IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER: 16139/2015

In the matter between:

SOUTHERN VALUE CONSORTIUM Applicant

And

TRESSO TRADING 102 (PTY) LTD Respondent

JOHANNES FREDERICK KLOPPER NO AND
JACQUES DU TOIT NO
Intervening Business Rescue Practitioners

REASONS PROVIDED ON 23 NOVEMBER 2015

BLIGNAULT J:

[1] On 30 October 2015 I granted the following orders in this application:

(1) Respondent is ejected from the property described as Unit E2, Access Park, 81 Chichester Road, Kenilworth, Cape Town.

(2) Respondent is ordered to pay the costs of this application.

[2] My reasons for granting these orders follow hereunder.

[3] Applicant is described as follows in the founding affidavit deposed to by Ms Desiree White, a manager of applicant: Vividend Income Fund Limited (registration number 2010/003232/06) and Forum SA Trading 143 (Proprietary) Limited (registration number 2001/018387/07), carrying on

business jointly under the name and style of Southern Value Consortium at Access Park, Chichester Road, Kenilworth, Cape Town.

[4] Respondent is Tresso Trading 102 (Pty) Ltd a company which carries on business at the property. It was placed in business rescue in terms of section 129 of the Companies Act 71 of 2008 ('the Companies Act').

[5] Mr Johannes Frederick Klopper and Mr Jacques Du Toit were duly appointed as respondent's business rescue practitioners. They oppose the present application on respondent's behalf.

[6] Applicant is the registered owner of the immovable property described as Unit E2, Access Park, 81 Chichester Road, Kenilworth ('the property'). On 11 August 2014 applicant and respondent concluded a written agreement of lease in terms of which applicant let the property to respondent. As at 20 April 2015 respondent was indebted to applicant in the amount of R320 501,12 in respect of outstanding monthly rental, operating costs, utility consumption and municipality charges in terms of the agreement of lease ('the rental and additional charges').

[7] On 20 April 2015 applicant's attorneys addressed a letter to respondent informing it that it was in breach of the agreement of lease by failing to make payment of the rental and additional charges due to applicant. Respondent was informed in this letter that respondent was indebted to it in the amount of

R320 501,12 in respect of rental and additional charges and that applicant reserved the right to cancel the agreement.

[8] On 6 May 2015 applicant's attorneys addressed a further letter to respondent in which they recorded that respondent was then indebted to applicant in the amount of R381 455,69 in respect of rental and additional charges. Respondent was informed that applicant demanded payment of this amount.

[9] On 8 May 2015 applicant instituted an action in the Wynberg Regional Court in which it claimed an order ejecting respondent from the property and payment of the sum of R381 455,69 plus interest. The summons was served on respondent on 11 May 2015. Paragraph 13 of applicant's summons in that action read as follows:

> *"The Plaintiff has cancelled, alternatively hereby cancels the lease with immediate effect."*

[10] On 29 May 215 applicant obtained an order in terms of section 32 of the Magistrate's Courts Act 32 of 1944 which directed the Sheriff to attach so much of the movables at the property as shall be sufficient to satisfy the sum of R381 455,69. Pursuant to this order the Sheriff attached all the movables at the premises. The proceedings in the regional court were later withdrawn.

[11] Applicant contended in the present application that it had cancelled the lease agreement and that it was entitled to eject respondent from the

property. To that end applicant launched the present application on 27 August 2015. Respondent was then indebted to applicant in the amount of R564 385,57 in respect of outstanding rental and additional charges.

[12] The business rescue practitioners opposed the application on behalf of respondent. Mr Jacques du Toit deposed to the main answering affidavit on behalf of both of them. According to the register of the Companies and Intellectual Property Commission respondent commenced business rescue proceedings on 16 September 2015. The business rescue practitioners were appointed on the same date.

[13] In their answering affidavit and in argument the business rescue practitioners raised a number of defences in *limine*. They may be summarised as follows:

(1) There is a conflict in the identity of the entities which claim to represent the applicant.

(2) There is no proof that Ms Desiree White was authorised to bring the present application on behalf of applicant.

(3) Applicant came to court with dirty hands in that it unlawfully dispossessed respondent from the property by changing the locks.

(4) Applicant's attachment of respondent's movables was irregular.

[14] I propose to deal first with these in *limine* points before turning to respondent's substantive defence, namely that applicant is precluded by the

provisions of sections 133(1) and 134(1)(c) of the Companies Act from pursuing the present application.

[15] The first defence in *limine* is the alleged confusion regarding the identity of the entities claiming to be the applicant. In my view this alleged confusion is more apparent than real. Legally a consortium is not a separate entity. It refers in general to two or more persons or entities acting jointly. As such it is not unlike an unincorporated association. In the present case the consortium consists of two legal entities Vivided Income Fund Limited and Forum SA Trading 143 (Proprietary) Limited. It is clear from the affidavits that they are the joint owners of the property, that they had concluded the lease agreement jointly and that they brought the present application jointly under the name of Southern Value Consortium. Despite loose language in other documents respondent could not have been in any doubt as to the identity of applicant, nor could the business rescue practitioners have been.

[16] The second point in *limine* concerns the authority of Ms Desiree White to represent applicant in these proceedings. Applicant was granted leave to file a resolution in order to clarify the question of her authority. The resolution makes it clear that the two companies do business as a consortium, that all the steps taken on behalf of the applicant, including the bringing of the present application, the affidavits deposed to on behalf of it and the appointment of their attorneys were duly authorised by the two companies at the time when these steps were taken.

[17] The resolution went further and, as an alternative step, purported to ratify all the steps that had been taken on behalf of applicant in the litigation. In argument the business rescue practitioner's attorney attacked the validity of this ratification. It seems to me, however, that the question of ratification became a non-issue. It was presumably introduced *ex abundante cautela* but it was not required and simply caused some confusion. In my view applicant proved that these proceedings were properly authorised by it.

[18] In the course of respondent's attorney's argument on ratification he referred to the judgment in *Pangbourne Properties Ltd and Another v Your Life (Pty) Ltd and Another* [2013] 4 ALL SA 719 (GSJ) in support of a submission that unauthorised legal proceedings could not be ratified after they had been instituted. He pointed out that applicant had ceded its claim to a bank before it launched the present proceedings. Counsel for applicant did not concede that this was a fixed rule but and he pointed out that the claim against respondent was in any event receded to Vividend Income Fund Limited on 12 August 2015 ie before applicant brought the present application.

[19] Respondent's third point *in limine* was that the application should be dismissed because applicant approached the court with dirty hands as it had acted irregularly in the course of the enforcement of applicant's rent interdict.

[20] In my view this issue is not relevant to the present proceedings. Apart from the fact that respondent's allegations are disputed, applicant is at

present seeking to assert its rights to the property and not to the movables. Any disputes in regard to the movables can be resolved, if need be, in separate proceedings.

[21] The fourth defence *in limine* was that applicant obtained an interdict in terms of section 32 of the Magistrates' Court Act as security for the rent and the additional charges but the section only provides for security for rent.

[22] This issue is in my view equally irrelevant to the present proceedings. The possible invalidity of the attachment of respondent's movables and the consequences thereof do not affect applicant's claim in the present application. As I said above, disputes in regard to the movables can be resolved in separate proceedings. Respondent's defences *in limine* are accordingly dismissed.

[23] Before discussing the interpretation of sections 133(1) and 134(1)(c) of the Companies Act, I must deal with the business rescue practitioners' attack on the validity of applicant's cancellation of the lease agreement. They contend that the cancellation was premature as applicant had not yet acquired the right to cancel the agreement when it purported to do so.

[24] In my view this submission is without merit. The agreement contained specific provisions regarding the day on which rent had to be paid, namely monthly in advance on the first day of each month. Respondent then failed to

pay the monthly rent and fell into *mora ex re.* Applicant thereupon acquired the right to cancel the agreement. In its attorney's letter dated 20 April 2015 it notified respondent of its intention to cancel the agreement. By way of the summons in the magistrate's court it actually cancelled the agreement. It is settled law that an agreement may be cancelled by way of a summons or an application. See *Win Twice Properties (Pty) LTd v Binos and Another* 2004 (4) SA 436 (WLD).

[25] Respondent's principal defence is that applicant is precluded by the provisions of sections 133(1) and 134(1)(c) of the Companies Act to bring the present proceedings. The relevant provisions of these two sub-sections read as follows:

> *"<u>133 General moratorium on legal proceedings against company</u>*
> *(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum…*

> *"<u>134 Protection of property interests</u>*
> *(1) Subject to subsections (2) and (3), during a company's business rescue proceedings*
> *… …*
> *(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company,*

> *irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing."*

[26] In my view the key to the interpretation of section 133(1) of the Companies Act lies in the difference between between a real right and a personal right. In *Absa Bank Ltd v Keet* 2015 (4) SA 474 (SCA) para [20] the Supreme Court of Appeal provided an authoritative description of the distinction:

> *'[20] In my view there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act. The High Court in Staegemann (para 16) was correct to say that the solution to the problem of prescription is to be found in the basic distinction in our law between a real right (jus in re) and a personal right (jus in personam). Real rights are primarily concerned with the relationship between a person and a thing, and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right.*
>
> *[21] That distinction between real rights and personal rights has consistently been recognised in our case law and was recently explained by this court in National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* [2011 (2) SA 157 (SCA)] *para 31:*
>
> > *'The first concerns the distinction between real and personal rights. Real rights have as their object a thing (Latin: res; Afrikaans: saak). Personal*

> *rights have as their object performance by another, and the duty to perform may (for present purposes) arise from a contract. Personal rights may give rise to real rights; for instance, a personal obligation to grant someone a servitude matures into a real right on registration. Real rights give rise to competencies: ownership of land entitles the owner to use the land or to give others rights in respect thereof. Others may say that ownership consists of a bundle of rights, including the right to use the land, but it does not really matter who is right on this point.'*

[27] The concept *'legal proceedings'* in section 133(1) of the Companies Act is on the face of it quite wide. The section draws an express distinction, however, between two categories of legal proceedings, namely:

(i) against the company; and

(ii) in relation to any property belonging to the company, or lawfully in its possession.

[28] In my view this distinction corresponds with the difference between a personal right and real right. The first category of proceedings comprises actions which are intended to enforce personal rights. The second category comprises actions which are intended to enforce real rights. Applicant's cause of action in the present case is the *rei vindicatio*. It seeks to recover property in respect of which it has a real right, namely ownership. It does not seek to enforce any contractual or other personal right against respondent.

[29] There is a well established presumption in the interpretation of statutes that a reference to conduct is presumed to be a reference to lawful conduct. See Du Plessis *LAWSA* second edition Vol 25(1) para 343 and Steyn *Die Uitleg van Wette* vyfde uitgawe 127 and the cases cited in footnote 251.

[30] In the present context the word *belong,* if read in isolation, may have a wide meaning but if the presumption referred to above is applied, it can only mean belong in a legally valid sense. It cannot in my view be construed to include a case where the belonging is unlawful. The same interpretation applies to the meaning of the concept *possession.* Section 133(1) of the Companies Act indeed refers expressly to *lawful possession*.

[31] Applicant claims to be the lawful owner of the property. The business practitioners did not refute this claim. It follows that the property never belonged to respondent. Following the cancellation of the lease agreement respondent was, furthermore, no longer in lawful possession of the property. The business practitioners can therefore not rely on the provisions of section 133(1) of the Companies Act as a defence to applicant's claim.

[32] Similar reasoning applies to the interpretation of section 134(1)(c) of the Companies Act. The key concept is the *lawful possession* of the company. After the cancellation of the lease agreement respondent was no longer in lawful possession of the property.

[33] My interpretation of section 134(1)(c) is also supported by considerations of reasonableness and practicality. If an owner of a thing cannot vindicate it from an unlawful possessor it would give rise to a stalemate situation. The owner (applicant *in casu)* would in effect be deprived of his power to exercise his ownership in the thing whilst the possessor (respondent *in casu)* would be unable to use it as such use would be unlawful.

[34] In *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para [14] the Supreme Court of Appeal said this:

> *'[14] It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.'*

[35] In my view it could not have been the legislature's intention that the company in business rescue would *restructure its affairs* by utilising assets to which it has no lawful claim.

[36] I accordingly formed the view that applicant is not precluded by the provisions of sections 133(1) and 134(1)(c) of the Companies Act from asserting its right of ownership in the property.

[37] For these reasons I granted the relief sought by applicant.

A P BLIGNAULT