

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 406/2005

In the matter between:

ISC PROJECTS (PTY) LTD

Applicant

and

SIEMENS LTD

First Respondent

ROOFING GUARANTEE (PTY) LTD

Second Respondent

SASOL TECHNOLOGIES (PTY) LTD

Third Respondent

CORAM:

EBRAHIM J

JUGDMENT:

EBRAHIM J

HEARD ON:

24 FEBRUARY 2005

DELIVERED ON:

10 MARCH 2005

[1] This is an application for spoliatory relief. The applicant
claims the following relief.

“1. That the Applicant’s failure to comply with the provisions of the Rules of Court pertaining to service and process, be condoned and this matter be heard as an urgent application in terms of the provisions of Rule of Court 6(12).

2. That a *Rule Nisi* be issued calling upon the Respondents to furnish reasons, if any, on **4 MARCH 2005 AT 09H30**, or as soon thereafter as this matter may be heard, why:

2.1 Applicant’s possession of and control over the Highbay Warehouse near SASOLBURG and to the extent that it, as sub-contractor responsible for the cladding of such warehouse, was in possession thereof and exercised control over such structure, be restored forthwith and, more particularly, the FIRST RESPONDENT shall not refrain from employing any other contractor or sub-contractor to clad such warehouse;

2.2 The FIRST RESPONDENT should not be ordered to pay the costs of this application;

2.3 Such other Respondents as may choose to oppose this application shall not, jointly and severally with the FIRST RESPONDENT, be ordered to pay the cost of this application;

2.4 Such further and/or alternative relief as may be deemed expedient, necessary or reasonably, should not be granted to the Applicant.

3. That the relief provided for in sub-paragraph 2.1 above shall serve as interim relief and an interim interdict with immediate effect.

4. That service of this application and this order be effected on SECOND and THIRD RESPONDENTS by the Sheriff in terms of the Rules of Court.

[2] This matter was initially brought by way of urgency and postponed to allow the filing of papers by the respondent and the applicant and the full ventilation of the issues. Urgency was not argued before me and in any event it is trite that the nature of the relief generally lends itself to urgency. The parties proceeded to argue the matter before me as to whether or not final relief

should be granted. In any event, I am disposed to deal with this matter as one of urgency.

[3] It is long settled that there are two essential requirements to be satisfied in order to obtain a spoliation order. The applicant must prove possession and a forced/wrongful/unlawful deprivation. Possession is a matter of fact and is not generally proved by recourse to the agreement relating to the underlying merits of the dispute between the parties.

[4] In the present case the applicant alleges possession of a warehouse. Such possession must be established on the evidence. The applicant shows that he was a subcontractor engaged to do cladding work on the warehouse which it is common cause was in the process of being erected by the first respondent on behalf of third respondent.

[5] Respondent alleges that the contract on which the applicant places reliance did not entitle the applicant to possession of

or control over the entire warehouse, but only to “access to and use of a qualified or restricted area or section of the warehouse at any one time”. What is in the contract is not relevant for the determination of this application, because whether or not there was possession is a fact to be determined irrespective of what the contract provides. If as a matter of fact the applicant’s possession and use was restricted only to that provided in the contract, the applicant will have failed to establish possession and control over the entire site of the warehouse. Conversely if the facts show that the applicant exercised *de facto* possession and control notwithstanding the limited provision of the contract, it would have satisfied the first requirement of possession for a spoliation order.

- [6] In the founding affidavit the applicant concedes partial possession in paragraph 6.1 where the following is stated:

“The purpose of this application is to claim restoration of the Applicant’s, albeit partial, possession of and/or control over a partly completed warehouse situated near SASOLBURG and within the area

of jurisdiction of this Honourable Court.”

- [7] The applicant further contends in sub-paragraph 6.4 of its founding papers that it has been

“unlawfully deprived of the possession of and control over the relevant structure and which it enjoyed due to its contractual obligation towards the FRIST RESPONDENT to clad the structure as aforesaid and that it is, consequently, entitled to the restoration of such possession and control”.

- [8] First respondent is the main contractor for the erection of what applicant contends is a “gigantic warehouse”. The applicant’s role in the construction of this warehouse is limited to cladding or the application of an outer skin. The applicant established itself on site together with its own sub-contractors. A dispute then erupted between the applicant and first respondent over the quality of applicant’s performance. First respondent refused to pay applicant and deprived applicant’s employees from further access to the site. In addition first respondent removed applicant’s

containers in which its site offices and equipment were housed from the site. This gave rise to spoliation proceedings in which an order was granted in applicant's favour. In the present proceedings the first respondent has respected the applicant's possession of its site offices and equipment which had been restored to the applicant pursuant to the earlier order granted in respect of prior application proceedings brought by the applicant for the restoration of same. Pursuant to the granting of that order, the first respondent employed the second respondent to complete the work.

- [9] A close scrutiny of the founding affidavit does not review any facts to support the submissions made by the applicant that it had the complete control and possession over the entire warehouse in respect of which it seeks the relief of restoration of possession. It is clear that the applicant was in possession of its offices and storage facilities and the highwatermark of its founding papers is:

“12.5 the structure was placed at the disposal of the Applicant for purposes of cladding same and the Applicant did commence therewith”.

That does not show factual possession and control of the Highbay Warehouse. At best it can be concluded that the applicant was given contractual access which first respondent has at present effectively denied the applicant by the employment of a replacement sub-contractor - that is the second respondent.

[10] Accordingly, in my view, the applicant has failed to establish either possession of the Highbay Warehouse or that it was unlawfully deprived thereof and the application must therefore fail.

[11] I make the following order:

11.1 The application is dismissed with costs including those consequent on the employment of two counsel, where employed, such costs to include the costs occasioned by the postponement on 8 February 2005.

S. EBRAHIM, J

On behalf of applicant:

Adv. M.H. Wessels SC
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of first respondent:

Adv. J.P. de Bruin SC and
Adv. J.Y. Claasen
Instructed by:
E G Cooper & Sons Inc
BLOEMFONTEIN

/sp