



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 High Court, Kimberley)**

REVIEW CASE NO: **2400/2016**
DATE HEARD: **25/11/2016**
DATE DELIVERED: **29/11/2016**

In the matter between:

C-ROCK MINING (PTY) LTD

Applicant

and

ROCKWELL RESOURCES RSA (PTY) LTD

1st Respondent

H C VAN WYK DIAMONDS LTD

2nd Respondent

SAXENDRIFT MINE (PTY) LTD

3rd Respondent

PIONEER MINERALS (PTY) LTD

4th Respondent

Coram: Olivier J

JUDGMENT

Olivier J:

A. Introduction

- [1.] On 4 November 2016 the applicant, C-Rock Mining (Pty) Ltd, brought an urgent application in which Rockwell Resources RSA (Pty) Ltd , H C Van Wyk Diamonds Ltd , Saxendrift Mine (Pty) Ltd and Pioneer Minerals (Pty) Ltd were cited as, respectively, the first, second, third and fourth respondents. It is not in dispute that the respondents for purposes of this application have shared interests and have been properly joined.
- [2.] The application was based on the *mandement van spolie*. The relief claimed against the second and third respondents in the notice of motion can be summarised as follows:
- 2.1 That they return computers and hardware to the applicant at the Saxendrift and Wouterspan mines and that they restore the applicant's access to the internet and the communication and telephone systems at those mines.
 - 2.2 That they return to the applicant possession of the so-called wet plant at the Wouterspan mine, remove all their employees from the wet plant and stop operating the wet plant.
 - 2.3 That all employees of the second respondent be removed from the mining equipment at the Saxendrift, Remhoogte and Wouterspan mines and that the applicant's possession of that equipment be restored.
 - 2.4 That the applicant 's access to offices, warehouses, storerooms and "*all facilities*" at the Remhoogte, Saxendrift, Wouterspan and Nuwejaarskraal ("*NJK*") mines be restored.

- 2.5 That the applicant be allowed free access to the NJK mine and to remove equipment required by it from that mine.
- [3.] All these mines are situated within the area of jurisdiction of this Court.
- [4.] On 7 November 2016 Coetzee AJ, after having heard argument on 4 November and on the founding papers only, "*on an interim basis with immediate effect, pending the final determination of this application*" granted the relief sought (but restricted the relief in respect of the wet plant to section 2 of the plant), and in addition ordered that the respondents "*do all things necessary to re-instate the legal appointments of all the employees of the applicant who held such legal appointments as at 2 November 2016*". I was informed from the bar that the order regarding the appointments was granted after the notice of motion had at the hearing been amended to include a prayer to this effect. Costs were reserved for later determination.
- [5.] The order of 7 November 2016 did not include a return date which could be anticipated in terms of Uniform Rule 6 (8). The fact that the order had not been made in the absence of the respondents would also have precluded them from setting the matter down for reconsideration in terms of Uniform Rule 6 (12) (c). The matter was however set down for hearing on 16 November 2016 and answering and replying papers were filed. On that day the application was postponed to 25 November 2016, and costs were once again reserved.
- [6.] On 25 November 2016 the matter was heard as if it was a return date and on the basis that what had to be decided was whether the relief sought in the notice of motion, as well as the interim relief regarding the appointments, should be granted on a final basis.

- [7.] Due to the fact that final relief was eventually claimed factual disputes were approached in accordance with the so-called **Plascon-Evans** rule that final relief would only on the papers be ordered *“if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. This is so unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers”*¹.
- [8.] In his replying affidavit the deponent for the applicant, Mr Melchior Jacobus Van Niekerk, made much of concessions which counsel who had represented the respondents on 4 November had been prepared to make as far as the relief set out in the notice of motion was concerned. It was also referred to in argument before me by Mr Daniels SC on behalf of the applicant. Whatever concessions may have been tendered at that stage would probably have been for purposes of interim relief only, and they could in any event never bind this court in its consideration of what has been placed before it for purposes of the final relief which the applicant eventually sought.
- [9.] The fact that some of the relief granted on 7 November 2016 has already been given effect to, and that in respect of some of the other relief it has been conceded that the applicant had been entitled to access or possession, makes no difference to the issues to be considered at this stage. At this juncture it not only has to be decided what final relief the applicant is entitled to, but also, and at least as far as costs are concerned, what relief the applicant had been entitled to even on an interim basis. Even if possession now appears to be common

¹ **ABSA Bank Ltd v Collier** 2015 (4) SA 364 (WCC) para [39]; Compare too **Andalis v Bartmann** 2014 JDR 0508 (GSJ) para [5]; **Dotcom Trading 849 CC v Rand Water** 2015 JDR 0659 (GP) para [20]; **Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd** 2010 (2) SA 59 (N) para [4]

cause, it would still be necessary to decide whether that possession was shown to have been despoiled.

B. Authorisation

[10.] In the replying affidavit the authority of Mr Adriaan Jacobus Benson, the deponent for the respondents, to oppose the application is challenged on the basis of him having failed to annex a resolution to this effect to the answering affidavit. In argument Mr Daniels SC, counsel for the applicant, pursued this argument, although not vigorously. It is trite that it is not always necessary to produce such a resolution (particularly not when there is not yet any indication that the issue of authority may arise)², and equally trite that a challenge to the authority to institute or oppose court proceedings should be done through the mechanism of Uniform Rule 7, and most certainly not like this³.

[11.] Mr Daniels speculated that Mr Benson could not have personal knowledge of all that he deposed to in his affidavit, but he never formally objected to the admissibility of Mr Benson's affidavit in evidence, nor did he apply for the striking out of any parts of it.

C. History

[12.] The applicant and various respondents concluded contracts which, as far as the applicant is concerned, resulted in access to the sites of the abovementioned mines and in possession of, *inter alia*, certain equipment there, and it appears that even before the conclusion of the contracts there had between the applicant and the group of respondents been a working relationship which had resulted in such access and possession. The precise extent of the access and possession is, however, in dispute.

² See **South West Africa National Union v Tjozongoro and Others** 1985 (1) SA 376 (SWA) at 381 D-E

³ Compare **Unlawful Occupiers, School Site v City of Johannesburg** 2005 (4) SA 199 (SCA)

- [13.] The relief claimed is spoliatory in nature. I do not agree with the contention that, if on the respondents' version the applicant is actually claiming more than what it enjoyed at the time of the alleged spoliation, the basis of the claim somehow changes and would no longer be spoliatory in nature. The claim remains spoliatory, and the fact that there may be a dispute about the exact measure of possession that an applicant had enjoyed cannot detract from this. If it is found that an applicant did in fact have possession, but not to the extent alleged by it, the applicant would simply only be entitled to the restoration of such possession as it had enjoyed. It would therefore at this stage be unnecessary, and indeed inappropriate, to become involved in the detail of the disputes that obviously exist in the present matter about the applicant's entitlement to the possession and access concerned here.
- [14.] Mr Green SC, counsel for the respondents, argued that the applicant, by referring to the contracts between the parties in founding, had introduced into the present dispute the issues regarding the actual possessory rights of the applicant. I disagree. The agreements were clearly referred to as background, and not to obtain anything more than spoliatory relief.
- [15.] Mr Green furthermore argued that, because some of the relief sought went further than merely orders that possession be restored, the application could no longer be regarded as a spoliation application. He singled out the relief that is aimed at the removal by the respondents of their employees from the wet plant and from equipment, at authorisation by the respondents of the removal of equipment by the applicant and at the reinstatement of appointments. In my view all these orders were intended to be ancillary to the orders that possession be restored, and to give effect to the latter. The fact that the applicant sought those orders did not in the circumstances, and in view of the fact that it was in the founding affidavit made clear that the aim of the applicant

was only to have the *status quo ante* restored, change the true nature of this application to one that could no longer be regarded as spoliatory in nature⁴. The cases referred to by Mr Green are distinguishable, because the applicant in this matter never went further than to make out a case for and to claim spoliatory relief, and it never claimed to be entitled to possession on any other basis than having been in possession and having been unlawfully despoiled of that possession⁵.

[16.] The applicant's case is that the spoliation complained of had occurred on 2 and 3 November 2016.

D. Internet, computers, telephone systems

[17.] I will first deal with the issue concerning the computers and the access to the internet and telephones.

[18.] It is common cause that the applicant made use of computers, telephones and an internet connection of the second respondents.

[19.] The case made out in the founding affidavit as far as dispossession is concerned was simply that the second respondent had on 2 November terminated the internet connection and that it had removed the computer hardware and printers, and also the applicant's records⁶. No specific allegations were made regarding dispossession of the telephone system.

⁴ Compare **Jones v Claremont Municipality** (1908) 25 SC 651; **Dalby v Soffiantini** 1934 EDL 100; **Zinman v Muller** 1956 (3) SA 8 (T); **Sebastian and Others v Malelane Irrigation Board** 1950 (2) SA 690 (T); **Fredericks and Another v Stellenbosch Divisional Council** 1977 (3) SA 113 (C)); **Vena and Another v George Municipality** 1987 (4) SA 29 (C); **Malan and Another v Green Valley Farm Portion 7 Holt Hill 434 CC and Others** 2007 (5) SA 114 (E) para [24]; **Impala Water Users Association v Lourens NO and Others** 2008 (2) SA 495 (SCA)

⁵ Compare **Stocks Housing Cape (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services, and Others** 1996 (4) SA 231 (C) at 244B – 245C; **Street Pole Ads Durban (Pty) Ltd and Another v Ethekweni Municipality** 2008 (5) SA 290 (SCA) para [15]; **Minister of Agriculture and Agricultural Development and Others v Segopolo and Others** 1992 (3) SA 967 (T) at 971

⁶ Although this was not in so many words said in the founding affidavit I assume that those records had been kept on the computers.

- [20.] The respondents' version is that the internet had only been disconnected for about an hour outside office hours, that by 08:00 on 2 November it had been restored and that the disruption could not have had any influence on the applicant in the performance of its functions. Reference was made to a data log, which according to the respondents indicates the use of data, by means of internet connection, on 2 and 3 November.
- [21.] It is denied that the applicant's use of the telephone system had been interfered with. Here too reference was made to an annexed calls log, as indicating the use of the system by the applicant's employees in the relevant period.
- [22.] It is denied that any computers or related equipment had been removed. Mr Benson explained that routine maintenance had indeed been done on the computers on 2 November, but without removing them.
- [23.] In reply the version of Mr Van Niekerk regarding the issue of the internet access is noticeably different from the allegation in the founding affidavit that it had simply been terminated. It is now alleged that the internet connection had been terminated "*on an intermittent and in a haphazard manner*". It is claimed that the data log referred to by Mr Van Niekerk did not show "*unrestricted continuous access*" during the relevant period.
- [24.] No other records or logs have been produced for purposes of comparison and to substantiate this adapted version of Mr Van Niekerk. The same applies to the telephone log referred to by the respondents.
- [25.] There is nothing improbable or untenable about the respondents' version in this regard and the applicant has most certainly not in reply succeeded in disproving it.

- [26.] Mr Daniels suggested that something sinister must be read into the fact that the alleged work on the computers and the temporary disruption of the internet connection took place more or less in the same period as the spoliation of the applicant's possession of the wet plant and of its equipment at the Remhoogte and NJK mines, but this would obviously beg the question whether there indeed had been a spoliation, as alleged or at all, in respect of the wet plant and the equipment at those mines.
- [27.] In fact, the applicant suspiciously appears to have changed its version in an attempt to explain the data log, which would otherwise have been irreconcilable with the applicant's case in founding. The applicant never challenged the accuracy or authenticity of the log or its contents.
- [28.] It follows that I am of the view that the applicant is not entitled to the final relief it seeks in this regard.
- [29.] This conclusion makes it unnecessary to decide whether the right to the use of the internet connection (as opposed to the use of the computers) would in the present matter be capable of protection through the *mandament van spolie* remedy. It is difficult to discern from the allegations in the founding affidavit on what basis the applicant would have been entitled to the availability of an internet connection. Mr Van Niekerk stated that the applicant required the connection, *inter alia*, to comply with the agreements referred to. Insofar as this may have suggested that the availability of the internet connection had been an implied or tacit term of one or more of those agreements, and that the applicant accordingly had a contractual right thereto, Mr Green referred me to, amongst others, the case of **Telkom SA Ltd v Xsinet (Pty) Ltd**⁷. In that matter it was held a contractual right to such a connection is only a personal right and that an order compelling restoration of such a connection under those circumstances would

⁷ 2003 (5) SA 309 (SCA)

amount to an order compelling specific performance, which would not be a competent order in an application based only on the *mandement*.

[30.] It was never alleged, on behalf of the applicant, that its use of the internet connection was based on anything other than contract, or that its right to the connection had not been only a personal right.

[31.] On the other hand, and on the assumption that the computers had been used to gain access to the internet, it could conceivably be argued that the availability and use of the internet connection, and the incorporeal right thereto, was an incident of the applicant's alleged joint possession, control and use of the computers and of the building in which those computers were, and that the termination of the connection would therefore have constituted an interference with the applicant's possession of the computers and building; something that would probably on the applicant's version have been capable of protection under the *mandement van spolie*⁸.

[32.] The onus to prove a right capable of protection, be it in respect of something corporeal or incorporeal, including the precise nature of that right⁹, is on the applicant¹⁰, and on what the applicant has placed before this Court it would probably not have discharged that onus. As I have however already said, however, it is not necessary to come to a finding in this regard in the circumstances.

E. Wet Plant

[33.] As regards the wet plant at the Wouterspan mine, it appears that the applicant had access to the Wouterspan mine area

⁸ Compare **Impala Water Users Association v Lourens NO and Others**, *supra*; **City of Cape Town v Strumpher** 2012 (4) SA 207 (SCA)

⁹ See **Firststrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others** 2008 (2) SA 503 (SCA) para [13]; **ATM Solutions (Pty) Ltd v Okru Handelaars CC and another** [2009] 2 All SA 1 (SCA)

¹⁰ See **Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd**, *supra*, para [17]

for purposes of the construction of the plant, and for purposes of performing its duties in terms of a mining contract.

- [34.] The issues to be decided are basically whether the applicant at the stage of the alleged spoliation still had sufficient possession of the plant for the purposes of spoliation and, if so, whether that possession had unlawfully been interfered with.
- [35.] I have already made mention of the fact that the relief granted by Coetzee AJ in this regard was restricted to section 2 of the wet plant. It is common cause that the wet plant would be constructed in three sections, each consisting of two so-called lines. It is also common cause that the applicant had by 2 November 2016 completed the construction of section 1 to at least the stage where testing of that section could be conducted, and that the applicant was at that stage busy with the construction of section 2.
- [36.] It is the applicant's case that possession of section 1 had, however, not been handed over to the second respondent and that the applicant had also been in undisturbed possession of section 2, which it was busy constructing.
- [37.] The respondents' version is fundamentally different, especially as regards section 1 of the plant. I do not know whether this is why Coetzee AJ restricted the interim relief regarding the wet plant to section 2. The answering papers had, as already indicated, not been filed by then, but the respondents had as already mentioned at the hearing on 4 November been represented by counsel.
- [38.] Be that as it may, the respondents' version is that possession of both lines of section 1 had since August 2016 been exclusively with the second respondent, who had been operating section 1 since then. Printouts of so-called Whatsapp messages in which Mr Van Niekerk appeared to have congratulated the second respondent on the successful

operation of section 1, and which included references to the operation of section 1, were annexed to the answering affidavit. Reference was made to records reflecting the quantity of diamondiferous gravel processed.

- [39.] In reply Mr Van Niekerk persisted with the version that the applicant had as at 2 November still been in control, and at the very least in joint possession with the second respondent, of section 1. In this regard he relied heavily, if not exclusively, on the fact that the relevant contract requires testing and commissioning of any section of the wet plant before it can be commercially operated, and maintained that that process had not been completed.
- [40.] In my view the mere fact that the relevant contract required testing and commissioning before any section is officially handed over to the second respondent would not really take the matter further. It is one thing to say that the second respondent would not contractually have been entitled to operate and possess section 1 by 2 November, to the exclusion of the applicant, but the issue here is really whether the second respondent had not nevertheless *de facto* done so.
- [41.] Mr Van Niekerk referred to a letter dated 17 October 2016, in which the applicant's representative wanted to know when the second respondent wanted to operate section 1 and indicated that the second respondent would be allowed to operate section 1 at its own risk. This could be argued to be indicative of the fact that the second respondent had not by then operated section 1 yet, but it is also susceptible to an interpretation that the second respondent was merely being informed that it was running section 1 at its own risk.
- [42.] In fact, the contents of the letter as a whole in any event militate against Mr Van Niekerk's argument that the second respondent could not have been in possession of section 1 by 2 November if the commissioning had not been finalised by then. It indicated a willingness to let the second respondent

operate and possess section 1 at a time when the commissioning would according to Mr Van Niekerk not have been completed.

- [43.] Mr Van Niekerk also relied on a letter dated 22 July 2016, by the engineer Mr Crail. In it Mr Crail made reference to issues that had to be addressed "*before a final sign off*" of section 1. The contents of that letter do not advance the case of the applicant. The letter does not exclude the possibility of the second respondent being in possession of section 1 before the final "*sign off*", because it has not been claimed that so-called "*final sign off*" would have been a prerequisite for possession of section 1 by the second respondent. It does not exclude the possibility of such a sign off having taken place since then. It also does not exclude the possibility that the respondents had after the date of that letter *de facto*, even though possibly in breach of the relevant contract, started operating section 1 and that they had still been doing so by 2 November. In fact, in the opening line of the letter Mr Crail expressly approved "*the first two production lines to go into operation as from the date of this letter*", and this approval does not seem to have been made subject to the resolution of the issues referred to in the rest of the letter, or to a so-called "*sign off*".
- [44.] Mr Van Niekerk's statement, in the founding affidavit and formulated in the present tense, that one of the functions of the applicant at the Wouterspan mine is to "*feed*" the mine material into the wet plant for processing, could also be argued to imply that the wet plant was already at least partially in operation, and more particularly section 1 of it.
- [45.] Mr Van Niekerk submitted that the quantities of gravel processed were small, which according to him would be indicative that the processing was part of only trial runs, and not of full operation and production, but it is not clear what quantities would be consonant with full production.

- [46.] In his Whatsapp message of 6 September 2016¹¹ Mr Van Niekerk stated that the applicant could not simultaneously “run” the plant and be responsible for construction, which could also be interpreted to mean that at least part of the wet plant had been in operation by then.
- [47.] Once again I do not find the respondents' version regarding the possession of section 1 improbable, untenable or far-fetched. If so it has to be accepted, for purposes of this application, that the second respondent had by 2 November 2016 been in possession of section 1 of the wet plant.
- [48.] It is so that indications are that the applicant still had to attend to the issues at section 1 which Mr Crail had referred to. As will be seen below, it has not however been shown that the applicant had been doing so as at 2 November 2016 and that it had accordingly on that basis at least been in co-possession of section 1.
- [49.] As regards section 2 the applicant could on 2 November 2016, as will be seen below, at best for it have been exercising possession of and control over that section through 4 of its employees who were construction workers (as opposed to employees involved in the mining activities of the applicant) and who were the only construction workers of the normal compliment of 45 who had according to even the applicant been present at the general area of the Wouterspan mine on 2 November 2016. As will also be seen below the applicant has not though, even on its own allegations, shown that it had on 2 November 2016 through the presence or conduct of those 4 employees exercised possession of or control over section 2.
- [50.] As will also appear in due course this issue is inextricably interwoven with the issue whether the applicant had

¹¹ Annexure RW18.2, p 325

abandoned possession of, *inter alia*, section 2 of the wet plant before the alleged events of 2 November 2016.

- [51.] There is in any event also in my view a serious factual dispute as far as the issue of dispossession of any of the sections of the wet plant is concerned.

- [52.] In founding the applicant's case was that the wet plant had on 2 November 2016 been taken over and that the applicant's employees had been "*displaced*", whatever that may mean. Mr Van Niekerk did not, however, claim that the applicant's employees had on that day, or on any other day, been denied access to any part of the entire wet plant. This is difficult to reconcile with the statement of the applicant's attorney, in two letters dated 2 November 2016¹², that the applicant had been locked out of and denied access to, *inter alia*, the entire Wouterspan mine, where the wet plant was after all being constructed.

- [53.] Mr Daniels, conceding this inconsistency and the fact that there had in fact been no lock out, explained that the attorney's statement may have been "*a shot fired too early*". There is no explanation by the attorney himself and the only inference that can be drawn is that the attorney was, in stating this, acting upon the instructions of somebody representing the applicant.

- [54.] In the founding affidavit Mr Van Niekerk made conflicting allegations about who it was that had "*displaced*" the applicant's employees and that had taken over the wet plant. In paragraphs 63, 65 and 66 of the founding affidavit he first stated that it was the second respondent's employees that "*took possession*" of the wet plant, then that the third respondent's employees "*commenced to operate*" the plant and "*took it over*" and later that it was employees of the second respondent who had "*displaced*" the applicant's

¹² Annexures FA17 and FA18 to the founding affidavit.

personnel and who were "*unlawfully commercially operating*" the plant.

- [55.] The repeated references to the "*operation*" of the plant would suggest that the plant had at that stage been operational, which would be irreconcilable with the applicant's case even in respect of section 1. The alleged displacement of employees of the applicant in the operation of the plant, would furthermore suggest that they had at that stage been operating the plant, as opposed to doing only construction work on it, which would be equally irreconcilable with the applicant's case.
- [56.] There was no clear allegation in the founding affidavit that the employees of the applicant had been "*displaced*" in the performance of their duties in the construction of the wet plant, that the construction process had been taken over or that they were prevented from going on with the actual construction process.
- [57.] At best for the applicant, as already mentioned, only 4 of its employees could have been involved in the alleged "*displacement*" as far as the construction of the wet plant is concerned, yet the applicant has not taken the trouble to have one or more of them describe what they were doing when the "*displacement*" occurred or how exactly the "*displacement*" and the occurred and how the wet plant was "*hijacked*". In view of the allegation that they "*had to restrain themselves not to become involved in a physical confrontation with employees of the third respondent*" they would have been in the ideal position to give at least some detail of what had happened there.
- [58.] Again the reference to the third respondent is confusing against the background that the wet plant contract had been concluded between the applicant and the second respondent and in the context of allegations that it had actually been the

second respondent's employees who had taken over the wet plant.

- [59.] By contrast the case of the respondents in this regard is very clear. They say there has been a dispute about payment and that the applicant had then threatened to stop construction on the wet plant. This is borne out by a letter dated 30 September 2016, which announced that the applicant was suspending construction.
- [60.] In reply the applicant's explanation for this is that it had been the beginning of a so-called pay weekend, during which the applicant's employees did not work. The contents of the letter as a whole militate against this explanation. It is categorically stated that the suspension of construction was because payment of salaries had not been made and because materials had not been supplied; exactly the things that are the subject of the dispute between the parties and which have nothing to do with the alleged institution of pay weekends.
- [61.] Mr Benson went on to say that, although the applicant had then during the following week resumed construction, it on 28 October 2016 finally stopped construction, left the site and abandoned possession of the wet plant. There would therefore after that according to the respondents have been no possession of any section of the wet plant by the applicant to be interfered with.
- [62.] Again the respondents substantiated this by referring to a letter addressed to them on behalf of the applicant on 27 October 2016. The letter once again informed the respondents that construction would be stopped at the end of that day.
- [63.] Here too Mr Van Niekerk's explanation in reply is that the letter had been intended to inform the respondents of the cessation of construction over the coming pay weekend, as construction had otherwise taken place every day of the

week. This explanation is to some extent borne out by the statement, in the letter, that work would be stopped "*due to the pay weekend*". Mr Van Niekerk explained that pay weekends occurred regularly once a month on the last weekend of the month, and were taken as long weekends.

- [64.] Viewed in isolation these words may have fitted in with Mr Van Niekerk's explanation, were it not for the fact that the letter did not end with the reference to a pay weekend. It went on to advance further reasons why construction would be stopped, namely once again non-payment and the unavailability of materials. In fact, the letter went even further, by unequivocally stating that construction would only resume on the following Tuesday "*if there is materials on site for the staff to continue*". This is exactly the crux of the dispute between the parties, the respondents denying responsibility for the supply of materials, and for the advancing of funds to enable the applicant to obtain the materials. The letter therefore made it very clear that the applicant would not resume construction if the required material was not on site, and this is exactly what the respondents say. No material was supplied and the applicant never returned to resume construction.
- [65.] In any event, I find the applicant's explanation improbable to the extent that, if the institution of pay weekends had been a regular monthly event, there would on the face of it have been no reason for the applicant to address a letter to the respondents merely to inform them of this. On the probabilities the intention with the letter must have been more than that.
- [66.] On 27 October 2016 Mr Glenn Norton, an erstwhile employee of the respondents who had taken up employment with the applicant, sent a message to Mr Benson. It informed Mr Benson that the plant would be closed "*at the end of the shift*", and added "*Just so you know*". It made no mention at all of a pay weekend. It included copies of two letters that

had the previous day been addressed to the respondents by the applicant's attorneys. Those letters dealt with the issues between the applicant and the respondents, made reference to liens allegedly held by the applicant and stated, quite significantly, that the applicant would not relinquish possession of equipment at the Remhoogte and Saxendrift mines or of the wet plant at the Wouterspan mine to the respondents. It was followed by another message from Mr Norton that read: *"Our first shots in the war"*.

- [67.] These messages make it very clear that at the very least the letter of 27 October 2016 was intended to convey much more than merely informing the respondents of an impending pay weekend. There is no way that a message denoted as a first shot in a war could be seen as a friendly, or at least neutral, letter, simply conveying information about a pay weekend. It would be naïve in the extreme, in view of the repeated references to liens and to possession in letters apparently deliberately included in that message, and against the background of the dispute between the parties, not to interpret Mr Norton's messages as conveying to the respondents that the plant would be closed as a direct result of the dispute and that such closure should not be interpreted as the relinquishing of the applicant's alleged liens.

- [68.] The fact that the respondents on 2 November 2016 had to remove a truck which the applicant had left in a position where it obstructed the operation of section 1 of the wet plant, strengthens the respondents' version. It is a very strong indication that section 1 had at that stage been in operation, otherwise there would not have been any reason to leave the vehicle exactly where it would prevent operation of section 1.

- [69.] According to the respondents only 3 employees of the applicant who had previously been involved in the construction of the wet plant returned to the Wouterspan mine on 2 November 2016, but have not since then been doing any work at all on the wet plant. According to Mr Van

Niekerk it was actually 4 construction workers that returned to the Wouterspan mine area on 2 November 2016 and all he says in reply is that the employees could not “*do any physical work*” because of the respondents’ spoliation. He does not elaborate or explain this. It is not clear why the respondents’ operation of section 1 would have prevented those employees from resuming construction of section 2 of the wet plant.

- [70.] It has in any event never been the applicant’s case that there had been any spoliation at the plant before 17:00 on 2 November, and even on the applicant’s case it can accordingly simply not be correct to say that the 4 employees had been prevented from exercising possession of at least section 2 of the wet plant.

- [71.] No case has therefore, as already mentioned, been made out that the applicant had through these employees exercised possession of the wet plant on 2 November, and at the time that they were allegedly “*displaced*” by the respondents’ employees.

- [72.] Mr Van Niekerk offers no explanation, in any event, for the fact that the full complement of 45 employees who had been involved in the construction of the wet plant did not return.

- [73.] There are in my view on the evidence indications that the applicant had indeed by 28 October 2016 abandoned any measure of possession which it may earlier have enjoyed in respect of the wet plant. At the very least though the respondents’ version in this regard is far from improbable, untenable or far-fetched, and on the **Plascon-Evans** principle it therefore had to be accepted for purposes of this particular factual dispute.

- [74.] As far as the allegation of a displacement of the applicant’s personnel is concerned Mr Benson’s denial is, as far as the operation of section 1 is concerned, substantiated by the very logical explanation that the applicant’s employees had never

held appointments to operate the plant, only to construct it, and the construction of section 1 had by then been completed.

- [75.] In the circumstances it has not been shown that the applicant was in possession of even section 2 of the wet plant at the relevant time on 2 November and no case has been made out that any dispossession occurred on 2 November in respect of either of the sections of the wet plant.
- [76.] There are in fact indications that even the mining activities had been abandoned, because the undisputed evidence is that on 2 November 2016 the only mining activities conducted by the applicant consisted of the construction of so-called woodrows in the general mining area of the Wouterspan mine by means of a single bulldozer; this while the applicant's mining activities had until then been conducted by no less than 126 employees.
- [77.] I am therefore of the view that the applicant is not entitled to the relief, in its final form, that is claimed in respect of the wet plant in paragraphs 3.3 to 3.6 of the notice of motion.

F. Equipment

- [78.] The relief sought in paragraphs 3.7 and 3.8 of the notice of motion concerned the issue of mining equipment and its possession, excluding the equipment at the NJK mine, which is the subject of separate prayers in the notice of motion and of separate orders made by Coetzee AJ.
- [79.] It appeared that the applicant had been in possession of mining and earthmoving equipment which it used to perform its mining duties at the Wouterspan mine. Some of it belonged to the applicant, but some belonged to the respondents. The latter equipment had been made available to the applicant on the basis of a sale agreement in terms of which the applicant was to purchase that equipment and the

purchase price would be set off against what was owing to the applicant for the materials used in the construction of the wet plant, and only upon completion of the wet plant.

- [80.] The applicant in my view did not in its founding affidavit make out any case at all that the respondents had dispossessed it of any such equipment. As regards equipment at the Wouterspan mine, I have already referred to the absence of even an allegation that access to that equipment was denied.
- [81.] In founding Mr Van Niekerk made the vague allegation that the third respondent had “*placed*” its employees on the mining equipment. He gave no particulars as to exactly when this occurred, or as to how it happened if the applicant’s employees had at the time used and been in possession of that equipment, unless of course it had been possible to place them on the equipment precisely because the applicant’s employees had still been absent, after having abandoned the site on 28 October 2016.
- [82.] On the applicant’s own version the sale contract, in terms of which it had on a provisional basis been placed in possession of certain equipment, lapsed due to the non-fulfillment of a suspensive condition. It appears, however, that when the applicant was requested to surrender possession of that equipment, it refused to do so, which would obviously imply that it had at that stage still been in possession of that equipment. Its representative then furthermore took possession of the duplicate keys of that equipment.
- [83.] The respondents denied having dispossessed the applicant of any equipment on any of the days on which the spoliation had allegedly taken place.
- [84.] The respondents’ admission that, in the absence of the applicant, equipment belonging to the second respondent was used, by means of duplicate keys, to carry on with the mining there and with the operation of section 1 of the plant, does

not assist the applicant. The possession of duplicate keys would not be consonant with exclusive possession on the part of the applicant and there is in any event no evidence at all that the temporary use of those vehicles had in any way despoiled the applicant's possession thereof.

[85.] In his replying affidavit Mr Van Niekerk interpreted this as an admission of dispossession. It must however be kept in mind that it is the undisputed evidence of Mr Benson that the use of that equipment was terminated when the applicant took possession of those duplicate keys. Insofar as the use of the equipment may at the time technically have amounted to dispossession and spoliation, it apparently stopped there and then and clearly could not have been the cause of the present application.

[86.] It appears that the applicant has, on the strength of the interim order, removed all of those vehicles and machinery from the Wouterspan mine area. That in my view is extremely difficult to reconcile with the supposed purpose of the urgent spoliation application in the circumstances of the present matter, namely to regain possession so that the applicant's work at the Wouterspan mine can go on. It would, however, fit in with a scenario where the applicant had in any event earlier ceased all construction and mining activities at the Wouterspan mine. It could also be argued to be suggestive of some ulterior motive which does not really have anything to do with the actual possession, use and purpose of this equipment. As far as the respondents' part of this equipment is concerned, the only possible inference would be that this conduct was intended to deprive them of the use of equipment in circumstances where the applicant itself was in any event not going to use it as before.

[87.] The applicant also had equipment at the Remhoogte mine. It complained that its access to and possession of that equipment was disturbed when two of its employees, Mr Martin Van Niekerk and Mr Jakes Aspeling, were on

2 November 2016 refused permission to work on equipment at the mine and escorted out of the area by security personnel.

- [88.] The respondents' version that the applicant's access to and possession of that equipment had always been controlled and subject to security measures, has not really been challenged in reply, neither has the explanation that permission to work on the equipment had been refused because there had been no safety officer present, which according to the undisputed version of the respondents had been a requirement. Insofar as the applicant's access to and possession of its equipment at the Remhoogte mine had always been subject to this type of control, and even if it is for the moment assumed¹³ that the access that the applicant had enjoyed constituted possession for purposes of the *mandement*, the actions of the security personnel there on 2 November 2016 would not have disturbed the *status quo ante*.

G. NJK

- [89.] It is common cause that the applicant had enjoyed access to the NJK mine to remove its equipment, but that this access had at all times been subject to security measures and to permission.
- [90.] It is also common cause that on 3 November 2016 employees of the applicant who wanted to remove a bulldozer from the NJK mine on a low bed vehicle were refused permission to do so. This is the only incident upon which the applicant's allegation of spoliation at the NJK mine is based.
- [91.] The respondents say that permission to remove the bulldozer was refused because of the absence of a safety officer, as according to their undisputed version was required by law. This explanation was not challenged in reply, and it must be

¹³ But not decided; Compare **De Beer v Zimbali Estates Management Association (Pty) Ltd and Another** 2007 (3) SA 254 (N)

assumed that this was exactly the type of control that the applicant's access to and possession of its equipment at the NJK mine had always been subject to. This would mean that the type and extent of possession that the applicant had enjoyed at the NJK mine¹⁴ had not been disturbed on 3 November, or put another way that the *status quo ante* as far as the NJK mine and the equipment there were concerned, was not disturbed by the actions of the security personnel on that day.

H. Access

[92.] As far as the issue of access is concerned the applicant claimed, and was on an interim basis granted, orders:

92.1 that would restore its possession of and access to mining equipment at the Remhoogte, Saxendrift and Wouterspan mines; and

92. that its employees be granted "*free and undisturbed*" access to offices, warehouses, storerooms, "*and all facilities*" at the said three mines and at the NJK mine, to which the applicant's employees had according to the wording of the order enjoyed "*free and undisturbed*" access before 2 November 2016.

[93.] I have already dealt with the alleged spoliation of the possession of equipment. In the light of the fact that the applicant at that stage sought final relief, and in view of what I have already said, I am not prepared to find that the applicant was dispossessed of any equipment.

[94.] As would already have been clear it furthermore transpired, mostly from the answering affidavit and the applicant's subsequent concessions and/or failure to challenge

¹⁴ And once again on the assumption only that it would have constituted proper possession for purposes of the *mandement*.

allegations, that the applicant had in fact not prior to 2 November 2016 enjoyed free and undisturbed access to all of these mines. It is abundantly clear that its access to at the very least the Remhoogte and NJK mines had been restricted to not only controlled access, but furthermore to only such access as was necessary to work on or to remove equipment. Equipment belonging to the respondents could furthermore only be removed with the respondents' permission.

- [95.] At all the mines the applicant could in any event always only enter with the permission of the security personnel.
- [96.] The applicant has in my view not shown, for purposes of final relief, that the access that it had enjoyed had been unlawfully disturbed at any of the mines.
- [97.] I have already dealt with the events at the Remhoogte mine. The problem there was in any event not so much that access to the mine area and to the applicant's equipment was concerned, but rather that it was refused permission to remove its equipment.
- [98.] A denial of access has in fact not even as much as been alleged in the cases of the Saxendrift and Wouterspan mines. It has also not been alleged that the applicant was refused access to offices, stores or warehouses.
- [99.] The catch-all phrase "*all facilities*" would in any event have been far too wide to be included in the relief in the circumstances of this matter.

I. Appointments

- [100.] It is common cause that the statutory appointments that some of the applicant's employees held in terms of the **Mine**

Health and Safety Act¹⁵ and/or the **Occupational Health and Safety Act¹⁶** have been terminated.

- [101.] The respondents' explanation for this is that by law the appointments had to be terminated after the particular persons had been absent from the site for more than three days. Reference was not made to the specific statutory provisions in this regard, but the applicant has not denied that this was indeed the legal position.
- [102.] I realise that there is a dispute about whether the particular employees of the applicant had in fact been absent, but I have already explained why the respondents' version in this regard is accepted. If it is indeed correct that the respondents had by law under those circumstances been obliged to terminate the appointments, that may have constituted a defense¹⁷.
- [103.] It is, however, necessary to first consider whether the applicant had in any event made out a case that the termination of the appointments had amounted to dispossession for purposes of spoliatory relief. The appointments would not have been movable or immovable property, as is usually the case in spoliation applications. *Quasi* possession of rights have however in our law in certain cases been recognised as sufficient possession for purposes of spoliatory claims¹⁸.
- [104.] The applicant did not furnish any particulars at all of the nature of the right that its employees had enjoyed through such appointments. In the founding affidavit, where the applicant had to make out its case in this regard, it was only stated that the termination of the appointments had "*the effect that none of the employees of the applicant (could) lawfully perform their duties*". It was not explained why the

¹⁵ 29 of 1996

¹⁶ 85 of 1993

¹⁷ Compare **Minister of Finance v Ramos** 1998 (4) SA 1096 (C)

¹⁸ See **Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi** 1989 (1) SA 508 (A); Silberberg & Schoeman's **The Law of Property**, 5th edition, Badenhorst *et al*, pp296-300

employees would need the appointments to "*lawfully*" perform their duties, and no reference at all was made to any such legal or statutory requirement. In the circumstances the applicant failed to make out a case that its employees had actually exercised, for purposes of a spoliatory claim, whatever right they had derived from those appointments. In the words of Hattingh J in **Plaatjie v Olivier**¹⁹ at 159H : "*What is protected by the remedy is the actual performance of acts which, if lawfully performed, would constitute the exercise of a right*". The possession would in other words "(have arisen) *from the exercise or use*" of the appointments, and from the deriving of some benefit therefrom, which the applicant had not shown²⁰.

[105.] Even if it is, however, to be assumed for the moment that the applicant's case was that its employees had exercised their rights in terms of the appointments by performing their duties in the construction of the plant or in the mining activities at the Wouterspan mine, that would have been contradicted by the respondents. Their version is, in the first place, that only a few of the applicant's employees held the appointments that were cancelled, which would in itself necessarily imply that the appointments could not have been a requirement for the performance by all of the applicant's employees of their normal duties as employees of the applicant.

[106.] Secondly the Mr Benson has in any event stated categorically that the cancellation did not have the effect that any of the employees of the applicant would not have been able to lawfully perform their duties as employees of the applicant. The appointments were according to them given to "*a handful of key individuals*", and only had the effect of placing upon them certain responsibilities in connection with health and safety issues. As long as anybody else who had such an appointment was present, the employees of the applicant

¹⁹ 1993 (2) SA 156 (O)

²⁰ **Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd and Others** 2013 (1) SA 239 (KZD) para [10]

could according to the respondents carry on with their normal duties. It would not have mattered whether those appointees were employees of the applicant or not. All that was required for the applicant's employees to be able to perform their normal duties, was that there had to be supervision by a person appointed for health and safety purposes, and that person did not have to be an employee of the applicant.

[107.] This explanation of the need for and the role of appointees have not been refuted by the applicant in reply. In my view the applicant has in the circumstances not shown that the cancellation of the appointments resulted in dispossession for the purposes of spoliation.

J. Conclusion

[108.] It follows that the application has to be dismissed. Although the orders were only sought and interim granted against the second and third respondents, the costs order did not distinguish between the four respondents. The first and fourth respondents were also implicated by the applicant in the founding affidavit.

[109.] All four respondents were therefore entitled to oppose the application and there is, for purposes of the costs order, no need to differentiate between them.

[110.] Mr Daniels made much of the fact that copies of the various agreements were annexed to the answering affidavit. In view of the fact that the applicant itself made fairly extensive reference to the contracts and their implications, *inter alia* regarding the requirements for handover of the plant for operation, the respondents should not be penalised for this.

K. Costs

[111.] There is no reason why costs should not follow the result.

[112.] There is also no reason why the same should not apply to the costs of the proceedings of 4 November 2016.

[113.] Mr Green did not pursue the argument foreshadowed in his heads of argument that costs should be awarded on a punitive scale and there is therefore no need to consider this.

[114.] Both counsel were agreed that the costs occasioned by the postponement of 16 November 2016 should be costs in the application.

[115.] In the premises the following orders are made:

1. **THE APPLICATION IS DISMISSED WITH COSTS, INCLUDING THE COSTS OF 4 AND 16 NOVEMBER 2016.**
2. **INSOFAR AS IT MAY BE NECESSARY THE INTERIM ORDERS OF 7 NOVEMBER 2016 ARE DISCHARGED.**

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

For the Applicant:	ADV P DANIELS SC (Van De Wall & Partners obo Molenaar & Griffiths Inc.)
For the Respondents:	ADV IP GREEN SC (Engelsman Magabane Inc. obo Falcon & Hume Inc.)