

SOUTH AFRICA / JUDGMENT

Ibhubhezi Powerlines CC v Udumo Trading 26 (Pty) Ltd and Another (5011/2015, 283/2016) [2016] ZAECGHC 72 (8 September 2016)

[2016] ZAECGHC 72

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J Lowe

CASE / FILE NUMBER

5011/2015, 283/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 5011/2015

283/2016

DATE:

8 SEPTEMBER 2016

In

the matter between:

IBHUBHEZI

POWERLINES

CC.....Applicant

And

UDUMO

TRADING 26 (PTY)

LTD.....First

Respondent

ESKOM

HOLDINGS SOC LIMITED

(ESKOM).....Second

Respondent

JUDGMENT

LOWE, J

Date heard: 02 June 2016

Date delivered: 08 September 2016

Introduction:

- [1] In this matter Applicant seeks an order that First and/or Second Respondents jointly and severally be ordered to restore possession to the Applicant of a certain overhead electrical installation, erected between Aliwal North and Lady Gray, Eastern Cape Province, (the extent of which is identified), by re-installing the Applicant's chains and padlocks and reconnecting these to the earth as was the position on 18 August 2015.
- [2] The papers in this matter are extensive comprising well over 500 pages.
- [3] The matter is opposed by both First and Second Respondents, both of whom bring a counter- application.
- [4] First Respondent opposes the application on the basis that the relief sought which relies on the mandament van spolie should be dismissed with costs and that its application for a declaratory should be granted, this in effect being launched as a separate application but to be adjudicated together with the main application and Second Respondent's counter-application.
- [5] Second Respondent alleges that it had nothing to do with any purported spoliation and opposes the mandament van spolie on the basis that First Respondent at no time had possession of the power line, raising a counter- application seeking declaratory relief which is in the form of an alternative defence and only needs be considered if its main defence is not upheld.
- [6] It seems to me that as argued by Mr Paterson if Second Respondent's arguments succeed it is unnecessary to enter into the case as between Applicant and First Respondent, save as to the question of costs.
- [7] Nevertheless, and subject to the above, as between Applicant and First and Second Respondents the following issues arise for determination, but only insofar as may be necessary:

7.1 The existence of the mandament van spolie as between Applicant and First Respondent;

7.2 The defence of Second Respondent to the mandament van spolie based upon the averment that Applicant was at no time in possession;

7.3 Whether it was appropriate for Second Respondent to have brought the counter-application;

7.4 If so, whether the declaratory relief sought by Second Respondent as against Applicant should be granted;

7.5 The issues raised in First Respondent's counter-application for a declarator.

The Relevant Facts:

- [8] The contractual relationship between the various parties in this matter arise out of a tender process that was formalized in annexure BM2 to the papers, which was signed on 14 September 2013 incorporating the terms of the NEC3 contract ("the main agreement").
- [9] The main agreement was concluded between First and Second Respondents in respect of the construction of the overhead power line. The employer is Second Respondent, First Respondent being the contractor. The terms of the main agreement is governed by what appears therein, together with the NEC 3.
- [10] The importance of the main agreement is that at least as between First and Second Respondents this is determinative of the issue as to the possession of the power line, such as Applicant may have had and which it seeks to restore to itself.
- [11] The main contract followed a tender procedure which resulted in the award of the tender and the signature of the main agreement on 14 September 2013.
- [12] The essential terms of BM3, relevant to this matter, are the following:

Clause 11.17 defines a subcontractor as

"A Subcontractor is a person or organisation who has a contract with the Contractor to

- Construct or install part of the works,
- Provide a service necessary to Provide the Works or
- Supply Plant and Materials which the person or organisation has wholly or partly designed specifically for the works."

7.3.2 Clause 26 provides for subcontracting as follows:

"26.1 If the Contractor subcontracts work, he is responsible for providing the Works as if he had not subcontracted. This contract applies as if a Subcontractor's employees and equipment was the Contractor's.

26.2 The Contractor submits the name of each proposed Subcontractor to the Project Manager for acceptance. A reason for not accepting the Subcontractor is that his appointment will not allow the Contractor to provide the Works. The Contractor does not appoint a proposed Subcontractor until the Project Manager has accepted him.

26.3 The Contractor submits the proposed conditions of contract for each subcontract to the project Manager for acceptance unless

- An NEC contract is proposed or
- The Project Manager has agreed that no submission is required.

The Contractor does not appoint a Subcontractor on the proposed subcontract conditions submitted until the Project Manager has accepted them. A reason for not accepting them is that

- They will not allow the Contractor to Provide the Works or
- They do not include a statement that the parties to the subcontract shall act in a spirit of mutual trust and co-operation.”

7.3.3 Clause 33.1 provides:

“The Employer allows access to and use of each part of the Site to the Contractor which is necessary for the work included in this

Contract. Access and use is allowed on or before the later of its access date and the date for access shown on the Accepted

Programme.”

7.3.4 Clause 35.1 provides:

“The employer need not take over the works before the Completion Date if it is stated in the Contract Data that he is not willing to do so. Otherwise the Employer takes over the works not later than two weeks after Completion.”

7.3.5 Clause 70.1 provides:

“Whatever title the Contractor has to Plant and Materials which is outside the working Areas passes to the Employer if the Supervisor has marked it as for this contract.”

7.3.6 Clause 70.2 provides:

“Whatever title the Contractor has to Plant and Materials passes to the Employer if it has been brought within the Working Areas. The title to Plant and Materials passes back to the Contractor if it is removed from the Working Areas with the Project Manger’s

permission.”

7.3.7 Clause 91.2 provides:

“The employer may terminate if the Project Manager has notified that the Contractor has defaulted in one of the following ways and not put the default right within four weeks of the notification.

- Appointed a Subcontractor for substantial work before the Project Manager has accepted the Sub-Contractor.”

7.3.8 Clause 91.4 provides:

“The Contractor may terminate if the Employer has not paid an amount certified by the Project Manager within thirteen weeks of the date of the certificate.”

[13] Second Respondent argues that on the basis of these terms:

13.1 The contract does not provide occupational possession of the site of the works by the contractor (First Respondent);

13.2 The consequence of this is that there can be no builders lien over the works;

13.3 That in any event the remedy for non-payment is provided in the provisions for termination;

13.4 That accordingly the main contract does not allow for liens of any kind;

13.5 That if the First Respondent contractor could not have a lien against Second Respondent, even less could a subcontractor, and particularly not a subcontractor unknown to Second Respondent (Applicant) and moreover argues Second Respondent was not a subcontractor duly appointed in terms of the contract.

[14] First Respondent in turn argues that Applicant’s claim against it, based on the mandament van spolie, should be dismissed inasmuch as Applicant has not satisfied, so it is argued, the requirements for such a mandament in principle, particularly having failed to establish possession of the overhead line, alternatively that First Respondent is no longer in possession of the overhead line and contractually precluded from reclaiming possession from Second Respondent, rendering any restoration by First Respondent impossible; alternatively Second Respondent is in possession of the overhead line but has not been involved in the spoliation precluding any mandament van spolie against Second Respondent; further alternatively that the court has a discretion not to grant such relief as this would cause considerable hardship given the applicable legislation in the public interest.

[15] Applicant argues that after the award of the main contract to First Respondent a subcontract was concluded between Applicant and First Respondent in terms of which First Respondent was responsible for payment to Applicant of monies paid to First Respondent by Second Respondent.

[16] I should comment immediately that it is alleged that this award to Applicant followed a quotation for the submission and performance of certain works on the project and supply of materials for the construction of the overhead line in accordance with the specifications and requirements of the Second Respondent. It is alleged that on the strength of this quotation First Respondent submitted a tender for the work. It is alleged that thereafter, First Respondent having been awarded the main contract, in turn, awarded a subcontract to Applicant for the construction of the overhead line. It is alleged that the agreement between Applicant and First Respondent was recorded in First Respondent’s letters dated 3 December 2013 and 5 June 2014. The letters are short,

to say the least, the first stating: “this serves as confirmation that the above contract... Is herewith awarded to you Ibhubezi power lines, as per Main NEC 3 contract.”(sic) The second letter dated six months later seems to award a further contract for a lesser sum.

- [17] These letters disclose very little, but it must be that any contract between Applicant and First Respondent was bound to comply with the terms of the main agreement between First and Second Respondents, which at least to this extent is included in the purported letter of appointment.
- [18] This is in fact Applicant’s case, Applicant contending that the Applicant completed the construction of the 54 km overhead line, that at all material times throughout the construction it was in peaceful and undisturbed possession and control of the overhead line and was in “lawful possession thereof”.
- [19] Applicant argues that there is a considerable sum due, owing and payable by First Respondent to Applicant in respect of the work, this being detailed in the founding affidavit. In this regard Applicant contends that First Respondent has been paid significant amounts by Second Respondent in respect to the contract but significant funds remain outstanding in this regard. Applicant argues there has been no formal handover or final inspection of the works and that Applicant retains a lien and right of retention over the overhead line. Acting on the basis hereof Applicant, to secure its lien and to prevent its electrification, placed metal chains over and around the overhead power lines at the terminal structures at appropriate places which were secured by padlocks and earthing steel poles. Upon an inspection on 20 August 2015 it was observed that these chains had been removed. It is common cause, in the papers, that First Respondent removed the chains as part of the formal handover process of the overhead line to Second Respondent by First Respondent so that Second Respondent could proceed with the electrification thereof at the end of September 2015.
- [20] Applicant alleges that this was an unlawful act constituting a mandament van spolie.
- [21] In response to Second Respondent’s denial that any contractual relationship existed between it and Applicant as regards the erection of the power line and its denial of any dealings with the Applicant in connection with the works, Applicant contends that this cannot be substantiated as the Second Respondent was fully aware that Applicant was a subcontractor, which was openly publicized and discussed and a so-called “well-known fact”. It argues that this relationship between it and First Respondent was accepted by Second Respondent’s representatives at the second site meeting, was confirmed at the fifth site meeting, this being thus unassailable.
- [22] In this context First Respondent acknowledges the terms of its subcontract with Applicant are subject to the terms of the main agreement between itself and Second Respondent but that Second Respondent has no contractual relationship with Applicant. First Respondent admits that it “subsequently informed the Second Respondent of the subcontract, but no written consent was obtained from the Second Respondent prior to or subsequent to the

conclusion of First Respondent's subcontract with the Applicant". First Respondent expresses the view that Second Respondent did not approve the appointment of Applicant as subcontractor.

[23] It is against this background that the present claim must be adjudicated.

The

Analysis:

[24] As will have been noted in the main agreement, extracts referred to above, the appointment of a subcontractor to the project does not, notwithstanding Second Respondent's ability to veto same (through the project manager), create any contractual nexus between Second Respondent and that subcontractor. This notwithstanding, the main agreement provides that First Respondent is not entitled to appoint a subcontractor until the project manager has accepted that subcontractor.

[25] Second Respondent contractually allows access to the site to the contractor such as is necessary for the work included in the contract to be performed.

[26] It seems from the averments made in the papers that in point of fact although First Respondent contracted with Second Respondent; it did so intending that the entire contract be subcontracted to Applicant. That this was formally the position is far from clear as this was referred to only in passing to the extent referred to by Applicant in its founding papers. It will also be noted that the main agreement contains a prohibition of cession without consent.

[27] Applicant contends, as set out above, that site meeting 5, held on 21 January 2014, indicated that the project coordinator expressed that he was pleased to have the Ultimate Dynamic representation at the meeting and that they needed to resolve the issues between themselves and the subcontractor as soon as possible.

[28] Second Respondent contends in argument that nothing in this minute, or that referred to earlier, fixes Second Respondent's representatives with knowledge of the nature of the subcontract, and that this fails to undermine Second Respondent's averments that the contractual requirements for the appointment of a subcontractor were not engaged or that Second Respondent did not approve of the Applicant as was required by the contract.

[29] In this regard the project coordinator addressed Ultimate Dynamic in writing on 4 January 2014, referring specifically to Clause 26.2 of the main agreement. The letter then points out that: "By violating so many of the above conditions, you are substantially in default of this contract, leaving the Employer well within his rights to terminate the contract with immediate effect. In fact, it has become evident that the entire Works has been subcontracted, something which the contract does not even allow for-it allows for subcontracting part of the Works under certain conditions." The letter then goes on to state that First Respondent violated clause 10.1 by not being truthful when confronted with the

situation at the first site meeting. The letter made it clear that the situation was regarded in the most serious of lights, but that it was not in the interests of either party to terminate the contract at that time and certain instructions followed in the letter. Failing compliance with those instructions the project coordinator stated that there would be no alternative but to initiate steps towards termination.

- [30] It seems to me, clear from this letter, that the contract formalities in respect of the appointment of a subcontractor were not followed, and in any event, there was no contractual nexus on any basis between Second Respondent and Applicant. This remains the position whatever Applicant's contractual position may have been, relevant to First Respondent.
- [31] This brings me to possession and spoliation.
- [32] It is clear from the affidavits that First Respondent was responsible for removing the locks and chains referred to by Applicant, and which Applicant had erected in its attempt to establish and keep its lien. Second Respondent was not party to the removal of the locks and chains, but avers nevertheless that Applicant was at no time in possession of the overhead lines. Applicant's contention that it was in possession, rests on its allegation of a subcontract between itself and First Respondent by virtue of having installed the overhead line.
- [33] In short Second Respondent argues that at best Applicant was a subcontractor but had no contractual relationship with Second Respondent and can have had no better rights than those given to First Respondent in the main agreement. In this regard First Respondent was given access to the site for the performance of the contract work. As per clauses 70.1 and 70.2 of the main agreement the title to materials passed to Second Respondent when marked for the contract by the Supervisor or brought within the working area. Notwithstanding Applicant's averment in reply relevant to the common law relating to the passing of title in credit agreements, it seems to me that Second Respondent's argument that this incorrectly ignores that there was no contractual nexus between Applicant and Second Respondent, and that Applicant can have no better rights than those given to First Respondent, must be correct. Similarly, Second Respondent argues that as a result and by operation of the particular contractual terms there can be no lien by First Respondent over materials and therefore Applicant can have no lien as against Second Respondent.
- [34] Crucial to the above is Second Respondent's averment that the contract does not provide for possession of the site by the contractor but only access as referred to in clause 33.1 of the main agreement. Quite apart from this, is Second Respondent's alternative or additional argument with reference to section 23 of The Electricity Regulation Act 4 of 2006 which reads as follows:

"23 Electricity infrastructure not fixtures –

- (1) Any asset belonging to a licensee that is lawfully constructed, erected, used, placed, installed or affixed to any land or premises not belonging to that licensee, remains the property of that licensee notwithstanding the fact that such an asset may be of a fixed or permanent nature.
- (2) An asset belonging to a licensee in terms of subsection (1)-
- (a) may not be attached or taken in execution under any process of law, or be the subject of any insolvency or liquidation proceedings, instituted against the owner of the land, the landlord or the occupier of the premises concerned;
- (b) may not be subjected to a landlord's hypothec for rent; and
- (c) May only be validly disposed of or otherwise dealt with in terms of a written agreement with the licensee."
- [35] It contends that the terms of this provision are sufficiently wide to exclude any lien of the nature contended for by Applicant. It seems to me from what follows, that it is unnecessary to enter upon this alternative argument.
- [36] Importantly, whilst Applicant contends First Respondent is owed a sum by Second Respondent, First Respondent in terms, and which must be accepted on the usual test, denies that Second Respondent owes First Respondent any amount at all.
- [37] Turning to the lien contended for on these facts it must be remembered that there is no contractual nexus between Applicant and Second Respondent; Second Respondent owes First Respondent nothing on the contract; Applicant, and for that matter, First Respondent had access to the site for the purposes of the construction but, so it is argued, not possession for the purposes of lien.
- [38] As pointed out by Mr Paterson, identical facts arose in the matter of Colonial Government v Smith, Lawrence and Mould and Others
- (1886) 4 SC 194. The State had contracted with a firm for the building of a railway line. That firm, without the consent of the State, subcontracted part of the works, namely the building of railway stations and houses. The subcontractor attempted to assert a lien over what it had built. It was held that in the absence of an averment that the State owed the main contractor monies

in respect of its work, the subcontractor could not detain the building as against the State. As was correctly pointed out by Mr.

Paterson, the only dissent from this is to be found in *Howes & Clover (Pty) Ltd v Ruskin and Others* 1978 (1) SA 99 (W), which was dissented from in *Wynland Construction (Pty) Ltd v Ashley-Smith and Others* 1985 (1) SA 534 (C) (which in turn was confirmed on appeal by *Wynland Construction (Pty) Ltd v Ashley-Smith and Others* 1985

(3) SA798)).

[39] On the facts which must be accepted on the appropriate test, having regard to First Respondent's allegation that Second Respondent owes it nothing, it seems to me, that this proposition must be accepted against Applicant.

[40] Further, and in any event, Second Respondent correctly argues that the only instance in which a subcontractor may perhaps have a right of retention against the owner is where the owner has consented to the subcontract and has not paid the main contractor. Again, it seems to me, on a proper construction of the facts that these requirements are not satisfied.

[41] Further, and in any event, the question arises on Applicant's argument as to whether there was possession in the sense required to establish a lien, where the above arguments were to be rejected.

[42] Second Respondent contends that the main contract provides merely for access to the site and not possession of the site. The site was 54 km long and the overhead line was built along servitudes given in favour thereof.

[43] As I understand it for a lien to arise the lien holder must have expended money or labour on property belonging to another; he must be in possession of the property (and this lien extends only to the property on which money or labour has been expended).

[44] It seems to me, on Applicant's own argument that there was no contract between it and Second Respondent (the owner by virtue of the provisions of the main contract). This is reinforced by the fact that contractually the ownership of the overhead line comprising its parts whether supplied by Applicant or not, passed to Second Respondent on these being marked for the contract. Over and above this there being no contract between Applicant and Second Respondent there was no debt which could in any event be secured. The only alternative is that there being no contract with the owner, there is a retention right based on

enrichment and the claimant of a lien can exercise that retention right against all enrichment amounts. Mr Paterson pointed out,

however that a lien in this instance is closely associated with the related enrichment action which, as he argues, is only available when a party in possession has made an improvement to the property of the owner and there is enrichment of the owner at the expense of the possessor. In *United Building Society V Smooklers Trustees and Golombick's Trustee* 1906 TS 623, the court held that in the case of a subcontractor who made the improvement, that subcontractor will usually have suffered a loss

in doing so, but the loss is not at the expense of the main employer. This being the case the enrichment action does not arise. See in this regard *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 at 573H. Again as pointed out by Mr. Paterson this decision was affirmed in *Brooklyn House Furnishers (Pty) Ltd v Koetze and Sons* 1970 (3) SA 264 (A) and placed beyond all doubt by *Buzzard Electrical v 158 Jan Smuts Avenue Investments* 1996 (4) SA 19 (A).

[45] Further, I agree with Mr Paterson that Applicant's reference to the common law relating to a builders lien therefore falls away, the only instance in which a subcontractor may possibly have a right of retention against the owner is where the owner has consented to the subcontract and has not paid the main contractor, none of which arises in the current instance.

[46] In the result, the mandament van spolie must fail as against Second Respondent.

[47] For that reason, it is unnecessary to enter upon Second Respondent's counterclaim.

[48] In respect of First Respondent it must be remembered that, at best for Applicant, the NEC3 agreement applied to their relationship. This must be taken to mean that the terms of that agreement apply between Applicant and First Respondent, with the same consequence which is referred to above, the title to materials passing to First Respondent once brought within the working area, alternatively to Second Respondent. Further, Applicant only had access to the site and did not obtain possession for the purposes of the mandament van spolie (or lien) as between Applicant and Second Respondent. Second Respondent became owner of all the materials used to construct the

power line, it being holder of all the relevant servitudes, further there being no need to handover the site, this quite correctly not being provided for in the main contract.

[49] In any event, it seems to me that Mr Paterson's argument is correct, and is such as to be upheld.

[50] Quite apart from the above, and in any event, the Applicant is equivocal on the fact that it retained possession of the overhead line subsequent to completion. It states that it completed the construction of the 54 km overhead line but fails to state on what date it did so. It states generally giving no detail that throughout the construction it remained in undisturbed possession and control of the line but fails to state that it remained in possession and control after the construction ceased. This became the subject matter of adjudication, as is referred to in the papers. The Applicant then says that in the normal course after such a project there would be a formal handover of the overhead line, misunderstanding that this was not required by way of the main agreement. Applicant then states that it made clear on various occasions since May 2015 that until the issue of

payment to the Applicant by First Respondent had been resolved, Applicant retained a lien, without indicating in what manner it

remained in position or secured same. Applicant then says that on 20 May 2015 it placed metal chains over and around the overhead power lines. The mandament van spolie requires the despoiled person who exercises control over property, such as building contractor, to demonstrate that it was in peaceful and undisturbed possession of the property. It must be remembered that no spoliation is committed where a person is deprived of possession in circumstances for example where that person consented freely to give up possession. In this matter, it flows from what I have said above, that on the affidavits and upon an analysis as set out

above, Applicant did not have possession in the sense required for spoliation, and further, and in any event, it has failed to demonstrate that it was in peaceful and undisturbed possession between finishing the contract and the time it decided to earth the overhead line.

[51] In the result, Applicant's claim against Respondents fails with costs.

[52] An order issues as follows:

1. The application is dismissed with costs
2. Applicant is to pay the First and Second Respondent's costs occasioned in the application.

M.J LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant: Adv. Cole

Instructed by: Neville Borman & Botha

22 Hill Street

Grahamstown

(Ref: Mr Powers)

Obo the First Respondent: Adv. J Pretorius

Instructed by: Wheedon Rushmere & Cole

119 High Street

(Ref: Mr van der Veen)

Obo the Second Respondent: Adv. Paterson SC

Instructed by: Netteltons

118A High Street

(Ref: Mr Nettelton/Sam)

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