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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 2022-025963

Date of hearing: 22 September 2022

Date delivered: 3 October 2022

REPORTABLE: NO

OF INTEREST TO OTHERS JUDGES: NO

REVISED

In the application between:

TENOX MANAGEMENT CONSULTING INC.

Applicant

and

SCANIA SOUTH AFRICA (PTY) LTD

Respondent

JUDGMENT

SWANEPOEL AJ:

[1] This is an urgent application for a spoliation order. Applicant alleges that respondent has taken into its possession five trucks that applicant had been renting from respondent. Applicant also alleges that respondent deactivated the operating system on the trucks remotely, causing the trucks to be unable to drive. Applicant seeks an order that the operating systems be reinstated, and that the trucks be handed back to applicant.

[2] The facts are largely common cause:

[2.1] On 17 May 2021 the parties entered into a 12-month truck rental agreement in terms of which the applicant rented the five trucks from respondent. The agreement was subsequently extended to 11 May 2023. Applicant paid respondent a deposit of R 533 704.65, which is repayable at the termination of the agreement.

[2.2] On 3 August 2022 applicant advised respondent that it would be unable to meet the entire June 2022 invoice. Applicant undertook to make part payment, and it duly paid R 70 000.00 towards the R 343 727.94 that was due in August 2022.

[2.3] On 5 August 2022 respondent dispatched an email in which respondent suggested certain "remedial action", including bringing the account up to date. It advised that unless the applicant abided by the demand within 7 days, the agreement would be cancelled. On 17 August 2022, in the absence of compliance with the demand, respondent cancelled the agreement.

[2.4] On 30 August 2022 two trucks were booked for a service at a Middelburg dealership, and on 1 September 2022 another truck was booked for a service at Scania Bethal. All three trucks were subsequently handed to the respective dealerships. One truck, the truck that had been serviced at Bethal, was handed back to applicant, but its operating system was later remotely deactivated.

[2.5] Applicant was advised by a person working in the Middelburg dealership that respondent had given instructions that the two truck being serviced there should not be released to applicant. Applicant subsequently took possession of these two trucks, bearing registration numbers [...] and [...]. Applicant alleges that in the early hours of 15 September 2022 the operating systems of all five trucks were deactivated.

[2.6] The remaining three trucks, having been deactivated causing them to be stranded next to the road, were recovered from the roadside by respondent's staff.

[3] It is based on the aforesaid facts that applicant alleges that it has been spoliated, and it seeks restoration of its possession by way of the mandament van spolie. Respondent says that it was contractually permitted to take possession of the trucks once it had cancelled the agreement. Applicant disputes that the agreement was validly cancelled. For purposes of this judgment, I do not have to make a finding on the cancellation of the agreement. I shall assume, for purposes of this judgment, that the agreement was indeed validly cancelled.

[4] In order to succeed with a spoliation application applicant has to prove that it was in possession of the trucks, and that it was dispossessed of the trucks whilst they were still in its possession. In Possessory Interdicts in Roman Dutch Law¹ the author says:

"Generally speaking, the only defence open to a respondent is a denial of the facts alleged. He may plead that the applicant did not possess the property in dispute at the time of the alleged spoliation or may, as is more usual, deny that the act alleged was one of spoliation, or claim that it was legally justified. "

[5] An owner who has dispossessed a possessor may not raise the defence that he is owner. A contracting party may also not raise the defence that the contract permits it to dispossess the possessor.² The sole question to be answered in a spoliation application is whether the applicant was in possession of the item sought to be returned, and whether it was unlawfully dispossessed thereof.

[6] The spoliation argument must be separately considered in respect of the two trucks that were recovered from the service station, and the three trucks that were

¹ Price, at page 108

² Wicomb v Rosen 1936 CPD 502

recovered by disabling the operating systems, leaving them stranded next to the road.

THE TRUCKS REMOVED FROM THE SERVICE DEALER

[7] The trucks with registration numbers [...] and [...] were brought to the dealership from where they were removed by respondent.

[8] Was applicant still in possession of the trucks notwithstanding that it had handed them over to the dealer? In *Van Malsen v Alderson & Flitton*³ Greenberg J said "*where one is in possession of an article lawfully, one's refusal to return that article when one's right to retain it expires...*" does not amount to spoliation. However, in *Monteiro and another v Diedericks*⁴ the Supreme Court of Appeal dealt with a matter in which the facts were on all fours with this matter. The respondent had left his vehicle at a service station, Autoglen, (second appellant) where a maintenance service was to be carried out on the vehicle, Respondent handed the keys to the vehicle to the service agent. During the course of the day the first appellant arrived at the dealership. He showed the dealer proof that the vehicle was owned by a company called Street Talk Trading. The second appellant then handed over the keys to the vehicle but retained the vehicle itself. The following day, upon receipt of payment for its invoice, second appellant handed over the vehicle to first appellant. First appellant, acting on behalf of Street Talk Trading, immediately sold the vehicle to a third party.

[9] In the High Court an order was granted for the return of the vehicle. In the SCA the majority of the Court upheld the appeal, but on the basis that it was impossible for appellant to return the vehicle as it had been sold to a third party.

[10] In a dissenting judgment Schippers JA held that respondent had been dispossessed of the vehicle when second appellant refused to hand it back to the appellant, and when it subsequently handed it over to the first appellant. More to the

³ 1931 TPD 39

⁴ [2021] 2 ALL SA 405 (SCA),

point, Schippers JA held that it is not necessary for a possessor to be in continuous physical possession of the thing. She said:

"As indicated above, the measure of control required for possession depends on whether the acquisition or retention of possession is in issue. In the former case, more stringent control is required; and in the latter, continuous physical contact with the thing is not necessary- As stated in Bennett Pringle, detentio will be held to exist despite the fact that the claimant may not possess the whole property, or possess it continuously. Thus, in Lawsa, the example is given of a person who has left his coat in the foyer of a dance-hall (normally handed to another for safekeeping). While he is dancing, he retains possession of the coat. Likewise, persons who leave their cars to be guarded by an attendant in a parking lot, and those who leave their cars at a carwash, do not lose possession of their cars, although they are unable for a period of time to exercise physical control over the cars. There is no difference in logic or principle between these examples and the facts of this case. Once possession is acquired it will be retained, as long as the possessor is capable of exercising physical control over the thing. "

[11] The majority of the Court did not deal with this aspect, and decided the matter solely on the impossibility of appellants giving effect to an order to return the vehicle. In light of this *dictum*, I must find that applicant was continuously in possession of the trucks, and that by persuading the dealer to refuse the return of the vehicles to applicant, and by then removing them from the dealer, respondent spoliated the applicant of its possession.

THE DISABLED VEHICLES

[12] The remaining three trucks were disabled remotely by respondent, and subsequently they were recovered and taken into respondent's possession. Respondent says that it was entitled to do so by virtue of the contract which reads:

"Notwithstanding anything to the contrary, the COMPANY in its sole discretion shall be entitled to without any notice, terminate the rental

agreement forthwith, disable the vehicle and take immediate possession of the vehicle at the cost of the HIRER. "

[13] As I have pointed out above (Wicomb supra), a term in a contract which allows a party to unilaterally remove a thing from the other contracting party is void.⁵ In *Painter v Strauss*⁶ the Court dealt with a matter in which applicant had been dispossessed of a garage that he had been using to store his equipment, pursuant to a contract with the respondent. The Court accepted (without finding so) that applicant had committed a breach of the agreement, and that the agreement had been cancelled. Notwithstanding, the Court held that respondent was not entitled to simply take possession of the garage:

"It is clear that the giving of notice to vacate does not of itself deprive applicant of his possession of the property. A further act is necessary. Either applicant must vacate the property with an intention of abandoning it or he must perform some other act which indicates that he has surrendered his possession. "

[14] The same principle applies to this case. Respondent is not entitled simply to take possession of the trucks on the basis that it had cancelled the agreement. Such conduct amounts to self-help, and respondent's remedy is to obtain an order for the return of the trucks, not simply to remove the trucks from applicant's possession.

[15] Applicant has also sought an order for the return of two trailers and their loads. However, respondent has tendered return thereof, and I do not believe it necessary to make an order to that effect.

[16] In the premises I make the following order:

[16.1] Respondent is ordered to return the following trucks and their keys, with the operating systems activated, to applicant's possession:

[16.1.1] Registration number: [...];

⁵ see also *S. Cohen Ltd v Majiedt* 1953 (2) PH F95 (SWA)

⁶ 1951 (3) SA 307 (O)

[16.1.2] Registration number: [....];

[16.1.3] Registration number: [....];

[16.1.4] Registration number: [....];

[16.1.5] Registration number: [....].

[16.2] Respondent shall pay the costs of the application.

**SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG**

COUNSEL FOR APPLICANT: Adv. Mthembu

ATTORNEY FOR APPLICANT: Molatudi Attorneys

COUNSEL FOR RESPONDENT: Adv. Blignaut

ATTORNEYS FOR RESPONDENT: MST. De Bruin Attorneys

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