FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1785/2011

In the matter between:-

GREG & SON ENTERPRISES CC Applicant

and

OCCUPIER OF EASTERN SECTION, GREG & SONS BUILDING, SELBOURNE LANE, KROONSTAD Respondent

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JUDGMENT BY: MUSI, JP

HEARD ON: 23 JUNE 2011

DELIVERED ON: 22 SEPTEMBER 2011

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[1] These are eviction proceedings brought by way of motion. The applicant seeks an eviction order against the "occupier of the Eastern Section, Greg & Son Building, Selbourne Lane, Kroonstad" (the "premises"). It turns out that the occupier of the premises is Kroonstad Good-Life Supermarket, a duly registered close corporation which is represented in these proceedings by its manager, Mr Qiang Lin (Lin). It is the respondent in these proceedings. The applicant is also a duly registered close corporation which is represented in these proceedings by its sole member, Mr Gregorios Papapanos

(Papapanos).

[2] The applicant's case is that the respondent is occupying the premises unlawfully in that it conducts business there without the permission of the owner. But the applicant does not stop there. It goes on to disclose that the respondent purports to be occupying the premises in terms of an alleged right obtained from Divine Heights CC, which claims to have the right to let the premises. The applicant further discloses that a deed of sale was concluded between it and Divine Heights, in terms of which the premises were sold to Divine Heights but claims that such contract is invalid. Since the respondent relies on the very lease and sale, the *onus* shifts to the applicant to show that the respondent has no valid grounds to occupy the premises. See **MYAKA v HAVERMANN AND ANOTHER** 1948 (3) SA 457 (AD) at 465; **CHETTY v NAIDOO** 1974 (3) SA 13 (AD) at 23. I shall revert to this issue in due course.

[3] The following facts are either common cause or undisputed:

3.1 That the applicant is the registered owner of the premises;

3.2 That on 14 February 2005 the applicant concluded a deed of sale with Divine Heights CC, whose sole member is Mr

Fayyaaz Ismail Seedat (Seedat) in terms of which the applicant sold the premises to Divine Hights for an amount R650 000,00; that this purchase price was paid in full into the trust account of the applicant's then attorney, Mr Deon Jacques Gresse of the firm Grimbeeck Van Rooyen and Partners of Kroonstad but that the premises has not been transferred to Divine Heights CC.

3.3 That the deed of sale is presently the subject of a dispute between the contractants, which is pending in this court under case number 1844/2001, wherein Divine Heights CC seeks an order declaring the deed of sale to be valid and transfer all the premises to itself.

3.4 That the respondent and Seedat concluded a lease agreement on 23 October 2009 for a five years period with effect from 1 November 2009 in terms of which the respondent occupies the premises and conducts business thereon. (Copy of the lease is annexed to the respondent's answering affidavit and marked "B".)

[4] In opposing the application, the respondent relies on the lease aforesaid. Its deponent, Lin, states in the answering affidavit that prior to the respondent taking occupation, the premises had

been occupied by Nungu (Pty) Ltd t/a Kroonstad Frozen Foods of a period of 5 years and that the latter had also rented the premises from Seedat. He goes on to say that the respondent has been conducting business there for over a year prior to the institution of the instant proceedings with full knowledge of Papapanos. Lin bases this assertion on the fact that Papapanos has been conducting a tavern and muti business right next to the premises in the same building and that Papapanos observes activities in premises on a daily basis and that on one occasion Papapanos actually came onto the premises to complain about the way that the respondent prepared its polony, and proceeded to lodge a complaint with the Health Department of the local municipality which complaint was investigated but dismissed. Based on all this, Lin submits that Papapanos had represented to the respondent that it was entitled to occupy the premises and that the applicant should be held to have consented to the respondent's presence on the premises on the basis of the doctrine of estoppel.

[5] Lin goes on to state that he had *bona fide* believed that Seedat was the owner of the premises and that when he discovered that there was a dispute over ownership, he stopped paying

rent to Seedat. Instead the monthly rental of R16 000,00 has since been paid, and is still being paid, into the trust account of his attorneys pending the outcome of this case.

[6] I should mention that in his founding affidavit Papapanos claims that he had not known who was the real occupier of the premises, which explains why he cited an unnamed occupier as respondent in this case, which assertion is disputed by Lin as indicated above. In his replying affidavit, Papapanos makes a rather startling but very serious allegation that his then attorney, Mr D J Gresse, had been in charge of the premises and made all the arrangements regarding occupation; knew who the tenants were and collected the monthly rental, which he then paid over to Papapanos. He says that he had been under the impression that the money received from Gresse every month was rental from whoever were the tenants. It turned out that in fact the source of the money was the purchase price paid by Divine Heights CC. I should mention that this fact was in fact disclosed in a letter written by Gresse's partner, Mr Barend Christiaan van Rooyen, dated 17 December 2010, to which is annexed a statement of account prepared by Gresse. It is apposite to quote this letter in full:

> "Ons heg hierby 'n staat voorberei deur Mnr Gresse wat aantoon welke bedrae aan Mnr Papapanos betaal is sedert die R650 000,00 koopprys van die eiendom in September 2005 betaal is. U sal merk dat 'n totaal van R1 225 868,64 betaal is in die vorm van "huur".
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> Mnr Gresse beweer dat hy 'n verdere bedrag van R167 450,45 uit sy eie fondse betaal het aan die Moqaka Munisipaliteit ten opsigte van 'n uitklaringsertifikaat. Daar is derhalwe R1 393 319,09 aan mnr Papapanos en ten behoewe van hom betaal, wat substansieel meer is as die R650 000,00 wat hy moes kry ten opsigte van die koopprys."

[7] On the basis of this letter Papapanos avers that he had been badly misled by his attorney and it is interesting to note that Mr Gresse acted for both the seller and the purchaser in the sale transaction and similarly also for the landlord and tenant in regard to the renting out of the premises prior to the applicant terminating his mandate when the shenanigans came to light.

[8] I pause to say that this allegation and others contained in the applicant's replying affidavit point to very serious unprofessional and unethical conduct on the part of an attorney, for it suggests

that Mr Gresse was engaged in double dealing to the detriment of his client. The very letter quoted above is startling, coming as it does, from the mouth of an attorney. Mr Van Rooyen has no qualms to state that money that was supposed to be kept in his firm's trust account pending transfer of the property to the purchaser, alternatively, pending resolution of the dispute around the sale agreement, is paid over to the seller in monthly instalments until it is used up without the client's knowledge, let alone authorisation. And where does the balance of R1 225 868,64 (R5 175 868,64) paid to Papapanos come from? On what basis does Mr Van Rooyn's firm pay a lump sum of R167 450,54 to the Moqhaka Municipality out of their pocket, when their client seemingly knows nothing about it? It is noteworthy that Mr Gresse has not responded to these allegations nor has anyone of his partners done so in spite of the fact that one of them is the attorney of record for the respondent in these proceedings. The Law Society of the Free State will be directed to investigate these allegations.

[9] The crux of the matter is whether it can be said that the respondent's occupation of the premises is unlawful. The first point to be noted is that these are motion proceedings and where there are disputes of fact that cannot be resolved on the

papers, the version of the respondent, taken together with the admitted facts in the applicant's affidavit, prevails. See **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (AD); **THE PRESIDENT OF THE RSA v M & G MEDIA** 2011 (2) SA 1 (SCA) para [13]. There is a dispute of fact about whether Papapanos was aware of the presence of the respondent on the premises and consented thereto. The respondent's version is that he was aware. Aspects of such version are undisputed and make sense. There is no way that an owner of premises who is there on a daily basis and who sees people conducting business right under his nose next to his own business in the same building will not know who the occupants are or allow them to continue trading unless they have his approval. Moreover, on his own version, Papapanos had entrusted the arrangements regarding occupancy to his attorney and agent, Mr Gresse. Obviously, Gresse knew about the fact that the applicant had been renting the premises from Seedat and approved of it. Besides, on his own version Papapanos did not really care who occupied the premises and as long as the occupant paid rent the latter could occupy the premises. It is clear that the applicant started these proceedings not because the respondent was an unlawful occupant but primarily because the applicant discovered that the respondent was paying rent to someone else.

[10] Even if I am wrong in my application of the **PLASCON-EVANS** rule this is a matter that calls for a robust approach to resolution of disputes of fact in motion proceedings. See **BUFFALO FREIGHT SYSTEMS (PTY) LTD v CRESTLEIGH TRADING (PTY) LTD AND ANOTHER** 2011 (1) SA 8 (SCA) at 14A – C. The applicant's version that it did not approve of the respondent's occupation of the premises is, on an objective analysis of the evidence, untenable and should be rejected.

[11] During the hearing, counsel for the respondent focused much of his argument on estoppel. In the view that I take of the matter it is unnecessary to deal with this issue. Suffice it to say that I have serious reservations about its applicability in the instant case.

[12] The application stands to fail on another ground. There is authority for the view that a lessor may validly let property to which he or she has no title. See **WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW**, 9th Edition by F Du Bois, *et al* at 191,

para [6]. A *fortiori* the position of a lessor such as Seedat who claims a valid title based on an existing (albeit disputed) written sale and purchase contract.

[13] The last issue to be dealt with is the applicant's contention that the lease between the respondent and Seedat is invalid. Three grounds are relied upon. Firstly, it is pointed out that the deed of sale between the applicant and Divine Heights prohibited the latter from taking occupation before registration of transfer in its name. It was submitted on behalf of the applicant that Divine Heights did not therefore acquire the right of occupation and could not validly let the premises. The short answer to this is that the uncontested version of the respondent shows that Divine Heights was, through its sole member Seedat, in *de facto* control of the premises, in the sense that he was able to let unchallenged not only to the respondent, but also to the previous occupant, Kroonstad Frozen Foods, for a considerable period running over six years. Interestingly, the name Kroonstad Frozen Foods is still prominently displayed on the walls of the premises as can be seen from the photo, annexure "DP5" to the applicant's founding affidavit. It appears that Divine Heights took over occupation soon after the sale

agreement was concluded. And it is quite clear that Gresse, the applicant's agent, had consented to this. The applicant cannot avoid the consequences of his agent's conduct by pleading ignorance or that his agent cheated him. That is a matter it must sort out with Gresse.

[14] The second point is that the lease cites Seedat as the lessor whereas the purchaser is his close corporation, Divine Heights. The answer to this is that it is Seedat who runs Divine Heights and the latter acts through him. At any rate, even if Seedat was not the purchaser and had no claim to the property, he could still let the property based on the authority cited above. The last objection is that the lease was concluded by a non-existent entity called Choice Supermarket and Mini Market. But it is obvious that respondent has taken the place of Choice Supermarket in the lease and it is the respondent that conducts business there and pays rent. This means that the respondent has simply been substituted for Choice Supermarket in the lease. At any rate, the validity or invalidity of the lease is, strictly speaking, a matter between the lessor and the lessee and they could agree to implement the terms of the lease even if it was invalid. In this regard, the applicant has failed to

discharge the *onus* resting on it as alluded to in para [2] above.

[15] Finally, it is important to note that the applicant launched this application fully aware that the respondent would rely on the lease with Seedat and fully aware that Seedat's close corporation is seeking to enforce the sale contract through the pending case number 1844/2011. That is the case that should resolve the dispute between the parties once and for all. The applicant should have awaited the outcome for that case and it is noteworthy that the respondent has adopted the proper course of paying the rent into the trust account of his attorneys pending the finalisation of that case. This would ensure that if the dispute is resolved in favour of the applicant it would still get the accumulated rent. In the circumstances, I had the option of simply ordering that these proceedings be stayed pending the outcome of that case. In the event, I opted to deal with the merits of the matter.

[16] The application is dismissed with costs.

H. M. MUSI, JP

On behalf of the applicant:	Adv. H. J. Benade Instructed by: Phatshoane Henney BLOEMFONTEIN
On behalf of the respondent:	Adv. J. Y. Claasen SC Instructed by: QB Grimbeek Attorneys BLOEMFONTEIN

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