REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 12231/2024
(1) REPORTABLE: YES/**NO**
(2) OF INTEREST TO THE JUDGES: YES/**NO**
(3) REVISED.
DATE
SIGNATURE

In the matter between:

FIRST CLASS FABRICATION (PTY) LTD	Applicant
And	
ROADS AGENCY LIMPOPO (SOC) LTD	First Respondent
RSSM CONSTRUCTION (PTY) LTD	Second Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **27 January 2025**.

JUDGMENT

MAKOTI AJ

Introduction

[1] Due to internal administrative mishaps this judgment was not circulated on 17 December 2024 when it was finalised. The parties deserve an apology.

[2] This application was brought on urgent basis, with First Class Fabrication (Pty) Ltd (FCF), the applicant, seeking an order to be restored possession or access to a construction site known as Mavunga Access Road, Vhembe District, Limpopo Province. The Roads Agency Limpopo (SOC) Limited (RAL), the first respondent, opposes the application. There was no filing on behalf of the second respondent, RSSM Construction (Pty) Ltd (RSSM).

[3] Where I refer to parties in this judgment it should be understood to mean both FCF and RAL collectively, and to the exclusion of RSSM which is not participating. It is common cause that RSSM is the new service provider that RAL appointed to take over the site at Mavunga to perform the construction works. It replaced FCF.

[4] The application was first before court on 12 November 2024 on which occasion it was removed from the roll by Pillay AJ. Costs were reserved for later determination.

Issues to be decided

[5] Before me the parties were *ad idem* on a number of facts, more so about the contract that bound them, its length and material terms. They were also in agreement about the delivery challenges which were encountered by FCF in its quest to meet the obligations under the contract. I will deal with the specifics of the challenges below.

[6] *Mandament van spolie* is a legal remedy that is available in our jurisprudence, the purpose of which is to protect possession of property. Its purpose is to prevent unlawful dispossession of property. Thus, where it is successfully invoked it results in the restoration of possession to persons who have been unlawfully dispossessed of property. What I have to decide, according to established legal principle for *mandament van spolie*[1] is whether FCF should be granted the remedy or not.

[7] To be granted the remedy an applicant has to satisfy two of important requirements. The first is that a person who seeks repossession must prove peaceful and undisturbed possession of the property. And the second is that the person must show unlawful dispossession (or deprivation) by the spoliator.[2] Both must be established. However, even if the first question whether the remedy should be granted is answered affirmatively, there are instances where the remedy may still be refused. This will happen where a valid defence has be raised.

[8] Before I ponder the question whether the remedy ought to be granted, I take a detour to deal with the question of urgency. This is necessary because of the contention by RAL that urgency is contrived and that I should reject the call to accord priority to the application.

Whether the application is urgent

[9] Urgency stands on two anchor consideration, which are trite. First, an applicant is required to adduce [sufficient] facts which it avers renders the application urgent. Second, once the first hurdle has been successfully overcome, such applicant must provide reasons why it will not attain substantial redress at a hearing in the future. In *Cekeshe And Others v Premier, Eastern Cape, And Others*[3] the court explained that the substance of the case, factually established, is an important consideration as opposed to the form of the application.

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1 Naidoo v Moodley 1982 SA 82 T.
2 Nino Bonino v De Lange 1906 TS 120; Also, Yeko v Qana 1973 4 SA 735 (A) 739.
3 Cekeshe And Others v Premier, Eastern Cape, And Others 1998 (4) SA 935 (TK).

[10] Without regurgitating them, the grounds for urgency raised by FCF are *inter alia* that:

[10.1] it [FCF] received a notice of termination of the service agreement on 23 October 2024. The applicant contends that RAL was barred from terminating the agreement due to its earlier breach of contract, and that the termination was unlawful and unwarranted;

[10.2] on 27 October 2024 FCF was told to leave the construction site, conduct which it contends amounted to spoliation. Physical dispossession also followed;

[10.3] further, that FCF retained contractual possession of the site;

[10.4] then that:

> "The present application is thus extremely urgent because, and, absent the enrolment and adjudication of the application on an urgent basis, the Applicant shall not achieve any redress in a hearing in due course. Unless the application is heard and determined urgently, the Applicant shall suffer irreparable harm."

[10.5] the its staff members will suffer from the illegal and unlawful manner in which the construction site was forcefully taken away from it; and

[10.6] that the public purse to the value of R41 000 000 (Forty-One Million Rand Only) was seriously and detrimentally affected by the awarding of the contract to RSSM.

[11] RAL refutes these by pointing out that the service agreement between the parties long terminated by effluxion of time on 08 May 2024. From that date, the contention continued, FCF lost all contractual rights to be in contractual possession of the site as there was no written extension of the agreement, in writing. The request for extension of contract was declined by RAL's agent (known commonly as employer's agent).

[12] Also, RAL contends that FCF has long abandoned the construction site on 07 November 2023, and that it did not state in the application as to when it returned to site. The allegation that employee were physically dispossessed from the construction site were rejected as false, recording that FCF refused to return to site when it was instructed to do so by the employer's agent. Thus, the contention proceeded, FCF has not been in physical possession of the construction site since 07 November 2023.

[13] I have already expressed it that the rules enjoin a party that seeks to be heard on truncated timeframes to:

> "… set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."[4] (Emphasis added)

[14] What the sub-rule requires are facts to the satisfaction of the court, firstly, which the applicant relies on for alleging that the application is urgent.[5] The second anchor, whether it will be afforded substantial redress in the future, is triggered once the applicant has succeeded with the first leg of the enquiry.

[15] Having regard to the facts in this application, viewed in light of the applicable legal principles, I am not convinced about most of the grounds of urgency that FCF relies on in its quest to be heard on truncated time periods. What make me willing to hear this application on urgent basis are the exchanges that took place on 23 October 2024 and, thereafter, on 27 October 2024. I do this in order to determine whether what happened on those days are acts of spoliation and, also, because of the nature of the application which were are told deserves urgent attention.

Whether the applicant was spoliated

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4 Erasmus: RS 13, 2020, D1-50.

5 Salt v Smith 1991 (2) SA 186 (Nm); Cekeshe v Premier, Eastern Cape 1998 (4) SA 935 (Tk) at 948F; also, East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[16] The extraordinary and robust nature of *mandament van spolie* is a well settled part of our jurisprudence. It is a potent remedy against unlawful dispossession.[6] Spoliation orders are especially important instruments in the battle against self-help. A court hearing a spoliation application does not concern itself with the rights of the parties, and it limits itself to the question whether there has been dispossession.[7]

[17] I need to briefly consider the written agreement between the parties, which they have addressed me on. They agree to have concluded a valid and binding service level agreement on 03 May 2023. This followed the formal appointment, in writing, of FCF as RAL's service provider or contractor on 07 December 2022, under tender numbers RAL/T1048/2022. Clause 1.16 of the service agreement reads thus:

> "The duration of the project implementation for the project that is the subject-matter of this agreement, as agreed by the parties, is a period of 12 (Twelve) months, which period shall commence on 9 May 2023 and lapse on 8 May 2024, unless extended or accelerated by written agreement by both parties, in terms of the procedure provided for extension in clause 5.12 of the GCC."

[18] Further, the service agreement states that no amendments shall carry contractual force and effect if they are not reduced to writing and signed by both parties. The parties, when concluding and agreeing the terms of the service agreement, exercised their freedom to contract. The freely agreed terms must be given their effect, a notion known in our jurisprudence as *pacta sunt servanda*.

[19] That principle simply means that agreements must be kept, and implicates court to not easily refuse to give effect to contracts concluded between parties. In *Beadica*[8] the court held that:

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6 Bon Quell (Edms) Bpk v Munisipaliteit van Otavi 1989 (1) SA 508 (A).

7 Top Assist 24 (Pty) Ltd T/A Form Work Construction v Cremer and Another [2015] 4 AII SA 236 (WCC) (28 July 2015) para 33.

8 Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020). See also, Napier v Barkhuizen 2006 (4) SA 1 (SCA) (Barkhuizen SCA).

> "[89] This principle follows from the notion that contracts, freely and voluntarily entered into, should be honoured. This Court has recognised as sound the approach adopted by the Supreme Court of Appeal that the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases."

[20] Upholding a contract with the fullness of its terms would also mean, in the context of this case, that an extension of the agreement is done in the manner that is contractually regulated. It is common cause that RAL through its principal agent, employed to oversee the programme of the works, refused to grant an extension of time to FCF when it made the request.

[21] FCF's case is that its service agreement with RAL was extended and that agreement was still valid on the fateful day. It reads this from a number of factors, including the letter that it received from RAL purporting to terminate the agreement, dated 13 September 2024. By then, according to the terms of the agreement which I have mentioned above, the stipulated date of termination of the agreement had already passed, with no written extension agreed to and signed by the parties.

[22] I struggle to conceive the argument on behalf of FCF that the agreement between the parties remained in existence. If it did, for how long was it going to remain in existence? Also, who agreed to the extension? These are questions that have no answers from FCF, except to try and infer from the above facts that it remained with the contract. But the applicant acknowledges that it did request to be granted an extension and that the request was refused.

[23] The fact that FCF disputed the termination of the agreement is for me of no moment. More so as the agreement terminated by effluxion of time. What FCF was firmly aware of was that its request for an extension was not allowed, and it was a only matter of time before it was asked to told to vacate site. It held onto the site when it was not performing any work, not due to anyone's fault, but its inability to perform the works for which it was appointed as a contractor.

[24] RAL pleaded that FCF had abandoned the construction site and that, as a result, the claim of spoliation is untenable. The contention is that FCF left site on 23 November 2023 and has not returned to it ever since. This is disputed by FCF which contends that it only suspended the works. To bolster the contention FCF relied on *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and another*[9] which affirmed a contractor's right to suspend works as a mechanism to enforce payment from the employer. I am not convinced with the notion that FCF suspended the works due to, perhaps, non-payment by RAL. There are no facts evincing that RAL was in breach of the agreement warranting suspension of the works.

[25] When I engaged with counsel for FCF about this issue she indicated that the applicant is not basing the application on physical possession but on contractual possession. This was a slight departure from the case that was made on behalf of FCF, in that it sought to refute the contention that it had abandoned site as baseless. The concession was correctly made in that objective evidence reveals that the applicant was asked on several occasions to return to site, and failed to do so. In my view, this seals the question that FCF was not physically in peaceful and undisturbed possession of the site. It was not.

[26] In *Turney and another v Ntintelo*[10] and another which was relied on by RAL the following was stated:

> "[22] Originally, the mandament only protected the physical possession of movable or immovable property. However, over the years and in the course of scientific development, it was extended to cover the so-called 'quasi-possession' of certain incorporeal rights, such as servitutal rights, and incidents of possession, such as electricity and water supply cases. See Telkom SA Ltd v Xsinet (Pty) Ltd (supra), para 9. But not all incorporeal rights may be the subject of spoliation. Eskom Holdings SOC Ltd v Masinda 2019 (5) SA 386 (SCA) para 14. For instance, the

[9] [2022] EWHC 3275 (TCC) paras [73] – [83].
[10] [2023] JOL 58279 (WCC).

quasi-possession of purely personal rights or specific performance of contractual obligations do not enjoy protection under this possessory remedy."

[27] Also, the Court in the same case then held that *mandament van spolie* remedy is not available to resolve contractual disputes or for specific performance.[11] In *Eskom Holdings SOC Ltd v Masinda*[12] it was held *inter alia* that:

"[22] ... The mere existence of such a supply is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession. Consequently, insofar as previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided." (Emphasis added)

[28] What FCF wants in this case is for its alleged contractual rights to be protected such that it is returned to site. That sounds like a cry for specific performance. However, on whatever front that I have tried to look into this application, I find myself unable to agree that FCF was in possession of the site and that it was dispossessed by RAL and the Second Respondent.

[29] The indications are that FCF met serious financial difficulties which hampered its abilities to meet its obligations in terms of the agreement. When it overcame those difficulties the term of the agreement had neared the end. Its request for an extension was not approved. The absence of an extension can only mean that the agreement terminated

[11] Ibid, par [38].
[12] Eskom Holdings SOC Limited v Masinda (1225/2018) [2019] ZASCA 98; 2019 (5) SA 386 (SCA) (18 June 2019).

in accordance with its terms.

[30] In the premises, I find, on the question posed above that FCF was not dispossessed. It simply was not there to perform its functions or obligations in terms of the agreement. FCF has not been in peaceful and undisturbed possession of the site.

Costs

[31] This is a case which does not implicate the protection of constitutional rights and, the now established *Biowatch*[13] principles are not applicable. The purpose of an award of costs to a successful litigant has been said to be to indemnify such party for the expense to which he or she or it has been put through having been unjustly compelled to initiate or defend litigation. This is a general principle.

[32] Some time ago the Court dealt with the question of costs in *Kruger Bros & Wasserman v Ruskin*[14] and it held that:

> "The rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised but it cannot be challenged, taken alone and apart from the main order without his permission".

[33] I have read the application which is made out of voluminous papers. Some of the documents which form part of the filed case were unhelpful and could have been avoided. Nonetheless, there is no reason why I should not follow the principle that costs should follow the result. I must also say that I am unpersuaded by the parties respective contentions that costs should be awarded at a higher scale and that they should include the costs of two counsel where there has been the use of more than one counsel. Normal costs are warranted.

ORDER

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[13] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009).
[14] 1918 AD 63 at 69.

[34] I make the following order:

[a] The application is dismissed with costs.

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M. Z. MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION

APPEARANCES:

FOR APPLICANT	**:**	**ADV S MARTIN** **COX YEATS ATTORNEYS** **C/O NILAND & PRETORIUS INC** **POLOKWANE**
FOR FIRST RESPONDENT	**:**	**ADV W MOKHARE SC** **ADV S MATHABATHE** **MONTANI ATTORNEYS** **POLOKWANE**
DATE HEARD:		**19 NOVEMBER 2024**
JUDGMENT DELIVERED:		**27 JANUARY 2025**