REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 59961/2014

DATE: 18 SEPTEMBER 2014

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

In the matter between:

ECONOCOM 183 CC t/a ECONOCOM **APPLICANT**

and

HERMANUS JOHANNES JTEYN SWANEPOEL **FIRST RESPONDENT**

(ID Number: [...])

PETRUS JOHANNES SWANEPOEL **SECOND RESPONDENT**

(ID Number: [...])

JUDGMENT

KUBUSHI, J

[1] The applicant seeks, on an urgent basis, the restoration of the possession of the immovable property known as Erf 930, Heritage Estate, Louwlardia X48, Gauteng (the property), by way of *mandament van spolie.*

[2] The respondents are opposing the application on urgency and on the merits. Their opposition on urgency

is founded on their submission that the applicant does not have a right of lien. They contend that the applicant's basis for urgency centres on the builder's lien, which, according to them, is none existent. I, however, hold a different view. This shall become apparent from my reasons set out later in this judgment. I am, on that ground inclined to hear this application on urgency.

[3] A brief factual matrix of this matter is necessary- On 21 February 2013, the applicant and the second respondent entered into a written construction agreement. The salient terms and conditions of the agreement were, amongst others, that the applicant would construct a dwelling on the property in accordance with the building plans provided to it by the second respondent for a price of R1 539 570. The construction agreement was subject to the respondents obtaining a building loan from a financial institution. During June 2013, Standard Bank granted the respondents a building loan in terms of a "New Home Loan Agreement (Natural Person)'' which was secured by a mortgage bond, i.e. "Mortgage Bond Loan Account Number 36735518".

[4] The property is situated in a security estate. Entry to the estate is regulated by security guards and access can only be granted subject to confirmation by the owners. The second respondent allowed the applicant access to the estate as from 25 October 2013. In terms of the Rules of the Estate all contractors' access needed to be renewed after the December 2013 builder's holiday. The electronic system of the estate automatically cancels/suspends the access of builders/contractors and their employee in the event that such access is not utilised for a period of one month.

[5] The applicant's contention is that it was an implied term of the construction agreement that: the second respondent would give the applicant possession of the property; and that the applicant would be entitled to retain possession of the property until the applicant received payment for the work done in terms of the construction agreement (the builder's lien). According to the respondent's counsel by being allowed access to the estate the applicant took possession of the property. This is denied by the respondents who contend that the applicant was not granted possession of the property but only access.

[6] During the latter half of 2013, a dispute arose between the parties regarding the quality of the work done by the applicant. The second respondent lodged a complaint with the National Home Builders Registration Council (NHBRC). Pursuant to such a complaint, the applicant did certain remedial work on the property. Due to reasons which are in dispute between the parties, the NHBRC informed the applicant that it was closing its file because the respondents were proceeding with a new home builder.

[7] The applicant alleges that when it did not receive payment from the second respondent for work done, it exercised its right of lien by, amongst others, giving the second respondent written notice demanding payment of the amount due for work already performed and informing the second respondent of its intention to exercise its right of lien should payment not be made; informing the estate manager and the security

guards that it was exercising its right of lien; and placing a notice on the property informing all and sundry that it was exercising its right of lien.

[8] Conversely, the submission by the second respondent is that the applicant at no stage whatsoever possessed a builders' lien on the basis of a waiver thereof in favour of Standard Bank of South Africa Limited (the Bank) by way of an agreement dated 24 June 2013. His counsel contended in argument that the agreement is a tripartite agreement between the applicant, the second respondent and the Bank and by signing the agreement the applicant waived its right of lien. I do not agree.

[9] The following clause appears in the 'Additional conditions and minimum requirements for the construction and/or alterations to buildings bonded to Standard Bank of South Africa Limited as security for mortgage loans incorporating a waiver of lien':

> "15. Waiver of Lien
>
> The builder, by his signature hereunder, hereby irrevocably waives any right of lien or any right of retention in respect of the property. He undertakes to obtain a similar waiver of lien from all his subcontractors"

[10] The additional conditions and minimum requirements are signed by G *I* du Plessis on behalf of the applicant and also by the first and second respondents. In terms of the additional conditions and requirements, by attaching their signatures thereto the parties warrant and undertake to the Bank that the work shall be carried out in accordance with the afore going minimum requirements.

[11] A similar issue, the facts of which are almost the same, came up for consideration in *Ploughall (Edms) Bpk v Rae.*[1] In that judgment, the court, at 891 F - H of the judgment, stated that 'the undertaking in the agreement with the Society does not extend any rights to the respondent The applicant has not waived his *jus retention's vis-a-vis the* respondent and applicant is thus still in possession of the premises'.

[12] I am of the view that, even in this instance, the applicant's waiver of the right of lien was in favour of the Bank and not the respondents because the agreement protects the Bank and not the respondents; it governs the reciprocal relationship between the applicant and the Bank. It cannot, therefore, be said that the applicant waived its right of lien in favour of the respondents.

[13] Even so, the applicant's submission is that the question whether it waived its lien or whether the applicant has a lien as alleged or not, is irrelevant for purposes of this application. What is relevant, according to applicant, is whether the applicant was in peaceful and undisturbed possession of the property, irrespective of its entitlement to exercise a builder's lien. The applicant is correct.

[14] *Mandament van spolie* protects possession. It depends not on a right to possess but the 素act of quiet possession. It is premised on the fundamental principle that no person is allowed to take the law into his or her own hands by dispossessing another, forcibly or wrongfully against his or her consent, of that person痴 property, whether movable or immovable.[2]

[15] In order to succeed, an applicant for a *mandament van spolie* is required to establish two requirements: that he or she was in possession of the property concerned and that he or she was unlawfully - i.e. without his or her consent and against his or her will -deprived of possession.[3]

[16] The *onus* is on the applicant to establish not only a *prima facie* case, but he or she must prove the facts necessary to justify a final order - that is, that the things alleged to have been spoliated were in his or her possession and that they were removed from his or her possession forcibly or wrongfully or against his or her consent. [4]

[17] The issue for determination, therefore, is whether or not the applicant was in possession of the property when it was despoiled.

[18] The 'possession' in order to be protected by a spoliatory remedy, must consist of the *animus* - the 訴 ntention of securing some benefit to・ the possessor; and the *detentio*, namely, the 蘇olding・ itself. Both these elements, especially the 'd*etentio',* will be held to exist despite the fact that the claimant may not possess the whole property or may not possess it continuously.[5]

[19] The submission by the applicant's counsel is that because of the applicant's right of lien over the property, it (the applicant), at all material times hereto, was in possession of the property. According to counsel, the applicant's objective manifestation of its conduct proves that it was in possession. Although the applicant removed some of its equipment from the premises it, however, in protection of its right, wrote a letter to the second respondent informing him of its intention to exercise its right of lien; informed the estate manager and the security guards that it was exercising its right of lien and also placed a notice at the premises informing the public that it is exercising its right of lien. According to counsel, these objective factors, which are not disputed by the respondents, show its intention to possess the property. The applicant denied that it had informed the estate manager that it was vacating the premises as alleged by the respondents.

[20] Counsel's further submission is that, despite being in contact with NHRBC, doing remedial work, another builder was unilaterally given possession of the property. It was not necessary that the applicant be at all times on the premises to prove possession, but, doing remedial work was an indication of continual possession. The applicant was arbitrarily dispossessed of the property, so he argued.

[21] The applicant's counsel submits that the respondent's denial that the applicant was in possession at the time it was despoiled militates against the fact that the dispute between the parties emanated in December 2013 and the fact that remedial work was still to be done on site and the applicant was awaiting a final report from the NBHRC. Instead of a final report, the applicant received a letter from the NBHRC informing it that they are closing the file because another contractor was on site.

[22] The respondents' counsel argues, on the other hand, that the applicant already knew in May 2014 that it was not doing remedial work on the property and removed all its equipment from the property, in so doing, it abandoned the project and as such lost control of the property. By the time the respondents took over the property the applicant had already lost control because of lack of physical manifestation. Even if it can be accepted that there was no need for continuous possession but there must be *de facto* control. Intention to possess as indicated in the letter written by the applicant to the second respondent is not enough. It is also not disputed by the applicant that for a period of one month, at least, the applicant never attempted to access the property, so he argues.

[23] Counsel痴 further contention is that the disputes emanating from the papers should be resolved in terms of the Evans-Plascon principle.[6]

[24] Generally speaking, in motion proceedings, such as the present, where final relief is sought factual disputes are resolved on the papers by way of an acceptance of those facts put up by the applicant, that are common cause or are not disputed, as well as those facts put up by the respondent, that are in dispute. The rule applies 組enerally speaking・ because the situation may differ if the respondent痴 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 it merely on the papers.[7]

[25] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his or her affidavit seriously and unambiguously addressed the fact said to be disputed. A bare denial may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment.[8]

[26] There are various disputes of facts emanating from the papers. The main dispute is whether the applicant was in possession of the property or not The respondents dispute the applicant's submission that it was in possession, in that, firstly, the applicant had removed all its equipment, building materials, shed, portable toilet and fencing from the building site whilst the applicant contends that some of its equipment were left behind; secondly, the applicant informed the estate manager that it was vacating the property whilst the applicant's argument is that it never informed him so; thirdly, the applicant knew from May 2014 that it was no longer doing remedial work whilst the applicant submits that it was doing remedial work and was

awaiting a final report from the NHBRC before resuming with further construction of the dwelling.

[27] I he tacts stated in paragraph [26] of this judgment are real, genuine and *bona fide* factual disputes. On the basis of the principle enunciated in the *Piascon-Evans - and Wightman -* judgments above, the applicant has to accept the version set up by the respondents. I therefore conclude that the application should be decided upon the assumption that the respondents' version of events was substantially true and correct.

[28] In the circumstances, the application is dismissed with costs.

EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES»

HEARD ON THE: 05 SEPTEMBER 2014

DATE Of JUDCMENT:18 SEPTEMBER 2014

FOR APPLICANT: ADV S C G0UWS, Instructed by ROSS & JAC0BZ INC

FOR FIRST A SECOND RESPONDENTS: ADV J R MINAAR, instructed by HARTZENBERG INCORPORATED

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1 1971(1) SA 887 (TPA)

2 Nino Bonino v De Lange 1906 TS120 at 122

3 ***Yako v Qana 1973 (4) SA 735 (A) at 739E - F***

4 ***Bennett Pringle (Pty) Ltd v Adelaide Munidpality 1977*** (1) SA 230 at 232G

5 ***Bennett Pringle (Pty) Ltd v A delaide Municipality*****1977 (1) SA 230 at 233G - H.**

6 ***Plascon-Evans Paints Ltd v Van Riebeech Paints (Pty) Ltd***1984 (3) SA 623 (A) at 634E - I and 635A- C

7 ***Plascon-Evans Paints Ltd v Van Riebeech Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634E - I and 635A - C and ***National Public Prosecutions v Zuma2009*** (2) SA 277 (SCA) para 26.

8 ***Wightman t/a JW Construction v Headfour (Pty) Ltd & Another200B*** (3) SA 371 (SCA) paras [11] -[13].