IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 23648/2020

Heard on: 19 June 2020

Date of judgment: 23 June 2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

23 JUNE 2020 DATE — **SIGNED.** SIGNATURE

In the matter between:

KBV GROUP (PTY) LTD — **Applicant**

and

UNIVEST MINING GROUP (PTY) LTD — **First Respondent**

JUPITER RESOURCES (PTY) LTD — **Second Respondent**

JACOBA ISABELLA WELTHAGEN — **Third Respondent**

JUDGMENT

SWANEPOEL AJ:

[1] This matter came before me as an urgent application in which applicant sought an order in the following terms:

[1.1] That applicant's non-compliance with the rules of Court be condoned;

[1.2] That applicant's possession of the immovable property at Portion 77 of the Farm Elandsdrif 467, Northwest Province ("the property") be restored;

[1.3] That first and second respondents be directed to remove all chains and locks on the gates leading to the property;

[1.4] That the Sheriff of Court be authorized to seek assistance from the South African Police or a security company to execute the order;

[1.5] Costs on the attorney/client scale.

[2] After hearing the matter, I granted the order as prayed for. I undertook to provide reasons for the judgment as soon as possible. These are my reasons.

[3] Applicant ("KBV"), which operated a crushing and washing operation on the property, alleges that it was in possession of the property by virtue of a lease agreement between KBV and third respondent until the Covid-19 lockdown forced the closure of the plant on 23 March 2020. Although third respondent was cited as a party, no relief is sought against her.

[4] On 2 March 2020 applicant and first respondent ("Univest"), with the view to entering into future business transactions to their mutual benefit, concluded a confidentiality and non-circumvention agreement which essentially obliged them not to compete with one another, and not to disclose the other party's confidential information. Second respondent ("Jupiter") is the owner of the washing and crushing equipment that KBV had been operating to their joint benefit.

[5] On or about 25 March 2020 Johan and Riaan Augustyn arrived at the property to find a meeting was being held between KBV employees and an employee of Univest. There seems to have been some confusion as to whether the Augustyn brothers were employed by applicant, but it seems not to be in dispute now that they are independent contractors. Nevertheless, they asked what was going on, only to be told that they should step aside as all of KBV's employees would in future be working for Univest. Subsequently, a large notice board was erected at the entrance to the property. It reads:

"Jupiter Resources Mooinooi Chromite Processing Plant

Operated by Univest Mining Group"

[6] There is no serious dispute that Univest and Jupiter (collectively referred to as "the respondents") have joined forces and have taken over the running of the operation on the property, and in argument counsel for Univest and Jupiter conceded that KBV had been spoliated.

[7] Respondents raised the following defences:

[7.1] That the matter is not urgent because KBV knew on 21 August 2019 already that Jupiter was occupying the property by virtue of its own lease agreement with third respondent;

[7.2] That the Court did not have jurisdiction to hear the matter as the non-circumvention agreement contained an arbitration clause;

[7.3] That a third party, Sogima Mining (Pty) Ltd held the mining rights on the ground and had not been joined as a party to the proceedings;

[7.4] That KBV intended to operate an unlawful mining operation, and the granting of a spoliation order would permit applicant to carry on an unlawful activity;

[7.5] That the lease agreement between third respondent and Jupiter was still of force and effect;

[7.6] That KBV had not been spoliated, and that it had only accessed the property by virtue of an agreement between it and Jupiter, together with the lease agreement between Jupiter and the third respondent;

[7.7] That there are factual disputes that cannot be resolved on the papers;

[7.8] That KBV was obliged, having approached the Court on an urgent basis, to disclose all relevant information, which it had allegedly not done;

[7.9] That KBV had brought the application whilst simultaneously trying to settle the matter.

[8] I will leave the issue of urgency, and the issue of KBV's entitlement to occupy the property to be dealt with later in this judgment, as those are in my view the main issues of dispute.

JURISDICTION

[9] The contention that this Court does not have jurisdiction to hear the matter because of the existence of an arbitration clause in the agreement between Univest and KBV ignores the fact that there is no agreement between Jupiter and KBV to arbitrate on disputes between them. The arbitration clause in the non-circumvention agreement between KBV and Univest is broad in scope, and requires "*any*

disagreement" between them to be referred to arbitration, which would clearly include the present dispute. That is, however, not the end of the matter, and where one party to a dispute is not subject to an arbitration clause, then other considerations may apply.

[10] It must be borne in mind that the allegation is that Univest and Jupiter have acted in concert with one another in spoliating KBV. Therefore KBV's case against the one respondent cannot be divorced from its case against the other. The Arbitration Act, Act 42 of 1965 ("the Act") recognizes that in certain instances it would not be appropriate for a dispute to be resolved by arbitration. Section 3 (2) (b) of the Act reads as follows:

"3 ….

(1)……

(2) The Court may at any time on the application of any party to an arbitration agreement, on good cause shown –

(a)……

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or…."

[11] In ***Pro-Khaya Constructions CC v Strata Civils and others***[1] the Court considered in what circumstances a Court would exercise its discretion in terms of section 3 (2) (b) of the Act. The following principles were identified:

[11.1] A Court will not set aside an arbitration agreement in the absence of good cause;

[11.2] The *onus* of demonstrating good cause is not easily discharged, and there must be compelling reasons for such an order;[2]

[11.3] Where some parties relevant to the dispute are not parties to an arbitration agreement, that might demonstrate good cause.

[12] In ***Welihockyj and others v Advtech Ltd and others***[3] the Court dealt with the same situation as in the present matter, where one party to a dispute is not subject to an arbitration agreement. The Court recognized the benefit of, on some occasions, allowing a matter to be adjudicated by a Court rather than by arbitration:

"A Court of law will not be curtailed by such factors and would be in a position to adjudicate and conclude all the interwoven issues in one and the same process."

[1] [2020] 1 ALL SA 267 (ECG)
[2] See also: Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (T)
[3] 2003 (6) SA 737 (W)

[13] One of the factors to be considered in this matter is the probability of multiple proceedings being launched should this Court not hear the matter. The likelihood of a duplication of proceedings, the enormous financial burden flowing from multiple actions, and the fact that the issues between KBV and the respective respondents are inextricably intertwined, are in my view factors that support a finding that there is 'good cause' for the matter to be dealt with by this Court.

JOINDER OF SOGIMA MINING

[14] The papers show that Sogima Mining (Pty) Ltd ("Sogima"), which is a company associated with Jupiter, has held a mining right over the property since 2018. This fact did not deter Jupiter from entering into a business transaction with KBV in terms of which KBV conducted certain operations on the property.

[15] There is no evidence that Sogima intends to mine on the property, nor evidence that should applicant continue its operations, Sogima would be adversely affected in any manner. A party should be joined to the proceedings as respondent in instances where there is a question arising between it and the applicant that is substantially the same as a question of law or fact that would arise should the respondents be sued separately. Put differently, the question is whether Sogima has a direct and substantial interest in the subject matter of this application.[4]

[4] Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) at 168 - 170

[16] As I will more fully expand on hereunder, this is a spoliation application, not a dissection of the different contractual relationships between the parties. Sogima might in future wish to exercise its mining rights, but that is irrelevant to the present question, which is whether KBV was in undisturbed possession of the property, and whether it was spoliated. In that question Sogima has, in my view, no direct or substantial interest.

UNLAWFUL MINING

[17] Respondents allege that KBV intends to conduct unlawful mining operations on the property, on the grounds that KBV has no mining permit or right. It is a mystery how respondents know that KBV intends to conduct these operations. There is no factual basis to this allegation which KBV denies categorically. It says that it intends to continue with the operation that Jupiter has allowed all along.

[18] It is so that where there is a dispute of fact in motion proceedings, the test laid down in ***Plascon Evans Paints (Ltd) v Van Riebeeck Paints (Pty) Ltd***[5] should be applied. Therefore, I have to consider the facts alleged by applicant that are admitted by respondents, together with the respondent's averments, and determine the matter on those facts. In certain instances a Court may, where an allegation is clearly bald and unsubstantiated, reject that allegation. In this case, the allegation that applicant intends to conduct illegal mining is simply that, an

[5] 1984 (3) SA 623 (AD) at 634 H

allegation without substance. How do respondents know that this is the case? Where are the facts supporting their claim?

[19] There are none, and therefore I reject this allegation.

UNRESOLVED FACTUAL DISPUTES

[20] The core facts of the matter are not in dispute, and that is that until 25 March 2020 KBV was in undisturbed possession of the property. It is also not disputed that Univest's employee told the Augustyn brothers that henceforth the KBV employees would be employed by Univest, and that a sign was erected at the entrance which announced that respondents were conducting operations on the property jointly. Those are the core questions in this matter, and in regard to these questions, there is no dispute.

KBV HAS FAILED TO DISCLOSE CERTAIN INFORMATION/ABUSE OF PROCESS

[21] Respondents allege that in an urgent application an applicant is obliged to disclose all relevant facts, even those that are not favourable to its case. They allege that because KBV did not disclose that there had been settlement talks between the parties, it had not complied with its disclosure obligations, and thus the application was an abuse of the processes of Court.

[22] There is no doubt that such an obligations rests on an applicant in an *ex parte* application.[6] This principle has been affirmed in numerous judgments. However, I am not aware of any such principle in matters other than *ex parte* applications.

[23] The fact that apparently was not disclosed by KBV, was that while KBV was prosecuting this application, it was also trying to also settle the matter on the basis that the parties co-occupy the property. How that can possibly be offensive is uncertain. In fact, it is improper to disclose the contents of settlement talks as respondents have done.

URGENCY

[24] I come now to the question which gave me much pause for thought, and that is the urgency of the matter. A brief outline of the chronology is useful to the consideration of this issue:

[24.1] On 25 March 2020 the Augustyn brothers became aware of the fact that respondents had taken over the operation. The Augustyns are involved in some manner with KBV, although they are apparently not employed by it.

[24.2] On 26 March 2020 the Covid-19 lockdown took effect, and all mining operations save for gold and coal mining were closed down. The Level 5 lockdown lasted until 30 April 2020, at which

[6] In re: The Leydsdorp & Pietersburg (Transvaal) Estates Ltd 1903 TS 254 at 257

stage mining operations commenced once again, albeit on the basis that permits were required to travel.

[24.3] On 9 April 2020 an attorney by the name of Erasmus wrote to respondent's attorneys, allegedly on behalf of KBV, and placed the incident of 25 March 2020 on record. Erasmus was apparently under the misapprehension that the Augustyns were employed by KBV, and that he was instructed by KBV.

[24.4] On 16 April 2020 respondent's attorneys wrote back to Erasmus. In summary, respondents' position was that KBV was in breach of its contractual obligations, and that it owed Jupiter a substantial amount of money. In order to secure its claim, Jupiter intended taking KBV's assets (which had been left on the property) into its possession, and to exercise a hypothec. The letter contended that KBV's only entitlement to possession of the property was derived from the agreement between it and Jupiter, which Jupiter had cancelled.

[24.5] On 6 May 2020 Erasmus, still ostensibly acting for KBV, acknowledged receipt of respondent's attorney's letter of 16 April 2020.

[24.6] On 19 May 2020 KBV's current attorney (who had also acted for third respondent at some point) wrote a letter to respondent's attorney placing on record the following:

"14. Before the stage 5 lockdown our client was occupying the premises as well as operating the crushing plant and washing plant and both plants were in possession of our client.

15. When our client was able to obtain permits to enter the premises again and start up his plants, Univest Mining Group (Pty) Ltd represented by Karabo Mkhabela already occupied the premises. Such occupation is illegal."

[25] KBV alleges that it only managed to secure permits and to access the site on 15 May 2020. When there was no positive response to KBV's attorney's letter of 19 May, this application was launched on 3 June 2020. What gave me pause for thought is the likelihood that the Augustyns, being business associates of KBV, would remain silent and not tell KBV of the spoliation of the property. Assuming that they did not disclose this information to KBV, then it is not unlikely that KBV only became aware of the spoliation on 15 May 2020. The Covid-19 lockdown made it exceedingly difficult for persons to obtain permits for travel, and having closed the plant before the lockdown, it is not impossible that KBV only returned to site on 15 May 2020.

[26] There was a further two week delay in prosecuting the application, which was then brought on severely curtailed time periods. Respondent's counsel argued that KBV had not fully dealt with the delay in launching the application. He contended that KBV had resolved on 14 May 2020 to institute proceedings against Jupiter, and

therefore it could not have become aware of the spoliation one day later. KBV's answer is that the resolution did not relate to this application, but to legal proceedings in general.

[27] There is some merit to respondents' counsel's argument that KBV has not fully explained the delay in launching the application. It has been stated in numerous matters that it is incumbent on an applicant to fully explain every delay.[7] However, the mere fact that there was a delay in bringing the application does not necessarily detract from the urgency of the matter. Where there is an attempt to resolve the matter in a non-litigious manner prior to issuing the application, such delay can in proper circumstances be condoned.[8] Also of importance is the nature of the relief sought. The more severe the consequences of striking the matter for lack of urgency, the more a Court would lean in favour of condoning any delay.[9]

[28] Respondent's counsel quite correctly criticized the lack of clarity of KBV's papers with regard to urgency. There was a long delay in bringing the application after the spoliation occurred in March 2020. In normal circumstances I would in all likelihood have struck the matter from the roll. However, what has complicated the matter is the Covid-19 lockdown. For a number of weeks the wheels of commerce ground to a halt. The functioning of attorneys' practices was affected, and it

[7] East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others [2012] JOL 28244 (GSJ)
[8] Victoria Park Ratepayers' Association v Greyvenouw CC and others [2004] 3 ALL SA 623 (SE); Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (4) SA 81 (SE); UMSO Construction (Pty) Ltd v City of Johannesburg and another [2018] 4 ALL SA 507 (GJ)
[9] See: UMSO Construction (supra par. 134)

was difficult for any party contemplating an application to consult with an attorney, and to launch the proceedings. It may well be that KBV only obtained a permit to travel to the property on 15 May 2020. Shortly thereafter KBV's attorney tried to resolve the matter by corresponding with respondents' attorney, and when no resolution could be reached, the application was brought some two weeks later.

[29] A factor that has also played a role in my decision is the nature of the wrong that KBV has suffered. It has been held that spoliation is by its very nature urgent.[10] In ***Clemson v Clemson***[11] Blieden J, however, made the point that the mere fact that a matter is one of spoliation does not automatically render it urgent. The normal rules of urgency should be applied to every matter brought on an urgent basis.

[30] Nevertheless, the harm that is sought to be corrected is a relevant issue, and the nature of respondents' conduct in this matter is what has swayed me in favour of condoning KBV's non-compliance with the rules of Court. I take into consideration that after the lockdown had been announced on 18 March 2020, and one day before it was to take effect, Univest employees simply entered the property and held a meeting with KBV employees with a view to taking over KBV's operation. Since then KBV, which had been in undisturbed possession of the property to that point, has been prevented from entering the property. To add insult to injury, respondents have apparently been

[10] Mans v Mans (formerly Richens, born Maddock) [1999] 3 ALL SA 506 (C)
[11] [2000] 1 ALL SA 622 (W)

using KBV equipment to conduct the operation. Such actions cannot be permitted.

[31] I am therefore of the view that the matter is urgent, and that KBV's non-compliance with the rules of Court should be condoned.

IS THE DISPUTE CONTRACTUAL OR IS IT SPOLIATION

[32] A further aspect that I have to deal with is respondents' contention that KBV simply accessed the property by virtue of a contractual relationship between Jupiter and KBV. It was argued that once that contractual relationship terminated, KBV's entitlement to access also terminated, and respondents were entitled to take possession of the property and to prevent KBV from accessing the property. I was referred to the judgment of ***ATM Solutions (Pty) Ltd v Olkru Handelaars CC***[12], and I was urged to take the same approach as in that case by finding that the respondents were entitled to oust KBV from the property once their contractual relationship ended.

[33] In the ***ATM Solutions*** matter (*supra)* the appellant had installed an automatic teller machine at a supermarket. It was entitled to access the machine during business hours for purposes of servicing. Upon the machine being removed and replaced with another machine, the appellant sought an order against the supermarket owner on the basis of spoliation. The nature of the right that the appellant was attempting to enforce was at the core of the enquiry. The Court held that the

[12] [2008] ZASCA 153

appellant had never had actual possession of the machine, and that at all times the floor space where the machine had been installed was in possession of the respondent. The appellant's right to have the machine remain in the supermarket derived solely from the contractual relationship between the parties, not from possession, and the appellant could not rely on spoliation.

[34] Respondents also referred me to the matter of ***First Rand Ltd t/a Rand Merchant Bank and another v Scholtz N.O. and others***[13]. In that matter the High Court had held that the termination of water supply through a pipeline network constituted spoliation. The first appellant had supplied water to a number of farmers pursuant to interim agreements between first appellant and the farmers. Those agreements were followed by agreements between second appellant and the farmers to supply water which agreement expired on 31 December 2004. The parties were then unable to reach agreement on the fee for the future water supply, and appellants stopped providing water from 31 December 2004 onwards.

[35] The High Court considered the farmers' entitlement to water to be a quasi-possessory right incidental to their possession of their properties. This right, the High Court held, had been spoliated. An order was

[13] [2007] 1 ALL SA 436 (SCA)

granted reinstating the water supply to the farmers. In an application for leave to appeal the Supreme Court of Appeal held as follows:[14]

"The mandement van spolie does not have a 'catch-all 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 mandement is obviously the appropriate remedy, but not where contractual rights are in dispute."

[36] In examining the nature of the right that the farmers sought to enforce, the Court held that their entitlement to water was the result of statutory water rights, which may well be incidental to their possession and control of their properties. However, the right that the farmers sought to enforce in this instance was a right to convey the water through the pipeline, which right had arisen by contract, and which had ended when the contracts terminated. This latter right was not an incident of their possession of their properties.

[37] In examining the nature of the right that KBV seeks to protect, one should distinguish between KBV's right to take possession of the property for purposes of running its operation, which right arose through contract (whether with third respondent or with Jupiter), and its right as possessor not to be deprived of that possession. Once KBV had taken possession of the property, it acquired a real right through its

[14] At par. 13

possession which is capable of being protected by the mandement van spolie.

[38] In my view therefore, the present matter is distinguishable from the cases to which I was referred.

[39] At the hearing of the matter I was handed a supplementary answering affidavit. KBV did not raise any objection to the handing in of the affidavit. The purpose of the affidavit was to place on record that the Jupiter had entered into a contract with third respondent for the lease of the property. Jupiter states that during October 2019 a new lease agreement had been negotiated between them which provided for a longer lease period of three years. Jupiter states that the written agreement was never signed due to the unavailability of third respondent's attorney, but that it had "now" been signed. It is dated 1 October 2019, despite the signatures obviously having been appended much later. Respondents state that this agreement is the basis for their continued occupation of the property, and that KBV therefore has no contractual entitlement to occupation.

[40] It may well be correct that KBV does not have a contractual entitlement to occupy the property. However, KBV is not trying to enforce a contractually grounded personal right, but rather a real right arising

from its possession of the property. As was stated in ***Shelving Man (Pty) Ltd v Dawood and others***[15]:

"The essential characteristic of the remedy of spoliation – the mandement van spolie – is, of course, that it is a possessory remedy. It is only the possession of a party that is protected. The underlying rationale of the remedy is that no person is allowed to take the law into his or her own hands and to unlawfully dispossess another of possession of property. If this occurs, the Court will summarily restore the status quo ante without enquiring into or investigating the merits of the dispute to determine a party's right to ownership or other right to the property in dispute. It was said in Tswelopele Non-Profit Organisation and others v City of Tshwane Metropolitan Municipality and others 2007 (6) SA 511 (SCA) [also reported at [2007] JOL 20003 (SCA) – Ed]:

> *"Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (spoliatus ante omnia restituendus est). Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the mandement's protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property."*

[15] [2015] 3 ALL SA 243 (KZD)

[41] The entire philosophy behind the mandement is to prevent self-help, and to restore the *status quo ante.* As was stated in ***Ivanov v North West Gambling Board and others***[16]*:*

"*The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute."*

[42] I therefore find that KBV is entitled to be reinstated in its possession of the property.

COSTS

[43] Applicant sought a punitive costs order. I am aware of the fact that attorney/client cost orders are not readily granted, and that a Court will only do so to express its displeasure with a party's conduct. Courts have granted punitive costs in cases where a party has been vexatious, reckless, malicious, or frivolous (***See: Van Loggerenberg, Erasmus' Superior Court Practice 2nd Ed D 5-22 and the authorities quoted***).

[44] In this particular case the respondent's conduct merits, in my view, that a punitive costs order be granted. Univest was party to a non-compete agreement with KBV in terms of which they undertook not to circumvent each other with regard to business transactions. By joining with Jupiter to exclude KBV from the operation on the property, Univest is in breach of that agreement. Jupiter and KBV were parties to a tolling

[16] 2012 (6) SA 67 (SCA) at 67 B - D

agreement in terms of which KBV operated the plant on the property to their mutual benefit. Respondents ignored these contractual relationships and simply took over KBV's operation, including its employees. They did so shortly before the lockdown commenced, leaving KBV unable to immediately enforce its rights. They have even used KBV's machinery in the operation, and when KBV demanded possession of the machinery, Jupiter professed to be exercising a lien (of doubtful origin) over the machinery.

[45] This matter concerns a classic case of self-help which should not be allowed. The unacceptable manner in which respondents conducted themselves warrant, in my view, a punitive costs order.

[46] Applicant handed me a draft order which, as I stated above, I made an order of Court. The order is as follows:

[46.1] Applicant's possession of the demarcated immovable property described as Portion 77 of the farm Elandsdrift 467, North West Province, Registration Division J.Q is restored.

[46.2] First and second respondents are directed to remove all chains and locks on the gates leading to the aforesaid farm.

[46.3] The Sheriff of the High Court or his Deputy are authorised to request the South African Police Service, alternatively a security company known as Engigyn (Pty) ltd to assist the Sheriff of the High Court to execute the order of the Court.

[46.4] First and second respondents shall pay the costs of the application jointly and severally on the attorney/client scale.

SIGNED.
J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria