

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO. HC-MD-CIV MOT-GEN 2017/00085

In the matter between:

VINCENT AND TIFFANY CONSTRUCTION CC

APPLICANT

and

AFRICAN WEALTH INVESTMENTS CC

FIRST RESPONDENT

TAKARUDA CHINYOKA

SECOND RESPONDENT

KUDAKWASHE CHIGAMA

THIRD RESPONDENT

DEVELOPMENT BANK OF NAMIBIA LTD

FOURTH RESPONDENT

Neutral citation: *Vincent Tiffany Construction CC v African Wealth Investments CC* (HC-MD-CIV-MOT-GEN-2017/00085) [2017] NAHCMD 101 (22 March 2017)

Coram: ANGULA, DJP

Heard: 17 March 2017

Delivered: 22 March 2017

Flynote: Motion proceedings - Spoliation – Onus on the applicant to prove that it had been in peaceful and undisturbed possession of the property or the thing and that he/she had been unlawfully dispossessed of such possession, and accordingly whether the applicant is entitled to an order restoring to him/her such peaceful and undisturbed possession.

Lien - Builder's lien - A builder is entitled to retain possession of the building site based on *ius retentionis* until such time any money owed to the builder has been paid in full

Summary: The applicant a building contractor who was employed by the first respondent to construct a Wellness Centre and a Gymnasium on the building site. The parties the concluded the standard building contract. The applicant took occupation of the building site and had completed about 90 % of the works when the respondents terminated the contract and took possession of the building site by removing the applicant's chains and locks at the gate giving access to the building site and replacing them with their own. The applicant then brought a spoliation application and simultaneously sought an order to enforce its builder's lien. The respondents contended that the applicant had abandoned the building site and that it had no lien over the site because no money was owed to the applicant.

Held that: - the applicant has made out a case that it had been in peaceful and undisturbed possession of the building site and that it was wrongfully and unlawfully dispossessed by the respondents from its peaceful and undisturbed possession of the building site and that the applicant is entitled to be restored into possession of building site.

Held that: - that the applicant is entitled to remain in possession of the of the building site by virtue of *its ius retentionis* until it has been fully paid the money owed to it in respect of work done on the respondents' property.

ORDER

1. The first and second respondents are ordered to immediately restore to the applicant peaceful and undisturbed possession of the property situated at:
 - 1.1. Erf 8607, Abraham Mashego Street, Katutura, Windhoek (“the building site”);
and
 - 1.2. Erf 8604, Katutura, Windhoek (“the site office”).
2. The first and second respondents are ordered to remove their chains and locks from the entrance to Erf 8687, Katutura, Windhoek;
3. The first and second respondents are ordered to remove any security personnel employed by them to prohibit the applicant and its functionaries and staff from entering “the building site” and “the site office”;
4. The first and second respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

ANGULA, DJP:

Introduction

[1] Judges in this division have been urged by the Judge President to stop writing long judgments, in keeping with judicial developments in other jurisdictions such as the United Kingdom and other Commonwealth jurisdictions unless the judgement is

precedent-setting. I will try to do so in this judgement, also keeping in mind the fact that this court has written a number of judgments on the subject of spoliation.

[2] I must preface my judgment by saying that it is saddening that we have had many spoliation cases in recent past, coming before this court where persons in this Republic have taken the law into their own hands. It is saddening we have had many spoliation cases coming before this court in the recent past where persons in this Republic have taken the law into their own hands. It is disconcerting that many more spoliation cases are still coming before this court. It is an indictment that some persons in this Republic tend to resort to self-help which is inimical to the rule of law upon which our Constitution is based.

The questions for determination

[3] Like in many cases of spoliation, the questions for determination in this matter, are whether the applicant had been in peaceful and undisturbed possession of the building site and whether the first and second respondents unlawfully dispossessed the applicant of such possession and accordingly whether the applicant is entitled to an order restoring it to such peaceful and undisturbed possession of the building site.

[4] A further question arising for determination is whether the applicant has a builder's lien over the respondents' property by virtue of which it is entitled to remain in possession until such time it has been paid the money owed to it for works done on the respondents' property.

Background

Applicant's case

[5] The applicant is a building contractor who was employed by the first respondent to construct a Wellness Centre and a Gymnasium on the building site situated at Erf number 8607 Abraham Mashego Street, Katutura, Windhoek. (“*the building site*”) Adjacent to the building site is a site office which is situated at Erf number 8604, Katutura. The relationship between the parties was governed by a written building contract which was entered into on 26 April 2015. In terms of the contract the completion date would be 1 January 2016. The applicant was given possession of the building site on 27 April 2015.

[6] The second respondent is a member of the first respondent. The third respondent is an architect and is employed by first and the second respondent as principal agent for the building project. The fourth respondent had advanced money to the first and second respondents in connection with the building project. No relief is sought against both the third and fourth respondents. Unless the context clearly indicates otherwise, I will henceforth in this judgment refer to the first and second respondents simply as “the respondents”.

[7] According to the applicant the building works are 90 % completed and the applicant has received payment in the total sum of N\$9 272 259,00. An amount of about N\$3.8 million is however owed to the applicant. On 1 March 2017 the applicant received a letter from the third respondent stating that he had been instructed by his client, the second respondent, to terminate the contract between the parties due to the applicant's non-compliance with the terms of the contract. Thereafter the applicant consulted its legal practitioner for legal advice. The Applicant's legal practitioner then addressed a letter to the second respondent stating *inter alia* that the applicant had not been paid in terms of the contract; that the contract had been unlawfully cancelled; and finally, demanded payment of the outstanding amount of N\$3.8 million within 10 days calculated from the date of the letter.

[8] On 9 March 2017 the legal practitioner for the applicant received a letter from the first and second respondents' legal practitioner confirming *inter alia* that the contract had been cancelled and that the applicant and its employees and representatives would thenceforth not be allowed on the building site. In response to the respondents' letter the applicant through its legal representative addressed further letter to the respondents' legal representative on 10 March 2017 in which it was stated that they have been informed that the respondents have proceeded to remove the applicant's chains and locks at the gate and had replaced them with new ones without the applicant's knowledge or consent. The letter demanded that the respondents immediately remove the said chains and locks and restore possession of the building site to the applicant. The letter further recorded that the applicant holds a builder's lien over the building site; that the respondents have been informed of the outstanding amount but had failed to pay such amount; and that the applicant intends to complete the project and as such will not abandon the building site. The letter finally demanded restoration of possession of the building site failing which an application would be made to court on an urgent basis for an appropriate relief.

[9] With regard to the possession of the building site the applicant points out in its founding affidavit that it has been in peaceful and undisturbed possession of the building site and at no stage did it relinquish possession thereof. Furthermore that it has plant and machinery and equipment on the building site such as concrete mixers, tools, shutter boards and scaffoldings. The applicant further points out that it has a large quantity of building materials on the building site.

[10] According to the applicant, it rented a separate piece of land which is situated adjacent, but not apart from the building site, referred to as a "site office". It is situated at Erf number 8604. The reason for the applicant renting this piece of land was because it was beneficial for the applicant to have a site office adjacent to the building site. Access to the site office is gained by entering the building site through a gate which is situated between the two sites.

[11] Finally, the applicant points out that it was in undisturbed possession of the building site and was unlawfully deprived of such possession by the first and second

respondents on 10 March 2017 when the applicant's chains and locks were unlawfully removed and replaced with those of the first and second respondents.

Respondents' opposition

[12] The respondents oppose the application. The opposing affidavit has been deposed to by the second respondent. The first and second respondents deny that the applicant holds a builder's lien of over the building site; the respondents further deny that the applicant was in peaceful and undisturbed possession on the building site or that it was not removed by coercion or force from the building site.

[13] Regarding the possession of the building site, second respondents contended that after the applicant was served with the letter of termination on 1 March 2017, the following day the applicant returned to the site to load some of the building materials and equipment; that on 9 March 2017 the applicant's representative and all employees came back again to load more construction material and equipment. As proof of this point the respondent attached photographs of the applicant's truck being loaded with building materials. Accordingly second respondent submits that the applicant was not in peaceful and undisturbed possession of the building site because they vacated the premises wilfully and voluntarily.

[14] With regard to the replacement of chains and locks on the gate, the second respondent merely stated that he had not seen chains and locks on the gate. In this connection he referred to the confirmatory affidavit by the respondents' operational manager a certain Mr Mutumbu who is alleged to be on the building site on a daily basis and who confirmed to the second respondent that he had not seen any chains and locks on the gate.

[15] The respondents argued further that there is no outstanding amount due and owing to the applicant because no single payment certificate has been issued by the architect in terms of clause 25 of the contract between the parties. The first respondent further alleged that he had always undisturbed access to the building site and further alleged that the property was vacant, with no person exercising any form of control on behalf of the applicant when that first respondent, acting in terms of the

contract, entered the building site to arrange for a new contractor to complete the building works. The second respondent further reiterated the fact that the applicant does not possess a builder's lien as no money is owed by the respondents to the applicant in respect of which the builder's lien would be based.

First and second respondents points in limine.

[16] The respondents also raised points of law *in limine* in their answering affidavit. The first point *in limine* related to the alleged defective timeline set out in the notice of motion filed on behalf of the applicant which time line was not in accordance with the timeline stipulated by the rules of this court. After counsel for the applicant had explained that the defect is ejustice system based counsel for the first and second respondents, correctly in my view, decided not persisted with point.

[17] The second point *in limine* was the that, in terms of the written document attached to the founding affidavit as VIN 14 the applicant had renounce or waived its builder's lien in favour of the fourth respondent, The Development Bank of Namibia. According to the applicant was required to sign the said document in favour of the Development Bank of Namibia which was condition for the respondents to be able to procure the financial assistance from the DBN. After hearing submissions from counsel for the parties I dismissed this point *in limine*, ruling that the first and second respondents are not privy to the agreement between the applicant and the fourth respondent and cannot therefore rely on the provisions of an agreement to which they are not parties. Furthermore it has been held that a waiver of a lien by contractor in favour of a party who agreed to advance money to the contractor does not constitute a waiver of the contractor's *ius retentionis* against the owner.¹

[18] Both points *in limine* therefore stand dismissed.

Applicable legal principles

¹ See: Ploughhall (Edms) Bpk v Rae 1971 (1) SA 887 (T)

[19] It is trite that in a spoliation, application the onus rests on the applicant to prove on the balance of probabilities that he was in peaceful and undisturbed possession of the building site or a thing and that he was unlawfully deprived of such possession by the respondents.² The words 'peaceful and undisturbed possession' mean sufficient stable or durable possession for the law to take cognisance thereof.³ Both counsel were in agreement on applicable legal principles relating the remedy of spoliation. It was on the application of the legal principles to the facts that they differed.

[20] As it appears from the summary of the applicant's case, in addition to relying on the remedy of spoliation, the applicant also relies on a builder's lien which he says he has over the work he has done on the property by constructing the Wellness Centre and Gymnasium for the respondents. The builder's lien is said to be a debtor - creditor's lien, which is a right of retention for a debt *ex-contractus*.⁴ A *lien* has been defined as the right to retain the property or the anything until payment has been effected. The lien is dependent on continuous possession of the said property⁵ In order for a lien to exist there must be actual possession on the property by the builder. There must in that regard be physical control or occupation (*detention*) and the intention of holding and exercising possession over same (*animus possidendi*). Temporary absence of the builder, such as a mere absence at night does not constitute a loss of possession, but absence for considerable time would amount to loss of possession unless, some special steps have been taken to maintain physical control.⁶

Application of the laws to the facts

Spoliation

² Nino Bonino v De Lange 1906 TS 120 at 122; Kuyiri & Another v Kindjoze & Others 2009 (2) NR 447 (SC)

³ Kandombo v Minister on Land Reform A352/2015 (delivered on 16 January 2016- unreported)

⁴ Conress (Pty) Ltd and Another v Gallic Construction (Pty) Ltd 1981(3) SA 73 p76 C-H

⁵ See Silberberg and Schoeman's : The Law of Property, 4th Edition p 392- 393

⁶ P A Ramsden, (2014) McKenzie's Law of Building and Engineering Contracts and Arbitration, 7th edition 112.

[21] The second respondent's response to the applicant's case is that the applicant voluntarily relinquished possession of the property after the agreement between the parties was terminated. It is common cause that the applicant was given possession of the building site by the respondents on 27 April 2015. It is the applicant's case that on or about 10 March 2017 without knowledge and consent of the applicant the respondents removed chains and locks at the gate which gives access to the building site and replaced them with their own chains and locks. In response to this direct and serious allegation the second respondent merely stated in paragraph 22 of his answering affidavit, that he has not seen chains and locks on the gate. He then referred to the confirmatory affidavit of a certain Mr Mutumbu who is apparently an operational manager on the building site. Mr Mutumbu also glibly stated that he had not seen any chains or locks at the gate. Later in paragraph 28 of his answering affidavit the second respondent states as follows: "*I deny that any chains or locks were removed.*" There is a clear contradiction between the two statements. The court is unable to say which of the two statements is correct. This leaves the applicant's allegation as the only reliable and open to acceptance by the court as the correct version of that crucial fact.

[22] The first statement is obviously an evasive response. The subsequent statement is contradictory. It leaves much to be desired. The first respondent was required to either deny or admit that they replace the applicant's chains and locks with their own chains and lock. The second respondent does not deny that new chains and locks have been place on the gate. In the letter dated 9 March 2017 from the first and second respondents legal representative addressed to the applicant the applicant was told that its "*employees/representatives wound hence forth not allowed on the building site*". In my view this is a clear admission that the respondent had deprived the applicant's peaceful and undisturbed possession of the building site without due process of law. I hold so for a fact.

[23] To buttress his argument that the applicant voluntarily vacated the building site the second respondent stated that the following day after the letter of termination was served on the applicant on 1 March 2017 the applicant went to the site and load some of the building materials and equipment that the applicant went to the site and that the applicant went again to the site again on 9 March 2017 and loaded more

materials and equipment. In my view this statement contradicts the second respondent's contention that the applicant vacated the building site voluntarily. In any event in response to the second respondent's allegations on this point, the applicant states that it was part of its activities to load and transport material in and out of the building site and that this was done in the normal course of the applicant's everyday construction activities on the site on the building site.

[24] The respondent version that the applicant voluntarily abandoned possession of the building site is so improbable that it is liable to be rejected as false. In my view no building contractor in his right mind would voluntarily abandon possession of the construction site while money is owed to him by the owner of the building. I think it is fair to say that this is the law of the Medes and Persians in the building industry. The second respondent was already informed through the applicant's legal representative by letter on 10 March 2017 that the applicant intended to complete the project and that as such it would not abandon the site. It is the applicant's case that the contract was unlawfully cancelled by the respondents; that it does not accept the cancellation of the contract and that it will not leave the construction site and will hold the respondents to the contract. It is improbable in the circumstances that the applicant would simply abandon the building site while it has valuable plant, machinery and equipment and a large quantity of building materials there. More importantly, it would defy reason for the applicant to vacate the site, while on its version there is a substantial amount of money it is owed by the respondents.

[25] My conclusion on this point is that the applicant made out a case that it was in peaceful and undisturbed possession of the building site and that it was unlawfully dispossessed of such possession by the respondents who removed the applicant's chains and locks on the gate of the entrance to the building site and replaced them with the respondents' own chains and locks.

Builder's lien

[26] It is the respondents' case that the applicant did not have a lien over the property because it is not owed any money by the respondents as there is no outstanding certificate of payment issued by the architect. In support of this

argument, counsel for the respondents referred the court to the matter *Conress and Another v Gallic Construction*⁷ where it was held that a creditor has no right, in disregard of a contractual provision regarding delivery, to retain the property until he had been paid money which although owing is not yet due. Furthermore, that under the standard form of building contracts, retention monies become payable only some months after delivery of the contracted work; the builder cannot claim a *jus retentionis* in respect of retention monies which are not yet due.

[27] This court has no issue with the legal principles outlined in the *Conress* matter. It is a correct statement of law. In my view, the facts in the matter of *Conress* are distinguishable from the facts in the current matter. In the *Conress* matter, the builder attempted to retain possession of the building units contrary to the term of the contract which stipulated that he was to give occupation of the building units on a date agreed in the contract. The applicant in this matter is not acting contrary to a term of the building contract which obliges it to hand over the building site. The money owed in the *Conress* matter was retention money whereas the money admitted by the second respondent to be owing to the applicant is not retention monies but, so to say, ordinary money owed to the applicant in terms of the contract.

[28] In paragraph 15 of the second respondent's answering affidavit it is admitted by the first respondent that "*that there is outstanding money that is due and owing to the applicant*" for the reason that no payment certificate has been issued. Notwithstanding this admission by the respondents, counsel for the respondent strenuously argued that there is no money owed to the applicant. Counsel for the respondents points out that in terms of the contract monies are due to the applicant once the interim certificate payment has been issued. It would appear to me the argument by counsel loses sight of the fine line between the meaning of money being owed and money being due. As I understand the legal position, the builder is to remain in possession of the property by virtue of *ius retentionis* until such time the money owed to him in terms of the contract has been paid. The money owed to the builder is not due and payable until the principal agent of the owner of the building has issued an interim payment certificate. Applying the principle to the facts of this

⁷ 1981 (3) SA 73 at 76 C-H

matter, there is money which is admittedly owed to the applicant. Accordingly, the applicant has a *ius retentionis* over the property and it is therefore entitled to remain in possession of the building site until such time as the amount owed to it has been paid or the parties have resolved the dispute in terms of the dispute resolution mechanisms provided in the contract. I agree with the respondents' counsel that since no interim certificate has issued the money owed has been not as yet become due and payable by the respondent to the applicant.

[29] It is my considered view that there is currently a real dispute between applicant and the respondents which will have to be resolved in the manner provided for in the contract or through other legal mechanisms. In the meantime the applicant is entitled to remain in possession of the building site by virtue of its *ius retentionis* until such time as the remaining balance of money owed by the respondents to the applicant is paid in full.

[30] The overall conclusion I have arrived at taking the cumulative effect of all the foregoing facts is that I am satisfied that the applicant has made out a case on both legs: firstly that the applicant was wrongfully and unlawfully dispossessed by the respondents from its peaceful and undisturbed possession or occupation of the building site and that the applicant is entitled to be restored into such possession; and secondly, that the applicant is entitled forthwith to remain in possession of the building site by virtue of its builder's lien until it has been fully paid the money owed to for works done on the respondents' property.

[31] In the result I make the following order;

1. The first and second respondents are ordered to immediately restore to the applicant peaceful and undisturbed possession of the property situated at:

1.1. Erf 8607, Abraham Mashego Street, Katutura, Windhoek ("the building site");
and

1.2. Erf 8604, Katutura, Windhoek ("the site office").

2. The first and second respondents are ordered to remove their chains and locks from the entrance to Erf 8687, Katutura, Windhoek;

3. The first and second respondents are ordered to remove any security personnel employed by them to prohibit the applicant and its functionaries and staff from entering "the building site" and "the site office";

4. The first and second respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

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H Angula, DJP

APPEARANCES

APPLICANT:

Mr Namandje

Of Sisa Namandje & Co.

RESPONDENTS:

Mr Bangamwabo

Instructed by Clement Daniels Attorneys