

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

Case No: 3717/2014

In the matter between:-

ENGALA AFRICA (PTY) LTD

Applicant
(First Respondent)

and

SOLAR MOUNTING SOLUTIONS (PTY) LTD

Respondent
(Applicant)

IN RE:

SOLAR MOUNTING SOLUTIONS (PTY) LTD

Applicant

and

ENGALA AFRICA (PTY) LTD

1st Respondent

SCHLETTER SOUTH AFRICA (PTY) LTD

2nd Respondent

SUN EDISON ENERGY SOUTHERN AFRICA (PTY) LTD

3rd Respondent

CORAM:

KRUGER, J

HEARD ON:

11 DECEMBER 2014

DELIVERED ON:

12 DECEMBER 2014

- [1] This judgment concerns an application for leave to appeal against the order of Wright AJ given on 5 September 2014 and an application for contempt of court. Because Wright AJ is not available to hear these matters, I have been asked to deal with both applications.
- [2] The applicant in the main application is Solar Mounting Solutions (Pty) Ltd. Engala Africa (Pty) Ltd is the first respondent in the main application (being the applicant in the application for leave to appeal). No relief was sought against the second and third respondents in the main application and they do not feature in this litigation. Schlettler South Africa (Pty) Ltd is the second respondent, and Sun Edison Energy Southern African (Pty) Ltd is the third respondent. In this judgment the first respondent is referred to as the “respondent”
- [3] On 14 August 2014 the applicant applied for a mandament van spolie *ex parte* on an urgent basis before Moloi J, who granted a *rule nisi* with immediate effect, determining the return day as 9 October 2014:
- “That the applicant’s possession of the property as defined in the applicant’s founding affidavit be restored by the first respondent to the applicant forthwith.”
- [4] The order of Moloi J was served by the sheriff on Mr Pipe, the person who had caused the spoliation. His email to the applicant on 12 August 2014 reads:

“Dear Scott,

Not too sure how many times you need to be told but your 'Lien' is rejected as its unlawful and has no substance. We hence do not recognise your lien.

Further to this I confirm that based on safety concerns that have been ramping up over the past several days Schletter and their sub-contractors have been thrown off the site until the safety is brought up to a standard that I am satisfied with.

The coincidence of your 'lien' with this safety actions is exactly that, a coincidence. It may even be such that you have introduced this unlawful Lien to avoid this safety eviction? I stress once again that safety is a priority and will always be my top priority and I will not compromise on safety for a contractual issue you may be having with Schletter.

Once Schletter can show me method statements and risk reviews for each and every snag activity, AND produced the associated programme, I will review the matter again but until then you are all off site BECAUSE safety comes first!

Regards,

Jeff"

- [5] On 3 September 2014 the respondent filed a notice to anticipate the return day on 5 September 2014 and filed its answering affidavit. On 5 September an answering affidavit was filed by the applicant and the matter was argued before Wright AJ. She made an order confirming the rule nisi on 5 September. The respondent filed an application for leave to appeal against the order of Wright AJ on that same day, 5

September 2014. On 12 September 2014 Wright AJ furnished reasons for her order.

THE CONTEMPT OF COURT APPLICATION

- [6] On 1 September 2014 the applicant filed an application seeking an order declaring that the respondent is in contempt of the order granted on 14 August 2014 by Moloi J. On that same day, 1 September 2014 the respondent filed a notice of opposition to the contempt application. On 2 September 2014 Wright AJ issued a *rule nisi* calling upon the respondent to show cause why it should not be found to be in contempt of the court order of 14 August and sentenced to a fine of R10 000. On 7 October 2014 the respondent filed its answering affidavit in the contempt proceedings. Applicant's replying affidavit was filed on 9 October 2014. On 9 October 2014 the rule was extended to 13 November 2014, and on that day it was extended to 11 December 2014, the date of the hearing before me of both the application for leave to appeal and the contempt application.
- [7] The answering affidavit in the contempt application is made by one Warffemius, the attorney of the respondent. It is attested to on 7 October 2014. He states that the pending application for leave to appeal against the order of Wright AJ on 5 September 2014 has not yet been heard and goes on to say:

“If the application is successful, neither the 1st respondent, nor its functionaries, nor its employees could, at least for the time being, be convicted of contempt of court for not complying with the order of 14 August

2014, or be sentenced to a fine. This is so because if an appeal against the judgment and order of Wright AJ succeeds, there would not have been contempt of [sic] the part of the 1st respondent, or its functionaries or employees.”

He then asks the court to extend the rule nisi pending finalising of the application for leave to appeal.

- [8] In the replying affidavit the applicant’s deponent points out that the respondent was in the *rule nisi* ordered to furnish reasons why it should not be committed for contempt of court. Instead the respondent places an affidavit by its attorney before the court. The deponent to the replying affidavit also points out that the order granted by Moloi J on 14 August was for interim relief. The order appealed against is the order for final relief granted by Wright AJ on 5 September 2014. Therefore, even if the court of appeal upholds the respondent’s appeal, it would be no reason for the respondent not to have complied with the interim order at the time of the interim order, which is the contempt complained about. The interim order, which is the subject of the contempt application, was granted prior to the launching of the application for leave to appeal. It is the final relief which is now suspended in terms of Rule 49(11) pending the outcome of the appeal, not the interim order which is the subject of the contempt application.
- [9] In his heads of argument Mr du Toit concedes that it does not avail the respondent to contend that the order might eventually be

reversed on appeal. He concedes that the order was extant and of full force and effect when the first respondent refused the applicant entrance to the premises. It is not in dispute that the order was served on Mr Pipe, the person who refused to comply with the order. Mr Du Toit says the first respondent accepts the principle that court orders, whether subsequently proven to be wrong or not, stand as enforceable orders for court, disobedience of which may result in a finding of contempt of court with reference to **Culverwell v Beira** 1992 (4) SA 490 (W) and **The Master v Motala** 2012 (3) SA 325 (SCA). Mr Du Toit refers to **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) par [42]. Once the applicant has proved the order, service or notice and non-compliance, the respondent bears an evidential burden in relation to willfulness and *mala fides*: “Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful or *mala fide*, contempt will have been established beyond reasonable doubt.” (**Fakie** par [42]).

- [10] Mr Du Toit contends that the respondent’s representative who refused the applicants access acted out of safety concerns because the plant posed dangers, as appears from emails he sent. Mr Du Toit says the concern for safety considerations refute inferences of willfulness and *mala fides*. Presumably Mr Du Toit wishes to draw the inference that the respondent’s representative was concerned about the safety of the applicant’s representatives as well as his possible liability as person being responsible for safety at the plant. There are only two requisites for a mandament van spolie:

possession and disturbance. It is a robust remedy that does not enquire any further. It is directed against self-help. Even a person who illegally possesses is protected by the mandament. The protection exists even where the applicant's possession has been wrongful (**The Institutes of Cape Law, Book II The Law of Things** by AFS Maasdorp (1923) 27). As to Mr Pipe's safety concerns, Moloi J made the order on 14 August 2014 with the letter of Pipe annexed to the founding papers in which Pipe spelled out his concerns about safety. Pipe can have no better protection against a potential claim than a court order directing him to allow persons access to the premises. Further, the applicant's employees were no strangers to the premises, they had done work there. The respondent's attorneys were aware of the order of Moloi J, and had been sent copies thereof. Any lawyer worth his or her salt would have told Pipe to obey the court order, because there is no room for other considerations in the case of a spoliation remedy. It is apparent, from the first line of the letter by Pipe dated 12 August 2014, that the true dispute between the parties is about a lien. That dispute forms no part of the consideration of a mandament van spolie.

[11] The applicant has made out a case for the conviction of the first respondent for contempt of court.

APPLICATION FOR LEAVE TO APPEAL

[12] Three grounds are listed in the notice of application for leave to appeal and in the notice of appeal:

- (i) Wright AJ erred in finding that the applicant was in actual and physical possession of the site.
- (ii) Wright AJ should have found that Pipe acted lawfully in accordance with his obligations under health legislation to evict applicant's representatives.
- (iii) Wright AJ should have found that applicant's assertion of a lien to which it was not entitled on 12 August 2104 in itself constituted an act of spoliation and that Pipe acted in counter-spoliation.

[13] In his argument on these points, Mr Du Toit contends that there is no evidence of factual possession and exercise of control or use of the land on the day in question. In the founding affidavit applicant's deponent says it was in peaceful and undisturbed possession of the property. The answering affidavit is done by the respondent's legal adviser. She blandly denies this allegation of possession. She does not explain how she could have personal knowledge of whether the applicant was in possession. (I do not overlook the fact that Pipe made a confirmatory affidavit). What is more telling is that she says that after completion of its work on the site the applicant "had no presence on the construction site but for access to attend to defective work. Since 25 August 2014 even that necessity has disappeared." The point is that the spoliation complained of occurred on 14 August 2014, at a time when, according to Ms van der Merwe, the applicant still had access to attend to defective work, in her own words. The

causa of the applicant's possession is irrelevant. Possession is sufficient if the applicant held to establish some benefit for itself (Yeko v Qana 1973 (4) SA 735 (A) at 739D-G). It is also important to note, as pointed out by Mr Louw for the applicant, that in its correspondence applicant asserted its lien against the second and third respondents, not against the first respondent, because they were in control of the premises as appears from applicant's letter of 12 August 2014, annexure "A" to the founding affidavit in the Spoliation Application.

- [14] The email from Pipe to Scott of the applicant dated 12 August 2014 quoted above shows that the applicant was in possession, and is evicted (spoliated) ("C" par 23): "...sub-contractors have been thrown off the site..."; "...you are all off site because safety comes first..." The letter starts with a reference to applicant's alleged lien. There is no specific reference to any particular aspect of safety or danger. In reply the applicant says that the fatality which occurred on the site was a truck driver who tried to fix the hydraulic parts of his truck, it had nothing to do with the plant on the site. The applicant was in possession. There is no merit in the allegation that the applicant was not in possession.
- [15] As to the second ground of appeal, namely the safety considerations for Pipe, Mr Du Toit says that one of the defences to spoliation is the exercise of a statutory function. As to statutory authority, CG Van der Merwe, *Sakereg*, 2nd Edition (1989) 132 footnote 310 refers to authorities. Wright AJ refers to the alleged unsafe conditions in par

[27] of her judgment. She points out that it is never explained how or in what manner the site was unsafe. In **Sillo v Naude** 1929 AD 21 the appellant sent cattle to the pound in terms of the Pound Ordinance. That was not spoliation. However, in **Potgieter v Du Plessis** 1978 (1) SA 751 (NC) the respondent called in the police, but personally took possession of the cow (755A), which was confirmed by the court as having been spoliation. In the present case Pipe had no statutory right to evict the representatives of the applicant. He was protected against any claim against him for failure to fulfill his safety obligations by the court order directing him to allow them. Further, they were not strangers to the site. They had done work there, and had a duty to oversee possible problems that had arisen.

- [16] In his argument on counter-spoliation Mr Du Toit said, with reference to paragraphs 22 and 23 of the founding affidavit in the main application, that what happened between 13:00 and 14:00 on 12 August 2014 was important because the allegations there indicate the counter-spoliation by the respondent. He says the applicant exercised spoliation by putting up a notice saying that no person or entity is allowed to enter phase 1 at the project without written consent of the applicant. It is common cause that applicant was asserting its lien. From Pipe's conduct and email it is clear that he was not acting in counter spoliation. He does not complain that the respondent has been spoliated by the applicant's notice to exercise its lien. There is not complaint by Pipe about the fact that he will now have to get the applicant's consent to enter the phase 1 area. The reason Pipe uses for the eviction is safety considerations.

Respondent used security guards to evict the applicant from applicant's site office.

[15] As to the alleged counter-spoliation Wright AJ found insufficient allegations to infer that Pipe acted in response to the applicant's notice in an act of counter-spoliation. The point is that the applicants were entitled to be on the site, albeit not exclusively. Pipe had no right to occupy the site to the exclusion of the applicant.

[16] Spoliation is a robust remedy. Once possession has been established, the prior situation must be restored. At a later stage the court can properly investigate the merits of the respective claims.

[17] There are no reasonable prospects that another court can come to a different conclusion.

ORDER

1. The first respondent is convicted of contempt of court and sentenced to a fine of R10 000.
2. The first respondent is ordered to pay the costs of the contempt application.
3. Leave to appeal against the order of Wright AJ on 5 September 2014 is refused with costs.

A. KRUGER, J

On behalf of applicant/ 1st respondent: Adv J Louw
Instructed by:
Webbers Attorneys
BLOEMFONTEIN

On behalf of respondent/applicant: Adv J du Toit SC
Instructed by:
Schoeman Maree Inc
BLOEMFONTEIN