

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO: 2640/2020

In the matter between:

MINISTER OF POLICE

Applicant

and

THE SHERIFF OF THE HIGH COURT, MTHATHA **1st Respondent**

THE REGISTRAR OF THE HIGH COURT, MTHATHA **2nd Respondent**

JUDGMENT

MBENENGE JP:

Introduction

[1] This application concerns a white Toyota Hilux T019 LDV CAB,¹ owned by the South African Police Service,² and allocated for use by the Ngqeleni police station.

[2] Upon its attachment and removal from the police station, possession of the motor vehicle has been retained by the first respondent in lieu of a demand for payment of execution fees allegedly owed by the applicant.

¹ Herein after conveniently referred to as “*the motor vehicle*.”

² Otherwise referred to as “*the Police Service*.”

[3] The applicant seeks vindicatory and declaratory relief, the object of which is to regain possession of the motor vehicle. The first respondent, on the other hand, seeks an order declaring the applicant's non-payment of the execution fees wrongful and unlawful.

Background

[4] The salient facts of this case are, by and large, common cause. During 2016 one Mr Mthuthuzeli Mahlosana,³ as plaintiff, launched action proceedings out of this court under Case No. 1630/2016 against the applicant and the Director of Public Prosecutions⁴ as first and second defendants, respectively.⁵

[5] Upon closure of pleadings, the main action was set down for trial on 5 June 2019, on which date it was postponed *sine die* with the applicant directed to pay costs occasioned by the postponement.

[6] Pursuant to the postponement order, a bill of costs allowing R80 640. 01 was taxed by the second respondent at the instance of Majavu Attorneys, who had been Mahlosana's attorneys of record, on 2 July 2019.

[7] The taxed bill culminated in demand being made, per letter dated 11 July 2019, for payment of the taxed costs by the applicant and the DPP.

[8] On 19 November 2019, the second respondent issued a writ of execution directing the Deputy Sheriff to "*attach and remove the movable property of the ...Execution Debtor, being MINISTER OF POLICE, whose address hereof is c/o STATION COMMANDER, NGQELENI POLICE STATION and for the same cause to be realised by public auction [in] the sum of R80 640.01 in respect of taxed bill of costs dated the 12th June 2019 and further to pay costs of collection commission and interest [at the] rate of 9 percent per annum from*

³ Herein after conveniently referred to "Mahlosana."

⁴ The DPP.

⁵ The main action.

[the] *date hereof, in the abovementioned case in favour of the Execution Creditor.*”

[9] On 27 November 2019, the “*Deputy Sheriff Mthatha/Nggeleni*,” Majokweni, served a writ of execution under Case No. 1630/2016 citing the execution debtor as being “*the Station Commander*,” and placing under attachment-

“2 X BAKKIES
10 X OFFICE DESKS
10 X OFFICE CHAIRS
10 X FILING CABINETS.”

On the face thereof, the writ emanated from the Sheriff, “*H M Ntsikeni*.”

[10] Pursuant to the writ referred to in paragraph 9 above, the motor vehicle was removed from Nggeleni Police Station and is being stored at the first respondent’s premises situated at 7 Beaufort Road, Mthatha.

[11] The judgment debt was paid in full by the applicant’s attorneys on 21 February 2020, whereupon Majavu attorneys addressed correspondence to the Sheriff advising him of the payment and instructing him to release the motor vehicle.

[12] Despite the settlement of the judgment debt for which the motor vehicle was attached and removed, demand for its release has yielded naught.

[13] When the Sheriff eventually responded to the demand, he transmitted an email addressed to the Mthatha civil litigation section of the Police Service “*Att Mr Mbeki*,” stating:

“Please find attached tax invoice of (1630/16 Mthuthuzeli Mahlosana v MEC of Police⁶).”

⁶ Sic

[14] The tax invoice pertains to the Sheriff's fees, storage charges, and security charges of the motor vehicle calculated from 6 February 2020 to 16 July 2020.

[15] Messrs Mbulelo Qotoyi attorneys (the Sheriff's attorneys) addressed a letter dated 6 August 2020 responding to the letter previously penned by the applicant's attorneys, worded as follows:

- "1. Letter written by Messrs Majavu and Associates is not disputed, however the aforesaid Attorneys were telephonically advised by our client that they will release the vehicle upon payment of Sheriff costs and storage.
2. We further advise that an invoice to that effect was drawn up and served to your client, we attach the same for your ease of reference.
3. Client has now drawn up revised invoice for your client's attention and payment. Kindly advise your client to pay and client will release the vehicle upon presentation of proof of payment."

The main application

[16] The present proceedings were launched on 17 August 2020, with the applicant suing in a nominal capacity as the repository of executive functions over the Police Service.

[17] The first respondent is cited in his official capacity as also in his personal capacity as, in the view of the applicant, the conduct complained of also warrants such manner of citation.

[18] The second respondent has been cited purely out of caution on the basis that he issued the writ that culminated in the attachment and removal of the motor vehicle.

[19] The relief sought in the main application is the *rei vindicatio* - an order directing the first respondent to release the motor vehicle to the applicant. Relief of a declaratory nature is also being sought.

[20] The declaratory relief seeks to assail the attachment, removal, and retention of the motor vehicle as being unconstitutional, unlawful, and invalid, on the bases that -

[20.1] in attaching and removing the motor vehicle, the first respondent did not give heed to the procedure outlined in the State Liability Act, 1957;⁷

[20.2] it is impermissible for the first respondent to retain the motor vehicle on the basis of a creditor's lien;

[20.3] any right to remove the motor vehicle on the part of the first respondent was extinguished upon the discharge in full of the judgment debt; and

[20.4] the first respondent is not entitled to retain the motor vehicle on the basis of the unlawful imposition of unreasonable execution charges.

[21] Costs are sought against the first respondent on the punitive attorney and client scale, principally on the basis that the conduct of the first respondent is egregious, constitutes an abuse of his office, and a breach of the Code of Conduct by which the first respondent is bound.

[22] The affidavit filed in support of the application is deposed to by Mr Sabelo Mbeki *qua* commander of the Mthatha civil litigation command centre and the designated functionary of the Police Service responsible for all civil litigation against the Minister of Police arising from the jurisdictional area of this Court.

⁷ Act 20 of 1957 (the Act).

[23] The application is opposed by the first respondent. To that end, Mr Methusi Humphrey Ntsikeni, the Sheriff of the High Court, Mthatha, deposed to the answering affidavit wherein he contends that-

[23.1] the relevant provisions of the Act were complied with prior to the removal and retention of the motor vehicle, more particularly in that the accounting officer of the Police Service was notified of the intention to remove the motor vehicle and subsequent thereto, of its retention in lieu of outstanding execution costs and did not object thereto; and

[23.2] the first respondent is entitled to retain the motor vehicle pending the payment of the execution costs.

[24] For reasons that will become clearer later, it is necessary to set out copiously the steps allegedly taken by the first respondent in giving effect to section 3 of the Act. His affidavit, in relevant part, reads:

“10. On or about 27 November 2019 I attached the applicant’s motor vehicle . . . acting in terms of warrant of attachment attach herein marked “SM7” in the applicant’s founding affidavit.

10.1 Before I attach[ed] the motor vehicle on 27 November 2019, I presented the warrant of attachment to Mr Mbeki, the accounting officer of the applicant, I explained the nature and the exigency thereof to him, we then agreed that I can attach the motor vehicle, in fact it was pointed out by him as the property to be attached.

11. After the motor vehicles concerned were attached, I personally informed the accounting officer of the applicant that if no payment is received, I will then remove the motor vehicle concerned for the purposes of sale. The applicant did not engage me relating to objection to the motor vehicle being attached and removed. I then took it as if applicant has no objection to the motor vehicle being attached and removed.

12. On the 26 February 2020, after having not received objection from the applicant relating to removal of the motor vehicle or pointing by the applicant of the alternative property I may attach, I then acted in terms of section 3 (7)(c) of the State Liability Amendment Act 14 of 2011. I then removed one motor vehicle for the purpose of sale to satisfy the judgment debt against the

applicant, this also includes payment in satisfaction of my office storage and security costs. I could not locate the second vehicle at the time.

13. The motor vehicle was then attached and removed for the purpose of sale not for the purposes as is alleged by the applicant.
14. The applicant is fully aware of the aforesaid warrant.
15. At all material times, with the applicant aware of matters in which the motor vehicle concerned has been attached and removed for, the applicant has never made an application in terms of section 3(10) . . . , objecting to the removal of the aforesaid motor vehicle on the basis that the continued attachment would disrupt service delivery, threaten life or put security of the public at risk and/or suggest that the continued attachment is not in the interest of justice.”

[25] The second respondent has remained supine, presumably because the writ of execution he issued is not being assailed.

The counter-application

[26] The counter-application is a quest for an order declaring the applicant’s non-payment of execution fees in the sum of R106 398 wrongful and unlawful. Besides praying for a costs order, the first respondent also seeks a *mandamus* directing the applicant to pay the fees “*together with storage and security costs . . . computed from the date of attachment to the date of final payment . . . within thirty days* [from the date of the grant of the order sought in the counter application].”

[27] The applicant is opposed to the grant of the relief sought by the first respondent. It is contended that the relief, in particular the imposition of the charges by the first respondent, is without lawful basis, hence the declarator sought by the applicant in the main application. Motion proceedings, contends the first respondent, are not suited for determining charges that were not, in the first place, agreed upon.

The law

[28] The *rei vindicatio* is premised on the notion that an owner may not be deprived of his or her property against his or her will, and is entitled to recover

property from any person who retains possession of it without his or her consent.⁸

[29] Therefore, no other person may withhold property from the owner unless he or she is vested with some right enforceable against the owner such as a right of retention against the owner or a contractual right.⁹

[30] It is trite law that possession should also be lawful in order to be a valid defence against the *rei vindicatio*.¹⁰

[31] An owner who institutes the *rei vindicatio* is required to allege and prove that-

[31.1] he or she is the owner of the thing;

[31.2] the thing was in the possession of the defendant at the commencement of the action; and

[31.3] the thing which is vindicated is still in existence and clearly identifiable.¹¹

[32] The onus to establish any right to retain possession of the thing always rests on the defendant¹² as long as the owner does not go beyond alleging his or her ownership and the fact that the thing is in the possession of the defendant.¹³

[33] In *Goudini Chrome (Pty) Ltd v MCC Contracts*¹⁴ the Supreme Court of Appeal stated:

⁸ *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B, where it was explained that one of the incidents of ownership is the entitlement of 'exclusive possession of res, with the necessary corollary that the owner may claim his property wherever found, from whosoever holding it.'

⁹ *Hefer v Van Greuning* 1979 (4) SA 952 (A) at 959.

¹⁰ *Hako v Minister of Safety and Security and Another* 1996 (2) SA 891 (Tk).

¹¹ *Port Nolloth Municipality v Xhalisa and Others, Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 110 – 111; also see *Khuzwayo v Dladla* [2000] 4 All SA 329 (LCC) at 334 d.

¹² *Free State Agriculture and Eco Tourism Development (Pty) Ltd v Mthembu and Mohammed* 2002 (5) SA 343 (O).

¹³ *Jeena v Minister of Lands* 1955 (2) SA 380 (A); *Chetty v Naidoo* at 20 C; *Khuzwayo* at 334 e

¹⁴ 1993 (1) SA 77 (A) at 84 I.

“The real question in this appeal is whether- to quote from the above dictum- the respondent is invested with ‘*n reg wat teen die eienaar geld. . . om die saak te hou*’- in this case a right of retention. And with that question the focus shifts from possible deficiencies in the appellant’s case to the merits of the respondent’s defence.”

[34] In this matter, ownership of the motor vehicle by the applicant and the possession thereof by the first respondent have been made common cause between the parties. It is also not in dispute that the motor vehicle being vindicated is still in existence and clearly identifiable. Save the quest for declaratory relief, which flows from alleged unlawful conduct on the part of the first respondent, the applicant has not gone beyond alleging the requisites for the grant of the *rei vindicatio*.

[35] In *Krugersdorp Town Council v Fortuin*¹⁵ the court held:

“There is a wealth of authority on this point, none of which departs from the clear statement in *Graham v Ridley*.¹⁶ The mere fact that a plaintiff is owner entitles him to possession and he need not state that the defendant is in wrongful possession. It is for the defendant to plead on what basis he claims he is entitled to possession.”

[36] Here, too, it is incumbent on the first respondent to establish entitlement to retain possession of the motor vehicle. That issue falls to be determined first as, in my view, it is dispositive of both the main application as also the counter-application.

Retention of the motor vehicle on the basis of a creditor’s lien

[37] The first respondent is refusing to release the motor vehicle based on a creditor’s lien in respect of execution fees, which he alleges are owing and payable to him.

[38] It is trite law that the imposition of a creditor’s lien is valid only in circumstances where there is a contractual nexus between the parties in terms of

¹⁵ 1965 (2) SA 335 (T) at 336 G – 337 B.

¹⁶ 1931 TPD 476 at 479.

which each of the parties undertakes reciprocal obligations one of which must be payment of the contract price.¹⁷

[39] It being common cause that the first respondent is retaining the motor vehicle in respect of unpaid charges, there is no contractual nexus between the parties, and it is not available to the first respondent to rely on the existence of a creditor's lien.

[40] The first respondent is accordingly precluded from seeking to recover execution charges from the applicant.

[41] In these circumstances, the imposition of a creditor's lien in the absence of a right to do so arising either in contract or another cognisable ground falls to be set aside as unlawful and invalid.

The attachment of the motor vehicle in contravention of the Act

[42] The Act seeks to regulate the satisfaction of final court orders sounding in money against the State or against any property of the State. It details stages for the satisfaction of judgment debts against the State. Each one of the stages makes provision for situations of non-payment until, finally, the stage that culminates in the attachment of the movable property of the State. These stages are adumbrated below.

[42.1] The relevant department must ensure that payment of the money is satisfied within 30 days from the date that the court order becomes final or within a time period agreed upon by

¹⁷ *Goudini*, above n 13, where, at page 85 D - F it was held:

"A debtor and creditor lien is available to anyone who, in terms of an agreement, has performed work pertaining to someone else's property, irrespective of whether the work was necessary, useful, enhanced the value of property concerned or was trifling. A debtor and creditor lien, being a contractual remedy and not a real right, is maintainable by the one party to a contract against the other who may or may not be the owner of the property. Unlike an enrichment lien it is not limited in its scope: it secures the full extent of the agreed remuneration, regardless of his own actual expenditure or the other side's actual enrichment." (cases omitted)

the judgment creditor and the accounting officer of the relevant department.¹⁸

[42.2] If payment is not made within 30 days or as agreed then the judgment creditor may, in order to enforce the judgment, serve in terms of the Rules of Court, the court order on-

- (a) the executive authority;
- (b) the accounting officer of the relevant department;
- (c) the State Attorney or other attorney acting for the department concerned; and
- (d) the relevant treasury.¹⁹

[42.3] The relevant treasury must within 14 days of service of the court order ensure that the judgment debt is satisfied or in the event that there are not sufficient funds available make payment within the time frame agreed to with the judgment creditor.²⁰

[42.4] If payment is not made within 14 days or as agreed then the judgment creditor may issue a writ or warrant of execution in terms of the Rules of the applicable court against the department, which can only be made against the movable property owned by the state and used by the relevant department.²¹

¹⁸ Section 3 (3) (a) of the Act.

¹⁹ Section 3(4).

²⁰ Section 3(5).

²¹ Section 3(6).

[42.5] Once the writ or warrant is issued, the Sheriff “*must*” attach the movable property but not remove the same.²² The Sheriff and the accounting officer of the relevant department may agree on the property owned by the State that may not be attached, removed, or sold in execution because it would severely disrupt service delivery, threaten life or put the security of the public at risk.²³ Absent such agreement, the Sheriff may attach the movable property to satisfy the judgment debt.²⁴

[42.6] At the expiry of 30 days from the date of attachment, the Sheriff may remove and sell the attached property in execution of the judgment debt. At this point, the Rules of Court become applicable.²⁵

[42.7] In the event of a party with a direct or material interest in the matter being of the view that the attachment and removal would severely disrupt service delivery, threaten life, put the security of the public at risk, or would not be in the interests of justice, then such party may apply to court for a stay before the sale of the attached property.²⁶

[43] No stretch of imagination is required in order to conclude that the provisions of section 3 were not complied with by the first respondent.

[44] Nothing points to the first respondent as having interacted with the executive authority or the applicant’s attorneys in any meaningful way. The accounting officer who, in terms of section 36(2)(a) of the Public Finance

²² Section 3(7) (a).

²³ Section 3(7) (b).

²⁴ Section 3(7) (c).

²⁵ Section 3(8).

²⁶ Section 3(9).

Management Act 1 of 1999,²⁷ is the national commissioner of the Police Service, was also not consulted during the impugned process. Neither Colonel Mbeki nor General Billet with whom the first respondent allegedly interacted is the accounting officer of the Police Service. On the first respondent's showing, at no stage was the relevant treasury ever afforded the opportunity to discharge the writ.

[45] The first respondent's answering affidavit is replete with further incongruities. Annexure "SM7" purporting to be the copy of the relevant writ of execution belies the first respondent's assertion that section 3 of the Act was complied with. In his affidavit, the first respondent would have this Court believe that when he attached the motor vehicle he interacted with Mr Mbeki to whom he presented the writ. This flies in the face of annexure "SM7" which points to the writ as having been served by the deputy sheriff (Mr Majokweni) at Ngqeleni police station, not at the PRD2 building on Mr Mbeki, as alleged by the first respondent.

[46] The annexure also does not state who the writ was served upon. It makes mention of office equipment about which the first respondent's affidavit is mum. Nor does the annexure mention that the nature and exigency of the writ was explained to the person upon whom service was effected.

[47] Therefore, the attachment and removal of the motor vehicle contravened the provisions of the Act and are, therefore, liable to be set aside as unlawful.

The unlawfulness of the retention on other bases

[48] In the first place, a finding that the attachment was not lawful results in the conclusion that the retention of the relevant item is unlawful. Moreover, and in any event, an item lawfully attached and removed ought to be sold. The

²⁷ The PFMA.

Sheriff is not entitled to retain the motor vehicle indefinitely or to retain the motor vehicle and allow storage charges to accrue thereon.²⁸ He is under an obligation, within a reasonable period, to either sell the property attached and removed by public auction or release it to the State. To the extent that the Sheriff must recover the amount of the judgment debt from the proceeds of the sale of the motor vehicle, he is obliged to sell the motor vehicle and not retain the same for the accumulation of the exorbitant fees, which is, in any event, precluded by the writ. These shortcomings render the continued retention of the motor vehicle unlawful and liable to be set aside.

[49] There is a further reason why the retention of the motor vehicle is unlawful. The judgment debt for which the writ was issued was discharged in full. The purpose of the execution procedure is to satisfy an unpaid judgment debt. In this instance, that purpose fell with the discharge of the judgment debt.

The demise of the counter-application

[50] The first respondent has not established his right to retain the motor vehicle. Certainly not for non-payment of storage fees and security costs allegedly due to him.

[51] As submitted by Mr *Solomon* who, together with Ms *Pillay*, appeared for the applicant, motion proceedings would, in any event, not be the appropriate forum for a quest to recover the alleged costs or fees. The dispute of fact in relation thereto would be irresoluble on the papers.

Conclusion

[52] The applicant is entitled to the relief he is seeking. The nature of the dispute in the main application coupled with the relief sought in the counter-application justifies the grant not only of the *rei vindicatio*, but the detailed

²⁸ *BG Bojosinyane and Associates v Van Staden* 2017 JDR 0912 (NCK)

declaratory relief sought by the applicant. The first respondent flouted procedure prescribed by the Act in the manner and to the extent already pronounced upon, with the result that his conduct is unlawful. More importantly, on the authority of *Fedsure*²⁹ and *Pharmaceutical Manufacturers*,³⁰ the first respondent breached the principle of legality, which renders his conduct unconstitutional.

[53] The corollary of the conclusion reached on the main application is that the counter-application must fail.

Costs

[54] No grounds or special circumstances have been shown to warrant a departure from the general rule that costs follow the result and that the applicant should be awarded his costs. Mr Mhambi, counsel for the first respondent, did not contend otherwise.

Scale of costs

[55] Costs are sought on the scale as between attorney and client, including those of two counsel. Both in the heads of arguments and at the hearing of this matter, the applicant's counsel, rightly so, did not press for an order for personal costs. Indeed, an order for personal costs against a person acting in a representative capacity is in itself inherently punitive.³¹ In my view, such a course is not justified in the present matter.

²⁹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (CC).

³⁰ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).

³¹ *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) 2019 (6) SA 253 (CC), at para 220.

[56] It is trite law that costs are in the discretion of the court to be exercised judicially upon a consideration of the relevant facts and must be fair to the parties.³²

[57] The following remarks relating to an award of punitive costs on an attorney and client scale in *Public Protector*³³ are helpful:

- “[221] . . . An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.
- [222] The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.
- [223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant.³⁴ Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.”³⁵

[58] This court was urged to consider the fact that prior to the institution of the instant proceedings, the applicant’s attorneys had addressed a letter to the first respondent, which did not result in the return of the motor vehicle; the conduct is egregious in that it constitutes a breach of the first respondent’s Code of Conduct by which he is bound;³⁶ that the first respondent is held in high esteem, to a high standard, and it is required of him to respect and uphold the law; and that the applicant should not be out of pocket on account of the first

³² *Wanderers Club v Boyes-Moffat and Another* 2012 (3) SA 641 (GSJ) at 643h – 644b.

³³ *Supra*, above n 30

³⁴ *Orr v Solomon* 1907 TS 281

³⁵ Also see *Plastic Converters Association of South Africa on behalf of members v National Union of Metal Workers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815(LAC), where the Labour Appeal Court held, in the context of non-constitutional matters, that-

“[t]he scale of attorney and client is an extra ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exertional and is intended to be very punitive and indicative of extreme opprobrium.”

³⁶ Section 14.1 of the Code provides that a Sheriff may not act in any way that will bring the good name and esteem of the office of the Sheriff in particular, and the administration of justice in general, into disrepute.

respondent's conduct which has caused the applicant to unnecessarily waste public funds to recover possession of the motor vehicle.

[59] These concerns are legitimate. However, the applicant is not without blame. That factor should not be eschewed in the court's exercise of its discretion. The adage that one should first look at the speck of sawdust in one's own eye and pay attention thereto, before pointing to the speck in the other's eye finds expression on this score.

[60] At the time the relevant costs order was obtained and the resulting bill of costs taxed, the applicant was represented by the State Attorney upon whom it is incumbent to act in the best interest of government. The Act casts a duty on departments to ensure that court orders are satisfied by departments without any delay.³⁷ In certain circumstances, an accounting officer who fails to ensure the satisfaction of court orders and adherence to section 3 of the Act may end up being liable for misconduct in terms of the PFMA.

[61] Section 195 of the Constitution sets out basic values and principles governing public administration. These values and principles apply to the Police Service. More importantly, section 195(1) (a) sets a high standard of professional ethics on the part of public servants; people's needs must be responded to;³⁸ and public administration must be accountable.³⁹ Section 2 of the Constitution provides that obligations imposed by the Constitution must be fulfilled.

[62] In the present matter can it be said that, after the demand for payment of the costs had been made, the first respondent acted with due diligence in the manner contemplated in section 3 of the Act and section 195 of the Constitution? The answer to this question is not far to seek.

³⁷ Section 3 (11) of the Act.

³⁸ Section 195 (1) (e).

³⁹ Section 195 9(1) (f).

[63] The costs order which is the genesis of this application was issued on 5 June 2019. The bill was taxed on 2 July 2019 and payment pursuant thereto demanded on 11 July 2019. No payment was forthcoming from the applicant's camp. This resulted in a writ being obtained on 19 November 2019. Attachment, albeit purportedly, was made on 27 November 2019, and the motor vehicle removed from Ngqeleni police station soon thereafter. Payment pursuant to the taxed bill was only effected on 21 February 2020, more than 6 months after demand for payment had been made. This demonstrates a lackadaisical attitude on the part of the first respondent, which has not been explained.

[63] This matter is of importance to the parties. It involves a complex question of law that hinged on an interpretation to be given to relatively new provisions.⁴⁰ In my view, it warranted the engagement of two counsel, whose handling of the case was of great assistance in the navigation of the relevant issues.

Order

[64] The following order is made:

(a) The first respondent is directed to forthwith restore possession of a white 2014 Toyota Hilux T019 LDV CAB (the motor vehicle) to the applicant.

(b) The conduct of the first respondent in -

⁴⁰ The provisions of the State Liability Act, 1957 in respect of a final order sounding money against a department were amended significantly by Act 14 of 2011 and Act 8 of 2017.

- (i) *attaching and removing the motor vehicle in contravention of the procedure set out in the State Liability Act 20 of 1957 and for purposes other than to sell the motor vehicle;*
 - (ii) *retaining the motor vehicle on the basis of a creditor's lien;*
 - (iii) *retaining the motor vehicle despite the payment of the judgment debt in respect of which the motor vehicle was attached; and*
 - (iv) *imposing security charges and storage fees over the motor vehicle despite payment of the judgment debt,*
- is declared unconstitutional, unlawful and invalid.*
- (c) *The first respondent shall pay costs of this application, which costs shall include those consequent upon the engagement of two counsel.*

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Applicant's counsel	:	<i>R A Solomon SC (with him K Pillay)</i>
Applicant's attorneys		Mvuzo Notyesi Incorporated Mthatha
First respondent's counsel	:	<i>M Mhambi</i>
First respondent's attorneys	:	Mbulelo Qotoyi Attorneys Mthatha
Date matter heard (virtually)	:	29 April 2021

Date judgment delivered : 29 June 2021

[By electronic mail transmitted to the parties' attorneys, in terms of paragraph 68 of the Eastern Cape National State of Disaster Management Directions]