REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No: A5026/09

In the matter between:

KRB ELECTRICAL ENGINEERS /
MASANA MAVUTHANI ELECTRICAL
& PLUMBING SERVICES (PTY) LTD
t/a KRB MASANA Appellant

and

JYOTI STRUCTURES AFRICA (PTY) LTD First Respondent
ESKOM ENTERPRISES (PTY) LTD Second Respondent

J U D G M E N T

MBHA J

[1] This appeal is specifically against paragraph 1 of the order of Mathopo J, granted on 29 April 2009 in terms of which the first respondent was ordered to return undisturbed co-possession with the respondents of the applicant's batching plant camp, situated at Volksrast, and the satellite camp, situated at Utrecht, where the appellant's goods were situated.

[2] The appeal is not against the reasons or judgment granted by Mathopo J, but is against the order which, appellant submits, was incorrectly granted after the learned judge had found that the first respondent spoliated the Applicant without proceeding lawfully with an ejectment order.

[3] The appellant, who will for convenience be referred to as the applicant, brought an urgent spoliation application compelling the first respondent to return to the applicant undisturbed possession of "*the area situated at Majuba Umfolozi 1765 KV Transmission Line, Section A, Kwazulu Natal",* ("the site").

[4] In terms of the agreement that was concluded between the applicant and the first respondent, the first page of which was attached to the founding affidavit as annexure "KRBA", the applicant was granted access to and possession of the site in order to perform building works thereto, during or about April 2008 and remained in such possession of the site until 8 April 2008.

[5] It is common cause that on 8 April 2008, the first respondent locked out the applicant's workers from accessing the site, resulting in the urgent application that served before Mathopo J. The applicant has a site office and goods situated at the site. It was never disputed that the applicant had already performed substantial works at the site. It was also not disputed that the applicant was in undisturbed possession of the site and equipment. However, the first respondent averred that the site in issue i.e. where the applicant was despoliated, included four fenced off areas (the site camps) which were inter alia, utilised for the siting of offices of both parties. The first respondent accordingly averred that the applicant was in possession of one of the site camps and not of the whole transmission line as described in the agreement.

[6] In dealing with the definition of site, Mathopo J, stated that *"In my view nothing much turns on the exact description of the area in view of the respondent's concession that the applicant was indeed in possession of one of the areas which is part and parcel of the whole transmission line"*

[7] Clearly, the first respondent is attempting to utilize this paragraph in Mathopo J's judgment in substantiating its allegations that the learned judge found that the applicant only had possession of one of the site camps and therefore is only allowed restored co-possession of such site camp.

[8] However, as the learned judge found that the site camps form part of the entire site as a whole, possession of the greater entire site includes possession of the lesser i.e. the site camps. It is trite that in circumstances as in the present case that the converse is also true, namely possession of the lesser includes possession of the greater.

[9] A reading of the judgment of Mathopo J reveals that he correctly understood the purpose of a building contractor having possession of a building site when he stated:

> *"14. In my view the applicant as a sub contractor in terms of the agreement with the respondent occupied and took control of the site in order to carry out the work and remained in occupation for that purpose. It had possession of the site which may be protected against any spoliation. As a builder it possessed the site in order to secure the benefits of its contract and should not be deprived of its possession of the site by the owner of the property or anyone else including the respondent.*
>
> *15. The admission by the respondent in its answering affidavit that it cancelled the agreement, took possession of the site pursuant to clause II of the agreement and denied the applicant further access to the site clearly shows or indicates that it spoliated the applicant when it locked the site and its workers.*

One needs to look no further than the respondent's affidavit which is replete with allegations seeking to justify the termination of the agreement and taking over the project that the respondent spoliated the applicant….

17. The respondent should accordingly be ordered to restore possession of the site to the applicant."

[10] The correctness of this approach was in fact confirmed in the case of ***Pretoria Racing Club v Van Pietersen 1907 (TS) 687*** where the court held that in cases of ordinary building contracts, and where a builder was contracted to erect a house on a particular plot of land, the builder would be in possession of that land for the purpose of carrying out the works. The court also held that the mere fact that the contract contains no express clause recognising that possession, did not matter at all.

[11] This approach has been followed in other decisions. In the case of ***Scholtz v Faifer 1910 (w) 243*** it was held that possession of an outbuilding on the building site would have constituted possession of the entire building site had the applicant remained resident in the building. The decision in ***Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Education and others 1996 (4) SA 231 (c)*** *spe*cifically makes the point that a building contractor who entered a building site and occupied and took control of it in terms of his contract in order to carry out the contract work, and remained in occupation for that purpose, had possession of the site which might be protected by a spoliation order.

[12] The first respondent submits that Mathopo J's order only makes mention of the restoration of co-possession of the batching plant camp and satellite camp, which is only part of the site as a whole and as a result of such it will only restore such possession to the applicant and will not restore possession of the entire site in accordance with the possession the applicant enjoyed before the spoliation.

[13] Significantly, in his judgment Mathopo J distinctly referred to the word *"site"* thirty eight (38) times and only referred to the phrase site camp(s) four (4) times. He clearly saw a distinction between the entire site where the applicant had to perform the works and the specific site camps where the applicant had its offices and equipment.

[14] If Mathopo J was of the opinion that the applicant did not have co-possession of the entire site, in as far as it had such possession in order to execute its works in terms of the agreement between it and the first respondent, no doubt he would have made such distinction in his judgment.

[15] Furthermore, if he was of the opinion that the applicant was not spoliated of the other parts of the site, in as far as it had such possession to execute its works in terms of the agreement between it and the first respondent, similarly he would have made mention of this and would have distinguished it from the other parts of the site which he ordered restoration of co-possession of. Significantly the learned judge chose not to do this. In fact in the sentence preceding the order he stated, expressly, that the respondent should be ordered to restore possession of the site to the applicant.

[16] In my view this is a clear indication of what Mathopo J's intention was when he ordered the restoration of co-possession of the site, in as far as the applicant had such possession to execute its works in terms of the agreement between it and the first respondent. Significantly, the area at which the applicant has to perform its works i.e. the site, is expressly described in clause 1.0 of the agreement as *"Majuba Umfolozi line 1765 KV Transmission Lane, Section A, Kwazulu Natal.* Furthermore, the same description is found at the top of each page of the Bill of Quantities regulating the charges between the parties for various works to be performed by the applicant.

[17] If the judgment and the order are read together, there is a clear ambiguity in that the judgment correctly refers to the site as a whole yet the order only refers to a very small part of the entire site. On a reading of the judgment and the order as a whole, the ambiguity persists and should be

varied, clarified or explained in order to give effect to the meaning and intention of the court.

[18] I accordingly find that the learned judge erred in couching the first paragraph of his order in the manner he did and it should be changed to reflect his intention so that it flows and accords with the entire judgment.

[19] Prior to the hearing of this appeal, the first respondent launched an application for an order that the appeal should be struck from the roll with costs. The basis of the application was the appellant's (applicant's) alleged failure to comply with the provisions of Rule 49 (13) of the Uniform Rules of Court.

[20] At the commencement of the hearing, Mr Swart, appearing for the first respondent, informed the court that due security had since been furnished by the appellant and that the first respondent was not proceeding with the application. However, the first respondent was seeking costs in respect of the application.

[21] Ms. Smit, appearing for the appellant, had not had sight of the application. It appears that no opposition was even filed to the application. However she referred the court to Annexure "JPB13" to the application which is a letter dated 26 February 2010, addressed by the first respondent's attorneys to the appellant's attorneys in which the appellant is given until close of business on Wednesday 3 March 2010, within which to pay in the requisite security.

[22] The application papers were served on the appellant's attorneys on 1 March 2010 at 13h26. Clearly, the launch of the application was premature.

[23] For this reason I do not deem it fair that the appellant should be mulcted with any costs in respect of this application

I accordingly propose the following order.

1. With regard to the application for the striking off of the appeal, each party shall bear its own costs.
2. The appeal is upheld with costs and paragraph 1 of the order of Mathopo J, granted on 29 April 2009 is set aside and is replaced with the following:

   "1. The first respondent is ordered to return undisturbed co-possession of the area situated at Majuba Umfolozi 1765 KV Transmission Line, Section A Kwazulu Natal ("the site") to the Applicant, within twenty four (24) hours of service of this order on the first respondent's attorneys of record."

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Judge BH Mbha

I agree

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Judge M Jajbhay

I agree

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Judge CG Lamont