the potential for prejudice to creditors."[5]

38]Given the terms of the deed of sale, appellants' assertions and arguments that Southern Engineering purchased Rhino Garments' right, title and interest in the lease agreement, in good faith and unaware of any uncertainty as to the ongoing validity of the lease by the Council, cannot be accepted. The clear terms of the agreement make plain that there was a large question mark over whether the lease was in existence (as the liquidators expressly refused to guarantee its existence).

39]In all these circumstances, it cannot be said that Southern Engineering or Mr Jacobs, had vested rights in the lease agreement, sufficient to constitute a bar to the ratification of the cancellation of the lease agreement by the Council. As the purchaser, Mr Jacobs was aware that the existence of the lease agreement was not certain, and he was also aware that if the lease agreement still subsisted he required the consent of the Council to its cession.

40]The appellants' argument that the ratification was not competent because it would interfere with vested rights of a third party cannot for these reasons be accepted. In the circumstances, I conclude that the clear ratification of the cancellation of the lease agreement by the Council on 12 April 2008 was lawful and valid and would have had the effect that the lease was cancelled if notice of cancellation came to the attention of the lessee, an issue to which I now turn.

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5 At 714 C – D.

(b) Notification of cancellation to Rhino Garments

41]The letter of 3 January 2006 was delivered to an address that had been the operational address of Rhino Garments, but not its registered address. In the circumstances, it cannot be said on this record that Rhino Garments obtained knowledge of the cancellation. The appellants argue that for the cancellation to be effective, notice of the cancellation must reach the lessee. It is not necessary to decide the question of whether a lease may be cancelled without notice reaching the lessee as it is clear in this case that the liquidators once they took office were aware of the contents of the letter of 3 January 2006.

42]It is trite that liquidators step into the shoes of the insolvent company and that the contract survives insolvency.[6] Moreover, as noted above, a lessor, who has accrued a right to cancel a lease prior to insolvency, may still exercise the right to cancel once the liquidation has taken place.[7] Once the liquidators became aware of the notice of cancellation dated 3 January 2006, therefore, the cancellation had been communicated to the lessee.

43]Given that I have concluded that the lease was validly cancelled once the liquidators became aware of the cancellation letter of 3 January 2006, it follows that the liquidators did not have an election either in terms of clause 23 of the lease agreement, or in terms of section 37(2) of the Insolvency Act, to continue with the lease agreement. Nothing further need be said about this

6 See *Smith and Another v Parton NO* 1980 (3) SA 724 (D) at 729A. See also *Porteous v Strydom NO* 1984 (2) SA 489 (D) at 494 F.

7 Id at 729D-E citing with approval *Mitchell v Sotiralis' Trustee* 1936 TPD 252.

issue.

44]One issue remains to be considered. In dismissing the argument raised by Southern Engineering challenging the authority of the Chief Executive Officer to cancel the lease, the High Court relied upon a principle established in the case of *Potchefstroomse Stadsraad v Kotzé,* 1960 (3) SA 616 (A) as endorsed by this Court in *Walvis Bay Municipality and Another v Occupiers of the Caravan Sites at Long Beach Caravan Park, Walvis Bay,* 2007 (2) NR 643 (SC). That principle is that a municipality may not deny that one of its officials acted on its behalf in circumstances where the official has written to a member of the public purportedly with the authority of the Council. The principle recognizes that it would be unduly burdensome and inconvenient to require members of the public to investigate whether an official has complied with the internal regulations and processes of the municipality before concluding that the official was indeed authorized by the municipality to act. [8] In both the cases mentioned, it was a municipality that sought to argue that its officials had acted without authority and in both cases the courts held that the municipality could not do so on the basis of the principle cited. In this case, it is not the municipality seeking to challenge the authority of its officials, but a member of the public and so the legal principle established in these two cases finds no application. Although this Court reaches the same conclusion as the High Court, it does so for different reasons.

Eviction of Southern Engineering

8 See *Potchefstroomse Stadsraad v Kotzé* 1960 (3) SA 616 (A) at 622 E – G, citing with approval *Mine Workers' Union v Prinsloo* 1948 (3) SA 831 at 845. See also *National and Overseas Distributors Coroporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 480.

45]The next question that arises is whether, given that the lease has been validly cancelled, the Council is entitled to an order evicting Southern Engineering from the leased premises. It is clear from the record that the Council is the owner of the land in question, and that Southern Engineering has not established that it has any valid title to be in occupation of the land, so the eviction order against Southern Engineering must stand.

46]In oral argument, the respondent's counsel requested that the terms of the eviction order be extended to include the second appellant, Jan Jonker Eight Investments (Pty) Ltd. The relief prayed for in the Notice of Motion and, therefore, the High Court order of eviction relates only to the first appellant, Southern Engineering. There is no cross appeal on the question whether the order of eviction should have extended to the second appellant and indeed that question has not been an issue in these proceedings. Accordingly, it is not open to the respondent at this stage of the proceedings to seek an extension of the court order to include the second appellant within its ambit.

Leave to Sue

The third paragraph of the High Court order provides that the applicant (the Council) is granted leave to institute legal proceedings against third respondent to recover a fair and reasonable amount from the third respondent for the duration of the third respondent's unlawful occupation of the leased premises on Farm 466. The first appellant argues that this order should not have been made in motion proceedings of this sort and argues that it should be set aside on appeal.

47]It is not immediately clear what the purport of this order is. There can be no doubt that the respondent has the right to sue the first appellant for appropriate relief and did not need a declaratory order to clarify that such a right exists. Whether such a claim will succeed will be a matter to be determined by the court hearing that case. When making the order, the judge in the High Court stated: "In my opinion, the applicant will be entitled to institute such legal proceedings without the leave of the Court based on the decisions already made. … I am of the opinion that such an order is neither here nor there and that it follows from my order in respect of prayer 2." The declaration, therefore, had no tangible effect, as the High Court itself acknowledged.

48]The grant of declaratory relief is a discretionary matter. Ordinarily, a court will only grant declaratory relief when two conditions are met. First, the court must be satisfied that the person seeking declaratory relief is a person interested in an existing, future or contingent right or obligation and secondly the court must consider it appropriate to grant declaratory relief in the circumstances of the case.

49]In particular, the relief sought must not be abstract, or of academic or hypothetical interest only and it must afford the litigant a tangible advantage. (*Ex parte Nell,* 1963 (1) SA 745 (A) at 759 A – B; *Reinecke v Incorporated General Insurances Ltd,* 1974 (2) SA 84 (A) at 93 B – E). Where an order does no more than restate general principles of law, and does not determine any existing, future or contingent right, it is not appropriate for a court to grant

declaratory relief. Such a declaratory order would be an “exercise in futility”. (*Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 97 D – E).

50]The respondent’s right to sue the first appellant for damages for the unlawful occupation of the leased premises is a matter which will arise for full determination only if and when the respondent institutes action against the first appellant. This Court does not know whether the respondent’s right to institute such an action will be challenged and, if so, on what basis. The Court cannot seek to predetermine these issues in these proceedings, as the High Court itself acknowledged.

51]Where a court has granted declaratory relief, the ordinary principle is that an appellate court will not interfere with the decision to grant relief unless the appellate court is satisfied that the discretion conferred upon the lower court was not judicially exercised. (*Ex parte van Schalkwyk NO and Hay NO* 1952 (2) SA 407 (A) at 410 H; *Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd* 1953 (3) SA 324 (A) at 332 A - B).

52] As mentioned above, paragraph 3 of the High Court order appears to have no tangible effect. Moreover, the High Court recognized that it had no such effect as is clear from the comment made by the judge that he considered the effect of the order “to be neither here nor there”. In the circumstances, the Court failed to act judicially in the exercise of its discretion for, as appears from the discussion in the preceding paragraphs, it is a clearly

established legal principle that declaratory relief should not be awarded unless it affords, some tangible relief. The appeal against paragraph 3 of the order made by the High Court should thus succeed and that portion of the order be set aside.

Costs

53]For the reasons given in this judgment, the appeal has been successful, but only in one small respect, that is, in relation to paragraph 3 of the High Court order. It is clear that the effect of paragraph 3 was of minimal importance to both parties and did not engage much discussion in argument. Accordingly, on all issues of substantial importance, the appeal has failed. Given that the appeal has been substantially unsuccessful, it is appropriate to order the appellants to pay the costs of the respondent in this Court, such costs to include the costs of one instructed and one instructing counsel.

Order

1. The appeal succeeds to the extent that paragraph 3 of the High Court order is set aside.
2. Save as set out in paragraph 1 of this order, the appeal is dismissed.
3. The appellants are ordered to pay the costs of the respondent in this Court, such costs to include the costs of one instructed and one instructing counsel.

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O'REGAN AJA

I concur

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MARITZ JA

I also concur.

_____
STRYDOM AJA

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