

SOUTH AFRICA / JUDGMENT

Salcarb KZN (Pty) Ltd v Ikwezi Mining (Pty) Ltd (2024/043364)

[2024] ZAGPJHC 434 (6 May 2024)

[2024] ZAGPJHC 434

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2024/043364

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024 – 043364

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO

In the application by

SALCARB KZN (PTY) LTD Applicant And IKWEZI MINING (PTY) LTD Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Urgent applications – rule 6 (12) – applicant approached court after exhausting attempts to liaise with respondent – case made out for hearing in the urgent court

Affidavit evidence – disputes of fact – bald denials

Deponent required to answer point of substance and must not be evasive

Order

[1] In this matter I made the following order on 3 May 2024:

1. It is declared that the Applicant has been deprived of access to the property situate at Dundee Coal Mine on Commercial Road, R33,

DundeeKwazulu-Natal (“the Property”) by:-

1.1. the Respondent; and

1.2. Mr. Santanu Chakraborty, Mr. Nitin Agrawal and Mr. Prosper Nkala, employees or officers of the Respondent.

2. The Respondent and anyone under their mandate, including the persons referred to in paragraph 1.2 above and any of the Respondent’s

employees or officers, are ordered and directed forthwith to:-

2.1. restore the status quo ante by allowing the Applicant and its employees, contractors and agents to enter and exit the Property; and

2.2. refrain from preventing the Applicant and its employees, contractors and agents from bringing in or taking out equipment and material to and from the Property;

3. Costs, on scale B.

[2] The reasons for the order follow below.

Introduction

[3] This is a judgement in the urgent court. The applicant seeks a spoliation order. It seeks an order that possession of the Dundee Coalmine situate on Commercial Road on the R33 in Dundee be restored to it and that the respondent be interdicted from preventing the applicant from bringing equipment and material onto the property and from removing equipment and material from the property.

[4] The registered address of the respondent is in Midrand within the geographical area of jurisdiction of this Court.

Founding affidavit

[5] Ms Vermaak, the general manager of the applicant, alleges in the founding affidavit that the applicant conducts its business at the property and that the respondent has refused the applicant access to and egress from the property. This prevents the applicant from moving materials to and from the site.

[6] The applicant’s predecessor entered into an agreement with the respondent’s predecessor in 2014 and in 2018 the applicant stepped into the shoes of its predecessor. The respondent purchased the mining business and the property in 2022 with knowledge of the lease. It now operates a coal mine at the property.

- [7] The deponent met with Mr Banerjee, the former general manager of the respondent to discuss the continuation of the business of the applicant shortly after the take-over. The business consists of a processing plant that processes anthracite. However, disputes arose between the applicant and the respondent.
- [8] The applicant was in peaceful and undisturbed possession of its business on the property when the respondent took steps on 8 April 2024 to deprive it of possession. The respondent instructed its staff to prevent the applicant from bringing out or taking in any material or equipment from the property. The applicant was therefore prevented from having its trucks enter or leave the property. The respondent did so without a court order.
- [9] On Friday, 19 April 2024 the applicant caused a letter of demand to be sent to the respondent demanding that it refrained from its conduct. No response was received. The applicant initiated the application on Monday the 22nd. The applicant states that between the 8th and the letter of the 19th it attempted to negotiate a resolution to the dispute but that these attempts failed. I deal with the question of urgency under a separate heading below.

Answering affidavit

- [10] In the answering affidavit deposed to by Mr Bonani Ndlovu, a director of the respondent, the respondent relies on misjoinder and essentially denies any business or other relationship with the applicant or any involvement with or interest in the property. The answering affidavit consists largely of a “no knowledge” defence.

The deponent denies that the respondent operates a mine on the property, that the respondent purchased the mining business and the property, and that it spoliated the applicant. In short, the respondent denies any interest in or involvement with the property or the business of the applicant at the property, or in the relief sought. The respondent comes to the litigation as a self-proclaimed stranger.

Replying affidavit and respondent’s further affidavit

- [11] In the replying affidavit the applicant presents evidence to substantiate its averment that the respondent carries on business at the property and is the party that spoliated the applicant. This evidence was not included in the founding affidavit as, so submits the applicant, it was not foreseen that the respondent’s role would be contentious, but the evidence was then presented in the replying affidavit in response to the denial of ownership or involvement by the respondent.
- [12] The applicant brought an application that certain paragraphs and annexures[1] of the answering affidavit be struck on the ground that the averments constitute new evidence in reply, and in the alternative that the respondent be permitted to file a further affidavit. The striking out application was argued and I ordered that the respondent be granted leave to file a further affidavit by 18h00 on 1 May 2024 and that the matter stand down to Thursday, 2 May 2024 at 14h00. I was of the view that the applicant could not reasonably foresee the applicant’s denial of any involvement with the property and should be permitted to deal with

the respondent's denials in reply, but that the respondent ought to be granted leave to respond to the evidence in a further affidavit.

- [13] The respondent duly filed its further affidavit on 1 May 2024 and the applicant did not deem it necessary to file a further affidavit in response. The new averments in the replying affidavit are therefore properly before court and must be read with the respondent's further affidavit.
- [14] In paragraph 16 of the founding affidavit the applicant refers to Mr Somdeb Banerjee as the former general manager of the respondent. In paragraph 51 of the answering affidavit the respondent denies that Mr Banerjee was a former general manager of the respondent or that he was authorised to conclude any agreements on behalf of the respondent. The deponent does not admit to any knowledge of Mr Banerjee and the applicant deals with this in reply:

On 30 May 2023 Mr Banerjee, the Director: Mining Business Units of Ikwezi Mining, wrote to the applicant referring to discussions and pricing policy.[2] His email was copied to officers of the respondent, including Mr Nitin Agrawal who is a director, and the respondent can hardly deny knowledge of him. The respondent however fails to disclose and deal with the fact that Mr Banerjee does exist and was indeed a senior officer of the respondent with the title of Director: Mining Business Units.

In the further affidavit the respondents merely denies that Mr Banerjee represented the respondent without dealing with the email of 30 May

2023. While the evidence that he was not a former general manager might be true, the evidence given is evasive and misleading. The respondent failed to deal with Mr Banerjee's role in the further affidavit.

- [15] It is also apparent from the email communication on 30 May 2023 that despite the respondent's denial of any relationship between the parties and despite its denial of any knowledge of a Mr Banerjee, the respondent wrote to the applicant about the business relationship between the parties and informed the applicant of price increases. It is noteworthy that when denying as ownership of the property the respondent does not allege that any associated business is in fact the owner of the property and is in fact the entity standing in a contractual relationship with the applicant. It merely denies any business relationship and fails to make a full disclosure and to answer the points of substance.

- [16] On 29 February 2024 Mr Santanu Chakraborty in his capacity as "Sr General Manager" of the respondent sent an email from his electronic mail address [...]to the applicant. He informs the applicant that the applicant -

"is at our premises without any agreement or any mutual agreed condition. You are using our power, land, water and heat from Calcine furnace. No local purchase from us has happened in the last few months.

We want have a meeting with you for discussion of all these issues. @Prosper Nkala please schedule a team meeting with Marilise[3] on Monday. Mr Nitin[4] will also be part of that meeting.

Santanu Chakraborty

Sr General Manager

Ikwezi Mining”

[17] In this correspondence Mr Chakraborty states that the property with which this application is concerned is the property of the respondent, that he is its senior general manager, and that the applicant is occupying the property without permission. The respondent denies any knowledge of the statements. In respect of the position of Mr Chakraborty as it appears from the correspondence Mr Ndlovu makes the bald statement in paragraph 16 of the further affidavit that

“I deny that Mr Chakraborty is the senior general manager of the respondent.”

No explanation is provided as to why it is that Mr Chakraborty identifies himself as the senior general manager of the respondent

and that he does so in communication copied to senior officers of the respondent. These are Mr Prosper Nkala (Legal Counsel: Mining

Business Units) and Mr Nitin Agrawal (director) The averment that the property belong to the respondent is similarly not dealt with. It is also not the case for the respondent that Mr Chakraborty’s emails are forgeries or that his claim to a senior position within the respondent is denied by the respondent in any other forum.

[18] Mr Chakraborty wrote a further electronic mail message on 7 March 2024 where he refers to a meeting with Ms Vermaak and he is again

identified as the senior general manager of the respondent with an email address s[...]

[19] On 12 March 2024 Ms Vermaak wrote to Mr Chakraborty, Mr Agrawal (who has an @Ikwezi email address), and Mr Nkala (who has an @buffalocoal email address as well as an @ikwezi email address) again dealing with the relationship between the parties.[5] It is clear from the context that Buffalo Coal is an entity related to or associated with the respondent. Mr Nkala and Mr Agrawal

represent both firms. Mr Nkala is the legal counsel of the respondent and a director of Bufalo Coal Dundee (Pty) Ltd; Mr Agrawal is a director of both firms.

[20] On 8 April 2024 Ms Rolene Will of Buffalo Coal wrote to Ms Vermaak referring to a request received from Mr Santanu Chakraborty and relating to a reconciliation of product “loaded” by the applicant.[6] In the email she is making enquiries on behalf of Mr Chakraborty. This email also reflects the spoliation alleged by the applicant. She writes that –

“He [Mr Chakraborty] has instructed that Salcarb [the applicant] may not bring or collect any material until this reconciliation has been received.”

- [21] On 11 April 2024 a WhatsApp message was sent to Mr Chakraborty requesting him to permit trucks to leave the property with loads. A response was received.[7] It read:

“Good day, let me check with our management.”

- [22] A further WhatsApp message was sent on the 16th to Mr Chakraborty again requesting access for the trucks. On 17 April 2024 Ms Vermaak sent an email[8] to Mr Chakraborty and Mr Agrawal of the respondent stating that

“truck access has been stopped since 8 April 2024 by Santanu without notice. This action is resulting in us running at a loss jeopardising our company’s survival. I have tried contacting Santanu via what’s app and email meeting request this week, but he has not responded to me at all. Please can you assist in allowing trucks to enter collect material from our plant to supply to our customers.”

- [23] On 22 April 2024 Mr Nkala informed the applicant that its court application would be opposed. Mr Nkala’s email was copied to Mr Chakraborty and Mr Agrawal.[9]

- [24] The failure to deal pertinently with the respondent’s role and the role played by its officers was explained by its counsel during argument by stating that the deponent to the respondent’s affidavits, Mr Ndlovu, simply did not know all the facts even though he was a director of the respondent. This is not a satisfactory explanation. A party to litigation cannot appoint a person to depose to an affidavit on its behalf even though that person does not have personal knowledge of all the facts and events and if need be a litigant should attach more than one affidavit by people who collectively do have personal knowledge and can speak to the facts. It may of course happen that a deponent’s personal knowledge is selective but then the shortcomings in his or her knowledge must be dealt with by others and he or she must identify the aspects he or she can not testify to.

- [25] Mr Agrawal and Mr Nkala signed confirmatory affidavits. They merely confirm the contents of the affidavits by Mr Ndlovu and take the matter no further.

Analysis

- [26] Witnesses providing evidence are expected to testify not only to the truth, but to the whole truth and nothing but the truth. Half-truths are not acceptable and are likely misleading. When for instance a person is referred to as a former general manager but is in fact not the general manager but rather the director of mining business units, it is not enough for the opposing party to merely deny that the person referred to is the general manager is the general manager without also stating that he or she is in fact the director of mining business units. The half- truth does not suffice.

[27] It is not permissible for a respondent to rely merely on bare denials without answering the point of substance. Evidence must be to the point and the deponent must not be evasive. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[10] Hefer JA said:

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding

that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.” [emphasis added]

[28] The respondent does not deal satisfactorily with the averments that it was Mr Chakraborty, identified as the senior general manager of the respondent, who claimed that the property with which this application is concerned is the property of the respondent. The email referred to of 29 February 2024 is merely met with a bald denial that he is the general manager of the respondent. The applicant cannot be blamed for accepting the words of the general manager at face value and identifying the respondent as the owner of the property.

[29] This is a spoliation application and the ownership of the property need not be decided. The applicant is not seeking an order to enforce contractual terms but it seeks to exercise the possessory rights it exercised before 8 April 2024.

[30] Possession is a question of fact. A spoliation order is a possessory remedy.[11] The purpose of a spoliation order is not to finally determine the rights and obligations of the parties but to restore the status quo ante.[12] The person in possession[13] of property may not be ejected without due process of law. An applicant seeking a spoliation order is required to allege and prove

that it was in peaceful and undisturbed possession (or occupation) of, in this case, immovable property and that it was deprived of possession by the respondent. Van Loggerenberg writes: [14]

*“The reason behind the practice of granting spoliation orders is that no man is allowed to take the law into his own hands, and to dispossess another illicitly of possession of property. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. The rule is *spoliatus ante omnia restituendus est*. A court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place; it merely inquires whether or not there has been a spoliation, and if there has been, it restores the status quo ante. In spoliation proceedings the court will, therefore, neither enter into the lawfulness of the applicant’s possession, nor into the question of ownership. The court will not consider any claim in reconvention, such as a claim for a declaratory order on the respondent’s rights to the property.” [footnotes omitted]*

- [31] Exclusive possession is not required.[15] The mandament van spolie is available to a litigant deprived of quasi possessio such as the exercise of a right to enter upon property.[16] Restoration of quasi possessio takes place by allowing the applicant the exercise of the right of which it has been despoiled. Quasi possessio takes place by the exercise of a right (such as the right to enter upon property) and dispossession of the right amounts to spoliation.

However, the applicant need not prove that it has the right but merely that it exercised the right. The right so exercised must be in the nature of a ‘gebruiksreg,’ an incident of the possession or control of the property. [17] The entitlement to the right is, again, something to be decided separately and independently of the spoliation of the application

- [32] The mandament may also be used to order the respondent to do something in addition to the mere putting of the spoliated applicant back in possession. What must be restored is the status quo ante. The purpose is to place the parties in the position they were in immediately before the spoliation occurred.
- [33] The applicant is required to prove its case on a balance of probabilities and the order has the effect of a final judgement. It is not sufficient for the applicant to make out a prima facie case only.
- [34] As already stated the rights and obligations of the parties need not be determined in this spoliation application. The question of an underlying contract relates to the underlying rights and obligations. The issue to be determined in this application is whether or not applicant enjoyed possession of the property and if so, whether the respondent interfered in such use and enjoyment. The respondent is of course a company and only acts through people, namely its directors, its staff, its officers, and its agents. It similarly does not matter whether or not these people also work for or represent other legal entities. A director or employee of the company can, in other words not spoliates a party and then defend its action by saying that it was also acting on behalf of another company.

[35] In this matter the respondent denies that it is the owner of the property, that it was ever in possession of the property, that it ever entered into agreements with a previous owner to purchase the property, that it has any staff at the property, and that it ever instructed anybody to refuse the applicant access to the property. In short, the respondent denies that it was properly joined to the application and alleges that its joinder was a misjoinder. Its bald denials are not consistent with the facts and its affidavits are evasive.

Urgency

[36] A spoliation application must be brought within a reasonable period of time and this the applicant has done.[18] The alleged spoliation took place on 8 April and the application was launched on the 22nd. The more pressing question is whether the applicant makes out a case for urgent relief in terms of rule 6 (12). An urgent application must be brought as soon as possible and an applicant must not be the author of the delay in bringing the application. [19] An applicant is not dilatory however when it takes reasonable steps before bringing the application to seek the co-operation of the respondent.[20]

[37] The applicant complains that it was spoliated on 8 April 2024 when the respondent deprived it of its possession by instructing its personnel to prevent the personnel of the applicant from bringing in or taking out equipment or material from the property, and the personnel acted accordingly.

[38] The act of spoliation was confirmed in the email sent by Ms Rolene Will on 8 April 2024 quoted above. Two days later, on the 11th, the applicant requested Mr Chakraborty by way of a WhatsApp message to permit trucks to leave and he undertook to consult with

management. On the 16th a further WhatsApp message was sent stating that

“without deliveries we are facing closure of the business. Please can you allow access for trucks to uplift material.”

[39] On the 17th the applicant sent an email to Mr Agrawal, one of the three directors of the respondent, to seek his assistance. The email was copied to Mr Chakraborty. Then on the 19th the applicant’s attorney sent a letter of demand to Mr Chakraborty and this elicited a response from the respondent’s legal counsel (Mr Nkala) to say that the threatened application had no merit and that the urgency was

“self-created and/or imagined.”

[40] I am satisfied that the applicant acted with due diligence and took reasonable steps to avoid having to approach the court for relief.

Conclusion

[41] The applicant had access to and the use of the property with which the application is concerned. It is entitled therefore to have its vehicles enter and leave the property, to occupy and use the property as it did before 8 April 2024, and to remove its equipment and material. In this regard the applicant's counsel conceded that the relationship is over but that the applicant requires access to remove its equipment and material from the property. The underlying contractual arrangements, if any, need not concern this court.

[42] The applicant is therefore entitled to the order it seeks, including an order for costs on scale B. I grant such an order.

MOORCROFT AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 6 MAY 2024

COUNSEL FOR THE APPLICANT: JG BOTHA INSTRUCTED BY: LE MOTTÉE ROSSLE ATORNEYS
COUNSEL FOR THE SECOND RESPONDENT: K MASHISHI INSTRUCTED BY: WERKSMANS
ATTORNEYS DATE OF ARGUMENT: 29 APRIL & 2 MAY 2024 DATE OF ORDER: 3 MAY 2024 DATE OF JUDGMENT: 6 MAY 2024

[1] Paras 7.1, 7.2, 7.4, and 11.2, and annexures MV3 to MV12.

[2] A copy of the email is annexed to the replying affidavit of the applicant as MV12.

[3] The respondent's general manager and deponent to the founding and replying affidavit.

[4] Mr Nitin Agrawal, director of the respondent.

[5] MV6.

[6] MV7.

[7] MV8.

[8] MV9.

[9] MV11.

[10] Wightman t/a JW Construction v Headfour (Pty) Ltd and Another

- [2008] ZASCA 6; 2008 (3) SA 371 (SCA). See also *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1163 and 1164. See also *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428–9; *Soffiantini v Mould* 1956
- (4) SA 150 (E) 154; *Engar v Omar Salem Essa Trust* 1970
- (1) SA 77 (N) 83E; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984
- (3) SA 623 (A) 634I–635A; *Tsenoli v State President of the Republic of South Africa* 1992
- (3) SA 37 (D) 41E–F
- [11] *Blendrite (Pty) Ltd v Moonisami* 2021
- (5) SA 61 (SCA) para 6.
- [12] *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) 512.
- [13] See *Dennegeur Estate Homeowners Association and Another v Telkom SA SOC Ltd* 2019 (4) SA 451 (SCA) para 10.
- [14] See *Van Loggerenberg Erasmus: Superior Court Practice* vol 2, 2nd ed. 2023 D7-1 et seq. The quoted phrase is at D7-2.
- [15] *Nienaber v Stuckey* 1946 AD 1049 at 1055.
- [16] In *Nienaber v Stuckey* 1946 AD 1049 the Appeal Court was seized with the possession of a right of access through a gate. See page 10, penultimate paragraph.
- [17] See *FirstRand td t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 (SCA) paras 12 to 13 and *Zulu v Minister of Works, KwaZulu, and Others* 1992 (1) SA 181 (D).
- [18] *Jivan v National Housing Commission* 1977
- (3) SA 890 (W) 893; *Nienaber v Stuckey* 1946 AD 1049 at 1059–60; *Le Riche v PSP Properties CC* 2005
- (3) SA 189 (C) 198E–F..
- [19] *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004
- (2) SA 81 (SE) 94C–D; *Stock v Minister of Housing* 2007
- (2) SA 9 (C) 12I–13A; *Kumah v Minister of Home Affairs* 2018
- (2) SA 510 (GJ) 511D–E.
- [20] *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) 94C.

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