



NOT REPORTABLE

CASE NO: SA 87/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NEW ERA INVESTMENT (PTY) LTD

Appellant

and

FERUSA CAPITAL FINANCING PARTNERS CC

First Respondent

DESERT PAVING

Second Respondent

HOWARD & CHAMBERLAIN ARCHITECTS

Third Respondent

HENDRIK HERSELMAN QUANTITY SURVEYORS

Fourth Respondent

IMPACT PROPERTY MANAGEMENT & SERVICES

Fifth Respondent

Coram: DAMASEB DCJ, SMUTS JA and CHOMBA AJA

Heard: 25 June 2018

Delivered: 6 July 2018

Summary: Appellant appealed against the dismissal by the court *a quo* of an urgent spoliation application seeking an order to restore its possession of three building sites as well as a separate order interdicting the first and second respondents from commencing or continuing with any construction work on those

sites pending an action or arbitration to be instituted against the first respondent for specific performance of building contracts entered into between the appellant and first respondent. The issues to be determined are whether the appellant have established an entitlement to the spoliation order and whether it should have been granted the interim interdict sought.

Spoliation – in spoliation proceedings, an applicant must on a balance of probabilities prove peaceful and undisturbed possession of the property in question and an unlawful deprivation of that possession by the respondents. Appellant contended that, although it had suspended work on the sites in April 2015 because of first respondent's inability to pay, appellant retained a presence on the site and intended to resume work as soon as first respondent was able to make payment of outstanding amounts. The nature of the possession claimed by appellant is that of a builder's lien. Employees of second respondent entered the sites on or around 7 October 2016 to work on those building sites which the appellant was contracted to complete. First respondent failed to explain how second respondent lawfully took possession of the sites when appellant was still contractually in possession of sites by virtue of the handover of possession and had not terminated its possession.

Applying the principles outlined by Innes, CJ in *Scholtz v Faifer* 1910 TS 243, it would follow on all the facts before court that the appellant was disturbed by the first and second respondents in the exercise of its possession of the sites. Once the sites were handed over to the appellant and it continued with the building works, it was unquestionably in possession of the sites. The works were thus under the appellant's control and the first respondent could not remove it from the

site as long as it performed and remained on site and tendered to perform under the contracts. After the work was suspended by reason of the first respondent's inability to pay for works duly performed, the appellant remained on site with the view to resume the works as soon as the first respondent was once again able to meet its obligations. This was not a case, as referred to by Innes, CJ, where a contractor was warned that if it did not continue the works, another contractor would be appointed so as to put the appellant on its guard to assert more control over the site. On the contrary, the appellant tendered to continue once the admitted amount owing to it had been paid. And it stayed on site, remaining ready to continue upon payment. Despite seeking to hold the first respondent liable for the cost of security guards, their presence was under the appellant's control and assisted it in exercising sufficient control to exercise its lien and certainly to remain in possession of the sites. It was understandable that it sought to hold the first respondent liable for payment of the costs of the security guards, given the reason for the suspension was first respondent's inability to pay due amounts – and for future work. Importantly the appellant did not terminate its possession. Nor is this alleged by the first respondent.

Held, appellant sufficiently established control and possession as well subsequent dispossession for the purposes of securing spoliation relief.

Interim interdict – the well-established requisites for an interim relief were referred to: a party must establish a *prima facie* right, a well-grounded apprehension of harm if the interim relief were not to be granted, that the balance of convenience favours granting interim relief and finally that the appellant did not have an adequate alternative remedy. These requisites are not considered in isolation and

interact with each other. In this instance, appellant failed to establish a reasonable apprehension of harm if it were granted a spoliation order. Its possession would be restored and the harm sought to be interdicted would not arise. This requisite thus not established.

Held – appeal against the dismissal of the application for interim interdict fails.

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and CHOMBA AJA concurring):

[1] The appellant unsuccessfully approached the High Court with an urgent spoliation application seeking an order to restore its possession of three building sites as well as for a separate order interdicting the first and second respondents from commencing or continuing with any construction work on those sites pending an action or arbitration to be instituted against the first respondent for specific performance of building contracts entered into between the appellant and first respondent.

[2] The application was opposed by the first respondent and was dismissed in the High Court. The first respondent is not represented on appeal.

The appellant's application

[3] The appellant is a construction company and in August 2014 entered into three building contracts with the first respondent (Ferusa Capital Financing

Partners CC – Ferusa) to construct low cost housing on three separate blocks of land in Swakopmund for a combined value exceeding N\$76 million. The building agreements are essentially sub-contracts. The first respondent in turn acted as contractor in terms of an agreement with the National Housing Enterprise (NHE) which would obtain funds from the State to finance the project. The Government of Namibia later replaced the NHE in a subsequent agreement with Ferusa. There was a handover of the Block 10B to the appellant in August 2014, Block 9C in February 2015 and the appellant states that Block 10A was handed over, 'during April 2015'. The appellant commenced building works.

[4] The appellant did not however state in the founding affidavit how far the works progressed and on what sites.

[5] The appellant's founding affidavit comprises for the large part extensive and lengthy quotations from email correspondence in the text of the affidavit without the deponent to the founding affidavit confirming the contents of correspondence sent by her or by others on behalf of the appellant. Quite apart from causing entirely unnecessary prolixity and duplication because all of the emails quoted at length (usually in full) are also attached as annexures, the emails sent on behalf of the appellant without their contents being confirmed would ordinarily merely constitute evidence that they were sent and not as to their contents.

[6] The founding affidavit runs into some 60 pages with less than a quarter constituting actual text. The annexures to the founding affidavit, which, save for the building contracts, are mostly already quoted in the affidavit exceed 120 pages. There are confirmatory affidavits for some – but not in respect of all emails

or letters sent on behalf of the appellant. But even then, they merely confirm what is stated in the founding affidavit as being true and correct – and do not confirm the contents of their emails. Inexplicably there is no confirmatory affidavit by the appellant's legal practitioner even though reliance is sought to be placed on correspondence directed by him.

[7] Litigating in this way is to be deprecated. Quite apart from the court being unduly burdened in endeavouring to determine what factual matter is properly before it, it also creates entirely unnecessary prolixity and serves to undermine the objectives of the High Court rules directed at saving litigation costs by facilitating the resolution of disputes in a speedy, efficient and cost effective manner.

[8] The founding affidavit also includes several photographs without stating who had taken them and when, except in one instance. In the absence of statements to that effect and that the photographs constitute a true likeness of the place, object or person which they purport to represent and confirmatory affidavits from those who took the photographs, these photographs amount to inadmissible evidence.¹ At the hearing of the appeal, a confirmatory affidavit of the photographer was handed in which in large part addresses this deficiency. This affidavit served before the court below.

[9] What emerges from the unsatisfactory presentation of the dispute in the founding affidavit is that the appellant was not paid by the first respondent for works performed. The appellant as a result suspended its site work in April 2015. This suspension was confirmed by the first respondent because of its inability to

¹ Zeffert & Paizes *The South African Law of Evidence* (2nd ed, 2009) at p 850.

pay and endured for more than a year. In August 2016, the appellant was informed by the first respondent's quantity surveyor (cited as a respondent) that the first respondent was indebted to the appellant in an amount of N\$6,554,829.61, as was subsequently confirmed in the first respondent's answering affidavit.

[10] The parties proceeded to negotiate over the payment of this sum and the recommencement of the works, but to no avail. On 26 September 2016, the first respondent terminated negotiations and tendered to pay this sum off over 10 months. At around this time, it also appointed the second respondent to perform works which the appellant was contracted to perform. The appellant claimed that this amounted to a repudiation.

[11] The appellant states that on 7 October 2016 employees of the second respondent entered 'the site' with a forklift and removed a stack of bricks and also made an unauthorised connection to the appellant's waterline.

[12] On 10 October 2016 it was contended for the first time on behalf of the appellant by its legal practitioner that it was exercising a lien (with reference to the presence of a site foreman and security guards on site). On 14 October 2016, the first respondent's lawyers responded by denying that a lien was being exercised and asserted that the appellant was 'attempting to disrupt the construction work which commenced with two weeks ago'. (*sic*) This complaint was echoed in a subsequent letter on 24 October 2016, asserting that the appellant had been 'disrupting and causing work stoppages at our clients' site' and also threatening to report the appellant's 'trespassing' to relevant authorities.

[13] Shortly afterwards and on 1 November 2016, the appellant complained that 13 employees of the second respondent took down lien sign boards of the appellant. These were promptly re-erected and the appellant enclosed the 'entirety of the site' with chevron security tape. On 4 November, the second appellant's employees removed that tape. It is not stated precisely when the notice boards were erected but this is said to have occurred 'shortly after' the first respondent's lawyers' letter of 14 October 2016 denying that the appellant was exercising a lien.

[14] The appellant's deponent further states under a heading 'other contractors on site', with apparent reference to the second respondent's employees, 'they also started working on the (appellant's) site by backfilling houses on which the foundation walls had been built with sand, in preparation for the concrete casting of the floors . . .'. Significantly, no date is specified with regard to this conduct. Two photographs are pasted into the text depicting this.

[15] The deponent however states that she instructed the bringing of the application on 2 November 2016 on behalf of the appellant.

[16] The founding affidavit proceeds to assert that the appellant was in peaceful and undisturbed possession of the sites and that the respondents deprived it of its possession without its consent. It is further contended that the appellant had been in sole possession of the sites since August 2014 with a site foreman living on site throughout together with 5 and then later 7 and still later 9 security guards 'at the site'. It was alleged that the second respondent had at the instance of the first respondent 'now taken possession of part of the site'. It is alleged that these employees had started construction work on 1 November 2016 and had removed

the appellant's sign boards 'at the site' and 'started with construction works at the site possessed and on the houses built by the applicant'.

[17] The appellant applied for an order restoring its possession as well as a further order in the form of an interim interdict calling upon the respondents to show cause 'why the following order should not be made final:

'that the first and second respondents be interdicted from commencing or continuing with any building construction work on the property pending the outcome of an action or arbitration to be instituted by the (appellant) against first respondent for specific performance of the building contracts entered into between (the appellant) and first respondent in respect of the property.'

[18] The property referred to in the notice of motion comprises Blocks 9C, 10A and 10B of the Swakopmund Mass Housing Project.

The first respondent's opposition

[19] Only the first respondent opposed the application in the High Court. Several preliminary points were taken. Some would understandably not appear to have been persisted with. One point rightly raised concerned the use of photographs in the founding affidavit. As I have said, in all but one instance, the photographer is not identified. But that point was largely met by the further affidavit filed although the captions to them remain unconfirmed.

[20] Another point raised was non joinder of the NHE and the Government of Namibia by reason of the fact that the first respondent had first contracted with the former and later with the latter for the construction of the mass housing project on

the blocks in question. The appellant's contractual relationship is however only with the first respondent.

[21] The first respondent for the large part denied that the appellant had sole undisturbed possession and denied it exercised a lien at the time when it claimed dispossession. The first respondent would however appear to have failed to appreciate the nature of a builder's lien in its answering affidavit and erroneously considered that the appellant was confined to the narrow form of lien referred to in the contracts. For the rest, the first respondent's affidavit comprises a series of bare denials and disputes of contention, without putting up contrary facts.

[22] The first respondent also denied that the appellant established the requisites for an interim interdict. It did however admit that it had cancelled the appellant's contracts even though the latter had 'at all times been willing to and tendered to comply with (its) obligations'. It added that it however 'no longer desires to carry on with the appellant as contractual partner' and had instead entered into a contract with the second respondent to continue with work on the sites. This desire is proffered as the sole basis for its cancellation of contracts with the appellant.

Approach of the High Court

[23] The High Court found that the appellant had failed to discharge the onus of establishing a sufficient exercise of physical control over the three blocks so as to amount to effective control of the property. The court referred to the appellant's own version that the engagement of security guards was on behalf of its 'client' – the first respondent and that it sought to hold the first respondent responsible for

those costs during the suspension of the works. The court found that possession through its employees was not established by the appellant. The court also doubted that security guards were deployed on all the blocks, given that the extent of construction works on those blocks would have varied and found that the possession the appellant exercised was to mitigate the risks of the first respondent at the latter's costs. The High Court concluded that the lien notice boards and the removal of the chevron tape occurred after construction work by another contractor had commenced and that the appellant had not established undisturbed and peaceful possession of the sites at the time of dispossession.

[24] The High Court also found that the appellant had not established a builder's lien on the facts and that the appellant had not established which portions of which sites were occupied by it. The court also found that the appellant had not shown that there was a disturbance in possession of a lien.

[25] The court below also held that an interim interdict to invoke specific performance was premature in view of the dispute provisions in the contractual terms. The court also took into account the failure on the part of the appellant to invoke the dispute procedure following non-payment and found that it was unlikely that the appellant could obtain final relief (in the form of specific performance at trial) and had not established that a damages claim was not an adequate remedy. Although the court referred to the failure to join the Government in a mass housing project funded by Government, the court made no finding of non-joinder.

[26] The High Court accordingly dismissed the application with costs.

This appeal

[27] The appellant filed a discursive notice of appeal. The first respondent's erstwhile legal practitioners of record informed the Registrar of this court that they do not hold instructions in respect of this appeal. This court thus only had the benefit of written and oral argument on behalf of the appellant. Following the dismissal of the application, the first respondent brought an urgent spoliation application against the appellant which was dismissed. A counter application to protect the appellant's possession of the sites pending this appeal was granted by Ueitele, J in the High Court who directed that those costs be costs in this appeal.²

[28] A segment of the appellant's heads of argument contends for a material misdirection on the part of the High Court in respect of urgency.

[29] At the conclusion of the High Court judgment, after dealing in detail with the merits, and under the heading of urgency, the court stated:

'I am . . . satisfied that applications for *mandament for spolie* are by their very nature urgent, however having found that the applicant did not succeed in establishing that it exercised a builder's lien over the property or the entire property, and that the applicant was not in effective possession of the property, I do not deem it necessary to decide on urgency.'

[30] The court had earlier in the judgment stated with reference to urgency that the appellant had acted expeditiously and cannot be said to have been remiss in bringing the application, as had been contended on behalf of the first respondent.

² Under case no HC-MD-CIV-MOT-GEN-2017/00046.

[31] Quite why the point of urgency was raised by the appellant on appeal is not apparent as the application was determined on the merits. Even though the court stated that it was not necessary to decide the question of urgency, it did so in effect by correctly expressing the view that spoliation applications are 'by their very nature urgent' and had proceeded to deal with the merits of the application.

[32] The court thus plainly dealt with the application as one of urgency, even if there was no direct finding to that effect and even an incorrect disavowal as to the need to decide upon that issue. But the failure to make a direct finding to that effect does not prejudice the appellant and in fact worked in its favour. An appeal after all lies against that court's substantive order and not against the reasons for that judgment.³

[33] The issue to be determined in this appeal concerns whether the appellant established an entitlement to the spoliation order sought and whether it should have been granted the interim interdict sought by it.

Appellant's submissions

[34] The appellant's written argument contains extensive quotations from three of the judgments of this court which concerned spoliation applications.⁴ It was argued that the court below incorrectly held that the appellant had failed to establish sufficient exercise of physical control to constitute effective control and in

³ *De Beers Marine Namibia (Pty) Ltd v Loubser* 2017 (1) NR 20 (SC) at para 11; See also *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

⁴ *Three Musketeers Properties (Pty) Ltd v Ongopolo and Processing Ltd and others* (SA 3/2007) [2008] NASC 15 (28 October 2018); *Kuiiri t/a Mahangu Safari Lodge and another v Kandjoze and others* 2009 (2) NS 447(SC); *Kock t/a Ndhovu Safari Lodge v Walter* 2011 (1) NR 10 (SC).

doing so ignored the common cause facts and also did so with respect to the application for its interim interdict.

[35] Mr Heathcote, who together with Mr Jacobs, appeared for the appellant argued that the interim interdict was separate and distinct from the spoliation order sought by the appellant. He pointed out that the appellant had since instituted an action directed at securing specific performance and damages and handed up the particulars of claim issued out of the High Court. The interim interdict was sought to prevent interference with the appellant's contractual rights and was not in protection of the lien contended for.

[36] He also argued that it was not disputed that the appellant had been placed in possession of the building sites. He argued that it had been illegally deprived of that possession when the second respondent's employees commenced their building works on sites it possessed under the building contracts and not when the signs were removed. That, he argued, continued the spoliation.

Spoliation

[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.⁵ These are two elements which the appellant was required to establish in these proceedings on a balance of probabilities.⁶

⁵ *Yeko v Dana* 1973 (4) SA 735 (A); *Kuiiri supra* per Maritz JA at paras 2-4 at p 461F-463B. *Silo v Naude* 1929 AD 21; *Ntai v Vereeniging Town Council* 1953 (4) SA 597 (A) and *George Municipality v Veena* 1989 (2) SA 263 (A).

⁶ *Kuiiri* at p 462D-E.

[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 possession⁷ with the intention of securing some benefit for itself.⁸ Both elements must be present.

[39] As has also been made clear by this court:⁹

‘. . . the fundamental principle underpinning the remedy of spoliation is that no one is allowed to take the law into their own hands and that all that an applicant would need to establish is possession of a kind which warrants the protection accorded by the remedy and that the applicant was unlawfully ousted. Possession need not be in a juridical sense and it would ordinarily be enough if the holding by the applicant was with the intention of securing some benefit for himself.’¹⁰

[40] The form of possession required for the exercise of a builder’s lien is exclusive possession of the property forming the subject matter of the right of retention. This form of possession, like all other forms of possession, comprises two elements – namely physical control and the mental component in the form of an *animus possidendi*. As was succinctly stated in this context by Innes CJ¹¹ more than a century ago:

‘Here the possession which must be proved is not possession in the ordinary sense of the term – that is, possession by a man who holds *pro domino*, and to assert his rights as owner. It is enough if the holding is with the intention of

⁷ *Kuiiri* at p 463A-B.

⁸ *Nienaber v Stuckey* 1946 AD 1049; *Yeko supra*.

⁹ *The Council of the Itireleng Village & another v Felix Madie & others* (SA 21/2016) 25 October 2017.

¹⁰ *Ibid* t para 53.

¹¹ *Scholtz v Faifer* 1910 TS 243 at 246-7.

securing some benefit for himself as against the owner . . . But to this natural possession, as to all possession, two elements are essential, one physical, and the other mental. First there must be the physical control or occupation – the *detentio* of the thing; and there must be the *animus possidendi* – the intention of holding and exercising that possession. . . . It is not easy to define what constitutes physical control or occupation of an unfinished and partly completed building. When the house has advanced so far towards completion that the doors are placed in position it may be locked up, and possession of the key would be equivalent to possession of the building. But that cannot be done when the building is only half finished. The position with regard to such a building appears to me to be in ordinary cases somewhat as follows. The builder has the right from the owner to go on the land to erect the building. He has the right for the purpose of continuously working at the building and completing it, and so long as he does so and goes upon the site for that purpose, the work must be regarded as under his control. During his possession he cannot prevent the owner from coming on to the work, but the owner cannot turn him off, and the work itself is under his (the builder's) control.¹²

And further

‘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 placing a representative in charge of the works, or putting a hoarding round it, or doing something to enforce his right to its physical control . . . 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.’¹³

[41] As is explained earlier in the judgment,¹⁴ Innes CJ stresses that the right of retention exists where buildings are in the course of erection and that the right

¹² At p 247.

¹³ At p 248.

¹⁴ At p 246.

'terminates with the loss of possession unless the possession is taken away by undue means.'¹⁵

[42] As I understand the appellant's case, its complaint is that the sites were handed over to it and that it was deprived of exclusive possession it had enjoyed over the sites by another contractor in the form of the second respondent which entered an unspecified portion of the sites to perform works on that portion of the sites.

[43] The nature of the possession contended for which was disturbed is a builder's lien latterly claimed in correspondence shortly before the alleged act of dispossession. The appellant's case of exercising a builder's lien is dependent on exclusive possession of the building sites to the exclusion of the employer and another contractor.

[44] Although the appellant's presentation of its case is not entirely clear, what does emerge is that the appellant remained on site after the act of dispossession contended for as at 1 November 2016, even though Mr Heathcote contended that the dispossession commenced when the employees of the second respondent entered 'the site' on around 7 October 2016.

[45] When the works on site were suspended in April 2015, the appellant retained a presence on the site through initially two employees and later a single foreman together with five, later seven and even later nine security guards. Its position as set out in the correspondence was that its presence and that of the

¹⁵ At p 246.

security guards was for one purpose of securing the safety of the building sites for the sake of the employer – the first respondent. But it is also clear from the papers that it was also for the purpose of resuming works as soon as the first respondent was able to make payment of outstanding amounts. In pursuance of this position, the appellant claimed the costs of its own employees plus the costs of security guards from the first respondents during the period of suspension and until resumption of the works. Although at first blush it may seem that such an approach would appear to be at odds with having the necessary intention to possess as a retentor as against the owner, the appellant's primary purpose was to resume work and remained in possession for that very purpose which was not terminated until employees of the second respondent entered the sites to perform work on portions of the sites.

[46] It is not stated where guards and its foreman were located on the three sites which are no doubt large in extent, upon which 89 houses were to be erected on Block 9C, 119 on Block 10 and 111 on Block 10B. It is not disputed that the appellant was placed in possession of the three sites for the purpose of performing under the building contracts and continued to tender to perform the works. The first respondent does not put up any contrary facts or squarely put certain of the factual issues relating to possession in issue by contenting itself with bare denials although significantly admitting that it contracted with the second respondent to continue the works which it had engaged the appellant to perform.

[47] The approach of the appellant was thus to protect materials and buildings on site for and on behalf of the first respondent and to remain in possession of the site for the purpose of resuming the works as soon as funds were made available.

It would seem that Block 10A was only handed over to the appellant shortly before the suspension of works as that handover was 'during April 2015'. That was also when work was suspended. When this was raised with counsel, Mr Heathcote referred to the quantity surveyor's certificate which indicated that work had been done on that block.

[48] There is also no mention of the exercise of a lien by the appellant until 10 October 2016.

[49] This was only after employees from the second respondent on 7 October 2016 removed a stack of 551 bricks with a forklift on one of the sites which prompted a letter on 10 October 2016 by the appellant's practitioner, asserting for the first time that the appellant was 'still in possession of the site and exercises its lien until such time as all monies are paid'. This assertion was disputed by the first respondent's legal representatives in a letter on 14 October 2016 which added:

'The remaining instructions we hold is that your client is attempting to disrupt construction work which commenced with two weeks ago . . . (*sic*)'.

[50] This statement, quoted in the founding affidavit, is not addressed and traversed at all in that affidavit. It was followed up by 24 October 2016 with the same practitioner asserting:

'We hold instructions that your clients have been disrupting and causing work stoppages at our client's site.'

[51] The same letter complains of the appellant 'trespassing'.

[52] These allegations were likewise not denied in the founding affidavit. Nor were they dealt with in correspondence on 24 October 2014, save for a statement that they were vague and calling for specific details.

[53] The appellant states that 'shortly after' 14 October 2017, it erected 40 sign boards proclaiming a lien. These were removed on 1 November 2016 together with chevron tape around what is merely termed the entirety of the site. Even assuming that tape was placed around all of the blocks to delineate and in an attempt to exercise exclusive control, this occurred some three weeks after the second respondent's employees had already commenced work on the site.

[54] The appellant in its founding affidavit acknowledges that 'other contractors' started working on the appellant's site, but fails to state precisely when this activity started and precisely where on the respective sites. This despite the uncontradicted statement in correspondence that work had already commenced two weeks before 14 October 2016. No further details are however provided in the unduly argumentative answering affidavit, except to admit that the second respondent had been contracted by the first respondent 'to continue with work at the property'. The first respondent was not called upon to provide documentation reflecting that contractual regime, despite the appellant's right to do so by virtue of this reference in the second respondent's answering affidavit.

[55] The first respondent does not however explain how this can lawfully occur after the appellant was contractually placed in possession of the sites by virtue of the handover of possession. There is no question of the appellant not retaining a

presence and occupation of the sites or leaving the sites, and thus terminating its possession despite the suspension of works. The first respondent instead appears to accept that the appellant was in possession of the sites which was 'not to the exclusion of the first respondent or its authorised agents'. This despite earlier denying that the appellant was in peaceful and undisturbed possession of the sites.

[56] Can it be said that the appellant possessed the sites for the purpose of a spoliation application? The appellant was placed in possession of the sites to perform building works. When work was suspended, it engaged security guards and had two employees on site to protect the materials and works on site. It said that this was done for the first respondent as client and that those costs would be charged to the first respondent. When the respondent's agent objected to paying for the costs of its two employees, only one remained on site. But the cause of the suspension was after all the first respondent's inability to pay for the works as it had not received funds to pay the appellant and once it was placed in funds and paid the appellant, the works would resume. That would appear to be the purpose of the appellant's presence on site - to protect the site during the suspension and to continue with the works upon resumption.

[57] The first respondent's denials of the appellant's possession and builder's lien would appear to be based upon its imperfect understanding of what a builder's lien constitutes by contending that it was confined to a reference in one of the contracts to the contractor being able to exercise a lien 'upon all unfixed materials and/or goods intended for the works which may have become the property of the employer under this contract until payment of all monies due to the contractor from

the employer'. This term is in the form of a proviso to the obligation of the employer to the contractor to make payment of the latter's loss or damage in the event of the contractor being entitled to terminate the contract. That type of lien is expressly stated in the proviso to be in addition to all other remedies. Furthermore the body of the clause refers to the remedies listed below as being without prejudice to the accrued rights of either party. One such right is that of retention under the common law in the form of a builder's lien. It is certainly not excluded or restricted by this clause as is erroneously thought by the first respondent. On the contrary, it is emphatically preserved.

[58] The first respondent's denial of possession for the purpose of a builder's lien thus rests on a false premise, as is its denial that a builder's lien would mean possession to the exclusion of itself and that of its agents.

[59] The first respondent not only denies that the appellant was in peaceful and undisturbed possession but also denies that the appellant is entitled to possess the sites. This is not explained. Elsewhere the first respondent however states that it cancelled the contracts without raising any contractual basis to support a cancellation. On the contrary, it confirms that the appellant 'has at all times been willing to and tendered to comply with its obligations against the contract'. The first respondent merely states that it 'no longer desires to carry on with the (appellant) as a contractual partner'. This is to be read with the admission that the second respondent was 'contracted to continue with the works on the property'.

[60] This approach cannot of course amount to any proper basis to contend that the appellant is not entitled to possess the sites. Possibly realising the fallacious nature of this approach, it is further stated in the answering affidavit:

‘In the event that first respondent so disturbed the (appellant’s) possession of the property, such disturbance is necessary in pursuance of the respondent’s obligations in terms of annexure “B”.’

[61] This annexure is its agreement with the Government to construct the mass housing project. No terms are referred to in support of this proposition. Those selective terms which are attached to the answering affidavit do not remotely provide any basis for the disturbance of possession of a duly contracted sub-contractor in the form of the appellant.

[62] The first respondent’s admissions about engaging the second respondent to continue with works upon the sites, its flawed understanding of the nature of a builder’s lien and its cynical disregard of contractual rights, more than makes up for the less than satisfactory presentation of the appellant’s spoliation application.

[63] Applying the principles so lucidly outlined by Innes, CJ, it would follow on all the facts before court that the appellant was disturbed by the first and second respondents in the exercise of its possession of the sites. Once the sites were handed over to the appellant and it continued with the building works, it was unquestionably in possession of the sites. The works were thus under the appellant’s control and the first respondent could not remove it from the site as long as it performed and remained on site and tendered to perform under the contracts – contrary to the first respondent’s approach. After the work was

suspended by reason of the first respondent's inability to pay for works duly performed, the appellant remained on site with the view to resume the works as soon as the first respondent was once again able to meet its obligations. This was not a case, as referred to by Innes, CJ, where a contractor was warned that if it did not continue the works, another contractor would be appointed so as to put the appellant on its guard to assert more control over the site. On the contrary, the appellant tendered to continue once the admitted amount owing to it had been paid. And it stayed on site, remaining ready to continue upon payment. Despite seeking to hold the first respondent liable for the cost of security guards, their presence under the appellant's control assisted it in exercising sufficient control to exercise its lien and certainly to remain in possession of the sites. It was understandable that it sought to hold the first respondent liable for payment of the costs of the security guards, given the reason for the suspension was first respondent's inability to pay due amounts – and for future work. Importantly the appellant did not terminate its possession. Nor is this alleged by the first respondent.

[64] The court below found that the appellant had not discharged the onus of showing sufficient control of the premises. While I am inclined to agree that the appellant's case was sketchy and lacked detail in this respect, the first respondent did not take direct issue on this score and preferred to resort to bare denials without placing any contrary factual matter before the court. This, coupled with its telling admission as to the second respondent's appointment and its erroneous understanding of a builder's lien and flawed and unsupported approach concerning its entitlement to remove the appellant from the sites, meant that the

appellant has in my view sufficiently established control and subsequent dispossession for the purposes of securing spoliation relief.

[65] It follows that the appeal against the refusal of spoliation relief should succeed.

Interim interdict

[66] The requisites for interim relief are well established. It was incumbent upon the appellant to establish a *prima facie* right, a well-grounded apprehension of harm if the interim relief were not to be granted, that the balance of convenience favours granting interim relief and finally that the appellant did not have an adequate other remedy.¹⁶ Although these requisites are not considered in isolation and interact with each other, so that, for instance the stronger the prospects of success, the less the need for the balance of convenience to favour an applicant,¹⁷ it is however incumbent upon an applicant to establish the four requisites.

[67] The interim interdict is premised upon establishing a *prima facie* right to possession of the site and to prevent interference with its contractual rights which flow from its right to proceed with the contracts. Although this was not crisply set out in the founding affidavit, this was amply clarified by Mr Heathcote in oral argument with reference to the founding affidavit and the contracts between the appellant and first respondent.

¹⁶ *Rally for Democracy v Electoral Commission for Namibia and others* 2013 (3) 664 (SC) at para 99, *Lock v Van der Merwe* 2016 (1) NR1 (SC) at para 47.

¹⁷ *Prest The Law and Practice of Interdicts* (1996) at 74-75 and the authorities collected there.

[68] At the outset of the argument on this issue, Mr Heathcote was asked how the appellant could establish a reasonable apprehension of irreparable harm if spoliation relief were to be granted. Possession of the site would then be restored to the appellant to the exclusion of the second respondent – the very harm sought to be prevented by the interdict. If either the first or second respondents were in contempt of that order, the appellant would have its remedies. Mr Heathcote was unable to point to any fact or circumstance contained in the papers which tended to suggest the contrary.

[69] It follows that this requisite for an interim interdict is not established at all. The application for interim relief was separately sought to a spoliation order and not in the alternative. That was misconceived and the application for interim relief amounted to an unnecessary duplication in the absence of establishing an apprehension that the first and second respondents would not adhere to a spoliation order.

[70] By reason of the failure to establish a reasonable apprehension of harm, the application for an interim interdict falls to be dismissed. It is accordingly not necessary to consider and address the other requisites for interim relief. This unnecessary duplication and engaging in the merits of the parties' underlying rights and obligations should be avoided in spoliation proceedings which are intended to provide an expeditious possessory remedy without the need for the court to determine the *causa* of possession and any underlying rights and obligations.

[71] The appeal against the dismissal of the application for the interim interdict thus cannot succeed.

Conclusion

[72] It accordingly follows that the High Court should have granted spoliation order and did not err in dismissing the application for an interim interdict.

Costs

[73] There remains the question of costs. Both the High Court and this court have deprecated the manner with which this application was brought, resulting in unnecessary prolixity. Litigating in this way is to be discouraged. The obvious and appropriate way to do so is to deprive the appellant of a portion of its costs. The first respondent also successfully resisted the application for an interim interdict. It is evident from the judgment and the papers that not much time was devoted to that issue. The costs order in the High Court proceedings should reflect these factors.

[74] The appellant achieved substantial success on appeal and should be accorded the costs of appeal. The magnitude of the matter and its complexity also justified the employment of two instructed counsel.

The order

[75] The following order is made:

- (a) The appeal succeeds in part.

- (b) The order of the High Court is set aside and replaced with the following order:
- “(i) The matter is heard as one of urgency in terms of rule 73(3) of the rules of the High Court;
 - (ii) The first and second respondents must forthwith restore possession of Blocks 9C, 10A and 10B of the Swakopmund Mass Housing Project to the applicant;
 - (iii) The application for the interim interdict is dismissed;
 - (iv) The first and second respondents must jointly and severally pay 75 per cent of the applicant’s costs, subject to no award of costs being made in respect of the drafting of the applicant’s founding affidavit. The costs referred to are to include those of one instructing and two instructed counsel where engaged.”
- (c) The first respondent is to pay the appellant’s costs of appeal.
- (d) The costs order contained in paragraph (c) above is to include the costs of one instructing and two instructed counsel where engaged.
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SMUTS JA

DAMASEB DCJ

CHOMBA AJA

APPEARANCES

APPELLANTS:

R Heathcote, with S Jacobs

Instructed by Fisher, Quarmby &
Pfeiffer

RESPONDENTS:

No appearance