IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

5/08/2016
DATE

SIGNATURE

12/8/2016

CASE NO: 79689/2015

In the matter between:

ARISE GENERAL CONSTRUCTION CC **APPLICANT**

REG CK2001/031812/23

And

SOUTH AFRICAN NATIONAL PARKS **RESPONDENT**

JUDGMENT

RAULINGA J

[1] This is an appeal against the judgment in which the applicant's urgent application was dismissed with costs.

[2] The application is based on the *mandament van spolie* under circumstances where the applicant is building contractor and alleges to have been deprived of its possession of a building site within the Kruger National Park, where it was in the process of executing the a building contract for the construction of certain student accommodation, student boma, security, guard house, supervisor, and manager accommodation (hereinafter referred to as "the works") at Phambeni Gate-Phambeni School (herein referred to as ("the site").

[3] The applicant is a building and construction enterprise founded in 2001. The respondent is the custodian of South African National Parks, including the Kruger National Park. The site is situated in the Kruger National Park, close to the Phambeni Gate.

[4] After the respondent had decided to improve its facilities pertaining to student accommodation and the general provisions for an educational facility to be established on the site, the applicant and the respondent concluded the principal building agreement, JBCC series 2000 (hereinafter referred to as "the agreement") on 4 December 2013. A copy of the applicant's founding affidavit, marked Annexure "A".

[5] It is contended by the respondent that the agreement was cancelled on the basis that the applicant failed to comply with the material terms and conditions of the agreement; which is denied by the agreement.

[6] As already stated above, the works consist of the construction of student accommodation, student boma, security, manager's accommodation and guard house [clause 42.2.1]. Possession of the site was given to the applicant on 11 November 2013 [clause 42.2.25]. The date for practical completion was 11 April 2014 [clause 24.3.1 and 42.2.7]. The accepted contract sum, including VAT, is R6443061.14.

[7] It was further agreed between the parties that;

7.1. "In the event that the applicant fails or omits to achieve the practical completion by 11 April 2014, the respondent is entitled to enforce a penalty in the amount of R1000, 00 per day [clause 30.1 and 42.2.7].

7.2. On being given possession of the site the applicant shall commence with the works within the period started in the schedule and proceed with the due skill, diligence, regularity and expedition and bring the works to:

- Practical completion on or before 11 April 2014;
- Works completion in terms of the provisions of clause 25 of the agreement; and
- Final completion in terms of the provisions of clause 26 of the agreement [clause 15.3].

7.3. In the event that the respondent considers cancelling the agreement, the principal agent shall be instructed to notify the applicant of such default in accordance with, the provisions of clause 36.1 and the respondent or the principal agent may give notice of such cancellation; should the applicant remain in default for 10 working days after the date of issue of such a notice of default [clause 36.3]

7.4. In the event that the agreement is cancelled the employment of the applicant shall be cancelled and execution of the work shall cease. The applicant shall furthermore vacate the site subject to the provisions of clause 36.5.6.1 of the agreement [clause 36.5.1]; and

7.5. The respondent may use the applicant's materials and goods, temporary buildings, plant and machinery on the site for proceeding with the works [clause 36.5.5]".

[8] The applicant avers that it put shoulder to the wheel and in fact proceeded with the works due to skill, diligence and expedition as it had done before. The applicant then sketches the sequence of events that led to what happened on 11 September 2015 when the applicant's employees were informed that the agreement had been cancelled.

[9] The respondent paints a different picture, in that it contends that from the outset the applicant experienced difficulties in that the project and the works were delayed unreasonably. Further, that it soon became evident that the applicant did not have the basic skill, experience, know-how, expertise and financial ability to achieve practical completion by 11 April 2014.

[10] It is also the contention of the respondent that when it realised the applicant was unable to complete the work on time, it did everything within its ability to accommodate the applicant and granted various indulgences to the applicant in order to enable the applicant to complete and to finalise the works at the site. In support of its argument, the respondent annexes correspondences dating from the 8 December 2014 and leading to the events of 11 September 2015. In all the letters directed to the applicant, the respondent referred to the relevant clauses in the principal building agreement. Chief amongst these is a letter dated 28 July 2015 Annexure "P" in which the following was placed on record:

"By failing to achieve practical completion of the buildings on 31 July 2015 we will act in terms of the JBCC principal Building Agreement – clause 17.4 and reserve our rights to act in terms of clause 36 of the JBCC principal Building Agreement.

[11] Importantly, is the final letter of demand dated 3 August 2015 in which is recorded the following:

"In terms of clause 15.3 you were to bring the works to practical completion with due skill, diligence, regularity and expedition on 31 July 2015 as agreed.

We hereby wish to notify you in terms of clause 36.2 of the JBCC principal Building Agreement that you are in default of your contractual obligations and that it is our intention to cancel in terms of clause 36.1.

In terms of clause 3.2 of the JBCC Principal Building Agreement we hereby wish to inform you that should you remain in default for ten (10) working days after the date of this notice, we reserve our rights to terminate the agreement without prejudice to any other rights we may have in terms of the JBCC Principal Agreement.

Your urgent attention is awaited.

I attached hereto a copy of my letter dated 3 August 2015 confirming same, marked Annexure "R1".

[12] The agreed practical completion date was 18 August 2015 as agreed between the parties. Despite numerous letters directed to the applicant including letter dated 31 August 2015, 4 September 2015 and 10 September 2015 the applicant failed to complete the works. Consequently, the Principal Building Agreement was cancelled.

[13] The applicant submits that it didn't voluntarily vacate the site, as is contended by the respondent. Further, that no dispute of fact arises on this issue and if any, it is more perceived than real.

[14] As a consequence, the applicant opted to act in terms of the dicta in **Room Hire Co.(PTY) Ltd v Jeppe Street Mansions (PTY) Ltd 1949 (3) 1155 (T)** at 1163 and called Mr. Abram Mogale to adduce oral evidence on its behalf.

[15] In paragraph 8.3 of its heads of argument, the applicant submits that the respondent's deponent, Mr. Vissagie, was not present and does not profess to have any personal knowledge of the circumstances of the applicant's employee's departure from the site on 11 September 2015. However, in paragraph 8.31 of the

founding affidavit, it is evident that Mr. Vissagie, Mr. Carrim and the legal representative of the applicant Mr. Abram Mogale were present at the meeting of 11 September 2015 when all the building and the services where inspected and everybody agreed that the practical completion has not been achieved. At the end, the applicant's site agent, Mr. Mogale, was instructed to cease all works and to evacuate the site on the same day. Further in paragraph 4.6 of its replying affidavit the applicant conceded that (sic) deponent, Mr. Vissagie was indeed on site with other persons on Friday 11 September 2015.

This in my view is a contradiction in terms by the applicant and also contradicts the oral evidence of Mr. Mogale. The oral evidence is therefore rendered futile and the matter must be decided on affidavits.

[16] The *mandate van spolie* is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status *quo ante*, irrespective of the merits of any underlying contest concerning entitlement to possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for *mandament van spolie* has to show. (Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust the possessor). The underlying principle is expressed in the maximum *spoliatus ante omnia restituendus est.* The fundamental purpose of the remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help. It is available both in respect of

the dispossession of corporeal property and incorporeal property. In the case of incorporeal property it is the possession of the right concerned that is affected – a concept described as *quasi* – possession to distinguish it from physical possession. The manifestation of the dispossession of the right in such a case will always entail the taking away of an externally demonstrable incidence, such as a use, arising from or bound up in the right concerned. **Van Rhyn and Others NNO v Fleurbarx Farm (PTY) Ltd 2013 (5) SA 521 (WCC) at 522 – 523 para [T]. See also Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Manicipalty and Another 2013 (1) 323 (CC)** paras 23 – 24 and **Bon Quelle (Edms) Bpk v Munisipaliteit Van Otavi 1989 (1) SA 508 (A)** at 511 I – 512B.

[17] In the Van Rhyn case (supra) the matter pertained to servitutal access where the applicants caused one of the respondent's directors to be advised that they would be closing the gravel road across their property so as to enable, amongst other things, the area between the main house on the property and a nearby dam to be landscaped as part of a garden extension. The respondent was advised that an alternative access road would be made available. The appellants thereafter constructed the alternative access road at a cost of nearly R3 million. Its availability coincided more or less with the closure of the gravel road. The remedy which the respondent claimed in its application for *anti-spoliatory* relief (a *mandament van spolie*) was on its face consistent with what might have been expected had it been asserting a defined right of servitutal access.

[18] The court in Van Rhyn emphasized the need to identify the right claimed. The court intimidating that in a case in which the applicant for *anti-spoliatory* relief seeks restoration of right of use, the nature of the alleged right upon which the use is founded must be identifiable on the papers because it is the subject-matter of the alleged dispossession if the conduct of the alleged disposer does not in law infringe or derogate from the alleged right. Thus the nature of the right can be material for determining whether the conduct complained about by the applicant for a *mandament van spolie* amounts to spoliation. Therefore, the requirements are that the *spoliatus* prove possession of a kind which warrants the protection accorded by the remedy and that he was unlawfully outsted.

[19] In the matter of **Bon Quelle (Edms) Bpk** *(supra)*, the Appellate Division determined that the municipality was entitled *ante ammica* to have the status *quo ante* restored on the assumption that the municipality did indeed have a servitutal right to the water supply.

[20] In **Firstrand Bank Ltd t/a Rand Marcant Bank & Another v Scholtz NO & Others 2008 (2) SA 503 (SCA)** the following basis for the need for the characterisation of the right in an application for mandament van spolie was stated:

"The mandament van spolie does not have a "catchall-function" to protect the quasi-possessio of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandamant is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi-possessio of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterized to establish whether its quasi-possessio is deserving of protection by the mandament".

[21] Thus the nature of the right can be material for determining whether the conduct complained about by the applicant for a *mandament van spolie* amounts to spoliation. Van Ryhn (*supra*) at page 526 E. This is an incident of the requirements that the applicant must prove "possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted". **Yeko v Qama 1973 (4) SA 735 (A) at page 739-G-H.**

[22] In my view the applicant has failed to make a sufficient case for the relief which it applies for. The applicant's "right" to site has been legally and lawfully terminated and cancelled for the following reasons.

[23] The applicant has failed and omitted to comply with the contractual obligation and responsibilities insofar as the practical completion of the works is concerned. Various indulgences were granted to the applicant to complete the works, but to no avail. The following letters directed to the applicant by the respondent bear witness to this: Letters dated 10 December 2015, 28 July 2015, 31 August 2015, 4 September 2015 and 10 September 2015. The applicant is therefore not entitled to rely on the *mandament van spolie*.

[24] In the result the application is dismissed with costs on party and party scale.

T.J RAULINGA

JUDGE OF THE HIGH COURT

APPEARANCES

Attorney for the Applicant	: Coetzer and Partners attorneys
Counsel for the Applicant	: Adv. Ellis SC
Attorney for the Respondent	: Day attorneys Inc.
Counsel for the Respondent	: Adv. FW Botes SC
Date of Judgment	: ~~05~~ 12 August 2016