

SOUTH AFRICA / JUDGMENT

Arise General Construction CC Reg CK2001/031812/23 v South African National Parks (79889/20165) [2016] ZAGPPHC 697 (12 August 2016)

[2016] ZAGPPHC 697

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

79889/20165

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 79889/20165

DATE:

12 AUGUST 2016

In

the matter between:

ARISE

GENERAL CONSTRUCTION CC

REG

CK2001/031812/23.....APPLICA

NT

And

SOUTH

AFRICAN NATIONAL

PARKS.....RESPONENT

JUDGMENT

RAULINGA J

This is an appeal against the judgment in which the applicant's urgent application was dismissed with costs.

[1] The application is based on the mandament van spolie under circumstances where the applicant is building contractor and alleges to have been deprived of its possession of a building site within the Kruger National Park, where it was in the process of executing the a building contract for the construction of certain student accommodation, student boma, security, guard house, supervisor, and manager accommodation (hereinafter referred to as "the works") at Phambeni Gate-Phambeni School (herein referred to as ("the arte").

[2] The applicant is a building and construction enterprise founded in 2001. The respondent is the custodian of South African National Parks, including the Kruger National Park. The site is situated in the Kruger National Park, dose to the Phambeni Gate.

[3] After the respondent had decided to improve its facilities pertaining to student accommodation and the general provisions for an

educational facility to be established on the site, the applicant and the respondent concluded the principal building agreement, JBCC series 2000 (hereinafter referred to as "the agreement") on 4 December 2013. A copy of the applicants' founding affidavit, marked Annexure 'A'.

[4] It is contended by the respondent that the agreement was cancelled on the basis that the applicant failed to comply with the material terms and conditions of the agreement; which is denied by the agreement.

[5] As already stated above, the works consist of the construction of student accommodation, student boma, security, manager's accommodation and guard house [clause 42.2.1].

Possession of the site was given to the applicant on 11 November 2013 [clause 42.2.25]. The date for practical completion wad 11 April 2014 [clause 24.3.1 and 42.2.7]. The accepted contract sum, including VAT, is R8443061 .14.

[6] It was further agreed between the parties that;

6.1.“In the event that the applicant fails or omits to achieve the practical completion by 11 April 2014, the respondent is entitled to enforce a penalty in the amount of R1000, 00 per day [clause 30.1 and 42.2.7],

6.2.On being given possession of the site the applicant shall commence with the works within the period started in the schedule and proceed with the due skill, diligence, regularity and expedition and bring the works to:- Practical completion on or before 11 April 2014;

- Works completion in terms of the provisions of clause 25 of the agreement; and

- Final completion in terms of the provisions of clause 26 of the agreement [clause 153J].

6.3.in the event that the respondent considers cancelling the agreement, the principal agent shall be Instructed to notify the applicant of such default in accordance with, the provisions of clause 30.1 and the respondent or the principal agent may give notice of such cancellation; should the applicant remain in default for 10 working days after the date of issue of such a notice of default [clause 36.3]

6.4.in the event that the agreement is cancelled the employment of the applicant shall be cancelled and execution of the work shall cease. The applicant shall furthermore vacate the site subject to t*1[®] provisions of clause 36.5.6.1 of the

agreement [clause 36.5.1]; and

6.5.The respondent may use the applicant's materials and goods, temporary buildings, plant and machinery on the site for proceeding with the works [clause 36.5.5]".

- [7] The applicant avers that it put shoulder to the wheel and in fact proceeded with the works due to skill, diligence and expedition

as it had done before. The applicant then sketches the sequence of events that led to what happened on 11 September 2015 when the

applicant's employees were informed that the agreement had been cancelled.

- [8] The respondent paints a different picture, in that it contends that from the outset the applicant experienced difficulties in that

the project and the works were delayed unreasonably. Further, that it soon became evident that the applicant did not have the basic skill, experience, know-how, expertise and financial ability to achieve practical completion by 11 April 2014.

- [9] It is also the contention of the respondent that when it realised the applicant was unable to complete the work on time, it did everything within its ability to accommodate the applicant and granted various indulgences to the applicant in order to enable the

applicant to complete and to finalise the works at the site. In support of its argument, the respondent annexes correspondences

dating from the 8 December 2014 and leading to the events of 11 September 2015. In all the letters directed to the applicant, the

respondent referred to the relevant clauses in the principal building agreement. Chief amongst these is a letter dated 28 July 2015 Annexure "P" in which the following was placed on record:

"By failing to achieve practical completion of the buildings on 31 July 2015 we will act in terms of the JBCC principal Building Agreement - clause 17.4 and reserve our rights to act in terms of clause 36 of the JBCC principal Building Agreement.

[10] importantly, is the final letter of demand dated 3 August 2015 in which is recorded the following:

‘In terms of clause 15.3 you were to bring the works to practical completion with due skill, diligence, regularity and expedition on 31 July 2015 as agreed. We hereby wish to notify you in terms of clause 36.2 of the JBCC principal Building Agreement that you are in default of your contractual obligations and that it is our intention to cancel in terms of clause 36.1.

In terms of clause 3.2 of the JBCC Principal Building Agreement we hereby wish to inform you that should you remain in default for ten (10) working days after the (Me of this notice, we reserve our rights to terminate the agreement without prejudice to any other rights we may have in terms of the JBCC Principal Agreement

Your urgent attention is awaited.

1 attached hereto a copy of my letter dated 3 August 2015 confirming same, marked Annexure “R1”.

[11] The agreed practical completion date was 18 August 2015 as agreed between the parties. Despite numerous letters directed to the applicant including letter dated 31 August 2015, 4 September 2015 and 10 September 2015 the applicant failed to complete the works.

Consequently, the Principal Building Agreement was cancelled.

[12] The applicant submits that it didn't voluntarily vacate the site, as is contended by the respondent Further, that no dispute

of fact arises on this Issue and if any, it is more perceived than real.

[14] As a consequence, the applicant opted to act in terms of the dicta in *Room Hire Co.(PTY) Ltd v Jeppe Street Mansions (PTY) Ltd* 1948 (3) 11SS (T) at 1163 and called Mr. Abram Mogale to adduce oral evidence on its behalf.

[15] In paragraph 8.3 of its heads of argument, the applicant submitted that the respondent's deponent, Mr. Vissagie, was not present and does not profess to have any personal knowledge of the circumstances of the applicant's employee's departure from the site on 11 September 2015. However, in paragraph 8.31 of the Founding affidavit, it is evident that Mr. Vissagie, Mr. Cairlm and

the legal representative of the applicant Mr. Abram Mogale were present at the meeting of 11 September 2015 when all the building and the services were inspected and everybody agreed that the practical completion has not been achieved. At the end, the applicant's site agent, Mr. Mogale, was instructed to cease all works and to evacuate the site on the same day. Further in paragraph 4.6 of its replying affidavit the applicant conceded that (sic) deponent, Mr. Vissagie was indeed on site with other persons on Friday 11 September 2015.

This in my view is a contradiction in terms by the applicant and also contradicts the oral evidence of Mr. Mogale. The oral evidence is therefore rendered futile and the matter must be decided on affidavits.

[16] The mandate van spolie is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying Contest concerning entitlement to possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for mandament van spolie has to show. (Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust the possessor). The underlying principle is expressed in the maxim *spoliatus ante omnia restituendus est*. The fundamental purpose of the remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help. It is available both in respect of the dispossession of corporeal property and incorporeal property. In the case of incorporeal property it is the possession of the right concerned that is affected - a concept described as quasi

- possession to distinguish it from physical possession. The manifestation of the dispossession of the right in such a case will always entail the taking away of an externally demonstrable incidence, such as a use, arising from or bound up in the right concerned. *Van Wiyn and Others NNO v Fleurbaey Farm (PTY) Ltd* 2013

(8) 8A 521 (WCC) at 522 - 523 para HI- See also *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) 323 (CC) paras 23 - 24 and *Bon Quelle (Edms) Bpk v Municipality of Tloane* 19B9 (1) SA508 (A) at 511 I-512B.

[17] In the *Van Rhyn* case (supra) the matter pertained to servitural access where the applicants caused one of the respondent's directors to be advised that they would be closing the gravel road across their property so as to enable, amongst other things, the area between the main house on the property and a nearby dam to be landscaped as part of a garden extension. The respondent was advised that an alternative access road would be made available. The appellants thereafter constructed the alternative access road at a cost of nearly R3 million. Its availability coincided more or less with the closure of the gravel road. The remedy which the respondent

claimed in its application for anti-spoliatory relief (a mandament van spolie) was on its face consistent with what might have to be expected had it been asserting a defined right of servitural access.

[18] The court in *Van Rhyn* emphasized the need to identify the right claimed. The court intimating that in a case in which the applicant for anti-spoliatory relief seeks restoration of right of use, the nature of the alleged right upon which the use is founded must be identifiable on the papers because it is the subject-matter of the alleged dispossession if the conduct of the alleged disposer does not in law infringe or derogate from the alleged right. Thus the nature of the right can be material for determining whether the conduct complained about by the applicant for a mandament van spolie amounts to spoliation.

Therefore, the requirements are that the spoliatus prove possession of a kind which warrants the protection accorded by the remedy and that he was unlawfully ousted.

- [19] In the matter of Bon Quelle (Edme) Bpk (supra), the Appellate Division determined that the municipality was entitled ante ammicca to have the status quo ante restored on the the municipality did indeed have a servitural right to the water supply.
- [20] In Firststrand Bank Ltd t/a Rand Marcant Bank & Another v Scholtz NO & Others 2008 (2) SA 503 (SCA) the following basis for the need for the characterisation of the right in an application for mandament van spolie was stated:

The mandament van spolie does not have a "catchall- function" to protect the quasi-possessio of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi-possessio of certain

rights. It follows that the nature of the professed right; even if it need not be proved, must be determined or the right characterized to establish whether its quasi-possessio is deserving of protection by the mandament".

- [21] Thus the nature of the right can be material for determining whether the conduct complained about by the applicant for a mandament van spolie amounts to spoliation. Van Ryhn (supra) at page 526 E. This is an incident of the requirements that the applicant must prove 'possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted". Yefco v Qama 1973 (4) SA 735 (A) at para 739-G-H.
- [22] In my view the applicant has failed to make a sufficient case for the relief which it applies for. The applicant's "right" to site has been legally and lawfully terminated and cancelled for the following reasons.
- [23] The applicant has failed and omitted to comply with the contractual obligation and responsibilities insofar as the practical completion of the works is concerned. Various indulgences were granted to the applicant to complete the works, but to no avail.

The following letters directed to the applicant by the respondent bear witness to this; Letters dated 10 December 2015, 28 July 2015, 31 August 2015, 4 September 2015 and 10 September 2015. The applicant is therefore not entitled to rely on the mandament van spolie.

- [24] In the result the application is dismissed with costs on party and party scale.

TJ RAULINGA

JUDGE OF THE HIGH COURT

Attorney for the Applicant : Coetzer and Partners attorneys

Counsel for the Applicant : Adv. Ellis SC

Attomeyfor the Respondent : Day attorneys Inc.

Counsel for the Respondent : Adv. FW Botes SC

Date of Judgment 12 August 2016

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