

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 2326/2010
Date heard: 18 August 2010
Date delivered: 25 August 2010

In the matter between:

VUKA-UZENZELE PLANT HIRE & CIVILS CC

Applicant

and

HO HUP CORPORATIONS (SA) (PTY) LTD

First Respondent

MULTI PROJECTS

Second Respondent

FRANCOIS THERON

Third Respondent

J U D G M E N T

DAMBUZA, J:

[1] In this application, the applicant seeks an order that possession of a certain construction sites referred to as Joe Modise Peace Village, Kwanobuhle, Uitenhage and the Thusong Community Centre, Motherwell, Port Elizabeth, be restored to it, and that the respondents be interdicted from interfering with its exercise of its rights of lien over the properties.

[2] The applicant is a close corporation incorporated and registered in accordance with the Close Corporation Act, Act No. 69 of 1984, with its principal place of business at Farm Langford, Somerset East.

[3] The first respondent is a company registered with Limited Liability in terms of the Companies Act, Act 61 of 1973. The second respondent is referred to in the application as “business contractors” with a principal place of business at 5 Lilac Street, Sunridge, Port Elizabeth. The legal status of the second respondent is not apparent from the papers. The third respondent is an adult male who is in charge of the second respondent.

[4] Only the first respondent opposes the application.

[5] The background to this application, is that the first respondent was appointed by the Nelson Mandela Metropolitan Municipality (“the Municipality”) as the main contractor in a contract relating to construction of “low cost” houses in the Joe Modise Peace Village, Kwanobuhle, Uitenhage and the Thusong Community Centre, Motherwell, Port Elizabeth (the sites). Pursuant to the agreement between the Municipality and the first respondent, the first respondent concluded an oral agreement with the applicant in terms of which the applicant was appointed by the first respondent as a subcontractor, to construct civil works (including sewer lines, water reticulation and roads) at the aforesaid sites. In terms of the agreement concluded between the applicant and the first respondent, the applicant would execute the works in accordance with the specifications and bills of quantities that formed part of the main agreement between the first respondent and the municipality. The applicant would then invoice the first respondent for the work done. The first respondent would include the applicant’s invoices in its

(the first respondent's) invoices to the municipality, procure a "certificate" as stipulated in the main agreement and seek payment from the municipality. On receipt of payment from the municipality, the first respondent would then pay the applicant in terms of the invoices issued by the applicant.

[6] The dispute in these proceedings has its roots in the payments made, or not made by the first respondent in respect of the applicant's invoices.

[7] The applicant contends that the first respondent has failed to pay to it an amount R1,905,371.55 due in respect of invoices submitted by it to the first respondent although the first respondent has received payment from the municipality. As a result of this failure by the first respondent to make payment, so contends the applicant, the applicant suspended work at the sites but has remained thereon, exercising its right of lien over the sites. According to the applicant it exercises its right of lien by retaining employees on site during the day. At night and for security reasons, the equipment and material belonging to the applicant is moved to the Uitenhage site office.

[8] Whilst Almero Pienaar, on the one hand, denies in the answering affidavit, that the first respondent owes the applicant some moneys or moneys are due to the applicant for work done by the applicant on the sites, he, on the other hand states that one of the applicant's invoices (Annexure "F" to the founding papers) was only received by the first respondent on 29 July 2010 and that a certificate in respect thereof is yet to be issued by the municipality

and the money paid to the first respondent. He also states that another certificate for R469,000.00 has been verified and issued by the municipality and the first respondent awaits the payment of the money. I am therefore persuaded that a portion of the applicants fees for the work done remained unpaid when the second and third respondents started working on the sites; whether that was as a result of the first respondent itself not yet having been paid by the Municipality or not, is, in my view irrelevant for the purposes of this application.

[9] It is common cause that on 6 August 2010, the applicant wrote to the first respondent's attorneys demanding payment of the amount alleged to be owing and advising that it was suspending works as a result of first respondent's failure to pay the amount concerned. On 10 August 2010, the first respondent appointed the second and third respondents to continue with the works that the applicant had been performing at the sites. The second and third respondents then started working on the incomplete works left by the applicant. The applicant viewed the appointment of the second and third respondents as repudiation by the respondent, of the agreement between itself and the first respondent and cancelled the agreement. The applicant contends that the appointment of the second and third respondents as contractors in its place constitutes spoliation as it was in undisturbed possession of the sites, exercising its right of lien when the second and third respondents took occupation. I may add that while Almero Pienaar, the first respondent's financial advisor, denies, in the answering affidavit, that the

second and third respondent are currently working on the sites and thereby interfering with the applicant's exercise or the lien, Theunis Crous, who has also deposed to an answering affidavit on behalf of the first respondent, states that work continues at the sites and that restoration of the sites to the applicant is undesirable as it would result in cessation of the works and a delay in the completion of the housing development.

[10] The first respondent denies that the applicant is exercising a lien over the sites and contends that on 6 August 2010, after suspending work at the sites, the applicant abandoned the sites and the first respondent had to seek services of another contractor, that being the second and/or third respondent. It further denies that any moneys are owing to the applicant for work done by the applicant on sites.

[11] The first respondent raises, a number of issues with the application. Firstly it takes issue with service of the application on it at the Uitenhage site office. Pienaar refers to an email sent by the first respondent's attorneys to the applicant's attorneys on the day before the application was launched, in which the first respondent's attorneys indicated that the first respondent's registered address is 109 Westview Drive, Mill Park, Port Elizabeth. The first respondent contends that service of the application at the Uitenhage site was an irregular step which falls to be set aside.

[12] That the applicant's attorneys were advised that the first respondent's registered address is 109 Westview Drive, Mill Park, Port Elizabeth is apparent from the copy of the email which is part of the papers. The applicant contends, however that no *domicilium citandi et executandi* was chosen in the oral agreement and that in other matters in which the parties are involved, the first respondent's address has often changed to the extent that the applicant is not certain as to what the correct registered address is. My view is that although the first respondent's registered office was given as the Port Elizabeth address, Rule 4(1)(a)(v) of the Rules of this Court provides that, in the case of a corporation or a company, service of process shall be effected by the Sheriff by delivering a copy to a responsible employee thereof at its *registered office* or *its principal place of business* within the Court's jurisdiction. The Rule is permissive and does not purport to make service at the registered office obligatory, to the exclusion of service at the principal place of business within the jurisdiction.¹ Service at the principal place of business within the jurisdiction is good service; the two places are offered as alternatives for service. It is not the first respondent's case that the Uitenhage site is not its principal place of business. In any event, there is no evidence that the first respondent suffered prejudice as a result of service at the Uitenhage office. I am not persuaded that service of the application was irregular or so irregular as to be a nullity.

[13] A further issue raised by the first respondent is that the period of time within which the first respondent had to answer to the applicant's case was

¹ Refer to **Erasmus Superior Court Practice**, at B1-25.

extremely short and that it was prejudiced in the preparation of its case in answer to the applicant's claims. I deal with this issue in conjunction with the third issue raised by the first respondent, that being a denial that the application is urgent in nature as contended by the applicant.

[14] The first respondent contends that the applicant abandoned the sites on 5 August 2010, yet it waited until 12 August 2010 to launch the application. The reason for this delay, so it was submitted on behalf of the first respondent, is not set out in the applicant's papers.

[15] Assuming that the applicant does have a right of lien over the sites and that it has been dispossessed of such a right, there is, in my view, merit in the argument that the matter is inherently urgent because such dispossession renders the exercise of lien impossible. If a proper case has been made out for a spoliation order then a case of emergency exists. A spoliation order is intended to meet a case of emergency.² The application was launched on 11 August 2010. The notice of motion provides that the application would be heard on Thursday, 12 August 2010 at 14h00, thus giving the first respondent less than a day within which to prepare to appear in Court in response thereto. Christoffel Johannes Lombard, the sole member of the applicant, states in the founding affidavit that the application is by its nature inherently urgent in that, should the applicant fail to take the urgent steps, it shall lose its right of lien over the property. Lombard states further that the second and

² **Willowvale Estates CC and Another v Bryanmore Estates Ltd** 1990 (3) SA 954 (WLD) 956J.

third respondents are currently on site, continuing work on the work done by the applicant and as such interfering with the applicant's security on an ongoing basis and changing the work done, which has not yet been fully valued and cannot be valued once further work is done.

[16] The second and/or third respondent arrived at the site on 10 August 2010. On the same day the applicant's attorneys wrote to the first respondent's attorneys demanding payment and advising that the applicant was cancelling the agreement between the parties (first respondent and the applicant), pursuant to what it viewed as repudiation hereof by the first respondent. The applicant also warned of its intention to institute Court proceedings for what it viewed as interference with its right of lien. The application was instituted the day thereafter, on 11 August 2010. Given that the second and third respondents were only appointed on 10 August 2010 and, presumably, only started work on the sites thereafter, the applicant could not have instituted proceedings prior thereto. I can therefore find no basis for a conclusion that applicant delayed in not launching the application prior to 11 August 2010.

[17] A fourth issue raised by the first respondent is that, whilst the applicant seeks a rule *nisi* together with interim relief pending a return date, the relief sought is in effect final in nature and not an interim interdict. This is therefore, so contends the first respondent, a clear attempt by the applicant to escape the more onerous requirements stipulated for granting of a final

interdict. It is also the first respondent's case that the applicant has failed to satisfy the requirements for the order it seeks.

[18] It has indeed been held that the *mandament van spolie* bears some resemblance to a final interdict and that although the *mandament* has sometimes been equated with an interdict, there are differences between the two remedies.³ To obtain a spoliation order, the applicant must satisfy the Court that on the admitted or undisputed facts, it was in peaceful and undisturbed possession of the property of which it was despoiled and that the respondents deprived it of the possession.

[19] *Mr Spruyt* who appeared on behalf of the applicant submitted, correctly in my view, that I need not enquire into whether the applicant is or was at the time of dispossession, entitled to a right of lien over the sites. In possessory proceedings for protection of a right, the question whether or not the applicant has the right is irrelevant; what is relevant and has to be proved, is that the applicant *exercised* the right and not that he *owned* the right.⁴

[20] In this case therefore the relevant inquiry is whether, on 10 August 2010 when the first respondent appointed the second and third respondent to do the work that the applicant had been doing on the sites and when the second and third respondents started working at the sites, the applicant was exercising a right of lien over sites. Consequently, the contention by the first

³ See **Burnham v Neumeyer** 1917 TPD 630 at 633.

⁴ **Ninno Bonino v De Lange** 1906 TS 120

respondent that the applicant did not have a right of lien over the properties because such a right does not exist over state property and is, in any event, not available to sub-contractors, does not assist the first respondent.

[21] Even if I had to consider these arguments by the first respondent I was not referred to any authority, and I could not find any, in support of the submission that no right of lien exists over state property. For the submission that no right of lien accrues to a subcontractor as a result of an agreement concluded with the main contractor I was referred to two decisions of the Supreme Court of Appeal; in **Buzzard Electrical v Jan Smuts Avenue Investments** 1996 (4) SA 19 and **Wynland Construction v Ashley-Smith en Andere** 1985 (3) 798. A material distinguishing fact between these two cases and the one at hand is that in the cases referred to the right of retention was raised in action proceedings as opposed to application for spoliation order. Hence the Court inquired into the validity thereof (ie whether the subcontractor was the owner of the right). The decisions relied on do not, in my view, support the submission on behalf of the first respondent that generally a sub-contractor, and in particular, the applicant has no right of lien over a property on which it performed work and has a claim for unpaid moneys against the main contractor.⁵

[22] Turning to whether the applicant was exercising its right of lien and was in possession of the sites when the second and third respondents took

⁵ Sielberg and Schoeman's The Law of Property; 3rd edition; at 464-465;

occupation, the general principle is that the right of lien exists only if the lien holder is in possession of the thing to which his claim relates for as long as he retains possession thereof.⁶ It has been held that the physical element of possession implies *control* rather than *physical prehension*.⁷ Spoliation takes place if the applicant is deprived by the actions of the respondent of control over the property in question.⁸ The first respondent denies that the applicant was in control of the sites when the second and third respondents started working thereon. According to Pienaar the first respondent, through its security guards, always retained possession and control of the property and the applicant's access was therefore at the instance or with the permission of the first respondent. In any event, so contends the first respondent, the applicant has never been denied access to the sites. In this regard I was referred to the matter of **Naidoo NO and Another V Coega Development Corporation, Case No.: 1394/2008** an unreported decision of this Division delivered on 27 August 2008 in which I found that the applicant in an application for a spoliation order had not been in possession of the property of which he sought restoration. However my finding in that case was based on the nature of the relationship between the applicant and the respondent being that of an employer-employee (or *quasi*-employee). The applicant in **Naidoo's** case had been employed to provide "construction management services" to a development on the respondent's property. That, in my view is

⁶ Sielberberg and Schoeman; *Supra*; at 467.

⁷ Erasmus; Superior Court Practice; E9-7 in which is cited **Mbuku v Mdinwa** 1982 (1) SA 219 (TkSC) at 221.

⁸ **Administrator Cape v Ntshwaqela** 1990 (1) SA 705 (A)

clearly, distinguishable from a case such as the one at hand, in which the applicant was an (independent) subcontractor to the first respondent.

[23] The applicant, so it was submitted on behalf of the first respondent, had stopped working on the sites on 5 August 2010. It then released its workers thereafter. It was improbable, so the argument went, that the applicant would, every morning move its plant and equipment from where it had been kept overnight onto sites in exercise of its lien. Issue was also taken with the applicant's failure to specify the parts of the sites that its claim relates to, given that the sites are spread over a very wide area.

[24] It has been held that it is not necessary that the possession of the thing despoiled of be continuous.⁹ In the case of immovable property the continuous presence of the applicant or his or her servants on the premises is not required, if the nature of the operations which he or she conducts on the premises do not require his or her presence.¹⁰ In **Nienaber v Stuckey** 1946 AD the Court held that there was nothing to show that there was any need for the applicant to be on the land between the ploughing and planting; he had never given up physical possession of the land. Possession need not be of the whole property. Similarly, the applicant need not have lost the whole of the property at the hands of the invader before he or she is entitled to claim a

⁹ **Bennett Pringle v Adelaide Municipality** 1977 (1) SA 230 (E) at 233

¹⁰ Erasmus; *supra*, at E9-7

spoliation order: a partial deprivation of possession, without deprivation of the whole of it, is sufficient.¹¹

[25] The applicant could clearly not have been in possession of the entire sites. The evidence is that houses were being built on some portions of the sites. But I am satisfied that it was in possession of the portions where installation of infrastructure was in progress. In an email dated 6 August 2010 addressed by the applicant's attorneys to the first respondent, the applicants attorneys state that the applicant had suspended all works at the sites and that, amongst others, it was exercising a lien over the works at the Uitenhage and Motherwell (Port Elizabeth) sites as security for payment of all the first respondent's obligations and that if the respondent's obligations were not settled by close of business on 10 August 2010, it would institute proceedings. The applicant's attorneys further remind the first respondent that *"until such time as the matter is resolved, the lien is exercised to the exclusion of all others ...In particular, should any attempt be made to deprive our client of its possession in terms of the lien, we will approach the High Court as a matter of urgency"*.

[26] It is, in my view that this correspondence clearly shows the applicant's intention of remaining in possession of the sites. It is improbable, in my view, that the applicant would thereafter abandon the site as contended by the first respondent. Apart from merely stating that the applicant abandoned the sites, the respondent does not dispute that the applicant's machinery and

¹¹ Erasmus; *supra*, at E9-7 (also cited therein **Bennett v Pringle**; *supra*; at 233).

equipment remains on the site, whether that is at the site office or anywhere else on the site. It was, in my view, not necessary for the applicant to move the equipment to the particular portions of the sites where it had been working prior to suspending the works. By all accounts, the agreement between the applicant and the first respondent effectively came to an end on 5 August 2010 when the applicant stopped all work at the sites. As it is clearly set out in the emails from the applicant's attorneys the applicant's intention was to continue maintaining presence on the sites and it left its machinery and employees thereon for the purpose of exercising its lien. The dispute of fact as to the applicant's possession of the sites can be resolved on the papers. I am satisfied that the applicant has proved that it was in possession of the sites, exercising its lien and that it was despoiled of its possession.

[27] Consequently I issue the following order:

[27.1] The respondents are ordered to restore undisturbed possession of the properties constituting the Joe Modise Peace Village, Kwanobuhle, Uitenhage, and the Thusong Community Centre, Motherwell, Port Elizabeth projects forming the subject matter of the agreement as between the applicant and the first respondent to the applicant, pending the finalisation of an action to be instituted by the applicant against the first respondent for payment in the amount of R1,905,371.55, so to be instituted within 7 days of the granting of this Order;

[27.2] Should the applicant fail to institute the action, the provisions of paragraph 1 above shall lapse and be of no further force or effect;

[27.3] The first respondent is ordered to pay the applicant's costs as taxed, including the costs in respect of the standing down of the matter on 12 and 13 August 2010.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Mr M.P.Q Spruyt instructed by Friedman Scheckter of Port Elizabeth.

For the 1st respondent: Adv A. Beyleveld SC and Adv A.C. Moorhouse instructed by Fredericks Incorporated of Port Elizabeth.

No appearance for 2nd and 3rd respondents.