

SOUTH AFRICA / JUDGMENT

Real Refreshments Supplier (Pty) Ltd v Ngubane and Others (14910/2019) [2019] ZAGPPHC 120 (4 April 2019) [2019] ZAGPPHC 120

COURT

North Gauteng High Court, Pretoria

BEFORE

Mavundla

CASE / FILE NUMBER

14910/2019

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IN THE HIGH COURT OF SOUTH
AFRICA,
GAUTNEG DIVISION, PRETORIA
CASE NUM BER: 14910 / 2019
4/4/2019
In

the matter between:

REAL
REFRESHMENTS SUPPLIER (PTY) LTD
APPLICANT
And
SIBONGILE
NGUBANE
1ST RESPONDENT
AMABOMVU
PROJECTS (PTY)
LTD
2ND RESPONDENT
THE
SERENGETI HOME OWNERS' ASSOCIATION
3RD
RESPONDENT

JUDGMENT

MAVUNDLA J;

- [1] The applicant, formerly known as Drickus Crous Construction approached this court on urgent basis in terms of rule 6(12) seeking that the court rules in respect of time frames and service be dispensed with and that possession of the site situated at Erf 537, Witfontein Extension 27/30 (Serengeti Estate) , Ekurhuleni (referred to in the applicant's application as "the stand") be restored to the applicant, with certain ancillary reliefs.
- [2] According to the applicant, during or about January 2015 it concluded a JBCC Agreement with the first respondent for the construction of a residential property on the stand. The stand is allegedly owned by the second respondent and the third respondent is the Home Owners' Association for the Serengeti Estate, in which the stand is located.
- [3] During or about May 2016, according to the applicant, a dispute which could not be resolved developed between the parties and the matter was referred to adjudication on or about 3 October 2017. The respondents alleged that the applicant abandoned the site in May 2016, and this remained in dispute. The alleged abandonment was referred for adjudication proceedings, and an adjudication award was made. The issue relating to the question of abandonment and whether the applicant has a builder's lien over the stand and that this issue stands to be debated in a separate forum in due course. The applicant alleged that it has no bearing to the present application. The applicant contends that it has a valid and binding adjudication award in its favour.
- [4] The other allegation by the applicant is that the adjudicator Adv. M. Van Der Merwe published his determination on 29 May 2018, in terms of which he found in favour of the applicant and ordered the first respondent to effect payment to the applicant in the respective amounts of R206 212. 00 and RSG 485.58 plus interest at the rate of 9.5% per annum on the aforesaid amounts from 1 September 2017 to date of payment. The first respondent was further ordered to pay applicant's costs of adjudication. The first respondent remains in default of the aforesaid adjudication award.
- [5] The applicant alleged that from May 2016 to date of the award referred to herein above, no third party, including the first respondent took possession of, or any further steps in relation to the stand. The applicant further alleged that it had been placed in possession of the stand in order to commence building works and has at no stage relinquished this possession, nor can any party be seen to have taken possession thereof.
- [6] According to the applicant on or about 1 June 2017 immediately after receipt of the adjudication award, it erected two signs on the property stating that: "Kindly note that Drickus Crous Construction (Pty) Ltd has taken possession of this stand for purposes of exercising its building lien for improvements. Should you have any queries in this regard, kindly contact Drickus Crous at dorous, construction @gmail.com."

[7] The applicant further alleged that the first respondent has never questioned the applicant's possession over the stand. No further

construction has been performed on the stand same has been suspended. The Gauteng Branch of the National Home Builders' Registration Council ("NHBRC") has telephonically informed the applicant that it remains enrolled builder in relation to the stand. (I must hasten to state that this is unconfirmed hearsay evidence to be disregarded.)

[8] In respect of urgency, the applicant alleged that based on the aforesaid, it remained in peaceful and undisturbed and undisputed

possession of the stand between the period of 1 June 2018 and 25 February 2019 as it exercised its right of retention over the stand. During about November 2018 the first respondent appeared to suggest that she wished to recommence building, without contacting the applicant or offering any security for the applicant's claim. On or about 15 November 2018 one Yvonne Peregrine, the Head of the Compliance for the third respondent, advised that they had been sent correspondence by the Masenya attorneys stating that construction will be continued with on the site. The applicant doubts that any building works have commenced, if it did, it should have started as far back as early June 2016.

[9] The applicant further alleged that it has been spoliated of the stand when on 26 February 2019 Ms Perregil advised it that construction

work had commenced on the stand. I must hasten to state that there is no confirmatory affidavit of Ms Perregil attached. Reading this paragraph together with the previous paragraph, it is clear that the applicant has not been to the stand to make personal observation of the alleged spoliation.

[10] The applicant in making up a case for urgency, proceeds to state that applications of this nature are inherently urgent, which has been exacerbated by the fact that it has been unlawfully dispossessed of its only security in relation to its claim against the first respondent. The situation is aggravated by the fact that it remains the enrolled builder on site and new builders are now attending to the construction work. The liability and obligations in relation to the construction on site remains that of the applicant and it cannot condone same. He further stated that arbitration proceedings are imminent to commence. This might necessitate inspection on site.

[11] In the matter of *Stocks Housing v Department of Education and Culture Services, and Others*[1] it was held as follows:

"The element of unlawfulness of possession which has to be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit or theft, but in all cases spoliation is unlawful when the dispossession is without the

consent of the person deprived of possession, since consent to the giving up of possession of property, if the consent is genuinely and freely given, negates the unlawfulness of the dispossession. (At 240BD.)

Held, that a building contractor who entered upon the building site and occupied and took control of it in terms of his contract in order to carry out work, and remained in occupation for that purposes, has possession of the site which might be protected by a spoliation order. The builder possessed the site in order to secure the benefit of his contract and should not be deprived of his possession and that benefit by an unlawful dispossession of the site by the owner of the property or anyone else. In the present case, accordingly, the applicant had been in possession of the site and the plant, equipment and materials onsite. (At 239DF) The dictum in *Yeko v Qana* 1973 (4) SA 735 (A) at 935 applied.

Held, further, that there might very well be contention between the parties as to the right of applicant to remain on the site, as to whether respondents had been entitled to terminate the contract and entitled to demand that applicant cease the contract works and vacate the site, but that was not the concern of the Court in this application. Those questions might have to be resolved in future litigation but could not be resolved in spoliation proceedings, where the applicant had not set up any claim to a right or title in terms of its contract to remain in possession of the site, and said no more than that it has been unlawfully ejected from the site. (At 239H240A.)

Held, further, that the allegations that applicant had been in default and in breach of the building contract, that the respondent had been entitled to cancel the contract and had done so, and that the respondent had been entitled in terms of the contract to demand that the applicant vacate the site, did not serve as a defence to a claim for spoliation order, nor did it justify the respondent's depriving the applicant of possession of the building site without the applicant's consent and without proceeding lawfully against the applicant for an ejectment order from the site and not by resorting to self help to obtain possession of the site. (At 240DE/ F)"

[11] Tersely put, the applicant, in casu, to succeed with its spoliation application, "must satisfy the court on a balance of probability that it was in possession of the property and that the respondent unlawfully deprived it of that possession. " Vide *Nienaber v Stuckey*. [2]

[12] It was further held in the *Stocks Housing* matter supra that: "If applicant is found to have been unlawfully dispossessed the Court will order that possession of the site be restored ante omnia, that is to say, before any litigation will be entertained relating to which party has title or a right to the possession to the property. *Nino Bonino v De Lange* B 1906 TS 120 at 1234; *Claassens v Monia Motors* 1976 (2) SA 83 (O) at 837. The element of unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession."

- [13] As its first salvo of defence, the respondents contended that the building agreement was between the first applicant and Drickus Crous, which agreement was never ceded to the applicant as such the applicant has no locus standi.
- [14] To counter this attack on locus standi, the applicant in its replying affidavit, alleged that the applicant was formerly known as Drickus Crous Construction (Pty) Ltd, with registration number 2013/015848/07. The applicant underwent name change because of pressing financial constraints. To this end Mr Ruan Pretorius (the current sole director who issued the resolution authorizing Crous to act on behalf of the applicant) was brought in to assist. The present applicant remains the same entity as the previous one under the same registration number. In this regard he referred the court to annexure "O".
- [15] Annexure N shows that Real Refreshments Suppliers (Pty) Ltd was registered on 01/02/2013, with tax number 9750886153 with registration number 2013/015848/07. The first respondent and Drickus Crous Construction (Pty) Ltd concluded the building contract on 10 January
2015. It is therefore strange that long after the Drickus Crous Construction (Pty) Ltd had allegedly undergone a name change in 2013 to Real Refreshments Suppliers (Pty) Ltd, the contract is entered between Drickus Crous Construction (Pty) Ltd, and not Real Refreshments Suppliers (Pty) Ltd. The inference is therefore that as at the time the contract was entered into, there were two legal entities coexisting parallel to each other. In my view, the two legal entities are different in character, and with distinct directors or shareholders. In my view, there is merit in the submission of the respondents that there is no evidence placed before the court that all the obligations and liabilities of Drickus Crous Construction (Pty) Ltd were ceded to Real Refreshments Suppliers (Pty) Ltd or the other way round. The applicant when called upon to prove locus standi, bears the onus of persuading the court that indeed it has locus standi. In this case I have not been persuaded otherwise consequently the point in limine of lack of locus standi raised by the respondent must be upheld.
- [16] In the event I am wrong in my conclusion on the point of locus standi, which is not conceded, I shall therefore deal with the issue of spoliation.
- [17] A spoliation application is a speedy remedy to restore the person dispossessed of the property. Towards that end the applicant must confine himself to the hard facts which show that he was in peaceful possession and was dispossessed. However, if he goes beyond this, and aver his right and title to the relevant property, the respondent is at liberty to answer in detail and, if need be, assert his right to the property, which is exactly what transpired in casu; Vide Minister of Agriculture and Agricultural Dev v Segopolo.[3] The applicant's affidavit is laborious and brings to play his reliance on the adjudicating award. The onus is on the applicant for a spoliation order to satisfy the court on admitted or undisputed facts, by the same balance of probabilities as is required in every civil case, that he was in peaceful and undisturbed possession of the property; vide Yeko v Qana.[4]

- [18] A spoliation order is final in nature. A final order is granted in an application proceeding only on undisputed facts subject to the qualification in *PlasconEvans Paints Ltd {Pty} Ltd*.^[5] In *Tamarillo (Pty) Ltd v BN Aitkien [Pty] Ltd*^[6], Miller JA held that: "A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to his claim will probably be disputed he chooses that procedural form at his peril, for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application."
- [19] There are disputes of facts as regards the issue of possession and whether the applicant abandoned the site. I bear in mind that the applicant bears the onus to prove that it was in possession of the site, and not the respondents. I also bear in mind the fact that the contract was concluded between the first respondent and Drickus Crous Constriction (Pty) Ltd, and that the applicant has not placed evidence demonstrating that whatever rights and obligations arising therefrom were ceded by the Drickus entity to the applicant.
- [20] The first respondent disputes that the applicant has been in possession of the stand as alleged. She further contended that the third respondent would every time when she fell in arrears with her monthly levies, lock and deny her access to the stand, only to remove the padlock and restore access to her upon repayment of the levies. The respondents further contended that the applicant suspended the construction works of the stand; breached the building agreement between the parties when it abandoned the stand.
- [21] According to the first respondent, construction commenced in October 2018 and not in February 2019. The applicant, says it must have commenced in
2016. The respondents further averred that the applicant was never in possession of the stand after May 2016. In this regard, she attached a "Site Inspection Report on Erf 537 Witfontein" by NHBRC dated 07 October 2016 (annexure SN011), wherein it is recorded, inter alia that: "2 Finding on site 2.2 No contractor on site". The first respondent has also attached a confirmatory affidavit by one H.M. Mulaudzi, who stated that he commenced construction work on the stand in issue on 1 October 2018. In my view, from these two facts mentioned herein, I am not satisfied that the applicant was in possession of the site, if it was ever in possession thereof, it abandoned same. In the premises, I find myself obliged to be guided by the authority in the matter of *Tamarillo (Pty) Ltd v BN Aitkien (Pty) Ltd* supra and to dismiss the application.
- [22] It is trite that costs follow the event.
- [25] In the premises it is ordered that the application is dismissed with costs.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

Date of Hearing:

22 I 03 I 2019

Date of Judgment:

04 I 04 I 2019

Applicant's Advocate: ADV GARETH MORRIS

INSTRUCTED BY: LAUTENBERG MORRIS ATTORNEYS

Respondent 's Advocate: ADV K. P. MASENYA

INSTRUCTED BY:

MASENYA ATTORNEYS

[1] 1996 (4) SA 231 at 2381J.

[2] 1946 AD 1949 at 10534.

[3] 1992 (3) SA 967 (TPD) at 9718 et 9711J.

[4] 1973 (4) SA 735 (A) at 735D.

[5]

[1984] ZASCA 51; 1984 (3) SA 623 (A) 6358C.

[6] 1982 (1) SA 398 (A) at 430G.

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