



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.1735/2013

In the matter between:

SHIFA INVESTMENTS (PTY) LTD

Applicant

And

MORMOND ELECTRICAL CONTRACTORS (PTY) LTD

Respondent

Neutral citation: *Shifa Investments And Mormond Electrical Contractors*

(Pty) Ltd (1735/2013) [2014] SZHC 114 (06th June 2014)

Coram: Hlophe J

For Applicant: Mr. Nkomondze

For Respondent: Mr. D. N. Jele

Date Heard: 21 November 2013

Date Delivered: 06 June 2014

Summary

Civil Law – Spoliation proceedings – Nature of proceedings – Applicant needs to prove that he was in peaceful and undisturbed possession and that he was illicitly disposed of such possession - Applicant purchased a Cumming’s Generator on credit from Respondent who delivered same – Afterwards a dispute as regards its authenticity arose - Respondent fetched same allegedly without Applicant’s permission and without a court order – Respondent claiming to have been allowed by Applicant to reposes generator – Respondent’s allegations contrary to its own assertions in a letter sent to Applicant – No serious or real dispute of fact arising – Matter capable of resolution on the papers because the facts alleged and admitted taken together with all the other facts pleaded justify the decision or resolution – Application granted with costs on the ordinary scale.

JUDGMENT

[1] The Applicant purchased an Electric Generator described as a Cumming’s Generator, from the Respondent on certain agreed terms. These terms included paying a deposit which was to be followed by payment of the balance after delivery of the generator. It is not in dispute that the purchase price agreed upon was a sum of E145, 451.46, of which

Applicant only paid a sum of E75, 000.00 with the E70, 541.46 outstanding as a balance to be payable after delivery.

[2] It is further not in issue that after delivery of the generator, there ensued a dispute between the parties with regards the authenticity of the generator. The Applicant was of the view that same was not a genuine Cumming's Generator because it had an inscription to the effect that it was made in "Shangai" yet he had expected these to be an inscription to the effect that it was made in England. The Respondent maintained that the generator was a genuine Cumming's Generator.

[3] The Respondent insisted on the Applicant paying the outstanding balance but the latter was reluctant as he persisted in disputing the authenticity of the generator.

[4] It would appear that the parties held a meeting on or about the 22nd October 2014 to discuss the issue of payment of the outstanding balance as well as the Applicant's fears that the said generator was not an authentic or genuine Cumming's Generator. Although the exact discussions are a subject of a dispute, it is common cause that the Respondent wrote a letter thereafter, in terms of which it recorded the nature of the dispute between the two of them as well as the terms of their

initial agreement. The relevant portions of the letter are from paragraph 6 onwards where the following is stated:-

“It is becoming abundantly clear that you no longer want a generator, and you are looking for an excuse to return the said generator to us.

On the basis that the generator is now regarded as a second hand, and that Mormond has now incurred both administrative, transport and labour costs in landing the set, we are more than happy to remove the generator, and refund your deposit less reasonable costs incurred to date. Should you be agreeable to this, please contact me on an urgent basis, in this regard.

I regret to inform you that should you fail to pay the balance of the monies due by close of business on Friday, 25 October 2013, we shall have no alternative but to take the necessary action to safe guard our interests”.

It is to be noted that the letter concerned was dated the 24th October 2013. What the necessary action to be taken was, was, not expressly defined but does not present a difficulty if one considers what the Respondent did as shall be seen herein below.

[5] On the 28th October 2013, the Respondent’s workmen went to the Applicant’s premises and removed the generator in question. According

to the Applicant, this was done without either its consent nor was there any court order authorizing same. The Respondent on the other hand contends that it was agreed in their meeting of the 22nd October 2013 that he would have to remove the generator since Applicant was not paying the balance except to point in a contention that the generator was not a genuine Cumming's Generator. It is noteworthy however that the letter written by Respondent on the 24th October 2013, some two days after the meeting does not record this agreement that the Respondent alleges was reached. It only confirms on disagreement together with a threat it was going to take the necessary action if no payment was made by close of business on the 25th October 2013.

[6] Contending that the Respondent's removal of the generator from Applicant's premises amounted to self help, the Applicant instituted the current proceedings seeking the following specific prayers:-

1. Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard and enrolled as one of urgency.
2. Condoning Applicant's non-compliance with the rules.
3. Ordering and directing the Respondent to restore possession ante Omnia, of the 60KVA Cumming's Generator, to the Applicant's possession at the Eteteni

Retail entre, within twenty four (24) hours of grant of this order.

4. Costs of application at Attorney and client scale.
5. Further and/or alternative relief.

[7] As stated above, the Respondent denied that the generator in question was removed from the Applicant's premises without the consent of the Applicant. It was in fact contended that the Applicant had expressly authorized the Respondent to remove the generator from the Applicant's premises. Furthermore it was contended that the Applicant was not in peaceful and undisturbed possession of the generator when it was removed. The Respondent contended that even before the merits as regards the propriety or otherwise of the removal of the generator could be determined, the Applicant failed to make a case for the relief sought. This, it was contended, was because the Applicant had not shown that he was making physical use of the generator at the time and that he derived a benefit from such use as well as showing that he was deprived of the use of the item without his consent. For these reasons it was contended spoliation proceedings were not appropriate.

[8] The starting point would be to determine whether or not there is a genuine dispute of fact which would mean that the matter cannot be decided on the papers as they stand. The position is settled that where a dispute of fact arises in application proceedings it becomes necessary that the matter be either referred to trial or to oral evidence on a specific point or that it be dismissed if the dispute of fact was foreseeable even as at the time the proceedings were instituted. See in this regard ***Hebestein and Van Winsen's The Civil Practice of the Supreme Court of South Africa, 4th Edition Juta and Company, at page 383 and Room Hire Co. (PTY) LTD v Joppe Street Mansions (PTY) LTD 1949 (3) SA 1155 (T) at 1162 and 1168.***

[9] According to the Applicant, he had not consented to the removal of the generator from its premises such that its removal was an act of self help on the part of the Respondent. The Respondent on the other hand disputes this assertion and contends that the removal of the generator was done with the Applicant's consent after he had said it would be fine for the Respondent to remove the generator when the latter asked him about the intended removal of same.

[10] Whilst on the face of it the foregoing depicts a dispute of fact, this is not so when one analyses the situation closely with the aid of settled legal positions. This is because when considering the contents of the letter by the Respondent on the 24th October 2013, it is clear that there was no consensus that the Respondent could remove the generator. This becomes apparent when one considers the paragraph expressed in the following terms:-

“On the basis that the generator is now regarded as second hand, and that Mormond has now incurred both administrative, transport and labour costs in landing the set, we are more than happy to remove the generator, and refund your deposit less reasonable costs incurred to date. Should you be agreeable to this, please contact me on an urgent basis, in this regard”. (Emphasis are mine).

[11] It is clear that a proposal to remove the generator was made which also called upon the Applicant to indicate its agreement, to the Respondent. It is clear we do not have such an answer agreeing to the removal of the generator by the Respondent. In any event I am convinced it would have been highly improbable for the Applicant to have agreed to the removal of the generator without the question of its refund being settled as the Respondent’s assertion does not take it into account this. This is another reason why the prospect of a dispute of fact cannot be upheld. Besides,

it should be noted that whereas the Respondent contends an agreement was reached on the 22 October 2013 to remove the generator, the letter of the 24th October 2013 from the Respondent did not record that than to confirm that an agreement had not been reached as can be seen from the above extract.

[12] Otherwise it is now settled that not every matter where there is a dispute of fact may not be resolved on the papers. According to the Plascon Evans rule as expressed in the case of ***Plascon - Evans Paints Ltd v Van Riebeack Paints (PTY) LTD 1948 (3) SA 623 (A) at 534 H-I*** it is not every dispute that would necessitate a resort to oral evidence in order to resolve as there are instances where a matter would be decided on the papers irrespective of the dispute. This it was stated in the said case would happen where the facts averred in the Applicant's papers and admitted by the Respondent are taken together with those alleged by the Respondent and justify the grant of such an order. ***Hebestein and Van Winsen (Supra)*** puts the position as follows at page 393;

“Where in proceedings on Notice of Motion disputes of fact have arisen on the affidavits, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavit that have been admitted by the Respondent, together with the facts alleged by the Respondent justify such an order”.

I have no hesitation that the admitted facts together with those alleged by the Respondent justify the decision not to dismiss the application nor to refer it to oral evidence nor to trial.

[13] Having concluded that there is no dispute of fact necessitating the referral of the matter to oral evidence or warranting its dismissal, I must now deal with the point in limine raised by the Respondent. It was contended that the Applicant's application was based on hearsay when considering that the Applicant did not have first hand information as regards the removal of the generator from the Applicant's premises by the Respondent. The Applicant it was contended had not annexed the affidavit of the person who saw the Respondent's alleged agents remove the generator including their having allegedly broken down the locks or sawed the padlocks.

[14] Whereas it is true that the Applicant was, on the founding affidavit as it stood alone, relying on hearsay evidence in so far as no confirmatory affidavit from the person who saw the Respondent's alleged agents remove the generator in question was filed, it is not however of any major significance if one considers the fact that the Respondent's letter had threatened to remove the generator after the 25th October 2013. In any event the Respondent's papers confirmed that the generator was indeed removed at its instance. This means that there is no prejudice occasioned

the Respondent as it understood the case it faced together with the fact that the facts concerned were common cause. Furthermore, the Applicant did file the confirmatory affidavit concerned even if it did so under a replying affidavit. The filing of the affidavit concerned in these circumstances had no prejudicial effect on the Respondent.

[15] According to *Shell Oil Swaziland Ltd vs Motor World Company (PTY) LTD T/A Sir Motors Appeal Court Case No. 23/06 (Unreported)*, a party who relies on the no less than perfect technical and procedural point without suffering any prejudice to raise an objection will often not succeed as a mere technical point which takes the matter nowhere than to point out at its technical deficiency is not good enough. Clearly the point in limine concerned (on the hearsay alleged) cannot succeed in the context of this matter.

[16] In these circumstances one needs to consider and determine whether a case has been made for the reliefs sought. In other words has a case for a spoliation order been made in this matter. The Respondent's contention was that such a case had not been made for three reasons, namely that the Respondent had not removed the generator without the Applicant's consent; that the Applicant was not in peaceful and undisturbed

possession of the generator and lastly that the Applicant was not physically using the generator to derive a benefit for itself.

[17] The question of the consent or otherwise of the Applicant to the taking or removal of the generator has already been determined, it having been found that from the letter of the 24th October 2013 by the Respondent, it was clear that there was no consent by the Applicant that that the Respondent takes or removes the generator in question.

[18] The essence of a spoliation order is to ensure that no one is allowed to take the law into his own hands or put differently no one is allowed to resort to self help. Furthermore it is the essence of this relief that the merits are not as yet considered as the only issue to consider is whether from the facts the law was followed so as to ensure peace prevails. From the facts of the matter it cannot be real for one to contend that the Applicant was not in peaceful and undisturbed possession of the generator. It shall be remembered that the generator in question had spent days with the Applicant such that it cannot be real to suggest he had not had a firm hold over it when it was eventually taken by the Respondent. It is in fact contended, although not decide, that when the generator was removed a padlock was broken.

[19] As states above, it reiterated that it is the essence of spoliation proceedings that the reasons for the removal of the item concerned are not for consideration as the only item for consideration is whether or not the Applicant was deprived of his possession in a lawful manner which is to say was it with his consent or was it done with an order of court. Consequently whether the Applicant was using an item for his benefit should not matter if the items removal was not done lawfully in the manner stated above. To hold otherwise would be to advocate for chaos where self help would be the order of the day the very result that spoliation proceedings are meant to prevent.

[20] I am convinced that the removal of the generator from the Applicant's possession was done without either his consent or a court order. I cannot agree that the Applicant was not in peaceful and undisturbed possession or even that it was not intending to use the generator concerned to its benefit. It is for these reasons I am in no doubt that the Applicant's application should to succeed with costs however being fixed at the ordinary scale.

[21] Consequently, I make the following order:-

21.1 The Respondent be and is hereby ordered to restore possession of the 60KVA Cumming's Generator to the Applicant's possession at the Eteteni Retail Centre, within 24 hours of this order.

21.2 The Respondent be and is hereby ordered to pay Applicant the cost of these proceedings on the ordinary scale.

Delivered in open Court on this the 06th day of June 2014.

N. J. HLOPHE

JUDGE - HIGH COURT