REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A28/2006

In the matter between:

JOHN CECIL WIGHTMAN trading as JW CONSTRUCTION	Appellant
and	
HEADFOUR (PTY) LTD	First Respondent
ARCHER COLLIER HEAD	Second Respondent

MINORITY JUDGMENT : 07 SEPTEMBER 2006

BOZALEK, J:

[1] I have had the benefit of reading the judgment prepared by my colleague Thring J and am largely in agreement with his formulation of the issues and his comprehensive and closely reasoned analysis of the legal principles applicable.

[2] I find myself, however, in respectful disagreement with him on how those principles should be applied to the facts of this matter and, as a result, with the conclusion reached by him with regard to this appeal.

[3] I accept, as a starting point, that the appellant ultimately lost his *detentio* of the building site and therewith, his possession thereof. The key issue is whether, examining the circumstances in which he lost possession critically and holistically, this was as a result of "undue means" on the part of the respondents. As Thring J's judgment makes it clear, in such circumstances, a former lien-holder is entitled to apply for a summary order of restitution of possession by way of a *mandament of spolie* – just as the appellant sought to do herein.

[4] Thring J finds that the appellant voluntarily parted with possession of the premises. He finds further, that the appellant can rely neither on the agreement he allegedly reached with the second respondent on 9 July 2004, because of a dispute of facts on this issue, nor on the agreement allegedly reached between them on 12 July 2004. In this latter instance, Thring J reasons, there is insufficient factual material to find that, as at 12 July 2004, the second respondent harboured an intention to breach the agreement.

[5] In order to gain a proper perspective of the various factual disputes it is firstly necessary to consider, from both sides, the history of the building

operation carried out by the appellant and the events of the last few weeks thereof.

[6] For five months between early March to at least early July 2004, the appellant was employed in reconstructing and/or renovating a partially built main dwelling and cottage on the premises. Presumably because of the extent of the building operations, during this period and, in fact, until early August 2004, neither second respondent nor any member of his family occupied the dwellings or part thereof.

[7] According to the appellant problems in the relationship arose on 7 July 2004 when he confronted second respondent concerning the latter's alleged erratic payments and monies owing to the appellant for work done. Second respondent's case was, however, that the problems arose on 3 July 2004 when the appellant repudiated the agreement and abandoned the building site, alternatively, when second respondent cancelled the agreement. No detail as to the circumstances of the alleged repudiation, cancellation or abandonment is ever given by second respondent and nor does contemporaneous correspondence confirm this version of events.

[8] The appellant avers that, after stopping work on 7 July 2004, he posted a guard to protect his possession of the premises and, further, that he only withdrew the guard on 9 July when he reached an agreement with the second respondent to resume work on 12 July. These allegations

are simply denied by the second respondent who states, in this context, that as a result of the appellant's abandonment on 3 July he was forced to employ alternative contractors. New contractors were in fact on the site as early as 12 July 2004. The appellant goes on to say that on 9 July he furnished a duplicate set of keys to the second respondent purely for the purposes of inspection.

[9] The appellant deals with these events in a lengthy three page paragraph (paragraph 28) under the heading "*Possession of the premises*". The paragraph contains much other information confirmatory, or at least suggestive, of the appellant's undisturbed possession of the premises until 12 July. Bearing in mind that the second respondent avers that the contract and building operations came to an end on 3 July 2004 it is instructive to consider his response to appellant's account of what seems, on the face of it, to be a logical sequence of events between 7 and 12 July.

[10] The response is contained in paragraph 15 of the second respondent's opposing affidavit in which second respondent avers that he and his family have been "*in physical control*" of the premises since 12 July 2004 and that "*certain other building contractors*" have had access thereto. There then follows a terse denial of the detailed factual account given by the appellant of his control and possession of the premises until 12 July 2004.

[11] The second respondent thus fails to deal, in any detail, with the appellant's version relating to his working on the premises up to and including 7 July. This includes the appellant's posting of a guard between 7 and 9 July, handing over duplicate keys to the second respondent on the latter date for inspection purposes, the alleged telephone conversation and agreement of 9 July between the appellant and the second, the entire events of 12 July when a further confrontation took place on which led to the second agreement, the appellant keeping his tools on the premises till 13 July and his continuing retention of a full set of keys to the dwellings. The second respondent also fails to deal with the appellant's statement that he never intended to give up control over and possession of the premises.

[12] The second respondent's failure to take meaningful issue with these important aspects of the appellant's case amounts, in my view, to a bare denial thereof in circumstances where one could reasonably expect the second respondent to respond in some degree of detail and certainly to go beyond a mere denial. This is, furthermore, not the only example of the respondents' dealing perfunctorily with allegations by the appellant which call for a fuller response. The appellant gives some detail of his dealings with the second respondent on 9 and 12 July. In response the second respondent merely denies them.

[13] This seems to me to be, par excellence, a situation in which a robust approach to the alleged disputes of fact must be adopted. See in this

regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E – 635 C.

[14] The skimpiness of the second respondent's treatment of the appellant's allegations leads me to conclude that no genuine dispute of fact exists which precludes the appellant from relying on the alleged agreement of 9 July. This conclusion is strengthened, furthermore, by the probabilities. If appellant abandoned the site on 3 July why would he post a special guard between 7 and 9 July and, having done so to protect his possession of the premises, then withdraw him on the latter date unless he had not received an assurance that the business relationship had been restored in the manner he alleges? Certainly, the second respondent suggests no other explanation. Why too would the appellant furnish the second respondent with a duplicate set of keys on 9 July or leave his tools on the premises until 13 July? All things considered, I am satisfied that on the papers the appellant is entitled to rely on the agreement of 9 July in the determination of whether he voluntarily gave up the premises on 12 July.

[15] The second finding where I must respectfully differ from Thring J is whether the appellant can rely on the agreement of 12 July 2005 in asserting his claim to a lien. In this regard Thring J finds, firstly, that it is not necessary to determine the dispute between the parties on their respective interpretations of the agreement and that the appellant's

view thereof may be accepted for the purposes of this case. He goes on to hold, however, that the agreement does not assist the appellant in establishing that he was deprived of his possession by the second respondent through "undue means". His reasons for so holding are, firstly, the insufficiency of factual material to support the appellant's argument that second respondent was intent upon hoodwinking him. Secondly, Thring J expresses the view that the crucial date for determining the second respondent's state of mind i.e. as to whether he in fact sought to deceive the appellant, was 12 July. In this regard he reasons further that, whilst a case may be made for a breach of the agreement when second respondent moved back into the dwelling in August, there is no evidence that the second respondent harboured an intention to deceive when he entered into the agreement on 12 July.

[16] I must respectfully disagree with this approach which tends, in my view, to treat the critical events over the relevant period as disparate and unconnected. Nor can I see why, if a party engineers the removal of a builder from premises over which he has a lien on the strength of an undertaking to recognise such lien and then some time later decides to renege on such agreement, the dislocation in time between these two events renders the party in breach immune to a spoliation application or restoration of the lien. In my view the crucial time is when the offending party's breach or *mala fide* action is made manifest to the lien holder. Adopting the approach which I favour allows, in my view, a more realistic appraisal of the parties' actions and a more equitable

treatment of their legal consequences. It does, however, also make it necessary to determine the dispute as to the meaning of the agreement incorporated in the letter from the appellant's attorney to respondent's attorney which is set out on pages 5 and 6 of Thring J's judgment. Although not perhaps a model of clarity, the core of the agreement was clearly that the respondents would recognise any lien which the appellant had in return for the appellant not continuing to assert his physical control over the premises by either affixing notices to the windows or by contesting the presence of other contractors on site.

[17] The respondent's attorney did not take issue with the terms of the agreement upon receipt of the relevant letter, merely recording in response thereto that the contents thereof had been "noted". Nor did he take issue with its terms when it was again raised in a letter dated 10 August written by appellant's attorney immediately after respondent's occupation of the premises. Instead, tellingly, the respondents' attorney, after stating that spoliation proceedings would be opposed, stated as follows:

> "*You will no doubt appreciate that the fact of giving up physical possession despite a reservation of rights may well create fatal difficulties for your client in seeking to give effect to a builder's lien.*"

This statement, if it does not amount to an admission that the appellant gave up physical possession on 12 July on the terms and in the

circumstances described by the appellant's attorney in the correspondence, comes perilously close thereto.

[18] It was only in the respondents' opposing affidavit that second respondent's attorney took issue with the terms of the agreement. He offers the following explanation of what was agreed:

> "*The agreement to which Kyriacos refers … must be seen in the context in terms of which it was made and in particular, it was conveyed to Kyriacos at that time, that the reservation of rights made by him for and on behalf of the Applicant, in relation to the lien, was that any alleged lien could only be subject to the Applicant having a valid claim in respect of the alleged monies owing by the First Respondent*.
>
> *3.3.3 I made it clear to Kyriacos that the First Respondent would not use the fact that Applicant's alleged lien over the premises had been lost, as a basis for failing to pay the Applicant for any of the building works performed by him, provided that Applicant's entitlement to payment for the said works in question, was properly proved.*"

[19] Stripped of surplusage, the assertion seems to be that, on behalf of the respondents, their legal representative agreed only not to withhold payment of any monies proved by the appellant to be owing to him by respondents on the ground that the appellant no longer had a lien.

Such a “concession” is of course, meaningless because, irrespective of the existence a lien, the respondents would always be liable to the appellant for what ever claims he could prove against them.

[20] To give any credence to this version of the agreement requires one to accept, firstly, that the respondents’ attorney gave a meaningless undertaking to the appellant’s attorney in return for a very real benefit, namely, the appellant there and then withdrawing from the premises and allowing the respondents’ new contractors to occupy them undisturbed. Furthermore, it envisages the appellant’s attorney accepting this empty undertaking on his client’s behalf and on the strength thereof advising him to withdraw from, and desist from asserting his physical control over, the premises.

[21] In my view, on a robust approach, the improbability of this version of the agreement, coupled with it being raised at so late a stage in the proceedings, must lead to its rejection and can not be seen as raising a genuine dispute of fact. The appellant’s claim for relief must then be determined on an acceptance of his account of the agreements of 9 and 12 July 2005.

[22] There can be no doubt that, at least until the removal of the guard, the appellant exercised full physical control over the premises and could thus assert a builders lien thereover. He withdrew the guard on 9 July, a Friday, after reaching agreement with second respondent that he

would resume building work on the premises on Monday, 12 July. Up to this time the appellant had been in sole occupation and control of the site. Certainly the second respondent does not claim to have set foot on the premises between 3 and 12 July 2004.

[23] Clearly then, as at the Friday, and before removing the guard and parting with a set of keys, the appellant's control over the premises was absolute. In my view these two factors alone i.e. his parting with a set of the keys and removing the guard, unaccompanied by any change of intention on the part of the appellant, were insufficient to deprive him of control of the premises by Monday, 12 July.

[24] According to LAWSA, Second Edition, Volume 2, Part 1, para 487 and Volume 15, First reissue, para 52, it appears settled law that a temporary absence, such as occurs at the end of a working day or over a weekend, does not interrupt a builders lien where the builder or contractor remains engaged in the work and continues to assert his occupation of the site. The case of *Scholtz v Faifer* 1910 TPD is cited as authority in this regard.

[25] This leaves only the appellant parting with a set of keys to the owner as a factor in determining whether by 12 July he had lost control and possession of the dwelling. I find myself in respectful disagreement with Thring J's conclusion, based on the authority of *Shaw v Hendry* 1927 CPD 357 and *Liquidators of Royal Hotel Co v Rutherford* (1906)

16 CTR 179, that in consequence of the appellant's voluntary parting with a set of keys, he lost his *detentio* over the premises and with it his possession thereof. In the first place, the case of *Ploughall (Edms) Bpk v Rae* 1971 (1) 887 (T) offers some authority for the proposition that the mere fact that the owner of a premises has used a duplicate set of keys to take occupation of premises does not in itself mean that the lien holder has lost possession of such premises.

[26] Secondly, the facts in the present matter do not lend themselves to a ready comparison with either of the two above-mentioned cases relied upon by Thring J. It must be accepted that the appellant initially handed over a set of keys to second respondent for a limited purpose, namely inspection, and not to allow other contractors onto the site. Their entry onto the site was effected on 12 July without the appellant's prior knowledge and in breach of the agreement of 9 July between the appellant and second respondent. Absent the further agreement reached on 12 July, it is most likely that the appellant would have continued to assert his *detentio* over the premises, as he in fact sought to do that morning *inter alia* by affixing notices to the windows. It will be recalled furthermore that the terms of the agreement of 12 July deal specifically with the presence of other contractors on site stipulating that their presence would not derogate from the appellant's rights.

[27] In my view where keys to premises are surrendered for a certain purpose but are then used by the receiver for another purpose this

must obviously be a material factor in determining whether *detentio* has been voluntarily lost over such premises.

[28] Thring J does emphasize that his conclusion that appellant lost possession of the premises is based not simply on his surrender of a set of keys to second respondent, but upon the limited basis that after doing so for inspection purposes, he permitted them to be used to allow other contractors onto the premises.

[29] In my respectful view however, this factor can not be held against the appellant. In the first place on the facts I have found these contractors were engaged by the second respondent in breach of the agreement of 9 July and without the appellant's prior knowledge. Secondly, the appellant did not acquiesce in their presence but continued to assert his control over the premises leading to the confrontation with second respondent over the notices. He only accepted their presence when he received second respondent's undertaking that his would not constitute a waiver of his lien. In my view the respondents' failure to honour the agreement rendered the stratagem by which the appellant was prevailed upon to give up his possession of and control over the premises, "undue means", irrespective of whether this was the respondents' intention as at 12 July or not.

[30] In any event there are, in my view, sufficient grounds to find that by at least 12 July, the second respondent had conceived his plan to effect

the appellants withdrawal from the premises by whatever means. By that day the second respondent had already secured the presence of other contractors on site. In the absence of any explanation from the second respondent it is most unlikely that he arranged and procured alternative contractors in a period of three days including the weekend. On the probabilities it follows then that even as late as 9 July the second respondent deliberately misled the appellant into believing that he could resume work on 12 July. The second respondent's breach of the agreement of 9 July followed by that of 12 July, strongly suggests that his over-riding priority was to rid himself of the appellant's presence from his premises.

[31] In any event, whether second respondent had already formulated his intention on 12 July to deceive the appellant or whether this crystallized sometime later before his occupation of the premises in early August is, to my mind, immaterial in the circumstances of this matter. Even if one assumes in favour of second respondent that as at 12 July he intended to honour the agreement reached that day, and only later decided to deny and dishonour the agreement, I see no reason why this factor sanitizes his conduct or removes it from the broadly defined category of "undue means"; its effect upon the lien holder was exactly the same save that it was delayed. What is important is when the second respondent first manifested to the appellant his true intentions and whether appellant thereupon acted promptly in asserting his rights.

[32] It must be accepted, as was stated by Quenet J in *Assurity (Pvt.) Ltd v Truck Sales (Pvt.) Ltd* 1960 (2) SA 686 (SR) at 689H – 690A, that "*where fraud, force or undue means are employed the lien holder's loss of possession will not prevent him from suing for restitutio in integrum, and that is so because although the detention has been lost the right of retention was not voluntarily surrendered*".

[33] The appellant in this matter was at all times astute to protect his rights and never resorted to self help. When he first became aware of the invasion of his rights he turned to court with a spoliation application. Nothing more, could, in my view be reasonably expected of him.

[34] I conclude then that the appellant did not give up possession of the premises voluntarily, instead he was deprived thereof by "undue means" on the part of the respondents. It follows that second respondent's occupation of the premises in August 2004 amounted, in the circumstances, to a spoliation.

[35] For these reasons I would uphold the appeal with costs and set aside the order of the court *a quo*. In its place I would substitute the following:

> "*A final order is granted in terms of prayers 2.1, 2.2 and 2.4 of the Notice of Motion.*"

LJ BOZALEK, J