

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
ORDER AND REASONS (I.T.O. P.D. 61)

CASE NO: HC-MD-CIV-MOT-GEN-2018/00212

In the matter between:

COSMO CONSTRUCTION & CIVILS CC

APPLICANT

and

JURGEN SPIEKER

1ST RESPONDENT

STRUCTCO CC

2ND RESPONDENT

Neutral Citation: *Cosmo Construction & Civils cc v Spieker* (HC-MD-CIV-MOT-GEN-2018/00212) [2018] NAHCMD 248 (17 August 2018)

CORAM: MASUKU, J

Heard: 27 July 2018

Delivered: 17 August 2018

ORDER

1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalised.

REASONS FOR ORDER IN TERMS OF PRACTICE DIRECTIVE 61

MASUKU J:

[1] Having listened to oral argument and after considering the written heads of argument and case law cited by the parties, I issue a judgment on the issues raised, in terms of Practice Directive 61 as follows:

Urgency

[2] Although the respondents denied that the matter was urgent in their answering affidavits filed of record, they conceded in argument, having had regard to cases cited, to the effect that spoliation proceedings are inherently urgent – *China Harbour Engineering Co. Ltd v Erongo Quarry and Civil Works (Pty) Ltd and Another*.¹ The matter is accordingly ruled to be urgent, particularly in the light of the averments made by the applicant, which amount to a good case of commercial urgency.

Builder's Lien

[3] Having had regard to the authorities cited by the applicant, I am of the considered view that the builder's lien is not open to the respondents to invoke in the present circumstances. I say so for the reason that it is clear from the papers that the

¹ 2016 (4) NR 1078 (HC).

respondents were not engaged by the applicant as builders but as project managers. The requirements of a builder's lien are set out in *New Era Investment (Pty) Ltd v Ferusa Capital Financing Partners CC and Four Others*.² The respondents, not being builders, cannot rely, in my view properly rely on this lien and it is accordingly excluded as a basis for exercising the lien they did.

[4] Furthermore, at para [43] of the *New Era* judgment, the Supreme Court held, with reference to authority, that for a party to invoke this lien, they must have exercised exclusive possession of the premises, namely, possession to the exclusion of the employer and other contractors. This does not appear to be the case with the respondent, as there is evidence that other independent contractors, involved in building, were on site.

Creditor's Lien

[5] From the papers filed of record, the respondents seem to rely on two debts and in respect of which they claim to have exercised the creditor's lien. The first is one in the amount of N\$ 171, 023. 86 and the other one is for N\$ 1 400 000.

[6] I am of the considered view that the latter debt falls to be excluded and cannot properly form the basis of the lien alleged. This is so because this alleged debt is predicated on a claim for future loss of earnings which would have to be proved and only once the respondents have shown on a balance of probabilities that the contract between them and applicant was not properly terminated, which the applicant forcefully states, is not the case. In this regard, the claim remains just that, a claim and has not metamorphosed into a debt that is due and in respect of which a creditor's lien can be properly exercised.

[7] Regarding the debt for N\$ 171, 023.86, different considerations apply. I say so for the reason that the debt is admitted by the applicant and it claims that it has made a

² Case No. SA 87/2016 (SC).

tender therefor. The main question for determination is whether the respondents are entitled to exercise the lien in the manner they did, i.e. of sealing off of the entire property and excluding the applicant and its sub-contractors from accessing the site in the process.

[8] In *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*,³ it was stated that:

'The function of a debtor and creditor lien is to fortify the claim of a creditor for agreed remuneration for work done; it is a shield which enables the creditor to withhold the return of the finished product until his claim has been met.'

Earlier at p.85, the court reasoned as follows regarding the said lien:

'A debtor and creditor lien is available to anyone who, in terms of an agreement, has performed work pertaining to someone else's property, irrespective of whether the work was necessary, useful, enhance the value of the property concerned or was trifling.'

[9] At para 30 of the founding affidavit, the applicant admits that the respondents had keys to the premises and there is no doubt in this regard that the respondents had possession of the premises and could, in that event, exercise a lien over the property in question.

[10] The only question that needs to be considered, is whether the applicant is entitled to the order it seeks. I have found that on the papers, a debtor and creditor lien has been established. Furthermore, the applicant has admitted owing the amount of N\$ 171, 023. 86 to the respondents, which entitles the latter, to exercise the lien in the circumstances.

The applicant's answer is that it has tendered payment for this amount and this was done by letter dated 02 July 2018, where the following is recorded, in part, at fourth paragraph of the said letter:

³ 1993 (1) SA 77 (A) at p.86B.

'The final contract sum due to Structco amounts to N\$ 171 023. 86 and this sum has been calculated in terms of the contents of Annexure "A" hereto. . . This sum is tendered in full and final settlement of all the claims by and between the parties and against the due and urgent return of the construction site and all the goods and materials that Stuctco placed under unlawful attachment into our client's possession.'

[11] It appears that the applicant's 'tender', which is not accepted by the respondents, is imprecise in its terms as to be meaningless. It does not state the form the payment will assume nor a date when such payment is to be made to the respondents by the applicant. Nor, I may add, is there an undertaking to furnish security for the amount agreed to be owed by the applicant to the respondents.⁴

Conclusion

[12] In the premises, I am of the considered view that the application must fail for the reason that the respondent has exercised a creditor's lien it has at law to take possession of the premises in question.

[13] I accordingly issue the following order:

1. The application is dismissed with costs.
2. The matter is removed from the roll and is regarded as finalised.

T S Masuku
Judge

⁴ Silberberg & Schoeman's Law of Property, 3rd ed. Butterworths, 1992 at p.469.

APPEARANCE:

APPLICANT:

P Barnard

instructed by Cronje & Co., Windhoek

RESPONDENT:

E Angula

of AngulaCo. Inc., Windhoek