**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

CASE NO: HC-MD-CIV-MOT-GEN-EXP-2021/00100

In the matter between:

**TULELA PROCESSING SOLUTIONS (PTY) LTD** **APPLICANT**

and

**SOUTHERN AFRICA RAILWAYS CC** **RESPONDENT**

**Neutral Citation:** *Tulela Processing Solutions (Pty) Ltd v Southern Africa Railways CC* (HC-MD-CIV-MOT-GEN-EXP-2021/00100) [2021] NAHCMD 209 (6 May 2021).

**CORAM:** MASUKU J
**Heard:** **12 April 2021**
**Delivered:** **6 May 2021**

**Flynote:** Civil Procedure – application for *mandament van spolie* – requirements application has to meet discussed – whether the *mandament* is available in respect of future deprivation apprehended – whether the *mandament* is suitable in cases where a party seeks to enforce rights based on the law of contract.

**Summary:** The applicant and the respondent entered into a contract in terms of which the former was to render screening ballast services on the respondent's premises. The applicant claimed that the respondent owed it a significant amount and claimed a lien over the finished product. It brought an urgent *ex parte* application

seeking to interdict the respondent from removing the screened material from the premises and a return of material that had been removed by the respondent to its clients via a spoliation application. The respondent opposed the application, challenging the urgency and propriety of approaching the court *ex parte*. The applicant, after receiving the opposing affidavit decided to forgo the relief relating to the lien and interdict and return of the material already removed. It persisted in the spoliation in relation to future removal of the screened material by the applicant.

*Held*: that spoliation is applied for in cases where a party seeks to restore possession of property of which it has been despoiled without a court order and when the applicant was in peaceful undisturbed possession of the property.

*Held* that: the *mandament* is geared to prevent the taking of the law into their hands by individuals to recover possession. It encourages the invocation of the law to aid the repossession.

*Held* further: that because the applicant had decided to forgo the relief relating to the material that had been already removed, the remedy would not be available to the applicant for removals apprehended in the future. It is a reactive and not prospective relief.

*Held*: that the *mandament* is not suitable in cases where a party seeks to enforce rights in contract as the respondent would have a right to canvass its defence, which would be beyond the legitimate scope of the remedy. This is because the *mandament* does not allow the traversing of the merits.

The court dismissed the application with costs and found it unnecessary to determine the matter on the other bases of urgency and propriety of an *ex parte* application, as raised by the respondent.

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**ORDER**

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1. The application for a *mandament van spolie,* and ancillary relief, be and is hereby dismissed.

2. The interim interdict issued by the court on 29 March 2021, is hereby discharged.
3. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner.
4. The matter is removed from the roll and is regarded as finalised.

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**JUDGMENT**

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Introduction

[1] By an urgent and *ex parte* application, the applicant, Tulela Processing (Pty) approached this court, seeking the following relief against the respondent, Southern Africa Railways CC:

'1. That the non-compliance with the rules and the Honourable Court and that the matter be heard on an urgent basis.
2. That a rule *nisi* be issued calling upon the Respondent to show cause on 7 May 2021 at 09h00 why the following orders should not be made final:
2.1 That the Respondent return and restore possession to the Applicant of 459.30 tonnes of screened ballast rock product removed from the site of the Applicant on the Southern Africa Railways yard situated in the Karirib Townlands, 1.2 kilometres outside Karibib, on the Navachab Gold Mine main access road, Erongo Region, Republic of Namibia.
2.2 That the respondent restore possession to the Applicant of the stockpile of the material at the site of the Applicant at Southern Africa Railways yard situated in the Karibib Townlands, 1.2 kilometres outside Karibib, on the Navachab Gold Mine main access road, Erongo District, Republic of Namibia;
2.3 That the Respondent be interdicted from removing any of the screened material from the site of the Applicant at the Southern Africa Railways yard, situated in the Karibib Townlands, 1.2 kilometres, on the Navachab God Mine main access road, Erongo District, Republic of Namibia, unless with the written consent of the Applicant, or in terms of an order of court; and
2.4 That the Respondent pays the costs of this application, such costs to include the costs of instructing and instructed counsel.
3. That the orders 2.1 to 2.3 above be of immediate effect, pending the return date of the rule nisi.

4. That the Respondent shall be entitled to anticipate the rule nisi upon three days' notice to the Applicant; and

5. Further and/or alternative relief as the Honourable Court may deem fit.'

[2] On the scheduled date of hearing, namely, 26 March 2021, at 09h00, the court heard the urgent application, with the applicant being represented by Mr. Barnard. He moved for the granting of the relief sought, including interim relief and the issuance of a rule *nisi* returnable on a date to be determined by the court.

[3] After hearing argument presented on the applicant's behalf, the court reserved its ruling on the relief to be granted, if any, until the afternoon of the same day. As I was on duty, and presiding over the first and second motion on that day, Mr. Linde, whose law firm represents the respondent, interjected and requested audience in relation to this matter, which was then not on the roll, awaiting, as indicated, a ruling later in the afternoon.

[4] I then requested Mr. Linde to attend court at the stipulated time when the ruling was to be made. My staff advised the applicant's legal practitioners accordingly in relation to the latest development. In the afternoon, the respondent was represented by Mr. Strydom, who indicated that the respondent opposed the matter in its entirety, conceded no inch of ground, including the question whether or not the matter was urgent.

[5] After listening to argument, as the parties were worlds apart, the court granted the following order was issued:

'1. The respondent is interdicted from removing any of the screened ballast rock product from the site of the Applicant at the Southern Africa Railways yard situated in the Karibib Townlands, 1.2 kilometres outside Karibib, on the Navachab Gold Mine main access road, Erongo District, Republic of Namibia, pending finalisation of this matter.

2. The Respondent is to file its answering affidavit on or before 6 April 2021.

3. The Applicant is to file its replying affidavit on or before 8 April 2021.

4. The case is postponed to 12 April 2021 at 10:00 for hearing.'

[6] As ordered by the court, the parties exchanged their papers, including heads of argument, and the matter proceeded in earnest for hearing on 12 April 2021. After listening to argument, the court reserved its judgment and extended the operative

part of the interim relief granted. The court's remit, in this judgment is accordingly confined to the question whether the relief sought, including the interim relief granted, should be confirmed.

Background

[7] In the main, the issues giving rise to the dispute do not generate much controversy and they are largely common cause. It is perhaps the law that is applicable to those facts that does generate controversy. Briefly stated, the facts giving rise to the dispute can be summarised as recorded below.

[8] The applicant and the respondent entered into an agreement signed by the parties in October and November 2020, respectively. In terms of the said agreement, the applicant was to render screening services, which were geared to produce a ballast rock product according to a grading agreed upon by the parties. The screening services were conducted by the applicant at a site belonging to the respondent. The applicant was entitled to payment by the respondent in respect of the services rendered. It is unnecessary, for present purposes, to record the other terms of the agreement.

[9] In the due course of time, it is common cause that the respondent failed to make payment to the applicant and the latter took the view that this was in breach of the agreement in question. In this regard, the applicant issued a letter of demand, requiring payment of N$ 4 179 531.48, a portion of which was alleged to have been outstanding for a period in the excess of 30 days. Despite demand, no payment was forthcoming from the respondent, so the applicant contended.

[10] Through its lawyers, the respondent argued that it was not obliged to pay the amount claimed and that the amount would be due for payment only once the respondent had itself been paid by its customers to whom it sold the product, which the applicant had produced. A dispute was thus in the offing, with the parties adopting disparate positions regarding the issue of when payment was due.

[11] From the applicant's perspective, the respondent was unnecessarily being difficult and refusing to pay yet the respondent took the view that it was obliged to

pay the applicant once it had itself been paid by its customers to who it would have supplied the product of the applicant's toil. This conflict of views on the issue of payment grew intense, with a flurry of correspondence being exchanged between the parties' legal representatives, with none conceding an inch of ground in the process.

[12] The applicant, through it legal representatives, wrote a letter advising the respondent that it, in terms of the law, exercised a lien over the product and further informed the respondent that (a) it is in lawful possession of the material it had screened; (b) that the applicant is entitled to payment therefor as previously demanded and (c) that the applicant would retain the screened material until such time that the respondent had met the demand for payment. The applicant also advised the respondent that the latter was not entitled, in the premises, to remove any material until all the amounts due to the applicant had been settled.

[13] The applicant thereafter suspended its services to the respondent from late February 2021. It also deposes that it placed a security company on the premises to safeguard the premises and its product on site. The matter escalated further, resulting in the parties being engaged in settlement negotiations, which never came to any resolution.

[14] The impasse continued unabated, with the parties at loggerheads. This attracted the involvement of the Namibian police, who it would appear, weighed in on the respondent's side. The bone of contention, at this stage, centred around the respondent removing the product from the site without meeting the demand of payment.

[15] The applicant further informed the company engaged by the respondent to transport the goods that it was not entitled to remove any further products due to the non-payment by the respondent. The applicant did not end there. It alleges that it placed markers on the property where the product was placed, to prevent removal of same by the respondent. The respondent was not deterred in removing more material from the site to its customers despite the applicant's protestations in word and deed.

[16] To further secure the product, the applicant states that it engaged a security company, Bullet-G Security Operations CC to take all reasonable measures to protect the product on site. The deployment of the security company, further contends the applicant, seems to have the desired effect for a season but for not much longer. On 22 March 2021, the respondent again commenced removal of the product from the site, after threatening the said security company with violence, gunshots, to be precise, should the respondent be prevented from transporting the product away from the site.

[17] It is the applicant's case that in the light of these developments, the security company decided to withdraw its personnel from the premises. The respondent thereafter proceeded to remove the product undeterred. Calls to the Namibian Police based in Karibib did not have the desired effect as the police refused to come to the applicant's assistance. Rather, the police threatened to charge and arrest the applicant for trespass. Needless to say, vast amounts of the product, in truck loads was transported from the premises.

[18] It is in these circumstances that the applicant then lodged this application on urgency. The applicant states that because of the respondent's determined behaviour, namely removing the product from the site despite protestations, it was necessary to approach this court on urgency. It further alleged that any notice to the respondent may have served to defeat the purpose of the application. The applicant contended that a rule *nisi* to operate with interim and immediate effect, was in the circumstances justified.

[19] It was the applicant's further case that it had and exercised a lien over the product and as such, the respondent had no right to remove same from the premises. The further removal of the product prejudiced the applicant in the light of the respondent's failure to pay the applicant for the services rendered. It was further alleged that the respondent was trading in insolvent circumstances, hence it was necessary for the applicant to exercise its lien strictly.

[20] What was the respondent's take on all these allegations? The respondent poured scorn over all the allegations made by the applicant, as recounted briefly above. In this particular regard, the respondent raised certain points of law *in limine.*

[21] In this particular connection, it was the respondent's case that the matter is not urgent and that if it may perchance be found to be urgent, any urgency was of the applicant's creation. As such, the court was moved to strike the matter from the roll for want of urgency.

[22] It was the respondent's further contention that the applicant enjoys no lien over the product because the applicant is not in possession of the goods or product in question. It was the respondent's additional contention that the applicant had no possession over the product on site because the agreement signed by the parties does not afford the applicant such possession over the material that had been screened by the applicant.

[23] It was the respondent's further case that the agreement between the parties had expired on 5 March 2021, after which the applicant left the site and in doing so, effectively relinquished possession of the screened material. In this regard, further pointed the respondent, the screening plant was located at the respondent's premises in Karibib and more importantly, the applicant never, in terms of the agreement, had any right of possession of the screened material.

[24] In respect of the merits of the application, the respondent denied that it was due to pay the outstanding amounts within the period of 30 days from date of invoice as claimed by the applicant. It was the respondent's position that at the conclusion of the agreement, the parties had contemplated that payment would be made once the respondent had been paid for the delivery of the screened material by its main buyer, namely China Gezhouba Investments Group (Namibia) (Pty) Ltd.

[25] It was the respondent's further contention that it availed its land to the applicant to set up the screening site. It however denied that the applicant exercised exclusive control over the site. It was the respondent's case that it was constrained to remove the screened material from the site to Tsumeb once the agreement came to an end.

[26] The respondent further denied that there was truth to the allegation by the applicant that there were no prospects of payment to it by the respondent. In this

regard, the respondent stated that it had paid an amount on N$ 1 million in February 2021 and a further N$ 60 000 subsequent to the earlier payment. It was the respondent's case that it was not in arrears with its payments to the applicant and put the latter to the proof thereof. I do not find it necessary to deal with every issue raised by the respondent in answer to the application.

[27] In its replying affidavit, considered together with the heads of argument, the applicant adjusted its position. First, the applicant stated that it no longer persisted in the interdict for future removal of the screened material from the respondent's site. Furthermore, the applicant did not persist any longer with the spoliation in respect of 450.30 tonnes of screened ballast rock product.

[28] It would appear that the only issue that remains for the court to determine, in light of the applicant conceding some ground, is a determination whether the applicant is entitled to a spoliation order in respect of the remaining screened ballast rock stockpile that remains in the respondent's premises in Karibib.

Determination

[29] The starting point of the matter is to delineate the nature and scope of the remedy of spoliation. The Supreme Court did so with great aplomb in *New Era Investment (Pty) Ltd v Ferusa Capital Financing Partners CC*.[1] The Supreme Court expressed itself in the following language at para [37]:

'In spoliation proceedings, an applicant must allege and prove peaceful and undisturbed possession of the property in question and an unlawful deprivation of that possession by the respondents. These are two elements which the appellant was required to establish in these proceedings on a balance of probabilities.
[38] As far as the first element of possession is concerned, it would suffice if the appellant exercised physical control (*detentio*) over the building sites of a sufficiently stable and durable nature to constitute peaceful and undisturbed possession with the intention of securing some benefit for itself. Both elements must be present.'

[1] 2018 JDR1202 (NmS).

[30] It was the applicant's contention that it had met the requirements stated so eloquently above. It was the applicant's further submission that the respondent had acted *mala fide* in removing the screened material and that the respondent did so with full knowledge of the applicant's rights thereto.

[31] The respondent came out guns blazing. It argued that the applicant's application has been seriously watered down from what it was when the court granted the order with an interim interdict question. This, so the argument ran, is evidenced by the applicant changing the relief in reply and giving up what it had initially claimed. The court was requested to take this into account and find that the applicant did not have a good case from the onset and was forced to retreat when the applicant was taken head on by the respondent.

[32] I am of the considered view that the main question that requires an answer that is unequivocal is the following: has the applicant, in this matter, shown that it was in peaceful and undisturbed possession of the screened material and that it was despoiled from the said possession by the respondent unlawfully?

[33] In this regard, the court must be astute and not entangle itself with answering the merits of the dispute. In this regard, the following instructive remarks appear from *Fredericks and Another v Stellenbosch Divisional* Council:[2]

'The law is quite clear. Where a litigant seeks a spoliation order, a *mandament van spolie,* the court will not concern itself with the merits of the dispute . . . it matters not whether the applicant acquired possession secretly or even fraudulently.'

[34] In *Horst Kock t/a Ndhovu Safari Lodge v R Walter t/a Mahangu Safari Lodge and Another*[3] Langa AJA stated the following, 'What one extracts from these decisions, and others, such as *Shoprite Checkers* (*supra*), *Zulu v Minister of Works, KwaZulu,* 1992 (1) SA 181 (T) is that the true purpose of the mandament van spolie is not for the protection of rights in general but rather the restoration of the status *quo ante* where the spoliatus has been unlawfully deprived of a thing, that he had been in possession or quasi-possession of.'

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[2] 1977 (3) SA 113 (K).

[3] Case No. SA 20/2009, delivered on 26 October 2010.

[35] When one has regard to the significant paradigm shift by the applicant regarding the relief sought in the application, after discarding the relief in respect of the screened material that had been removed by the respondent, the question is whether the *mandament* is available to a party who apprehends that some property which is in his possession (and the question of the applicant's possession is seriously disputed) may be taken away in future?

[36] In the applicant's heads of argument, the matter was captured as follows, regarding the matter presently at hand:

> ''The applicant does not persist with relief in the form of an interdict against the future removal as a spoliation order in respect of the remaining stockpile would be sufficient protection against any future spoliation.'[4]

[37] From the excerpt quoted above in paragraph 33 above, it is clear that the application of the *mandament* is quite limited. It is limited to the restoration of property that has been unlawfully removed from possession of the applicant when the said applicant was in peaceful and undisturbed possession thereof. It does not operate in an anticipatory fashion, to stop now what has not yet happened.

[38] I am of the considered opinion in the circumstances, that once the applicant discarded the relief relating to the material that had been removed by the respondent, it cannot properly rely on the *mandament* to prevent future removal for that is not the purpose of the *mandament*. A *mandament* is reactive and cannot ever be proactive, as it would then lose its clear confines purpose and design.

[39] It is also clear that the applicant is, without doubt seeking to enforce a contractual obligation against the respondent in this case. In such a case, a party in the respondent's shoes is entitled to raise defences applicable or to adduce evidence in support of its defence. Because of the nature of the remedy, namely, that it does not seek to deal with matters on the merits, and precludes the respondent from raising its defences to the matter on the merits, it becomes clear that the applicant is not on the incorrect side of the law in seeking the relief of a *mandament van spolie* in

[4] Paragraph 3 of the applicant's heads of argument.

the instant matter.[5] This is particularly so, taking into account the concessions the applicant made regarding the limited nature of the relief it eventually sought after the reading the respondent's answer.

[40] In this connection, the words that fell from the lips of Hattingh J in *Plaatjie & Another v Olivier NO & Others*[6] resonate profoundly. The learned Judge said the following:

'If the protection given by the *mandament van spolie* were to be held to extend to the exercise of rights in the widest sense, then such as a right of performance would have to be included, which would be to extend the remedy beyond its legitimate field of application and usefulness.'

[41] In the premises, it appears to me that the applicant is barking the wrong tree. I say so for two reasons. First, it is now clear, with the applicant having abandoned the relief relating to the material that was removed by the respondent, which would have fallen within the confines of the remedy, if otherwise proved, that the remedy now sought is in relation to screened products that are on site and have not yet been removed. Whether the removal of that product would be unlawful in the future is a different enquiry altogether.

[42] It should not be forgotten what the aim or purpose of the relief in question is. In *Fischer v Seelenbinder*[7] the Supreme Court reminded that, 'The underlying rationale of a spoliation application is to discourage people from taking the law into their own hands to recover possession, and, to rather invoke the aid the law for this purpose.' In this connection, the relief is sought *ex post facto* the spoliation. It cannot serve as a pre-emptive strike as it were before a party has been despoiled.

[43] In the *Shoprite* case, Zulman J cited with approval the remarks in *Zulu* case, where the following excerpt is to be found:

'The mandament van spolie is a possessory remedy by which a person who has been illicitly deprived of possession is restored to his possession before the merits of the dispute

[5] Shoprite Checkers Ltd v Pangbourne Properties Ltd 1994 (1) SA 616 (W).
[6] 1993 (2) SA 156 SA (OPD) at 159J-160A.
[7] Case No. SA 31/2018 (delivered on 8 June 2020).

regarding the lawfulness of his possession are enquired into. An applicant for spoliation has to prove that he had possession.'[8]

[44] Second, the applicant has sought to extend the application of the *mandament* beyond traditional its remit. I say this because it is clear that the applicant seeks to invoke the *mandament* in a matter where it alleges that there are contractual obligations that the respondent has reneged on. In seeking to counter or defend itself in relation to the enforcement sought against it, the respondent would not be allowed by the narrow confines of the *mandament* to raise its defences thereto. This clearly shows that the applicant did not seek the relief in an appropriate case because the merits, both of the claim and the defence, should not enter the equation in a proper case of a *mandament van spolie*.

[45] I am acutely aware that the respondents raised other issues including the lack of urgency and that the applicant, although approaching the court on an *ex parte* basis, did not make a full and frank disclosure of all the material facts. In the light of the conclusion that I have arrived at above, it is unnecessary, in the circumstances, to devote any time or attention to those issues as there is only one destination for the application in the circumstances. It is recorded in paragraph 47, below.

Conclusion

[46] In view of the analysis above, together with the courts findings and conclusions, I am of the considered view that this application is, regard had to the concessions made, ill-advised. In the premises, the only route open to the court is to dismiss the application as it is not meritorious at all.

Costs

[47] Although not immutable, the ordinary rule is that costs should follow the event. There is nothing apparent or submitted by the applicant as to why this ordinary rule should not follow in view of the respondent's success in this matter. The only issue to deal with, in my view is the necessity or otherwise of the employment by the respondent of two counsel. This issue is addressed below.

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[8] *Ibid* p 622 F.

[48] I am of the view that the employment of two counsel was justified in the circumstances of this matter. I say so considering the intricacies of the matter at the launch of the proceedings. I say so cognisant though that midstream, the applicant decided to abandon some of the relief sought. This, however, was after the respondent had dealt with the issues of law implicated in the answering affidavit.

[49] Secondly, it is common cause that the matter was brought and dealt with on an urgent basis. In this particular regard, the respondent was called upon to deal with the complicated issues that arose on short notice. The employment of two counsel was therefor, in my view justified in the peculiar circumstances of this case and I am so satisfied.

Order

[50] The order that accordingly commends itself as warranted in the circumstances is the following:

1. The application for a *mandament van spolie,* and ancillary relief, be and is hereby dismissed.
2. The interim interdict issued by the court on 29 March 2021, is hereby discharged.
3. The applicant is ordered to pay the costs of the application, consequent upon the employment of one instructing and one instructed legal practitioner.
4. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge

APPEARANCES:

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|---|---|
| APPLICANT: | P. Barnard<br>Instructed by Cronje & CO, Windhoek |
| RESPONDENT: | J. Strydom, (with him, AJF Small)<br>Instructed by Theunissen, Louw & Partners, Windhoek |