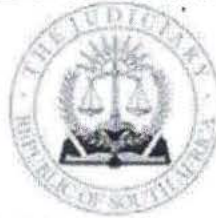


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 58907/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
12/01/2021	
.....	
DATE	MNGQIBISA-THUSI J

In the matter between:

NEW DAWN COMMODITY TRADING INVESTMENT

GROUP (PTY) LTD

Applicant

(Registration Number: 2019/095059/07)

and

AMAVA MINING INVESTMENTS (PTY) LTD

(Registration Number: 2007/029473/07)

Respondent

JUDGMENT

MNGQIBISA-THUSI J:

- [1] This is an application for a spoliation order.
- [2] The matter came before this court on an urgent basis on 30 December 2020. Having considered the submissions made by counsel and having read the documents file, on 31 December 2020, an interim order was granted in terms of which the respondent, Amava Mining Investments (Pty) Ltd, was directed to restore to the applicant, New Dawn Commodity Trading Investment Group (Pty) Ltd, access to the premises situated at Plot 1202 Platinum Drive, Steelpoort, Extension 10, Steelpoort Industrial Park, Steelpoort, Limpopo ("the premises") and to assets on the premises and listed in the order, pending the final determination of an application intended to be brought by the applicant within 60 days of the order relating to the respondent's purported cancellation of an agreement.
- [3] The respondent raised, as a point *in limine*, the issue of whether this court had jurisdiction to hear the matter. It was correctly pointed out by the respondent that the correct court having jurisdiction was the Gauteng Local Division, Johannesburg. As the *domicilium* address is in Rivonia, the Gauteng Division and Local Division have concurrent jurisdiction,

with the Local Division being the most appropriate court to hear the matter. However, this does not exclude this court from hearing the matter if it is in the interests of justice. Due to the urgency of the application, I am satisfied that this court's jurisdiction should not be excluded.

- [4] In order to succeed in a spoliation application, the applicant has to establish that it was in peaceful and undisturbed possession of his or her movable or immovable property or quasi-possession of an incorporeal right, and that it was unlawfully deprived of that possession by the respondent. Violence or fraud is not an essential element of the dispossession provided the act is done against the consent of the person despoiled and illicitly. In *Nino Bonino v De Lange*¹ the court described the *mandament van spolie* in the following terms:

“... is any illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable property or even in regard to a legal right. He does not make violence or even fraud an essential element, provided that the act is done against the consent of the person despoiled illicitly”.

Further in *Ivanov v North West Gambling Board and Others*² the court stated the following:

“19] ... The historic background and the general principles underlying the *mandament van spolie* are well established. Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking

¹ 1906 TS 120 at 122.

² 2012 (6) SA 67 (SCA).

the law into their own hands. An applicant upon proof of two requirements is entitled to a *mandament van spolie* restoring the *status quo ante*. The first, is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant – that is why possession by a thief is protected. The second, is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant as that would go to the merits of the dispute”.

[5] The following facts are not in dispute.

[6] On 16 March 2020, the parties concluded a sale agreement (“main agreement”) in terms of which the applicant undertook to purchase from the respondent a chrome processing plant situated at the premises. The salient terms of the agreement included, inter alia, the following:

6.1 the purchase price was set at R15 million.

6.2 the effective date of the agreement would be suspended pending the applicant’s initial deposit in the amount of R3,75 million within 21 days of the signing of the agreement.

6.3 the balance would be paid in equal instalments over a period of 12 months, of which the first instalment would be within 45 days of the hand-over date.

6.4 the respondent would manage the sale of the chrome concentrate through issuing interim and final release notes.

6.5 the applicant would be responsible for the payment of rent and utilities.

[7] It is common cause that the applicant did not pay the initial deposit on a date as envisaged in the main agreement. However, on 21 May 2020

the applicant deposited an amount of R2,5 million towards the initial deposit.

- [8] On 24 August 2020, the parties concluded an addendum to the main agreement which addendum varied certain terms of the main agreement. The addendum provided in part as follows:

- 8.1 the effective date of the agreement was set to be 24 April 2020;
- 8.2 the initial deposit was set to be R2.5 million; and
- 8.3 the hand-over date was provided to be 14 July 2020.

- [9] On 16 October 2020, the respondent (through its representative Mr Pillai Prabaharan) sent the applicant a notice of breach in which it gave the applicant an opportunity to submit a plan on how it intended to remedy its breach and comply with the agreement. This was followed by a letter (dated 17 October 2020) sent by the respondent's attorneys giving the applicant notice that through defaulting in its payments it was in breach and that it must remedy its default within 30 days of the notice.

- [10] On 31 October 2020, pursuant to Mr Prabaharan's proposal, the applicant submitted what it termed a 'Remedial Action Plan' ("the Plan") to which no formal response was received from the respondent, even though Mr Prabaharan had voiced some reservations about the Plan. Despite the applicant requesting from the respondent a response to the Plan and proposing a way of dealing with arrear rental of the premises, the respondent did not respond. The issue of the arrear rental relates to

the fact that the premises on which the plant was located were rented by the respondent from the owner of the premises.

[11] In the meantime, on 02 November 2020, the applicant concluded a sale agreement with an entity known as Amaya Resources (Pty) Ltd ("Amaya") in terms of which Amaya agreed to buy from the applicant a minimum of 5, 000 metric tons of the processed chrome at a minimum of 1,000 metric tons per week. Pursuant to the agreement with Amaya and as envisaged in the addendum, on 17 December 2020 the applicant requested the respondent to issue a Release Note to enable it to perform its obligations towards Amaya. The respondent failed to issue the Release Note. Despite a reminder to the request for the issuing of the Release Note, the respondent did not do as requested.

[12] On 21 December 2020, the respondent's legal representative sent the applicant a letter in which it was given notice of the cancellation of the agreement. On 22 December 2020, the applicant's employees could not gain access to the premises as the respondent had locked them out by replacing the keys to the premises and placed security guards at the gates. Further, the respondent also cut off the electricity and water supply to the premises.

[13] It is the respondent's contention that the matter is not urgent and that the urgency was self-created because the applicant was aware that it is in breach of the agreement and that in terms of the agreement the

respondent is entitled to cancel it after giving notice of the applicant's breach on 17 October 2020.

- [14] On behalf of the applicant it was submitted that the matter was urgent in that through the spoliation, its assets were being exposed to water damage and theft and that it was prevented from supplying its only buyer, which order of 1000 tons of chrome concentrate was due on or before 4 January 2021.
- [15] It is trite that a spoliation application ordinarily is dealt with on an urgent basis. Notice of cancellation of the agreement was given to the applicant on 21 December 2020 and on the same day, it was locked out. I am of view that the applicant has acted with the necessary speed to bring this application and I am satisfied that, in view of the lock-out and the agreement the applicant concluded with Ameya and the due performance on its part, the applicant would not have a satisfactory remedy in the event that the respondent's cancellation is not valid and Ameya has already cancelled the agreement and instituted legal action against the applicant.
- [16] It is the applicant's contention that the changing the keys to the premises and placing security guards in order to prevent access into the premises, was an act of spoliation in that such prevention was done without the consent of the applicant. It was submitted on behalf of the applicant that it was in possession of the premises from the time it took over the business and that the premises and the assets therein were under its

control and therefore that it had undisturbed and peaceful possession of the premises.

[17] It was further argued on behalf of the applicant that by cutting off of the electricity and water supply at the premises without the applicant's permission, the respondent had unlawfully deprived it of its peaceful and undisturbed possession of the electricity and the water.

[18] The respondent contended that since it had given the applicant prior notice of its intention to cancel the agreement unless the breach was remedied, it was entitled to lock-out the applicant from the premises. Further, it was submitted that the applicant could not complain of spoliation since it had removed some 500 metric tons of chrome concentrate from the premises without the consent of the respondent.

[19] There is no dispute that the applicant has been deprived access to the premises and possession of its assets which are located on the premises. Further that the applicant has been denied access to the premises which it has had possession of since 17 July 2020.

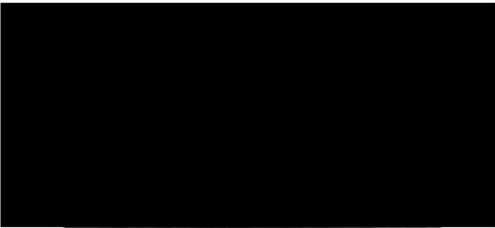
[20] It does not assist the respondent to defend its actions on the basis that the applicant was in breach of the agreement and that it was entitled to cancel the agreement. In order for the respondent's actions to have been lawful it needed either the consent of the applicant or to obtain an eviction order. As submitted on behalf of the applicant, the respondent did not respond to the applicant's request for a release note in order for it to perform on its obligations in terms of its agreement with Ameya.

[21] I am of the view that the change of keys, the placing of security guards at the premises and the cutting off of the electricity and water supply in order to prevent the applicant and its employees from accessing the premises amounts to unlawful dispossession. It does not assist the respondent that it had given the applicant notice of its intention to cancel the agreement. The only manner in which the respondent could gain control of the premises was through the consent of the applicant or through legal action.

[22] I therefore come to the conclusion that the applicant is entitled to an order in terms of its Notice of Motion dated 28 December 2020.

[15] Accordingly the following order was made:

‘An order is granted in terms of the draft order marked “X”.



NP MNGQIBISA-THUSI
Judge of the High Court

Appearances

For Applicant: Adv L Adams (instructed by Elton De Bruin Inc)

For Respondent: Adv L Grobler (instructed by Ayoob Kaka Attorneys)

X

Q10-
30/11/2020

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 56907/2020

On ^{20th} 25 December 2020 at Pretoria

Before the Honourable Justice NP MNGQIBISA - THUSI

In the matter between:

NEW DAWN COMMODITY INVESTMENT TRADING GROUP (PTY) LTD

(Registration Number: 2019/095059/07)

APPLICANT

and

AMAVA MINING INVESTMENTS (PTY) LTD

(Registration Number: 2007/029473/07)

GD-PRET-002

RESPONDENT

~~DRAFT COURT ORDER~~

HAVING HEARD counsel(s) for the parties and having read the documents filed of record

Q10-1

R.M

REPUBLIC OF SOUTH AFRICA
 HIGH COURT OF SOUTH AFRICA
 PRETORIA

Private Bag X67, Pretoria 0001

2020 -12- 31

GD-PRET-002

REPUBLIC OF SOUTH AFRICA
 HIGH COURT OF SOUTH AFRICA
 PRETORIA

IT IS ORDERED THAT

010-2

1. That the time periods, forms and manner of service provided for in the rules of court be dispensed with and that the matter be heard as one of urgency in terms of High Court Rule 6(12).
2. That the Respondent be ordered to immediately restore the Applicant's undisturbed possession of the premises situated at Plot 1202 Platinum Drive, Steelpoort, Extension 10, Steelpoort Industrial Park, Steelpoort, Limpopo (hereinafter referred to as "the premises").
3. That the Respondent be ordered to immediately restore the Applicant's undisturbed access and possession to electricity utilities on the premises.
4. That the Respondent be ordered to immediately restore the Applicant's undisturbed access and possession to water utilities on the premises.
5. That the Respondent be ordered to immediately restore the Applicant's undisturbed possession to all the Applicant's trading stock, furniture and equipment, which had been locked up at the premises by the Respondent.
6. That in the alternative, and only in the event that the Respondent failed to restore the Applicant's undisturbed possession, as referred to in paragraphs 2, 3, 4 and 5 above, within twenty-four (24) hours after this court order, that the Sheriff of this Honourable Court be authorised to do whatever as is necessary to restore the Applicant's undisturbed possession to the premises, the Applicant's trading stock, furniture and equipment and to restore the water and electricity utilities to the premises.

010-2

7. That the order in paragraphs 2, 3, 4, 5 and 6 operate pending the finalisation of an application regarding the validity of the Respondent's purported cancellation of the agreements as entered into between the parties respectively on the 16th March 2020 and the 24th August 2020.
8. That the application as referred to in paragraph 7 above, be instituted by the Applicant within sixty (60) days from the date of service of this court order upon the Respondent, failing which this order shall lapse.
9. That the Respondent be ordered to pay the costs of this current application.



BY THE COURT

REGISTRAR

ATT: ELTON DE BRUIN INC.