



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 12794/2024

In the matter between:

K2022504463 SOUTH AFRICA (PTY) LTD

First Applicant

**THE BEACH COUNTRY & SAFARI
COLLECTION (PTY) LTD**

Second Applicant

and

STEPHEN MARK VAN ROOYEN

First Respondent

PATRICK MARCO HAUSOTTER

Second Respondent

JONAS HANDEKYN

Third Respondent

MY DESTINATION HOLDINGS (PTY) LTD

Fourth Respondent

and

MARCEL YVON MARIE DE MAUDAVE BESTEL

Third Party

JUDGMENT

PARKER, AJ:

Introduction

[1] It is about money and friendship. The envisaged third party is the sole shareholder and director of both Applicants (hereinafter referred to as “Bestel”). As for first respondent, he will hereinafter be referred to as “Van Rooyen”. These two parties are now in a boxing ring after a promising future floundered, which had its genesis in a business venture in the hospitality sector. They concluded an oral agreement based on the trust between them and agreed to structure the business in a certain manner due to the personal circumstances of Van Rooyen. They agreed to team up to create a business in which they would purchase immovable property on the Breede River to conduct a resort business.

The issues

[2] The applicants as the registered owner of the immovable property and the business conducted thereon, respectively, are seeking an order of eviction and interdict restraining the respondents from using any of the assets. Van Rooyen denied that the respondents are in competition with the applicants and alleging there is no evidence to prove it. The second and third respondents are the “investors” in the venture and will be referred to as such. They, along with the first and fourth respondents oppose the grounds sought by the applicants, namely that;

2.1 The respondents be evicted from Portion 4[...] of the Farm A[...], Erf 1[...], Swellendam, Western Cape.

2.2 The respondents be interdicted and restrained from using any of the assets of the applicants for commercial purposes.

[3] The investors do not reside at the business however visited it from time to time. Their opposition to the action brought by the applicants is based on their investment capital paid.

The first respondent opposes the eviction on the basis he resides there most of the time. The fourth respondent (hereinafter referred to as “MDH”) of which Van Rooyen is the director of, has its registered address at 2[...] T[...] Ave B[...], Cape Town. This is also the address disclosed by Van Rooyen in his opposing affidavit as his address.

Bestel’s version

[4] A property holding company, the first applicant (hereinafter referred to as “K2”) would be formed in which investors could acquire a stake to fund the purchase of the immovable property which became the registered owner.

[5] Bestel’s version is, Van Rooyen and he agreed that they would incorporate a second company which would be the operating company to conduct the business (*“the resort”*) and accordingly second applicant (hereinafter referred to as “BCSC”) came into being. The proposed structure was that BCSC would own 100% of the shares in K2 and that Bestel would hold all the shares in BCSC and be the sole director of both companies. This arrangement was due to Van Rooyen’s difficult past which affected his reputation; hence the structure was agreed upon to mitigate potential prejudice to their intended business. On this basis, the two men agreed that Van Rooyen would stay outside of the formalities of the entities. Accordingly, it was agreed that Bestel would hold 50% of the shares in BCSC on Van Rooyen’s behalf and the other 50% will be held by himself.

[6] According to Bestel the purchase of the immovable property required substantial investment and its development in the amount of between R10.5 million to R15 million and thereafter about R4.5 million for its renovations. This venture required financial resources and business acumen which Bestel claims he undertook to contribute towards, including funding all the initial expenses relating to the launch of the project including the purchase of both BCSC and K2 as a shelf company.

[7] To finance the first phase of the project Van Rooyen identified the two investors who agreed to invest €300,000 each into the venture in return for a 25% interest in K2. Bestel learnt that there was a shortfall in the payment due by the investors of an amount of €150,000, which resulted in Bestel securing a loan for R2.5 million being the shortfall needed to effect payment to the conveyancing attorneys for the transfer and registration of the property after Van Rooyen's payment left a shortfall of R1 million.

[8] The parties agreed that Van Rooyen would manage the resort at a salary of R30 000 per month and he would also oversee the renovation of the resort. The business went through some financial woes emanating from two storms which hampered the full development and the renovations. Despite an interest by a certain Mr Marcel Golding in the business, the said Golding declined to invest in the project allegedly due to Van Rooyen's failure to make full disclosure of the exact financial position of the business with a proper accounting thereof.

[9] Despite hiccups, the renovations went ahead, and it was Van Rooyen's goal to launch a new resort on 31 December 2023 for the New Year's Eve music festival. Bestel contends that the event would be hosted by the BCSC and all deposits received from the 250 prospective festival goers would be for the benefit of BCSC. Unfortunately, the intended event did not materialise as intended due to certain concerns raised by neighbors.

[10] Instead and without Bestel's consent, Van Rooyen proceeded to host a toned down event at a New Year's Eve event at the resort. Van Rooyen on the other hand stated that this event was done with the consent of the legal counsel for the municipality. The lack of financial disclosure reached a boiling point when Van Rooyen demanded that payments be made from the BCSC's account to a third party for certain refunds for the cancelled festival, which payment request Bestel did not accede to.

[11] The relationship between them became fractious and broke down irretrievably. To preserve the company's assets Bestel brought an ex parte application for an interim interdict restraining payments from Van Rooyen's bank account in which a final order was granted on 9 April 2024 in this court by Justice Sher. Applicants issued an action against Van Rooyen, calling upon him to render a true and proper statement of account which was at the date of this hearing, still pending. In addition, seven neighbors of K2 brought an application against BCSC, K2 and the respondents praying for an order, inter alia, declaring the use of the resort unlawful and seeking an interdict to prevent Van Rooyen to hold any further musical festivals.

Van Rooyen's version

[12] According to Van Rooyen, a special vehicle company (SPV) would hold the immovable property directly which would allow for investors to enjoy the flexibility of buying shares in the SPV which he had envisaged as the structure for the ownership of the property. For the management of the property, he envisaged setting up a second company which he would own outright. He would be responsible for the upkeep of the property, booking guests, marketing to potential clients and arranging dates for events.

[13] In his opposing affidavit he disclosed an overall picture of him being the mastermind of the venture, that he identified the resort property in the Breede River, he saw the potential for the digital nomad market, and he engaged the investors before approaching Bestel. For this, Van Rooyen's contribution would comprise not only a R5 million financial contribution but also what he terms as the "*sweat equity*" for which he would take up a 50% stake in the SPV. According to him the two investors were already in a business relationship with him and the shareholdings between the four of them (including Bestel) would be 25% each. This was not acceptable to Bestel, and accordingly the investment agreement was not signed by Bestel. Furthermore, he agreed the 50/50 co ownership terms of BCSC were that Bestel would hold Van Rooyen's 50% stake in his own name.

[14] On his version, Bestel became a problem when he did not come up with a R2.5 million Rand which left them with a shortfall to fund the purchase of the resort and the planned renovations.

[15] Furthermore, it is alleged that Bestel showed a lack of interest in the project and asserted that he was “*never - not once been to the resort.*” This was denied by Bestel. Also, Bestel failed to open a bank account for K2 which caused Van Rooyen to open up a separate bank account. This too was denied by Bestel because according to him the BCSC account was already in existence on 2 December 2022 which Van Rooyen had knowledge of as Bestel furnished him with the bank details on 5 December 2022. The BCSC bank account details were also used by Van Rooyen in e-mails dated 6 April 2023 and 14 April 2023 respectively, where he set out that the BCSC bank details changed on 24 January 2024 ultimately for MDH.

[16] Van Rooyen offers the explanation to be - the running of the resort required money for the renovations and since Bestel did not open the bank account of K2, it necessitated the continued using of the MDH as a solution. Of critical importance, Van Rooyen concedes that Bestel was not part of that decision.

[17] Insofar, as the unhappiness stemming from the adjoining neighbours, Van Rooyen says there was a disinformation campaign to convince several neighbours that the planned New Year's Eve event would spell trouble. Van Rooyen concedes that he proceeded with a much smaller toned down New Year's Eve party with 130 guests in attendance which, under the municipal bylaws, was permissible. The cancellation of the bigger event caused cancellations of various service providers and K2 and BCSC lost over a R1 million in loss of profits. Interestingly, applicant's argument was made that the service provider refunds requested by Van Rooyen to be paid from the BCSC account was refused by Bestel.

[18] On respondent's version, second, third and fourth respondents are not resident at the resort. As for the fourth respondent, it's registered address and that of Van Rooyen's address (as contained in his opposing affidavit) is the same, in Bakoven. Van Rooyen states that therefore there is no evidence to support the applicant's suggestion that the second and third respondents are in fact in unlawful occupation of the resort. As for Van Rooyen's occupation of the resort he contends that the occupation is not unlawful since he spent a great deal of time there as a part owner of the business and he is within his rights and fundamentally entitled to be there and to carry on a trade there. He therefore seeks the protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

[19] Van Rooyen is the partner who has been at the resort living there most of the time to renovate and run the business and it was agreed Bestel would be the initial placeholder shareholder and figurehead director of K2 and BCSC. According to Van Rooyen, Bestel understands that he is liable to transfer 25% of K2 to second and third respondents, and that he Bestel as figure head, holds 50% of BCSC for Van Rooyen.

Analysis

[20] Of importance, Bestel and Van Rooyen are embroiled in an action in respect of the debatement of account relating to monies paid by the two investors to Van Rooyen, destined for K2, which is still ongoing. Since these monies were paid into the MDH account it is yet to be determined whether the investors paid their full investment and whether these full amounts were employed for the benefit of K2, all of which remains to be seen.

[21] As stated by Bestel the proverbial key to unlocking the transfer of shares has therefore always been with Van Rooyen. Since full payment has not been made by the investors the shareholding cannot be determined.

[22] Because of the breakdown of the relationship, disciplinary action for the dismissal ensued for the dismissal of Van Rooyen as manager of BCSC and K2.

[23] It is clear that a factual dispute exists between the parties relating to the structure of the business and the debatement of the account in respect of the lis pending will hopefully resolve those issues. It is unclear whether the intention was that BCSC would manage the resort and would result in it enjoying a stake in the K2, in contrast to Van Rooyen's contention that BCSC was never going to be the owner of K2.

[24] Bestel shows that Van Rooyen's version is demonstrably false if one has regard to and exchanges put up by him, in his opposing affidavit. These were contained in the annexures to agreements in terms of which BCSC sold shareholding in K2 to each of the investors without Bestel concluding the agreements with the investors, conflicts with the version put up by Van Rooyen. This position is made worse in lieu of Van Rooyen's explanation of the structure to Golding.

[25] The respondents are of the view that the factual disputes are best determined by way of an action and not by motion proceedings. Furthermore, there is a lis pending that should follow that normal course to steer the determination of this matter. However, what serves before me is firstly an eviction from the premises owned by K2 and secondly, in relation to the business conducted on it, for the restraint of the respondents. Both of which relates to a commercial eviction.

[26] In respect of the issue of an interdict restraining the respondents from using any of the assets of the applicants for commercial purposes the requirements for an interdict are trite.¹ In this regard the relief sought by applicants is that of final relief. First applicant is the owner of the immovable property. Second applicant is the owner of the business

¹ Rule 6 (12) Uniform Rules of Court: Superior Court Practice, Erasmus.

conducted on the property of first applicant. Therefore, the applicants meet the first requirement of possessing a clear right.

[27] How the two investors came to be in possession of the premises is unclear. According to Bestel the two investors and Van Rooyen do not have permission to occupy the resort from the first applicant's board of directors, at the very least, not any longer. To this end, applicants seek to interdict the investors also from using its assets as the investors and Van Rooyen continue to operate the resort for the benefit of MDH unlawfully. In this regard the injury is the continued occupation and the use in competition with the applicants.

[28] The underlying problem is that Van Rooyen has not accounted to Bestel hampering the determination of the investors transfer of shareholding in K2. This is the crux. This underlying issue which respondents rely upon, in the guise of a factual dispute to resist both the issues, however, respondents lose sight of the current legal position. Bestel is the sole director of both applicants. On Van Rooyen's own version he occupied the resort and utilised it for fourth respondents benefit. It is not denied by Bestel that second and third respondents through the injection of €300,000 as investors into the great plan would in return hold a 25% interest in first applicant.

[29] It appears the investment happened; however, applicants did not see the money in either of their bank accounts as it was contended that there was a short payment. It is here that the wheels started coming off. According to Bestel, the investors paid their investment to Van Rooyen. This is not denied by Van Rooyen who according to him, utilized these funds to manage the resort.

[30] Bestel has shown that the applicants have no alternative remedy in respect of the eviction and the unlawful competition, particularly since the defences raised by the respondents do not support their defences to the main action. As to an alternative remedy, the current lis (the debatement case) in my view, as a defence, is unsustainable.

[31] Van Rooyen opposes the eviction on the basis that he wants the court to accept that the business premises are his primary residence. Firstly, there is no escaping the nature of the business. It is in the hospitality sector which may include sleeping at the accommodation of the business premises. However, it is a commercial concern. I found it hard to accept that this is Van Rooyen's primary residence. I say so because of what is before me - he disclosed an address at 2[...] T[...] Ave, B[...], Cape Town, in his answering affidavit *"my address is 2[...] T[...] Avenue, B[...], Cape Town. Although I stay a lot of time at portion 4[...] of the Farm A[...] of 1[...] Swellendam."*²

[32] I accept that Van Rooyen may for such purposes and in furtherance of his duties has slept at the business premises. But that had changed due to him not being the manager for the applicants any longer. However, if one looks at what the definition of primary residence is, it is far-fetched to accept the business premises to be Van Rooyen's primary residence. Neither does the PIE Act assist Van Rooyen. This is a commercially run business and Van Rooyen falls outside the definition of a vulnerable person under PIE and the same argument therefore applies to the investors.

[33] Applicants lean on *Stay at South Point Properties (Pty) Ltd v Mqulwana and Others*³, where the appellant was nonsuited for failure to comply with PIE finding the application fatally defective. *"The appellant contended that the residents did not constitute the respondents home ,and if evicted , they would not be rendered homeless because they had homes to go to".*⁴ However, by the time the hearing of that application took place the students had already vacated the accommodation and although the issue became moot, because of the wider and far-reaching implications of the evictions of students from student accommodation the appeal hearing proceeded.

² Page 85 of the record

³ 2024 (2) SA 640 (SCA)

⁴ Ibid para [4]

[34] The court went on to consider what is meant to be a “*home*”, and followed the approach in Barnett⁵, that the sensible and ordinary meaning of the home is a place with regular occupation with some degree of permanence. The court found that the eviction does not render the students homeless because the students had homes other than the residence. Importantly the student accommodation was said to be precisely that, “*accommodation is not a home, it is a residence, of limited duration, for a specific purpose that is time bound by the academic year...*”.⁶

[35] Accordingly, the court found that PIE did not apply to the unlawful occupation by the respondents of the student accommodation having found, if “*the occupation of land does not constitute the home of an occupier, PIE does not find application.*”⁷ Since Van Rooyen is no longer treated as an employee, he no longer holds the position as employee and by implication any benefits which he may have derived from such employment is terminated. Accordingly, the first respondent’s reliance on PIE is opportunistic.

Conclusion

[36] Whilst I agree that juristic persona acts only through its board and permission to occupy can only be granted by its director, Bestel. There is no escaping that the two investors had ventured their money into a great plan which now has bellied up and as sympathetic as I may be with the investors, their rights are hanging on a thread as against the legal title that applicants have, thus leaving the investors in the proverbial cold. The sooner the debatement of account is resolved, the sooner the investors will know where they stand. However, as it currently is, the investors have not raised a sustainable defence to the issues at hand in this application.

⁵ Barnett and Others v Minister of Land Affairs and Others (304/06) [2007] ZASCA 95; 2007 (6) SA 313 (SCA) 2007 (11) BCLR 1214 (SCA) (6 September 2007) para [37] - [38]

⁶ Supra Stay at South Point Properties Pty Ltd para [17]

⁷ Supra para [9]

[37] The respondents' basis of opposition to resist the eviction, one that Van Rooyen resides at the resort and accordingly the provision of PIE applies, cannot be correct for reasons furnished earlier. In any event Van Rooyen confirms that neither of the investors are resident at the resort therefore this defence only applies to him. In any event even if one concedes that his duties as the erstwhile manager of K2 and BCSC would be such that he would from time to time overnight there, it is clear that he is no longer employed by the applicants when Van Rooyen was dismissed pursuant to a disciplinary hearing which he did not attend on 13 March 2024 and therefore there is no merit in his defence.

[38] The second defence raised is that none of the respondents are in unlawful occupation because according to them they are entitled to the majority shareholding in K2. It was argued that a party's mere ownership of shareholding in an entity does not entitle them to unfettered use or occupation, of that entity's property. This is so because juristic entities act through their directors.

[39] As such the competition is ongoing as the respondents are intent to continue with their business. Accordingly, no weight can be attached to Van Rooyen's version that he and the respondents are not competing with the applicant when the facts show otherwise.

[40] The facts upon which the applicants rely for the relief sought in the main application is notwithstanding the denials by the respondents clear and not contested on a genuine and bona fide basis.

[41] Whilst it is my view that Van Rooyen has no legal basis to be in possession of the premises or the business, applicants succeed with the interdict and eviction against him.

[42] The two investors have not disclosed the basis for their occupation save for the investment destined for the applicants, however it was paid elsewhere, thus leaving them with no protection ether.

[43] In the result, since Bestel is the only share holder of the applicants and the dispute regarding first to third respondents in relation to their shareholding in K2, is of no consequence. Simply put, Bestel is the sole director of both K2 and BCSC. The respondents including fourth respondent, occupy the premises unlawfully without the consent of the board of directors of K2 and are unlawfully using its assets including that of BCSC, in the sense that they have taken control thereof. The respondents conduct the business of the resort at the property with proceeds flowing to the fourth respondent, (admittedly so, by Van Rooyen) to the exclusion of the applicants. Lastly the respondents do not have the permission of K2, or BCSC, through Bestel as the director, to occupy the resort or to utilize it for any purpose.

The Counter Application

[44] The respondents have failed in respect of two issues, firstly whether it is a proper for the respondents to join Bestel as a third party, to then claim the relief that Bestel transfers shareholding in the applicants to them. To this end Bestel relies on the pending *lis*. The dispute pertaining to the shareholding of the respondents is not relevant to the main application which relates to the eviction on the basis that the respondents do not have the applicants' permission to occupy the premises. Therefore, the relief sought in the counter application has no bearing to that sought in the main application and it is not an appropriate for Bestel to be joined to these proceedings.

[45] To make out a case for the substantive relief against Bestel in the counter application, the respondents do not seek direct relief against any of the applicants. Instead, they seek to introduce an alternative *lis* between themselves and Bestel pertaining to the subject matter that is unrelated to the main application.

[46] It is trite that the test to determine whether there is a misjoinder is whether the party to be joined has a direct and substantial legal interest in the subject matter of the litigation which might be affected prejudicially by the judgment of the Court.⁸

[47] I agree with the Applicants that a party who has a financial or commercial interest in the relief claimed, but no legal interest, should not be joined as a Plaintiff.⁹ Bestel's joinder and the introduction of the claim under the counter application is also not justified based on convenience. The factual matrix of the counter application is entirely distinguishable to the main application and the matter turns on significant factual disputes namely that of the payment by the investors, the content of the agreement between Bestel and Van Rooyen pertaining to the structure of the business; and the way Van Rooyen utilised funds paid to him by the investors

[48] The respondents have raised wide ranging disputes of fact and Bestel has replied to it in detail pointing out the incorrect and conflicting submissions made by Van Rooyen with the shareholder dispute as the crux of the matter especially that of the shareholding of K2. The respondents sought to rely on the factual disputes as grounds for it to be referred to oral evidence. I disagree for the reason that the respondents have failed to raise a defence to the main action.

The application to strike out

[49] The respondents sought an application to strike out certain paragraphs of the replying affidavit on the basis that it contains new matter and in certain instances, hearsay, privileged or irrelevant and vexatious.

[50] The first two objections being paragraphs 23-24, relates to Van Rooyen's initial occupation of the resort on account of his position as manager of both applicants and his

⁸ Henri Viljoen (Pty) Ltd v Awerbusch Brothers 1953 (2) SA 151 (O) at 169H. See also National Union of Metalworkers of South Africa v Intervale (Pty) Ltd 2015 (2) BCLR 182 (CC) para14.

⁹ Agriplas (Pty) Ltd v Andrag Ampersand Sons (Pty) Ltd 1981 (4) SA 873 (C) at 890B-C

dismissal. I see no difficulty with this, it certainly does not constitute new matter as alleged by the respondents of the applicant's aim to patch up what was not contained in the founding affidavit.

[51] However, in my view the founding affidavit made references to Van Rooyen's dismissal as manager of the applicants when the disciplinary hearing took place on 13 March 2024. This was not dealt with by Van Rooyen in his answering affidavit. To that extent the strike out will not be upheld.

[52] In respect of paragraph 38, being Van Rooyen's e-mail to Bestel at annexure FA 14 wherein Van Rooyen's refusal to attend the disciplinary hearing and the inferences made by Bestel flowing from it introduces new evidence.

[53] As for the complaints at paragraphs 39 that applicants are parachuting in the reply and therefore the content is inadmissible. I agree that Bestel was referring to the Kilbride application where certain admissions were made by Van Rooyen was dealt with by Van Rooyen in the answering affidavit, however Van Rooyen dismissed it as a bald allegation.

[54] As such to the extent that paragraphs 38 and paragraph 39 are considered hearsay and falls to be struck out. The same applies to paragraph 40.

[55] As for paragraphs 69 and 114, that relating to settlement negotiations as privileged, are self-explanatory therefore also struck from the record.

Costs

[56] There are no reasons to depart from the usual costs order that costs follow the result.

[57] **Accordingly it is ordered that;**

1. The counter application is dismissed with costs.

2. The joinder application is refused with costs.
3. Paragraphs 38, 39, 40, 69 and 114 are struck out from applicants replying affidavit.
4. The first respondent and fourth respondents be evicted from Portion 4[...] of the Farm A[...], Erf 1[...], Swellendam, Western Cape.
5. That the respondents be interdicted and restrained from using any of the assets of the applicants for any commercial purposes.
6. The respondents are liable for costs as between party and party on scale B including the costs of counsel where so employed.

PARKER AJ

Acting Judge of the High Court

Appearances

Counsel for the Applicants: Adv Pieter-Schalk Bothma

Instructed by: TSP Attorneys

Counsel for the First, Second, Third and
Fourth Respondents: Adv R Patrick SC

Instructed by: Scherman & Associates

This judgment was handed down electronically by circulation to the parties' representatives by email.