IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 2671/2024

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

In the matter between:

TAU MINING CONTRACTORS (PTY) LTD	Applicant
and	
AVENG MOOLMANS (PTY) LTD	1st Respondent
BLACK MOUNTAIN MINING (PTY) LTD	2nd Respondent

Coram: Lever J

JUDGMENT

Lever J

1. This is an application for a *mandament van spolie* brought on an urgent basis before this court. The matter was initially set down in the motion court of the 11 October 2024. Due to a combination of factors including the abridged notice periods imposed by the applicants, on the 11 October 2024 the court was confronted with a record of affidavits and annexures of slightly more than 500 pages. By the time this matter could be heard after the motion court on the 11 October 2024 there had been no time for the court to even read most of this

record. All the answering affidavits and their annexures as well as the replying affidavit were filed on the morning of the 11 October 2024.

2. In these circumstances, discussions were held with the parties and between the parties themselves. After such discussions all concerned agreed that the matter would be postponed to the 24 October 2024. It was further agreed that the hearing on the 24 October 2024 would be a virtual hearing. The right to argue the question of urgency based on the papers as they stood on the 11 October 2024 was expressly reserved by the respondents. The question of the costs occasioned by the appearance and postponement of the matter on the 11 October 2024 was reserved.

3. The applicant is a mining contractor, who in terms of a contract carried out mining activities at the Gamsberg Mine in the vicinity of Aggeneys in the Northern Cape. The first respondent is also a mining contractor, who also in terms of a contract carried out mining activities at the Gamsberg mine as well. The second respondent owns, controls, administers and operates the Gamsberg mine in accordance with the applicable legislation as it holds the relevant mining right. The applicant's contract to carry out mining activities on the Gamsberg mine was with the second respondent. The first respondent's contract to carry out mining activities at the Gamsberg mine is also with the second respondent.

4. It is common cause between the applicant and both respondents that the applicant had a contract with the second respondent to carry out mining activities on the Gamsberg mine. It is common cause between the applicant and second respondent that the relevant contract for mining services between applicant and second respondent has been terminated although the date and circumstances of such termination is disputed.

5. Applicant claims that it was in possession of an area of the mine before it was despoiled of such possession, it alleged by the first respondent. It is common cause that this took place during the night shift on the 29 September 2024. It is also common cause that this was on a Sunday night. First respondent denied

despoiling the applicant and claimed it was acting in accordance with a lawful and valid work instruction issued by the second respondent.

6. Applicant defined this area of the mine over which it claimed to have possession by means of an aerial photograph with the area alleged to be in its possession delineated within a red line. This photograph was referred to in the founding affidavit as annexure “FA4” and the founding affidavit contended that applicant was in possession of the area within the red line delineated on annexure “FA4” prior to the spoliation alleged on the 29 September 2024.

7. Both applicant and second respondent agree that the contract that had existed between them had been terminated one way or the other at the latest by the 4 October 2024. Although the actual date of termination and the circumstances of such termination remain in dispute. This application was issued and prosecuted on the 8 October 2024.

8. Although the details are in dispute, the papers reveal that there was an ongoing dispute between applicant and second respondent relating to certain monetary claims asserted by the applicant. Applicant claims both a debtor and creditor lien as well as an enrichment lien that it asserted by reason of its alleged possession of the portion of the mine defined by the applicant in annexure “FA4”.

9. There are several issues raised in the papers in this matter that need to be considered before a decision in the matter can be reached. *Inter alia*, these include: is the matter urgent; has urgency been established on the papers; did applicant have peaceful and undisturbed possession of the mining site, as defined above, in the sense necessary in order to justify a *mandament van spolie*; is the ‘mining site’ as defined by the applicant in the founding affidavit sufficiently certain and accurately defined in order to enable this court to make an order should it find that applicant had possession and that such possession should be restored; and should this court find that on the papers the applicant has established the requirements of the *mandament van spolie* this court should exercise its discretion and not return the parties to the *status quo ante*.

10. Naturally, before this court can consider and determine any of the other issues between the parties, it must consider and determine the question of urgency. If the matter is found to be urgent then the court will consider all the other issues between the parties. If the court finds that the matter is not urgent or that urgency has not been established on the papers, for whatever reason, it will have to consider what is the appropriate process in the circumstances.

11. Access to the High Court on an urgent basis is governed by the provisions of Rule 6(12)(a) and (b) of the Uniform Rules of Court (the Rule/s). The relevant portion of the said Rule reads as follows:

> "(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.
>
> (b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

12. The applicant contends that it has complied with this rule. The applicant, *inter alia*, relies upon: certain health and safety considerations set out in its founding affidavit; the fact that the value of the liens it asserts diminishes if it does not reestablish its liens and the defined mining area is mined to its detriment; as well as the contention that by its very nature the *mandament van spolie* is inherently urgent.

13. The first respondent disputes this and contends: Firstly, the applicant delayed in instituting this action; Secondly, the applicant has not made out a factually defensible case for urgency in its founding affidavit; and finally in its founding

affidavit applicant has failed to justify the abridged time frames imposed on the respondents.

14. The second respondent submits that the matter is not urgent for *inter alia* the following reasons: The applicant failed to adhere to the requirements of Rule 6(12) and in particular 6(12)(b); The applicant failed to engage with the warning and the degrees of urgency set out in the case of Luna Meubels Vervaardigers (Edms) Bpk v Makin (t/a Makins Furniture Manufacturers)[1]; and that whilst a *mundament van spolie* is intended to be a robust and speedy remedy by its very nature and is ordinarily afforded some degree of urgency[2], this does not mean that the applicant can disregard the rules[3].

15. The claims that the matter was urgent due to the health and safety considerations put forward by the applicant as a basis for urgency have been debunked by the respondents. Nothing further needs to be said on these considerations.

16. After the alleged spoliation which took place on the 29 September 2024, the applicant's attorney wrote a letter to the first respondent which was copied to the second respondent. This letter is dated the 3 October 2024. In the said letter the applicant's attorney demanded that the first respondent vacate the defined mining area by 5pm on the 4 October 2024. This letter of demand was obviously an attempt to avoid the necessity of litigating.

17. On the 4 October 2024 the second respondent replied to the letter of the 3 October 2024, and it is clear from the second respondent's letter that possession of the defined mining area would not be returned to the applicant. Thereafter and on the 4 October 2024 the applicant instructed its attorneys to launch the present application. The present application was issued and served on the 8 October 2024.

---

[1] 1977 (4) SA 135 (W).
[2] Mans v Mans [1999] 3 All SA 506 (C) at para [9].
[3] Mans case., above at para [9].

18. The Gamsberg Mine, where the relevant events unfolded, is situated in a remote part of the Northern Cape, being several hundred kilometres from the seat of this court. The applicant's attorneys are situated in Sandton in the province of Gauteng. Even with the convenience of modern communications, the logistics in launching this application would take some time. Also, regard must be had to the attempt to avoid litigation in the present case. In these circumstances I think the application for the relief under the *mandament van spolie* has been launched within a reasonable time and it cannot be said that there has been an undue delay in seeking such relief to the extent that the right to seek such relief has been lost.

19. The difficulty is however, in launching this application on the 8 October 2024, the applicant sought to have it heard on the 11 October 2024. In effect this left each respondent with only one day or twenty-four hours to file their respective answering affidavits. I am made to understand that the second respondent was afforded an extra period overnight to file its answering affidavit.

20. This resulted in a situation where the answering affidavits and replying affidavit were filed on the morning of the day the matter was to be heard. The matter was set down to be heard at the end of the ordinary motion court. Given the volume of the application and that the court had no opportunity to read the answering affidavits, consider the annexures where relevant and read the replying affidavit, in these circumstances, the matter had to be postponed to the 24 October 2024.

21. The applicant made very little effort to explain why it could not obtain substantial redress in the ordinary course. The most that appears from the founding affidavit is that the value of the liens asserted by the applicant would diminish if ore were to be removed from the defined mining area. This is very thin and untenable in several respects. Firstly, the available evidence shows that the area within the defined area, possession of which is claimed by the applicant, was being prepared for the mining of ore. The evidence further shows that such area was not yet ready for the mining of ore. Secondly, the applicant did not disclose when ore might be mined in the relevant area of the mine. Finally, no meaningful

attempt was made to show why applicant would not obtain redress in the ordinary course in these circumstances.

22. The abridged time periods imposed on both respondents and the court were unduly oppressive to both respondents and the court in the circumstances. Further, no factual basis was laid for imposing that abridged time line.

23. The question now becomes what to do with the matter. In my view justice will not be served by striking the matter off the roll in the circumstances of this case. The matter will simply be left hanging and all parties concerned will simply suffer further delay in reaching a resolution of the actual issues between them. I have heard full argument on both the urgency and the merits of the *spoliation* application. Given the nature of the *mundament van spolie,* that it is to discourage persons from acting unlawfully and taking the law into their own hands and encourage those persons to seek relief within the parameters of the law, there is a residual measure of urgency that remains even though applicant has not fulfilled the requirements of rule 6(12)(b). In all these circumstances I believe I should exercise my discretion and entertain the merits of the *spoliation* application and return to the applicant's failings on the question of urgency when I consider the appropriate order of costs to be made in the circumstances.

24. Procedurally, a *spoliation* application is an application for final relief. It is an application for final relief in the sense that if it is granted, such order can be appealed. Conceptually, it is an application to restore the status *quo ante* for a short period whilst the entity that took the law into its own hands is afforded an opportunity to pursue and prosecute a process for any relief the law allows. Conversely, it also allows the person or entity who suffered the unlawful deprivation of its possession to prosecute an interdict or any other legal relief that may be open to it should it feel so inclined. It is clear from this that the purpose of a *mandament van spolie* is not to determine the underlying disputes or issues between the parties. Its purpose is to purge unlawful conduct and set the scene for a lawful process between the parties concerned to take the matter forward.

25. Insofar as the relief claimed under the *mandament van spolie* is concerned, the main point at issue between the parties is whether the applicant had possession of the defined mining area in the sense required to seek such relief.

26. To complicate matters the facts of the present case are not comparable to a situation where a technician is called in to fix an electrical outlet. Nor are the facts of the present matter comparable to a 'turnkey' project where a builder is handed a site and employed to construct a building. On both extremes the answer to the question of whether the person employed to do the necessary work had possession of the workplace in the sense required to claim relief under the *mandament van spolie* would be simple.

27. The present case, on its facts, falls somewhere between the two extremes described above.

28. It is well established in our law that the possession required to claim relief in terms of a *mandament van spolie* requires both a physical element and a mental element.

29. Initially, the applicant claims the requisite possession of the defined mining area was conferred upon it under the provisions of its contract with the second respondent. Thereafter applicant, on its version, cancelled the said contract, the intention with which it retained possession of the defined mining area was to assert and secure the two liens which it claims. What this means is that the applicant claims physical possession of the relevant mining area under the provisions of the said contract. Applicant's intention to possess the relevant mining area also flowed from the contract. In other words, to fulfil its obligations in terms of the contract and secure for itself the benefits that would flow to it by virtue of such contract. Applicant contends that after it cancelled the contract it retained physical possession of the defined mining area but its intention to possess changed to being to secure the two liens that it asserts. If these contentions are established this would establish the possession required to claim relief under the *mandament van spolie*.

30. Mr Schäfer for the first respondent, referred the court to the work of Duard Kleyn who in dealing with the physical control necessary set out the position as follows:

> "Thus it is taught that possession was acquired *corpore et animo;* it was imperative for both elements to be present. The measure of physical control (corpus) required depended on the nature of the thing and the surrounding circumstances."[4]

31. The respondents deny the contention that possession of the defined mining area was conferred on the applicant by the said contract. Mr La Grange SC, who appeared for the second respondent submitted I would search in vain to find such a provision in the relevant contract. Mr La Grange further submitted that the second respondent: controlled access to the mine itself; controlled mining activities on the mine; had overall control of mining activities. The second respondent itself maintained that it could direct any one of the mining contractors to do anything within the duties assigned to it on any part of the mine. In their papers the second respondent creates the impression that it did this on a daily basis.

32. Mr Miltz SC, in reply, referred me to annexure "A" to the contact and more particularly to the scope of work that is defined in the contract. This document is annexed to the second respondent's answering affidavit as annexure "AA3". The relevant portion of the relevant document reads as follows:

> "The scope of work to be carried out by the Business-Partner pursuant to the terms of this agreement includes but is not limited to arranging required resources of equipment, people, materials and accordingly executing the excavation, loading and hauling of material in the given sequence from the mining benches the scope includes the following activities:
>
> - Drilling and blasting, wherever deemed necessary by the Business – Partner based on the Mine Plan;
> - Excavation, loading, hauling and dumping the waste material in the designated dumps;

[4] Duard Kleyn., "Possession" in Reinard Zimmermann and Daniel Visser., Southern Cross: Civil Law and Common Law in South Africa (1996) at p. 823.

- Haulage of the Ore from the pit to the crusher and/or Designated Stockpiles;
- Construction of in-pit and ex-pit (HMV and LDV) roads, as per the agreed battery limits; maintenance of shared roads to be executed as per SLA. The roads should be constructed as per agreed designed (sic) which includes construction and shaping of side and central berms;
- Construction and Maintenance of all the access roads in and around the pit periphery that require (sic) to carry out installation, operation of mining support activities such as (sic) installation of communication tower, installation of Geomos, placement of drill rigs for geological-geotechnical Investigation etc;
- Drains for roads and sump construction for water control during mining;
- Provision of adequate lighting required for the Business-Partners mining activities;
- Security of the Business-Partner's labour, equipment, workshop and offices as deemed fit by the contractor for providing Mining Services; Primary access control at the mine gate will be done by the Principal;
- Dust control by means of water for all in-pit and ex-pit roads operated, used and maintained by the Business-Partner including the North Access Ramp & other shared roads (based on the SLA between other parties/mining contractors). It is required that the contractor (sic) to provide the chemical mixed with water for dust suppression to improve dust suppression and
- All other activities that are explicitly written or not, in pit bore hole drilling, installation of slope stability system and other work by provi.ng (sic) space as per plan and prepare area as part of pit activities.

The scope of work shall comprise of mining overburden Waste and Ore by open pit mining method. The activity will involve site preparation, blast hole drilling, blasting, excavation of Waste and Ore to dumps and Designated Stockpile areas as designated in tender or in the Mine Plan."

33. In the context the Business-Partner referred to in this document must refer to the applicant.

34. Mr Miltz submitted that for the applicant to carry out the duties described in the scope of work that the applicant of necessity must have physical control over such area of the mine. That such control need not be over the whole area of the mine. That such control of necessity meant that the applicant possessed that area. As the applicant carried out these duties defined in the 'Scope of Work' within the area defined in annexure "FA4" it had, of necessity, possession of this area.

35. Further on in the document that is annexed to the second respondents answering affidavit as annexure "AA3", one finds item 6(b) a clause which places further obligations on the applicant and which reads as follows:

> "6 b) Provide a site manager as required by the MHSACT governing the operation of the Mine and in accordance to (sic) any statutory requirements deemed necessary by the law enforcers. Provide competent personnel and ensure that all manager (sic) and supervisors appointed are conversant with MHSACT requirement (sic) and all other laws governing the mining operation."

36. For the applicant to comply with the legislation governing Mine Health and Safety, it would have to take responsibility for occurrences where it carried out its obligations in terms of the "Scope of Work" referred to above. Of necessity this implies that the applicant must have control over such area. To control such area, the applicant would have to physically possess it.

37. Apart from access control to the mine overall the evidence did not establish that the second respondent changed the mining area and areas of responsibility of the various mining contractors on a daily basis. The evidence established only that there was a three-month rolling Mine Plan. Only two instructions to contactors were placed in evidence. There was an issue with the date of at least one of these instructions. Interpreting dates of these documents in the most

favourable way to the respondents such instructions were at least several weeks apart. Clearly, the second respondent did not give daily directions to the mining contractors including the applicant, on the area of the mine upon which it was to carry out its duties in respect of the “Scope of Work”.

38. Whilst Mr La Grange is correct that there is no explicit provision in the contract that specifically provides that the applicant had possession of the area of the mine where it carried out its duties under the “Scope of Work,” I think Mr Miltz is correct that this is of necessity implied in the very nature of the work contemplated in the agreed “Scope of Work.” This is reinforced by the nature of the responsibility imposed on the relevant appointed managers and officials of the applicant by the relevant legislation which forms part of the agreement between the applicant and second respondent. The relevant part of the agreement is quoted above.

39. On the issues of the “Scope of Work” and the responsibility of the applicant’s on-site management under the relevant mining legislation, the first and second respondents did not set up a real or *bona fide* dispute of fact. In these circumstances I accept the contention of the applicant that it was in physical possession of the mining area defined by annexure “FA4”.

40. The facts of this case are far removed from, and distinguishable from, the facts Zulman J (as he then was) confronted in the case of Shoprite Checkers Ltd v Pangbourne Properties Ltd.[5]

41. The evidence shows that the intention with which the applicant possessed the defined mining area at the time it was despoiled was to assert the two liens claimed by the applicant. This court is not able to find that there is absolutely no possibility of either lien being established by the applicant even though there are several questions raised by the claim for such liens on the facts presently before this court. It is beyond the scope of the issues placed before this court to determine the claim to such liens. In these circumstances the liens are irrelevant

[5] 1994 (1) SA 616 (W).

to the relief claimed by the applicant. There is nothing to gainsay the applicant's assertion that the intention with which it possessed the relevant mining area at the time it was despoiled was to assert the liens it claims.

42. In these circumstances the applicant has established both the physical and mental aspects of its claim to possess the defined mining area for the purposes of the *mandament van spolie*. It is further clear from all the circumstances that the applicant did not voluntarily part with possession of the defined mining area. The applicant was despoiled, and the facts show that it was progressively pushed off the mine in its entirety.

43. The next issue to be considered is the assertion by the respondents that the applicant has not sufficiently defined the area it wishes this court to return to its possession. It is true that the applicant has not used co-ordinates on a map to define the area it claims possession of. It is also true that the mine has a system of 'blocks' to identify specific areas. In response to this Mr Miltz submitted that both respondents know what area is being referred to. In assessing whether this is an adequate response it must be borne in mind that first respondent, before the instruction to mine on a portion of the applicants assigned mining area, mined an area contiguous to the area mined by the applicant. In these circumstances the first respondent knows precisely the area assigned to the applicant. It was indeed the second respondent who assigned the relevant area to the applicant to carry out its mining duties. Neither applicant contested the area designated in annexure "FA4" as not accurately reflecting the area mined by the applicant. The evidence adduced by both respondents show that they are well aware of the area involved. In these circumstances both respondents will have to think long and hard before disregarding any order this court might make. In the circumstances I believe the relevant area is sufficiently delineated for this court to issue and enforce any order it might give in respect of the possession of such mining area.

44. The next issue raised by the respondents is that if this court finds that the applicant has established the requirements for a spoliation order, this court should exercise its discretion and not grant such relief.

45. In motivating this course of action, the respondents rely on the decision of Van Den Heever J (as she then was) in the matter of Parker v Mobil Oil of Southern Africa (Pty) Ltd[6]. In that case the spoliatory relief was ancillary to an application for specific performance of a contract. In that case the applicant conceded that without the relief of specific performance the return of the aircraft refuelling equipment involved would be of no use to him. In those circumstances she exercised her discretion and refused the spoliatory relief.

46. The facts of the present case are far removed from those in the Parker case. Both respondents have made out a case that they would suffer serious hardship if the relief requested was granted.

47. The respondents also sought to rely on the decision of Olivier J in the matter of Polonyfis v The Provincial Commissioner SAPS NC and Others[7]. The learned Judge indicated that it was easy to foresee circumstances where the court might exercise its discretion to refuse spoliatory relief. These comments are in my opinion Obiter and were not necessary to decide the case that was before him at the time.

48. This court is not indifferent to the hardship claimed by the respondents, but the *mandament van spolie* in our law is a robust and speedy process. It is meant to deter unlawful activities and promote the use of lawful processes.

49. The hardship and inconvenience that the respondents claim might assist them in the lawful process that they might be advised to follow, and it might even provide a basis to move for such relief on an urgent basis. Lawful process ought to have been followed in the first instance. Such lawful process remains open to the respondents. The *mandament van spolie* in the broad and general sense always intended subsequent lawful process be followed, otherwise the *status quo* would be maintained.

---

[6] 1979 (4) SA 250 (NC).
[7] [2008] ZANCHC 46.

50. The last issue to consider on the merits of the application is the issue of the return of the applicant's equipment. Mr La Grange raised the issue of the equipment and submitted that a case had not been made out specifically regarding spoliatory relief in respect of such equipment that was removed from the defined mining area. In my view this was part and parcel of despoiling the applicant of the area defined by annexure "FA4" and the equipment removed from such site must be returned to such site and thereby placed in the applicant's possession.

51. The final issue to be considered is the question of costs. Here there are two sets of costs to be considered. Firstly, the costs of the appearance and postponement on the 11 October 2024 which costs were reserved for later decision. Secondly the cost of the application on its merits.

52. I don't think it can be disputed that the applicant was responsible for the situation that arose on the 11 October 2024 and the necessity to postpone the matter. In these circumstances the applicant should pay the costs of both of the respondents for the appearance and the postponement that occurred on the 11 October 2024. Having regard to the importance of the matter to the parties involved and the issues involved I believe it was justified to employ two Counsel. Having regard to the same factors I believe it would be equitable for me to order that such costs be taxed on scale "C".

53. Turning to the costs on the merits. In the ordinary course the applicant would have been entitled to costs on the basis of the ordinary rule that costs follow the result. However, as pointed out earlier, applicant had not properly established the need for, and proportionality of the urgency with which it prosecuted this application. In these circumstances, I believe the ordinary rule would not be appropriate. In the circumstances I believe that it would be equitable to order that each party bears its own costs on the merits of the application.

Accordingly, the following order is made:

1. The respondents are ordered to forthwith restore to the applicant full access to and possession of the mining area, situated at [...] P[...] Road, Aggeneys,

Northern Cape, 8839 (as demarcated in red on the aerial photograph, being annexure “FA4” to the founding affidavit)(“the mining area”) by:

1.1. fully vacating the mining area, including the removal of all the first and second respondent’s employees, equipment and structures from the mining area and restoring the applicant’s possession of the mining area to the status as at 29 September 2024;

1.2. permitting the applicant’s employees to have access to and possession of the mining area on the same conditions that prevailed on and before 29 September 2024; and

1.3. returning all of the applicant’s equipment and other moveable property that was removed by the first and/or second respondent (or their appointed agents) from the mining area (“the applicant’s moveable assets”) by:

1.3.1. pointing out to the applicant where the applicant’s moveable assets are situated; and

1.3.2. allowing the applicant to attend to taking all necessary steps to return the applicant’s moveable assets to the mining area.

2. The applicant will pay the costs of the respondents’ appearance on the 11 October 2024 as well as the costs occasioned by the postponement on that date. Such costs will include the costs of two Counsel where two counsel were actually engaged. The said costs will be taxed on scale “C”.

3. In respect of the costs on the merits of the application itself, each party shall pay their own costs.

L G Lever
Judge
Northern Cape Division, Kimberley

Representation:

For the Applicants:	Adv I Miltz (SC) & Adv C De Villiers-Golding (Argued the matter)
Instructed by:	Duncan & Rothman Inc.

For The Applicants:	Adv AJ Daniels (SC) & Adv C De Villiers-Golding (Prepared Heads of Argument)
Instructed by:	Duncan & Rothman Inc.
For The 1st Respondents:	Adv LI Schafer Olivier
Instructed by:	Van De Waal Inc.
For The 2nd Respondents:	Adv WG La Grange (SC) & Adv DS Hodge
Instructed by:	Van De Waal Inc.
Date of Hearing:	24 October 2024
Date of Judgment:	01 November 2024