THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 267/13

In the matter between:

WILLEM PHEIFFER	**Appellant**
and	
CORNELIUS JOHANNES VAN WYK	**First Respondent**
AAGJE VAN WYK	**Second**
Respondent	
MARDE (PTY) LTD	**Third Respondent**
MARIUS EKSTEEN	**Fourth Respondent**

Neutral citation: *Pheiffer v Van Wyk* (267/13) [2014] ZASCA 87 (30 May 2014)

Coram: Mthiyane DP, Lewis, Mhlantla, Saldulker JJA and Mathopo AJA

Heard: 19 May 2014

Delivered: 30 May 2014

Summary: Enrichment lien ─ non-owner of property ordered by high court to provide security in lieu of a lien over property: no reason why enrichment lien cannot be secured by guarantee furnished by person

other than owner.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Hughes AJ sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The order of the high court is set aside and replaced with the following:

'(a) The appellant is ordered to vacate Portion 2, Farm Bleshoenderpan 211, Registration Division MR, Dardanelin, Alldays, Limpopo Province (the property) with immediate effect.

(b) The guarantee provided by ABSA Bank Ltd on 7 February 2013 on behalf of Marde (Edms) Bpk is sufficient security for the appellant's enrichment claim in respect of improvements to the property.

(c) The guarantee shall lapse should the appellant not institute action as contemplated in the order of the high court, within 30 days of this order.'

JUDGMENT

Mathopo AJA (Mthiyane DP, Lewis, Mhlantla and Saldulker JJA concurring):

[1] On 19 May 2014 this appeal was heard and the order set out above was made by the court. It was then indicated that the reasons for the order would follow. These are the reasons.

[2] The issue in the appeal is whether the security tendered by the third respondent, Marde (Pty) Ltd, is sufficient for the appellant's (Willem Pheiffer) enrichment claim in respect of improvements to the property of the first and second respondents (the Van Wyks). The North Gauteng High Court, Pretoria (Hughes AJ) answered this question in

favour of the Van Wyks. It declared the agreement between the Van Wyks and Pheiffer null and void *ab initio*. It ordered the third respondent to file security in the amount of R2 million in lieu of Pheiffer's right of retention in respect of the property. Furthermore, Pheiffer was given a period of three months to vacate the property and was ordered to institute an action for enrichment within 14 days of the order. The appeal is directed against the decision that the third respondent and not the Van Wyks should file security and serves before us with the leave of the high court.

[3] A brief background to the matter is as follows. During October 2001 the first respondent (Cornelius Johannes van Wyk) concluded an oral agreement with the appellant for the purchase of the property called Portion 2 of Farm Bleshoenderpan 211, Registration Division MR Limpopo Province (the property) for the purchase price of R3.5 million payable against registration of the property in the name of Pheiffer. The property was jointly owned by Van Wyk and his wife Mrs Aagje van Wyk (the second respondent) to whom he was married in community of property. On 26 October 2011 Pheiffer was given occupation of the property.

[4] Some time later, Pheiffer prepared a document described as '*Koop van Plaas'*. This document, which purported to be an agreement of sale of the property, was signed on 1 March 2011 by Van Wyk only. The document was antedated to 26 March 2010. It read as follows:

'*Hiermee koop Mr W Pfeiffer … die plaas genaamd Kilimanjaro, Ged: 2, Bleshoenderpan, Aldays, soos hy staan boerstoots (sic) vanaf Mr en Mev CJ Van Wyk … vir die bedrag van R3 500 000,00 … Die plaas word aan Mr Pfeiffer verkoop met voorwaardes soos op aanhangsel uiteengesit.*'

[5] This document contained several terms which conferred certain rights on Pheiffer. These included a right to occupy the property and effect improvements as he deemed fit. He was also obliged to repair any damage to the farm. The Van Wyks were granted permission to visit the farm. Attorneys were appointed to prepare a deed of sale

between the parties. In addition, Mr van Wyk transferred certain accounts, notably the Eskom account for electricity, to Pheiffer.

[6] It is common cause that despite numerous indulgences Pheiffer failed to raise the finance necessary to purchase the property, with the result that the Van Wyks purported to cancel the agreement. On 13 June 2012 they concluded a new agreement with the third respondent represented by Marius Eksteen (the fourth respondent). In terms of this agreement, the Van Wyks were obliged to grant undisturbed possession of the farm to the third respondent on signature of the agreement. When the third respondent and Marius Eksteen attempted to take occupation of the property from Pheiffer, who was still in occupation, they were met with an urgent spoliation application which was granted against them: the Van Wyks were interdicted from transferring the property to the third respondent.

[7] When the Van Wyks sought to evict Pheiffer, he raised the improvement lien as a defence. In the high court, Pheiffer also raised a number of defences against the eviction claim, and contended that he had a valid and binding agreement in the 'Koop van Plaas' document with Mr Van Wyk. The high court, in a detailed analysis of the facts and law, held that the agreement was void *ab initio*. This finding is not challenged before us. I consider the concession as to invalidity to have been properly made. The issue relating to the form of security to be tendered was not then placed in dispute. The high court, in the absence of any dispute regarding the form of security, exercised its discretion and ordered the third respondent to file security in the amount of R2 million and ordered that Pheiffer vacate the property.

[8] On 8 February 2013 the third respondent filed a bank guarantee issued by ABSA Bank. It undertook to pay Pheiffer any sum not exceeding R2 million upon receipt of a written demand stating that he had obtained judgment in the high court against the Van Wyks in respect of the alleged improvements made by him on the farm. The funds

would eventually be released upon the production of a certified copy of the court order for the judgment.

[9] On appeal the lien and the form of security ordered and subsequently furnished, are the central issues. Pheiffer contended that the high court erred in the exercise of its discretion in ordering security instead of a lien because, so he argued, the security was inadequate and meaningless since the third respondent was not the owner of the property. Consequently, the issue on appeal was narrowed to whether the high court was correct in the exercise of its discretion since the third respondent was not the owner of the property, and that no claim for enrichment lies against it. The argument is that security in substitution of Pheiffer's improvement lien is not sufficient to secure the enrichment claim. It is thus the right to the improvement lien and the adequacy of the guarantee provided by the third respondent that is central to the dispute between the parties on appeal.

[10] Before these arguments are considered, it is necessary to place the issue in its proper perspective with regard to the legal principles governing improvement liens. To successfully raise the defence of a lien, it must be alleged and proved that (a) the person has possession of the object; (b) that the expenses incurred were necessary for the salvage of the property or that it was useful for the improvement of the object (improvement lien).

[11] The possessor of the property who has a debtor/creditor lien is not required to relinquish possession until such time as the full contractual amount is paid to him. A debtor/creditor lien is not a form of real security. It is based upon a contract and extends to all expenditure which the lien holder has incurred upon the property in terms of a contract express or implied with another party. A lien holder may retain the property as against the contracting party (but not against the third parties) until he has been compensated for the work and costs incurred. This lien does not exist apart from the

contract and can be a defence to any vindicatory action.

[12] A real lien (an enrichment lien) is afforded a person who has expended money or labour on another's property without any prior contractual relationship between the parties. The lien holder is entitled to retain possession until his enrichment claim has been met. It is an established principle of our law that the *owner* of the property subject to a right of retention may defeat the lien by furnishing adequate security for the payment of the debt.

[13] It is common cause that Pheiffer was granted permission to effect the improvements on the property on the basis that he would be able to secure the finance necessary to purchase the property. It is also correct that the mere offer or granting of security by the owner does not confer any right of possession on the owner, but a court may, in its discretion, order cessation of possession against the provision of security. The security need not cover the cost of a possible action by the lien holder since the security serves as a substitution for the lien and not as an additional security. A lien may be defeated by the owner of the property against whom an enrichment action lies by furnishing security for the improvements effected which can take place in the form of either a payment into court or the furnishing of a banker's guarantee.

[14] In this court, Pheiffer did not assert any contractual entitlement to remain on the property but contended that as a lien holder in respect of the improvements amounting to at least R2 million, effected with the consent of Van Wyk, he would be obliged to vacate the property only against adequate and proper security in respect of his improvement lien. What Pheiffer now contends is that the security that has been tendered is not acceptable because it emanated from the third respondent, who is not yet the owner of the property and that an enrichment claim would not lie against it. The result would be that the right of retention would be of no value.

[15] The submission of Pheiffer is that it is not equitable to make him lose his security (improvement lien) which is a real right and substitute it with a personal right against the third party. On this basis, it was contended that the discretion cannot be exercised to substitute security by a third party. It was argued that the court below failed to appreciate that there has to be a *nexus* between the debt and the lien which it secures before it could exercise its discretion. The essence of this argument is that as there was no debt owed to Pheiffer by the third respondent, ordering the third respondent, who is not a party to any enrichment action, to provide security for the Van Wyks against a claim based on unjustified enrichment is not sufficient.

[16] The Van Wyks on the other hand submit that the security tendered by the third respondent in substitution of Pheiffer's improvement lien is adequate. It was further contended that, by means of the sale and allowing the third respondent to occupy the property, the guarantee which was tendered would provide Pheiffer with the necessary security to enable his claim to be paid once he has fully quantified it and has obtained a judgment to that effect. What the third respondent has effectively sought to achieve as an interested party and new purchaser by providing security is two-fold. First, it is to assist the Van Wyks to obtain restoration of their property. Second, to make it possible that it obtains vacant possession which Pheiffer successfully resisted. The argument advanced is that the longer Pheiffer continues to refuse to vacate the property, the greater the prejudice the respondents will suffer as the value of the property will be diminished.

[17] It is apposite at this stage to consider the cases relevant to this issue. In *Bombay Properties (Pty) Ltd* v *Ferrox Construction* 1996 (2) SA 853 (W) Coetzee J had distinguished between a debtor/creditor lien, in which the person relying on a *jus retentionis* had an enforceable claim in contract against the owner of the property, and an enrichment / improvement lien, where there was no such contractual claim available to the possessor, and where the court accordingly did not have a discretion to deprive

the lien holder of its possession and to substitute for that a meaningless form of security. He concluded that in the case of a *jus retentionis* based on an enrichment lien, the court does not have jurisdiction to deprive the lien holder of his possession and that the substitute security provided by a third party for such a lien would be meaningless since the respondent in that matter could not bring an enrichment claim against a non-owner.

[18] In *Sandton Square Finance (Pty) Ltd and another* v *Vigliotti & others* 1997 (1) SA 826 (W), De Villiers J declined to follow the judgment in *Bombay Properties* on the basis that it was wrong. He concluded that a court has a discretion in a case of an improvement lien similar to the one it has in the case of a debtor/creditor lien. De Villiers J further held that it is illogical that the court should have a discretion in the case of a debtor/creditor lien but not in the case of an enrichment lien. Accordingly, the fact that a debtor/creditor lien flows from a personal right, while an enrichment lien affords a real right, was not a basis for such a distinction because in both cases the lien afforded the holder thereof a form of security for this claim and concluded that there is no reason for allowing the substitution of the security in one case but not in the other.

[19] In this regard De Villiers J went further and referred at 831D-F to Voet 16.2.21 (Gane's translation) which said the following:

'But is one who has a right of retention held liable to restore the thing to his opponent whenever the latter tenders sound security for the refund of expenses or the payment of wages? It appears that that ought to be left to the discretion of a circumspect judge according as it shall have become clear from circumstances either that he who ought to restore is deliberately aiming at holding back possession of the thing too long under cover of expenses or wages; or on the other hand that the person owing the expenses has it in mind to recover the thing under security, and then by a lengthy and pettifogging protraction of the suit to make the following up of the expenses, wages and the like a difficult matter for this opponent.'

De Villiers J further observed that Voet in this passage was dealing not only with debtor/creditor liens but also with improvement liens.

[20] It follows that the conclusion reached in the *Bombay Properties* case that in the case of a *jus retentionis* based on an enrichment lien, the court does not have a discretion to deprive the lien holder of his possession or that the substitute security for such a lien would be meaningless is clearly wrong. The *Sandton Square Finance* case made it clear that the court does have a discretion in respect of an enrichment lien. Quite clearly once it is established that a court has a discretion in relation to a debtor/creditor lien, there is no reason why such a distinction should not extend to the enrichment lien. On appeal counsel for Pheiffer did not persist with the argument that the approach in *Sandton Square* was wrong. It would consequently be untenable to allow substitution of security in the one case (debtor/creditor lien) but not in the other (enrichment lien).

[21] The principle articulated in the *Sandton Square Finance* case is sound and based on considerations of equity and justice. I do not agree with the contention that the security tendered by the third respondent is meaningless. In my view, once Pheiffer has fully quantified and proved his claim, he will be entitled to payment in respect of the improvements to the property. As soon as sufficient security has been tendered, Pheiffer has no basis to continue occupying the property. As the court below rightly held, he must vacate the property.

[22] In my view, the court below correctly exercised its discretion. In doing so it considered various factors: first, Pheiffer had been in possession of the property since October 2010, enjoying the use and privileges, which included movables such as vehicles, as well as other benefits attached for purposes of farm life. Secondly, he has to date not lodged his claim for improvements. Thirdly, the third respondent entered into a valid sale agreement with the Van Wyks on 13 June 2012. In terms of the agreement, the Van Wyks were obliged to grant occupation of the property to the third respondent on signature of the agreement.

[23] The final question is whether the guarantee filed by the third respondent is

sufficient. In my view, the guarantee is sufficient security for Pheiffer's enrichment claim in respect of the improvements on the farm in that it will cover a judgment debt obtained against the Van Wyks up to the sum of R2 million. Furthermore, the guarantee has been furnished by an interested party, the purchaser of the property who will enjoy the benefits of the improved property. There is thus no reason why the enrichment lien cannot be secured by the guarantee filed by the third respondent. All that is required from Pheiffer is for him to submit to the third respondent a written demand for the payment of such sums that have been granted by the court and a certified order of court that he has obtained judgment to that effect.

[24] It is for all the reasons set out above that the order referred to in the first paragraph was made.

R S Mathopo
Acting Judge of Appeal

Appearances

For the Appellant:	S J Reinders
	Instructed by:
	Bekker Attorneys, Pretoria
	c/o McIntyre & Van der Post, Bloemfontein
For the Respondents:	B Pretorius (with him W J Edeling)
	Instructed by:
	Van Zyl Le Roux Inc, Pretoria
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