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

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

Case number: 391/2019

In the matter between:

SONGQWABA SIYAKUDUMISA

Applicant

and

THE MEC FOR POLICE, ROADS AND TRANSPORT,
FREE STATE PROVINCE

1st Respondent

THE COMMANDER, TRAFFIC DEPARTMENT
WEPENER, FREE STATE PROVINCE

2nd Respondent

CORAM: DAFFUE, J

HEARD ON: 14 MARCH 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 14 MARCH 2019

I INTRODUCTION

- [1] On 28 January 2019 applicant launched an urgent application intending to obtain relief on 7 February 2019, in essence the release of his motor vehicle. On 6 February 2019 respondents gave notice of intention to oppose and filed their answering affidavit the next day. By agreement the matter was postponed to the opposed roll of 21 February 2019 with further orders pertaining to the filing of the replying affidavit and heads of argument. Since then the matter was postponed by agreement more than once.

II THE PARTIES

- [2] Applicant is Mr S Songqwaba a businessman residing at Chris Hani Park, Mthatha, Eastern Cape. He is the owner of a Toyota Quantum motor vehicle with registration number [...]EC (“the Quantum”). He is represented in these proceedings by Adv SK Maliwa.
- [3] First respondent is the MEC for Police, Roads and Transport, Free State Province, herein represented by the Office of the State attorney. Adv BS Mene appeared for the MEC. I shall herein later refer to the MEC as the respondent.

- [4] Although the commander of the Wepener Traffic Department was cited as second respondent, it is denied that such a position or person exists, but this is immaterial to the adjudication of the application.

III **THE RELIEF CLAIMED**

- [5] Applicant sought condonation in terms of rule 6(12) as well as section 35 of the General Law Amendment Act, 32 of 1955 in order to have the application heard as one of urgency. Although Mr Mene addressed the issue of urgency in his heads of argument, nothing turns on this anymore. The merits have been traversed fully.
- [6] Applicant intended to obtain a rule nisi returnable on 28 February 2019 in terms whereof it sought *interim* orders that the search and seizure of the Quantum be declared unlawful and unconstitutional and the Quantum be released to him forthwith. It is apparent from the affidavits and applicant's heads of argument in particular that he relies on the mandament van spolie for the relief claimed pertaining to the release of the Quantum.
- [7] Insofar as the parties have now filed their affidavits on the merits, there is no need to consider an *interim* order. If the applicant is successful, relief should be granted as claimed in paragraphs 3.1 to 3.3 and 5 of the notice of motion. If the court finds that applicant

has not proved its case, the application shall be dismissed with costs. Respondent claims that the claim is frivolous and that a punitive costs order should be issued.

IV THE DEFENCE

- [8] On 6 January 2019 respondent's Transport Inspector, Mr R Motshumi, stopped the driver of the Quantum and after making enquiries issued a traffic fine and impounded the Quantum. The impoundment was done in accordance with sections 99(1) and 99(2) read with sections 102(1)(b) and 103 of the Free State Public Transport Act, 4 of 2005 ("the Free State Act").
- [9] Instead of acting swiftly, applicant filed its urgent application three weeks later, to wit on 28 January 2019, intending to obtain relief a few days later and without complying with the rules of court. Therefore, Mr Mene argued that urgency was self-created and the application should not be entertained. I dealt with this *supra*. Nothing further should be said in this regard.
- [10] Respondent is adamant that any person transporting passengers for reward must have the required operating permit. *In casu* the driver indicated that he did not have a permit and applicant also failed to attach a permit to his papers. Insofar as the National Land Transport Act, 5 of 2009 and the Free State Act have been

contravened, respondent's Traffic Inspector impounded the Quantum lawfully.

V THE MANDAMENT VAN SPOLIE

[11] Applicant relies on the mandament van spolie for the relief claimed, apparently in particular in respect of the release of the Quantum. He suggests that he was in peaceful and undisturbed possession of the Quantum until it was seized and also that he was unlawfully deprived of his possession.

[12] The requirements of the mandament van spolie are well-known and applicant correctly referred thereto in his founding affidavit. In order to succeed with the mandament van spolie an applicant must allege and prove the following two requirements:

12.1 that he was in peaceful and undisturbed possession of the object;

12.2 that he was deprived of possession unlawfully.

See: *Yeko v Qana* 1973 (4) SA 735 (AD) at 739 E, C G van der Merwe, *Sakereg*, 2nd ed, p 129 and further and Klein & Borreine, *The Law of Things*, at pp. 134 – 141.

[13] In *Tswelopele Non-profit Organisation v City of Tswane Municipality* 2007 (6) SA 511 (SCA) the court per Cameron, JA commented as follows in paragraph [21]:

“[21] It is true that the *mandament* offered the occupiers an alluring template for the relief they crave. The remedy originated in the canon law, and found its way thence into Roman-Dutch law and modern South African law. Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor - a fraud, a thief or a robber - is entitled to the *mandament*'s protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property.”

[14] In *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) Madlanga, J dealt with a situation where members of the South African Police Service without a search and seizure warrant had seized a vehicle whose engine and chassis numbers had been tampered with. The learned judge explained the legal position in paragraphs [10] – [17] and I paraphrase the *dicta* as follows:

“[10] The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by

restraining persons from taking the law into their own hands and by inducing them to follow due process. [11] This applies equally whether the despoiler is an individual or a government entity or functionary.

.....

- [12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur.....
- [13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. Surely then it should make no difference that in dispossessing an individual of an object unlawfully, the police purported to act under colour of the search and seizure powers contained in the Criminal Procedure Act. Non-compliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawful.....
- [14] The obvious conclusion is that the mandament van spolie is available even against the police where they have seized goods unlawfully. The central question is: are ss 68(6)(b) and 89(1) of the Traffic Act to be read in a manner that alters this position? Do they stand in the way of restoration of possession of the vehicle in terms of a spoliation order in this matter? I think not.
- [15] It seems to me that on this subject the Supreme Court of Appeal proceeds from the premise that a tampered vehicle is no different from an article the possession of which would be unlawful under all circumstances. That is an erroneous premise because possession of a tampered vehicle will be unlawful only if it is 'without lawful cause'. That leads me to a crucial point of departure. It is that in this case we are not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had we been concerned with objects of that nature, then the mandament van spolie might well not be available; but that issue is not before us and need not be decided. The fact that we are here concerned with an article that *may be possessed quite lawfully* makes all the difference. On the

assumption that an individual can never possess heroin lawfully, the Supreme Court of Appeal's heroin example is not apt. At the risk of repetition, the simple point of distinction is that an individual can possess a tampered vehicle if there is lawful cause for its possession.

[16] With this in mind I take the view that ss 68(6)(b) and 89(1) of the Traffic Act must as far as possible be read in a manner that is harmonious with the mandament van spolie.....

[17] Specifically on self-help and thus more on point, in *Vena_Milne* JA expressly approved a statement by Friedman J in the court of first instance, which read as follows:

'It is a fundamental principle of our law that a person may not take the law into his own hands and a statute should be so interpreted that it interferes as little as possible with this principle.'

VI EVALUATION OF THE EVIDENCE AND THE PARTIES' SUBMISSIONS

[15] It is common cause that the Quantum was used to carry passengers from the Eastern Cape through the Free State *en route* to Gauteng. It is also common cause that applicant does not have an operating permit for such transportation, that the Quantum was used for unauthorised services in terms of the Free State Act and the National Land Transportation Act, 5 of 2009, that the vehicle was impounded on 6 January 2019 and that applicant's driver received written notice to appear in the Wepener court to face a charge for transporting passengers without an operating permit.

- [16] Mr Maliwa was initially not prepared to accept that the Free State Act exists. During the tea break Mr Mene presented him with a copy of the Act and I accessed the Jutastat electronic services to obtain clarity. There cannot be any doubt that the Free State Act became law on 23 March 2007 and has not been repealed.
- [17] In my view the legislation is clear. Respondent's Traffic Inspector acted lawfully and in terms of the applicable provincial and national legislation in impounding the Quantum pending the outcome of the criminal prosecution.
- [18] I do not agree with Mr Maliwa's submission that the facts *in casu* are on all fours with those in *Ngqukumba*. The case is clearly distinguishable from the facts in the *Ngqukumba* judgment. In that case the court held that possession of a tampered vehicle will be unlawful only if it is "without lawful cause" as set out in section 68(6)(b) of the National Road Traffic Act, 93 of 1996. The court was satisfied that the seizure without the necessary warrant was not in accordance with the law. Madlanga, J held in paragraph [18] that nothing in sections 68(6)(b) and 89(1) indicates that the sections plainly intended to alter the common law and therefore the sections must be read not to oust the normal operation of the mandament van spolie. In paragraph [19] the learned judge warned that members of the South African Police Service shall comply strictly with the Criminal Procedure Act, 51 of 1977 relating to search warrant requirements. *In casu* an authorised officer who is satisfied on reasonable grounds that a motor vehicle is being

used by any person for operation of public transport without the necessary operating licence or permit may impound the vehicle pending investigation and prosecution of that person. The word “may” is indicative that the officer does have a discretion, but his/her authority is evidently clear.

[19] *In casu* the Traffic Inspector was satisfied, after making the necessary enquiries, that the applicant’s driver was using the Quantum in conflict with the aforesaid legislation. Clearly, on respondent’s version which must be accepted for purposes hereof, the passengers were transported for reward. Applicant states so much in his own words in paragraph 8 of the founding affidavit. Applicant failed to present the required permit which he could and should have done when he launched this application. The Traffic Inspector did not merely purport to act under colour of the legislation, to borrow the words used by Madlanga, J, but he acted properly within the law. People should not be allowed to transport passengers in conflict with the law and contrary to the rights of legitimate taxi owners. This is a recipe for disaster and tremendous violence in the taxi industry as we have often experienced.

[20] Mr Maliwa submitted that respondent did not show any prejudice in the event of the Quantum being released immediately. In fact, he argued that the Quantum should never have been impounded. In my view respondent did not have to show any prejudice, but merely that its employees acted lawfully. Mr Maliwa also

submitted that respondent's employees had several options and should have relied upon one only. A written notice to the driver, as issued, should have sufficed without the necessity of impounding the Quantum as well. I do not agree. It is not a case of two forms of punishment as the written notice is directed at the driver and the impoundment affects the applicant who was not the driver. The Traffic Inspector acted fully within the parameters of the law to impound the applicant's vehicle. The legislature considered the seriousness of relevant offences and impoundment is a convenient tool to ensure that illegal taxi operators and taxi owners are called to book and accept responsibility.

[21] Applicant's driver may still defend the criminal case set down for 18 March 2019 and plead not guilty. If the charge is withdrawn before then or if the driver is acquitted, the Quantum must be released. If the driver is convicted as charged, the impoundment fee will have to be paid, unless the court directs otherwise. See section 87 of Act 5 of 2009 and section 99 of the Free State Act, specifically relied upon by respondent.

[22] Applicant failed to show that he was unlawfully deprived of his possession of the Quantum and therefore, he failed to prove the second requirement of the mandament van spolie.

VII CONCLUSION

[23] In conclusion applicant is not entitled to rely on the mandament van spolie. Insofar as submissions have been made on behalf of applicant to rely on compliance with the three requisites for final interdicts, applicant failed to prove any of those requirements. He has no clear right for the reasons advanced. Insofar as he may not lawfully use the Quantum for the transport of passengers for reward, he failed to prove an injury committed or reasonably apprehended. He has a satisfactory remedy. In fact he should have arranged long ago, if there was no defence, that the fine imposed and the penalty for the release of the Quantum be paid and that would have been the end of the matter. As indicated *supra*, the criminal case has been set down for hearing on 18 March 2019, but nothing prevented applicant to have negotiated in good faith with the authorities. His legal costs in launching proceedings in the High Court are far in excess of the penalties imposed.

[24] I considered awarding costs on a punitive scale as requested by respondent. However, I understand applicant's frustration insofar as he has been prevented to use his vehicle even for lawful business activities since 6 January 2019. Having said this, applicant may count himself fortunate. I decided after careful consideration to give him the benefit of doubt as to whether the proceedings are vexatious. Therefore the usual party and party costs order shall follow.

VIII ORDER

[25] Consequently, the application is dismissed with costs.

J P DAFFUE, J

On behalf of Applicant: Adv S H Maliwa
Instructed by: S S Nkonyeni Inc
c/o Maduba Attorneys
BLOEMFONTEIN

On behalf of Respondents: Adv B S Mene
Instructed by:
State Attorney
BLOEMFONTEIN