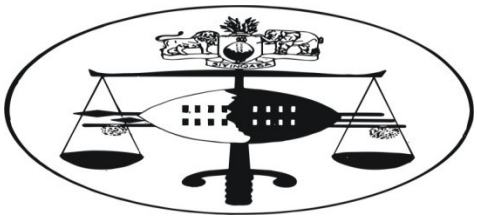

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO: 300 /2016

In the matter between:

AFRICAN MANAGEMENT DEVELOPMENT INSTITUTE APPLICANT

AND

MKL CIVIL CONSTRUCTION RESPONDENT

Neutral Citation: *African Management Development Institute v MKL Civil Construction (Case No. 300/16) [2016] SZHC (159) (28 April 2016)*

Coram: MLANGENI J.

Heard: 10th March 2016

Delivered: 28 April 2016

Summary: *Law of property – Applicant's claim based on vindication, alternatively on spoliation.*

Applicant and Respondent entered into an agreement in terms of which the Respondent was to construct a building on behalf of the Applicant for an agreed price. A dispute arose, resulting in Applicant ordering the Respondent to leave the construction site.

Respondent left the construction side and took with it unused building material. Applicant seeks to recover the building material on the basis that it is the owner thereof, alternatively a spoliation order on the basis that it was in peaceful and undisturbed possession thereof when it was removed by the Respondent.

Having listened to oral submissions, and having conducted a site-inspection of the construction site, court held that on the available evidence the Applicant is not owner of the building material; neither was it in possession of the said material, hence Application dismissed with costs.

JUDGMENT

[12] By way of an urgent application dated 10th February 2016 the Applicant seeks orders in the following terms:-

1.1 Pending finalization of the present application, the respondent being (sic) interdicted and restrained from disposing off the building material it removed from Applicant's premises situated at Portion 70/1007 Droxford Farm, Ngwenya, Hhohho District.

1.2 The Respondent be interdicted and restrained from removing building material at the Applicant's premises, Portion 70/1007, Droxford Farm, Ngwenya, Hhohho District.

1.3 The Respondent be ordered and directed to restore possession of the building material, it removed from the Applicant's premises, Portion 70/1007, Droxford Farm, Ngwenya, Hhohho District, on the 9th February 2016, to the Applicant forthwith.

1.4 Costs of suit on attorney-client scale.

THE FACTS

[2] On the 4th May 2015 and at Mbabane in the Hhohho Region the parties entered into a written agreement in terms of which the Respondent was to construct a building for the Applicant upon specified terms and conditions. Where convenient I will refer to the Applicant as the principal and to the Respondent as the contractor.

[3] The contract document is an epitome of poor workmanship. On several major issues it offers no clear answer or guidance. The project was to run for a period of about seven (7) months beginning on 4th May 2015 to 30th November 2015. The agreed price for the project was E1, 908, 704-00, inclusive of material, which was to be sourced by the contractor at its expense.

[4] Subsequently, the scope of works was increased at an extra cost and, unavoidably, there were implications on the time frame, which was extended. The additional cost and extended time frame did not become an issue between the parties and are of no concern in these proceedings.

[5] It appears that from day one the written agreement was not fully adhered to. For example I refer to clause 5 which is on payments. At paragraph 5.1 it inelegantly provides as follows: -

> ***"Payment for work done will be paid monthly ------on the last day of every month for the period of which the contract subsists."***

[6] The papers before me show that this way of effecting payment was never followed. The record shows payments that were made by the Applicant on the following dates: 02/07/15, 03/09/15, and 16/10/15. None of these payments were made on the last day of the month. It is likely that there is a payment or payments that precede 02/07/15, possibly characterized as category one, but it is not reflected on the papers. This failure to adhere to the express terms of the agreement, and in certain instances a stark departure therefrom, may have provided a perfect recipe for conflict.

[7] As a matter of fact this notion of paying at the end of each month is a drastic and unworkable departure from industry practice, which bases payments upon certificates which match the works done and the amount due at that stage.

[8] Conflict between the parties did in fact occur, and it played itself out in a rather dramatic manner. The Applicant allegedly failed to make some payments on time. In pursuance of clause 4.2 of the agreement the Respondent stopped all works **“for want of Payment”**. Clause 4.2 reads as follows:-

"The client agrees that if payment is not made according to the agreed terms of payment, Builder has the right to stop all work until such payments have been brought current."

[9] To the ceasation of works the Applicant responded by terminating the contract, verbally. This despite the provisions of clause 7.3 of he agreement which requires written notice of termination in circumstances of dissatisfaction, such notice to specify the reasons for termination. On the face of it, this termination can be described as very highhanded, in that the Respondent by stopping works was exercising its rights in terms of the contract. Upon termination of the contract by the Applicant the Respondent requested an explanation but was told to vacate the premises, with all of its belongings. See: paragraph 4.4 of the answering affidavit at page 30. This critical averment is not specifically denied by the Applicant. In its reply at page 56 of the Book, paragraph 24 is in response to paragraph 4.4 of the Respondent's answer. It merely states the following:-

"contents of this paragraph are denied ---"

and proceeds to aver that "I state however that the building material does not belong to the Respondent as it was purchased using funds sourced by the Applicant"

[10] Clearly, it is the removal of the building material and equipment from the construction site which led to the present application, but not before the Applicant unsuccessfully sought the intervention of the Ngwenya Post Police. It appears that when the assistance of the Police was sought some material had already been removed from the site.

THE APPLICATION

[11] The legal redress sought by the Applicant is two-pronged and in the alternative. On one instance it seeks vindication of ***"its building material".*** In the event that it is found not to be the owner, and therefore unable to vindicate, Applicant avers that it was in peaceful and undisturbed possession of the building material, and that the Respondent is guilty of spoliation. The issues raised by the Respondent in its answering papers make it far from obvious that the Applicant was either the owner or was in peaceful and undisturbed possession at the material time. This might be the reason why the Applicant did not insist on interim relief.

[12] It is common cause that the building material was sourced by the Respondent, for purposes of raising the building which, upon completion, was to be handed over to the Applicant. So the material

came to the construction site pursuant to a contract of sale between the Respondent and a third party, the supplier. It is clear that the Applicant is not in this equation. So how does the Applicant become owner of the material? Applicant offers an answer to this question at paragraph 9.4 and 10 of its founding affidavit, which I quote presently –

> ***"9.4 This (sic) payment enabled the Respondent to purchase building material and also pay its salaries ---"***
>
> ***"10. I state that the building material does not belong to the Respondent and the money used to purchase the said material was sourced from Applicant's coffers. In any event, even if the material had been purchased by the Respondent, it was agreed that it would remain the sole ownership (sic) of the Applicant and the Respondent would only have a claim for damages against the Applicant"***

[13] The position of the Applicant is vigorously challenged by the Respondent who, at page 32 of the Book, paragraph 8, has this to say –

> ***"Contents are denied entirely. I state that payment that was done was for work done. Each time a certain stage was reached a certificate would be issued. The Respondents used its own funds to source material and would claim upon reaching a certain stage. On numerous occasions the Applicant failed to honour its obligations regarding payments and that respondent would be forced too (sic) request overdraft facilities from its bankers. Several letters have been written by the Applicant to confirm for the bank that she was***

indebted to the Respondent when the Respondent requested for an overdraft facility ----. This was caused by Applicant's failure to pay in time."

Respondent makes reference to annexures **"C1"** and **"C2** at pages 47 and 48 which are confirmations to Respondent's bankers that it was indeed owed by the Applicant. Per annexure **"C2"** dated 3rd December 2015, the Applicant states that as at that date the Respondent was owed by the Applicant an amount of E782,383, and that **"of this amount, E300.000 will be paid on or before 31st January 2016 and the remaining balance by 31st March 2016"**.

[14] The basis of the Applicant's claim that it owns building material is it's averment that certain payments that were made by it to the Respondent were specifically intended to acquire the material and that in acquiring the material the Respondent acted as agent and on behalf of the Applicant. The facts before me do not support this position; far from it.

14.1 The agreed price for the completed works, as extended, was inclusive of building material, per clause 3.3 of the agreement.

14.2 In terms of clause 5.3, in the event that the Applicant assisted "the builder" with acquiring some material, the former was to

make “the necessary deductions from the original value of the contract.”

[15] It is averred that the Applicant verbally terminated the contract during December 2015. Annexure “C2” dated 3rd December confirms that at that time the Applicant owed Respondent E782, 383-00, the last of which was to be paid on or before 31st March 2016. In my view it is preposterous to claim to pay someone in advance when you are in fact indebted to that person in an amount that is not disputed.

[16] There are two other clauses that falsify the Applicant’s claim to be the owner of the building material.

16.1 Clause 8.1 gives ownership rights to the Applicant in respect of **“all the work product and intellectual property.”** It says nothing about building material. At the hearing the parties agreed that **‘work product’** refers to the completed structure.

16.2 In terms of clause 3.7 of the agreement, the contractor was to **“remove all debris, equipment, materials ----- from the location upon completion of the construction.”** It says nothing about the Applicant’s residual rights to the building material or anything other than the ‘**work product’**.

[17] The Applicant has made much of annexure **'H'** at page 64 of the Book, as demonstrating that its money was used by the Applicant to purchase material. I have already stated earlier on that the evidence shows otherwise. On this annexure the relevant words are at paragraph three line 2 which states that –

> ***"--- we request that instead of payment NO.2 you pay us NO.3 so that we pay for roof trusses fabrications and steel purlins and also deposit the roofing sheets."***

[18] This passage went beyond its relevance and usefulness. There was no need for the author to explain what he was to use the money on. His was to request, as he did, that he be paid for certificate NO.3 instead of NO.2. The surplasage does not in any way create a basis for the submission that the Applicant was to become owner of what the Respondent chose to purchase. What if all that money was used to pay an overdraft facility or to finance a different project altogether?

[19] I am persuaded by the Respondent's submission that the Applicant would become owner of the material once it was used on the project. A window frame would, for instance, belong to the Applicant once it was mounted on the building, for it then becomes part of the building.

Until it is so mounted, the contractor could well use it on another project somewhere in Mpumalanga. What is not used on the project cannot be handed over to the Applicant but it is to be removed from the site by the Respondent upon completion of the project.

[20] I come to the conclusion that the Applicant has failed to show that it is the owner of the building material. It has failed to show that it paid some monies to the Respondent in advance. But even if it had succeeded in proving that it made some advance payments this would not, in my view, create anything more than a simple debtor-creditor relationship. Put differently, the material so acquired would not automatically become security in respect of any future debt in favour of Applicant.

[21] Accordingly, Applicant cannot succeed on ***rei vindicatio*** as it is not owner of the building material. In this respect I find support in a passage quoted in the Applicant's head NO.9, from **PHILLIP LOOTS ENGINEERING AND CONSTRUCTION LAW** at page 263, where it states:-

> ***"----the plant or materials would normally remain in the contractor's possession, and accordingly ownership could***

pass to the employer only if some form of constructive delivery could be considered to have taken place."

[22] In the present case there is no factual delivery; neither is there constructive delivery.

[23] I now consider the alternative remedy based on possession. This is the remedy known as spoliation. Its purpose is to protect possession and it seeks to prevent self-help, which would endanger peace in society. An Applicant is required to demonstrate that he was in peaceful and undisturbed possession when he was despoiled by the spoliator. If the court is satisfied on these requirements it grants a summary order for restoration of possession, without enquiring into the merits. It is a drastic remedy in that it gives relief to a party without hearing the other. **See: WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW, 8TH Ed by Hutchison, Van Heerden, Visser and v.d. Merwe at page 267**

[24] But then it must be clear on the Applicant's papers that he was in peaceful and undisturbed possession. Was the Applicant ever in possession of the building material? Applicant owns a university campus at Ngwenya Township in the Hhohho Region. The project in

question was the construction of a hall within the campus premises, Was it in possession of the building material because of its overall control of the campus? On this aspect the evidence in the pleadings is inconclusive.

[25] A clearer picture of the situation at the site emerges from Respondent's revised heads of argument. At paragraph 4.2 of these heads it is stated that once the Respondent was shown the construction site it "took possession and charge over the site --- hired his own security to guard over the premises and the building materials. Further, at paragraph 4.3 it states –

> ***"------ Respondent has brought to the site its full equipment and materials for construction. It also brought its security guards to guard the site, materials and equipment. This in essence shows that at all material times the site was in the control and possession of the Respondent."***

[26] Obviously, heads of argument are not evidence. The aforegoing is not and cannot be a substitute for evidence. But also, where the quest is to do justice between man and man, the hint that it provides cannot be ignored. It is with this in mind that I asked the parties' attorneys to avail themselves for a site inspection of the construction project, on

the assumption that no significant changes had taken place since the inception of the litigation.

[27] Both Counsel were in agreement that the inspection would add value in the endeavour to resolve the dispute. The inspection was conducted in the afternoon of the 21st April 2016. Oral evidence was restricted to pointing out, with minimum elaboration where necessary. My observations are stated below.

OBSERVATIONS

[28] The college campus is situated on a vast piece of land at Ngwenya, pretty close to the border post. The main entrance is on the South-East tip of the land. At this entrance there is a modest guard house. As one walks towards the north the eyes are attracted by nice building structures on the immediate left and an imposing, unfinished concrete structure further north, about 200 metres from the main entrance. At this 200 metre point there is a steel sign board with an assortment of messages, relating mainly to safety. It is common cause that this sign marks the entrance to the construction site which is at the centre of the dispute between the parties. It is also common cause that this sign board was put up by the contractor upon assuming occupation of the site.

[29] Just below the sign board, there is a line of wooden stakes of about two metres high. They are about 15 in number and traverse the land in the direction of East-West. I was informed that this was intended to be a boundary fence demarcating the construction site from the lower portion which is seat for the completed structures. These wooden stakes were hoisted by the contractor with the approval of the principal. It is unclear why the fencing was not completed, but it does not even matter because the intention behind it is unmistakable – it was to separate the construction site from the rest of the land.

[30] At the construction site one easily sees material such as hips of crush stone, river sand and plaster sand. There is also a shabby guard house and close to it there is a shed which, I was informed, contains building material such as window frames and door frames. There are also concrete blocks within sight.

[31] I was informed that the principal, who is the Applicant, is not allowed to remove anything from the construction site without the consent of the contractor. The principal also says that no building material can be taken out of the main premises without its consent, and this is in fact the gist of its case. It takes the position that because of its overall

control of the college campus, it was in possession of the building material at all relevant times.

CONCLUSION

[32] I am unable to agree with the principal's point of view. Possession is defined as **"a compound of a physical situation and a mental state involving the physical control of a thing by a person and that person's mental attitude towards the thing."** See Silberberg and Schoeman's **THE LAW OF PROPERTY**, 4th Ed, page 253. This work states the requirements of possession as follows:-

(i) effective physical control of the thing;

(ii) a state of mind that intends to retain or hold on to the thing.

See: CAPE TEX ENGINEERING WORKS (PTY) LTD vs. SAB LINES (PTY) LTD 1968 (2) SA 528.

[33] Applying the requirements stated above to the case in casu, I come to the conclusion that the Applicant was never in possession of the building material which is the subject of this Application. The material was acquired by the contractor to build the structure and deliver it to the principal as **'Work product'**. The contractor is not expected to obtain the permission of the principal in order to use sand, crash stone

or window frame. The material is being kept in a restricted area which is controlled by the Respondent, and to which access by the principal is restricted. Nothing demonstrates this better than the wooden stakes that were intended to hold demarcation fence between the construction site and the finished structures. Through the sign board the contractor is telling all and sundry that they are now entering controlled territory, and must observe certain rules of safety, which includes prohibition of firearms, alcohol, dogs as well as need to wear hard hats, goggles, overalls and gloves.

[34] I may add, needlessly, that the principal could not have expected to derive any benefit from possessing the material. All that the principal required was to take delivery of a completed building, the **'work product'**, and the Respondent would at that stage have cleared the site of all unused material and debris.

[35] In my conclusion, the Applicant has again failed to make out a case for spoliation.

[36] The Application is accordingly dismissed with costs at the ordinary scale.

T.M. MLANGENI

JUDGE OF THE HIGH COURT