IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 26980/2016

In the matter between:

NILGRA FLATS CC Applicant

and

CENTRAL COUNTRY LODGE CC First Respondent

ZIAD NOUR Second Respondent

Case Summary: Ejectment – by means of *rei vindicatio* – applicant's ownership and respondents' possession establish entitlement to ejectment of respondents – Only defence raised against *rei vindicatio* is that first respondent is lawfully in possession as improvement lien holder and second respondent possesses for and on behalf of first respondent – elements of defence not established and exclusive possession of the property not proved – Ejectment ordered.

JUDGMENT

MEYER, J

[1] This is an application that is brought by way of urgency in which the applicant, Nilgra Flats CC, seeks the ejectment of the first respondent, Central Country Lodge

CC, and of the second respondent, Mr Ziad Nour, from an immovable property known as Holding 31, Beverley Agricultural Holdings, Registration Division JR, in extent 2,0234 hectares, with street address at 31 Mulbarton Road, Beverley, Lonehill, Gauteng ('the property') by means of the *rei vindicatio*. The applicant claims that the respondents restore possession of the property and its contents to it immediately. The second respondent controls and is the sole member of the first respondent. The application, despite the respondents' protestation, is urgent.

[2] The applicant is the owner of the property and the respondents are currently in possession of it. The property is developed and equipped to be operated as a lodge. A number of people reside in certain units of the lodge. The applicant does not seek any order against them. In addition, although it is disputed, the second respondent alleges that he too occupies a unit, namely unit 201. He freely admits that he is an 'unlawful occupier' of that unit. The applicant also does not seek his eviction from that unit for the reason that it did not bring this application in compliance with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.

[3] The applicant's ownership and the respondents' possession establish the applicant's entitlement to the ejectment of the respondents from the property, and the onus is upon them to establish a right to possession of the property, or other valid defence (see *De Villiers v Potgieter and others NNO* 2007 (2) SA 311 (SCA), para 12; *Chetty v Naidoo* 1974 (3) SA 13 (A), at 20A-E). The only defence against the *rei vindicatio* raised by the first respondent is that it is lawfully in possession of the property as an improvement lien holder. The defence of the second defendant is that he is in possession of the property for and on behalf of the first respondent lien holder. An improvement lien provides a dilatory defence against a *rei vindicatio* and,

if successfully raised, the owner may not recover possession of the property from a person who is lawfully in possession and who has an underlying valid enrichment claim, unless and until that person has been compensated. (See *Singh v Santam Insurance Ltd* 1997 (1) SA 291 (SCA).)

[4] I briefly deal with the history to the present litigation. In June 2011, the second respondent together with a business partner, Mr Jonathan Van der Westhuizen, entered into a lease agreement in respect of the property with Town and Country Hotel CC (Town and Country). During the subsistence of that lease the first respondent conducted the business of a lodge and 'full function venue' at the property. In September 2013 that lease terminated when a lease agreement was purportedly concluded between Town and Country and 'Life Recovery Centre (Pty) Limited' (Life Recovery). It later transpired that Life Recovery was never incorporated. The envisaged rehabilitation centre that would have been conducted by Life Recovery on the property, accordingly, did not realise. That purported lease was 'terminated' in December 2013. From January until August 2014 the second respondent personally conducted a lodge business at the property.

[5] Oasis Lonehill Hotel (Pty) Limited (Oasis) became the tenant of the property in terms of a written lease agreement concluded between it and the applicant. The second respondent was the sole shareholder of Oasis. It conducted the lodge business from August 2014. Due to non-payment of rental and other charges, the lease agreement was cancelled on 25 May 2015. The cancellation was disputed, and was ultimately resolved in the applicant's favour in arbitration proceedings before Bham SC on 17 June 2016. In terms of the award, Oasis was obliged to vacate the property with immediate effect and return it, with the movables thereon, to

the applicant. The second respondent, on behalf of Oasis, refused to hand over possession of the property to the applicant. On Monday, 20 June 2016, the attorney then acting for the second respondent and Oasis, sent a letter to the applicant's attorney, Mr Kerr-Phillips, informing him that Oasis was no longer in possession of the property, but that the second respondent-

'. . . continues to retain possession of the property on behalf of Central Country Lodge CC in respect of its lien over the property for renovations effected thereto'.

[6] The respondents contend that the first respondent never surrendered possession of the property in September 2013 when it ceased conducting the business of a lodge and 'full function venue' at the property and that it is entitled to retain possession of the property by virtue of its lien.

[7] In order to succeed with the dilatory defence provided by a lien, a party must prove: (a) that it is in lawful possession; (b) that the expenses were necessary for the preservation of the property or useful for its improvement; (c) the actual expenses and the extent of the enrichment of the property owner (because the lien only covers the lesser of the two amounts); (d) that the property owner's enrichment is unjustified; and (e) that there was no contractual arrangement between the parties, or a third person, in respect of the expenses. A lien is simply security for a debt. It does not entitle the possessor to use the property. Loss of possession destroys a lien, which cannot be revived by recovery of possession. (See Harms *Amler's Precedents of Pleadings* 6th Ed at 226 and the authorities therein cited.) Exclusive possession of the property forming the subject matter of the lien is an absolute requisite for its operation. (See *LAWSA* Vol 15 1st Re-issue para 51.)

[8] The respondents did not establish the defence provided by a lien at least for two reasons. First, they dismally failed to establish the requirements for that defence and, second, they did not prove that the first respondent had exclusive possession of the property since September 2013 (when it ceased conducting the business of a lodge) until 20 June 2016 (when the respondents' erstwhile attorney notified the applicant 's attorney that the second respondent continues to retain possession of the property on behalf of the first respondent).

[9] The totality of the respondents' allegations relating to its underlying claim are that the first respondent effected improvements and renovations to the property and that the total cost thereof amounted to R5 217 500. They attach a few documents in support of their allegations that the first respondent built a pool and a lapa. These documents fall substantially short of the alleged amount of the claim, and only show improvements, not renovations. It is common cause that the first respondent conducted business at the property during the period June 2011 to September 2013. Also that the first respondent was not a party to any lease agreement with the applicant. The respondents deny the validity of the agreement between Town and Country as lessor and the second respondent and Van der Westhuizen as lessees. But they do not state on what basis the first respondent was entitled to be in possession of the property. They have, therefore, failed to establish that the first respondent ever had lawful possession of the property. They have furthermore not shown that the expenses were necessary for the preservation of the property, or that they were useful improvements. They have not proven the actual expenses, nor the extent of the enrichment of the applicant, or that it was unjustified. Their failure to do so also precludes the applicant from seeking an order for the release of the property

against the provision of security for the first respondent's claim. (See See Harms *Amler's Precedents of Pleadings* 6th Ed at 227 and the authorities therein cited.)

[10] It is trite that affidavits in motion proceedings constitute both pleadings and evidence. The answering affidavit lacks such facts as would be necessary for determining whether a lien was conferred upon the first respondent by operation of law. The allegations that the first respondent effected improvements and renovations to the property at a total cost of R5 217 500 and that it has a lien are mere conclusions with the primary facts on which they depend omitted. (See *Radebe and others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A), at 793C-F.)

[11] The respondents allege that the first respondent never surrendered possession of the property. Life Recovery would have exercised concurrent possession with the first respondent, so they allege, had the business begun to operate, because the second respondent would have been the controlling member of Life Recovery and the first respondent, and accordingly would have permitted concurrent possession. The first respondent 'enjoyed concurrent possession with Oasis', the respondents allege, because the second respondent was the controlling member of Oasis and accordingly permitted the concurrent possession. They also allege that the first respondent 'exercised concurrent possession with other entities over the relevant period'. The applicant takes issue with the first respondent's alleged concurrent or joint possession of the property during the period September 2013 until June 2016. I need not consider this issue. The first respondent was not in exclusive possession of the property during that period and the alleged lien could not be revived when it recovered exclusive possession of the property on 20 June 2016.

I should add that our law recognises the concept of 'joint' possession (*Rosenbuch v Rosenbuch* 1975 (1) SA 181 (W); *Shapiro v Roth* 1911 WLD 43; Van der Merwe *Sakereg* 102-103) but not that of 'concurrent' possession.

[12] Finally, the matter of costs. The applicant seeks a punitive costs order against the respondents. In all the circumstances of this case I am of the view that a deviation from the ordinary rule that the successful party is awarded costs as between party and party is warranted and an order on the attorney and client scale is appropriate. Such an order would express this court's disapproval of the conduct of the respondents herein. The second respondent is the sole member of the first respondent and the sole shareholder of Oasis. He controls both corporate entities. He is the person who represented both Oasis in the arbitration proceedings and the first respondent in these proceedings. He puts on different corporate hats as and when it suits him. The second respondent blatantly disregarded the award of the arbitrator by not restoring the property and movable assets on the property to the applicant. Furthermore, neither the first respondent nor the second respondent has any right to use the applicant's property, whether or not the first respondent enjoyed a lien over the property. Nevertheless, the second respondent, by his own admission, occupies a unit and uses the property. The respondents, at the very least, permit others to use the applicant's property. Such use is in blatant disregard of the applicant's rights as property owner. The respondents have shown a general lack of candour as to the activities that are currently undertaken on the property. There is no justifiable reason why the applicant should financially be prejudiced as a result of this litigation. It has been put through the unnecessary trouble of enforcing its rights as property owner.

[13] In the result, the following order is made:

(a) The first respondent and any person claiming possession by, through or under the first respondent shall vacate the property situated at 31 Mulbarton Road, Beverley, described as Holding 31 Beverley Agricultural Holdings, Registration Division J.R., Gauteng (the property) and restore possession of the property with its contents to the applicant immediately.

(b) The second respondent and any person claiming possession by, through or under the second respondent shall vacate the property and restore possession of the property with its contents to the applicant immediately.

(c) The sheriff of this court is authorised to eject the first and second respondents from the property in the event of them not vacating the property and restoring possession thereof, together with its contents, to the applicant, with immediate effect.

(d) The occupants of the individual units on the property, including the second respondent in respect of unit 201, are not subject to this order.

(e) The first and second respondents shall pay the costs of this application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	18 August 2016
Date of judgment:	19 August 2016
Counsel for applicant:	A Bester
Instructed by:	Matthew Kerr-Phillips, Norwood, Johannesburg
Counsel for respondent:	R Bhima
Instructed by:	Bloom Attorneys

C/o Richter Attorneys, Parkhurst, Johannesburg