NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO. **A119/2016**

In the matter between:

OCEANS 102 INVESTMENTS CC **APPLICANT**

And

STRAUSS GROUP CONSTRUCTION CC **1ST RESPONDENT**

RUBICON SECURITY SERVICES **2ND RESPONDENT**

Neutral citation: *Oceans 102 Investments CC v Strauss Group Construction CC & Another* (A 119/2016) [2016] NAHCMD 274 (19 September 2016)

Coram: ANGULA, DJP

Heard: 7 July 2016

Delivered: 19 September 2016

Flynote: Applications – Spoliation orders – Builder's Liens – A lien is dependent on continuous possession - There must be physical control or occupation (*detentio*) and the intention of holding and exercising possession (*animus possidendi*) - Intention alone is insufficient – Symbolic possession in order to exercise a right of retention is likewise insufficient and cannot substitute actual or effective possession.

Summary: The applicant and the respondent entered into a written building agreement in terms of which the respondent undertook to construct residential units on the applicant's property for a consideration set out in the agreement. The respondent then took possession of the property and commenced with the construction works. The applicant failed to pay the respondent in respect of the work done. The respondent then cancelled agreement and removed all its goods from the building site and informed the applicant that its removal of the goods should not be seen as relinquishing its lien over the property. Thereafter the property was occupied by vagrants. The applicant then received complaints from the neighbours. Thereafter the applicant employed a security company which posted guards on the property. The respondent then erected boards outside the boundaries of the property indicating that it was exercising lien over the property. The boards were removed by the applicant's guards. A stand-off over the boards ensued between the guards. That prompted the applicant to launch this application alleging *inter alia* that it has been despoiled of its undisturbed and peaceful possession of the property. In opposition to the application the respondent contended that it never relinquished its builder's lien in that its intention throughout was that it retained possession of the property through its lien over the property.

Held that – a builder's lien is dependent on continuous possession. There must be physical control or occupation. An intention of holding and exercising possession alone is insufficient.

Held further that - symbolic possession in order to exercise a right of retention is likewise insufficient and cannot substitute actual or effective possession.

Held further - on the facts that respondent lost its lien over the property when it moved and left the property on 10 May 2015.

Held further - that on the facts of the matter the applicant succeeded in proving that it was in peaceful and undisturbed possession of the property and that the respondent committed spoliation when it sent security guards to prevent the security guards placed on the property by the applicant to exercise possession and control over the property on behalf of the applicant.

ORDER

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1. The application is granted.

2. The first respondent is ordered to the pay applicant's costs, such costs to include the costs of one instructed counsel and one instructing counsel.

JUDGMENT

ANGULA, DJP:

Introduction

[1] The applicant is Oceans 102 Investments CC, a Close Corporation duly registered and incorporated in terms of the laws of Namibia with its principal place of business situated at erf No 577 Nakanda Mukatala Street, Outapi. The applicant is the registered owner of erf 102 situated at Damara Tern Street, Dolphin Beach, Walvis Bay ("the property"). The property is the subject matter of the dispute between the parties in this matter. The first respondent is Strauss Group Constructions CC a Close Corporation duly registered and incorporated in terms of the laws of Namibia with its principal place of business situated at erf no 3689 Einstein Street at Swakopmund. The second respondent is Rubicon Security Services CC also a Close Corporation duly registered and incorporated in terms of the laws of Namibia with its principal place of business situated at the corner of Vrede Rede and Second Avenue, Vineta, Swakopmund. It provides security services. Only the first respondent opposed the application and accordingly it will simply be referred to as "the respondent" in this judgment.

Background

[2] On 17 February 2014, the applicant and the respondent entered into a written building agreement ("the agreement") in terms of which the respondent undertook to construct residential units on the property for a consideration set out in the agreement. The respondent then took possession of the property during March 2014 and commenced with the construction works. The respondent finalised the underground basement structure consisting of driveways and garages, covering an area of about 3225 m^2 under a reinforced concrete roof. Thereafter the applicant failed to make payment to the respondent in respect of the work done.

[3] By letter dated 19 February 2016, the respondent cancelled the agreement due to the applicant's non-payment. The respondent sent a termination notice to the applicant, informing the applicant that the removal its goods, machinery and plant must not be

seen as the relinquishing of possession and that it shall specifically continue to exercise possession in order to safeguard its lien over the works.

[4] On 10 March 2015 the respondent removed its goods from the property and sent a letter to the applicant's agent, the architect, confirming that it had removed all its goods from the site and maintained that it was retaining its builder's lien over the property. According to the respondent it then moth-balled the site by re-erecting a fence along the boundary, screened off the boundary fence with black netting, cleaning the site and locking the gates in the fence with chains and padlocks.

[5] After the respondent had removed its goods from the site, there were numerous complaints from the owners of the adjacent properties as well as the Municipality of Walvis Bay. These complaints were *inter alia* that the site was viewed by neighbours as a building site disaster, a hazard and diminishing property value of the adjacent properties with each day the project site stood idle. The occupants of the body corporate sectional title scheme adjacent to the site complained of the safety risk the site posed due to it being used by vagrants and crayfish poachers and the failing lateral support causing the walkway between the properties to fail.

[6] As a result of the neighbours' complaints and of the a break-in into one of the adjacent properties, the applicant during May 2015, employed Shilimela Security, a security company, and placed security guards on the property to guard the property.

[7] Thereafter during August 2015 in order to address the safety risk complained by neighbour the applicant employed a building contractor, Nexus to carryout remedial works and to effect lateral support repair-work to the structure at the site. This was done with the knowledge of the respondent. Nexus gained access to the premises by breaking the padlocks at the gate of the fence. It filled up the contours with sand, compacted it and relayed the paving. After completion of the repair works, Nexus closed

off the fence. The site was returned to its moth-balled state. Thereafter from May 2015 until April 2016, the applicant's security guards remained on and guarded the property.

[8] During February 2016, the applicant appointed a real estate entity, Remax Coastal Property Centre in Walvis Bay to market the property. On 30 March 2016, the respondent placed three boards outside the boundaries of the property on which it indicated that it was exercising a lien over the property. Shortly thereafter, the applicant instructed the Shilimela Security guards to remove the boards. On 4 April 2016 the respondent went to the property and tried to re-erect the lien boards again. He was blocked by the security guards of Shilimela Security. Shortly thereafter the respondent returned with security guards in bigger numbers from Rubicon Security Services, the second respondent. The stand-off between the guards from the two security companies threatened to become violent. As a result police from Nampol were called in to diffuse the situation. In order to avoid confrontation the guards from Shilimela Security were withdrawn from the site. On 12 April 2016, the respondent's security guards re-erected the lien boards and remained on site. On 19 April 2016 the guards were withdrawn on the respondent's instructions. So much of the background.

[9] On 26 April 2016 the applicant launched this spoliation application on an urgent basis seeking for orders in the following terms:

> *'2. That the first and second respondents be ordered, immediately upon service of this order, to restore to the applicant peaceful and undisturbed possession of the property situated at Erf 102, Damara Tern Street, Dolphin Beach, Walvis Bay ("the property") by, inter alia,*
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> *2.1 removing the sign boards erected on the property by the first respondent and/or second respondent;*
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> *2.2 removing the security guards of the second respondent from the property;*

2.3 removing all material and equipment placed on the property by the first respondent.'

[10] The application was opposed by the respondent.

[11] The application came before me on 9 May 2016 for a ruling on the question of urgency only. On 12 May 2016 the court ruled that the matter was urgent.

[12] The merits were argued on 7 July 2016 whereafter judgment was reserved. Mr Jones appeared for the applicant and Mr Jacobs appeared for the respondent. Counsel filed comprehensive heads of argument for which the court wishes to express it appreciation.

The parties' respective positions regarding the possession of the property

[13] The applicant's case is that that it took possession of the property during May 2015 after the respondent abandoned the property; that it employed Shilimela Security to guard the property; that the guards occupied and protected the property until April 2016 when a confrontation ensued between it's the guards and the guards sent by the respondent to guard the property. The applicant thus contends that it has been unlawfully despoiled from the property by the respondent.

[14] The respondent's case is that it removed its goods from the property on 10 March 2015 but continued to exercise possession over the property through its builder's lien and that its removal of its goods must not be seen as relinquishing of possession and that it shall specifically continue to exercise possession in order to safeguard its lien over the works. Thus the respondent contends that it never relinquished possession of the property. The respondent further maintains that it retained possession of the site by virtue of the following facts: by re-erecting the fence along the boundary with adjacent

property; screening the boundary fence around the said adjacent property; storing a large quantity of steel in the basement; and locking the gates in the fence with chains and padlocks.

Issues for determination

[15] It seems to me that the issue for determination is who of the parties has been in possession of the property. Was it the applicant through physical occupation of the property and guarding of the property by the guards or did the respondent continue to exercise possession over the property through its builder's lien.

Applicable legal principles to spoliation

[16] There are two sets of different legal principles involved and pleaded in this matter namely the principles relating to the remedy of spoliation and the principles relating to the defence of a lien. The remedy and the defence are different and accordingly produce different results on their application to a particular set of facts. It is therefore necessary, in my view, to consider each principle separately and apply it to the facts at hand.

[17] In their heads of arguments, both counsel thoroughly dealt with the legal principles applicable to the remedy of *mandament van spolie*. Counsel were *ad idem* on the applicable legal principles relating to the remedy of spoliation. It is trite that the onus rests on the applicant to prove on a balance of probabilities that he was in peaceful and undisturbed possession of the thing and that he was unlawfully deprived of such possession by the respondent. It is generally accepted that the underlying rationale for the remedy is that no person is allowed to take the law into his or her own hands and

therefore an act that amounts to the breach of peace in the community should be discouraged.[1]

[18] A number of defences may validly be raised in spoliation proceedings namely that the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession; that the dispossession was not unlawful and therefore did not constitute spoliation; that restoration of possession is impossible; and that the respondent acted within the limits of counter-spoliation in regaining possession of the thing.[2]

Application of the law to the facts with regard to spoliation

[19] It is common cause that the respondent removed all its goods from the property on 10 Mach 2015. It is further common cause that between 10 March 2015 and May 2015 the respondent did not have physical possession of the property. It is not disputed by the respondent that between March 2015 and May 2015 vagrants and crayfish poachers took possession of the property.

[20] On or about May 2015, Shilemela Security guards took control of the property on the instruction of the applicant; this is not disputed by the respondent. The guards of Shilimela Security remained on the property until about 4 April 2016 when they were withdrawn after a confrontation with the guards from Rubicon security posted at the property by the respondent. Furthermore the respondent does not deny that despite its earlier stance that it would not allow another contractor on the site it thereafter allowed another contractor, Nexus, on site who was contracted by the applicant to carry out extensive remedial works on the property without any interference or objection from the respondent. It is important in this context to point out that, Mr Strauss, who is a member

[1] Nino Bonino v De Lange 1906 TS 120 at 122; Kuiiri and Another v Kandjoze and Others 2009 (2) NR447 (SC).
[2] LAWSA Vol 27 page 74 par 79

of the respondent, his residence is situated not far from the property and he has a full view of the property. He had a full knowledge of Nexus being in occupation of the property.

[21] As observed above the respondent is not denying that the applicant took physical possession of the property. It is not the respondent's case that it was in physical possession of the property. In fact it is admitted that it removed all its goods from the property but attempts to assert that it was still in possession by stating that the removal of its goods from the property must not be construed as relinquishing possession and that the respondent shall specifically continue to exercise possession through the lien over the works. The respondent's assertion for having remained in possession of the property is based on an alleged 'intention' to continue to possess the property. Counsel for the respondent relying on what was stated in the matter of *Kuiiri and Another v Kandjoze and Others*[3] submits that once possession has been acquired of land, continuous occupation or use thereof is not necessary for the retention of such possession and it is enough if the right is exercised from time to time as occasion requires. The respondent maintains that it continued to maintain symbolic possession or retained possession with the mind. Even if it were to be accepted that the respondent had been in possession of the property, it did not mount counter-spoliation against the applicant's when the latter took possession May 2015. The undisputed fact is that the applicant took possession of the property during May 2015 and has ever since been in possession of the property until April 2016. At no stage did the respondent resist the applicant's possession of the property during that period. As pointed out earlier the most obvious mode of resistance or defence would have been a counter spoliation.

[22] In the light of the undisputed facts coupled with the respondent's stance that it's claim for retention of possession is based on lien, it is my considered view that the applicant, has made out a case that it was in peaceful and undisturbed possession of

[3] 2009 (2) NR 447 (SC)

the property since May 2015 and that it was unlawful dispossession of such possession by the respondent when respondent posted guards from Rubicon security on the property who prevented the security guards placed on the property by the applicant, to exercise possession and control over the property on behalf of the applicant.

[23] It clearly appears from the papers that right from the beginning the respondent's claim for that it retained possession was based on a builder's lien. This much is clear from the first letter written on its behalf on 19 February 2015 in which it was recorded that the respondent shall continue to exercise possession in order to safeguard its lien over the works. The respondent's position was again reiterated in the letter dated 10 March 2015 after the respondent had removed its goods from the property. The letter once again repeated that the respondent shall retain its lien over the property. In bid to assert its lien the respondent erected boards near the property on 30 March 2016 indicating that it exercised a lien over the property. The boards were removed by the applicants guards by were re-erected again 4 April 2016.

[24] Despite the fact that the respondent's defence has at all times been based on its builder's lien, no case law was cited in support of that defence. It is therefore necessary to consider the respondent's claim of possession of the property in the context of legal principles governing possession of the builder's lien.

Applicable legal principles to a builder's lien

[25] A lien has been defined as a form of security. It is a right to retain the property or thing until payment has been done. According to *Silberberg and Schoeman's The Law of Property*[4] a lien is dependent on continuous possession. The authors go on to say that a right of lien exists only if the lien holder of the thing to which his or her claim relates and for as long as he or she retains possession thereof. A lien does not

[4] PJ Badenhorst (et al) (2003) *Silberberg and Schoeman's The Law of Property*, 4th edition, p.392 – 393.

automatically revive if the lien holder relinquishes his or her possession and subsequently regains it. The only exception to this rule would seem to be if the lien holder is deprived of the thing by force or the threat of force, or if he or she parts with its possession as the result of a fraud.

[26] According to *McKenzie's Law of Building and Engineering Contracts and Arbitration*[5], in order to have a lien, there must be actual possession on the part of the builder. The possession necessary, is not possession as owner, but possession with a view to protection as against the owner. There must be physical control or occupation (*detentio*) and the intention of holding and exercising possession (*animus possidendi*). Furthermore, temporary absence on the part of the builder, such as mere absence at night, does not constitute a loss of possession, but absence for a considerable time would constitute a loss of possession unless some special steps have been taken to maintain physical control.

[27] In the matter of *Scholtz v Faifer*[6] the building contractor suspended work on a partially completed building. During his absence from work the owner assumed possession and proceeded to complete the building. The building contractor claimed he had been wrongfully despoiled of the building by the owner and sued to be restored to possession. Innes, C.J., held that there was no doubt that in these circumstances the building contractor was in *de jure* possession of the building until he formally abandoned such possession, but that in order to entitle the contractor to a spoliation order it was necessary that he prove not only that he was the *de jure* possessor of the building but that he was actually in *de facto* possession of the building at the moment when he was despoiled. At p. 248 the learned Chief Justice reasoned:-

> *'But where 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*

[5] P A Ramsden, (2014) McKenzie's Law of Building and Engineering Contracts and Arbitration, 7th edition, p.112.
[6] 1910 TPD 243.

placing a representative in charge of the work, or putting a hoarding round it, or doing something to enforced his right to its physical control. If he chooses to leave the work derelict, then, no matter what his intention may be, the physical element is absent, and he loses possession, even though he may say he intended to resume it or never intended to abandon it; the animus is there, but the detentio is absent. It seems to me that a builder who has ceased work, and whom the owner has warned that it will be completed by another if he does not continue it, should take some special step to define his position and assert his control, if he wishes to ask the Court to regard his possession as still existing.'

[28] According to *Silberberg and Schoeman's Law of Property* symbolic possession in order to exercise a right of retention is insufficient and cannot substitute actual or effective possession. In support of this proposition the learned authors referred to two judgments, namely *Louw t/a Intensive Air v Aviation Maintenance and Technical Services (Edms) Bpk*[7] and *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd*[8]. The *Louw* case confirmed the principle laid down in the latter case of *Cape Tex Engineering* in which the court stated as follows at page 533 para C – D*:*

'Mr Cooper argued that, despite this change in the position, the applicant nevertheless retained its possession of the ship. He argued that the presence of these two representatives on board must be seen in relation to the previous possession enjoyed by the applicant, and in what he described as "symbolic" light. Now, I know of no such principle whereby a party claiming a lien can substitute for the real and actual possession of the subject matter of a lien something in the nature of a symbol. It seems to me that the fact of the matter is that these two representatives did not in truth retain any real physical control of any portion of the vessel. Accordingly, I cannot see how their presence on board or the presence of one of them at any particular time on board on 5th December. 1967, could constitute the basis of a possessory lien. This view appears to me to be in accordance with those expressed in certain English cases of Mr Friedman

[7] 1996 (1) SA 602 (T)
[8] 1968 (2) SA 528 (C)

referred me. See The Scio, 16 L.T.R. 642; Olsen 7 Ugelstad v.Gray & Co., (1921) 9 Lloyds List Reports 565.'

[29] The above principles were applied by the court in the matter of T*sholofelo Amos Jackie Tshepe and Another v S Naraghi Construction Cc*[9]*.* The *Tsholofelo* matter is of similar facts with the case before court. The only difference is that the builder in this case had slowed down the construction works and still kept its property on the building site whereas in the case before court, the respondent has removed all its equipment from the building site but nevertheless claims that it has retained its lien over the property. It was correctly so submitted that mere symbolic control of one's physical control over a site is insufficient; that a person can only have a right of retention for as long as he/she is in possession of the property.

[30] The court in the *Tsholofelo* judgment, at para 18, quoted with approval what was stated by the court in *Muller and Another v Bryant & Flanagan (Pty) Ltd*[10] on page 218 H – 219 E:

"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. I consider that the doubts expressed obiter by CORBETT, J (as he then was), in Cape Tex Engineering Works (Pty) Ltd v S.A.B. Lines (Pty) Ltd, 1968 (2) SA 528 (C) at p. 533, are well founded:

'Moreover, even if the applicant did acquire exclusive control over a portion of the vessel, does this give it a possessory lien over the whole of the vessel, bearing in mind

[9] CIV APP HC 7/10
[10] 1976 (3) SA 210 (D & CLD)

that in all other respects the vessel is in the possession and control of the master and the crew. I doubt it.'

Similarly in Insolvent Estate of Israelson v Harris and Black and Others, 22 S.C. 135 at p. 141, DE VILLIERS, C.J., said with regard to a matter involving building contracts:

'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 symbolic, and it certainly was not rightful."

It is correct, as was found by LUDORF J., in Beetge v Drenka Investments (Isando) (Pty) Ltd, 1964 (4) SA 62 (W), that possession sufficient for the purposes of a jus retentionis need not be exclusive where, for example, possession is shared with other contractors, but in that matter it was held that the possession was continuous and firm and never relinquished (see p. 69G). I do not regard this judgment as authority for the proposition that the partial use for storage purposes of an insignificant portion of the whole is a sufficient retention to found an effective debtor and creditor lien. In Liquidators of Royal Hotel Co. v Rutherford, 22 S.C. 179, it was held that a portion only of a building could be held under a jus retentionis where the contract related to the whole building but it is clear from the report of the judgment of DE VILLIERS, C.J., that the retention was only claimed against amounts owed in respect of the portion held (at p. 181):

'The claim of the defendant was that he was entitled to retain this property or so much of it as he was in possession of, until the money in respect of the portion occupied by him was paid.'"

Application of the legal principles in respect of a builder's lien to the facts

[31] On the basis of the authorities referred to above it is clear that the respondent lost its lien during March 2015 when it abandoned the property. It's record that by moving from the property should not be viewed as relinquishing possession was hollow in law. On the facts the property became a shelter for the vagrants and crayfish poachers. Under those circumstances it cannot be seriously contended that the respondent has had undisturbed possession. The possession was taken over and disturbed by the vagrants and crayfish poachers.

[32] Next came the stage when the applicant placed security guards on the property. The security guards were placed on the property to guard against the vagrants and crayfish poachers taking possession of the property. In my view since the respondent abandoned the property on 10 May 2015 the respondent did not exercise possession over the property; he lost his lien over the property. The next fact which, in my view clearly demonstrates that the applicant was in control and indeed maintained possession of the property is by placing another contractor, Nexus, in possession of the property to carry out remedial-works. Nexus was in physical control and exercised possession of the property on behalf the applicant. Nexus gained access to the property by removing the padlocks at the gate. Despite Nexus having broken down the gates to gain access, the respondent took no steps to protect or reclaimed its alleged lien. In fact, in law once alien is lost it is not capable of revival. It follows therefore that even if the respondent had tried to regain its lien by chasing Nexus from the property, in law, it would not have regained the lien possession. Counsel for the respondent argued that its possession was never threatened at that stage as Nexus simply came in to fix the failing lateral support and left immediately after having fixed what it was required to fix. In my view based on the facts referred to above the argument by counsel for the respondent that the respondent retained and exercised control of the property cannot stand.

[33] Counsel for the respondent submits that the respondent remained in possession and therefore the applicant obtained joint possession of the property. In support of this

proposition counsel referred the court to the matter of *Kuiiri and Another supra* where the principle of joint possession was considered. I have already found that the respondent lost possession of the property when he abandoned the property on 10 May 2015. On the facts before me the first time the respondent attempted to regain possession of the property was on 4 April 2016 through the guards of Rubricon Security, when they moved on the property. This was almost a year after the respondent removed its goods from the property on 10 March 2015. In my view this was not regaining possession; this was the commencement of the act of spoliation by the respondent against the applicant's undisturbed and peaceful possession of the property. I agree with the submission by Counsel for the applicant that the respondent placed the security guards on the property in an attempt to show that it had an intention to physically possess the property. In my view, and as I have already found, the respondent was not in possession of the property within the meaning of remedy of spoliation. Furthermore the respondent had lost the lien over building when it abandoned the property.

[34] In addition to the clear intention displayed by the respondent, counsel for the respondent submits that Mr Strauss regularly visited the property and this should be seen as a symbolic act to exercise actual physical control over the property. Counsel placed his reliance on the judgment in the *Nienaber v Stuckley*[11] matter which was referred with approval in by the Supreme Court of Appeal in the case of *Kuirii and Another v Kandjoze and Others*[12]. He argued that what Mr Strauss had done by taking regular walks around the premises was a symbolic act which was more than enough to exercise his control over his lien over the building site. This argument runs against the weight of authorities referred above. It has specifically been held (*Tsholofelo supra*) that symbolic possession in order to exercise a right of retention is insufficient and cannot substitute actual or effective possession.

Conclusion

[11] 1946 AD 1049 at 1056 and at 1058 – 1059.
[12] 2009 (2) NR 447 (SC)

[35] In summary, it follows therefore that the respondent's conduct during April 2016 when it attempted to regain possession of the property by means of the security guards from Rubicon, amounted to spoliation; and finally that respondent lost its lien over the property when it moved and left the property on 10 May 2015

[36] I have therefore arrived at the conclusion that the applicant has made out a case that it is entitled to the relief it seeks namely to have its peaceful and undisturbed possession of the property restored to it.

[37] In the result I make the following order:

1. The application is granted.
2. The first respondent is ordered to the pay applicant costs such costs to include the costs of one instructed counsel and one instructing counsel.

H Angula

Deputy Judge President

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APPEARANCES

APPLICANT:	**Mr Jones** Instructed by Sisa Namandje & Co. Inc.
RESPONDENTS:	**Mr Jacobs** Instructed by Du Pisani Legal Practitioners