

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 11590/2010

Reportable

In the matter between

SANYATI BUILDING (PTY) LTD

Applicant

And

ERNERGY X-RAY TRADING COMPANY

KZN (PTY) LIMITED

First Respondent

AFRICA X-RAY INDUSTRIAL AND

MEDICAL (PTY) LIMITED

Second Respondent

JUDGMENT

Cele AJ

Introduction

[1] The applicant has approached court on urgent basis seeking to be granted a spoliation order in the following terms:

1. That the respondents are ordered jointly to restore possession of the x-ray equipment listed and described in annexure “D” to the founding affidavit hereto, to the applicant at the construction site of the Park Rynie Mortuary, 29 Smith Street, Park Rynie, forthwith;
2. That failing immediate compliance with the order in paragraph 1 above, the Sheriff is authorized to attach and remove the said equipment, wherever it may be found, and restore possession thereof to the applicant;
3. That the respondents be and are hereby ordered to pay the costs hereof jointly and severally, the one paying, the other to be absolved.

[2] The application has been opposed by both respondents simply on the basis that the applicant could not have been in such possession of the equipment in question as to be entitled to the order sought, having possessed the equipment as a servant, holding it for its master.

[3] A number of the facts in this matter have stood common cause between the parties or have not been seriously put into dispute. Those that are germane in the resolution of the issues in dispute will be dealt with under the factual background.

Factual background

[4] The Department of Public Works in the Provincial Administration of KwaZulu-Natal, hereafter referred to as the “Department” commissioned the construction of a government mortuary in Park Rynie. The task was given to the applicant. The applicant moved into the site for the construction and commenced with erection of the building. For all electrical work involved in the building of a mortuary, including the installation of certain x-ray equipment, it then subcontracted with a Close Corporation called the Red Ants Maintenance (the Red Ants).

[5] Sometime in 2009 the Red Ants entered into a contract of purchase and sale with the second respondent. In that agreement it was buying the x-ray equipment which is the subject matter of this application. The purchase price was R935 872 08. I shall henceforth refer to the x-ray equipment simply as the equipment. The second respondent delivered the equipment on site, at which instance Mr Brian Antonizzi, the Branch Manager of KwaZulu-Natal Region for the second respondent, was in attendance. He met Mr Govender who was in attendance, as the Foreman for the applicant. Mr Govender worked under the supervision of Mr Kevin Patrick O'Connor, the applicant's Construction Manager. The equipment was then kept under lock and key in a storeroom on the construction site and Mr Govender kept the key to that storeroom.

[6] In due course, the Department reneged on its decision to have the equipment installed at Park Rynie in favour of an installation at a mortuary in Gale Street, Durban. The change, it seems was due to the decision taken by the National Radiation Control and the Department preferred to install it at the Gale Street mortuary which has a licence for a high dosage unit, such as the equipment. The Department corresponded with Mr O'Connor in relation to its changed attitude and that information came to the knowledge of Mr Govender. The Department issued a letter dated 19 July 2010 in which it instructed the applicant to await an instruction from it as to what should become of the equipment. The letter went on to say:

".....I know there were some concerns with continuing to do so within the existing contract and we have since pursued some other avenues which have now proved to be problematic and extremely costly. Could we have it done within the current contract?"

The reason for this is that the original supplier has given the main contractor an "installation discount" of approximately R15 000 but has given DOH a quote for almost R100 000 to do the installation at Gale Street.....

Could you give me your thought and the way forward."

[7] On 14 September 2010 Mr Antonizzi arrived at the Park Rynie construction site with a truck and he asked Mr Govender to release the equipment to him. The explanation he proffered is that he was uplifting the equipment in order to take it to Gale Street Mortuary. In the course of the exchanges the two had, one document, bearing letterheads of the first respondent and described as a delivery note was passed by Mr Antonizzi to Mr Govender. The description of items

exchanged by the parties appears in that document. Such description is understood between the parties to be of the equipment. It is a two paged document. The second and last page ends with a signature of Mr Antonizzi, but it begins with the writings:

"Items uplifted from Park Rynie Mortuary and delivered to Gale Street Mortuary.

The above mentioned goods received in good order and condition."

- [8] Mr Govender duly complied with the request of Mr Antonizzi and the equipment was removed from his possession. However and contrary to the endorsement in the delivery note, the equipment was not taken to the Gale Street mortuary. Instead it was kept and stored by the first respondent. The applicant became aware of that fact when a letter from the respondents addressed to Red Ants dated 29 September 2010 was copied to it. Paragraphs 5 to 10 of that letter read:

- "5 It is common cause that Red Ants, in terms of the sale, has only paid R200 000, 00 towards the invoiced cost the machinery, being the aggregate of R938 872.08*
- 6 Per our recent discussion, it has become clear that Red Ants is unable to pay the balance of the invoiced cost and has tendered cancellation of the Sale.*
- 7. We note, should it be agreed to cancel the Sale, that our client will be holding Red Ants liable for the aforementioned 10% cancellation fee plus costs of shipping the machinery.*
- 8 Our clients have recently uplifted the machinery from the Park Rynie Mortuary and, in accordance with the Terms (referred to above), have elected to deliver and secure the Machinery in their warehouse for safekeeping pending the outcome of negotiations herein.*
- 9 We re-iterate, as our client has at all times remained owners of the machinery and Red Ants is unable to pay the full purchase price, that our clients are fully entitled to so store the machinery until the question of payment in full alternatively cancellation of the Sale is negotiated and resolved.*
- 10 We confirm that a copy of this letter will be forwarded to the relevant authorities at the Park Rynie Mortuary and the KZN Department of Health."*

- [9] On 30 September 2010 Mr Antonizzi sent an e-mail message to Mr O'Connor in which he indicated, inter alia that the equipment was meant to be returned to their warehouse in Johannesburg but that it was in a storage place in Durban.
- [10] The applicant took the position that it had been tricked into releasing the equipment at a time when the respondents had no intention of delivering it to Gale Street Mortuary and such release was never authorized by the Department to uplift it from the site. The applicant instructed its attorneys to attend to the matter and attorneys of both parties exchanged correspondence. The applicant initiated the present application and seeks an order as foreshadowed in the notice of motion.

Submissions by the parties

Applicant's submissions

- [11] A building contractor that occupies a site and takes possession of the plant, equipment and materials does so in order to secure the benefit of its contract. Therefore it has *locus standi* to apply for a *mandamus van spolie*. A spoliation is available when a possessor has been unlawfully or wrongfully dispossessed, meaning without resort to legal process and against the will of the possessor. A spoliation order will be granted where a possessor is tricked into relinquishing possession. Deprivation is said to take place without true consent.
- [12] *In casu*, the respondents took the equipment under the pretext that they intended to deliver it to the Gale Street Mortuary. Their true intention was however to hold the equipment pending the outcome of negotiations regarding the outstanding purchase price.

Respondents' version

- [13] The respondents were not admitting that Mr Govender was tricked into releasing the equipment and therefore that the respondents acted fraudulently or with *mala*

fides. However, the application would be argued on the basis that the respondents would not have obtained Mr Govender's consent for uplifting the equipment, had he known that it was not going to be taken to the Gale Street Mortuary.

[14] The submission is that the applicant could never have had the requisite *locus standi* to move this application in that it never possessed the equipment in such a manner that it could constitute a basis for a *mandament van spolie*. The respondents have pointedly asked to be provided with the details of the contractual arrangements and obligations of the applicant *vis a vis* the Department, which would presumably, regulate the terms under which the equipment was stored on site. Despite the specific issue having been raised and the applicant having been given an opportunity to deliver its replying affidavit, it has not provided a copy of the contract.

[15] By its own admission, the applicant has no interest in the equipment for the reasons that:

- The equipment does not belong to it;
- The equipment was simply kept on site pending installation;
- The site belonged to the Department;
- The Department instructed the applicant that it wished the equipment to be removed from the Park Rynie site and clearly the applicant was agreeable to that.

[16] In spoliation proceedings it is not necessary that an applicant should prove that he or she actually possessed the subject matter of the application in the full sense which the word "possess" might imply. The possessor need not be the owner. However, and as a minimum requirement the applicant still has to show an intention of securing some benefit for himself. The fact that the person must derive a benefit from the use of the property as a minimum requirement in order to found an application for the minimum for spoliation has been stressed time and again.

[17] *In casu*, the applicant has no interest in the equipment and was prepared to release it for usage in the Gale Street Mortuary. The applicant has not

established any right, interest or entitlement to the possession of the equipment. The equipment was clearly, on everyone's version, never intended for the applicant's benefit.

Evaluation

- [18] It remained common cause between the parties that the equipment was on the site at Park Rynie at the material time to this matter. The applicant was in charge of the site, having taken it and construction work was in progress. The applicant was in peaceful and undisturbed possession of the equipment. The equipment was removed by the respondents without the consent of the applicant. The only issue for consideration is whether the applicant possessed the equipment, at the time, with an intention of securing some benefit for itself.
- [19] In *Stocks Housing v Department of Education and Culture Services* 1996 (4) SA 231 CPD court held that:
- “A building constructor who enters upon a building site and occupies and takes control of it in terms of his contract in order to carry out the contract work, and remains in occupation for that purpose, has possession of the site which may be protected by a spoliation order. He possesses the site in order to secure the benefit of his contract. He should not be deprived of his possession and that benefit by an unlawful dispossession of the site by the owner of the property or anyone else. Applicant obviously was in possession of the site and of the plant, equipment and materials on the site....”*
- [20] The applicant has placed reliance on this case by contending that the facts in its case were similar to those in the *Stocks* case. The respondents dispute the assertion by contending that the position of the applicant vis a vis the Department was similar to that of the master and servant. The respondents further likened the position of the applicant to a person “in charge” of cattle and one that “looked after them” who had not necessarily taken possession of the cattle.
- [21] In *Mdlulwa and Another v Gwija and Others* 1992 (3) SA 776 (TK), White J considered the meaning of “possession” in the context of a *mandament van*

spolie for the return of the deceased's property. At page 777 he had the following to say:

"The definition of possession by the learned author of Wille's Principles of South African Law 6th ed at 192, which has been accepted by the Courts (see, for instance, Mbuku v Mdinwa 1982 (1) SA 219 (TK), reads as follows:

"Possession is the physical control by a person of a corporal thing with the intention of keeping the control of it for his own benefit"

Possession therefore consists of two elements, namely the physical element of detention (detentio) and the mental element of exercising control over the thing for one's own benefit (animus possidendi) –Van der Merwe (op cit para 63). The minimum requirement for 'possession' in an action for a spoliation order is that the 'possessor' must have intended deriving some benefit for himself from the property. In Scholtz v Faifer 1910 TPD 243 at 246 Innes CJ set out the position as follows:

'Here the possession which must be proved is not possession in the ordinary sense of the term- that is, possession by a man who holds pro domino, and to assert his rights as owner. It is enough if the holding is with the intention of securing some benefit for himself as against the owner.'

[22] From the cases discussed, it is apparent that the intention with which one possesses a thing is decisive on whether one should succeed in an application for a *mandamus van spolie*. Up until 30 July 2010 when the Department instructed the applicant to await an instruction from it as to what should become of the equipment, the applicant clearly possessed the equipment with an intention of securing some benefit for himself, in terms of his performance in accordance with the contract. It is necessary to investigate the effect, if any, of the receipt of the letter of 19 July by the applicant from the Department. The letter informed the applicant that a firm decision had been taken by the Department not to install the equipment at Park Rynie and that, it would instead be installed at Gale Street Mortuary. It then pleads in the following manner: *"Could we have it done within the current contract?"* The letter concludes with the words: *"Could you give me your thought and the way forward."*

[23] The position taken by the Department was clear. It did not want to repudiate the

contract it had with the applicant. Secondly, it considered the costs implications of transporting to and installing the equipment at the Gale Street Mortuary. It sought to engage the applicant in that regard. It must follow that both the Department and the applicant considered themselves bound by the contract and they wanted to accommodate each other on how the equipment was to be installed at the Gale Street Mortuary. The Department knew that the applicant had the skills, through the Red Ants, to install the equipment. Clearly therefore the applicant held the equipment, even after 19 July 2010, with the intention of securing some benefit for itself against the Department. The Department respected the position of the applicant, in term of the contract it had.

[24] On the facts proved and those assumed by the parties for purposes of this application, the removal of the equipment from the applicant was clearly unlawful. Possession of the applicant of the equipment must therefore be restored *ante omnia*.

[25] Consequently the following order will issue:

The order prayed for in paragraphs 1, 2 and 3 of the notice of motion is granted.

CELE AJ

Date of Judgment	:	5 November 2010
Counsel of Applicant	:	Advocate M Bingham
Instructed by	:	Deneys Reitz Attorneys
		Applicant's Attorneys
		3 Pencarrow Crescent
		La Lucia Ridge
		DURBAN
Counsel for Respondents	:	Advocate A D Collingwood

Instructed by : **Garratt Mbuyisa Neale Inc**
Respondents' Attorneys
c/o Gavin Price Attorneys
199/201 Percy Osborne Road
Morningside
DURBAN