

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates	YES/NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 2826/2024

In the matter between:-

JOHANNES ZACHAIAS HUMAN MULLER NO 1st Applicant

ANGELENE POOLE NO 2nd Applicant

and

KKK PROTECTION SERVICES (PTY) LTD 1st Respondent

JOHN PAPIE MOTSOENG 2nd Respondent

JUDGMENT

*This judgment is electronically handed down via e-mail to the legal representatives of the parties. the date of handing down the judgement is deemed to be **27 June 2024**.*

FMM REID J

Introduction

[1] The applicants are the appointed liquidators, acting in their

official capacity as the joint provisional liquidators of the company Greenleaf Rehabilitation (Pty) Ltd, which company has been placed under provisional liquidation on 24 June 2022 by an order of this Court. For ease of reference and clarification, I will refer to Greenleaf Rehabilitation (Pty) Ltd (in provisional liquidation) as “Greenleaf”.

[2] The application is brought on an urgent basis and the applicants pray for a spoliation order against both respondents, to immediately restore the applicant’s peaceful and undisturbed possession and occupation of and access to a specific property. On this property there is a mining site and mine washing plant. The property described herein is known as “the remaining extent of Portion 30 (a Portion of Portion 10) of the Farm Hartebeesfontein 422, Stilfontein, North West Province” (the property).

[3] The 1st respondent is a security company and the 2nd respondent is the director of the 1st respondent security company, which company is appointed by the applicants to secure the premises and mining equipment on the property. The 1st and 2nd respondents filed a notice to abide by the

decision of this Court.

[4] When the matter was set down for hearing on 11 June 2024, a company named Hydro Water Solutions (Pty) Ltd (Hydro Water Solutions) brought an application to intervene in the urgent proceedings. Hydro Water Solutions also instituted a counter-application, dependant on being granted leave to intervene. In the counter-application this Court is requested to interdict and restrain the applicants from dismantling and removing the CDE wash plant¹ situated on the property, or causing the CDE wash plant to be dismantled and removed, pending the outcome of the action proceedings instituted by Hydro Water Solutions under case number 2821/2024 in this Court. The matter was stood down for affidavits to be filed in the intervention application, and consequently heard on 14 June 2024.

[5] The crisp issue for this Court to determine, is whether the applicants had peaceful and undisturbed possession and occupation of and access to the property and if so, whether

¹ "CDE turnkey washing plant effectively processes 350tph of dredged sand and gravel to supply high-quality washed material for construction & specialist sand applications."
See: <https://www.cdegroupp.com/products/washing-classification#>

that possession was disturbed by the respondents. In addition to that, the application of Hydro Water Solutions to be added as an intervening party to the proceedings, should be determined. In the event that Hydro Water Solutions is granted leave to intervene, the counter-application is to be adjudicated.

- [6] It is common cause that the applicants require access to the property with the purpose of disassembling a CDE mine washing plant, intermittently referred to as “the Blue Plant”. This Blue Plant is the property of the intervening party Hydro Water Solutions and which plant was rented to Greenleaf. The Blue Plant consists of mining equipment, which includes *inter alia* large components, dams, conveyor belts, motors and electrical wiring.
- [7] The provisional liquidators bring this spoliation application in order to be able to disassemble the Blue Plant on the property and reassemble it on another property, with the purpose of having the mine wash plant generating an income which would be beneficial to all the creditors of Greenleaf.

Point in limine

[8] The intervention application includes an answering affidavit to the main urgent application, in the event that the intervention application is successful.

[9] Hydro Water Solutions raises a point *in limine* in relation to the *locus standi* of the deponents to the affidavit of Greenleaf. Due to the fact that the issue of *locus standi* is a legal issue, which may vitiate the outcome of the application, I deem it prudent to deal with the issue of *locus standi* of the applicants.

[10] The legal position in relation to *locus standi* is set out as follows in **The Law of South Africa LAWSA:**

“General: The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person’s interest in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules.

Jacobs v Waks 1992 (1) SA 521 (A) p. 534D

Gross v Pentz [1996] 4 All SA 63 (A).”

[11] The point *in limine* is that the applicants, as provisional

liquidators, do not have the powers to institute the proceedings on behalf of the applicants. The argument is that the applicants are Provisional Liquidators whose certificate of appointment vests them with “*the powers set out in Section 386(1) of Act 61 of 1973.*” Hydro Water Solutions argues that the provisional liquidators do not have the power that is only given to the final liquidators of a company, as contemplated by section 386(3) and (4) of the **Companies Act** 61 of 1973. As such, the point *in limine* is that the provisional liquidators have no powers to institute the application.

[12] The court order that granted the provisional liquidation under case number UM119/2022 on 24 June 2022 determines in paragraph 4 that the applicants, who are the 1st and 2nd applicants in this application, reads as follows:

- “4. *THAT: The applicants are authorised to:*
- 4.1 *Bring or defend in the name and on behalf of Greenleaf any action or other legal proceedings of a civil nature...*
- ...
- 4.5 *To execute agreements in the name of Greenleaf...*

...

5. *THAT: Leave be granted to convene a commission of enquiry (the enquiry) into the trade dealings of Greenleaf in terms of the provisions of sections 417 and 418 of the 1973 Companies Act... ”*

[13] The provisional liquidation order specifically authorises the applicants to *inter alia* institute proceedings of a civil nature.

[14] I therefore find that the applicants have the necessary *locus standi* to institute the application.

[15] As such, this point *in limine* is dismissed.

Material background

[16] The property is an open piece of industrial land that belongs to an entity named Greenleaf Trust with registration number IT193/12. In terms of an agreement entered into between these two entities, Greenleaf Trust has provided Greenleaf possession and occupation of the property since 2018.

[17] For the period that Greenleaf has been in provisional liquidation, the applicants were able to secure assets and an

income stream to the benefit of the creditors.

[18] The 1st respondent is a creditor of Greenleaf (historically) by virtue of security services rendered prior to the date of provisional liquidation. By agreement between Greenleaf and the 1st respondent, the security services were retained at the property. The applicants pay the respondents to provide security to the property and equipment on the property.

[19] Whilst the application was drafted, Greenleaf was in the process of dismantling the Blue Plant that is situated on the property. The plant is being dismantled, repaired and moved to Sibanye mine, a different location where it will generate an income for Greenleaf to the benefit of the creditors of Greenleaf. Dismantling the Blue Plant would take approximately a month, and the reassembling of it would take the same period or longer. Various contractors and experts are involved in the process of moving the Blue Plant. The site where the Blue Plant is to be reassembled at Sibanye mine, had to be prepared in that the necessary foundations had to be built and casted to accommodate the Blue Plant.

[20] It is common cause between the parties that the services rendered by the 1st and 2nd respondents are rendered to the sole and exclusive benefit of Greenleaf and the 1st respondent is being paid by Greenleaf for such security services.

[21] Greenleaf (as duly represented by the 1st applicant) and Hydro Water Solutions entered into a Plant Rental Agreement on 30 January 2023. It is common cause that Greenleaf had undisturbed and peaceful possession of the property, which includes access to and use of the Blue Plant, since 30 January 2023.

[22] The plant referred to in the Plant Rental Agreement is the Blue Plant that forms the subject matter of this application. In the Plant Rental Agreement, it is specifically agreed that Greenleaf will remove and reassemble the Blue Plant at the Sibanye mine.

[23] The aforesaid agreement is stated as follows in the Plant Rental Agreement:

“RENTAL AMOUNT AND PAYMENT

4.

4.1 Greenleaf will pay Hydro an amount of R15.00 (Fifteen Rand) per ton (Inclusive of VAT) processed through the Plant once assembled and commissioned at its intended site of operation.

4.2 Greenleaf confirms that it intends to assemble the Plant at Sibanye mine as to increase performance in terms of and pursuant to its agreement with Sibanye under its mineral process license.

4.3 The parties acknowledge that Greenleaf will be liable for the costs of dismantling the Plant at the site where it is assembled at the intended site of operation. As a consequence, the parties acknowledge and agree that Greenleaf will be afforded 6 (Six) months from date of signature to cause the Plant to be operational and to generate an income as intended in terms of this Agreement...

...

5.2 Greenleaf will employ an independent contractor to inspect and verify the Plant at its current location as to confirm that the Plant is complete and fit for purpose in terms of and intended in this agreement.

5.3 Greenleaf will be obliged to take all reasonable steps to dismantle the Plant without delay, transport, reassemble and commission the Plant at the intended site and to ensure that the Plant becomes operational within a reasonable time and without due delay.”

[24] The dismantling of the Blue Plant was momentarily interrupted when the security employees of the 1st respondent refused the contractors of Greenleaf access to the property during April 2024. The access was restored amicably and through correspondence by their respective attorneys.

[25] On 4 June 2024 Hydro Water Solutions, via their attorneys, directed correspondence to Greenleaf. In this letter, Hydro Water Solutions informs Greenleaf that Hydro Water Solutions cancels the Plant Rental Agreement with Greenleaf on the basis of Greenleaf's repudiation of the contract. The following is recorded in the letter:

- “4. Paragraph 4.3 of the agreement placed an obligation on your client to dismantle the Blue Plant and to assemble same within six months of the date of signature of the agreement, i.e. by 31 July 2023.*
- 5. It is now June 2024 and your client failed to adhere to its express obligation in terms of paragraph 4.3 of the agreement.*
- 6. The conduct of your client in failing to adhere to its obligations in terms of the agreement amounts to a repudiation thereof, and which repudiation*

our client accepts and accordingly effects to terminate the agreement.

7. *Our client has instructed us that attempts are being made to dismantle and remove the Blue Plant, however in light of the termination, any such attempts cannot be proceeded with and would be unlawful.”*

[26] At this stage it is apt to mention that one Mr Alvin Naicker is the sole director of Hydro Water Solutions, and as such the deponent to the affidavit in the application for intervention of Hydro Water Solutions. Of importance is the fact that Mr Alvin Naicker is also a shareholder of Greenleaf. Mr Alvin Naicker therefore has a vested interest in both Greenleaf (in provisional liquidation) and Hydro Water Solutions.

[27] I mention *obiter dictum* the logical effect of what the outcome of this application would have on Greenleaf and Hydro Water Solutions. In the event that the Blue Plant is dismantled and reassembled at Sibanye as stipulated in the Plant Rental Agreement, the profit received will be to the benefit of all the creditors of Greenleaf. Should the Blue Plant not be dismantled and mining operations conducted with the Blue Plant by a contractor other than Greenleaf, the profit would be to the sole benefit of Hydro Water Solutions, and of

course the new contractor.

The application for intervention by Hydro Water Solutions

[28] The application for intervention is brought on the basis that the Plant Rental Agreement was breached by Greenleaf in that *inter alia*, not complying by the time periods set for the dismantling of the plant, failing to ensure that the plant is operational, failure to pay the rental amount and a host of other reasons. On this basis, Hydro Water Solutions argue that the Plant Rental Agreement was repudiated by Greenleaf, which repudiation was accepted by Hydro Water Solutions resultant in the cancellation of the Plant Rental Agreement between the parties.

[29] The aforesaid is clear from the founding affidavit of the intervention application, where Mr Alvyn Naicker states as follows:

“53. In the face of all the various breaches by the Provisional Liquidators and their evident repudiation of the Putative Agreement, and now without the security of knowing that the Plant would be returned to it at the end of the term of the Putative Agreement, Hydro Water had no option but to terminate the Putative Agreement

as it was entitled to.”

[30] The application to intervene is brought on the basis that the Plant Rental Agreement is cancelled and as such of no more effect. However, the cancellation of the Plant Rental Agreement is in dispute and Greenleaf argues that the Plant Rental Agreement is intact and the attempts of cancellation are unlawful.

[31] Adv Lotter argued on behalf of the intervening party *verbatim* that “*Prima facie, the cancellation of the agreement is valid. If it is accepted that the cancellation is valid, then the provisional liquidators has no right to access the plant.*” I agree with the submission that the provisional liquidators would not have any right to access the plant, in the event that the cancellation is valid. The *proviso* however, is the validity of the cancellation of the Plant Rental Agreement.

[32] This is the urgent court and a robust approach is called for. The alleged and disputed breach, repudiation, and cancellation of the Plant Rental Agreement is not for this Court to determine. This Court is to determine the spoliation

application, the application to intervene and if intervention is successful, the counter-application.

[33] The only ground on which Hydro Water Solutions requests intervention, is on the basis that the Plant Rental Agreement is cancelled and as such not enforceable. In fact, this is the very relief sought by Hydro Water Solutions in the action issued under case number 2821/2024 in this Court. The following relief is claimed in the mentioned action:

“WHEREFORE the Plaintiff (Hydro Water Solutions) prays for judgment against the Defendant as follows:

1. *(That) the Agreement concluded between the Plaintiff (Hydro Water Solutions) and the Third Defendant (Greenleaf) on 1 February 2023 be and is hereby declared void ab initio.*
2. *Alternatively to prayer 1, it is confirmed that the Agreement concluded between the Plaintiff (Hydro Water Solutions) and the Third Defendant (Greenleaf) on 1 February 2023 was cancelled with effect (from) 4 June 2024.”*

[34] The dispute around the validity of the cancelation of the Plant

Rental Agreement is yet to be determined. Hydro Water Solutions is very much alive to the fact, which is evident from the prayers sought in the action as quoted above.

[35] On the basis that the urgent court is not to determine the validity of the Plant Rental Agreement, and that Hydro Water Solutions only has an interest in the application before this Court on the basis that it is accepted that the Plant Rental Agreement is cancelled, the application of Hydro Water Solutions to intervene in the spoliation application stands to be dismissed.

The counter-claim of Hydro Water Solutions

[36] The counter-claim is, similarly, sought on the basis that the cancellation of the contract should be accepted as a *prima facie* valid cancellation.

[37] In the counter-claim the court is also requested to issue an interim interdict pending the outcome and finalisation of the action instituted under case number 2821/2024 in this Court, which is to adjudicate on the validity of the cancellation of the contract.

[38] Save to advance that the interest of Hydro Water Solution in the spoliation application is founded in the cancelation of the Plant Rental Agreement, no grounds for urgency has been set out why the counter-application should be dealt with on an urgent basis.

[39] Having regard to my finding that Hydro Water Solutions is not to be joined as an intervening party, the counter application is not before this Court.

The spoliation application

[40] The spoliation application is not opposed by the 1st and 2nd respondents.

[41] It is common cause that the applicants had peaceful and undisturbed access to the Blue Plant.

[42] It is furthermore common cause that the respondents have acted, allegedly on instruction of Naicker, to prevent the applicants access to the property and further dismantling and removal of the Blue Plant.

[43] Although the above is sufficient to justify an order of spoliation, this Court would be amiss in not referring to the relevant legal principles.

[44] I can do no better than to borrow the words of Djaje DJP in a full bench appeal in the matter of **K2017427913 South Africa (Pty) (Ltd) v Gideon Jacobus du Plessis** under case no CIV APP FB 24/2022 UM223/2021 as handed down on 03 August 2023:

The Law and Analysis

[19] *The law on spoliation is trite. In Nino Bonino v De Lange, 1906 TS 120 at 122, Innes CJ explained the nature of spoliation: “[S]poliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right.”*

*The remedy is a possessory suit based on the maxim *spoliatus ante omnia restituendus est*. In its simplest form, this means that possession must be restored to the dispossessed. See: **Hano Trading CC v JR 209 Investments (Pty) Ltd 2013 (1) SA 161 (SCA)**; **James Brown & Hammer (Pty) (Previously named Gilbert Hamer & Co Ltd) Ltd v Simmons, NO 1963 (4) (SA) 656 at 660E-G.***

[20] *Although a number of different possessory remedies existed in Roman-Dutch law (the mandament van complainte (which had its origin in Anglo-Norman law), the mandament van maintainue (which had its origin in medieval Italian law) and the mandament van spolie (which had its origin in canon law), only one of these 13 has been received into modern South African law, namely the mandament van spolie. (See: **Kleyn "Possession"** in Zimmermann and Visser *Southern Cross: Civil Law and Common Law in South Africa* 1996 at 820).*

[21] *Spoliatory relief is predominantly founded on application, although it is not unusual that a litigant may favour action proceedings. Fleshing out the intricacies, of spoliatory relief, it is incumbent on an applicant to simply prove that he or she was in possession of the thing and that he or she was unlawfully dispossessed or despoiled. (See: **Nino Bonino v De Lange** 1906 TS 120, **Yeko v Qana** 1973 4 SA 735 (A) 739).*

[22] *In the **Law of South Africa (LAWSA)** Vol 27 par 94 it is stated that the spoliation order or mandament van spolie is available where:*

- "(a) a person has been deprived unlawfully of the whole or part of his or her possession of movables or immovable;
- (b) a joint possessor has been deprived unlawfully of his or her co possession by his or her partner taking over exclusive control of the thing held in joint possession;
- (c) a person has been deprived unlawfully of his or her quasi-possession of a servituted right;
- (d) a person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights.

In case (c) and (d) the courts have warned that the application of the spoliation principles to incorporeal rights require closer investigation and subtler treatment and that one must distinguish carefully between rights incidental to the quasi-possession of the right and a mere right to claim specific performance of a contractual or statutory obligation. Illicit deprivation of possession in any of the ways mentioned above is termed spoliation."

[23] *In Ivanov v North West Gambling and Others* 2012 (6) SA 67 (SCA) it was held that: "Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant - that is why a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute."

[45] The facts common cause in this urgent application before this Court, underline that the legal requirements of spoliation has been met. The applicants were in peaceful and undisturbed possession of the property (which property includes the disassembling and removal of the Blue Plant) and were deprived of such possession.

[46] In addition, it has recently been found by this Division in **Limcroma Properties (Pty) Ltd v Jonker** (2236/2024) dated 14 May 2024 that spoliation applications are urgent in circumstances where the applicant takes mitigation steps timeously and where the spoliation cannot wait for the determination of another dispute. As such, this urgent application has to be determined now and cannot be determined after the dispute in relation to the validity of the cancellation of the Rental Plant Agreement has been finalised.

[47] The application therefore stands to be successful.

Costs

[48] The normal principle is that the successful party is entitled to be reimbursed by the unsuccessful party for its cost.

[49] The 1st and 2nd respondents did not oppose the application and filed a notice to abide by the Court's decision. As such, the 1st and 2nd respondents are exempt from an adverse cost order.

[50] On the basis that the Hydro Water Solutions sought to intervene in these proceedings, which intervention application is to be dismissed, it would be just and fair that Hydro Water Solutions be ordered to pay the costs of the application, including the costs of the intervention-application and the counter-application.

[51] Both parties instructed senior counsel with together with junior counsel. Having regard to the intricacy of the facts and the legal arguments, I hold the view that the appointment of two (2) counsel is warranted.

[52] As such, Hydro Water Solutions is ordered to pay the costs of the applicants, which costs include the cost of the employment of two (2) counsel.

Order

In the premise, the following order is granted:

- i) The application is heard as an urgent application and condonation is granted to the applicants in terms of Rule

6(12) of the Uniform Rules of the Court in respect of the non-compliance with the prescribed time limits and forms.

- ii) The respondents are ordered to immediately restore the applicant's peaceful and undisturbed possession and occupation of and access to the property (site) by removing any guard or obstacle preventing access or exit to and from the property known as:

Remaining Extent of Portion 30

(a Portion of Portion 10) of the Farm

Hartebeesfontein 422, Stilfontein

North West Province

(herein after referred to "the property")

- iii) The respondents are interdicted and restrained from frustrating or preventing the applicants and/or their duly authorised nominees and/or representatives to exercise access to the property and/or conduct the affairs of Greenleaf Rehabilitation (Pty) (in provisional liquidation) without interference, disturbance or threat to impose on intrude into the property or affairs of the applicants.

- iv) The application for intervention to the proceedings by Hydro Water Solutions is dismissed.

- v) The applicant in the application for intervention, Hydro Water Solutions (Pty) Ltd (Registration number 2014/184877/07) is ordered to pay the costs of the applicants, which costs is to include two (2) counsel, on a party and party basis.

**FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG**

DATE OF ARGUMENT: 14 JUNE 2024
DATE OF JUDGMENT: 27 JUNE 2024

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