REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00090

In the matter between:

REHOBOTH PROPERTIES CC **APPLICANT**

and

THE PERMANENT SECRETARY OF THE NATIONAL PLANNING COMMISSION **FIRST RESPONDENT**

MATHEW GOAGOSEB **SECOND RESPONDENT**

Neutral citation: *Rehoboth Properties CC v The Permanent Secretary of the National Planning Commission* (HC-MD-CIV-MOT-GEN-2017/00090) [2017] NAHCMD 132 (3 May 2017)

Coram: ANGULA DJP
Heard: **22 March 2017**
Delivered: **3 May 2017**

Flynote: Applications and Motions – Spoliation – The applicant must prove on a balance of probabilities that he or she was I peaceful and undisturbed possession of the property; and that he or she was deprived unlawfully of such possession. – Application upheld.

Summary: The applicant was contracted by the first respondent to carry out renovation and construction works on eight separate sites in the Karas Region – A

dispute arose between the parties regarding alleged non-performance by the applicant on the one hand and several alleged breaches such as outstanding payments by the respondents of money owed to the applicant by the respondent on the other hand in respect of work done – The respondents then terminated the contract and took occupation of the sites due to the alleged non-performance – The respondents further alleges that the applicant had abandoned the sites – In an application for a spoliation order, the applicant disputed that it abandoned the sites and furthermore that it was exercising a lien over the sites – The applicant contended that it was in peaceful and undisturbed possession of the sites and that it was unlawfully dispossessed of such possession by the respondents

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ORDER

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1. The applicant's non-compliance with the forms and service provided by the Rules of this court in both applications, to wit Case No.: HC-MD-CIV-MOT-GEN-2017/00090 are hereby condoned and the application is heard as one of urgency.

2. The Respondents are ordered to forthwith restore ante omnia the Applicant's free and undisturbed possession in and to the construction sites at Tierkloof Campsite, Gibeon Traditional Authority Office, Vaalgras Heritage Site, Blaauwes Traditional Authority Office, Tses Tourism Information and Camp Site, Warmbad Traditional Office and Heritage Site, Aroab Hostel, SME Units and Tourism Information Site, Koes SME Units and Camp Site.

3. The Respondents are ordered to forthwith restore ante omnia the Applicant's free and undisturbed possession in and to all the construction material and equipment at Tierkloof Campsite, Gibeon Traditional Authority Office, Vaalgras Heritage Site, Blaauwes Traditional Authority Office, Tses Tourism Information and Camp Site, Warmbad Traditional Office and Heritage Site, Aroab Hostel, SME Units and Tourism Information Site, Koes SME Units and Camp Site.

4. The Respondents pay the costs of this application jointly and severally the one paying the other to be absolved.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is a spoliation application. The applicant seeks orders to be restored into possession of the construction sites which he alleges he has been despoiled by the respondents. The respondents on the other hand contend that the applicant had abandoned the sites.

[2] Accordingly the applicant seeks for orders in the following terms:

> '1. An order condoning Applicant's non-compliance with the Rules of this Honourable Court and hearing this application on an urgent basis as is provided for in Rule 73(3) of the High Court and in particular, but not limited to, condoning the abridgement of time periods and dispensing, as far as may be necessary, with the forms and service provided for in the Rules of this Honourable Court.
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> 2. Ordering the Respondents to forthwith restore ante omnia the Applicant's free and undisturbed possession in and to the construction sites at Tierkloof Campsite, Gibeon Traditional Authority Office, Vaalgras Heritage Site, Blaauwes Traditional Authority Office, Tses Tourism Information and Camp Site, Warmbad Traditional Office and Heritage Site, Aroab Hostel, SME Units and Tourism Information Site, Koes SME Units and Camp Site.
>
> 3. Ordering the Respondents to forthwith restore ante omnia the Applicant's free and undisturbed possession in and to all the construction material and equipment at Tierkloof Campsite, Gibeon Traditional Authority Office, Vaalgras Heritage Site, Blaauwes Traditional Authority Office, Tses Tourism Information

and Camp Site, Warmbad Traditional Office and Heritage Site, Aroab Hostel, SME Units and Tourism Information Site, Koes SME Units and Camp Site.

4. That the Respondents pay the cost of this application jointly and severally the one paying the other to be absolved.

5. Further and alternative relief.'

The parties

[3] The applicant is Rehoboth Properties CC, a Close Corporation registered in terms of the laws of the Republic of Namibia with its principal place of business situated at Rehoboth Republic of Namibia. The first respondent is the Permanent Secretary of the National Planning Commission of Government of Namibia. The second respondent is the Programme Manager for the Namibia-German Initiative Programme.

Issues for consideration

[4] The first issue for consideration in this matter is whether the applicant has made out a case that the matter is urgent; secondly whether the applicant has made out a case that it was in peaceful and undisturbed possession of the eight construction sites situated at various sites in the Karas Region and that it was unlawfully dispossessed of such sites by the respondents.

Background

[5] The dispute in this matter arises from an agreement that was entered into between the applicant and the first respondent for infrastructure development of rural communities at various sites in the Karas Region. The applicant was awarded a tender for construction and renovations situated at eight sites namely, Gibeon, Blaauwes, Warmbad, Tses, Aroab, Koes, Tierkloof and Vaalgras. A written agreement was entered into by the parties on 14 March 2016. Lithon Project Consultants (Pty) Ltd was appointed as principal agent on behalf of the respondents in the implementation of the agreement.

[6] The applicant took possession of the sites on or about 20 April 2016 and commenced with works. The deadline for the completion of the construction works for four of the eight sites, namely, Gibeon, Blaauwes, Warmbad and Tses, was 16 December 2016. On 13 and 14 December 2016. The sites were visited by a representative of Lithon and the Deputy Permanent Secretary of the National Planning Commission (NPC). Work on these four sites was not completed at the time of the visit and as a result thereof, the Permanent Secretary addressed a letter to the applicant on 16 December 2016 in which NPC extended the deadline to 31 January 2017. However, NPC terminated the agreement in respect of the remaining four sites namely, Aroab, Koes, Tierkloof and Vaalgras.

[7] In response to NPC's notice of termination of the agreement, the applicant through its lawyers, in a letter dated 16 February disputed the termination of the agreement. It contended that, this termination was null and void in that the respondents failed to comply with the terms and stipulations of the agreement. The applicant then informed the respondents that it was cancelling the agreement in terms of clause 16 of the contract on account of the numerous material breaches committed by the respondents.

[8] The applicant, further recorded that it will exercise its builder's lien and would not vacate the sites until and unless fully compensated for work performed at all the eight sites thus far. The letter further recorded that no contractor would be allowed to commence work at the sites until the value of the works performed thus far have been determined.

Applicant's case

[9] The applicant's case is that on 3 March 2017, the respondents took the law into their own hands by forcefully removing the applicant's employees from the sites and taking possession of the construction sites, material and the equipment.

[12] The applicant further alleges that it was at all material times in peaceful and undisturbed possession of all eight construction sites and all the material and

equipment stored or stock-piled at the various construction sites. The applicant further alleges that it had employed a number of employees who performed the construction works at the sites. Furthermore that it stored materials and equipment including sand, gravel, cement, bags of cement, concrete mixtures and various loose building tools on the sites. According to the applicant the construction operations were ongoing when the respondents deprived the applicant of its possession of the aforementioned construction sites, material and the equipment.

[13] Finally the applicant states that the matter is urgent given the unlawful conduct of the respondents; that its properties at the various sites are currently exposed to the elements of nature and theft, and finally that the applicant would not be able to do construction works at other sites without its equipment.

The respondents' opposition

[14] Mr Hungamo deposed to the opposing affidavit on behalf of the respondents. With regard to the issue of urgency Mr Hungamo, points out that the applicant failed to provide factual circumstances as to why it avers the matter is urgent and also failed to advance reasons as to why it cannot be afforded substantial redress at the hearing in due course. Furthermore, that the applicant failed to provide any factual basis explaining what had happened between the 3 March 2017 and 14 March 2017 when the application was issued and served on the respondents.

[15] As to the merits Mr Hungamo states that it is common cause that the agreement between the parties has been terminated. According to Mr Hungamo, four of the eight sites are currently in possession of new contractors who are on-site busy completing the projects. In support of this allegation he attached a variation order which he says confirmed the appointment of new contractor on site. He denies that the applicant was in possession of the sites disputes and that the applicant voluntarily vacated sites prior to the alleged spoliation. According to Mr Hungamo he was informed by the various project management committee members of four of the sites, namely, Gibeon, Blaauwes, Warmbad and Tses and who reside at these sites that no employees of the applicant have been present on the sites since end of February 2017. Confirmatory affidavits by the said members of the committee were

filed. Furthermore, he has been informed by Dr Namu Musulwe who is part of the project management team of the Programme and who went to the four sites on 10 March 2017 to introduce the new contractor to the sites and that upon their arrival no employees of the applicant were present on these sites; that the sites were vacant and abandoned by the applicant's employees. A confirmatory affidavit by Dr. Masulwe was filed.

[16] Regarding the four sites of Aroab, Koes, Tierkloof and Vaalgras the agreement was already terminated by the respondents on 16 December 2016 and the sites were handed over to a new contractor on 31 January 2017 and therefore no spoliation could have taken place on 3 March 2017 as alleged by the applicant.

The applicant's reply

[17] On the issue of urgency, the applicant's contention is that a period of seven days from the date the alleged spoliation took place to the date when this application was launched, which is the period between 3 March 2017 and 14 March 2017, is not inordinate. The applicant points out that it needed to make appointment and to consult with its lawyers before the application could be launched.

[18] On the merits, the applicant maintains that it was in possession and control of all sites until 3 March 2017. With regard to the alleged handover of the sites to new contractors, it points out that there are procedures to be followed when a contractor surrenders a site and denies the allegation that the applicant simply walked away from the sites as absurd.

[19] In respect of the other four sites namely, Tses, Gibeon, Blaauwes and Warmbad, the applicant denies that these four sites had already been handed over and that new contractors were appointed at the end of January as the applicant was still in control and possession of all sites until 3 March 2017.

Analysis of the evidence and findings

[20] I will first consider the issue of urgency.

[21] The facts in this matter are almost similar to the facts in the matter of *JJF Investments CC v Helgaardt Mouton* Case No HC-MD-CIV-MOT-GEN 2017/00048 in which I delivered a judgment on 5 April 2017. In that matter the dispute also arose from a contract for the construction and renovation of infrastructures for the rural communities also in Hardap Region but at Hoachanas. That contract was also funded under the Namibia-German Special Initiative Programme and was being implemented by the National Planning Commission. Lithon Projects Consultant similarly acted as the principal agent of the NPC/ GNSIP. The issue was also spoliation. In that matter the issue of urgency was also raised. Similarly it was alleged on behalf of the respondents that the applicant abandoned the sites.

[22] The legal position with regard to spoliation has been stated as follows:

> '[25] … It is generally accepted that an application for spoliation relief is by its very nature urgent. The remedy's main objective is to preserve law and order and to prevent or discourage self-help. It has been held that for the purpose of deciding urgency, the court's approach is that it must be accepted that the applicants' case is a good one and that the respondent has unlawfully infringed upon the applicant's right.'[1]

[23] Similarly,

> '[29] Regarding the alleged delay of one month as contended by the respondents, this approach is based on the so-called 'delay rule', where the respondent calculates each day from which the incident which gave rise to the application being brought, took place, up to the day when the application is launched. Calculating the days which went by, it is then contended that there has been undue delay because so many days went by. It has been pointed out in the matter of *Shetu Trading v The Chair of the Tender Board for Namibia* that there is no such thing as the 'delay rule' in our law as far as urgency is concerned. Based on the objective facts of this matter I am of the view that there has not been culpable remissness on the part of the applicant in launching this application.'[2]

[1] Page 11 of the *JJF Investment* judgment.
[2] Page 13 of the *JJF Investment* judgment.

[24] I agree with the applicant's contention that a period of seven days from the date the alleged spoliation took place to the date, when this application was launched is not inordinate. The applicant has pointed out that it needed to make appointment and to consult with its lawyers before the application could be launched. Apart from the fact that an application for a spoliation order is by its very nature urgent, allowance must be made for steps to be taken by the applicant and his legal practitioner before launching the application. Such steps are logical and are based on common sense. They involve consultation with legal practitioner and considering advice imparted during such consultation; the assembling of the documentary evidence, drafting papers and attending to deposing affidavits and ultimately the issuing and serving of the application. In my view such steps take place without saying.

[25] Based on the facts of this case and taking into account the case law referred to, I am of the view that there has not been culpable remissness on the part of the applicant in launching this application. In my considered view, the applicant has made out a case that the application is urgent. There are no facts before this court to support the respondents allegation that there has been self-created delay by the applicant in launching the application.

[26] Accordingly the point *in limine* is rejected.

The merits considered

[27] It is not in dispute that the applicant took possession of the sites on or about 20 April 2016. It is also not in dispute that the applicant is no longer in possession of the sites. The applicant's case is that it was despoiled of possession of the sites by the respondent's on 3 March 2017. On the other hand the respondents' case is that the applicant voluntarily vacated and abandoned the sites.

[28] The respondents allege four sites (Vaalgras, Aroab, Tierkloof and Koes were already handed over to a new contractor on 31 January 2017. The applicant denies that the four sites had already been handed over to a new contractor and persists that it was in control and possession of the sites until 3 March 2017.

[29] Mr Boonzaier for the respondents, relies on what was held in *Nienaber v Stuckey* 1946 AD 10049 at page 1053, quoting what was said by Bristow J in *Burnham v Neumeyer* (1917 T.P.D 630 at p. 633):

> 'Where the applicant asks for a spoliation order he must make out not only a prima facie case, but 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.'

[30] Mr Boonzaier's contention is that the applicant has failed to place facts before the court to show on a balance of probabilities that it is entitled to the relief claimed. Based on what was held in *Nienabar*, Mr Boonzaier argues that it is not sufficient to merely make out a *prima facie* case in the present circumstances and that the applicant ought to have set out facts in the founding affidavit necessary to justify the order sought. I do not entirely agree with Mr Boonzaier, as it will appear later in this judgment, the facts will show that it is rather the respondents who failed to provide facts to support their allegation that the applicant had voluntarily vacated and abandoned the sites by the time of the alleged spoliation.

[31] Mr Rukoro, for the applicant submits that there is no real dispute of facts as the respondents failed to provide details as to when the applicant abandoned the sites. I agree with Mr Rukoro's submission. The respondents further failed to state when they visited the sites and found sites abandoned. When the applicant omitted to attach the agreement between the applicant and the respondents to its founding affidavit, the respondent were ready to attach the whole agreement to their answering affidavit. In my view, it begs a question why respondents did not attach the new agreement with the new contractor to their answering affidavit. The alternative would have been for the respondents to file an affidavit by the new contractor simply to say I am the new contractor and I am in possession of the sites since whatever the date. Either of those documents would have settled the dispute. Instead the respondents attached what is referred to as a 'variation order'. In was simply attached to the affidavit without any explanation.

[32] Mr Rukoro referred the court to what was said by the court in the matter of *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[3] with regard to the first exception to the *Stellenvalle rule* namely if the court is satisfied as to the inherent credibility of the factual averment by the applicant it may proceed on the basis of the correctness of such averment and include it within the factual matrix upon which it determines whether the applicant is entitled to the final relief.

[33] In my view, a serious and *bona fide* dispute of facts can only exist where the court is satisfied that the party who purports to raise the dispute in his or her affidavit seriously and unambiguously addresses the fact said to be in dispute. The court in the matter of *Wightman* had the following to say at paragraph 13:

> 'Where facts averred are such that the disputing party must necessarily possess knowledge of them and be able, to provide and answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case with a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

[34] I have already mentioned the facts which ought reasonably to be within the knowledge of the respondents which they did not disclose. Instead the respondents simply attached an unexplained document to their affidavit. It has been held that it is impermissible for a party to simply attach a document to an affidavit without explaining to the court the relevancy of such document or to direct the court to the relevant part of such document.

[35] I am satisfied about the credibility of factual allegations by the applicant. I consider my finding in this respect supported by the applicant's legal practitioner's letter of 16 February 2017 in which it was categorically stated that the applicant will exercise its builder's *lien* and will not vacate the sites until and unless it has been fully compensated for the work done. In my view it is highly improbably that the applicant would have caused such letter to be written after it had already vacated the sites at the end of January 2017, as alleged by the respondents.

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[3] *Wightman v Headfour (Pty) Ltd* (66/2007) [2008] ZASCA 6 (10 March 2008).

[36] The applicant states in its replying affidavit with response to the respondents contention that the applicant had abandoned the site, that there are procedures to be followed when a contractor surrenders a site and the suggestion by the respondents that the applicant simply walked away from the site is preposterous. I agree with the applicant's sentiments. In the judgment in the matter of *JJF Investment CC v Mouton* (*supra*). A similar allegation was made by the respondents. The court stated as follows which statement is, in my view, applicable to the facts of the present matter:

'Given such a dispute and having regard to well-known practice in the construction or building industry that a builder will never abandon the construction site until he is paid, I consider it highly improbable that the applicant would have abandoned or vacated the site without the dispute of payment having been resolved.'

[37] With regard to the sites at Tses, Gibeon Blauwes and Warmbad, Mr Hungamo sates that he has been informed by members of the Project Management Committee *"who resides at these specific sites"* that no employees of the applicant have been present on the sites since end of February 2017. Each such member filed a confirmatory affidavit. In respect of Tses a certain Mr Silas Amulunga filed a confirmatory affidavit. He simply stated that he is *"residing at Tses*". He did not say he resides at the site as alleged by Mr Hungamo. According to the applicant the construction and renovation works at Tses were in respect of the Tourism Information and Campsite. Mr Amulunga did not say that he was residing at Tses's Tourism Information and Campsite. In respect of Warmbad a certain Mr Daniel Kalopa deposed to a confirmatory affidavit. He simply stated that he is "*residing at Warmbad*". He did not say he resides at the site as alleged by Mr Hungamo. According to the applicant the renovations and construction works at Warmbad were at the Traditional Office and the Heritage Sites. Mr Kalope did not say that he was residing at either of those two sites. In respect of Blaauwes a certain Mr Aloysius Boys deposed to a confirmatory affidavit. He stated that he "*is residing at Vaalgras*". He did not say he was residing at Blaauwes site. According to the applicant the construction and renovation works in respect of Blaauwes, were placed at Blaauwes Traditional Authority Office. Mr Boys did not state that he is residing at Blaauwes Traditional Authority Office site. Mr Boys did also not state that he was residing at the Vaalgras site. According to the applicant the construction and renovation work at Vaalgras was in respect of Vaalgras Heritage site. In respect of Gibeon a certain Mr

Piet Basson deposed to a confirmatory affidavit. He stated that he is *"residing at Gibeon*". He did not say he was residing at Gibeon site. It is not disputed that the construction and renovation work in respect of Gibeon were at Gibeon Traditional Authority Office.

[38] Having regard to what I have said in the preceding paragraphs, it is in my view incorrect, as alleged by Mr Hungamo, that the members of the Management Committee were residing *"at these specific sites*". In my view the fact that those members reside in the town or villages were the construction sites are situated does not mean that they are residing at the sites. My view is therefore that Mr Hungamo's version in this respect amounts to uncorroborated hearsay.

[39] Furthermore the members of the Committee failed to state exactly when or at the very least minimum, when the applicant's employees in each town or village in which such member construction site is situated abandoned such site.

[40] To my mind it is not helpful for the members of the committee to simply file generic affidavits stating that they have read the affidavit of Mr Hungamo and that they confirmed the contents thereof in so far as it related to them. The said members are said to be residing in those different towns or villages. It leaves a legitimate question whether the applicant employees abandoned the respective sites in each town or village in mass on the same day or whether they left the said sites on different dates in different towns of villages. I would have expected from the committee members at the bare minimum to at least state respect of his town or village, on what dates the applicant's employees abandoned the site in his town or village and if it is not possible for such member to state a specific date on which the site was abandoned to at least say between what dates or days the site was abandoned.

[41] Furthermore it would have been helpful for a member to at least state the last time he had visited the site. I am saying, this assuming that the committee members indeed were under obligation to visit the sites in their town or villages. Mr Hungamo does not say that the committee members were under such obligation and if so at what frequency they were expected or obliged to visit the sites. Such a statement

would have assisted the court to verify the veracity of the statements by the committee members. Furthermore Mr Hungamo, does not state when the members of the committee last visited the respective sites in their towns or villages. In view of what I have stated herein before regarding the members' confirmatory affidavits, I found the confirmatory affidavits not only un-corroborative of the allegations by Mr Hungamo but unhelpful to the resolution of the apparent dispute of facts created by the respondents through their allegation that the applicant had abandoned the sites prior to 3 March 2017.

[42] In my view it was incumbent upon the said members to provide facts exactly when the applicant's employee's abandoned each site in such member's site situated in his or her town or village. The members of the Committee failed to provide such information to this court.

[43] It follows therefore in my view that applicant's version on this point that it did not abandon the sites stands un-contradicted.

[44] Mr Hungamo further states that the four sites (Tses, Gibeon, Blaauwes and Warmbad) were also confirm by Dr Namu Musulwe that on 10 March when Dr Musulwe went to those sites to introduce the new contractor the site were vacant and abandoned by the applicant's employee. The relevancy of this allegation is not understood, for simple the reason that according to the applicant the spoliation took place already on 3rd March 2017. According to the applicant the respondents forcefully removed the applicant's employees form the sites and took possession of the construction material belonging to the applicant on 3 March 2017. Simply taking into account the dates, it is probably true that on 10 March 2017 when Dr Musulwe visited the sites, they were empty because by that time the applicant's employees had already been removed from the sites.

[45] Taking all the facts in this matter into account, considered against the legal principles considered, I have arrived at the conclusion that the applicant has established on the balance of probabilities that it was in peaceful and undisturbed possession of the said site and that it was unlawfully dispossessed of such

possession of the sites by the respondents; and further that the applicant is entitled to an order restoring it to such possession *ante omnia*.

[46] In the result I make the following order:

1. The applicant's non-compliance with the forms and service provided by the Rules of this court in both applications, to wit Case No.: HC-MD-CIV-MOT-GEN-2017/00090 are hereby condoned and the application is heard as one of urgency.

2. The Respondents are ordered to forthwith restore ante omnia the Applicant's free and undisturbed possession in and to the construction sites at Tierkloof Campsite, Gibeon Traditional Authority Office, Vaalgras Heritage Site, Blaauwes Traditional Authority Office, Tses Tourism Information and Camp Site, Warmbad Traditional Office and Heritage Site, Aroab Hostel, SME Units and Tourism Information Site, Koes SME Units and Camp Site.

3. The Respondents are ordered to forthwith restore ante omnia the Applicant's free and undisturbed possession in and to all the construction material and equipment at Tierkloof Campsite, Gibeon Traditional Authority Office, Vaalgras Heritage Site, Blaauwes Traditional Authority Office, Tses Tourism Information and Camp Site, Warmbad Traditional Office and Heritage Site, Aroab Hostel, SME Units and Tourism Information Site, Koes SME Units and Camp Site.

4. The Respondents pay the cost of this application jointly and severally the one paying the other to be absolved.

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H Angula

Deputy-Judge President

APPEARANCES

APPLICANT:	S Rukoro Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
FIRST AND SECOND RESPONDENTS:	M G Boonzaier Of Government Attorney, Windhoek