CASE NO: 300/2010

NORTH WEST HIGH COURT, MAFIKENG

In the matter between:

S NARAGHI CONSTRUCTION CC	**APPLICANT**
and	
TSHOLOFELO AMOS JACKIE TSHEPE	**1ST RESPONDENT**
GADIMANG GLORIA TSHEPE	**2ND RESPONDENT**
DANIëL CHIDI	**3RD RESPONDENT**

J U D G M E N T

MPSHE AJ:

[1] This is an application for ***mandament van spolie*** of a construction site. The applicant had entered into a sale agreement with respondents on the 21 July 2008. This is a sale of land in respect of Site 4226, Unit 11, Mmabatho. Property was accordingly transferred and registered in the respondents' names.

[2] On the same day parties concluded another contract providing for applicant to build a house for respondents on the said site.

[3] Subsequent to the building contract applicant acquired possession of the building site and commenced the building construction. The construction has progressed up to roofing level. It needs to be mentioned that first and second respondents secured loan from First National Bank.

[4] The relationship between the parties was not without problems. As per construction agreement an amount of R210 869.00 (two hundred and ten thousand eight hundred and sixty nine) was paid on the 30 March 2009 to builders. This was the first progress payment representing 35,7% work done.

[5] Disputes then arose between applicant and first and second respondents ***inter alia*** around money due and payable to applicant, and the construction of the work as well as the so-called "front loading of a bid" to the effect that applicant claimed money up-front without the corresponding value to first and second respondents.

[6] It is common cause that both applicant and first and second respondents tried to resolve the conflicts but to no avail. It is further common cause that first and second respondents took possession of the property on the 03 February 2010 by removing a truck belonging to applicant and the "fence". It is further common cause that the said occupation or possession was not preceded by due process of the

law. It is further common cause that first and second respondents put the property in possession of another contractor, the third respondent to this application. It is further common cause that the construction of the house had reached a roofing level as reflected in photographs attached.

[7] In order to arrive at an informed judgment I will deal with the three important issues. These are:

(i) ***Locus standi*** of the applicant.
(ii) Whether respondents committed an act of spoliation.
(iii) Urgency.

[8] ***LOCUS STANDI OF THE APPLICANT***

Adv Rossouw SC for both respondents argues that applicant was never in possession of the property. That applicant never acquired free and undisturbed possession whatsoever. The bottomline being that respondents did not enter into any agreement with applicant but with S NARAGHI-ARANI and his wife MARINA NARAGHI. Counsel argues that a wrong unknown party is before court, that the application be dismissed for lack of ***locus standi***.

Needless for me to state that Advocate Pistor SC holds otherwise and contends that applicant has ***locus standi*** before court. He contends that whichever way one sees it Mr S NARAGHI-ARANI and his wife never intended to build the house in any other way save through applicant.

I agree with counsel for both respondents that in motion proceedings a party, applicant in particular has to make out his case in the founding affidavit. Whilst in agreement with counsel for both respondents it needs to be mentioned that the founding affidavit referred to attached documents not disputed by both respondents. The relevance and materialness of these documents cannot be overlooked. I am enjoined to look at all papers before me to make a decision on the matter.

I will therefore refer to attached documents:

8.1 Annexure "B" entitled Variation Order (V.O.) TO CONSTRUCTION AGREEMENT …….

A closer look of this document on the first paragraph dealing with the parties states both respondents and S NARAGHI Construction CC as parties thereto.

On page 2 of 2 of this document all parties have appended their signatures, of importance is the writing of S NARAGHI CC underneath that of S NARAGHI-ARANI. I cannot attach any significance to this save the one that S NARAGHI-ARANI signed in a representative capacity.

8.2 Annexure "C" entitled AGREEMENT BETWEEN PARTIES BELOW INDENTIFIED AS CLIENT AND CONTRUCTOR …….. dated 30 March 2009. On this document again parties are first and second respondents and S NARAGHI

CONSTRUCTION C.C. Below the signatures of S NARAGHI are the words “FOR S NARAGHI CONSTRUCTION C.C.”

Similarly, here as in 8.2 ***supra*** meaning is that S NARAGHI acted in his representative capacity. It is interesting again to note the wording of the heading of this document i.e. Agreement between parties below identified as client and contractor. (My underlining).

8.3 Annexure “D” entitled TAX INVOICE NO. 1 FOR FIRST NATIONAL BANK dated 6 March 2009. The builder on this document is reflected as S NARAGHI CONSTRUCTION C.C. S NARAGHI-ARANI has again signed for the builder. The name S NARAGHI Construction appears on the top right hand side of the document reflecting the address and the NHBRC registration number.

8.4 Annexure “E” is entitled PROGRESS PAYMENT CERTIFICATE dated 06 March 2009. This is an FNB document issued by first and second respondents for payment in favour of S NARAGHI Construction. Similarly on this document S NARAGHI-ARANI has signed in a representative capacity being S NARAGHI CONSTRUCTION DIRECTOR.

8.5 First and second respondents in response to paragraph 1 of applicants founding affidavit dispute title of applicant with regard to the entity and demands proof thereof. Similarly in response to paragraph 3 of founding affidavit first and second

respondents dispute the existence of close corporation even though the registration numbers of the entity is thereon reflected boldly as CK 93/27436/23.

Conclusion one arrives at is to the effect that if applicant can prove existence of the entity the objection will fall away.

8.5.1 It is noteworthy that first and second respondents reaction to the words S NARAGHI CONSTRUCTION C.C. on ducuments is that it is wrong. First and second respondents find an error on all documents mentioning S NARAGHI CONSTRUCTION. In conclusion first and second respondents state that upon signing of these documents the patent error was not noticed. However, it needs to be mentioned that it is not a document but documents as I have indicated ***supra***.

I therefore conclude that first and second respondents knew or should have known that applicant was the contracting party.

[9] **WHETHER RESPONDENTS COMMITTED AN ACT OF SPOLIATION**

I will not deal herein with the law regarding ***mandament van spolie*** as this is trite. I however will embark on the elements thereof as required of the applicant to succeed in securing the relief sought. Evidence in this application will be referred to in the sequence it

presented itself.

9.1 Peaceful and undisturbed possession. It is trite that applicant has to proof on a balance of probabilities that prior to spoliation he was in a peaceful and undisturbed possession – KRAMER v TRUSTEES CHRISTIAN COLOURED VIGILANCE COUNCIL, GRASSY PARK 1948 (1) SA 748 (c) at 753.

9.2 It is common cause that applicant acquired lawful possession of the property around November 2008 after first and second respondents had acquired a loan with the First National Bank.

9.3 This occupation started the building construction by applicant and was peaceful and undisturbed. In April 2009 due to a dispute between the parties applicant slowed down building activities. First and second respondents argue that applicant actually abandoned the property and thereby lost possession. Nothing turns around this in that albeit applicant slowed down activities or stopped work entirely, the property of applicant, the truck was still on the property.

9.4 On 28 May 2009 parties called upon NHBRC to mediate between the parties. It is not stated anywhere that during this mediation process in May 2009 applicant was not on the site or that that applicant's truck had already been removed, instead it is evidence that applicant still had access to the property because applicant painted the walls of the building and erected a fence. The said fence was later removed by first and second

respondent.

9.5 On the 01 July 2009 applicant re-erected the fence and evidence by first and second respondents is that applicant removed all wheels from the mobile machinery on the property. I cannot interpret this anyhow save that applicant re-affirmed occupation of the property. There is nothing before me indicating or suggesting that possession was lost even at this stage.

9.6 As a result of NHBRC intervention the contract was reinstated around September 2009. this simply means that applicant was enabled to proceed with building activities.

9.7 As a result of the continued possession and continuing building activities progress report in favour of applicant was issued on 11 November 2009 by first and second respondents. On 06 January 2010 applicant was paid for progress made. There is no evidence nor suggestion that after 11 November 2009 applicant left the property and thereby did not have peaceful and undisturbed possession. However, first and second respondents state that contract was cancelled around January 2010. Accepting that contract was cancelled even though not communicated to applicant this did not deprive applicant of possession of the property.

9.8 On 03 February 2010 first and second respondents for the first time removed the fence and loaded it on the truck which was

still on the property. Mr Rossouw for first and second respondents argued that the possession or occupation was not peaceful and undisturbed. He argued further that possession was lost by applicant during April 2009 when he stopped building activities. I do not agree given the chronology of events outlined above. It cannot be suggested that the difference with regard to payments means loss of peaceful and undisturbed possession. All these differences around payments happened whilst the applicant was still in possession of the property and at no stage was applicant despoiled up until the 03 February 2010.

Advocate Rossouw argued possession has to be for a long period and referred court to the case of ***MBANGI & OTHERS v DOBSONVILLE CITY COUNCIL*** 1991 (2) SA 330 WLD.

Advocate Rossouw argued that applicant has no lien over the property as same was waived by applicant to First National Bank. He referred me to Annexure "T4" of his bundle. I don't agree with this argument. A closer reading of this annexure reveals that applicant was agreeing that the bank be "ranked preferent in every respect to any claim, lien, or right of retention" over the said property. There is no evidence whatsoever that the lender (the bank) is claiming the lien over the property, nor is the bank a party in this application on the issue of right to a lien.

The purpose of ***mandament van spolie*** is well-known. It cannot

be argued that first and second respondents did not take the law into their hands. The decisions in ***MANS V LOXTON MUNICIPALITY*** 1948 (1) SA 996 (c) at 977, ***MEYER v LA GRANGE & ANOTHER*** 1952 (2) SA 55 (N) AT 58 and ***YEKO v QANA*** 1973 (4) SA 735 (A) at 739 E are authoritative.

I therefore come to the conclusion that first and second respondents did commit an act of spoliation. Mr Rossouw for first and second respondents argued that the application be referred for a hearing. I don't agree in that the application is capable of being decided on papers filed.

[10] **URGENCY**

I am in agreement with Mr Rossouw that application for ***mandament van spolie*** does not make the said application automatically urgent. He correctly referred to ***MANGALA v MANGALA*** 1967 (2) SA 415 (E).

It is our law that urgency is not a given in applications' but that applicant must make out a case for urgency in order to enjoy provision of Rule 6 (12).

In this application it is common cause that a third party in the form of third respondent was put in possession of the property. It is evidence of the applicant that the property is necessary for payment of monies owed by first and second respondents.

The case of ***JIVIAN v NATIONAL HOUSING COMMISSION*** 1977 (3) SA 890 at 896 C-D is apposite.

The application had to launched on an urgent basis for reasons stated ***supra.***

CONCLUSION

In conclusion I come to the conclusion that first and second respondents had committed an act of spoliation.

ORDER

I grant an order as prayed for in accordance with Draft Order marked "X".

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M J M MPSHE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant	:	Adv Pistor SC
For the 1 & 2 Respondents	:	Adv Rossouw SC
For the Applicant's Attorneys	:	Smit Stanton Inc
For the 1&2 Respondents' Attorneys	:	Botha Coetzer Smith Attorneys

Date of hearing	:	22 February 2010
Date of judgment	:	04 March 2010