

SOUTH AFRICA / JUDGMENT

Tri-Star Construction (Pty) Limited v Mehboob Adam Parrow (Pty) Limited (27918/2016) [2016] ZAGPJHC 383 (19 August 2016) [2016] ZAGPJHC 383

COURT

South Gauteng High Court, Johannesburg

BEFORE

P.A. Meyer

CASE / FILE NUMBER

27918/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

No: 27918/2016

In

the matter between:

TRI-STAR
CONSTRUCTION (PTY)
LIMITED Applicant
and
MEHBOOB
ADAM PARROW (PTY)
LIMITED Respondent

Case

Summary: Spoliation – Mandament van spolie - Builder –
whether in possession or voluntarily abandoned possession

–

whether deprived of possession without acquiescence and consent -
Application for mandament van spolie granted.

JUDGMENT

MEYER, J

[1] This is an urgent application in which the applicant, Tri-Star Construction (Pty) Ltd (Tri-Star), seeks final relief by way of the mandament van spolie against the respondent, Mehboob Adam Parrow (Pty) Ltd (MAP). The matter is urgent.

[2] MAP is the owner of an immovable property described as 'remainder erf 113, Rosebank, Johannesburg,' on which a sectional title development called 'The Caversham' has been constructed (the property). The development comprises 13 residential

units. MAP is the developer and Tri-Star the builder that has been a sub-contractor to the main contractor, Vanderbilt Construction

(Pty) Ltd (VC). Tri-Star commenced with the construction of the development during March 2015 and achieved practical completion on Friday, 1 July 2016. It has not been fully paid as a result of a dispute between MAP and VC. Tri-Star asserts that it enjoys a lien over the property. The validity of Tri-Star's assertion need not presently be decided.

[3] Tri-Star avers that it was unlawfully deprived of possession of the property on Saturday morning, 13 August 2016. MAP, on the other hand, avers that Tri-Star relinquished possession of the property on Friday, 1 July 2016, when practical completion of the development was achieved. The principles relating to the mandament van spolie are trite. Tri-Star needs to prove that it was in peaceful and undisturbed possession (physical possession and the intention to possess) of the property on 13 August 2016 when the alleged spoliation took place and that it was unlawfully ousted from that possession. (See *Yeko v Qana* 1973 (4) SA 735 (A), at 739G.)

[4] In its founding affidavit Tri-Star states that its possession of the property is clear from the following: it has completed

construction on the property but has not handed over possession of the property to MAP; its representatives have at all relevant

times been physically present on and in control of the property; its construction equipment is still on the property; it continues to clean the building and perform routine maintenance on the property; and it is the only entity that has possession of all the keys to the building on the property. Tri-Star handed keys to the two units to the principal agent who signed an acknowledgment that '[k]eys handed over to the owner to allow the storage of furniture only' and a tenant of one unit who signed an acknowledgement of Tri-Star's lien and on the express understanding that Tri-Star does not relinquish possession of the unit.

[5] In response, MAP states that: '[a]s appears from the emails sent by Tri-Star on 1 July 2016, Tri-Star handed the site to MAP at that time'; since 1 July 2016, Tri-Star has only attended at the property to attend to post-completion issues; the only equipment of Tri-Star that is on the property are 'three wheel barrows, a pallet jacket and a ladder'; Tri Star continues to clean the building and perform maintenance 'not as possessor, but in order to discharge its post-practical completion obligations in the ordinary course'; 'Tri-Star has keys not in order to keep possession of the property, but because it installed the locks in the course of construction' and that 'Tri-Star has handed over keys as and when required, as appears from its email of 1 July 2016'.

[6] It is necessary to contextualise Tri-Star's email of 1 July 2016 on which MAP essentially relies in asserting that Tri-Star

relinquished possession of the property at the time of that email. In an email dated 13 June 2016, Tri-Star advised MAP in no uncertain terms, thus:

'Please be very sure that we will retain possession and exercise our lien if we are not paid by end of June.'

Tri-Star was not paid by the end of June.

[7] In an email dated 30 June 2016 at 3:50 Tri-Star's Mr N Hagen advised MAP's Mr F Moosa:

'Tri Star work hours are as follows,

Monday to Friday 07.00 to 16.00.

Saturday and Sunday site closed.

Please inform Estate Agents and Owners of work hours and that there will be no access to the complex over the weekends.'

The email was forwarded to Ms MR Gibson, who is an attorney and employee of MAP, and she responded to Tri-Star's Mr Hagen as follows on 1 July at 12.48:

'There is no basis in law or otherwise for you to withhold access to the property.'

At 1:41 MAP's Mr F Moosa also responded as follows:

'... PGP [Pam Golding Properties] are having a show day this weekend so it would not be convenient to have the place locked up! This certainly detracts from having all the units sold ASAP which is MAPDEV's stated objective! Please reconsider or make arrangements accordingly.'

At 14.21 Tri-Star's Mr Hagen responded to MAP's Ms Gibson, and Mr Moosa was also copied:

'Working hours Monday to Friday 07.00 16.00.

We are not required to work over the weekend.

Security has not been arranged by the Developer.

For safety and security the site will be locked.'

- [8] During that email exchange, also on 1 July, at 12:52, Tri-Star's Mr M Williams sent an email to MAP's Mr Moosa, which email was inter alia also copied to Tri-Star's Mr Hagen and is the email on which MAP relies in asserting that Tri-Star relinquished possession of the property (the 1 July email). It reads:

'We have been issued PC which means the security and insurance becomes the clients responsibility now. Please find all relevant correspondence regarding our de-establishment as well as quotes forwarded to you and George in advance.

Please feel free to talk to the security company direct.

Nick,

Please arrange for the keys for the show unit to be given to Farhaad [Mr Moosa].'

- [9] The meaning which MAP ascribes to the 1 July email is not supported by its clear wording or in the context of the email exchange between the parties. The 1 July email records that a PC (certificate of practical completion) has been issued and notes the consequence of that as being 'that the security and insurance becomes (sic) the client's responsibility now'. When this email is read in context it is plain that neither Tri-Star nor MAP understood the issuance of the PC as resulting in Tri-Star losing possession. Tri-Star asserted its possession and physical control of the property before and after the 1 July email. The 1 July email does not evince any intention on the part of Tri-Star to relinquish control or possession of the property. Tri-Star's other emails on 13 June, 30 June and 1 July show that it had no intention of abandoning possession on 1 July. It intended to retain possession until it gets paid.
- [10] On 1 July MAP called on Tri-Star to hand over the keys to all the units on the property. It refused to do so. It retained the keys and merely handed a set of keys to the show unit for purposes of the show day. Tri-Star had carried the work to practical completion by 1 July and at that stage 'possession of the keys was equivalent to possession of the building and a temporary absence would not be taken as an abandonment.' (Per Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd* and another [2008] ZASCA 6; 2008 (3) SA 371 (SCA), para 26.) Furthermore, as a matter of admitted fact, post 1 July Tri-Star's representatives continued to attend at the property, it retained a few items of equipment on the property and it continues to clean the building and perform maintenance. On the objective evidence, and irrespective of the various disputed issues of fact, it is clear that Tri-Star's physical possession of the property was not lost on 1 July 2016 and it intended to retain possession until it gets paid.

- [11] I now turn to the question whether MAP unlawfully spoliated Tri-Star's possession on Saturday, 13 August 2013. It was held in *Wightman*, para 27, that- '[v]iolence or fraud is not an essential element of dispossession provided the act is against the consent of the person despoiled and illicitly: *Nino Bonino v De Lange* 1906 TS 120 at 122. By 'illicitly' I understand 'in a manner which the law will not countenance': cf *R v M* 1949 (4) SA 975 (N) at 977.'
- [12] A particularly apposite case is *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services, and others* 1996 (4) SA 231 (C). There the contractor was given occupation of a building site on which a school was to be erected. Its employer terminated the contract. According to the contractor all its employees were ordered to vacate the site and that anyone remaining on site would be arrested, which the contractor's employees, sub-contractors and their employees did. These allegations were denied. *Rose Innes J* held that there had been an illicit dispossession and reasoned as follows (at 240B-D):

'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 the alleged title or right of the 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.'

- [13] Tri-Star states that it came to its knowledge during the course of the week beginning 8 August 2016 that MAP had advised prospective

residents that the keys to each unit had been lost and that they should employ a locksmith to open the units and change the locks.

Tri-Star, accordingly, employed its own security team at the property 'to protect its possession given the underhanded tactics

employed by [MAP] to undermine it.' Tri-Star also changed any locks that had been tampered with back, it changed the locks for the two show units and it locked the building more securely. Security personnel employed by it have been on the property since 10 August 2016.

- [14] It is undisputed that on Saturday, 13 August 2016, MAP called the assistance of the police to the property, informed them that

Tri-Star's representatives were trespassing on the property and that Tri-Star's representative, Mr Hagen, and its security

guard then left the property. The facts surrounding the involvement of the police are in dispute. MAP alleges that the police explained to its representative, Ms Gibson, that they would not become involved and that the parties must sort out the matter between themselves. She infers that Tri-Star's representative, Mr Hagen, and its security guard departed

voluntarily. Tri-Star, on the other hand, alleges that the police insisted that its representatives leave, and they threatened

that its security guard would be arrested if he did not leave. Mr Hagen was concerned about the safety and well-being of the security guard and only asked him to leave out of this concern.

[15] On Ms Gibson's version (so she implies), she called the police to evict Tri-Star's security guard, they arrived and refused to assist, and then Tri-Star's representative voluntarily departed and sent the security guard home. This is unlikely and directly contrary to the repeated correspondence in which Tri-Star has asserted its possession in order to maintain its alleged lien. But I need not consider whether to reject MAP's allegations on this issue as 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers' (see Wightman para 12), because MAP's account falls short of showing acquiescence by Tri-Star in abandoning possession. In order to establish a voluntary abandonment of possession, MAP needs to establish that a duly authorised person abandoned possession on behalf of Tri-Star (Stocks pp 240-241). There is no allegation on behalf of MAP that anyone on behalf of Tri-Star with authority to do so agreed to the handing over of the property.

[16] The undisputed evidence shows unequivocally that there was never an intention by Tri-Star to voluntarily surrender possession.

Tri-Star wrote a letter of demand the very next morning, protesting the spoliation. It then launched this application that

evening. Moreover, prior to the spoliation Tri-Star asserted that it has a lien over the property and that it intends to retain possession of the property until it is paid and it implemented measures to protect its continued possession.

[17] Finally, the matter of costs. Tri-Star seeks a punitive costs order against MAP. In all the circumstances of this case I am of the view that a deviation from the ordinary rule that the successful party is awarded costs as between party and party is not warranted.

[18] In the result the following order is made:

- (a) The forms and service provided for in the rules of this court are dispensed with and this application is disposed of as one of urgency in terms of rule 6(12)(a).
- (b) The respondent is to immediately restore possession of the property described as erf 113, Rosebank, Johannesburg, on which 'The Caversham' development has been constructed, to the applicant.
- (c) The respondent is to pay the costs of this application.

P.A. MEYER

JUDGE OF THE HIGH COURT

Date of hearing: 16 August 2016

Date of judgment: 19 August 2016

Counsel for applicant: D Watson

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