REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

30 May 2013 .....

Date **Signature**

CASE NO: 10957/2013

In the matter between:

VANSKE TEAM CONSULTING CC Applicant

and

ZWELOTHANDO MINERALS AND RESOURCES (PTY) LTD Respondent

JUDGMENT

WEINER J

[1] In this matter, the applicant obtained a spoliation order against the Respondent on the 02 April 2013. The respondent has applied in terms of Rule 6(12)(c) for the matter to be reconsidered. The principles relating to this procedure were dealt with in *Oosthuizen v Mijs*[1], where it was held that in such a case, the court should

[1] 2009 (6) SA 266 (W)

consider the matter de novo.

THE FACTS

[2] The applicant is a building contractor that was contracted by the respondent, a property developer, to renovate certain immovable property situate at 59 and 61 Bowling Road, Johannesburg ("the property"). The applicant was represented by Warren Skene (Skene) and the respondent by Ms Vavi (Vavi)

[3] The precise terms and conditions of the building contract are in dispute. The applicant submits that they are partly written and partly oral. The respondent contends that they were oral. It is common cause that the written agreement was handed over to the respondent and that she never signed it. Vavi states that she never expressed an intention to sign and that she, in fact, never looked through it in its entirety. The applicant submits that Vavi did express an intention to sign and as such it should form part of their agreement. It is not necessary in these proceedings to determine this issue.

[4] The issue to be decided is whether the respondent committed an act of spoliation when it employed a security guard to prevent the applicant having access to the property. The applicant contends that it was always in peaceful possession of the property and is entitled to remain there, despite the contract being cancelled, as it is exercising a valid builder's lien over the property.

POSSESSION

[5] The issue as to whether there was a spoliation depends upon which party was in peaceful, undisturbed possession when the respondent barred the applicant from entry.

[6] There is a dispute of fact on this point. The applicant states that it, at all times after they moved onto the premises, has been in possession of the only set of keys. Their representative, Vusi would allow other parties access when necessary.

[7] The respondent, however, says that the applicant never had full access to or complete control over the property. It contends that access was controlled solely by their representative, one Mawale. He was in charge of the premises and had the keys thereto. He handed the keys to the applicant's representative on the 2nd April 2013, when he was requested to do so, on a temporary basis. According to his version, he expected that they would be returned at the end of the day. The respondent states that Mawale asked for the keys back the next day but that the applicant refused to give them back. The applicant contends that this did not occur as it was always in possession of both the original and a duplicate set of keys and had no need to obtain same from Mawale. They remain in possession of same.

THE LAW/FINAL RELIEF

[8] In essence, the dispute in question is purely factual. The applicant seeks final relief. In regard to determining factual disputes in motion proceedings, the judgment of Harms DP in *National Director of Public Prosecutions v Zuma*[2] is of relevance, particularly at [26]:

> *"Motion Proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of facts arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*[3] *(my emphasis)*

[9] The issue *in casu* is who was in possession of the property on the 19th April 2013 when the security guard prevented the applicant from entering the premises. The question to decide is whether the respondent's version is *bona fide* or whether such version can be rejected as being; a "*bald or*

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[2] 2009 (2) SA 277 (SCA).
[3] *Ibid* [26].

uncreditworthy denial"[4]; whether it "*raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable*"[5] that justify the Court deciding this factual dispute in favour of the applicant. I, therefore, turn to the version put forward by the respondent. In so doing, the issue as to whether there are aspects of the respondent's version which corroborate those of the applicant for purposes of final relief, will be considered[6].

THE RESPONDENT'S VERSION

[10] The respondent contends that they, as owner of the property, had employed the caretaker Mawale to be the custodian of the keys and access to the building site. Mawale confirms this. The respondent submitted in its answering affidavit the applicant came into possession of the keys when they "insisted" that the caretaker furnish the applicant with the keys to the premises, on the understanding that same would be handed back that day. Counsel for the applicant argued that they are in possession of both sets of keys, which suggests that Mawale handed over both the original and a set of duplicates. This does not necessarily follow.

[11] The respondent requested the keys be returned on several occasions. The applicant sent an email to the Respondent on 19 March stating that he could not hand over the keys. The applicant relies on this email as evidence of its intention to exercise its

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[4] *Ibid.*
[5] *Ibid.*
[6] *NDPP V Zuma supra fn 2.*

builder's lien. However, this is not stated. Mention is made that the applicant's supervisor, Vusi has keys to the "office doors". The refusal to hand over the keys to the "office doors" is refused pending receipt of the "completion certificates".

[12] The Court is, accordingly, unable to find that the applicant was, at all material times, in peaceful and undisturbed possession of the property when the respondent prevented access thereto. Nor can it be found that the applicant was, at the time, exercising its lien.

[13] The version of the applicant is not such that the respondent's version can be found to be "untenable" and "far-fetched". The standard set by Harms DP in *National Director of Public Prosecutions v Zuma*[7] is quite stringent as the applicant has to show that the version of the respondent is *"clearly untenable."* This burden has not been successfully overcome by the applicant and as such there exists a material dispute of fact. The issue as to who was in possession of the keys to the property and, therefore, in symbolic possession of the property, remains in dispute and not resoluble, on the papers, in applicant's favour.

[14] In the circumstances, I make the following order:

a. The order granted on the 2nd April is set aside.

b. The applicant is to pay the costs of this and the previous application.

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[7] *Supra, fn 1.*

Weiner J

Date of hearing: 3 May 2013

Date of judgment: 30 May 2013

Counsel for Applicant: Adv. A.R. Van Der Merwe

Attorneys for Applicant: Scholtz Attorneys

Counsel for Respondent: Adv.C Van Der Merwe

Attorneys for Respondent: Read Hope Phillips Attorneys