IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 5335/2015

In the matter between:

TOP ASSIST 24 (PTY) LIMITED
T/a FORM WORK CONSTRUCTION Applicant
(Registration No: 2006/037960/07)

And

GEORGE CREMER First Respondent

RENATE CREMER Second Respondent

JUDGMENT DELIVERED ON 28 JULY 2015

BOQWANA, J

Introduction

[1] The applicant brought an application on an urgent basis for a spoliation order directing the respondents to forthwith:

1.1 restore peaceful and undisturbed control and possession of the immovable property described as Erf 1494, Somerset West and

situated at 5 Aries Street, Croydon Vineyard Estate, Somerset West ('the premises') to applicant; and

1.2 handover all the keys to the premises in the respondents' possession to the applicant's duly authorised representative, Mr Philippus Rudolfus Wiese ('Wiese');

1.3 that, in the event that the Respondents fail to comply with the relief sought above, the sheriff with the assistance of the members of the South African Police Service, if necessary, be authorised to assist the applicant and Mr Wiese to give effect to the provisions of paragraph 2;

1.4 that the Respondents and/or any other third party employed by them, be interdicted and restrained from accessing the premises without the applicant's consent, which consent shall not be withheld unreasonably.

[2] The respondents opposed the application. During the course of the proceedings the applicant abandoned the second relief regarding the handing over of the keys referred to in paragraphs 1.2 and the relief in paragraph 1.4 above and submitted an amended notice of motion in that regard. It further amended the relief in paragraph 1.1 by deleting 'control' and correcting the Erf number as 1496. The relief that is essentially being sought after the effecting of the amendments aforementioned is the restoration of peaceful and undisturbed possession of the immovable property. The immovable property is referred to as 'the premises' in the founding affidavit. It will become apparent later in the judgment why it was important for me to highlight the amendments made in the relief.

[3] This application was preceded by an application to strike out certain paragraphs of the opposing affidavit and in particular paragraphs 7.14, 7.15, 7.17.1, 7.17.2.3 as well as annexure AA5 and paragraph 22.4 on the basis that the said paragraphs referred to what transpired during a meeting that took place on a

without prejudice basis when the parties were attempting to settle the dispute between themselves.

[4] According to the respondents the relevant paragraphs are not without prejudice because they merely set out the agreement culminating from the discussions held without prejudice and in law it is perfectly acceptable to refer to them. It is the respondents' argument that it is entitled to set out what the parties agreed to after the negotiations. I deal with this issue later in the judgment.

Factual Background

[5] On 10 June 2014 at the Croydon Vineyard Estate, Somerset West, the applicant and the respondents concluded a house building and small contracts agreement ('the agreement') in terms of which the applicant was appointed by the respondents to build a new dwelling on the premises. The respondents are married and are both retired. Wiese is the applicant's sole director.

[6] Possession of the premises was given to the applicant in and during June 2014 in terms of clause 6.2 of the agreement. Clause 6.2 states that:

> 'Possession of the site shall be given to the Contractor on the date recorded in the Schedule who shall thereupon within a reasonable time begin the Works and regularly and diligently proceed with and bring the Works to practical completion by the date recorded in the Schedule subject to any extension of time granted by the Employer in terms of 8.2 hereof and subject to the provision that the Contractor shall not be obliged to begin the works until:....'

[7] In terms of clause 9.1 of the agreement the applicant shall notify the respondents when the works are substantially complete, where after the respondents shall within 5 working days inspect the works together with the applicant and provide the applicant with a single, comprehensive list of any work still to be completed and/or defects to be remedied ('the snag list'). The Works shall have reached practical completion as soon as the work indicated on the snag list has been completed by the applicant and inspected and accepted by the respondents, or when the respondents take occupation of the Works, whichever

happens first, as stated in clause 9.2 of the agreement. The Works are described as the ‘new dwelling’ in the schedule to the agreement.

[8] The contract was valued at the sum of R2 734 068.24. When the agreement was entered into the parties indicated that the intended date of practical completion would be 31 March 2015.

[9] On 13 February 2015, which was prior to the intended date of completion, the respondents provided the applicant with a document which was prepared by a building consultant Jonathan Mitchell (‘Mitchell’) in which they listed items which they deemed were still to be completed and/or defects which were to be remedied. According to the respondents this document was their first inspection report. According to the applicant, it had not yet at that stage given notice to the respondents in terms of clause 9.1 of the agreement that the Works had been substantially completed.

[10] Wiese who deposed to the founding affidavit on behalf of the applicant alleged that he explained to the respondents that this list was premature but they simply ignored his explanation. He formed a view that the respondents deliberately created a dispute about the building work in an attempt to resile from the agreement.

[11] According to the respondents during the initial period the construction of the building work was executed in a satisfactory manner but as from October 2014, they observed a lack of qualified supervision, a marked slowdown in the execution of the work, mistakes and compromises in the quality of the work and materials. Sub-contractors also started complaining that they were not receiving full payment for their work. They formed a view that the applicant was going through financial difficulties. It became increasingly difficult to communicate with Wiese who was almost never at the building site. The respondents contracted Mitchell who is an independent building consultant and construction dispute practitioner to prepare a report which he submitted on 11 February 2015. This report, the respondents term as the first inspection report. This report, according to the respondents,

demonstrated a considerable amount of deficiencies in the contract works and came to the conclusion that 76.1% of the work had been completed. The first respondent furnished this report to Wiese on 13 February 2015 for him to read carefully and remedy the issues raised. A meeting was held on a without prejudice basis on 26 February 2015. It appears that certain undertakings were made in that meeting. It is the undertakings that transpired at this meeting that the applicant submits should not have been disclosed in the opposing affidavit. The respondents allege that the applicant did not honour those undertakings.

[12] On 3 March 2015, the respondents sent a letter *via* their attorneys to the applicant's attorneys, calling upon the applicant to, *inter alia*, remedy the breaches. The said breaches included the applicant's failure to furnish of the performance guarantee to the respondents in a form acceptable to them in the amount of 10% of contract sum; effecting of contract work insurances in the joint names of the applicant and the respondents; failure to execute and complete the work to the satisfaction of the respondents; failure to proceed with the contract work with reasonable diligence.

[13] On 4 March 2015, the applicant's attorneys responded to the respondents' allegations as being untruthful. Various correspondences were exchanged between the attorneys, until on 16 March 2015 when the respondents' attorneys sent a letter dated 14 March 2015 to the applicant's attorneys, giving notice of cancellation of the agreement. On 17 March 2015, the applicant's attorneys addressed a letter to the respondents' attorneys stating that the 'purported cancellation of the agreement is unfounded and not accepted by the applicant.' It further reserved its rights in that regard. At the end of the letter the following is recorded, 'We once again confirm that our client is in possession of the premises and will continue to exercise its builder's lien at all times.'

[14] On 18 March 2015, the applicant's attorneys sent a further letter to the respondents' attorneys stating the following:

'It was brought to our attention that your clients, without our client's knowledge and consent, took possession of the keys to the premises yesterday afternoon. By doing so they unlawfully disturbed our client's peaceful and undisturbed control of the site and their conduct is a serious violation of our client's builder's lien.

In the event that your clients fail to return the keys to our client on or before 12h00 today, alternatively provide security for the outstanding account to our client's satisfaction by paying the monies into our trust account, we have been instructed to bring an urgent spoliation application, the costs of which will be for your clients' account.'('Own emphasis')

[15] On the same date the respondents' attorneys dispatched a letter in response to the applicant's attorneys denying that their clients took possession of the keys to the premises without the applicant's knowledge and consent. The letter went on to state the following:

'2. The correct status is as follows:

2.1 Our clients, for some time now, have had keys to the premises (this happened with the full knowledge and consent of your client);

2.2 Certain additional keys have at all relevant times been in the control of an employee of your client;

2.3 Since the notice of cancellation your client has started vacating the site. In light thereof our clients requested your client's employee (who is obviously aware of the relevant facts and circumstances and duly authorised by your client) to hand over certain additional keys, which he did. We emphasise that our clients did not exercise any force or stealth.

3. Our clients do not accept that the document entitled "DETAILED ACTIVITY REPORT: 10 MARCH 2015' is a document in compliance with sub-clause 11.1 of the agreement.

4. Our clients have employed Jonathan Mitchell to prepare a reasonable estimate of the value of the work duly executed (which shall include any materials properly required for the works and delivered to the site). Mr Mitchell will conduct an inspection of the site tomorrow and as soon as we have his report we will be in a position to address the report of your client described hereinbefore.

5. Please advise your client that the current skirmish regarding the alleged lien of your client is cynical having regard to the following facts and circumstances:

5.1 The property is unencumbered;

5.2 Our clients clearly have the means to pay any amount validly due to your client;

5.3 In the event a reasonable value of the work executed by your client up to the date of cancellation (including any materials delivered to site - still on the site) exceeds the amount paid by our clients to your client, we will recommend to our clients that the difference be guaranteed. Any other games will merely escalate the claim in damages to which your client will be exposed in due course.'

Spoliation claims

The issue of the keys

[16] The applicant alleges that on Monday 16 March 2015, the first respondent approached one Charles Martinus ('Martinus'), a general worker employed by the applicant who was in charge of cleaning the premises and who had control over the keys to the premises during the day. The first respondent allegedly indicated to Martinus that the applicant had no need to enter the premises through the sliding doors in the main bedroom and the extra bedroom and demanded that Martinus handed over the keys to these doors to him, which Martinus then did.

[17] During the morning of 17 March 2015 Christo Niemand ('Niemand'), the applicant's site manager, arrived on the premises and ensured that the applicant's workers continued with their duties. At some stage he temporarily left the premises and attended at the applicant's office to fetch material which the workers required for work to the roof of the premises. Whilst Niemand was absent the first respondent approached Martinus again and requested he hand over all the applicant's remaining keys to the premises to him. Martinus refused and only handed the keys to the outside (sliding door in the dining room and the outside sliding door of the lounge) to the first respondent. The first respondent then told Martinus that he was not going to hand the keys back as the respondents were taking occupation of the premises in a week's time. Neither Wiese nor Niemand

were aware of the fact that Martinus handed the keys to the first respondent. Later on that afternoon the first respondent handed the applicant's key tags to Niemand. It then only became evident to Niemand that the first respondent, but for two keys through which access to the premises could be obtained which was still in the possession of Martinus, had removed the applicant's keys, where after he removed the tags from the keys and took the keys with him.

[18] On the morning of 18 March 2015 the first respondent again approached Martinus and demanded that he hand over to him the remaining keys and that were still in the applicant's possession but Martinus refused to do so. The parties' respective attorneys exchanged correspondence which I have already referred to regarding the issue of the keys.

[19] The respondents deny that by taking the keys to the premises they unlawfully disturbed the applicant's possession and all control of the premises. They allege that they had had keys to enter premises. They further confirmed that the applicant was still in possession of certain keys to the structure upon the property. The respondents allege that the applicant started vacating the premises and by the time it is alleged that the first respondent took the keys, the applicant had already started to remove equipment, certain cast iron grids and a generator.

[20] It became apparent during the hearing that the applicant could not sustain its claim on the issue of the keys. It was argued by Mr Kulenkampff, who appeared for the respondents, that the applicant could not be awarded in spoliation proceedings 'more than it had' prior to the alleged spoliation. It was accepted by both parties that the respondents had keys to the premises and had access. Furthermore, not all the keys were taken by the first respondent from the employee of the applicant. Mr Heunis, who appeared for the applicant, submitted that the issue of the keys is incidental to the main application but it is not what the application is about. The relief sought for the handing over of all keys to the premises to the applicant was abandoned; so too the relief seeking that the respondents and/or other third party employed by them be interdicted and

restrained from accessing the premises without the applicant's consent. It became common cause that the parties had joint possession of the property. Mr Kulenkampff raised other arguments in relation to the dilemma created by the applicant's claims that it was 'spoliated' already by 17March 2015, as appears from their attorney's letter of 18 March 2015. Before I deal with this issue, I continue to set out what the applicant regards as the crux of its spoliation case, which is what transpired on 19 March 2015.

The events of 19 March 2015

Applicant's version

[21] The applicant alleges that during the afternoon of 19 March 2015, the first respondent arrived on the premises and proceeded to forcefully and unlawfully remove the applicant's building equipment and material, which was stored in the garage on the premises and instructed the applicant's workers, who were attending the premises, to discontinue with their work and to take their equipment and material with them.

[22] On the instructions of the first respondent, the security staff of the Estate on which the premises are located arrived at the premises and ordered the applicant's workers to leave the premises. The first respondent then proceeded to put up a notice stating: *'Phillip Wiese not allowed on Erf 1496 as per attorneys letter on file with immediate effect'*. The applicant further alleges that its equipment which was used for the building work was locked in the garage located on the premises until 19 March 2015, when the first respondent forcefully removed the equipment.

[23] The applicant submits that the allegations regarding the cancellation of the agreement are irrelevant and they do not detract from the applicant's right to its builder's lien and/or its rights to be in peaceful and undisturbed possession of the premises. It alleges that the issue of the cancellation of the agreement would be the subject of the arbitration proceedings which were to be instituted in due course.

[24] It submits that it was at all relevant times in peaceful and undisturbed joint possession and control of the premises. Up until the spoliation on 19 March 2015, its employees and sub-contractors were in possession and control of the premises. The applicant denies that it started to vacate the site as alleged by the respondents.

[25] It alleges that the applicant was unlawfully and forcefully removed from the premises on 19 March 2015 and accordingly unlawfully dispossessed thereof. According to the applicant the respondents were at all relevant terms aware of the fact the applicant had exercised its builder's lien over the premises. The applicant alleges that the respondents have failed and/or refused to provide the applicant with adequate security in respect of the amount due to it, despite the respondents' attorneys indication that he 'will recommend (his) client guarantee' this amount.

Respondents' version

[26] The respondents deny the applicant's version of events regarding what happened on 19 March 2015. They deny that they 'forcefully and unlawfully' removed building equipment and material from the store. The first respondent alleges that he had the key to the store and removed a few rolls of insulation material and some equipment (as far as he could recollect paintbrushes, etc.) from the store. He emphasises that he placed the said items in front of the store of the property.

[27] The first respondent admits that he informed Niemand that because of the cancellation of the contract he wanted them to vacate the property. He also asked them to load the equipment and materials. He denies that he acted forcefully or unlawfully. He alleges that he is an elderly retired person and thus did not have the ability to exert any form of force *vis avis* the work force of the applicant.

[28] The respondents allege that upon cancellation of the building contract the first respondent gave the Home Owners Association a copy of the letter addressed by the respondents' attorney to the applicant's attorney. According to the respondents, the Home Owners Association exercises an element of control over

builders upon their estate and quite obviously so controls the security upon the estate. As such it has an interest in the status of building contracts on the estate.

[29] The respondents admit that one Denver Michaels ('Michaels') came to the premises and spoke to Niemand. The first respondent alleges that he was not directly privy to the discussion but he could observe that the discussion was friendly and cordial, to the extent that Niemand gave Michaels a good-natured slap on the shoulder after they had spoken. According to him, this would obviously not have happened if there was any form of aggression and/or in circumstances in which Michaels had forced Niemand to do something contrary to his will. Subsequent thereto Niemand loaded some of the building materials, equipment and a painter onto his vehicle and disappeared. He re-appeared about an hour later to load further equipment and one remaining person, being Martinus junior.

[30] The first respondent alleges further that at some stage during the afternoon, another vehicle came and collected a portable toilet on the building site. He assumed that it was linked to the entity that owned the portable toilet and that it was instructed to collect the portable toilet by the applicant. According to the respondents this demonstrated that the applicant voluntarily vacated the property that afternoon.

[31] The respondents deny that they or anyone acting on their behalf, on the date in question or ever, put up a notice as alleged by the applicant stating that Wiese was not allowed on the premises. The first respondent emphasized that the handwriting on such notice was not his handwriting neither was it the handwriting of the second respondent. He further alleges that the roofing contractors had left before the arrival of Michaels.

[32] The respondents have attached an affidavit from Michaels in support of their case. Michaels states that he is linked to the security at Croydon Vineyard Estate and was on duty on 19 March 2015. On the said date he attended at 5 Aries Street, Croydon Vineyard Estate (Erf 1496). He had been advised (by the Home Owners Association) that the building contract between the applicant and the respondents

in this matter had been cancelled. Upon arrival at the building site he spoke to Niemand. He advised Niemand that he had been informed that the building contract between the applicant and the respondents had been cancelled and requested Niemand and his workmen, for the sake of good order, to leave the building site. Michaels alleges that he wished to emphasize that the discussion between Niemand and himself was a friendly one (and not visited by any threats and/or a threatening attitude). Niemand agreed and undertook to vacate the building site which he then in fact did. To demonstrate the good nature of the discussion and the absence of any threat or order, Niemand, after he requested him to leave the site, gave Michaels a good-natured slap on the shoulder.

Discussion

Legal Principles

[33] It is established that the Court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place. It merely enquires whether there has been spoliation or not, and if there has been, it restores the *status quo*.[1] In the judgment of **Van Rhynand Others NNO v Fleurbaix Farm (Pty) Ltd**[2] the Court held that:

> '[7] The *mandament van spolie* is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the *status quo ante*, irrespective of the merits of any underlying contest concerning entitlement to possession of the object or right in issue; peaceful and undisturbed possession of the thing concerned and the unlawful despoilment thereof are all that an applicant from a *mandament van spolie* has to show. (Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust the possessor). The underlying principle is expressed in the maximum '*spoliatus ante omnia restituendus est".* The fundamental purpose of the remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help. It is available both in respect of the disposition of corporeal property and incorporeal property. In the case of incorporeal property it is the possession of the right concerned that is affected – a concept

[1]Rosenbuch v Rosenbuch and Another 1975 (1) SA 181 (W) at 183 A-B.
[2]2013 (5) SA 521 (WCC) at 524G to 525B.

> described as "quasi-possession" to distinguish it from physical possession. The manifestation of the dispossession of the right in such a case will always entail the taking away of an exteriorly demonstrable incidence, such as a use, arising from or bound up in the right concerned."

[34] It has been held that a spoliation order is a final determination of the immediate right to possession; it is the last word on the restoration of possession *ante omnia*.[3] In the judgment of **Malan and Another v Green Valley Farm Portion 7 Holt Hill 434 CC and Others**[4] the Court found that the spoliation order as a final order will ordinarily have 3 important results: firstly, it is not sufficient for the applicant merely to show a *prima facie* case; he must prove his case on a balance of probabilities as in any other civil case; secondly, it is an order having an effect of a judgment; and thirdly, an order for costs should be made.[5] The Court in **Malan** went on to say that*: 'the spoliation is an extra-ordinary remedy in that once the applicant has discharged the onus resting upon him and no recognised defence has been raised successfully, the Court has no discretion to refuse the ground of a spoliation order on the ground of considerations relating to the merits of the dispute between the parties.* '[6]

[35] In order to obtain a spoliation order the applicant must prove that it was in possession of the property and that the respondent deprived it of the possession forcibly or wrongfully against its consent.[7] The possession need not have been exclusive possession. A spoliation claim will lie at the suit of a person that holds jointly with others. In the decision of **Beetge v Drenka Investments (Isando) (Pty) Ltd**[8] the Court held that:

> 'It has been said that a builder who merely does repairs to a house has no lien. That is so because ordinarily the owner retains possession and permits the workman to enter to effect the repairs. The workman is in no sense in possession and has no *animus possidendi.* But if an owner were to vacate his house for extensive repairs and give

[3]Mankowitz v Loewenthal 1982 (3) 758 (AD) at 767 F-G.
[4]2007 (5) SA 114 (ECD)
[5]Malan v Green Valley Farm Portion 7 HoltHill 434 CC supra at para 25; See also Erasmus Superior Court Practice at E9-4.
[6]Malan v Green Valley Farm Portion 7 HoltHill 434 CC supra at para 25
[7]Erasmus Superior Court Practice at E9 – p5-6.
[8]1964 (4) SA 62 (WLD) at 68H-69A.

> full possession to the contractor, I see no reason why the contractor should not acquire a lien. The fact that the contractor is thereby put into the position of holding more than his own construction does not to my mind affect the issue. When a mechanic takes possession of a motor vehicle to effect repairs he has a lien on the whole car although the cost of his repairs may be small in relation to the value of the whole car. Likewise a bookkeeper retains all the books although his work on the books may be only a small proportion of the total entries made in the books.'

[36] Deprivation of possession is the second requisite for the granting of a spoliation order. Spoliation takes place if the applicant is deprived by the action of the respondent of control over the property in question.[9] Force or stealth in the deprivation of possession which has been suffered by the applicant need not be shown in order to obtain a spoliation order. In the much celebrated judgment of **Nino Bonino v de Lange**[10] the Court stressed that violence or even fraud is not an essential element in the definition of spoliation. Any wrongful deprivation - including by force or by stealth – suffices.

[37] In the judgment of **Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services and Others**[11] the Court held: 'that the element of unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal inquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit or theft, <u>but in all cases spoliation is unlawful when the dispossession is without the consent of the person deprived of possession, since consent to the giving up of possession of property, if the consent is genuinely and freely given, negates the unlawfulness of the dispossession.</u> The allegations therefore, that the applicant was in default and in breach of the building contract, that respondents were entitled to cancel the contract and did so, and that respondents were entitled in terms of the contract to

[9] See Erasmus Superior Court Practice at E9-10.
[10] 1906 TS120 at 122.
[11] 1996 (4) SA 231 (C).

demand that applicant vacate the site, do not serve as a defence to the claim for a spoliation order, and do not justify respondents' depriving applicant of possession of the building site without applicant's consent and without proceeding lawfully again applicant for an ejectment order from the site and not by resorting to self-help to obtain possession of the site.'[12]

[38] When an applicant seeks a spoliation order it is not sufficient for him to make out merely a *prima facie* case for the order: he must 'prove the facts necessary to justify a final order – that is, that the things alleged to have been spoliated were in his possession, and that they were removed from his possession forcibly or wrongfully or against his consent.'[13]

[39] Furthermore, when the proceeding are on affidavit the applicant must satisfy the Court on the admitted or undisputed facts, by the same balance of probabilities required in every civil suit, of the facts necessary for his success in the application. The onus of proving the two requisites for the order is on the applicant (or plaintiff). If he fails to discharge such onus, the parties will be left to their remedy by way of action, and a *fortiori* where the evidence supports the respondent.[14]

[40] Mr Kulenkampff argues that the applicant must prove on admitted or undisputed facts firstly that it was in possession of the property at the time of the alleged spoliation and secondly that the respondents and not some third party deprived him of the possession. He argues further that there is a dispute of fact on how the applicant's workforce left the premises. In that regard, he submits, the court must accept the respondents' version unless it can be found to be palpably implausible or untenable or far-fetched which is not the case.

[41] There are a limited number of defences which a respondent can raise in spoliation proceedings and these are: denial; restoration impossible and counter spoliation. The respondent may deny that the act alleged was one of spoliation or claim that it was legally justified. Thus a respondent may raise the defence that the applicant had consented to the removal of the property.[15]

---

[12]Stocks Housing v Department of Education and Culture Services supra at 240 B –D

[13]Erasmus Superior Court Practice at E9-10A.

[14]Erasmus Superior Court Practice at E9-10B-11.

[15] See Erasmus Superior Court Practice at E9-11 to E9-12.

Did the applicant have possession of the premises on 19 March 2015?

[42] In the **Stocks Housing** case the Court said:

> 'A building contractor who enters upon a building site and occupies and takes control of it in terms of his contract in order to carry out the contract work, and remains in occupation for that purpose, has possession of the site which may be protected by a spoliation order. He possesses site in order to secure the benefit of his contract. He should not be deprived of his possession and that benefit by an unlawful dispossession of the site by the owner of the property or anyone else. Applicant obviously was in possession of the site and of the plant, equipment and materials on the site. Respondents' denial raises no real factual or legal issues in this regard.'[16]

[43] It is common cause that the applicant obtained possession of the premises during June 2014 in accordance with the contract. It had its equipment and workforce on the premises where it commenced working. The respondents were dissatisfied with the progress and the quality of workmanship on site which led them to procure the services of an independent building consultant. A dispute ensued which the parties tried to resolve. At least up until 17 or 18 March 2015, there is no issue about the applicant's workmen being on the premises and continuing to work, albeit not to the respondents' satisfaction.

[44] The applicant admitted in its founding affidavit that it held joint ownership of the premises with the respondents. The question of the keys was no longer in issue. Both parties were in agreement that the respondents also possessed keys for the premises, the respondents stored goods there, could open and lock the premises and were on site on a regular basis.

[45] Mr Kulenkampff argued that the letter written by the applicant's attorneys on 18 March 2015 regarding the keys was fatal to the applicant's case because it claimed spoliation had already taken place by 17 March 2015 by virtue of the keys having been taken away from the applicant's employees. The applicant was therefore no longer in possession of the premises on 19 March 2015 and there is no

[16] Stocks Housing v Department of Education and Culture Services supra at 239D-E

allegation that possession was regained before then and accordingly could not rely on spoliation that took place on the said date. Mr Heunis' response to that was that no reference to possession of property was made in that letter. The letter spoke of 'unlawful disturbance of peaceful and undisturbed control' and nowhere does it mention possession.

[46] I am persuaded by Mr Heunis' submission that the letter was about possession of the keys and control of property as opposed to deprivation of possession of property. The letter of 18 March 2015 therefore did not entail deprivation of possession of the premises. I say so not only because of the content of the letter, that deals with the taking away of the keys, but also because of the fact that the applicant still had other keys and could enter the premises as they did on 19 March 2015. This tells us that the applicant did not regard itself as being deprived of possession of property by virtue of the certain keys simply being taken by the first respondent from its employee. The presence of the workforce on the premises working on 19 March 2015 showed that the applicant was still in possession even on that day. The extent of the work that was being carried out and the number of workers on site are in my view irrelevant for the purposes of determining whether the applicant was indeed in possession of the site on that day in question. The first respondent in fact admits that Niemand and other workmen were there on 19 March 2015 and had equipment on the premises and he informed them that by reason of the cancellation of the contract he wanted them to vacate the property and he also asked them to load the equipment and materials. This all occurred on 19 March 2015. The argument that the applicant was not in possession on 19 March 2015 is without merit and must be rejected.

[47] The purpose and the motive for being in possession are also not relevant.[17] Mr Kulenkampff submitted that the applicant was holding onto the property for sinister reasons and that the respondents were not indebted to it. On the contrary they were owed an amount of R167 843.14 which they paid in excess of the value

[17]It has been held that even a thief can be in possession. In this regard see*Yeko v Qana*1973 (4) SA 735 (A) at 739D-G

of the work done by the applicant. This is based on the report compiled by Mitchell on 25 March 2015, 'the second inspection report', following an inspection he carried out on the premises on 19 March 2015. Mr Kulenkampff further argued that the applicant was admittedly in joint possession with the respondents. He therefore was not entitled to a builder's lien as he could only have that upon exclusive possession.

[48] The question of whether or not the applicant owed the respondents money and that the claim that the applicant did not have the lien it alleges it had, are in my view not central to the issue of whether or not the applicant held possession of the property in the circumstances. It has been shown that the applicant was in possession, the purpose of which it alleges was to finish work and it also alleges that it was entitled to a builder's lien. The fact of joint possession does not mean the applicant is not entitled to the relief it seeks. Once again I must stress that the purpose of holding on to the property is not an issue the Court should decide on. To do so would be akin to deciding whether or not the applicant had a right to be in the property which is not an enquiry the Court should enter into. It must also be borne in mind that Mitchell's second inspection report was only issued on 25 March 2015.

Was the applicant deprived of possession?

[49] Mr Heunis submits that the Court should have regard to the **Stocks Housing** judgment as it is on all fours with this present matter. Perhaps it is important to briefly look at the facts of that case and the relevant findings made by the Court therein.

[50] The applicant in that matter brought an urgent application for a spoliation order compelling respondents to restore the applicant's possession of the building site on which a school was being constructed together with the plant and equipment used for the construction. The parties had concluded a building contract where the applicant was appointed after a tender was accepted. The applicant had been given possession of the site. The Department of Education and Culture

Services ('the department') was dissatisfied with the work done by the applicant. A letter was handed to the foreman of the applicant (Mitchell) at the site by two officials of the department shortly after 12 noon in which the first respondent (the chief executive director of the department) terminated the agreement and ordered that the works be discontinued and the site vacated by 1pm. The foreman contacted the applicant's contracts director who instructed him to remain on site and that he would revert to him shortly. The foreman was told by an official from the department that anyone who remained on site would be arrested. The foreman was alarmed at what might happen and telephoned the contracts director again who told him that in the circumstances they should leave. Before he left the site the security guards changed the locks on the gates to the site. After the workmen left, the security guards remained in control of the site and the plant, equipment and materials on the site. The department's official denied in his affidavit that he threatened that anyone remaining on the site after 1pm would be arrested as the foreman alleged. He also said that he had no instructions to remove anyone from the site, or to arrest anyone, or in any way to enforce compliance with the notice to vacate the site. He maintained that he would not involve himself in any force or threats of force.

[51] Mr Kulenkampff submitted that the **Stocks Housing** case is distinguishable from the present one. The first point is that Niemand is a site manager whilst in **Stocks Housing**, Mitchell was a foreman, a position below that of a site manager. Mitchell specifically phoned to obtain instructions upon being ordered to vacate. Secondly, the foreman in that case was told that those persons on site would be arrested if they did not leave; in the present instance, 'a head of security' went to someone and asked him to leave; these two scenarios are not comparable. In this instance, Mr Kulenkampff submits that the security guard requested someone to leave and did not threaten them. He had a friendly conversation which was not visited by threats and at the end was followed by a pat on the shoulder. He further submits that the applicant does not state exactly what words were used to order Niemand to leave whilst Michaels on the other hand gives details about what the

conversation entailed. According to Mr Kulenkampff, the respondents' version must be accepted and it must be deduced from the respondents' version that Niemand was convinced that he should leave and he left voluntarily.

[52] I do not see how the facts in the **Stocks Holdings** decision can be said to be distinguishable to those in this case on the grounds raised by Mr Kulenkampff. It was held in that matter that 'as a matter of the probabilities on the averments of the officials of the department themselves, the court regards with a measure of incredulity the protestations of the officials concerned that they were present at the site merely to assume possession of the site and the plant, equipment and materials on the site from the applicant company and its employees, who readily and freely consented thereto without any threat of force or, indeed, without in any way seeking to enforce or compel compliance with the order given to vacate the site.'[18]

[53] The Court however found that the question whether the applicant consented to the repossession of the site did not turn upon the issue of whether there was a threat of arrest on the site but on whether the company, acting through its authorised officers, and in particular its managing director, accepted the cancellation of the building contract and consented to repossession of the building site by the department.[19] The Court found that:

> 'On the assumption that the applicant's workmen and foremen on the site left when ordered to do so by the officials of the department and did so without any threats being made to them and on the instruction of Mr van der Vyver to Mr Mitchell that in the circumstances they should vacate the site, the question still remains whether the applicant company consented to the repossession of the site. The undisputed facts demonstrate quite clearly that there was no such consent.
>
> There is no allegation on behalf of respondents that the managing director of applicant company or anyone else on its behalf with authority to do so agreed to a handing over of the site. The averments of the managing director that he wished to protest the actions of the officials in repossessing the site, that he could not make contact with Mr

[18] Stocks Housing v Department of Education and Culture Services supra at 238 G-H
[19] Stocks Housing v Department of Education and Culture Services supra at 240 H - I

> Cornelius to do so because Mr Cornelius had absented himself from his office, that he forthwith instructed the applicant's attorneys to protest the repossession of the site, which protest could only be effectively made on the Monday morning after the repossession, whereupon the notice of motion in these proceedings was issued the same day, is wholly inconsistent with the defence that applicant accepted the cancellation of its contract and agreed to cease the contract works and to hand over the site to the department.'[20]

[54] According to the respondents the applicant left voluntarily from the premises. In this regard they submit that it must be found that Niemand was authorised to consent to leave. They further submit that even if it is found that the applicant did not consent, which is denied, Michaels was not their (i.e. the respondents') agent. If spoliation took place, it took place at the behest of Michaels and/or the Home Owners Association.

[55] Michaels does not say who sent him. While he mentions that he was told by the Home Owners Association that the contract between the applicant and respondents had been cancelled, he does not say he was sent by them. What stops him from stating categorically that he was acting on the instructions of the Home Owners Association or that he was sent by them? He merely alleges that he was told that the contract was cancelled and that he requested Niemand and his workmen to leave for the sake of good order. I find it hard to believe that, whilst all this was happening, the first respondent was standing at some distance observing but could not hear the conversation. He did not enquire as to what was going on, in circumstances in which a security guard from nowhere comes to his premises, has a conversation with workmen of the applicant with whom he had had 'a contract' (albeit cancelled) and the next thing they pack up their equipment and go. These are the same individuals whose equipment the first respondent had removed from the store to the outside of the garage and whom he had told that because the contract was cancelled he would like them to vacate the property. They did not vacate at that time. Furthermore, he is the one who gave the Home Owners

[20] At 240I-241E.

Association the letter of cancellation of the contract. He did not tell them that the cancellation was disputed. The only reasonable conclusion to be drawn is that the security guard acted on the respondents' behalf.

[56] I now turn to the issue of whether Michaels requested Niemand and the workmen to leave or ordered them to do so. The meaning of the words that they were requested to leave 'for the sake of good order' uttered by a security officer of the estate is not explained. Be that as it may, deprivation of possession does not turn on such an issue (as was rightly found in the **Stocks Holdings** judgment). It ultimately turns on whether the applicant consented to vacate the premises after having been told to leave, however that may have occurred. The facts of the case do not support the proposition put forward that there was consent for the following reasons: cancellation of the agreement was not accepted by the applicant, and in fact the applicant continued to occupy the premises; Niemand and his workmen were earlier requested by the first respondent to leave but they did not do so; the first respondent removed equipment from the store and placed it in front of the premises and asked them to take their equipment with them which they did not do. Mr Kulenkampff argues that the applicant failed to give details of the conversation between him and Michaels, whereas the respondents have stated exactly what Michaels said to Niemand. I do not find the allegation that the workmen were ordered to leave the premises by the security guard lacking in detail. The applicant's case does not rest on the nature of the conversation; it is the respondents that seek to stress and emphasize the friendliness of the conversation. Michaels on his own version did not say much either; all he said was he had been advised that the contract had been cancelled and he asked the applicant to leave for the sake of good order. It is rather striking that the respondents allege that Michaels was not acting on their behalf, but are so keen to emphasize that the discussion between Niemand and Daniels was friendly and not visited by any threats or threatening attitude. The tapping on the shoulder of Michaels by Niemand is neither here nor there in my view.

[57] It is submitted by Mr Kulenkampff that there are many reasons why the applicant could decide to leave voluntarily and those include the following: the fact that it had financial problems; it had to put up a guarantee and it had to put up insurance; it realised that it had no lien because it did not have exclusive possession and the law required exclusive possession; it owed the respondents an amount of R167 000 and had no claim; it did not want to finish the contract; it did not want possession but security if one has regard to the letter written by its attorneys on 18 March 2015; and it had submitted 'fraudulent invoice' (which is disputed by the applicant) from Reeduwaan Alice ('Alice), reflecting an amount which was double the amount he charged for the roof structure. This proposition is not reconcilable with the actions of the applicant throughout the period of March 2015 and before. It does not make sense that the applicant would resist the cancellation, involve attorneys, exchange correspondence with respondents through attorneys on various disputes, refuse to leave when requested by the first respondent to do so due to the cancellation of contract, only to walk away freely after being requested by the security guard in a friendly manner to leave because the contract was cancelled and for the sake of good order. There was nothing new that Michaels raised in the conversation that would suddenly lead to a change of mind by the applicant. Furthermore, the issue of R167 000 owing only arose after 19 March 2015; that could therefore not have been the cause of the applicant deciding through its workforce to leave. Those issues are in any event in dispute and fall to be determined in future litigation or arbitration. The above submissions implicitly invite the Court to make findings on the rights of the parties to possession of the site in determining if spoliation had occurred, which is legally unsound. I decline the invitation of entering that debate.

[58] I now turn to the question of Niemand's alleged authority to consent to the vacating of the premises on behalf of the applicant. Wiese is said to be the sole director of the applicant. There is no allegation that he or anyone else on his behalf with authority agreed to hand over their possession of the premises. In fact, Wiese was criticised for not being on site often enough, for lack of supervision and for

being hard to contact. I have taken cognisance of Mr Kulenkampff's argument that the applicant characterised Niemand as someone that had authority at one point in its papers. Wiese alleged that neither he nor Niemand was aware that Martinus handed the keys to the first respondent. The impression one should get from this, according to Mr Kulenkampff, is that the two people that keys are to be given to and who are in control of the premises are Wiese and Niemand. He argues further that Niemand is a site manager unlike the foreman in the **Stocks Housing** case. Whilst Niemand may have been in a position of seniority or responsible for managing the site, there are no facts to support the proposition that Niemand was authorised to consent to hand over possession of the premises. I would not like to equate the fact that he managed the site on behalf of the applicant to mean that he also possessed authority to acquiesce or consent to handing over possession of the premises. I therefore find that the respondents effectively took the law into their own hands by seeking to enforce what it considered to be its right which was to dispossess the applicant of the premises pursuant to their cancellation of the contract.

Relief sought

[59] That takes me to the submission that the relief sought by the applicant extended beyond the relief that can be granted in terms of a *mandament van spolie*. Mr Kulenkampff argued that this remains the case even after the notice of motion was amended. He argued that the *mandament van spolie* only restores possession and not control. Furthermore, the applicant was not in peaceful and undisturbed possession of the premises. According to Mr Kulenkampff, this can be gleaned from one of the letters written by the applicant's attorneys dated 11 March 2015 complaining about the respondents' unreasonable conduct in that they interfered with, hindered and/or obstructed the workmen employed by the applicant to such an extent that some subcontractors were unwilling to go back to the site. Relevant authorities show that for a spoliation order to be granted, possession must be

'peaceful and undisturbed'[21]. In the judgment of **Ness and another v Greef, the** Court held that, 'By the words "peaceful and undisturbed" is probably meant sufficiently stable or durable possession for the law to take cognizance of it.'[22] In **Kgosana and another v Otto** where applicants had squatted on the respondent's property without his consent, the court held 'the respondent from the outset, continuously and timeously, took appropriate steps to counter the applicants' illegal conduct. The applicants' occupation did not become peaceful and undisturbed.'[23] Having regard to the relevant case law, I am of the view that the meaning of the words 'peaceful and undisturbed possession' is not as narrow as argued by Mr Kulenkampff. In **Mbangi and Others v Dobsonville City Council** the Court said, 'it would be evidenced (but not necessarily so) by a period of time during which the de facto possession has continued without interference[24].' Interference in a literal sense may occur in joint possession by its nature. Hindrances, obstructions or irritations complained of by the applicant's attorneys did not mean that the applicant did not enjoy 'peaceful and undisturbed' possession in the legal sense or in the sense referred to by the relevant case law. The respondents' alleged unreasonable conduct which seemed to irritate workers on site also did not lead to loss of possession. In this case the applicant has been able to show sufficient level of possession which was continuous until it was deprived of it by the respondents. Parties had joint possession and the granting of a spoliation order would not give the applicants more than they had prior to being deprived.

[60] I am not persuaded that an order be made that the sheriff with the assistance of the police where necessary be authorised to assist to effect this order.

Striking out

[61] In view of my findings on the merits, I do not find it necessary to make a finding on whether or not certain paragraphs of the answering affidavit should be

[21] See Mbangi and Others v Dobsonville City Council 1991 (2) SA 330 (W); Kgosana and another v Otto 1991 (2) SA 113 (W); Ness and Another v Greef 1985 (4) SA 641 (C)

[22] Ness and Another v Greef supra at 647D

[23] Kgosana and another v Otto supra at 116 H

[24] Mbangi and Others v Dobsonville City Council supra at 338A-B

struck out. In any event those are not crucial to the determination of the case before me. They deal with issues of breach and undertakings made, which once again are issues to be considered in the future litigation and cannot be resolved in spoliation proceedings.

Costs and Urgency

[62] On the issue of urgency the applicant submits that an application of this nature is by its very nature urgent and if the matter is not dealt with as a matter of urgency, the applicant shall not be afforded substantial redress.

[63] As regards urgency the respondents admit that a spoliation application enjoys a sense of urgency. They however denied that it enjoyed the degree of urgency specified in the notice of motion. The respondents feel aggrieved that the notice of motion gave them a few hours to prepare and file answering papers notwithstanding the fact that the applicant took 6 days (after 19 March 2015) to deliver its founding papers. They are of the view that the applicant should be visited with costs on an attorney and client scale regardless of the result. I agree that the applicant should have afforded the respondents more time than they did to file answering papers. Whilst the matter was urgent, the urgency thereof did not require a degree of haste such that the respondents are only given a few hours to file their papers. Be that as it may, the applicant's conduct does not call for a cost order on an attorney and client scale nor does it call for departure from the general rule that costs should follow the result.

[64] There are also costs relating to the amendments of the notice of motion, one in respect of which the applicant tendered wasted costs occasioned by such amendment. It is only fair that wasted costs on both amendments be borne by the applicant. Whilst the result favours the applicant, the knee-jerk manner in which it conducted its case, changing its relief as the case went along, must be criticised.

[65] In the circumstances, the following order is made:

1. The respondents are directed to forthwith restore peaceful and undisturbed possession of the immovable property described as Erf 1496,

Somerset West and situated at 5 Aries Street, Croydon Vineyard Estate, Somerset West to the applicant.

2. The respondents must pay the costs of this application, including costs that stood over for later determination, jointly and severally, the one paying the other to be absolved, except for costs occasioned by amendments to the notice of motion.

_____

N P BOQWANA

Judge of the High Court

APPEARANCES

FOR THE APPLICANT: Adv A Heunis

INSTRUCTED BY: Goussard Coetzee & Otto Inc., Somerset West, C/O De Jager De Klerk Attorneys, Cape Town

FOR THE RESPONDENTS: Mr Kulenkampff of Kulenkampff & Associates, Somerset West