IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 2506/2021

Date Heard: 11 November 2021

Date Delivered: 23 November 2021

In the matter between:

SA FENCE AND GATE JOINT VENTURE Applicant

and

THE TRUSTEES FOR THE TIME BEING OF THE INDEPENDENT DEVELOPMENT TRUST (669/91) First Respondent

B RAMGOOLAM & ASSOCIATES INC Second Respondent

RUWACON (PTY) LTD (Registration number: 2003/017933/07) Third Respondent

THE HONOURABLE RONALD LAMOLA
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES N.O Fourth Respondent

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JUDGMENT

EKSTEEN J:

[1] In this application the applicant, SA Fence and Gate Joint Venture (the applicant), sought an urgent order, by way of the *mandament van spolie* (the mandament) to be restored in peaceful and undisturbed possession of its campsites, buildings, containers and materials, plant and equipment at St Albans Prison Management Areas.

[2] The material background to the dispute, which arises from the performance of a tender, is as follows. The first respondent, the Independent Development Trust (IDT), has been described as a Schedule 2 Public Entity in terms of the Public Finance Management Act, 29 of 1999, and an organ of state. During 2012, operating as an implementing agent for the Department of Correctional Services, it advertised a tender (the tender) for construction and maintenance work at various correctional facilities in South Africa, including the St Albans Prison in Gqeberha. The tender was ultimately awarded and a contract concluded with a joint venture styled SA Fence and Gate, JV, which had been established between:

(i) SA Fence and Gate Investment Holdings (Pty) Limited (SA Fence and Gate) registration number 2004/031774/07;

(ii) Raubex Construction (Pty) Limited (Raubex);

(iii) Gordian Fence SA (Pty) Limited (Gordian); and

(iv) Mavundla Ironclad Systems (Pty) Limited (Mavundla).

[3] Construction and maintenance in terms of the tender duly commenced and continued until 2017 when a dispute arose between IDT and the contractor on site. The applicant said that it was the contractor on site. IDT denied its right to perform the contract

and contended that the applicant was not the successful tenderer and, accordingly, it ceased payments. In response, the applicants suspended the works and IDT, in turn, purported to cancel the contract. Litigation, which is currently still pending, followed.

[4] It was the applicant's case that it had all material times retained possession of the site and its equipment at St Albans and, despite requests, it refused to relinquish possession thereof in order to protect what it perceived to be its *lien*. It said that after an exchange of extensive correspondence, on 17 August 2021, IDT unilaterally appointed locksmiths "to change the locks to the containers on the campsites and thereafter commenced removing the materials situated thereon and relocating same without the applicant's consent".[1] I revert to this issue later.

[5] The present application is for a spoliation order. IDT is the only respondent to oppose the application. In doing so it did not join issue with the particular allegations of spoliation in respect of the containers. Rather, it raised various points *in limine* in its answering affidavit. It is not necessary for purposes of the present application to consider all the issues raised and I confine myself to those material to the adjudication of the application.

[6] In its first material argument IDT contended that the applicant "does not exist" and, accordingly, that it has no *locus standi* to bring the application. The attack, it seems to

[1] This allegation is not disputed.

me, is accordingly on the allegation that it is the applicant that was in peaceful and undisturbed possession. The argument proceeded on the following factual basis.

[7] The successful bidder, to whom the initial tender was awarded in 2012 had been a joint venture (i.e. a partnership) styled SA Fence and Gate JV, which was constituted as adumbrated earlier. During the tender evaluation process, IDT explained, SA Fence and Gate JV was scored on the basis and strength, including B-BBEE requirements, of all four of its constituent members, as it presented at the time.

[8] It appears to be common ground between the parties that Raubex resigned from the partnership on the same day that the tender was submitted, against payment being made to it by the remaining partners of R8 million. IDT contended that the payment was patently made in consideration for Raubex fraudulently lending its name to the purported joint venture specifically for purposes of the tender.

[9] Mavundla had also resigned from the partnership during 2012 and placed itself in voluntary liquidation on 16 April 2013. SA Fence and Gate was liquidated on 29 June 2016.

[10] The applicant also styled itself as SA Fence and Gate JV, and it contended that it was the same joint venture which secured the tender, but currently consisting of:

(i) SA Fence and Gate (Pty) Limited, registration number 2011/115011/07;[2]

(ii) Raubex; and

(iii) Gordian.

[11] In law, of course, a partnership is automatically dissolved when one of its members has resigned therefrom, or dies, or when a new partner is admitted. IDT accordingly contended that the new company, SA Fence and Gate (Pty) Limited, was masquerading as the joint venture to whom the tender had been awarded.

[12] Mr *Bekker*, who appeared on behalf IDT, argued, convincingly in my view, that the joint venture to whom the tender was initially awarded no longer exists and that its rights and obligations vis-a-vis IDT could not have passed to a new joint venture without further ado. I accept the argument for purposes of this judgment. However, it does not follow from this conclusion that there does not exist a partnership comprised as the applicant contends that it is. Whilst IDT may be correct that it does not derive any rights from the award of the tender, neither its existence, albeit as a separate entity without legal rights, nor its assertion that it was in fact carrying out the works described in the tender when the dispute arose in 2017, has been disputed on any factual basis.

[13] In spoliation proceedings it's the physical possession, not the right to possession which is protected. It suffices, for purposes of the mandament, if the possession was with the intention of securing some benefit, such as the protection of a *lien*. In the

[2] This is a different company to that described in para 2 above.

circumstances it seems to me that the dispute which exists relating to the applicant's entitlement to the contractual benefits under the tender is irrelevant for purposes of the mandament. The first point *in limine* can therefore not succeed.

[14] The second material issue raised, is more problematic. IDT contended that even if I did find that there had been a spoliation of some property, which, as I have said, has not been disputed, that the relief sought was incompetent. The relief claimed, so the argument went, was too vague and unspecific to be capable of enforcement, in the sense that the applicant could not proceed to execution of the order. It is necessary, for the assessment of this argument to revert to the relief sought. The applicant sought an order directing the respondents to:

> "1. Restore the Applicant's peaceful and undisturbed possession of the Applicant's campsites, buildings, containers and materials, plant and equipment at St. Albans Prison Management Areas; and
>
> 2. Return to the Applicant all the materials removed from the Applicant's campsites, buildings, containers and materials, plant and equipment at the St. Albans Management Areas."

[15] The applicant had initially contended that it had been in possession of "certain campsites[3], buildings, containers and materials, plant and equipment at the St Albans Prison". Later, it asserted that it had always maintained that it had "retained the

[3] At times described as "various sites contemplated in the tender". The tender did not form part of the papers.

possession of the site and a *lien* over materials and the works thereon, in particular the St Albans Prison."

[16] As I have said, before the employment of locksmiths to change the locks to certain containers, correspondence flowed between the parties. The applicant explained that it had sought various undertakings regarding, "in particular, that the applicant's possession of the St Albans Prison would not be disturbed and that the applicant's materials would not be tampered with". The founding affidavit concludes with the assertion that "the restoration of the applicant's possession of St Albans Prison is inherently urgent, …".

[17] There is no indication in the papers of the nature or location of the "campsites" (other than that they are at St Albans) or any description of the "buildings" which the applicant contends that it had possessed. The claim varies from time to time between "campsites", "the site" and "the St Albans Prison".

[18] The term "campsite", in its ordinary English meaning, generally refers to a place for camping.[4] The existence of such a facility on the premises of a large prison strikes me as being inherently improbable. Mr *Gajjar*, for the applicant, was constrained to acknowledge that something different was intended, but was unable to suggest what meaning was to be given to the term. As I have said, it is unclear whether a single site or multiple sites are in issue.

[4] The New Shorter Oxford English Dictionary (1993)

[19] The reference to "certain buildings" is equally obscure. St Albans Prison is a large correctional facility which has at all material times been in full operation. The suggestion that the applicant may have been in possession of the entire prison need only to be stated to be rejected. Indeed, Mr *Gajjar* disavowed the suggestion, as he had to do. Once this concession was made it became impossible to identify any building to which the applicant laid claim.

[20] There is no description or identification of the alleged containers nor of the number or position of containers which were subjected to the change of locks. Neither the containers nor the campsites on which they were allegedly situated are identifiable. The founding affidavit did not attempt to describe the materials, plant or equipment to which reference is made. For these reasons IDT contended that the granting of the relief sought was likely to give rise to numerous disputes between the parties regarding which properties and items had been removed or were to be returned. It pointed out that no inventory or description or quantification was provided.

[21] I consider that there is merit in the argument. In *Mansell*[5] Broome JP explained:

> "It is surely an elementary principle that every Court should refrain from making orders which cannot be enforced. If the plaintiff asks the Court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears to me to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation."

[5] *Mansell v Mansell* 1953 (3) SA 716 (N) at 721E-F

[22] These remarks are appropriate in the present context. A sheriff would be unable to establish from the order any items or property which he is supposed to seize from the IDT in order to return to the applicant and he would be unable to execute or to give effect to the order. Reference to the papers in the application could provide no assistance. I think that the IDT is correct that an order granted in the terms sought would simply be a recipe for further litigation. When the matter was argued before me I invited Mr *Gajjar* to propose a formulation of the order which found support in the founding papers to overcome this difficulty. He was unable to do so. In the result, the application cannot succeed.

[23] The application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv G Gajjar instructed by Biccari Bollo Mariano Inc c/o Kaplan Blumberg Attorneys, Gqeberha

For 1st Respondent: Adv S Bekker SC instructed by Weavind and Weavind Inc c/o Annali Erasmus Inc, Gqeberha