

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3717/2014

In the matter between:

SOLAR MOUNTING SOLUTIONS (PTY) LTD

Applicant

and

ENGALA AFRICA (PTY) LTD

First Respondent

SCHLETTER SOUTH AFRICA (PTY) LTD

Second Respondent

SUN EDISON ENERGY SOUTHERN
AFRICA (PTY) LTD

Third Respondent

HEARD ON:

5 SEPTEMBER 2014

JUDGMENT BY:

G.J.M. WRIGHT, AJ

REASONS

- [1] On 14 August 2014 and after the Applicant approached the court on an ex parte basis, Moloi J issued a rule *nisi* calling on the First Respondent to show cause on 9 October 2014 why a final order in the following terms should not be made:

- (a) The applicant's possession of the property as defined in the applicant's founding affidavit shall be restored by the first respondent to the applicant forthwith;
- (b) The first respondent shall refrain from spoliating, dispossessing, or otherwise interfering, with the applicant's possession of the property.

[2] In terms of a notice dated 3 September 2014 the First Respondent anticipated the return date of the rule *nisi*. An opposing affidavit was filed, followed by the Applicant's replying affidavit.

[3] The parties appeared before me on 5 September 2014 and argued the application. The Applicant requested me to confirm the rule *nisi* and the First Respondent implored me to discharge the rule *nisi*. After hearing arguments I considered the matter and proceeded to issue the following orders:

1. The rule *nisi* is confirmed;
2. The First Respondent is to pay the costs of the application.

[4] Against the background of time constraints as well as the urgency of the matter I indicated to the parties that the reasons for my decision will be made available at a later stage. Here follow the reasons for that order.

[5] The *mandament van spolie* is a possessory remedy. The essential characteristic of a possessory remedy is that the

legal process whereby the possession of a party is protected, is kept strictly separated from the process whereby a party's right to the property, is determined. Spoliation orders are granted so as not to allow any man to take the law into his own hands. If he does so, the court will summarily restore the status *quo ante* as a preliminary step to any investigation into the merits of the dispute.

See: **Nino Bonino v De Lange** 1906 TS 120 at 122;
Ivanov v North West Gambling Board 2012 (6) SA 67 (SCA) at 75 B – E.

[6] As such, the *mandament van spolie* is an extraordinary and robust remedy. The requisites for a spoliation order are trite and may be summarized as follows:

- (i) that the applicant was in possession of the property;
and
- (ii) that the respondent deprived him of the possession forcibly or wrongfully against his consent.

See: **Yeko v Qana** 1973 (4) SA 735 (A) at 739.

[7] The cause for the applicant's possession is irrelevant.

See: **Nino Bonino v De Lange** 1906 TS 120 at 122.

[8] The question whether that possession is wrongful or illegal is also irrelevant and goes to the merits of the dispute.

See: **Ivanov v North West Gambling Board** 2012 (6) SA 67 (SCA) at [27].

- [9] An applicant has to show not that he was entitled to be in possession, but that he was in *de facto* possession at the time of being despoiled. It is not necessary that the possession be continuous.

See: **Bennett Pringle (Pty) Ltd v Adelaide Municipality** 1977 (1) SA 230 (E) at 233.

- [10] In cases that concern immovable property, the continuous presence of the applicant or its servants on the premises is not required, if the nature of the operations which it conducts on the premises does not require his continuous presence. Furthermore the possession need not have been exclusive possession. A spoliation claim will lie at the suit of a person who holds jointly with others.

See: **Bennett Pringle**, *supra*.

- [11] An incorporeal right cannot be possessed in the ordinary sense of the word. The possession is represented by the actual exercise of the right. Consequently refusal to allow a person to exercise the right will amount to a dispossession of the right. In spoliation proceedings the applicant need not prove that he has the right; what is relevant is whether or not he has *exercised* the right.

See: **Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi**
1989 (1) SA 508 (A).

[12] The act of spoliation complained of *in casu* occurred on 12 August 2014. At the time the Applicant still had (at least) a right of access to the site albeit only to perform remedial work. This fact may be illustrated with reference to the papers.

[13] A completion certificate relating to the work of Schletter and the First Respondent was only issued on 25 August 2014. The First Respondent explains the effect of the certificate in paragraph 15 of the Opposing Affidavit.

“The moment Engala certified completion of Schletter’s work, Schletter and its subcontractor SMS, had no business on the construction site, but for future contractual obligations that may arise from defects in Schletter’s work.”

[14] This implies that Schletter and the Applicant “had business” on the premises up until 25 August. I fail to see how this did not of necessity entail the presence of the Applicant and its employees on the site and/or their right of access to the site – at least until 25 August (which is after the act of spoliation and even after the rule *nisi* was granted).

[15] The First Respondent admits that the Applicant had access to the portion of the construction site where it performed its work. (see paragraph 24 of the Opposing Affidavit) Since 23

June 2014 the Applicant was allowed access to perform remedial work. (paragraph 33 of the Opposing Affidavit)

- [16] In its Opposing Affidavit the First Respondent pertinently refers to the fact that the employees of the Applicant were “forbidden entry to access the construction site”. (paragraph 25) This again implies that up until the 12th of August they were at least enjoying access to the site. The First Respondent avers in paragraph 44 of its opposing affidavit that the Applicant “was denied access to the site by Pipe”. These words speak for themselves.
- [17] The property that the Applicant was in possession of in order to fulfil its contractual obligations has been described in paragraph 18 of the Founding Affidavit. In answering to that specific paragraph, the First Respondent never denied that the property has been described correctly or that the Applicant was entitled to possession of that specific property.
- [18] During argument, Mr Roestoff for the First Respondent, referred to the “snag list” attached to the Replying Affidavit (annexure “SM4”) and argued that the list refers to portions of the site where the Applicant was not expected to do remedial work. He did so by comparing the snag list with annexure “B” to the Founding Affidavit which indicates Block 6 where the Applicant was performing its contractual obligations at all relevant times. This argument may be relevant with reference to the Applicant’s presence after the

completion certificate of 25 August, but does not disprove Applicant's possession and right to access on 12 August.

[19] It is not denied that Mr Jeff Pipe, representing the First Respondent, ordered the Applicant and its employees to vacate the premises. In the Applicant's words the Applicant was "thrown off site". The First Respondent admits this in its Opposing Affidavit. The exact wording is also found in an e-mail of Jeff Pipe, dated 12 August 2014, and annexed to the Founding Affidavit. It may legitimately be asked why Pipe would have found it necessary to have the Applicant and its employees physically removed from the premises if they were not occupying the premises in the first place. It is important to keep in mind that the alleged act of spoliation complained of also occurred on the 12th of August. Pipe does not contend that the Applicant was merely denied access to the site.

[20] The First Respondent contends that the Applicant never had exclusive possession of the site. This fact is not denied. It is clear that other sub-contractors at all relevant times also enjoyed possession of the site and access to portions thereof. Mr Roestoff compared the situation to that of a regular building site such as where a house is erected. A multitude of contractors will be employed with reference to specific areas of expertise and areas of work. He argued that no single subcontractor will have possession of the whole of the site or of areas where they are not specifically employed.

[21] This argument loses sight of the following:

- (i) It has been established through case law that an applicant that complains of an act of spoliation need not have had exclusive possession of the property.
- (ii) The Applicant *in casu* does not complain about a denial of possession of areas of the site other than those described in the Founding Affidavit and admitted by the First Respondent.
- (iii) Even though the Applicant may not have had actual possession of the property complained of, it had a right of access to portions of the site.

[22] Mr Roestoff further focused on pages 64 and 65 of the paginated papers, being a notice by the Applicant indicating that it -

“has exercised a lien on all structures on phase 1 at the Boshof Solar Photovoltaic project.”

The Applicant does not deny that such a notice has been issued. The question whether the Applicant acted correctly or not in issuing the notice is not an issue that may be decided in these spoliation proceedings.

[23] The Applicant does not rely on the fact that it was in possession of the whole of phase 1. It concerns itself only with the property as described in paragraph 11 of the Founding Affidavit, specifically block 6 of phase 1. In any

event the Applicant acts as subcontractor to the Second Respondent (Schletter). Schletter had the right to access the whole of phase 1 (compare paragraph 7 of the Opposing Affidavit).

[24] Applying the principles set out in the well-known case of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** (at 634 E – 635 C) I find that the Applicant was indeed in possession of at least a right of access to the property described in the founding papers and that the First Respondent through Pipe deprived it of the enjoyment and exercise of such right.

[25] Mr Roestoff argued that the notice issued by the Applicant (pages 64 and 65 of the indexed papers) should be seen as act of spoliation in itself and that any actions by Pipe thereafter are at most acts of counter-spoliation. He argues that the Applicant, by issuing the notice, acted as a “gate-keeper” to the whole of the site.

[26] I do not find on the papers convincing proof that Pipe acted in response to the notice, i.e. in an act of counter spoliation. In its papers the First Respondent mainly avers that its defence to the allegations of spoliation are to be found in Pipe’s concern about safety. The First Respondent argues that Pipe was entitled to deprive the Applicant of possession as he acted lawfully. The argument relates specifically to the issues of safety at the site. Pipe has been appointed as a

section 16(2) assignee under the provisions of the Occupational Health and Safety Act of 1993.

- [27] The First Respondent alleges that the Applicant's employees were forbidden entry to access the construction site by Pipe as he considered the site "unsafe" (paragraph 25 of the Opposing Affidavit). It is never explained how or in what manner the site was unsafe. It is not explained how serious the alleged safety issue was and whether Pipe was indeed justified in acting the way he did. The First Respondent seems to rely on the vague submission that Pipe acted properly in terms of the Health and Safety Act. Unfortunately the First Respondent chose not to put the relevant and pertinent information before me but persisted with vague and general averments.
- [28] Without the necessary information I find it impossible to determine whether Pipe in fact acted correctly in terms of the Act. This links closely with the question whether the decision by Pipe was correctly taken and whether it was made for the right reasons. Such an enquiry should properly be dealt with by means of a review application. I cannot, and should not, decide in this spoliation application whether Pipe made the correct decision and whether he did so in the correct manner.
- [29] Pipe may have been entitled to stop the work at the site if he considered it necessary and in line with his authority under the Act. This was also the threat mentioned at a site meeting

held on the same day as the alleged spoliation took place. This is borne out by the minutes of that meeting, with reference to paragraph 10 thereof, as it deals with “method statements, risk reviews and training” (see annexure “AA9” to the Opposing Affidavit).

[30] The relevant portion reads as follows:

“Jeff Pipe will carry out a brief review if these are all in place and if not then the works will be stopped with immediate effect.”

[31] Pipe however did more than “stop the work”. He ordered the subcontractors to physically vacate the site. The First Respondent does not explain how (and even if) such a drastic measure was in line with the provisions of the Health and Safety Act and regulations.

[32] In the premises the First Respondent did not succeed in convincing me that they acted lawfully. As such the First Respondent failed to prove a defence to the act of spoliation committed on 12 August.

[33] Pipe may still be entitled to order the Applicant to cease all activity on the site. He may even be entitled to obtain an interdict to compel them to do so. But he will have to endure the presence of the Applicant and its employees on the site and/or their right to access to that site.

[34] The rule *nisi* had to be confirmed. No arguments have been advanced as to why costs should not follow the result. The First Respondent should therefore be held liable for the costs of the application.

[35] It is against the background of all the aforementioned reasons that the following orders were made:

1. The rule *nisi* is confirmed;
2. The First Respondent is to pay the costs of the application.

G.J.M. WRIGHT, AJ
12 September 2014

On behalf of applicant:

Adv Johan Louw
Instructed by:
Liversage Attorneys
c/o Webbers Attorneys
BLOEMFONTEIN

On behalf of first respondent:

Adv Roestoff
Instructed by:
Schoeman Maree Inc
BLOEMFONTEIN