IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

Case No. 4488/2018

In the matter between:

EAGLE UKHOZI CIVILS (PTY) LTD

(Registration No. 2012/014521/07) **Applicant**

And

MNQUMA LOCAL MUNICIPALITY **1st Respondent**

BOBOSHE TRADING ENTERPRISE CC

(Registration No. 2009/041629/23) **2nd Respondent**

JUDGMENT

JOLWANA J

[1] The applicant instituted urgent court proceedings in which it sought the following relief:

> "**PART A:**
>
> 2. That the First Respondent's action in evicting the Applicant and preventing it from obtaining access to and possession of the construction site, being the Butterworth Driver's Licence and Testing Centre in Msobomvu Township, Butterwoth ("the construction site"), be declared unlawful;
>
> 3. That the First Respondent be and is hereby ordered and directed to restore the Applicant's access to and possession of the construction site;
>
> 4. That the First Respondent, the Second Respondent and/or any third party acting for and on behalf of the First and/or Second Respondents be interdicted and restrained forthwith from interfering with the Applicant's right of retention over the construction site;
>
> 5. That it be declared the Applicant possesses a right of retention over the construction site until such time as the First Respondent has paid all that is due to the Applicant for the construction works performed and services rendered on the construction site;

6. That the relief in paragraph 2 and 5 above is to operate as interim orders forthwith pending the outcome of the action instituted by the Applicant with this Honourable Court against the First Respondent under Case No. 5603/2017 as well as final resolution of all claims the Applicant has for the improvements and other works performed at the construction site;

7. That the First Respondent be ordered to pay the costs of the present application on an attorney and client scale;

8. That the Second Respondent be ordered to pay the costs of this application jointly and severally with the First Respondent, the one paying the other to be absolved, should it oppose the relief sought herein; and

9. Further and/or alternative relief.

PART B:

10. That pending the final determination and outcome of the main application instituted with this Court under Case No. 3712/2018 on 8 August 2018, the First Respondent be interdicted and restrained forthwith from:

    10.1 taking any further steps in connection with Tender No. MNQ/SCM/15/17-18 which called for bids for the construction of the very same Driver's Licence and Testing Centre for which the Applicant was appointed;

    10.2 instructing, permitting and/or allowing the Second Respondent to perform any construction works on the construction site pursuant to the awarding of Tender No. MNQ/SCM/15/17-18; and

    10.3 giving effect to and implementing the awarding of Tender No. MNQ/SCM/15/17-18 to the Second Respondent.

11. That the relief sought in paragraphs 10.1 to 10.3 above is to operate as interim Orders forthwith pending the final determination and outcome of the main application;

12. That the First Respondent be ordered to pay the costs of the present application on an attorney and client scale;

13. That the Second Respondent be ordered to pay the costs of this application jointly and severally with the First Respondent, the one paying the other to be absolved, should it oppose the relief sought herein; and

14. Further and/or alternative relief."

[2] It is common cause that on 6 November 2014 the applicant was awarded a tender for the construction of the Butterworth Driver's Licencing and Testing Centre (DLTC). The intended duration for the completion of the project was six months.

[3] It is further common cause that on 27 November 2014 the construction site was handed over to the applicant. The applicant commenced with site establishment and construction works soon thereafter in accordance with the scope of work, the technical data and drawings provided by the first respondent's engineer.

[4] It is also common cause that the project had not been completed on 12 September 2018, the date on which the applicant was allegedly unlawfully evicted by

the first respondent. I do not deem it necessary to deal with all the facts and events that took place between November 2014 and August 2018 save to the extent necessary to deal with what happened on 12 September 2018 and thereafter.

[5] It is the applicant's case that on 12 September 2018 Mr Klaas who is under the employ of the applicant as a security officer was chased away from the site with threats of violence. In so doing the first respondent unlawfully evicted the applicant from the construction site and took possession thereof.

[6] The applicant seeks two reliefs being a *mandament van spolie* to be restored to the possession of the DLTC site so as to protect its right of lien over the site for an unpaid liquidated amount of money. The second relief sought by the applicant is an interim interdict *pendete lite* pending the outcome of case no. 3712/2018 instituted by the applicant on 8 August 2018.

[7] It appears that the *mandament van spolie* is also sought on an interim basis for the restoration of the applicant's occupation and thus its right of retention over the construction site pending the outcome of an action instituted by the applicant against the first respondent in this court under case no. 5603/2017. It was argued on behalf of the first respondent that *mandament van spolie* is not available on an interim basis as it is, by its very nature, a final remedy, and therefore the application should be dismissed even on this basis alone.

[8] In this regard reliance was placed on the case of *Nienaber v Stuckey* 1946 AD 1049 at 1053 where Greenberg JA said:

> "Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict and not of a temporary interdict..."

[9] I agree that a *mandament van spolie* is fundamentally a final relief. This was recently pointed out by the full bench of this Division in *King Sabata Dalindyebo Local Municipality v Thobani Noah* case no. 3478/2016 (21 August 2018) in which Huisamen AJ said:

> "[16] *mandament van spolie* is available where a person has been deprived unlawfully of his or her possession of movables or immovable property, as well as where a

> person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights.
>
> [17] It is critical to mention that a *mandament van spolie* order, by its very nature, is final in effect."

[10]These authorities however are, in my view, no basis for the proposition that where a litigant seeks a *mandament van spolie* on an interim basis, as does the applicant in this case, relief should be refused necessarily. All that the learned judge of appeal said in *Nienaber v Stuckey* is that the amount of proof required will be as is required for the granting of a final interdict.

[11] I cannot understand why a *mandament van spolie* should be refused only on the basis that the applicant said more than he needed to in that he indicated that he requires restoration of possession up to a particular date. An applicant, fully knowing that he or she is vacating the property in six months time for instance, is entitled to be silent about that and merely establish the two fundamental requirements for a spoliation order, namely that he was in undisturbed and peaceful possession and was wrongfully deprived of possession.

[12] The requirement that a party who seeks a *mandament van spolie* as a remedy must satisfy the requirements for a final interdict, is not to say that if he or she seeks restoration for a limited period, he or she must be refused the spoliation order. It is to say that if he or she fails to prove or establish the requirements for a final interdict he or she may not be granted a spoliation order.

Has applicant established possession?

[13] This requires the examination of some of the facts before and up to the 12 September 2018. What happened before and up to the 12 September 2018 is hugely in dispute. Mr Hobbs, counsel for the applicant accepts this reality and correctly so. At paragraph 82.4 of the applicant's heads of argument the following submission is made:

> "The nature of the dispute of fact in the present case is on issues that are initially exclusive, it cannot be difference of views but rather either the applicant or the first respondent's deponents have lied under oath. If their version is to be the basis to deny applicant relief, it would be just and expeditious to test same on the narrow issue of possession."

[14] In my view it was clear from the start that there was a dispute about rights of possession over the site. To illustrate this point I consider it better to refer to applicant's own papers. The applicant has annexed to the founding affidavit a statement made to the police by the project manager of the first respondent, Mr Madubela marked annexure "A22". That statement was made following the alleged theft of paving bricks from the construction site and the arrest of certain individuals.

[15] In that statement Mr Madubela says:

> "The property that is alleged to be stolen belongs to Mnquma Municipality. The complainant in this case Mpendulo Ndlazi does not have authority nor ownership of this property. He does not have a right to claim the ownership of the property and his contract for the construction of the Msobomvu testing driving licence was terminated, after he was fully paid for the work he had done. The contract was terminated because his contractor was not performing and he himself decided to withdraw the contract.
>
> Luthando Jojwana who is regarded as the main suspect in this case is the director of Thalami Civils which was appointed by Mnquma Municipality to do a taxi rank in Centane.
>
> Luthando Jojwana was authorised by me to take the paving bricks at Msobomvu drivers licencing and testing centre which belongs to Mnquma Municipality. I authorised him to take the material so that he can finish up at Centane taxi rank."

[16] This statement was signed on the 10 April 2017. Three days later a letter was addressed to the first respondent by the applicant's attorneys marked annexure "A21" in which *inter alia*, the following is said:

> "We are instructed to demand, as we hereby do, that Mnquma Local Municipality, Mr Sakhumzi Madubela and or any of its employees must desist from unlawfully dispossessing or purporting to authorise unlawful dispossession of our client's property inclusive of paving bricks, site containers, or any material on site at the premises of DLTC forthwith for the duration of our client's lawful occupation of the premises."

[17] Both annexures "A21" and "A22" make it clear that there is a dispute about the rights of possession over the construction site. In addition to that, even when one considers what happened after the very crucial date of the 12 September 2018, the only conclusion is that this dispute continues. At paragraphs 10-12 of the founding affidavit the following averment is made by the applicant:

> "10. The main event which necessitated the launching of the present application on an urgent basis occurred on Wednesday, 12 September 2018. On this date, the applicant was unlawfully dispossessed of its occupation and thus its right of retention over a construction site in respect of which it was appointed to undertake certain construction related works.

11. Immediately after the occurrence of the unlawful dispossession, which is fully detailed herein below, I personally made contact with the First Respondent's Municipal Manager (being one Mr Mahlasela) to alert him of the unlawfulness of the First Respondent's actions in view of the Applicant's right of retention subsisting over the construction site:

12. My attempt to reach out to the First Respondent was ignored. I then contacted my current attorneys of record on Friday 14 September 2018 to arrange for an urgent consultation. A consultation was held on Saturday 15 September 2018 and immediately thereafter, the present papers were drafted."

[18] With these facts, it was already clear that there was a huge dispute of fact about the rights over the construction site including its possession and the alleged dispossession which is said to have occurred on 12 September 2018. Despite such clear dispute, nowhere in the founding affidavit does the applicant ask, even in the alternative, that the disputed facts over possession be referred for the hearing of oral evidence.

[19] In the answering affidavit Mr Mahlasela, the first respondent's depondent deals with the interaction between Mr Ndlazi and himself about the incident of the 12 September 2018 as follows:

> "[26] It is so that Ndlazi contacted me on the 12 September 2018, alleging unlawful dispossession of the DTLC from the applicant. I denied that there had been any act of dispossession by the first respondent. To date I still deny this baseless contention. That Ndlazi has made this contention so many times does not mean the contention is correctly made. In any event, Ndlazi was not reaching out to the first respondent on 12 September 2018, he was demanding that the second respondent's appointment be withdrawn and that the second respondent be forbidden from accessing the DLTC. A demand the applicant is, in law, not entitled to make."

[20] A confirmatory affidavit of Mr Mpiti, the Manager of legal services of the first respondent is attached to the answering affidavit. Among other things he confirms that the first respondent had taken possession of the site. He also confirms what Mr Madubela said in his statement to the police on the alleged theft of the paving bricks. He also confirms that the first respondent did not cause the paving bricks to be stolen but removed them to another project following the first respondent's take over of the possession of the site.

[21] Mr Hlokoza, the Chief Security Officer of the first respondent also signed a confirmatory affidavit. In it he confirms that the first respondent did take over and assume control and possession of the DLTC long before the 12 September 2018. He also says that following the handover of the site to the second respondent he saw

a person putting up a sign post next to the entrance of the DLTC in which it was indicated that the site was under a lien of the applicant.

[22] There is another confirmatory affidavit by Ms Mbusi who is a Project Manager of the first respondent. She also confirms that it is the first respondent and not the applicant who has been in possession of the site since 13 September 2016.

[23] She says that she worked with the first respondent's engineers to prepare a tender document in respect of Tender No. MNQ/15/17-18. For this reasons she had to constantly visit the DLTC to verify certain information and get correct specifications for this tender. During this period the applicant was not in possession of the site after having abandoned it.

[23] In its replying affidavit the applicant makes the following averment:

> "40. Further to what is stated herein above the applicant stands by and reiterates the averments made in the founding affidavit in support of the present application. In the premises and all things considered it is respectfully submitted that the applicant has made out a case for the relief sought in the present application."

[24] The applicant does not directly challenge some of the allegations made by the first respondent or put up its own version if it denies them or are not correctly reflected. Most significantly one would have thought that by now it was clear to the applicant that there is a huge dispute of fact on the most critical issue of possession. It however still makes no reference to a dispute of fact even on an alternative basis about the possession of the site in the replying affidavit. In fact, at paragraph 8.1 of its replying affidavit the applicant specifically disavows the existence of a genuine dispute of fact on its alleged uninterrupted possession of the site since 13 September 2016.

[25] Only in the heads of argument was it accepted on behalf of the applicant that there is a material dispute of fact. Even that acceptance appears to be with a great degree of reluctance. I say this because in his heads of argument Mr Hobbs suggests that what he calls a material dispute of fact may not be fundamental. I do not know that, that which is material, may at the same time be not fundamental. This is confusing because according to the dictionaries that I have consulted these words seem to have the same meaning. For instance, the Shorter Oxford English Dictionary, sixth edition describes the word "material" as serious, important, of

consequence. It describes the word "fundamental" as meaning, pertaining to the basis or grand-work, going to the root of the matter.

[26] This is how the question of the dispute of fact is raised in the heads of argument of the applicant:

> "16. Patently the affidavits in these proceedings reveal a material dispute of fact as to whether or not the applicant was in occupation of the project and by extension still maintained its lien – on 12 September 2018. It is submitted that this court should adopt the approach set out in the matter of *Ferreira* which we refer to above. In this regard we submit that the applicant has prospects of success in its claim for albeit that such prospect may be assessed by this court as being week.
>
> 17. In the circumstances we accordingly submit that the material dispute of fact should not preclude the granting of the interim relief that the applicant seeks. Alternatively, in the event of this court funding that the material dispute of fact is so fundamental that it will not apply the principles set out in the *Ferreira* case then we submit and apply that the parties should be sent to oral evidence to resolve that narrow dispute."

[27] I must point out that the case of *Ferreira v Levin NO and others* 1995 (2) SA 813 (W) is largely in the context of interim interdicts. As pointed out above, a *mandament van spolie* is essentially not an interim interdict but fundamentally a final interdict.

[28] Most importantly Harms DP, in *Law Society*, *Northern Provinces v Mogani* 2010 (1) SA 186 at 195 para 23 C-D made it clear that only in exceptional circumstances will a court permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail. This is what the learned Deputy President of the Supreme Court of Appeal said on this issue:

> "An application for the hearing of oral evidence must, as a rule, be made in *limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail."

[29] It was not submitted during argument that the dispute of fact was not foreseeable and therefore could not be raised even in the alternative in the founding affidavit. Even worse, when the answering affidavit was filed together with the confirmatory affidavits it should have become very clear to the applicant that there was a material dispute of fact, if it initially had some doubts. However, even in the replying affidavit the dispute of fact is still not raised and the applicant does not ask

for the hearing of oral evidence, at least on the events of the 12 September 2018. Even at the stage of the argument it is raised not in *limine* but as an alternative.

[30] The exceptional circumstances that were referred to in *Law Society, Northern Provinces v Mogani* are not and cannot be a regurgitation of the original facts that were pleaded in the founding affidavit. They must be such as to enable the court to exercise its discretion in favour of the applicant and not dismiss the application on this ground as the first respondent urges the court to do.

[31] However, in my view, the interests of justice are paramount. The court cannot and should not say that because referral to oral evidence should have been raised in *limine* and was not, therefore nothing else matters. That is why there is reference to exceptional circumstances. The court must still see if on all the facts and despite the failure to plead the dispute of fact and its concomitant referral to oral evidence in *limine*, it will arrive at a just decision. In this case I do not think that there are any factors that would result in injustice if the court invokes the provisions of Rule 6 (5) (g) of the Uniform Rules of Court.

[32] This Rule in part provides thus:

> "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision."

[33] In my view a just and expeditious decision in this case does not require the hearing of oral evidence but the dismissal of the application. The contract was for a period of six months. There were many problems some of which could be due to the first respondent, like the alleged non-payment of payment certificates. Almost two years since the contract was awarded the applicant reached such a state of exasperation that it wrote the letter dated 13 September 2016 in which it *inter alia* said the following:

> "We hereby tender our withdrawal from the contract with immediate effect, it has become impossible to complete the works due to inflation since the time of tender.
>
> Our rates are for the duration of 2014, costs have escalated enormously over the period, the contract does not have an escalation clause under which we may apply for price adjustment, in the circumstances, taking into account the regulatory framework of public sector contracts, we are unable to find any basis to sort price adjustment.
>
> Background

The contract has been severely delayed due to a litany of challenges, just for the sake of completeness, we briefly lay a short background.

Post award and upon commencement of works we discovered that the ground was unsuitable for construction at the depth of 150mm as stipulated for in the contract. The depth had to be approximately 600mm, filled with rocks all of which was not in the original stipulations. In preparing the various order meant to mitigate the challenge, the engineer erroneously assumed the rock material will be available from a local commercial source, as such in making up the price for the variation order, the haul distance was assumed to be 3 kilometres. (see attached engineer's work sheet for the variation order)

This was not to be, we tried crushing on site but there was insufficient surface rock meeting the required strength, we could not blast since this requires a permit, which is not in place. Ultimately we bought the rock 80 kilometres away, from a Bityi quarry which was utilised by another contractor, Haw and Inglis. We could not claim for this since the variation order had been approved without this haulage. Since we were expending every effort, in good faith to complete the contract, we completed this task and other subsequent activities. The delays occasioned by the processing of variation order, haulage from new distances all impacted upon the delivery dates, which bears upon time. It has however become impossible to complete the work for reasons on paragraph 2 above hence our withdrawal from the contract.

Proposal

The municipality may decide to separate the contract. The building together with associated works is 95% complete, if we complete same to 100% the municipality may issue a certificate of completion for the reduced scope of works under the contract. The benefit for this would be that in the event of any defects to the building, the contractor will remain liable under the standard defects liability period (this is essentially a warranty). Otherwise we are willing to vacate this too, be fully discharged forthwith and leave it to be completed otherwise. The dilemma which may face the municipality is that another contractor may not have the lawful obligation or appetite to be held liable for possible defects on a building one did not construct.

We thank you most sincerely for the opportunity you granted us and look forward to a healthy relationship in future.

Hope you find the above in order."

[34] It will be noted that not even indirectly does applicant alleged that the cause of the termination or withdrawal from the contract is the non-payment in its letter dated 13 September 2016 affidavit. I simply do not see how it is in the interest of justice that the stalemate that has been there for a very long time should be allowed to carry on. What is in the interest of all concerned, in my view, is the completion of the project, if needs be, by somebody else so that those who were intended to benefit from the facility are not delayed any longer.

[35] The applicant's demand to retain the site is so that if it succeeds in its claim for monies owed by the first respondent it will have retained the project site exercising its right of retention or builder's lien. This, in circumstances in which it is not being suggested that when and if the applicant is successful in case no. 5603/2017 the first

respondent might not be able to pay. On the contrary this facility, when completed will be an addition to the first respondent's other attachable assets. Unless it is being suggested that by then the applicant will have dissipated its assets including this facility. The applicant has not made and is unable to make such a submission because it would simply be baseless and farfetched. In any event a lien cannot be exercised where possession has been lost.

[36] For the same reasons I simply cannot see how the applicant can suffer irreparable harm if the interim interdict is not granted. In fact, the reading of paragraphs 161-163 of the founding affidavit where the applicant deals with this requirement, I get the distinct impression that the applicant is simply unable to articulate the irreparable harm it will suffer. At best it says that the outcome of the main application in case no. 3712/2018 will be rendered nugatory and academic. How this will be so is not explained, a point I will come to later.

[37] With this in mind the basis on which it is suggested by the applicant that there is no alternative remedy is also difficult to discern. The applicant is already exercising an alternative remedy under case no. 5603/2017. If its prospects of success are good it means its prospects of recovering the amounts said to be owing are equality good. They do not get any better by means of an interdict *pendente lite*. No cogent basis has been pointed out that the chances of recovery of the money said to be owing through either the exercise of the lien are improved. I therefore find that there is an alternative remedy which has been and is being exercised already.

Has applicant established a *prima facie* right?

[38] As indicated above, there is a dispute of fact about whether or not applicant did or did not abandon the DLTC, a point applicant belatedly concedes. At best, what appears to be a clear right is for the applicant to be paid if it proves that it has not been paid monies that are due to it. It is trying to do that under case no. 5603/2017. It cannot be denied on any logical basis that if it succeeds in its claim it will recover all the monies owing through execution against first respondent's properties. The right to be paid does not translate to a *prima facie* right to retain the DLTC where it has not proved on the papers that it did not lose it.

[39] The applicant deals with the *prima facie* right at paragraphs 156 to 160 of the founding affidavit as follows:

> "156. The applicant was lawfully appointed as a contractor for the construction of the Butterworth Drivers Licencing and Testing Centre.
>
> 157. According to the applicant there is an existing contract between it and the first respondent.
>
> 158. The applicant is pursuing its remedy of specific performance in so far as the said contract is concerned.
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> 159. In launching the main application the applicant is seeking to protect and preserve its contractual rights arising from its appointment by the First Respondent.
>
> 160. The other rights that are at play in the main application are set out in paragraph 149 above."

[40] The whole of the relief sought in Part B is difficult to understand. For the sake of clarity and completeness I deem it necessary, to again quote the key prayers in Part B.

> "10. That pending the final determination and outcome of the main application instituted with this Court under case no. 3712/2018 on 8 August 2018, the first respondent be interdicted and restrained from;
>
> 10.1 taking any further steps in connection with Tender No. MNQ/SCM/15/17-18 which called for bids for the construction of the very same Driver's Licence and Testing Centre for which the applicant was appointed;
>
> 10.2 instructing, permitting and/or allowing the second respondent to perform any construction works on the construction site pursuant to the awarding of Tender No. MNQ/SCM/15/17-18; and
>
> 10.3 giving effect to and implementing the awarding of Tender No. MNQ/SCM/15/17-18 to the second respondent.
>
> 11. That the relief sought in paragraphs 10.1 to 10.3 above is to operate as interim orders forthwith pending the final determination and outcome of the main application."

[41] It seems to me that the case of the applicant in this regard is an afterthought designed to belatedly and urgently interdict a process that started in May 2018 when the tender was advertised. I say this because at paragraphs 147 and 149 of its founding affidavit it is said:

> "147. In the main application, I am inter alia challenging the lawfulness and constitutionality of the decision of the first respondent to recall for tenders for the construction of the Butterworth Driver's Licensing and Testing Centre. I am also seeking an order declaring any award of the re-advertised tender to be unlawful and unconstitutional, with the consequent result that it be set aside as a nullity.

149. In the main application, the applicant is seeking to vindicate the constitutionally protected right to just administrative action. Equally, the applicant is seeking to vindicate:

149.1 the right to freedom of trade, occupation and profession as protected by section 22 of the Constitution;

149.2 the right to fair, equitable, transparent, competitive and cost-effective procurement as protected under section 217 of the Constitution;

149.3 its contractual remedy of specific performance regarding the unlawful cancellation of the contract concluded between it and the first respondent; and

149.4 the constitutional value of the rule of law, which *inter alia*, entitles everyone that has a dispute that can be resolved by the application of law to a right to have such dispute decided in a fair public hearing before a Court."

[42] By its own admission, the applicant saw the advertisement of Tender No. MNQ/SCM/15/17-18 in May 2018 and decided not to bid for it. Secondly the applicant decided not to interdict it or the first respondent from adjudicating the bids for the tender after having seen the advertisement. Thirdly, in his capacity as managing director of the applicant, Mr Ndlazi attended the handing over of the DLTC to the second respondent on 06 September 2018 and decided not to interdict the handing over of the site. Fourthly, it became aware that the tender had been awarded to the second respondent.

[43] It is difficult to understand how it intended to protect the rights listed in paragraph 149 of its founding affidavit when it decided not to bid for the new tender in circumstances in which according to its own annexure "A19" it admitted to being unable to complete the initial job due to inflation - that its contract had no escalation clause for it to apply for price adjustment and that the regulatory framework of the first respondent would not allow for price adjustment.

[44] One last point needs to be made. The handing over of the DLTC happened on the 6 September 2018 in the presence of the representative of the applicant. The applicant's case is that it was unlawfully evicted on 12 September 2018 when Mr Klaas was chased away by employees of the first respondent. The applicant moved this application on an urgent basis only on 19 September 2018, a full week after the alleged eviction and two weeks after the site was handed over to the second respondent. No allegation is made that, as at that date when the managing director

of the applicant deposed to the founding affidavit, the second respondent had not moved into the DLTC or taken it over.

[45] On the contrary in his founding affidavit Mr Ndlazi appears to accept the possibility of the second respondent having taken possession of the site as follows:

> "134. As matters stand the applicant is unable to gain access to the construction site in that it has been taken over by representatives of the first respondent, *alternatively* second respondent on the instruction of the first respondent. Immediately after unlawfully evicting the applicant from the construction site, the first respondent placed its own security personal."

[46] In the first respondent's answering affidavit an averment is made that the second respondent is already rendering the services under contract number MNQ/SCM/15/17-18. Most significantly in his replying affidavit deposed to on the 25 September 2018 Mr Ndlazi confines his denial of the fact alleged by Mr Mahlasela, the Municipality Manager of the first respondent that the second respondent is rendering the services in respect of the contract to the 12 September 2018. Nothing is said about the 24 September 2018 when the answering affidavit was signed or on 25 September 2018 when Mr Ndlazi deposed to the replying affidavit.

[47] It is accepted that after the second respondent was awarded the contract, the site was handed over to it on 6 September 2018. Furthermore if it is true that it has been rendering services as at the 24 September 2018 when the answering affidavit was signed, the question is whether it would be justifiable to evict the second respondent for purposes of restoration of possession to the applicant.

[48] This question was recently answered in the negative in this Division by Plasket J in *Sityata v Eastern Cape Development Corporation*, case no. CA & R14/2018 delivered on 3 July 2018 in which the learned judge expressed himself as follows:

> "[17] It is clear that it is not possible for the respondent to restore possession to the applicant even though it may well have transferred possession to the third party with unseemly haste and with the intention of defeating a *mandament van spolie*. If it purported to cancel the lease with the third party, in the absence of one of the circumstances mentioned in clause 17 it would act unlawfully. Unfortunately, the *mandament van spolie* cannot be stretched to come to the aid of the appellant. This is a case in which the application of the law does not equate to doing justice. The appeal cannot succeed."

[49] In all these circumstances the application cannot succeed. There is no reason why costs should not follow the results. Therefore the following order will issue.

1. The application is dismissed;

2. The applicant is ordered to pay costs of this application including costs reserved on 25 September 2018.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicant: JL HOBBS

Instructed by: NDUMISO VOYI INCORPORATED

MTHATHA

Counsel for the respondent: A BODLANI

Instructed by: NT VUBA INC.

MTHATHA

Heard on: 02 October 2018

Delivered on 23 October 2018