



IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4101/2022

In the matter between:

VARYMIX NINETEEN(PTY) LTD

APPLICANT

t/a DOMANI BUILDERS

[Reg No: 2011/ 025604/07]

And

MOTHEO TVET COLLEGE

FIRST RESPONDENT

LEBOHANG MICHAEL MOKHELE

SECOND RESPONDENT

SERVICES SECTOR EDUCATION

THIRD RESPONDENT

AND TRAINING AUTHORITY (Services SETA)

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **13 OCTOBER 2022**

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII on 16 NOVEMBER 2022. The date and time for hand-down is deemed to be on 16 NOVEMBER 2022 at 11H30.

- [1] The Applicant instituted an application against the First Respondent seeking an order to restore its possession of the property situated at 3 St Georges Street, Central Bloemfontein. The Applicant seeks further orders that (1) this court refer the alleged conduct of the Second Respondent to the Legal Practice Council for investigation and (2) that the Second Respondent be mulct with punitive costs *de bonis propriis*.
- [2] The First Respondent had initially expressed the intention to oppose the application but on 13 September 2022 it signalled its intent to withdraw its opposition by filing the Notice of Withdrawal. The First Respondent and the Applicant thereafter entered into settlement negotiations. The said negotiations were partly successful but it appears that not all issues were settled. The Applicant was, however, restored of its possession of the building and the keys and locks were handed back. This was in essence the main relief sought by the Applicant. It is submitted by the Applicant; which submission is not disputed by the First Respondent, that the relief sought has become moot save for the issue of costs;
- [3] At all material times the Second Respondent was the attorney and Director in the firm LM Mokhele Incorporated. He was also the attorney of the First Respondent in the dispute between the Applicant and the First Respondent. It is contended that the First Respondent spoliated the Applicant on the advice of the Second Respondent.
- [4] It is necessary to set out the background to this dispute. The Applicant is one of the sub-contractors appointed by Khato

Consulting Engineers Consortium to perform certain building works on the premises of the First Respondent. Khato was later dissolved as one of the partners and resiled from the consortium. It is the case of the Applicant that the Third Respondent took the place of Khato and funded the remaining of the building works on the premises of the First Respondent.

- [5] During 2020 at the request of the Third Respondent, the Applicant performed maintenance and building works on the premises of the First Respondent. The Applicant contends that no payment came forth at the stage for works rendered. As a result, the Applicant as it was in possession of sixteen buildings for which it had rendered work, elected to exercise its right of lien over those buildings it constructed or improved. The remaining buildings on the area that the Applicant had not performed work on, remained open and accessible to the general public.
- [6] At all relevant times, the Applicant was in possession of the chains which locked the doors of the premises and the keys to these chains of the First Respondent and thereby denying the employees, students and the general public to certain sections of the premises of the First Respondent. To this end, the Applicant effectively had control of who entered the premises and who left at any given time. It seems this prompted action by the First Respondent which led to correspondence by the Second Respondent to the Applicant as more set out below.
- [7] On 26 July 2022 the Second Respondent on behalf of LM Mokhele Attorneys Incorporated wrote to the Applicant as follows:
- “1....

2. *We confirm hereto that we have since instructed Our Client to cut all the barricades (sic) placed on their buildings so as to afford them an opportunity to render their duties as an educational institution.*
3. *Take notice further that, we have advised them that, your client has no right in law to lock (sic) out Our Client's staff as well as its students and your client's conduct continues to greatly prejudice Our Client's in carrying out their Constitutionally(sic) guaranteed mandate.*
- 4..."

- [8] It is the case of the Applicant that as a result of the advice of the Second Respondent all the locks and chains on the premises of the First Respondent were removed and the Applicant's retention over the buildings was unlawfully deprived off. This, according to the Applicant constituted spoliation. The Applicant contends that the First Respondent never had access to the keys to the buildings, locks or gates, under its control. The Applicant contends therefore that there is direct link between the advice given in the letter above-mentioned and the spoliation by the First Respondent.
- [9] The Second Respondent has raised a number of defences as to why he should not be liable for costs *de bonis propriis*. In my view the sole issue for determination is whether there is a link between the letter dated 26 July 2022 by the Second Respondent and spoliation referred to above, and if so, should the Second Respondent be ordered to pay costs *de bonis propriis*.
- [10] The letter from the Second Respondent unequivocally acknowledges that the Second Respondent '*instructed*' the First

Applicant to ‘*cut all barricades placed on their buildings*’ and thus deprive the Applicant of its right of retention over the premises over which there existed a lien. Absent any other developments, the letter could most likely prove to be the trigger for unlawful deprivation of the undisturbed possession of the building premises under retention.

[11] Following the above-mentioned the Second Respondent and the attorney for the Applicant engaged in settlement negotiations and certain terms and conditions were agreed upon. The Second Respondent was expected to dispatch the draft settlement agreement to the Applicant but same never happened.

[12] On 18 August 2022 the Second Respondent wrote another letter to the Applicant’s attorneys in which he complained about the closure of part of the Campus of the First Respondent. In the said letter the Second Respondent also demanded an undertaking that access would no longer be denied to the Applicant. The Second Respondent further said:

“...should we not receive your written undertaking not later than the stipulated time....we hold instructions . once again, to approach a competent court for an appropriate relief...”

[13] The Second Respondent may initially have advised the First Respondent to barricade and cut the chains and locks and thereby instigated the unlawful spoliation. It is undisputed that following that advise there was some amicable negotiations to resolve the issues between the Applicant and the First Respondent. Following that meeting when the dispute further reared its head the Second Respondent categorically informed the Applicant that he intended to

approach the court for appropriate relief. This was on 18 August 2022. At no stage after the meeting of 27 July 2022 was there any intimation on the part of the Second Respondent advising the First Respondent to take the law into its own hands.

[14] In my view, the meeting of the 27 July 2022 became the intervening eventuality which overtook the advice given in the letter of 26 July 2022. The correspondence of 18 August 2022 further confirms the view I hold in that the Second Respondent wanted to approach a competent court for appropriate relief. The spoliation took place on 24 August 2022, hardly six days after the Applicant was threatened with litigation. It is difficult to come to the conclusion that the spoliation is directly linked to the advice referred to in the letter of 24 July 2022 in view of the intervening meeting as well as the correspondence of 18 August 2022. I cannot find that the Second Respondent ought to be mulct with costs *de bonis propriis*. In view of this finding, I have no reason to accede to the request to order the referral of the Second Respondent to the Legal Practice Council.

[15] When it comes to adjudication of costs the general rule is that the successful party is entitled to costs. Allied to this rule is another principle that the award of costs lies in the discretion of the Court which must be judicially exercised upon a consideration of the facts of each case and bearing in mind that such decision is a matter of fairness to both sides¹.

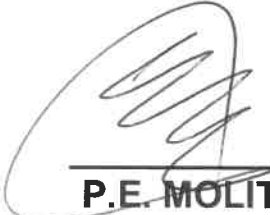
[16] The Applicant launched these proceedings alleging that the First Applicant had unlawfully deprived it of its peaceful undisturbed

¹ McDonald t/a Ford Helicopter v Huey Extreme Club 2008(4) SA 20 (C) at 22A-B.

possession of sixteen buildings. There were indeed negotiations which culminated in the restoration of the status quo. The First Respondent in a way conceded the wrong doing in that it filed the Notice of Withdrawal and did not persist with its opposition. The First Respondent did not act lawfully when it deprived the Applicant of its possession. The Applicant was thus partly successful in obtaining relief that it originally sought and has to be indemnified for its expenses in instituting this application. There is no reason why the First Respondent should not pay the costs at least until it formally withdrew its opposition. I accordingly make this order:

ORDER

1. The First Respondent is liable for the costs of the Applicant until 12 September 2022.



P.E. MOLITSOANE J

On behalf of the applicant:

Instructed by:

Adv. PC Ploos van Amstel

Kleingeld Mayet Attorneys

Bloemfontein

On behalf of the first respondent: No Appearance
Instructed by:

On behalf of the Second Respondent: Mr L.M Mokhele
Instructed by: L.M Mokhele Attorneys Inc

On behalf of the third respondent: No appearance.

/TKwapa