THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 66/2007

In the matter between
JOHN CECIL WIGHTMAN

trading as J W CONSTRUCTION

APPELLANT

and

HEADFOUR (PTY) LTD **FIRST RESPONDENT**
ARCHAR HEAD **SECOND RESPONDENT**

Coram: **MPATI DP, CAMERON, HEHER, PONNAN JJA and MHLANTLA AJA**
Heard: **27 FEBRUARY 2008**
Delivered: **10 MARCH 2008**

Summary: **Practice – application – dispute of fact – real, genuine or *bona fide* – what constitutes. Possession – spoliation – builder making duplicate keys available to owner for limited purpose – whether possession *ipso facto* lost – owner using keys to place other contractors in occupation – possession taken against consent of builder and illicitly.**

Neutral citation: This judgment may be referred to as Wightman v Headfour (Pty) Ltd (66/2007) [2008] ZASCA 6 (10 March 2008)

JUDGMENT

HEHER JA

HEHER JA:

[1] The appellant is a building contractor. In March 2004 he entered into an agreement with the first respondent to carry out construction work on an erf in Hout Bay owned by the first respondent. At all material times then and thereafter the company was represented by its sole director and shareholder, Mr Archar Head, the second respondent.

[2] During July 2004, before completion of the contract, the parties fell out over payment or defective workmanship, depending on which one you believe. On or shortly before 12 July the respondent took possession of the property and put in other contractors to complete the work.

[3] The appellant consulted an attorney who wrote two letters to the respondents' attorney on 13 July. In the first, payment of outstanding payments was claimed and the second relied on an agreement allegedly concluded between the attorneys to the effect that the appellant possessed and would retain a lien over the property notwithstanding his agreement to the continuation of the work by the contractors whom the second respondent had employed.

[4] Early in August the first respondent issued summons against the appellant.

It claimed payment of R463 669,00 as the alleged cost of remedying his defective performance and some R220 000 as special damages for loss of rental income, occupational rental and moving and storage costs.

[5] The appellant thereafter became aware that the second respondent and his family had taken occupation of the completed works. He regarded that as a breach of the agreement which acknowledged his lien and as a spoliation. On 17 August 2004 he launched an application in the Cape High Court seeking an order for restitution *ante omnia* and ejectment of the respondents and their invitees, together with a temporary interdict to prevent the respondents from reoccupying the premises pending final determination of a counterclaim to be instituted against the first respondent and costs on the attorney and client scale. The appellant alleged that the first respondent still owed him over R350 000,00 for work done under the contract.

[6] I have not attempted to do more than provide a terse summary of the case. The facts are fully set out in the judgments in the court *a quo* which is reported at 2007 (2) SA 128 (C).

[7] The application was heard by Waglay J. He dismissed it with costs in March 2005, but granted leave to appeal to the Full Bench. In September 2006 Thring J (Blignault J concurring) dismissed the appeal with costs. Bozalek J dissented. He would have granted the relief claimed save for the interdict against occupation of the premises. The present appeal is with the special leave of this Court.

[8] Although the appellant, in his founding affidavit, relied on the occupation by the second respondent and his family in August as the act of spoliation, it is apparent that he did so because of a fundamental misconception induced by the legal advice that he received. This was to the effect that he continued to retain

possession in August by reason of the agreement reached between the attorneys on 13 July. In fact it is clear, as the respondents emphasised in their answering affidavit, that the appellant had lost possession by 12 July and never thereafter regained it. The founding affidavit contained averments covering all material events from 3 July onward. The respondents did not seek to avoid meeting them because of alleged irrelevance or immateriality. Despite counsel's submissions to the contrary, the appellant's misdirection should not be allowed to deflect us from the real issue in dispute: Did the respondents unlawfully despoil the appellant?

[9] Much of the argument was directed to the meaning of the agreement reached between the attorneys on 13 July. In the view I take of the matter it is unnecessary to decide whether they agreed that the appellant possessed an enforcible lien (as appellant's counsel submitted) or merely that if the appellant possessed a lien at all he would not be deemed to have waived it by agreeing to allow the contractors to proceed (as was contended on behalf of the respondents). There is no dispute that the appellant had lost (whether by voluntary abandonment or spoliation) physical control over the property before that agreement was concluded. No agreement between the attorneys could of itself revest such control. At best for the appellant it purported to confirm a state of possession which did not exist. The lien referred to in their correspondence also no longer existed and could not exist absent possession. Nor was the effect of the agreement, even on the appellant's interpretation, such as to restore possession to him. If therefore the appeal were to turn on this aspect of the case it would go the way of the respondents.

[10] That does not conclude the matter. The events which preceded the agreement between the attorneys require careful consideration. If the proven facts establish that the appellant was unlawfully despoiled of his possession before that agreement was reached, then their consensus, on whatever basis, could only have

deprived the appellant of a remedy if its effect was to restore possession (which it did not) or because the appellant thereby waived or abandoned his rights to be restored to possession. It is not helpful to describe the agreement as a 'substitute' for whatever rights had accrued to the parties before its conclusion (as the respondents' counsel did). Apart from the fact that it is very doubtful that such was the attorneys' intention, unless the legal effect was that of a waiver or abandonment there was no negation of these rights. But the respondents did not rely on a waiver nor do the undisputed facts support such a case. In fact, the appellant has at all material times believed, and, apparently, been advised, that their agreement entitled him to contend for and rely upon uninterrupted physical possession of the premises. In his eyes, accordingly, he intended to give up no rights whatsoever.

[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or *bona fide*. For the reasons which follow I respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.

[14] In paragraph 12 of his founding affidavit the applicant deposed as follows:

'12.1 Throughout the currency of the agreement First Respondent made irregular payments to myself, thereby repeatedly breaching the terms of the agreement relating to payment. Matters came to a head on Wednesday 7 July 2004, during a telephone conversation with Second Respondent (representing First Respondent) in which I confronted him about the erratic payments. Second Respondent repudiated the agreement by stating that no further payments would be made to myself.

12.2 On Friday 9 July 2004 I had another telephone conversation with Second Respondent (representing First Respondent), in which we agreed that I would continue with my work at the premises with effect from Monday 12 July 2004. When I arrived at the security gate of the complex where the premises are located at 7:25 on 12 July 2004, I was refused entry by the security guard, apparently on the orders of Second Respondent. I phoned Second Respondent, who requested a meeting at my house in Bergvliet at 9:00 on the same day. When Second Respondent failed to keep the appointment, I phoned him again and he refused to discuss the matter with me, stating that he was going to see his attorney. I thereupon contacted my attorney, Mr Fotis Kyriacos of F Kyriacos & Company in Kenilworth, for advice.'

[15] The second respondent dealt with these allegations as follows:

'9.1 As is apparent from the particulars of claim, in consequence of Applicant's breaches of the agreement, on or about 3 July 2004, I on behalf of First Respondent and as I was entitled to do, I duly cancelled the agreement, **alternatively** on 3 July 2004 Applicant unlawfully repudiated his obligations to First Respondent arising from the agreement by refusing to complete same and abandoning the project site. Insofar as was necessary, I accepted on behalf of First Respondent Applicant's repudiation as aforesaid and duly cancelled the agreement in consequence whereof First Respondent was obliged to employ alternative contractors to remedy Applicant's defective performance and to complete the project in consequence whereof Applicant is indebted to First Respondent in the capital sum of **R682 276.21**.

9.2 Save for the aforegoing, this paragraph is denied..

[16] The comparison between the two approaches is striking. Whereas the appellant sets out chapter and verse the second respondent deals in generalisations. Each material averment should have been met and answered appropriately not

enveloped in a fog which hides or distorts the reality. Importantly, in so far as the second respondent claims that the appellant abandoned the project site, there is an ambiguity as to whether this occurred on 3 July or subsequently. In paragraph 14.2 of the answering affidavit the second respondent deposed 'that applicant voluntarily gave up his lien over the property on or about 12 July 2004'. In paragraph 15.1.1 he said 'As a matter of fact Applicant has not been in possession of the premises since 12 July 2004'. The particulars of the alleged cancellation are unjustifiably scanty, a matter of greater concern when one refers to a letter written by his attorney, Mr Hunter, on 13 July in which Hunter states that, in accordance with his instructions, 'the said contract between our clients herewith being formally cancelled'. The attorney does not refer to any earlier cancellation 'informal' or otherwise.

[17] In paragraph 28 of the founding affidavit the appellant laid the basis of his alleged possession of the premises. He deposed:

'28. I have been in undisturbed possession of the premises since I started my work in terms of the agreement on 3 March 2004. I state this for the following reasons:

28.1 Both dwellings on the premises were unoccupied, and in fact uninhabitable, when I started my work and remained so until occupation was taken by Second Respondent and other persons during the long weekend of 6 to 9 August 2004;

28.2 I am in possession of a full set of keys to the dwellings on the premises, which keys I received on 3 March 2004 and used in the course of my work on the premises in order to lock the dwellings after a day's work and to unlock it at the beginning of the next;

28.3 Although I delivered duplicates of some of the keys to Second Respondent on 9 July 2004, I retained the main set of keys in my possession and refused to hand it to First or Second Respondent at all times when requested to do so;

28.4 The duplicates were delivered purely to allow Second Respondent to inspect the premises, as was confirmed by Mr Kyriacos in his letters dated 13 July 2004 and 6 August 2004(Annexures "JCW6" and "JCW11" respectively). At no time did I intend to give up my possession of the premises when I did so and in fact, I

would most certainly not have handed over the duplicates if I had any suspicion that it would be used to gain entry to the premises for its occupation;

28.5 When I left the premises after I stopped work on 7 July 2004 following the repudiation of the agreement, I posted a guard onsite with instructions not only to protect the site, but also to prevent any occupation of the premises and to notify me immediately in the event of any attempt being made to gain such occupation. I removed the guard on 9 July 2004, the same day that I agreed with Second Respondent that I would resume work on 12 July 2004;

28.6 On 12 July 2004, after my last conversation with Second Respondent, I attended at the premises in order to affix notices on the dwelling confirming the existence of my builder's lien and my intention to exercise it. I attach hereto a copy of the notices that I intended to affix as Annexure **"JCW15"**, as well as a copy of a letter by Mr Kyriacos that I used to gain entry to the premises, as Annexure **"JCW16"**. When I arrived at the premises, Second Respondent was there and a verbal confrontation between us ensued. I was prevented from affixing the notices as I intended and after discussions between our respective attorneys, it was agreed (as is evident from Mr Kyriacos' letter dated 13 July 2004 – Annexure **"JCW6"**) that the notices would not be affixed and that my omission to do so would not constitute a waiver of my right to exercise my builder's lien. Had I suspected that First Respondent did not intend to honour the agreement, I would have insisted that the notices were affixed and remained in place;

28.7 I kept my building tools on the premises at all relevant times until I collected it on 13 July 2004, after the agreement relating to the building lien was reached between Mr Hunter and Mr Kyriacos.

28.8 Although I allowed certain subcontractors access to the premises in order to allow them to finish their work, I never intended to give up my control over, and resultant possession of, the premises. It is so that I was not physically present at all times after the agreement was reached with Mr Hunter on 12 July 2004, but apart from the fact that such continuous physical presence was impractical, I had reason to believe that the agreement would sufficiently protect my rights in terms of my lien and that my intention to retain possession of the premises was sufficiently manifested to Respondents (and any third parties) by my retention of the main set of keys to the dwellings and the terms of the agreement itself. I reiterate that I would have done everything necessary to retain my possession (including prevention of access to the premises by subcontractors and changing the locks to the dwellings) if I had the slightest suspicion that Respondents

intended disregarding the terms of the agreement.'

In paragraph 29 the appellant turned from allegations of fact to brief submissions based on the preceding paragraph.

[18] The second respondent addressed paragraphs 28 and 29 in paragraph 15 of the answering affidavit. He was long in submission but exceedingly short on fact:

'15.1 **Ad paragraphs 28 and 29 thereof:**

15.1 It is apparent from these paragraphs that:

15.1.1 As a matter of fact Applicant has not been in possession of the premises since 12 July 2004. From 12 July 2004 my family and I are in physical control of the premises and certain other building contractors have had access to the premises.

15.1.2 Since 12 July 2004 Applicant, on his own version, has not been in possession of the premises.

15.1.3 Both Applicant and his legal representatives are under an incorrect and legally flawed impression with regard to Applicant's alleged lien which, as I have been advised and verily believe, does not constitute a builder's lien in the terms alleged by Applicant or at all.

15.2 Save for the aforegoing, the further allegations contained in these paragraphs are denied.'

[19] The second respondent's general denial leaves important matters unanswered. The failure to deal issuably with the factual averments is unjustifiable on any rational basis. The condition of the dwellings, the appellant's means of access and exercising control over the works are all matters which would either have been discussed between the parties or become apparent to the second respondent during the execution of the contract. His bare denial of these aspects is seriously unconvincing. As to the allegations in paragraphs 28.3 and 28.4 of the founding affidavit, there is no dispute that the respondents did gain access to the premises on 12 July (if not during the weekend immediately preceding that day). The second respondent, within whose knowledge the truth lies, fails to explain

how and in what circumstances that took place if not by means of duplicate keys provided by the appellant for the limited purpose of inspecting the premises. Reference to the correspondence between the attorneys further emphasises the wholly unsatisfactory nature of the denial of the allegations. On 13 July Kyriacos wrote to Hunter recording inter alia that the appellant had called at the property on the previous day for the purpose of affixing notices to the dwelling stating that he intended exercising his builder's lien and found the premises occupied by other contractors. Kyriacos informed Hunter that the appellant had 'given certain of the keys to the dwelling to [the second respondent] for inspection purposes only'. When Hunter replied on 16 July, although he made it clear that he did so on the instructions of his client, he did not place any of the factual allegations in dispute. When Kyriacos referred again to the handing over of the keys in a letter of 6 August, Hunter replied, in a letter dated 16 August:

'The fact that your client handed over various keys and allowed certain subcontractors to continue working, is unfortunately of your client's own doing and must be interpreted appropriately, should this be necessary, in the appropriate forum and at the appropriate time.'

From the totality of the reaction from the respondent's side to the matter of the keys, the inescapable inference is that the 'dispute' inherent in the general denial was without substance.

[20] As to the allegations in paragraphs 28.5 and 28.6 of the founding affidavit, the respondents set up no factual basis for denying that the appellant posted a guard on the premises from 7 to 9 July (for example, that the second respondent had gone to the premises and found no such person), nor is there any reason offered for placing in issue the appellant's statement that he attended at the premises on 12 July with the intention of putting up notices – something not denied in the correspondence – and was prevented from doing so: that was after all why he consulted his attorney. The general denial also ostensibly negates those averments in paragraph 28.6 relating to the agreement between the attorneys. But

that is a matter amply borne out by the correspondence which it is inconceivable that the second respondent genuinely intended to place in dispute.

[21] As to the averment in paragraph 28.7 relating to the building tools the second respondent's general denial is unsubstantiated by any fact which suggests a genuine basis for the denial.

[22] It seems clear that the respondents adopted or were advised to adopt an attitude to paragraphs 15 and 28 of the founding affidavit (which is manifest throughout their answering affidavit) of placing an obstacle in the path of the appellant at every step of the way irrespective of whether there were valid reasons for doing so. Whatever the tactical value of that approach, the effect was to water the force of the general denial down to a state of insipidity into which reality, bona fides and the genuineness of the denial all disappear. In the circumstances there is no good reason to regard as untrue the appellant's averment that upon his arrival at the premises on the morning of 12 July he was refused entry by the security guard, apparently on the orders of the second respondent.

[23] The conclusion is thus that the court *a quo* should have approached the application upon the foundation that the respondents had failed to raise real, genuine and bona fide disputes of fact in relation to the events from 3 to 12 July and that the case had to be decided upon the assumption that the appellant's account of these events was substantially true and correct.

[24] In order to succeed in the application the appellant had to establish that he was in peaceful and undisturbed possession of the property and that he was unlawfully deprived of that possession.

[25] To summarise, the evidence which is either undisputed or not the subject of

a real, genuine or bona fide challenge is the following:

1. The appellant held the original set of keys to the premises until at least 13 July.

2. He kept his tools of trade on the premises until that date.

3. He placed a guard on the premises to prevent entry by other persons from 7 to 9 July.

4. The appellant and the second respondent reached an understanding on 9 July which satisfied the appellant he would continue in possession of the premises with the agreement of the second respondent.

5. The appellant handed a duplicate set of keys to the second respondent to enable him to inspect the premises.

6. He removed the guard on the strength of his consensus with the second respondent.

7. On his arrival on Monday 12 July he found contractors working on the premises who had not been granted access by him.

8. He was refused access to the complex in which the premises is situated by a security guard who apparently acted on the instructions of the second respondent.

[26] The law relating to the rights of a builder who has not completed a building which he is employed to erect is stated in *Scholtz v Faifer* 1910 TPD 243 at 247-8. The appellant had carried the work so far by 9 July that possession of the keys was equivalent to possession of the building and a temporary absence would not be taken as abandonment.

[27] Counsel for the respondents contended that the appellant lost possession of the premises *ipso facto* by delivery of the duplicate keys to the second respondent on 9 July. I disagree. The fundamentals of spoliation are well-established. Violence or fraud is not an essential element of dispossession provided the act is done against the consent of the person despoiled and illicitly: *Nino Bonino v De*

Lange 1906 TS 120 at 122. By 'illicitly' I understand 'in a manner which the law will not countenance': cf *R v M* 1949 (4) 975 (N) at 977. For this reason the mere fact of making duplicate keys available to another (who happens to be the owner of the premises) does not always equate to the giving up of physical possession. Both the giving and receiving must be considered in context to answer the question. To the extent that Gardiner JP may have found otherwise in *Shaw v Hendry* 1927 CPD 358 at 359 I think he was wrong.

[28] The appellant retained the main set and delivered the duplicates for a limited purpose which was not broad enough to justify the second respondent in taking a more extensive physical control nor did it warrant a belief on his part that the appellant intended to abandon any of the control which he had hitherto exercised exclusively. The appellant only delivered the duplicates because he had come to an accord with the second respondent. The second appellant ostensibly received them on the same basis.

[29] Physical possession of the premises was only lost when the second respondent used the duplicate set to obtain entry and, in doing so, manifested a state of mind to possess the premises in despite of the terms of the understanding. That probably did not occur until the morning of 12 July when the second respondent gave access to his own contractors and caused entry to be refused to the appellant. There is no doubt that his true intention was deceitfully withheld from the appellant (whether at the initial receipt of the keys or later) in order to gain control of the premises and that he took occupation without the appellant's knowledge. This conduct was not such as the law will countenance.

[30] In these circumstances the spoliation was complete when the appellant arrived at the premises on 12 July. That he was refused entry merely confirmed the accomplished fact. Since, as I earlier pointed out, possession was never thereafter

restored to him, but, on the contrary, the respondents merely strengthened their unlawfully obtained grip on the property by the occupation taken by the second respondent's family, it becomes clear, in my view, that the appellant should have succeeded in his application for a spoliation order at first instance. Counsel on appeal did not seek to persuade us that the interdict relief was wrongly refused and nothing more need be said in that regard.

[31] The appellant's object, in bringing the application, was to re-establish the builder's lien which his possession of the premises secured to him before the spoliation. As the holder of a lien the appellant's right of possession is not absolute; the owner can recover possession by putting up satisfactory security. See, for example, *Avfin Industrial Finance (Pty) Ltd v Interjet Maintenance (Pty) Ltd* 1997 (1) SA 807 (T) at 814D-J. But, by the time this judgment is delivered, the second respondent and his family will, one assumes, have enjoyed occupation for more than three and a half years. Rather than expose them to the unnecessary disruption of an eviction, the second respondent should be offered the opportunity to provide such security before the eviction order takes effect.

[32] In the result:

1. The appeal is upheld.

2. The order made by the court *a quo* is set aside and replaced by an order in the following terms:

'1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and replaced by an order in the following terms:

"2.1 Failing provision of security to the satisfaction of the appellant or, in the event of dispute, the Registrar of the Cape High Court for the amount of the applicant's counterclaim in case no 6365/2004 (CPD) within one week of the making of this order,

the respondents are forthwith ordered to restore possession of the buildings on Erf 8871, Hout Bay situate at 20 Eagle Avenue, Kenrock Estate, Valley Road, Hout Bay, Western Cape ("the premises") to the applicant.

2.2 The Sheriff or his deputy is authorised and directed to eject the second respondent and any person occupying the premises through him from the premises, in the event of possession not being so restored.

2.3 The respondents are ordered to pay the costs of the application jointly and severally the one paying the other to be absolved." '

3. The respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.

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J A HEHER
JUDGE OF APPEAL

MPATI DP **)Concur**
CAMERON JA **)**
PONNAN JA **)**
MHLANTLA AJA **)**