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JBCC: WHEN AN EMPLOYER GIVES YOU THE BOOT

COMMON LAW REMEDIES AVAILABLE TO THE CONTRACTOR SHOULD AN EMPLOYER DEPRIVE THE CONTRACTOR FROM POSSESSION OF SITE

+ *Author: Odette Potgieter*

Contractors often wonder what their options are (rights and entitlements) under a contract, and in law, when an employer cancels a contract without valid grounds to do so. In this article, we will look at recent case law dealing with certain legal principles and the contractor's right to approach a court should an employer cancel a contract which effectively deprives the contractor from possession of a building, structure or site without valid grounds to do so. Firstly, an explanation of some of the legal jargon that is referred to in the case law is required.

What is spoliation?

Spoliation is any wrongful deprivation of another's right of possession.

What is a mandament van spolie?

It is an order of court which undoes a spoliation. The court will order the guilty party to restore the right of possession to the party it was wrongfully taken

from, after a spoliation.

Now that we have given a simple explanation of the legal jargon / principles we take a look at how a contractor attempted to use the mandament van spolie to get around the fact that the employer terminated the contract (for reasons the contractor didn't agree with)

In the recent matter between Arise General construction CC v South African National Parks [2-16] ZAGPPHC 697 the court looked at spoliation and the requirements to successfully enforce a mandament van spolie.

This matter was an appeal against a judgment on which the applicant's urgent application was dismissed with costs. The urgent application was based on the mandament van spolie. The applicant is a building contractor and alleges to have been deprived of its possession of a building site within the Kruger National Park, where it was in the

process of executing the building contract for the construction of certain student accommodation, student boma, security, guard house, supervisor, and manager accommodation¹. The contractor was dispossessed from site because of cancellation of the contract by the employer.

The contract was based on the principal building agreement, JBCC series 2000 (“Contract”).

The employer contended that the Contract was cancelled on the basis that the contractor failed to comply with the material terms and conditions of the Contract, which failure was denied by the contractor.

The relevant terms and conditions of the Contract were²:

- If the contractor fails to or omits to achieve the practical completion by 11 April 2014, the employer is entitled to enforce a penalty in the amount of R1000.00 per day [clause 30.1 and 42.2.7]
- On being given possession of the site the contractor shall commence with the works within the period stated in the schedule and proceed with due skill, diligence, regularity and expedition and bring the works to:
 - o Practical completion on or before 11 April 2014
 - o Works completion in terms of the provisions of clause 25 of the agreement; and
 - o Final completion in terms of the provisions of clause 26 of the agreement
- In the event that the employer considers cancelling the contract, the principal agent shall be instructed to notify the contractor of such default in accordance with the provisions of clause 30.1 and the employer or the principal agent may give notice of such cancellation should the contractor remain in default for 10 working days after the date of issue of such a notice [clause 36.3]
- If the contract is cancelled the employment of the contractor shall be cancelled and execution of the work shall cease. The

contractor shall furthermore vacate the site subject to provisions of clause 36.5.6.1

- The employer may use the contractor’s material and goods, temporary buildings, plant and machinery on the site for proceeding with the work [clause 36.5.5]

It is alleged by the employer that numerous correspondence was issued to the contractor in respect of its failure to bring the works to practical completion and on 10 September 2015 the Contract was duly cancelled. It is, for purposes of this article, not necessary to deal with all the facts surrounding the cancellation of the Contract. However, it was the contractor’s position that it did not voluntarily vacate the site and thus the reason for its application.

With specific reference to a ‘mandament van spolie’ the court stated that:

“The mandate van spolie is directed at restoring possession to a party which has been unlawfully dispossessed. It is a robust remedy directed at restoring the status quo ante, irrespective of the merits of any underlying contest concerning entitlement to possession of the thing concerned and the unlawful despoilment thereof are all that an applicant for mandament van spolie has to show. (Deprivation is unlawful if it takes place without due process of law, or without a special legal right to oust possessor). The underlying principle is expressed in the maximum spottatus ante omnia mstituendus est. the fundamental purpose of the remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help. It is available both in respect of the dispossession of corporeal property and incorporeal property. In the case if incorporeal property it is the possession of the right concerned that is affected – a concept described as a quasi-possession to distinguish it from physical possession. The manifestation of possession of the

¹See paragraph 1 of the judgment dated 12 August 2016

²See paragraph 6 of the judgment dated 12 August 2016

right in such a case will always entail the taking away of an externally demonstrable incidence, such as a use, arising from or bound up in the right concerned.”³

The court referred to and relied on the matter of Firststrand bank Ltd t/a Rand Merchant Bank & Another v Scholtz BO & Others 2008 (2) SA 503 (SCA) wherein the basis for the need for the characterisation of the right in an application for mandament van spolie was stated:

“The mandament van spolie does not have a ‘catchall function’ to protect the quasi-possession of all kinds of fights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights in a dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi-possession of certain rights. It follows that the nature of the professes right; even if it need not be proved, must be determined or the right characterized to establish whether its quasi-possession is deserving of protection by the mandament”.

In this matter the court held that the nature of the right is material for determining whether the conduct complained about by the contractor constitutes spoliation⁴, that should this constitute spoliation the contractor must prove that the ‘possession’ is of a kind which warrants the protection accorded by the remedy, and that the contractor was unlawfully ousted⁵.

After considering the contractor’s application, the court decided that the contractor failed to make a sufficient case for the relief which it applied for in that the contractor’s right to possession of site has been legally and lawfully terminated and cancelled by the employer. As such it was found that the contractor was not entitled to rely on the mandament van spolie⁶.

It is again emphasised in this judgment that should a contractor want to approach a court to assist with enforcing its rights and entitlement when it was deprived of possession of a site, the contractor

will have to satisfy certain requirements. These requirements are⁷:

- The contractor should prove that it had, and was in possession of the site; and
- That the employer has deprived the contractor from possession of the site, building or structure forcibly or wrongfully (without valid grounds to do so).

For a contractor to allege that it had possession of a site the contractor should prove that the applicable contract, in this instance the JBCC, gives possession of the site to the contractor.

The JBCC expressly states and makes provision for possession of the site by the contractor. In terms of clause 12 [Duties of the Parties], and more particularly clause 12.1.7⁸, it is a duty of the employer to give possession of the site to the contractor on the agreed date stated in the contract data.

This is different from some of the other standard form contracts, for example the NEC3, where such contract only makes provision for access to site and not specifically possession of the site.

The purpose of this article is to provide an understanding of certain legal principles (spoliation and mandament van spolie) to contractors and to remind contractors that, should they be wrongfully deprived from possession of the site under the JBCC contract, they can rely on and make use of the remedies that are available to them under the common law and should not only necessarily rely only on the remedies in the contract⁹.

This will, however, require a consultation with an expert in construction contracts to determine whether or not such common law remedies will be available.

³See paragraph 16 of the judgment dated 12 August 2016

⁴See paragraph 21 of the judgment dated 12 August 2016

⁵See paragraph 21 of the judgment dated 12 August 2016

⁶See paragraph 22 of the judgment dated 12 August 2016

⁷See the judgment of Yeko v Qana 1973 (4) SA 735 (A) where these requirements were also set out

⁸See the Principal Building Agreement, JBCC Edition 6.1 March 2014

⁹The provisions of an employer’s payment guarantee (see clause 11.4.1), the contractor’s right to exercise a lien (see clause 25.12.2) or the waiver of the contractor’s lien (see clause 11.1) should not affect the position set out in the article or the contractor’s entitlement to exercise its rights under the common law