

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

28/11/11

CASE NO: 23518/11

In the matter between:

PIPE JACK GAUTENG (PROPRIETARY) LIMITED

Applicant

and

JVZ CONSTRUCTION CC

Respondent

J U D G M E N T

Weinkove A.J.

1. This matter came before me as a matter of urgency in the Motion Court. It is opposed and Opposing Affidavits and Heads of Argument on behalf of Applicant have been filed.
2. It would appear that Respondent has contracted with the Drakenstein Municipality to execute certain construction works for a bulk sewer to be constructed in Southern Paarl in the Western Cape.
3. Applicant gave a quotation for part of these works (described in these papers as "pipe jacking works") and succeeded in securing a contract with Respondent to execute certain pipe jacking works in accordance with rates set out in a quotation which was accepted by Respondent. Payment in respect of the works had to be made 30 days after the end of the month

within which the works were executed. Applicant claims that it carried out its obligations and "practically" completed the pipe jacking works. Invoices were duly submitted but Applicant alleges certain of these invoices were not paid. It claims that Respondent is indebted to it in the sum of R884 675.22 (inclusive of VAT).

4. On 8 November 2011 Applicant gave notice to Respondent that it would retain possession of the "pipe jacking works" until payment of the outstanding amount had been made.
5. On 14 November 2011, Applicant informed Respondent that it was retaining possession of the pipe jacking works. On that date, an altercation ensued between Applicant's Project Manager and certain other people at the building site. Initially, Applicant's Project Manager prevented Respondent's representative from entering the pipe jacking works and was successful in this respect.
6. On 15 November 2011, Respondent's representative again requested Applicant's Project Manager to allow access to the "box jacking pit". This is a pit that had been dug into the ground in accordance with specifically designed structural engineering drawings and furnished access to underground pipeworks which could be accessed from this pit.
7. On 16 November 2011, Respondent's staff again tried to enter the box jacking pit of the pipe jacking works and Applicant's Project Manager

informed them that Applicant was continuing to exercise its lien and would not allow them to enter the box jacking pit.

8. On 17 November 2011, armed members of the security staff employed by Respondent ordered and forced the Project Manager to vacate the pipe jacking works. He has not since been allowed back onto the pipe jacking works despite repeated further attempts.
9. Applicant alleges that Respondent has begun the process of dismantling or otherwise altering the pipe jacking pit without any structural engineer's approval. Applicant claims that Respondent is also allowing workers to enter the confined space of the pipe jacking pit despite the fact that they are not properly trained or wearing gas detectors as required by relevant legislation.
10. Applicant accordingly seeks an Order that it be restored to possession of the pipe jacking pit and the 75 metres of jacket pipeline apparently which emanates from this pit. Applicant also asks that the Sheriff of the Court restore it to possession of the site described above and that Respondent be ordered to pay the costs of this application.
11. Respondent's defences are as follows:

6.1 that this matter is not urgent.

I find that Applicant has established urgency in this matter;

6.2 **that the owner of the property has not been joined in the application and that such lack of joinder is fatal to the present application.**

I have considered the authorities on this aspect of the matter and I am satisfied that Applicant has established that it had exclusive possession of that section of the property which was necessary to enable it to perform its works. That access was given by the main contractor in terms of an agreement with the owner of the property. I find that it would be unnecessary to join the owner of the property in an application of this nature because possession of the site had already been given to the contractor and possession of that section of the property necessary to construct the jack piping pit was given to Applicant and the owner would have no right to interfere with the exercise by Applicant of its lien over that section of the works;

6.3 **Respondent claims that it was not a party to the spoliation complained of by Applicant.**

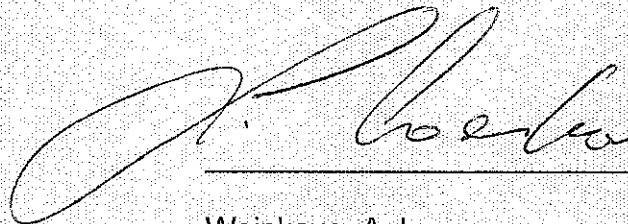
I find that using armed security guards to eject Applicant from the site constitutes a spoliation;

6.4 **Respondent contends that granting an Order such as is being sought in this matter would be a *brutum fulmen*.**

It seems to me that the area of the site is sufficiently described in these papers as being the pit that was dug in order to enable Applicant's workmen to insert the pipes in the underground area

and zone of the sewerage works. Clearly Applicant and Respondent know exactly what area of the building site is referred to and it is that area of the building site in respect of which Applicant has a lien. There should be no difficulty in giving effect to the Court's Order.

7. In the result there will be an Order in terms of prayers 1, 2, 4 and 5 of the Notice of Motion.

A handwritten signature in cursive script, appearing to read 'A. J. Weinkove', is written over a horizontal line.

Weinkove, A.J.