

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 323/2017
Heard on: 17/02/2017
Delivered on: 24/02/2017

In the matter between:

ABSOLUTE DYNAMIC SOLUTIONS CC

APPLICANT

And

CHRISTIAN ARNOLDUS JACOBUS VICTOR

1ST RESPONDENT

CHRISTIAN ARNOLDUS JACOBUS VICTOR N.O.

2ND RESPONDENT

JUDGMENT: SPOLIATION APPLICATION

MAMOSEBO J

- [1] The applicant, Absolute Dynamic solutions CC, a close corporation with registered address at 53 Harbour Close, West Beach, Western Cape Province, sought urgent relief by way of a *mandament van spolie*. It sought an order for the restoration of its possession of mining equipment and accessories *ante omnia*. The application is opposed.

- [2] Adv Coetzee SC, appearing for the respondents, disputed the urgency and submitted that it was not so urgent that it had to be heard by the Motion Court Judge on the same day in the absence of exceptional circumstances. The respondents tendered an undertaking not to remove the equipment forming the subject matter of this application from the premises pending finalisation of the application. The respondent even arranged a tentative date with the office of the Registrar of 02 March 2017 for the hearing and proposed that costs be reserved for later determination. Adv Botes SC acknowledged the undertaking by the respondents but pointed out that it remained within the discretion of the Court to hear the application. The nature of the application, spoliation, necessitated that the parties be heard as soon as possible to avoid a situation where the relief sought would turn out to be of no consequence if overtaken by events.
- [3] The circumstances set out in the applicant's founding affidavit as regards the conduct of the first respondent, Christian Arnoldus Jacobus Victor, on 07 February 2017, in my view, constitutes sufficient compliance with Rule 6(12)(b). It is my view further that the relief sought relating to the restoration of possession of the movable equipment and accessories *ante omnia*, by its very nature renders the application urgent.
- My finding, in the circumstances, was that the parties should proceed with their arguments on the merits.**
- [4] There is also an application to join Christian Arnoldus Jacobus Victor N.O as the second respondent. Briefly, the first respondent had alleged the following in his answering affidavit at para 21.2:
- “Ek ontken dat ek in beheer van die betrokke items is en voer, by herhaling, aan dat die trust die kontrole en beheer oor die myntoerusting*

het uit hoofde daarvan dat dit vrylik en sonder enige dwang aan die trust gelever is en die trust die betrokke artikels huur.”

Adv Coetzee submitted that the respondents do not oppose this application for joinder. As a result, I was satisfied that Christian Arnoldus Jacobus Victor N.O should and was joined as a party (the second respondent) in the application.

- [5] Mr Victor is a businessman with his principal business at Kareepan Mine, Postmasburg, Northern Cape Province. The second respondent, Victor N.O, has been authorised by the Master of the High Court, Kimberley, by Letter of Authority No IT208/2001 dated 10 July 2001 to act as trustee of Vicmaster Mining Trust.
- [6] Mr Mervin Bruce Horstmann deposed to the affidavit as the sole member of the applicant. His averment is that the applicant was in peaceful and undisturbed possession of the following mining equipment until 07 February 2017 when it was dispossessed of:
- 6.1 160 meters of 4 Core 35 mm armed cable;
 - 6.2 180 meters of 4 Core 6 10 mm armed cable;
 - 6.3 74 kw Star Delta starter box for jaw crusher;
 - 6.4 1 set liners for jaw crusher;
 - 6.5 5.5 kw 6 pool 380 volt electric motor for small jaw crusher;
 - 6.6 Lab crushers, including small 10 X 6 jaw crusher and pulverizer;
 - 6.7 Ripper for 60 ton excavator;
 - 6.8 200KVA 380 volt 3 phase diesel powered generator;
 - 6.9 1 set of 4 bucket tips for Volvo generator; and
 - 6.10 220 volt 50 litre per minute diesel pump.

- [7] On or about October 2016 the applicant, represented by Hortsmann, and Vic Master Mining Trust, represented by Victor, entered into a contract in terms of which the respondent sold to the applicant manganese lumpy at R460.00 per metric ton for the product quantity at Mn 37%. Consequent thereto, the applicant established a site at the Kareepan Mine to procure and stockpile the manganese lumpy. The mining equipment mentioned in para 5 (above) was in the applicant's peaceful possession, so it is said. A dispute between the parties arose relating to the price of the manganese lumpy which resulted in the respondent selling the manganese lumpy to third parties at an increased price.
- [8] On 07 February 2017 one of the employees of the applicant, Mr Boeta Wessels, went to Kareepan Mine to have the equipment removed from site but the first respondent refused him that latitude by not only prohibiting any removal of the equipment but by also instructing him to leave the property forthwith, an act which is admitted at para 21.1 of the answering affidavit.
- [9] The defence raised by the first respondent in response to the contention by the applicant that it was the lawful possessor of the equipment, has *locus standi* to launch the application and to seek the relief in the notice of motion is the following:
- “Die bewerings vervat in die paragraaf onder beantwoording word ontken en ontken ek by herhaling dat die applikant, wat in ieder geval slegs opgetree het as verteenwoordiging van Mnr Jiang, alternatiewelik die maatskappy, op enige stadium in vrye en ongestoorde besit van enige van die items wat die onderwerp van hierdie aansoek vorm, was en/of is.”*

- [10] Adv Botes SC, appearing for the applicant, made the submission that the first respondent, in raising this defence, is trying to shift the focus from the available evidence with regards to possession. In the contract referred to at para 6 (above) Vic Master Mining Trust was the “seller” represented by the first respondent while the buyer was a company from the United Kindom, Gallantlion Resources (UK) Co Ltd, represented in South Africa by the applicant (Mr Hortsmann). Counsel submitted that the equipment forming the subject matter of this application has nothing to do with the aforementioned contract.
- [11] The respondents challenged the assertion by the applicant that it conducts mining activities at Kareepan Mine and invited the applicant to specify what those activities entailed as well as to provide a register of its employees who performed those mining activities. The response to this challenge was dealt with in the replying affidavit which brings me to the next point of the objection by Mr Coetzee to the propriety of admitting the replying affidavit.
- [12] Mr Coetzee contested the correctness of accepting the unsigned replying affidavit. According to him the respondent’s legal team ignored it and regarded the affidavit only as a draft which did not warrant their attention and opted not to make any submissions pertaining thereto. In actual fact the filing chronology was as follows: The founding affidavit was filed on 09 February 2017; the answering affidavit was filed on 15 February 2017 and the the replying affidavit was filed on 16 February 2017 for the matter to be heard on 17 February 2017.
- [13] What seemed evident from the papers is that Mr Hortsmann signed the original of the replying affidavit at Tulbagh on 16 February 2017 which

was commissioned on the same day. According to Adv Botes the signed replying affidavit was delivered to the respondent's instructing attorney's offices, Engelsman Magabane, at 15h25. The fact that this matter was brought before court on an urgent basis is not out of the norm if the unsigned document would be available electronically or be made available to the Court and the opponent to enable them to prepare adequately while the signed documents are in transit and subsequently filed. A properly signed copy was handed up to me in court confirming the submissions by the applicant's counsel. It is my view that the replying affidavit was properly and timeously served. The respondents will therefore suffer no prejudice. Hence I allowed it.

- [14] The replying affidavit contains copies of quotations, Tax invoices and proof of payment for some of the mining equipment forming the subject matter of this application. Adv Botes submitted that, contrary to the contention by the respondents, the equipment does not form part of the contract between the buyer and the seller which involved the UK Company. Counsel added that the equipment enabled the applicant to conduct its own mining activities as stated earlier of procuring and stockpiling the manganese lumpy.
- [15] Mr Coetzee contended not the applicant but the respondents were in possession and control of the equipment in question. What should however not be misconstrued, Mr Botes argued, was that the Kareepan Mine was the respondent's main place of business and the applicant had set up site at the same Kareepan Mine for purposes of their mining activities in manganese lumpy. This is what the applicant explained at para 19 of its affidavit:

“19.1 The equipment is located on the property behind a fence and secured entrance;

19.2 The respondent has appointed security officials to guard the entrance of the property; and

19.3 It is impossible for the applicant to access the property without the respondent’s prior consent in order to remove the equipment from the property. The respondent’s aforementioned conduct, i.e to disallow the applicant an opportunity to remove the equipment from the property, constitutes spoliation.”

[16] A respondent has limited defences that can be raised in spoliation applications, namely: (a) denial, (b) restoration is impossible or (c) counter-spoliation. See Erasmus, Superior Court Practice, Volume 2 D7-13. *In casu* the respondents’ defence is that of denial.

[17] In *Willowvale Estates CC and Another v Bryanmore Estates Ltd* 1990 (3) SA 954 (W) at 956 D-I Kirk-Cohen J considering the nature of a mandament van spolie, referred to Wille Principles of South African Law 7th edition at page 198:

“Possession is regarded by the law with such significance that a person who is in possession of a movable thing is presumed to be the owner of it. As a consequence of this importance, the law affords a possessor every possible protection and assistance; not only in retaining his physical control, but also in regaining it when he has been unlawfully dispossessed. The result is that a possessor may resist anyone who attempts to deprive him of possession; he may remain in undisturbed possession until another person has legally established a better title than his to own or possess the property in question; and if he is despoiled of

possession he may then and there(ie before the disposition is complete) eject his adversary or he may by summary legal process, known as a mandament van spolie, obtain immediate restitution of possession without regard to his want of title. These remedies are available to any possessor, whether civil or natural or bona or mala fide; to a possessor of moveable or immovable property, or of an incorporeal right, such as a right to have a nameplate affixed to a wall, or a servitudal right even to a possessor of property which he has stolen.

If a possessor has been deprived of possession by violence, fraud, stealth or some other illicit method, he may obtain from the court a mandament van spolie, or spoliation order, commanding the dispossessor to restore the possession to himself, the applicant. It is a fundamental principle that no man is allowed to take the law into his own hands. Consequently if a person without being authorised by a judicial decree, dispossesses another person, the court, without inquiring into the merits of the dispute, will summarily grant an order for restoration of possession to the applicant, as soon as he has proved two facts; namely, that he was in possession, and that he was despoiled of possession by the respondent. The policy of law is neatly summed up in the maxim, spoliatus ante omnia restituendus est.”

The learned Judge continued at 961E:

“..[A] spoliation must be adjudicated upon ante omnia and thus speedily.”

[18] Erasmus, Superior Court Practice, Vol 2, D7-1 describes the remedy for the *mandament van spolie* as follows:

- (a) it is a possessory remedy;
- (b) it is an extraordinary and robust remedy;

(c) it is a speedy remedy.

[19] In *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) at 117 para 10 Madlanga J's pronouncements are instructive:

"[10] The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process."

[20] What seems to be uncontested or inexplicable by the respondents is the purported connection made by the applicants of the list of equipment in the founding affidavit that forms the subject matter of this application and the tax invoices, quotations and proof of payment for the same equipment. The respondents have not challenged the evidence at all save for the vehement application to have the affidavit rejected. There were also copies of e-mail communication that were attached to substantiate the applicant's operations.

[21] At this stage, I am satisfied that the applicant was in peaceful and undisturbed possession of the mining equipment specified at para 6 (above) and must therefore succeed in obtaining the relief sought.

[22] On the issue of costs there is no reason why the costs should not follow the result. The submission by both Mr Botes and Mr Coetzee with regards to the employment of two counsel on either side was that it was prudent to appoint senior and junior counsel because the outcome of this application will have dire consequences for either party. I agree.

[23] In the result the following order is made:

1. The respondents (Christian Arnoldus Jacobus Victor and Christian Arnoldus Jacobus Victor N.O) are ordered forthwith to restore the applicant's (Absolute Dynamic Solutions CC's) possession in respect of the following movable mining equipment and accessories *ante omnia*:
 - 1.1 160 meters of 4 Core 35 mm armed cable;
 - 1.2 180 meters of 4 Core 6 10 mm armed cable;
 - 1.3 74 kw Star Delta starter box for jaw crusher;
 - 1.4 1 set liners for jaw crusher;
 - 1.5 5.5 kw 6 pool 380 volt electric motor for small jaw crusher;
 - 1.6 Lab crushers, including small 10 X 6 jaw crusher and pulverizer;
 - 1.7 Ripper for 60 ton excavator;
 - 1.8 200KVA 380 volt 3 phase diesel powered generator;
 - 1.9 1 set of 4 bucket tips for Volvo generator; and
 - 1.10 220 volt 50 litre per minute diesel pump.
2. The respondents are ordered to deliver and to surrender the equipment in para 1 (above) to the applicant forthwith.
3. The sheriff of this Court is authorised and mandated to serve this order on the respondents forthwith at the respondents' principal place of business situated at Kareepan Mine, Postmasburg, and by way of electronic transmission (e-mail or facsimile).

4. Should the respondents refuse or omit to comply with the order as contained in para 1 (above), the sheriff of this court and/or his/her deputy is authorised and mandated to execute this order (attach and remove the equipment) and to do everything necessary to reinstate the applicant's possession in respect of the equipment forthwith and, if necessary, to obtain the assistance of the South African Police Services to assist him/her in the execution of this order.
5. The respondents are ordered to pay the costs of this application, including the costs consequent upon the employment of two counsel jointly and severally the one paying the other to be absolved.



MAMOSEBO J

NORTHERN CAPE DIVISION

For the applicant:

Adv FW Botes SC

Adv ASL Van Wyk

Instructed by:

Fletcher's Attorneys

For the respondents:

Adv W Coetzee SC

Adv AG Van Tonder

Instructed by:

Engelsman Magabane Inc