NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 5344/2016
Date heard: 16 February 2017
Date delivered:24 February 2017

In the matter between

DEZZO DEVELOPMENT HOLDINGS (PTY) LTD	**Applicant**
Vs	
SEVEN SIRS GROUP (PTY) LTD	**First Respondent**
MEC FOR THE DEPARTMENT OF HUMAN SETTLEMENTS (EASTERN CAPE)	**Second Respondent**

JUDGMENT

PICKERING J:

[1] Applicant, a private company with limited liability is a so-called construction contract and implementing agent. First respondent, also a private company with limited liability, is the duly appointed implementing agent in respect of certain low income housing projects in the districts of Lesseyton and Ntsongeni. Although first respondent was cited as Victory Parade Trading 182 (Pty) Ltd trading as Seven Sirs Development Contractors it is common cause that it is now known as Seven Sirs Group (Pty) Ltd.

[2] Second respondent was the MEC for the Department of Human Settlements (Eastern Cape Province) who was cited as an interested party. The application as against second respondent has, however, been withdrawn by applicant with each party to pay their own costs, it now being common cause that second respondent has no interest in the application.

[3] In launching its application applicant sought a Rule Nisi calling upon first respondent to show cause why certain interim orders should not be confirmed, namely:

> "*2.1 Interdicting the First, Second and/or any third party acting for and on behalf of the First or Second Respondents from interfering with the Applicant's right of retention over the immovable properties being 119 sites in the area known as Lesseyton as set out in the schedule attached hereto marked "A" and 44 sites in the area known as* Ntsongeni as set out in the schedule annexed hereto marked "B".
>
> *2.2 Interdicting the First, Second and any third party acting for and on behalf of the First or Second Respondents from entering onto the abovementioned sites set out in annexures "A" or "B" save by the consent of the Applicant or by order of this Honourable Court.*
>
> *2.3 Declaring that the Applicant possesses a right of retention over the sites set out in annexure "A" and "B" hereto, until such time as the Respondents have re-imbursed the Applicant for the cost of all improvements on the sites aforementioned or until such dispute is otherwise resolved.*
>
> *2.4 Directing the First Respondent (together with any other Respondents that may oppose) to pay the costs of this application.*
>
> *3. That the relief in 2.1 and 2.2 above are to operate as interim orders forthwith pending the final resolution by the Respondents of all claims the Applicant may have for the improvements to the sites mentioned in annexures "A" and "B".*
>
> *4. Directing the Applicant to institute any actions for its claims incurred aforementioned within thirty (30) days of confirmation of the Rule Nisi envisaged in paragraph 2 above.*

[4] When the matter was first called on 17 November 2016 an undertaking was given by first respondent not to engage in any construction activities on

any of the Lesseyton or Ntsongeni sites on which the applicant has executed works pending the argument of the matter on 1 December 2016.

[5] On 1 December 2016 the matter was further postponed to the opposed roll on 16 February for argument with first respondent undertaking to comply with paragraphs 2.1 and 2.2 of the notice of motion in the interim, it being recorded that such undertaking was in no way an admission by first respondent that applicant had a lien over the sites. It was further agreed that pending the determination of the final interdict proceedings the first respondent consented to applicant removing its employees and agents from the sites with, however, full reservation of applicant's rights.

[6] It is common cause that the districts of Lesseyton and Ntsongeni fall within what is commonly referred to as previously disadvantaged areas of the Eastern Cape Province. In order to provide essential housing and ancillary services the second respondent identifies implementing agents with experience in facilitating the implementation of the construction of low income housing contracts. Second respondent accordingly contracted first respondent to be the implementing agent to implement and construct low income housing in both the aforesaid districts. In terms of first respondent's agreement with second respondent it was appointed for the construction of 752 housing units and VIP toilets at Lesseyton and 130 housing units and VIP toilets at Ntsongeni. In terms of that agreement first respondent was appointed as turnkey consultant to provide professional services and to act as the implementing agent for planning activities.

[7] First respondent then concluded a sub-contract agreement with applicant. In a letter (Annexure F1) dated 11 February 2016 addressed by first respondent to applicant first respondent stated, *inter alia*, as follows:

> "*This letter serves to confirm that as of 10 February 2016, Dezzo Development Holdings has been appointed as a sub-contractor for the construction services listed below:*

Construction of 600 houses (Ntsongeni 130 houses and Lesseyton 100 houses from wall plate to completion and 370 complete houses)... The sub-contractor will only be paid for the milestones that they have constructed/performed."

[8] The duration of the appointment was for twelve months. Applicant was further to be responsible for making timeous application for all extension of time claims which would only become valid on written agreement by first respondent.

[9] It was a further term of the agreement that applicant would be responsible for drafting a Project Implementation Plan (PIP) in agreement with first respondent. On approval the PIP would become the legally enforceable programme for the implementation of the projects. It was provided that should applicant fail to meet the programme deadlines, first respondent was entitled to terminate the sub-contract agreement with immediate effect.

[10] It was further stated that a N/S sub-contract Agreement (JBCC) would be "*compiled*" on acceptance of the appointment. A JBCC contract is an industry standard agreement containing a series of terms and conditions, "*JBCC*" being a reference to Joint Building Contracts Committee and N/S referring to "*nominated/selected.*" Nothing turns on this.

[11] The appointment was duly accepted by applicant on 15 February 2016.

[12] It is not in dispute that the Lesseyton site is massive, comprising as it does approximately 900 plots of approximately 200 square metres each. Each plot is fenced and already has an existing occupied structure on it. The site is approximately 4–5 kilometres in length and, at its widest, approximately 1,5 kilometres across. The Ntsongeni site, whilst more rural in nature, is also large and extensive in size.

[13] Applicant contends that it performed its obligations as appointed contractor to attend to the construction works at the two sites and that it has

rendered services thereon. It states in this regard that at the time of repudiation it had already cleared and cut platforms and done site compaction of 44 of the original 130 houses at Ntsongeni. At Lesseyton it had started construction of 119 houses on site. It alleges that of these, 12 have been constructed to "*wall plate*" stage; 49 beyond wall plate to roof stage; 58 sites have been cut and compacted; and the necessary material for the construction of further houses has been ordered and delivered.

[14] It contends that first respondent has unlawfully repudiated the agreement which repudiation it has accepted, thus terminating the agreement. It is not necessary to detail the allegations and counter-allegations in this regard. Applicant alleges that it has an unpaid money claim for the work rendered on the said sites, and alleges that it was in peaceful and undisturbed occupation of the 119 sites at Lesseyton and the 44 at Ntsongeni as at the date of repudiation and its subsequent acceptance of such repudiation.

[15] It avers that it gave notice to first respondent that it intended to exercise its lien and that it in fact did so by cordoning off the various sites on which it had been working with so-called construction tape, or as it is colloquially known, "*candy tape*" this being red and white striped ribbon. It also installed two security officers and a site official to guard over the works. It alleges that despite this first respondent has, through its agents, been infiltrating the sites to continue work thereon.

[16] It states that because the Lesseyton site, being a peri-urban development, is huge, it was obliged to employ the candy tape method of demarcating the sites when its contract was unlawfully repudiated. It alleges that it is not physically possible for it to maintain actual physical control of each of the plots with which it was concerned. So too with the Ntsongeni site.

[17] First respondent contends, however, that the application is ill-founded and falls to be dismissed on two main grounds, as specified by first respondent, namely:

"*1. Applicant never had nor does it have the requisite physical control over the sites to establish and maintain its lien and,*

2. Applicant is, in any event, contractually precluded from exercising any lien."

[18] It will be convenient to deal firstly with the contractual issue.

[19] First respondent contends, with reference to the JBCC sub-contract that clause 36.5.1 thereof constitutes a waiver of lien. Clause 36.5.1 reads as follows:

"*Where this n/s agreement is terminated the following shall apply:*
The employment of the sub-contractor shall be terminated and execution of the n/s works shall cease. The sub-contractor shall vacate the n/s works and the site." (Annexure DK3)

[20] Applicant contends, however, that the JBCC N/S-contract is dependent on a JBCC principal agreement having been concluded. It contends that there is in fact no principal agreement and that the only written agreement which regulates the project is contained in the letter F1 of 11 February 2016. It denies further, in any event, that the provisions of clause 36.5.1 constitute a waiver of lien. It points out that the JBCC contract stipulates an express waiver of lien, in the following terms, namely:

"*The contractor waives in favour of the employer any lien or right of retention that is or may be held in respect of the works to be executed on the site.*"

[21] In contrast hereto the JBCC sub-contract, which it did not sign, contains no such express waiver.

[22] Of interest is that the waiver of lien contained in the JBCC contract is conditional upon the provision by the employer of "*a security for payment in fulfilment of obligations in terms of the identified agreement.*"

[23] As set above clause 6 of the letter F1 provided that a "*N/S sub-contract agreement (JBCC) will be compiled on acceptance of this appointment. The JBCC will be over ruled by this letter in any clause mentioned above.*"

[24] First respondent contends that the clear intent of clause 6 of the sub-contract is that the provisions of the JBCC N/S sub-contract are to apply to the present matter. It submits further that the terms of the JBCC agreement are known and that, in clause 6 of F1, the parties were agreeing that those terms would operate between them by incorporation subject to the terms of F1.

[25] In my view this contention cannot be upheld. The word "*compiled*" would appear to indicate that the subcontract agreement is not necessarily a standard agreement applying to all such subcontracts. As submitted by applicant the parties did not determine the contract variables of the JBCC agreement. In these circumstances the contention for an implied/tacit agreement is untenable. There is, in any event, no signed principal JBCC agreement nor any signed JBCC subcontract between the parties. In these circumstances the subcontract would be governed by the letter, F1.

[26] Even if the JBCC subcontract is applicable this, in my view, does not assist first respondent. All that it provides is that in the event of the subcontract being terminated by first respondent the applicant "*shall vacate the N/S works and site.*" This, in my view, cannot be interpreted as an implicit agreement by applicant to waive its right of retention. As pointed out by Mr. Pillay, who appeared for the applicant, the JBCC contract makes special provision for such a waiver. If it was the intention of the parties that a similar provision would apply to the subcontract agreement it is inexplicable that it was not specifically included therein.

[27] In Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) the following was stated at 436:

> "*[I]t should be pointed out, as Innes CJ, stated in Laws v Rutherford (1942 AD 261, at p 263), that the onus of proving waiver is strictly on the party alleging it and he must show that the other party with full knowledge of his right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.*"

[28] See too Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA) where, at para 19, Nienaber JA stated:

> "*Because no one is presumed to waive his rights, one, the onus is on the party alleging it and, two, clear proof is required of an intention to do so. The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.*"

[29] In my view the first respondent has not discharged the onus upon it. Accordingly the applicant is not contractually precluded from exercising any lien which it may have.

[30] I turn then to consider the second issue, namely whether or not applicant has established that it has the necessary physical control over the sites on which it has worked to establish and maintain its lien. In this regard the authorities are clear that the right of lien exists only if the lien holder is in possession of the thing to which its claim relates and for as long as he or she retains possession thereof. I should mention that it is not in dispute in the present case that the applicant at all times had the necessary *animus* to possess the sites upon which it had been working.

[31] If applicant was in lawful possession of the sites upon which it was working and was unlawfully dispossessed of such possession then clearly there would be a proper case for the grant of a spoliation order. As stated in the leading case of Nino Bonino v De Lange 1906 TS 120 "*no-one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of his property, whether movable or immovable*."

[32] In the matter of Muller and Another v Bryant and Flanagan (Pty) Ltd 1976 (3) SA 210 (DCLD) reference was made by Shearer J to a number of judgments dealing with the issue of possession in relation to liens. It is clear from the various authorities cited therein that there can be no retention by a person of anything which is not in his actual possession. Symbolic possession is insufficient. In Insolvent Estate of Israelson v Harris and Black and Others 22 S.C. 135 at 141 De Villiers CJ stated as follows:

> "*In the present case the relation of debtor and creditor certainly does exist between the plaintiff and the defendants but the essential requisite to the exercise of the right of retention is wanting. There can be no retention by a person of anything which is not in his actual possession, and such actual possession the defendants never had until they asserted their right by closing up an outer door leading into the premises. Even then their possession was only* symbolical*, and it certainly was not rightful.*"

[33] The headnote of Moss v Begg 1908 TH 1 reads as follows:

> "*To enforce a builder's lien there must be active possession of the premises over which the lien is claimed by or on behalf of the builder. A notice on such premises that trespassers will be prosecuted, signed by the builder, is insufficient.*"

[34] Similarly, the headnote of Scholtz v Faifer 1910 TPD 243, a judgment of Innes CJ with whom Wessels and Bristowe JJ concurred, reads:

> "*In order to retain his lien over partially erected buildings, the builder must have not only the intention to hold possession, but also the actual physical possession either personally or by a representative. Mere temporary absence from the building would not constitute a cessation of such possession, but where work is suspended for a considerable time special precautions must be taken to retain control.*

The possession necessary is not the possession as owner, but possession with a view of protection as against the owner."

[35] Innes CJ put it thus at 248:

"*[W]here work is suspended for a considerable time, then it seems to me that if the builder desires to preserve his possession he must take some special step, such as placing a representative in charge of the work, or putting a hoarding around it, or doing something to enforce his right to its physical control.*"

[36] In Cape Tex Engineering Works (Pty) Ltd v S.A.B. Lines (Pty) Ltd 1968 (2) SA (CPD) Corbett J (as he then was) stated at 553 C – D:

"*I know of no such principle whereby a party claiming a lien can substitute for real and actual control of the subject matter of the lien something in the nature of a symbol.*"

See too: Hillkloof Builders (Pty) Ltd v Jacomelli 1972 (4) SA 228 (DCLD) at 231 E.

[37] In Muller's case *supra* Shearer J stated at 218 H as follows:

"*There is, on its own allegations, no doubt that it had left the premises on 6 March. The only sense in which it was physically or symbolically present to exercise physical control was the presence of certain of its property in the liquor store, which was locked and to which it had keys. Taikyo also had keys. The property in that room was of apparently insignificant value. In my judgment there was certainly not a sufficient exercise of physical control of that room to be described as* "retention". *Symbolic possession is insufficient—there must be actual possession.*"

[38] In sum therefore, as was stated in Silberberg and Schoeman's, The Law of Property, 5th edition at 417, "*it is clear that the builder must retain*

effective possession." It is of course a question of fact in each case as to what constitutes "*effective*" possession.

[39] There was some debate at the hearing of this matter as to the proper approach to be adopted in the light of the relief sought by applicant. Mr. Pillay submitted that the trite principles applicable to the granting of an interim interdict and the establishment of a prima facie right were of application. In my view this submission overlooks the terms of the order which was granted by agreement on 1 December 2016 in terms whereof the matter was postponed to 16 February 2017 "*for argument on the final relief sought by applicant*" in terms of the notice of motion. (My emphasis) Paragraph 5 of that order provided further that "*pending the determination of the final interdict proceedings by this Honourable Court, the First Respondent consents to the Applicant removing its employees and agents from the sites*" with full reservation of applicant's rights. (My emphasis)

[40] In my view this order, by agreement, can mean nothing other than that the parties were agreed that the application was to be determined on 16 February as being one for final relief.

[41] In the event that I may be wrong in my interpretation of the order I am in any event of the view that the proper approach is, with respect, that set out by Corbett J in the Cape Tex case, *supra*. In that matter a rule had been granted operating as an interim interdict restraining respondent from removing a ship from the Cape Town docks pending the payment of an amount due to the applicant in respect of the costs of certain repairs to the ship. On the anticipated return day the proper approach to be adopted in such a case was debated. Corbett J stated as follows at 530A – C:

> "*Although the interdict sought in this particular case is one which is only to endure pending payment of the amount of R87 506,37 claimed by the applicant, the relief sought is in the nature of a final order. It involves a final and decisive finding that the applicant does enjoy a lien, and, incidentally, that it is in possession of the ship. The fact that the*

interdict would come to an end upon payment of the amount due does not render it any the less final because that is inherent in the nature of the right conferred by the lien. My approach in this matter must therefore be to have regard to the facts alleged by the respondent and to the facts alleged by the applicant which are admitted or at any rate not disputed by the respondent and consider upon those facts whether the applicant has established, upon a balance of probabilities, that the lien which it claims existed at the time when the Court was approached for an interdict, i.e. on 5th December, 1967."

[42] In this regard, with reference to Knox-D-Arcy Limited and Others v Jamieson and Others 1995 (2) SA 579 (W) and Radio Islam v Chairperson, Council of Independent Broadcasting Authority 1999 (3) SA 897 (W) it was submitted on behalf of applicant that the decision in Cape Tex "*does not appear to have found favour.*" In my view, however, whatever reservations may have been expressed thereanent in the above-mentioned cases I am satisfied that the Cape Tex decision is clearly correct. A decision in this matter, that applicant does or does not enjoy a lien, cannot be revisited and is final and decisive in that regard.

See too: Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd 646 (C) at 651D- G.

[43] I would refer also to Beetge v Drenka Investments (Isando)(Pty) Ltd 1964 (4) SA 62 (WLD) where, in dealing with a similar matter involving a builder's lien, Ludorf J stated at 69H:

"*Although the order sought is in the nature of interim relief, I agree with Mr. Schneider that the order is a final one and that the applicant must prove his case on a balance of probabilities as in any other civil case. In my view the applicant has shown on a clear balance of probabilities that he was in lawful possession of at least the buildings erected by him and that he was unlawfully dispossessed of his* jus retentionis *by respondent."*

[44] Accordingly, what was stated by Harms DP in National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para 26 is applicable:

> "*Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes on fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr. Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter justifies such order. It may be different if the respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.*"

[45] Against this background I turn then to consider whether applicant has established that it has effective possession of the sites in question.

[46] It is common cause that each of the sites consist of vast tracts of land which are divided up into plots on which the identified beneficiaries of the housing project already live in what are described as being "*self-made informal dwellings*." The new dwellings are constructed next to the existing structures each of which remains occupied by the beneficiary. Each of the plots containing the new structure and the existing structure is fenced off.

[47] Applicant avers that until such time as each new dwelling was fully constructed the site remained under its control. This, however, is denied by first respondent which avers that at Lesseyton the applicant "*merely came onto the site and took occupation of a portion of a site house that had been made available to first respondent by the local community*" as a favour, which favour first respondent extended to applicant. With regard to Ntsongeni first

respondent avers that applicant established a site office on a portion of land belonging to a chief which was not even within the boundaries of the site.

[48] It avers further that because of the fact that each site on which applicant worked was within a fenced plot occupied by a beneficiary there was nothing to prevent that beneficiary from denying applicant access to the plot nor was there anything applicant could do to prevent the resident from accessing the unfinished structure within the fenced off area.

[49] In response applicant avers that it was in possession of the sites whilst the project was underway and that, upon the repudiation of the contract by first respondent, applicant's attorneys recorded expressly that applicant's lien was being exercised to the exclusion of all others which, so it avers, "*at the very least denoted applicant's intention of remaining in possession of the sites*", an intention which it at no stage abandoned.

[50] Applicant avers that because the "*project is huge*" it was not possible for it to maintain "*actual physical control of each of the plots.*" According to applicant "*our law does not countenance a breach of the right of retention on that physical impossibility.*" (sic) It states further that the site plan "*must surely demonstrate that it is impossible to retain actual physical control of each of these sites.*" It avers that it was in the circumstances compelled to employ the construction or candy tape method of demarcating the sites. It also employed the services of two security officers as well as a site official, Ms. Magubane, to secure both the sites and applicant's material on the respective plots. It avers that the two security guards and the site official "*have been present on site continuously and have taken control over these two sites.*"

[51] In response hereto first respondent avers that on its inspection of the sites the candy tape was "*blowing in the* wind" and that it in no way afforded possession of the sites to applicant. It states that it is further physically impossible for a security guard to guard and exercise possession over more than one plot at a time, more especially as the plots on which applicant had worked are not all grouped in one area, but are "*located sporadically*" across

the entire two sites. First respondent avers further that it is equally impossible for the site official, Ms. Magubane to keep watch over all the plots scattered over the sites. It states that, on the contrary, when its employees visited the two sites the guards and site official were nowhere to be seen.

[52] Applicant with reference to this concedes in reply that "*it is a near impossibility to retain physical possession of each individual site*". However it reiterates that it has given notice of its intention to exercise its right of retention and that it retains such intention.

[53] As I have stated, the issue of applicant's intention to remain in possession of the plots is not in dispute. This application, however, is not concerned with applicant's intention but with the issue of whether or not applicant has established that it had the actual, effective physical possession of the plots necessary to constitute a valid possessory lien.

[54] In my view it did not.

[55] As pointed out by Mr. O'Dowd, who appeared for first respondent, the immediate problem facing applicant in this regard is that each site on which applicant performed work is situated within a fenced off plot on which there is an existing structure occupied by the beneficiaries of the project. The very nature of the physical layout of each site precluded applicant from, for instance, putting up a hoarding or locking any gate giving access to the plot. To have done so would have been to deprive the beneficiaries of access onto their own properties. Because of this applicant was obliged to resort to the expedient of surrounding each site on which it worked with candy tape. It cannot, however, be disputed by applicant that candy tape would offer no resistance whatsoever to any person wishing to access a particular plot. In my view, candy tape serves no better purpose as a means of maintaining effective possession of a plot than did the notice referred to in Moss v Begg, *supra,* to the effect that trespassers would be prosecuted. Such candy tape is, in my view, quintessentially symbolic in nature.

[56] I am also entirely unpersuaded that the presence of the two security guards and the site official was anything more than symbolic. The Lesseyton site is described as "*huge*" and "*massive*", being approximately 4 – 5 kilometres in length and 1,5 kilometres in width. The Ntsongeni site is described as "*large and extensive*". As was submitted by Mr. O'Dowd, given the extensive and sprawling geographical nature of both Lesseyton and Ntsongeni and what is contained within them, two security guards and one site official cannot conceivably exercise any effective control over the sites. In this regard I must accept first respondent's averment that on a visit to the sites by its employees there was no sign whatsoever of the security guards or the site official.

[57] In the circumstances I agree with the submission by Mr. O'Dowd that none of the measures employed by the applicant are of the sort that would offer any resistance whatsoever to anyone else wishing to enter on any of the sites on which applicant may have worked or which afforded it actual physical control of the plots.

[58] It is, in my view, no answer for applicant to state, as it does, that because of the huge size of the project and the impossibility of maintaining actual physical control over each of its sites it was obliged to use candy tape in order to give notice of its intention of retaining its possession thereof. That averment begs the question as to whether applicant did in fact retain effective possession.

[59] Applicant's complaint that "*our law does not countenance a breach of the right of retention on that physical impossibility*" cannot be sustained. If it is physically impossible for a builder to retain actual physical control of a site then it must follow, in my view, that one of the prerequisites for the establishment of a lien, namely effective possession, is absent. Applicant in my view, is no more in possession of the sites than were the workmen alleged to be in possession of the ship in the Cape Tex case *supra.*

[60] Mr. Pillay submitted, with reference, *inter alia*, to the matter of Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (ECD) that it was not necessary that applicant's possession of the various sites be "*continuous and all pervasive".* In that matter Addleson J held that where what is encompassed by possession requires little in the way of positive physical activity by the possessor, the person who gave him such right and who now invades it cannot justify his conduct on the ground that there was very little positive physical activity by the possessor. Bennett Pringle, *supra* is, in my view, entirely distinguishable. It was concerned with the alleged spoliation by a lessor of the lessee's use and enjoyment of the premises let for the purpose of operating an abbatoir. It was in this context that Addleson J stated at 233 A – B that the claimant's possession need not be continuous "*if the nature of the operations which he conducts on the premises do not require his continuous presence.*" The case was not concerned with the issue of the requisite degree of possession in relation to a builder's lien.

[61] Mr. Pillay relied further on the matter of Vuka Uzenzele Plant Hire & Civils CC v Ho Hup Corporations (SA) (Pty) Ltd and Others (2326/2010) [2010] ZAECPEHC 54 (25 August 2010) which, so he submitted, was on all fours with the present matter. I disagree. In that matter the applicant, a construction company, averred that as a result of the failure by the first respondent to make payment of monies owing to it in terms of a sub-contract agreement it "*suspended work at the sites but has remained thereon, exercising its right of lien over the sites*" and that "*it exercises its right of lien by retaining employees on site during the day. At night and for security reasons, the equipment and material belonging to the applicant is moved to the Uitenhage site office.*"

[62] In this regard Dambuza J, as she then was, stated at para 26 as follows:

> "*It is, in my view that this correspondence clearly shows the applicant's intention of remaining in possession of the sites. It is improbable, in my view, that the applicant would thereafter abandon the site as contended*

by the first respondent. Apart from merely stating that the applicant abandoned the sites, the respondent does not dispute that the applicant's machinery and equipment remains on the site, whether that is at the site office or anywhere else on the site. It was, in my view, not necessary for the applicant to move the equipment to the particular portions of the sites where it had been working prior to suspending the works. By all accounts, the agreement between the applicant and the first respondent effectively came to an end on 5 August 2010 when the applicant stopped all work at the sites. As it is clearly set out in the emails from the applicant's attorneys the applicant's intention was to continue maintaining presence on the sites and it left its machinery and employees thereon for the purpose of exercising its lien. The dispute of fact as to the applicant's possession of the sites can be resolved on the papers. I am satisfied that the applicant has proved that it was in possession of the sites, exercising its lien and that it was despoiled of its possession."

[63] It would appear, firstly, that the learned Judge approached the matter as an application for interim relief hence her finding in favour of the applicant on the facts. Secondly, the factual averments by applicant which the learned Judge accepted as having established applicant's right of lien, namely the presence of employees and equipment on the sites, differ materially from the facts in the present matter.

[64] The case is not, in my view of assistance to applicant.

[65] In my view therefore, having regard to what was stated in Zuma's case, *supra*, the applicant has failed to establish on a balance of probabilities that the lien which it claims, existed at the time it approached this Court for an interdict. Accordingly, the application cannot succeed and must fail.

[66] The following order will issue:

The application is dismissed with costs.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. I. Pillay
Instructed by: Wheeldon Rushmere and Cole, Mr. van der Veen

Appearing on behalf of Respondents: Mr. O'Dowd
Instructed by : Netteltons Attorneys, Mr. Nettelton