

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number:16567/2022

In the matter between:

LEAD ENGINEERING AND PROJECTS (Pty) Ltd

Applicant

and

SWE REPCO SA (Pty) Ltd

First Respondent

SOLAR CAPITAL (Pty) Ltd

Second Respondent

SOLAR CAPITAL ORANGE (Pty) Ltd

Third Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 18 APRIL 2023

RALARALA AJ

1. INTRODUCTION

[1] This matter was served before me on an urgent basis. The applicant sought an order directing that the respondents restore the applicant's access and or possession of the project site situated approximately 53 kilometres North East of Loeriesfontein, ("the Project Site").

[2] The applicant, Lead Engineering and Projects (Pty) Ltd ('LEP') has been engaged in electrical, mechanical and civil works on a solar project ("the project"). The

respondents 'Repco', 'Solar' and 'Orange' are subsidiaries under Phelon Energy Group Limited and are all engaged in the project. Orange is the company that leases the land on which the project is situated. Orange contracted Repco as a principal contractor. Repco in turn sub-contracted LEP to work on the project in terms of a written contract ("the subcontract agreement").

2. THE FACTUAL MATRIX

[3] The applicant commenced the work on the project site in July 2021 in terms of the subcontract. On 15 September 2022, Repco terminated the subcontract agreement it had with LEP and thereafter, denied LEP and its employees access to the project site. Repco made allegations of conduct by LEP that Repco regarded as amounting to a repudiation of the subcontract agreement. Repco claimed inter alia:

- that LEP failed to complete the works by 27 August as per the subcontract agreement, which caused severe financial losses on the project to the detriment of Repco;

- LEP submitted claims belatedly and incorrectly which claims are denied by Repco;

- LEP repeatedly failed to furnish an accelerated plan with the latest request contained in Repco's correspondence to LEP dated 12 September 2022;

- No proper inventory and system of stock recording all equipment delivered to the project site as well as its use on site was kept, a responsibility that fell squarely on LEP.

[4] LEP refuted Repco's claim that the applicant's actions amounted to a repudiation of the subcontract agreement. LEP brought a spoliation application on an urgent basis seeking an order that the respondents be ordered to restore access or possession of the project site to LEP. The application was struck off the roll on 11 October 2022 for lack of urgency. Pursuant thereto, the matter was enrolled on the semi-urgent roll on 09 February 2023.

[5] Meanwhile, LEP launched a second application on 02 November 2022 under case number 18461/2022 ("the second application"). The second application was brought for similar relief but confined itself to the site establishment, housing its containers and the movables located on-site rather than the entire project site. The court considered the second application and an order was granted on 25 November 2022, however, the issue of costs stood over for determination till 09 February 2022.

3. ISSUES FOR DETERMINATION

[6] This court is enjoined to determine the following disputed issues:

[6.1] Whether LEP had possession of the project site when the respondents denied LEP access to the project site. If LEP had such possession was the respondents' conduct unlawful?

[6.2] Whether LEP had a lien over the project site?

4. SUBMISSIONS BY THE PARTIES

[7] LEP contends that on 29 July 2021, a notice to proceed with the work on the project site was issued by Repco's representative Louise Phelan and signed by Hendrick Jacobus Engela on behalf of LEP. LEP avers that subsequent thereto, LEP established itself on the project site. According to LEP, their site establishment was extremely substantial and comprised of 9 (nine) office structures, a board room, ablution facilities, electrical power supply and 75KVA generator machinery, as well as 2432 complement of tools with fencing to secure the site establishment.

[8] It was further submitted that the project site is secured by numerous gates controlled and patrolled by Repco and Solar's security representatives. Mr Ellis who appeared for the applicant further asserted that to gain access to the project site, two security checkpoints must be passed. Mr Ellis contended that subject to certain

legislated health and safety requirements, the applicant and its employees and contractors have always enjoyed free and unfettered access to and from the project site.

[9] It was further contended that Repco is indebted to LEP in an amount of R84,073,000.00 for work performed of which a portion thereof the respondents dispute, and payment thereof is still outstanding. Mr Ellis argued that LEP has a lien over the project site, therefore has security for the claims. Counsel further contended that on 16 September 2022, the respondents barred LEP from the project site after a purported cancellation of the contract on 15 September 2022, which LEP disputes.

[10] In LEP's heads of argument, counsel advanced an argument to the effect that, the respondents do not dispute that they barred LEP from the Project site and (at least initially) its property, plant and equipment on site without recourse to legal process and consent. In amplification of this argument, it was further contended that the respondents' opposition is grounded on the dispute that LEP had possession of the site and its associated structures and equipment on the project site.

[11] According to LEP, the respondents untruthfully contended that its actions were done based on the contractual regime which excluded any form of possession by LEP, and that access was within the respondents' absolute discretion. This, LEP argued, is in contrast with clause 10.5 of the subcontract agreement which expressly stipulates that: "save for reasons beyond Repco's reasonable control, Repco must provide to the subcontractor (LEP) all rights of access to and possession of the project site on or before the Commencement date."

[12] It is on the basis of clause 10.5 that LEP contends that it is abundantly clear that there existed the sameness of minds from the inception of the subcontract agreement, that LEP would have access to and possession of the Project site, albeit not exclusive.

[13] Meanwhile, the respondents in their answering affidavit assert that Repco and Solar were at all times in joint and exclusive possession and control of the project site. The respondents aver that LEP and other subcontractors were always subject to being granted access to the site which at all times remained at the absolute discretion of Orange and its security services, as instructed by Repco. Repco, it is contended, is the main contractor whose function is to project manage the entire construction to ensure that various subcontractors cooperate properly, to achieve a harmonious execution of the construction and commissioning of the plant.

[14] According to the respondents, numerous other subcontractors are involved on the project site, in the circumstances, only Repco and Orange have possession of the Project Site. Thus, the applicant and all other subcontractors have the same level and type of access to the site. It is further averred that LEP had no keys to the project site in its possession and access thereto was at the discretion of Repco.

[15] To justify the conduct displayed by the respondents on 15 and 16 September 2022, they rely on innumerable subcontract agreement clauses. For the sake of brevity, paragraph 47 of their answering affidavit states:

“If the applicant failed to submit notices required under clauses 5.1 to 5.4 within the times required, or fails to comply with any other notice required, under the subcontract regarding the event (including Force Majeure Event, the notice under clause 5.4) then:

47.5.1 the applicant has no entitlement to an extension of time; and

47.5.2 the applicant must comply with the requirements to perform the Works by the Time of Completion. [clause 5.8]

47.6 Repco may terminate the contract immediately, without prejudice to any other rights or remedies that it may have, if (inter alia):

47.6.1 The applicant abandons the subcontract works, or repudiates the subcontract [clause 8, and 8.1.4];

47.6.2 The applicant substantially or repeatedly materially breaches any obligations assumed under the subcontract [clause 8, 8 .1.10].

47.7 Upon termination of the subcontract under clause 8 .1, Repco may, if the applicant is on the site, expel the applicant and Repco may complete the subcontract works with itself or by engaging any third party [clause 8.8.1]

47.8 The subcontract contains general clauses relating to the ‘whole agreement, no representations no variations’, and no ‘no extension of time or indulgences ‘ , ‘no waiver ‘[clause 28]”

[16] Based on the aforementioned clauses, the respondents submit that the applicant failed to establish the necessary possession requirement and accordingly, the application should fail.

5. APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

5.1 Was the Applicant unlawfully dispossessed?

[17] It is well established in our law that the *mandament van spolie* remedy is designed to prevent recourse to self-help. It seeks to prevent people from taking the law into their own hands. The requirements are that the dispossessed person had possession of a kind which warrants the protection accorded by the remedy and that he was unlawfully dispossessed. Essentially, all that must be proved is the fact of prior possession and that the possessor was deprived unlawfully. Unlawfully here means without agreement or recourse to law.

[18] For the applicant to be successful in the bid for a spoliation relief, there ought to have been a disturbance of possession without consent and against the will of the applicant. *Bischoff and Others v Welbeplan Broedery (Pty)Ltd* 2021 (5) SA 54 (SCA); *Ivanov v North West Gambling Board and Others* 2012 (6) SA 67 (SCA) paragraph [19]; *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA) para 6.

[19] In *Impala Water Users Association v Erasmus Lourens NO and 20 Others* 2004 JDR 0235 (SCA), the court stated:

"I am accordingly of the view that the court a quo correctly held that rights capable of protection by spoliation proceedings had been interfered with in the present case. It is accordingly necessary to consider whether such interference is to be regarded as lawful so that no spoliation can be held to have taken place. In this regard, the first question to be discussed is whether, as the court a quo found, the onus rested on the appellant to show that its actions were covered by the provisions of section 59(3). In the George Municipality case, supra (at 271E), Milne JA expressly approved a statement by Friedman J in the court of first instance in that case which read as follows: 'It is a fundamental principle in our law that a person may not take the law into his own hands and a statute should be so interpreted that it interferes as little as possible with this principle.' Applying this principle, I agree with the judge a quo that section 59(3) can only be invoked when the water use charge the non-payment of which triggers the power to restrict the supply of water to the user is legally payable. Indeed, I did not understand counsel for the appellant to dispute this proposition." (my own underlining).

[20] In the present matter, it is common cause that Repco locked LEP and its employees out of the project site, subsequent to Repco's transmission of a letter cancelling the subcontract agreement and LEP's receipt thereof. In the letter, Repco states *inter alia*:

- *That applicant failed to complete the works by 27 August 2022 as per agreement.*
- *Applicant belatedly and incorrectly submitted claims for an extension of time.*
- *Applicant's failure to complete the works as per agreement is causing severe losses on the project.*
- *The applicant failed to provide any acceleration plan despite several requests from the respondents.*

[21] The case of *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another* 2009 (4) SA 337 (SCA), in my view, is apposite in this matter. In that matter, ATM Solutions installed an ATM in Olkru's convenience store, Kwikspar. Olkru disconnected ATM Solution's machine and replaced it with ABSA's ATM. ATM Solutions brought an urgent application for spoliatory relief against both Olkru and ABSA. The claim against ABSA was brought on the basis that it was a co-spoliator, having facilitated the immediate replacement of ATM Solutions' ATM in Kwikspar with its own. The High Court refused the application for a spoliation order on the basis that ATM Solutions had nothing more than a contractual right to have its machine in place at Kwikspar, and that the *mandament* is not the appropriate remedy for the enforcement of contractual rights. On appeal, it was held that the relief sought by ATM Solutions which was restoring and reconnection of its ATM machine in Kwikspar premises amounted to no more than an order for specific performance of the contract. The SCA dismissed the appeal with costs. See also *Eskom Holdings SOC LTD v Masinda* 2019 (5) SA 386 (SCA).

[22] Reverting to the facts of the present case, while the respondents claim that LEP had no possession of the project site, clause 10.5 of the subcontract agreement unequivocally conferred possession of the project site to LEP to enable the performance of the works. Based on clause 10.5 Repco granted LEP possession of a specific portion of the project site, enabling LEP to perform work based on the subcontract agreement. Thus, it is not permissible that Repco, Solar and Orange selectively rely on certain and

not on all clauses of the subcontract agreement. This is evenly pertinent to LEP, as the entire subcontract agreement is binding to both parties. Equally perceptible from the subcontract agreement, categorically in clause 8.1, Repco is entitled to immediately terminate the subcontract agreement due to default on the part of the subcontractor.

[23] Most significantly, it was set out prominently in the letter of 15 September 2022, that LEP's conduct constitutes a repudiation of the subcontract agreement. It was further stated that such repudiation was being accepted by the respondents and alternatively to the extent necessary, Repco was terminating the subcontract agreement in terms of clause 8.1 of the subcontract agreement. Pursuant to the 15 September 2022 letter, around 8 am on 16 September 2022, Repco denied LEP access to the Project site. At the hearing of this application, the parties were *ad idem* that the applicant's response to the termination letter was sent to the respondents after 10 am on 16 September 2022. The 16 September 2022 letter written by LEP to Repco, disputed that LEP has repudiated the subcontract agreement.

[24] It must be noted that at the time LEP's possession and access to the project site were denied by Repco, Repco was unaware of LEP's stance with regard to the repudiation or termination of the subcontract agreement. However, the view I take is that in denying LEP access to the project site, Repco was acting in accordance with the terms of the subcontract agreement.

[25] Mr Ellis on behalf of LEP advanced an argument to the effect that, even though clause 8.1 permits Repco to expel LEP, Repco was not entitled to carry out the expulsion unlawfully. The argument went on to say; the right may be there but the due process had to be followed. Mr Ellis further contended that consent by LEP is not pleaded by Repco and thus cannot be relied upon. As already indicated in the preceding paragraph, Repco in their answering affidavit relied on clause 8.1 of the subcontract agreement, and the contents of the 15 September 2022 letter referred to by LEP in their founding papers. In my considered view, Repco's reliance on the terms of the subcontract is a clear demonstration that Repco followed due process. In my mind,

LEP's argument is untenable, as both parties are bound by the terms of the subcontract agreement, hence when LEP signed the subcontract they consented to expulsion from the project site (in the circumstances described in the letter of 15 September 2022). From all the evidential material placed before court, it is consistently contended that the applicant failed to adhere to the material terms of the subcontract agreement and the respondent decided to terminate the agreement in terms of clause 8.1

[26] Most importantly, the parties agreed that: LEP will be conferred possession of the project site, albeit not exclusive possession; upon the termination of the contract the first respondent may expel LEP from the Project Site. At the hearing of the matter, counsel for LEP when granted an opportunity to address the court on clause 8.1 of the subcontract agreement which is annexure 'FA4' to the applicant's founding affidavit, argued that the clause is irrelevant to the matter.

[27] In my view, the significance of clause 8.1 of the subcontract agreement is that it deals with the termination of the subcontract agreement and empowers Repco to expel LEP from the project site, which is what Repco has done leading LEP to bring this application. Not only is it relevant, in my view it is dispositive to the matter. More so, Repco disputes that the applicant had exclusive possession of the Project site and this contention finds support in clause 10.5.3 of the subcontract agreement, dealing with access and possession of the project site.

[28] In *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* 2007 (3) SA 254(N) para 54 to 55, considered the type of possession protected by *mandament van spolie* and found that possession must be exclusive in the sense of being to the exclusion of others. For applicant to exercise physical control of the premises, applicant must have the only key to the premises.

[29] In this matter, it remains uncontroverted that more than 10 (ten) subcontractors enjoyed a similar kind of possession of the project site at the relevant period, as they had to bring material, tools and equipment on site for purposes of performing their

contractual obligations and leave these items on site for the duration of the work. Ostensibly LEP possessed no keys at the time, enabling voluntary access to the project site, save for keys to its own containers with the material, tools and equipment, access to the project site was provided by Repco's security personnel.

[30] Notwithstanding the dispossession and denying LEP of access to the project site, it is clear that Repco acted on the strength of an undisputed cancellation of the subcontract agreement. The argument by counsel for LEP, that cancellation of a contract does not take away possession from LEP, is opportunistic in that the parties have agreed that where the subcontract has been terminated, the contractor, (in this case, Repco) may expel the subcontractor(LEP) from the project site. An intended consequence is that, with the termination of the contract, Repco exercising the discretion conferred by the subcontract agreement expelled LEP from the project site, thus LEP's possession of the site has ceased for it was a right based on the subcontract. From the foregoing, it is plain that Repco acted within the ambit of the subcontract agreement and its conduct was informed and guided by the written subcontract agreement. Thus the dispossession was lawful and LEP is not entitled to the remedy sought.

[31] Furthermore, in considering the applicable legal framework, it is abundantly clear that LEP sought to restore possession of the project site, a right based on a contract. Evidently, LEP was conferred possession of the project site in terms of the contract, albeit not exclusive, as there were other subcontractors involved in the project site. Similarly evident, is that such possession is a purely contractual right and therefore not protected by *mandament van spolie*. The respondents conduct in denying LEP access and possession of the project site was lawful, as LEP had consented thereto when the parties concluded the subcontract. *Mandement van spolie* does not protect contractual rights and cannot be used to enforce specific performance of a contract.

5.2 Did LEP have a lien over the project site?

[32] LEP in the founding affidavit also asserted that they were exercising a lien over the project site for works done but not paid at the time of the expulsion from the project site. While in their replying affidavit, it was asserted that LEP was exercising a lien over the project site for works completed but not paid for at the time the spoliation took place and was completely caught off guard by the respondents' forcible and wrongful conduct, in an attempt to defeat its lien. LEP relied on *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2007 (2) SA 128 (C) at 145 B:

"It appears settled law that a temporary absence such as occurs at the end of a working day or over a weekend does not interrupt a builder's lien where the builder or contractor remains engaged in the work and continues to assert his occupation of the site."

I must also stress the fact that this High Court decision was reversed by the Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371.

[33] The first respondent opposes the relief of a lien and contends that the requirements of the creation of a lien: Money or labour must have been expended by one person on a thing belonging to another; A lien is only created and retained as long as the *retentor* remains in possession of the thing; *Possessio civilis* is not required, but only physical control over the thing to hold it as security. Mr Kuschke for the respondents, further argued that LEP has never held the site as security for its claim for payment. On this point, Repco relied on the case of *Investec Bank v The Master of the High Court and Others WCHC Case number 2668/2012* (unreported judgment)10 April 2012 at [3]. In this matter Binns - Ward J held the following:

"The sufficiency of physical control required in a given case falls to be determined objectively the determinant criteria being effectiveness against adverseness to, the rights of the owner, who continues to live in the building while maintenance is effected to it, that the repairer of a house would normally be regarded as acquiring possessory

lien over the house' (Cape Tex Engineering Works at 532 fin, citing United Building Society v Smmokler's Trustees,1906 T.S 623 at 627; Beetge v Drenka Investments(Isando))Pty)Ltd 1964 (4) SA62(W)at 68 to 69, and Lee and Honore, South African Law of Property, p 44)."

[34] LEP was expelled from the project site. As such, LEP no longer has any possession of the site as a result of lawful dispossession, thus it could not rely on a lien hypothec. For all the reasons set out above, it follows that the application must be dismissed.

6. THE ORDER

[35] The following order is accordingly granted:

[35.1] The application is dismissed with costs.

[35.2] The costs include the costs of the first and second applications and the costs of two counsels.

**RALARALA NE
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION**

Counsel for the Applicant: Adv P ELLIS SC

Adv E MALHERBE

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