

SUMMARY OF THE JUDGMENT

BUILDER'S LIEN TRIUMPHS, OWNER NOT TO TAKE LAW INTO OWN HANDS

Top Assist 24 (Pty) Limited T/A Form Work Construction v Cremer and Another (5335/2015) [2015] ZAWCHC 102 (28 July 2015)

The fundamental purpose of the mandament van spolie remedy is to serve as a tool for promoting the rule of law and as a disincentive against self-help. What happens though if the owner cancelled the building agreement before allegedly asking the estate security to arrange for the builders to vacate the premises with all their goods and tools? Are the rights of the parties before the spoliation took place relevant in such an application? The Judgment can be viewed [here](#).

FACTS

In June 2014, Top Assist 24 (Pty) Ltd t/a Form Work Construction (Top Assist) and Cremer concluded a building agreement in terms of which Top Assist would build a new house for Cremer.

Possession of the premises was given to Top Assist just after conclusion of the agreement and the intended date of practical completion was 31 March 2015.

In February 2015, the relationship between Cremer and Top Assist soured as Cremer was of the opinion that the building work deteriorated and did not meet the expected standards. According to Cremer, the construction of the building work was executed in a satisfactory manner during the initial period, but as from October 2014, the position changed. In addition, some sub-contractors also started complaining that they were not receiving full payment for their work and Cremer assumed that Top Assist was going through financial difficulties.

A meeting was held on a without prejudice basis and certain undertakings were made. Top Assist however did not honour these and in March 2015, Cremer sent a letter to Top Assist calling upon it to remedy the breach.

Top Assist denied that it was in any breach. Various correspondence was subsequently exchanged, until on 16 March 2015 when Cremer cancelled the agreement. A day later, Top Assist responded stating that the purported cancellation of the agreement was unfounded and not accepted. Top Assist indicated in this letter that it was in possession of the premises and would continue to exercise its builder's lien at all times.

The next day a further letter was sent by Top Assist complaining that Cremer, without Top

Assist's knowledge and consent, took possession of the keys to the premises and that this constituted an unlawful disturbance of Top Assist's peaceful and undisturbed possession of the site. The conduct, so Top Assist alleged, was a violation of its builder's lien.

On the same date, Cremer dispatched a letter to Top Assist denying that he took possession of the keys to the premises without Top Assist's knowledge and consent. The letter went on to state that Cremer always had keys to the premises with the full knowledge and consent of Top Assist; that certain additional keys have at all relevant times been in the control of an employee of Top Assist; that since the notice of cancellation, Top Assist had started vacating the site indicating its acceptance of the cancellation. In light hereof, Cremer requested an employee (who was aware of the relevant facts) to hand over certain additional keys, which he did.

However, what exactly happened on this day was disputed. Top Assist alleged that during the afternoon of 19 March 2015, Cremer arrived on the premises and proceeded to forcefully and unlawfully remove Top Assist's building equipment and material, which was stored in the garage on the premises and instructed Top Assist's workers to discontinue with their work and to take their equipment and material with them. On the instructions of Cremer, the security staff of the Estate on which the premises are located arrived at the premises and ordered Top Assist's workers to leave the premises. Top Assist further alleged that its equipment which was used for the building work was locked in the garage located on the premises until 19 March 2015, when Cremer forcefully removed the equipment.

Cremer denied Top Assist's version of the events of 19 March. He testified that he had the key to the garage and removed a few rolls of insulation material and some equipment and placed it outside in front of the property. He informed Top Assist's employee that because of the cancellation of the contract he wanted them to vacate the property. He also asked them to load the equipment and materials, which they did freely. He advised further that upon cancellation of the building contract he gave the Home Owners Association (HOA) of the Estate a copy of the letter he had previously addressed to Top Assist, which confirmed cancellation of the agreement. He denied instructing the security staff to ask the builders to leave.

Top Assist approached the court for an order restoring its peaceful and undisturbed possession of the building site:

HELD:

Legal Principles

- The *mandament van spolie* is directed at restoring possession to a party which has been unlawfully dispossessed thereof, irrespective of the merits of any underlying contest. 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. In a spoliation application the court does not concern itself with the rights of the parties before the spoliation took place. It merely enquires whether there has been spoliation or not, and if there has been, it restores the *status quo*.
- In order to obtain a spoliation order, Top Assist had to prove that it was in possession of the property and that Cremer deprived it of the possession forcibly or wrongfully against its consent.
- Therefore, the allegations that Top Assist was in default and in breach of the building contract, that Cremer was entitled to cancel the contract and did so, and that Cremer rightfully could demand that Top Assist vacate the site, do not serve as a defence to the claim for a spoliation order.

Was there spoliation?

- Applying the law to the facts of the present matter, the court concluded that Top Assist had in fact been in possession of the premises on 19 March 2015.
- The presence of the workforce on the premises working on 19 March 2015 showed that Top Assist was in possession at the time. The extent of the work that was being carried out and the number of workers on site was irrelevant for the purposes of determining whether Top Assist was indeed in possession of the site. Cremer admitted that workers of Top Assist were on the premises on 19 March 2015 and had equipment there and he informed them that by reason of the cancellation of the contract he wanted them to vacate the property. He also asked them to load the equipment and materials.
- It was irrelevant in this context that Cremer obtained some of the keys to the premises before the 19th from some workmen on the premises. Top Assist still held certain keys and clearly was in possession of the premises. In fact the parties had joint possession, as Cremer too had keys. This however did not disentitle Top Assist to claim the remedy it was seeking.
- It was also not appropriate to argue, as Cremer did, that the personnel of Top Assist left the premises voluntarily, as the employee who was instructed to leave on that day, was not authorised to consent to vacating the premises on behalf of Top Assist. In fact, the evidence showed, on the probabilities, that the workmen were ordered to

leave by the security of the HOA in the estate, probably on the instruction of Cremer (although he denied this).

- As such the conclusion was that Cremer took the law into his own hands by seeking to enforce what he considered to be his right which was to dispossess Top Assist of the premises pursuant to his cancellation of the contract.

Cremer was accordingly directed to forthwith restore peaceful and undisturbed possession of the immovable property to Top Assist.

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