

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5973/2022

In the matter between:

TIRELO MARUPING

Applicant

And

PRECIOUS DINEO MATLALA

Respondent

JUDGMENT BY: C REINDERS, J

HEARD ON: 23 MARCH 2023

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15H40 on 21 April 2023.

- [1] A blue Hyundai Getz motor vehicle ("the vehicle") forms the subject matter of this application which is based on the mandament van spolie.
- [2] In her amended notice of motion the applicant prays for declaratory relief that the averred dispossession of the vehicle be found unlawful, and further orders directing, amongst others, the respondent (or any other person) from interfering with her possession of the vehicle, restoration of her undisturbed possession of the vehicle and her full and unimpeded access to the vehicle.

- [3] The respondent opposed the relief claimed on the basis that the applicant was not spoliated. She moreover proffers the defence of impossibility in that the vehicle is no longer in her possession as it had been sold to a third party who had taken possession of the vehicle.
- [4] In her founding affidavit the applicant averred that she had been in the peaceful and undisturbed possession of the vehicle since 1 November 2019 after she had purchased it from Mr P Matlala (since deceased). She had paid for services, the licensing discs and the like in respect of the vehicle. In her founding affidavit applicant avers that she was approached by the respondent and an unknown lady and gentleman on 11 November 2022 at her workplace in Kimberley where the vehicle was parked in a parking lot. She was informed by the respondent that she (respondent) had come to collect the vehicle as it belonged to the deceased (respondent's late husband to whom she had been married in community of property), but she resisted the request to hand over the key and vehicle. She attempted to block the respondent's access to the vehicle but was then "pushed away" from the vehicle, resulting in the respondent taking possession of the vehicle without her consent. Applicant avers that, at the time of launching of the application (which was initially brought on an urgent basis) she was still in possession of the "spare" key of the vehicle. The applicant states that the respondent is capable of restoring the possession of the vehicle to her as it is still in her possession and had not been sold.
- [5] The respondent in her answering affidavit denied that the events had occurred as averred by the applicant. She avers that she and her late husband bought the vehicle in 2019, where after he had used the vehicle for travelling to his place of work in Kimberley where he had stored the vehicle. Upon his death, she discovered that he had an affair with the applicant. She went to the said workplace accompanied by her sister's daughter and her husband ("the couple"). The applicant was informed that she (respondent) had come to fetch the vehicle and applicant was requested whether she was in possession of the car keys, which she admitted. Applicant then accompanied them to the vehicle, handed over the vehicle's keys and

removed her possessions. Respondent denied having had any physical contact with the applicant and averred that the applicant consented to her taking the vehicle and handed her the keys. Confirmatory affidavits of the couple were annexed. On or about 18 November 2022 she sold the vehicle to one Mr Malefane in terms of a verbal agreement who, after having paid the purchase price, took possession thereof. The vehicle was, at the date of deposing to the affidavit, still in his possession.¹

[6] In her replying affidavit the applicant denied the version of the respondent and insisted that she had been unlawfully, forcefully and without her consent dispossessed of the vehicle while she was in peaceful and undisturbed possession thereof. When faced with the opportunity to reply to the respondent's version that the vehicle was no longer in her (the respondent's) possession, applicant did not deny that there was a sale of the vehicle or, more importantly, that a third person took possession of the vehicle and was at the time of adjudicating this application, still in possession thereof. The applicant rather replied that the said agreement of sale was not done for any bona fide purposes and was void as a result of the contravention of s13(1) of the Administration of Estates Act.

[7] It is trite that the mandament van spolie is a possessory remedy aimed at restoring the *status quo ante*. It is not concerned with the underlying rights to claim possession of the property. It seeks only restoration. It does so by mandatory order irrespective of the merits of any underlying dispute regarding the rights of the parties.² The despoiled person need to prove that she was in possession of the object and that she was wrongfully deprived of such possession without her consent.³ From the different versions tendered by the parties as alluded to above, it is evident that a factual dispute arose in this application. It is incumbent on an applicant to satisfy a court on a balance of probabilities that she is entitled to the relief sought by proving the

¹ At para 6.15 of Respondent's answering affidavit

² Van Rhyn and Others NNO v Fleurbaix Farm (Pty)Ltd 2013 (5) SA 54 (WCC)

³ Ngqukumba v Minister of Safety and Security 2014 (5) SA 112 CC at para 13

aforementioned, based on the well-known test as enunciated in ***Plascon-Evans Paints***.⁴

[8] On the version of the respondent the applicant was indeed in possession of the vehicle when she (the respondent) fetched the vehicle in Kimberley, so the first requirement for spoliation could in my view not be seriously disputed. The question is thus whether the applicant was deprived of her possession of the vehicle unlawfully. It is the applicant's case that such dispossession was done unlawfully, forcefully and without her consent. The version of the respondent (confirmed by two supporting affidavits) is that the applicant consented to the respondent taking the vehicle by freely handing her the keys thereof.

[9] I am unable to find that the version tendered by the respondent can be said to be untenable or far-fetched. On applicant's own version she was, at the time of deposing to her founding affidavit still in possession of the "spare" key of the car. This begs the question how the respondent would have managed to drive the car if not given the keys to the vehicle. The respondent's version is that applicant handed her the keys to the vehicle. It is not the applicant's version that such keys were forcefully taken from her. In my view the consent of the applicant for the removal of the vehicle by providing the respondent with the keys to the car, negates the notion that applicant was unlawfully deprived of her possession of the vehicle. Accordingly, the applicant has not succeeded in proving that she is entitled to the relief claimed, namely restoration of her possession of the vehicle.

[10] Even if I am wrong in my conclusion herein as stated above, the applicant must still cross the hurdle relating to the defence of impossibility as tendered by the respondent.

[11] Recently the Supreme Court of Appeal in ***Monteiro and Another v Diedericks***⁵ dealt with the question whether in an application for mandament

⁴ *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

van spolie the court can order a party to restore possession of goods of which it is not in possession. A BMW motor vehicle was the subject matter on facts that are similar to the application in casu, where the vehicle was at the time also not in the possession of the spoliator but in that of a third. Goosen AJJA (Dambuza and Plasket JJA concurring) dealt comprehensively with case law setting out the principles applicable to mandament van spolie, confirming the principle that the remedy is possessory in nature. Reference was made to ***Administrator, Cape and Another v Ntshwaqela***⁵ wherein the principle was enunciated that the court will not make orders which cannot be carried out with Nicolas AJA holding:

“In the context of the mandament van spolie, impossibility is a question of fact, and where it is contended that an order should not be granted because it cannot be complied with, it must be shown that compliance is impossible on the facts.”

The order of the trial court that the party not in possession of the vehicle must restore possession thereof to the spoliated party, was set aside

[12] As indicated in para [9] above, the application should be dismissed as the applicant did not succeed in proving on a balance of probabilities that she had been despoiled of the vehicle. Moreover, it is not disputed by applicant that a third party was in possession of the vehicle when the application was instituted. It would not have been possible for the respondent to remove the vehicle from such a party. In my view, and based on ***Monteiro and Another v Diedericks supra***, the applicant would in any event not have been successful in claiming the relief as requested. There is no reason why cost should not follow the event.

[13] Accordingly the following order is granted:

The application is dismissed with costs.

⁵ (Case no 1199/19) [2021] ZASCA 015(2 March 2021)

⁶ 1990 (1) SA 705 (A) at 720 G-H

C REINDERS, J

On behalf of applicant:

Adv T Mogwera

Instructed by:

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BLOEMFONTEIN

On behalf of respondent:

Adv Z Nyezi

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