IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : 4391/2014

In the matter between:-

GM PANEELKLOPPERS CC Applicant

and

GLL ADVANCE BODY REPAIR AND SPRAY CC Respondent

CORAM: NAIDOO, J

JUDGMENT BY: NAIDOO, J

HEARD ON: 4 DECEMBER 2014

DELIVERED ON: 19 MARCH 2015

NAIDOO J

[1] The applicant seeks the eviction of the respondent from its property and therefore vacant possession of the property. The applicant proceeds on the basis of an owner's *rei vindicatio*. The applicant's ownership and the respondent's possession and occupation of the property are common cause between the parties.

[2] Hester Maria Pieters (Mrs Pieters) was married Jan Pieters (the deceased) and they each held a 50% member's interest in the applicant. After the deceased passed on in April 2010, his 50% interest was bequeathed, in terms of his Last Will and Testament, to Mrs Pieters and she is currently the sole member of the applicant. The deceased started the applicant's business of panel beating and restoring vehicles in 1996, and the applicant bought the property situated at 12 Pretorius Street, Bethlehem, Free State in 2000. This is where the applicant has conducted its business since that date.

[3] Gawie Pieters (GP) is the son of the deceased, who divorced GP's mother and married Mrs Pieters. Franscois Jacobus Coetzee (Coetzee) is GP's stepfather, having married GP's mother after she and the deceased were divorced. Coetzee apparently is the sole member of a business called Bethlehem Pre-Owned Cars CC, trading as Fifa Motors (Fifa Motors). GP alleges in the Founding Affidavit of an application for the liquidation (the liquidation application) of the applicant (which I will deal with later) that he was involved in the applicant's business as a manager since 2004, and that in 2005, he identified a business opportunity for the sale of second hand motor vehicles. He wanted to run that business from the premises of the applicant at 12 Pretorius Street, Bethlehem. The deceased, representing the applicant, gave GP permission to build a showroom and do other improvements to the property, at GP's cost, to accommodate GP's business. GP alleges in the liquidation application that he secured funds from Coetzee and effected improvements to the applicant's property

to the tune of approximately R1 200 00.00. GP further stated that there was never a specific agreement between him and the applicant (represented by the deceased) with regard to the repayment of the money he had spent on the improvements to the property. His father did, however, mention to him shortly before his death that he would give GP his (the deceased's) member interest in the applicant so that GP would benefit from his interest as a member of the applicant as well as the improvements that GP had made to the property.

[4] As I indicated above, the deceased's 50 % member interest was in fact bequeathed in his Will to Mrs Pieters after his death in April 2010, making her the sole member of the applicant. GP alleges that after the deceased passed on, Mrs Pieters agreed to transfer 50% of the members' interest in the applicant to GP and he should carry on running the applicant's business. In return he should pay her R15 000.00 per month for her living expenses. He agreed to this and commenced payment (in 2010) of the R15 000.00 per month to Mrs Pieters. This appears to have continued until 2014.

[5] It is also GP's version that a family trust, namely the Pieters Familie Trust (the family trust), was established during 2010 in order to hold the member interest in the applicant on his behalf, as he was at that time, and still is, an un-rehabilitated insolvent, having been sequestrated on 9 April 2009. For the same reason (presumably because he was advised that he could not run a business and/or be registered as a member of a close corporation), a close corporation was formed (the

respondent in this matter), and the family trust was the sole member of the respondent. The respondent was registered in about September 2010, and has conducted its business from the applicant's premises since then. GP's version, therefore, is that such occupation was with the consent of the deceased and after his death with Mrs Pieters' consent. In addition, he acquired the right of occupation when she agreed that she would transfer the deceased's member interest to him, and requested that he continue to run the business of the applicant.

[6] It appears from the papers that meetings were held between GP and Mrs Pieters to discuss the transfer of the 50% member's interest in the applicant to GP. He seems to be of the view that an agreement to this effect was, in fact, concluded. Mrs Pieters of course denies that any agreement in this regard was reached. It also appears that GP tried to buy out Mrs Pieters' interest, and presented her with an agreement to this effect, which, from the correspondence in the file, appears to have been rejected by her. What is clear is that the relationship between Mrs Pieters and GP soured quite considerably, and ultimately in July 2014, GP and the respondent launched an urgent application for the liquidation of the applicant. They were unsuccessful as the matter was held to lack urgency. However, extensive affidavits were filed by GP and Mrs Pieters in the liquidation application in which the versions of the respective parties were articulated. Both the applicant and respondent in the matter before me have requested that I read the affidavits filed in the liquidation application as if incorporated in these papers.

[7] Mrs Pieters' version accords largely with GP's version as I have outlined it above. The point of departure relates to the transfer of the deceased's 50% member's share in the applicant. As indicated, Mrs Pieters denies that any agreement was reached between her and GP in this regard. She concedes, however, that meetings and discussions were held in connection with the matter of the transfer of the deceased's member interest in the applicant which, according to her, failed to produce any agreement in that regard. She alleges that, at best, GP had a *spes* in relation to the transfer of the member's interest. It is also her version that when she discovered that GP had misappropriated money from the applicant, she insisted that the parties enter into a lease agreement. She prepared a written lease agreement and presented it to GP to sign. She sought a monthly rental of R25 000.00. GP apparently refused to sign but the respondent offered to pay R15 000.00 per month as consideration for its use of the property, as well as the utility expenses such as water and electricity levies, rates and taxes on the property and the monthly bond instalment in respect of the property. In return the respondent would continue the panel-beating business of the applicant which was hired out to it, as well as its second hand car dealership from the applicant's premises. Mrs Pieters agreed to this. These payments commenced in 2010 and continued until about April 2014, when the respondent stopped paying the said amounts. Shortly thereafter GP and the respondent launched the liquidation application against the applicant.

[8] GP deposed to the Founding Affidavit in the liquidation application, apparently in his personal capacity, without any mention of what role, if any, his curator had played in this matter. No affidavit was filed on behalf of the respondent (as second applicant), but confirmatory affidavits by the Trustees of the family Trust, were filed.

[9] The version put forward by GP in the liquidation application has been set out above. This version changed quite substantially in the opposing/replying affidavit to this application. GP also deposed to the latter affidavit. I pause to mention that GP alleges that he is authorised to depose to the replying affidavit by virtue of his position as manager of the respondent, as well as in his personal capacity. As an un-rehabilitated insolvent, it was expected that he would mention that he is opposing the application (in his personal capacity) with the consent of his curator. This was not done, nor was any documentary substantiation filed for his allegation that he is authorised to depose to the affidavit on behalf of the respondent. To return to the version which appears from the replying affidavit, GP alleges that he made a "bona fide error" in the liquidation application by creating the impression that he sourced funds from Coetzee and/or Fifa Motors to fund the improvements to the applicant's property. His version now is that the deceased held discussions with GP and Coetzee and authorised them both to continue with the improvements, which were actually paid for by Coetzee/Fifa Motors during 2005/2006. These

improvements increased the value of the property by some R1.2 million. In addition, the respondent effected improvements to the property during 2010/2011, which increased the value of the property by approximately R500 000.00. Such improvements were effected with the consent of the deceased and MrsPieters. Needless to say, Mrs Pieters strenuously denies this and states that Coetzee was never part of the discussions and agreement between GP and the applicant (as represented by the deceased), nor did she consent to any improvements by the respondent. This change in version entails such a fundamental shift in the factual situation pertaining to the sourcing of funds, with which the improvements were effected, that I find extreme difficulty in reconciling it with the notion of a "bona fide error".

[10] As alluded to earlier, Mrs Pieters alleges that the respondent and GP occupied the applicant's property by virtue of a verbal) lease agreement, after the death of the deceased. GP alleges that his and the respondent's occupation arose from an agreement between him and Mrs Pieters that she would transfer 50% of the member interest in the applicant to him, in return for which he should continue to run the business of the applicant. In her opposing affidavit to the liquidation application, Mrs Pieters gave notice (in paragraph 75) of cancellation of the lease agreement and asked that the respondent vacate the applicant's premises, so as far as she was concerned, the respondent ceased to have any right to occupy the premises. For his part, GP (ostensibly acting on behalf of the respondent and himself), in paragraph 36 of the

founding affidavit in the liquidation application, cancelled the agreement he alleges he had with Mrs Pieters, and appears, therefore, to rely on an enrichment lien.

[11] The respondent, in its Heads of Argument, states that it does not rely on the right to occupation which the applicant alleges to have cancelled. Its version is that the applicant permitted it to occupy the premises until such time as such consent was withdrawn. The applicant has not withdrawn such consent, hence the respondent still validly occupies the property. This is alleged to be in the nature a *precarium*. A *precarium* is where one party enjoys the use and/or occupation of the property of another, with the owner's consent and permission. Such right of use or occupation can be revoked at the will of the owner.

[12] The respondent also goes on to allege in its Heads that it relies on an enrichment lien which is enforceable against the applicant for the expenses it incurred in effecting improvements to the property or for the value by which property has been enhanced due to such improvements. The respondent's affidavit in the liquidation application refers to improvements to the value of R1 200 000.00 and in this application it alleges that the value of the property was enhanced by "approximately R1.2 million" due to the improvements paid for by Coetzee and/or Fifa Motors, and by "approximately R500 000.00" in respect of the improvements effected by the respondent. It is well

version that this was the reason that the respondent was established and that the family trust was made the sole member of the respondent. He therefore appears to be the human being that directed the activities of the respondent, or the respondent. Everything GP did in furtherance of the business of the respondent, therefore, would have been in his representative capacity. It may be that the proposed written lease agreement which Mrs Pieters presented to GP reflected their personal names, but it was not taken to its final conclusion, and instead a verbal lease agreement was concluded. The fact that Mrs Pieters refers in this regard to the "current applicant" is indicative of her intention to deal with the respondent, via GP. GP himself claims that the respondent made the payments of R15 000.00 to Mrs Pieters as well as the other expenses of the applicant. To allege that such an agreement was made with GP personally, to the exclusion of the respondent makes no sense and is disingenuous and opportunistic. I am satisfied that in cancelling the lease agreement, the applicant, acting through Mrs Pieters, effectively withdrew its consent for the respondent to remain in occupation of its property. The fact that GP (on behalf of the respondent) undertook to vacate the premises is a further indication the respondent's acknowledgement that it had no right to remain in occupation. The argument that the applicant did not withdraw its consent for the respondent to remain in occupation cannot, in my view, be sustained.

[15] A further point raised by Mr Van Aswegen is that the dispute as to different routes by which the parties allege that the respondent acquired occupation of the applicant's property, namely lease versus *precarium*, creates a factual dispute entitling the respondent to a dismissal of the application. In view of what I have said above, it is not necessary for me to decide this issue, as the manner by which the respondent acquired occupation is not relevant, in view of the fact that the respondent's occupation was not disputed. Each party cancelled the agreement which it alleges created the right of occupation, leaving the respondent with a possible lien for improvements, which it in fact based its defence on. The respondent failed to establish a lien, hence the manner in which it acquired occupation becomes irrelevant. I pause to mention also that the respondent raised in its replying affidavit a point *in limine* that Mrs Pieters did not have *locus standi* to bring this application, on account of the deregistration of the applicant. This point was not pursued and need not detain us further.

[16] It is common cause that the respondent and/or GP has secured alternative premises from which its business is operated and has left a few motor vehicles on the applicant's premises on the basis that it has a lien over the property. It will effectively not be put out of business by handing back possession of the applicant's property to it. The applicant does not dispute that certain improvements were made to its property. In order to move forward, the applicant has, in its founding affidavit, offered to register a continuing covering

bond over its property to meet the claim of the respondent that the latter may choose to pursue against the applicant. The claim according to the respondent is approximately R500 000.00. From the papers, there appears to be sufficient equity in the property to meet such a claim.

[17] In the circumstances, I make the following order:

17.1 The respondent, its employees, directors, sub- tenant or any person associated with it, and who are either actively or inactively engaged in, or connected to, the furthering of the respondent's business activities at 12 Pretorius Street, Bethlehem, Free State Province, are ordered to vacate the said premises within Thirty (30) days of the date of this order ;

17.2 In the event that the respondent and all those associated with it fail to vacate premises as directed in paragraph 1, the Sheriff of this court is directed and authorised to evict the respondent from the premises, using all legal means to secure the eviction of the respondent and all those occupying through it;

17.3 The applicant is directed to take steps, at its cost, within Thirty (30) days of the date of this order to register a continuing covering bond on its property situated at 12 Pretorius Street, Bethlehem, Free State Province, in the amount of Five Hundred Thousand Rand (R500 000.00).

17.4 The respondent is directed to institute its claim, if any, against the applicant, within Sixty (60) days of the date of this order.

17.5 Should the respondent fail to institute its claim as directed in paragraph 17.4, the applicant shall be entitled to cancel the continuing covering bond referred to in paragraph 17.3, in which event, the respondent is directed to pay the costs of such cancellation.

17.6 The respondent is directed to pay the costs of this application.

S NAIDOO, J

On behalf of the applicant:	Mr S Grobler Instructed by: Honey Attorneys BLOEMFONTEIN (123967/BM Jones/bv)
On behalf of the respondents:	Mr WA Van Aswegen Instructed by: McIntyre & Van Der Post BLOEMFONTEIN (Mr ES Els/RAB278)