

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

CASE NO.: 3478/2016

APPEAL CASE NO.: CA & R 19/2018

In the matter between:

**KING SABATA DALINDYEBO
LOCAL MUNICIPALITY**

Appellant

and

THOBANI NOAH

Respondent

FULL BENCH APPEAL JUDGMENT

HUISAMEN AJ

[1] This is an appeal against a declaratory order with costs, made by Notununu AJ on 4 July 2017, with respect to the unlawful impoundment of the respondent's motor vehicle. The appeal comes before us with the leave of the Supreme Court of Appeal, after an

application for leave to appeal had been dismissed by the Court *a quo* on 25 October 2017.

- [2] It is the respondent's case that he had parked his motor vehicle in an open parking space next to the Home Affairs building in Mthatha on 28 September 2016.
- [3] The respondent, being a practicing attorney, was running a trial in the regional court in Mthatha at the time. During the course of the trial he was informed that his vehicle had been impounded.
- [4] The respondent subsequently went to the appellant's pound where he was informed that he had to pay an amount of R3 000,00 for the release of his vehicle. According to the officials the vehicle had been unlawfully parked in an undemarcated area. The respondent requested to meet with the head of the pound, who was unavailable. The remaining officials in charge at the unit were unwilling to assist him in getting his vehicle back.
- [5] On 30 September 2016 the respondent brought an application in the Eastern Cape Local Division, Mthatha, for the following relief:

"1. That the applicant be and is hereby granted leave to institute this application;

(a) Utilizing Form 2(a) and;

(b) In accordance with Rule 6(12)(a) of the Rules of this Honourable Court.

2. That the Applicant's non-compliance with the 72 hour notice in terms of the General Law Amendment Act when instituting urgent proceedings against an organ of state be and is hereby condoned;

3. That Rule Nisi be issued calling upon the Respondent to show cause, if any, before this Honourable Court on Tuesday 18th day of October 2016 at 10h00, or so soon thereafter as the matter may be heard, why an order in the following terms should not be made final,

3.1 declaring the respondent's conduct to impound applicant's motor vehicle to wit a VW Polo red in colour with registration letters and numbers H[...] EC wrongful and unlawful;

3.2 Interdicting and restraining the respondent and any person acting in cohorts with the respondent from further

unlawfully impounding applicant's motor vehicle to wit a VW Polo with registration letters and number H[...] EC;

3.3 Ordering and directing the respondent to return the applicant's motor vehicle VW Polo with registration letters and numbers H[...] EC forthwith to the applicant.

4. That respondent is directed to pay costs of this application on an attorney and own client scale;

5. That paragraph 3.3 shall operate as interim interdict and/or mandamus pending the finalization of this application"

[6] According to the respondent the decision to impound and retain his vehicle was wrongful and unlawful and inconsistent with the provisions of the National Road Traffic Act No. 93 of 1996, as amended. The respondent therefore demanded that the vehicle be returned to him forthwith.

[7] On 30 September 2016 the appellant filed a notice of opposition to the respondent's application. On the same day the matter came before Brooks J, who then made an order in the following terms, by agreement between the parties:

- "1. The Respondent is hereby ordered to return the Applicant's motor vehicle VW Polo with registration letters and numbers H[...] EC forthwith to the Applicant;**
- 2. The respondent is to file it's answering affidavit, if any, by the 11th of October 2016;**
- 3. The applicant to file it's replying affidavit, if any, by the 17th October 2016;**
- 4. Both the Applicant and the Respondent are to file their respective heads of arguments by the 25th of October 2016;**
- 5. The matter be postponed to Tuesday, 1st November 2016 at 10h00am;**
- 6. Costs shall be costs in the cause."**

[8] On 18 October 2016 the appellant filed its answering affidavit in which its deponent contended, *inter alia*, as follows:

- (a) The respondent's vehicle was parked on a sidewalk next to the Home Affairs Building in Mthatha;

- (b) The vehicle was unoccupied;
- (c) A traffic fine of R500,00 was issued for the traffic violation, whereafter the vehicle was removed and impounded;
- (d) The vehicle was removed in terms of the law. In this regard the deponent refers to Regulation 305(6) of the Regulations issued in terms of the National Road Traffic Act which provides as follows:

"Whenever a vehicle has been parked in contravention of the Act, any by-law made under the Act, or in contravention of or in disregard of the directions of any road traffic sign or notice board as prescribed in those regulations, such vehicle may be removed or caused to be removed and impounded by a traffic officer."

- [9] The appellant also relies on the provisions of section 20 of the Criminal Procedure Act No. 51 of 1977, which provides, *inter alia*, that:

"The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter refer to as an article) –

(a) *which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;*"

[10] On 25 October 2016 the respondent filed his replying affidavit in which he denied that his vehicle was parked unlawfully. He furthermore contended that his vehicle was not parked in contravention of the National Road Traffic Act. He also contended that section 20 of the Criminal Procedure Act was not applicable to the facts of the matter.

[11] The respondent furthermore points out, in reply, that the order granted by Brooks J was not in the form of a *rule nisi*, but was a final order that was granted by consent between the parties. The application has therefore become academic on the main issue leaving costs as the only outstanding issue for determination.

[12] The matter eventually came before Notununu AJ who found, *inter alia*, as follows:

(a) that section 20 of the Criminal Procedure Act was not applicable to the facts of the matter;

- (b) that there was a dispute of fact regarding whether the respondent's motor vehicle was parked on the sidewalk or the pedestrian area as alleged by the appellant, or in a demarcated parking bay as alleged by the respondent. Such a dispute of fact must, however, be real and not fictitious;
- (c) that in the present case the appellant's version consisted of bald and uncreditworthy denials, raised fictitious disputes of fact and was palpably implausible and farfetched. In the circumstances the learned Judge had no difficulty in rejecting the perceived disputes of fact on the papers;
- (d) that the matter was finally disposed of in accordance with the consent order granted by Brooks J on 30 September 2016 in that the order did not incorporate a *rule nisi*;
- (e) that the only plausible explanation for the consent order was that the appellant had conceded the unlawfulness and wrongfulness of the impoundment of the vehicle.

[13] The learned Judge then held that costs should follow the result, and made the following order:

"(1) The respondent's conduct to impound applicant's motor vehicle to wit a VW Polo red in colour with registration letters and numbers H[...] EC be and is hereby declared wrongful and unlawful.

(2) The respondent be and is hereby ordered to pay costs of the application."

[14] The appellant is appealing against the said order of Notununu AJ on the following grounds, namely that:

- (a) the Court erred in finding that the respondent's version consisted of bald or uncreditworthy denials, that it raised fictitious disputes of fact and was palpably implausible and farfetched;
- (b) the Court erred in rejecting the photograph of the place where the motor vehicle was parked, which was annexed to the appellant's answering affidavit;

- (c) the Court erred in not finding that the issues in the matter raised real disputes of fact which could not be resolved on the papers;
- (d) the Court erred in not dealing with the provisions of Regulations 304(1)(e), 304(4) and 305(6) of the National Road Traffic Act, as these provisions, according to appellant, constituted the respondent's primary defence in the matter;
- (e) the Court erred in finding that the matter was solely before the Court for the determination of costs;
- (f) the Court erred in not determining the issue of an interdict in its judgment;
- (g) the Court erred in finding that section 20 of the Criminal Procedure Act was not applicable in the matter;
- (h) the Court erred in finding that the concession to release the respondent's vehicle amounted to a concession that the vehicle was unlawfully and wrongfully impounded.

[15] The application brought by the respondent was in the form of a *mandament van spolie*. The essence of the *mandament van spolie* is that the person who has been deprived of his or her possession must first be restored to his or her former position before the merits of the case can be considered. The main purpose of the *mandament* is to restrain persons from taking the law into their own hands by inducing them to submit the matter to the jurisdiction of the Courts.¹

[16] A *mandament van spolie* is available where a person has been deprived unlawfully of his or her possession of moveables or immovable property, as well as where a person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights.²

[17] It is critical to mention that a *mandament van spolie* order, by its very nature, is final in effect.³

[18] It is plain from the order of Brooks J of 30 September 2016 that it was granted by consent between the parties. It was argued before us that the lawfulness of the impoundment of the vehicle stood over to be dealt with on the return day. However, if this were so the order

¹ See LAWSA – Mandament van Spolie, paragraph 93

² See LAWSA (supra), paragraph 94

³ See Nienaber v Stuckey 1946 AD 1049 at 1053

of Brooks J should not have been agreed to. It was implied in the consent to the spoliation order that the required element of unlawfulness was conceded.

[19] In terms of paragraph 1 of the order of Brooks J the appellant was ordered to return the respondent's motor vehicle forthwith. This order was final in effect and is not subject to the appeal before us.

[20] Notununu AJ exercised his discretion to award costs to the respondent on the basis that the respondent was successful in the matter.

[21] I fail to see any basis upon which this Court could possibly interfere with the exercise of Notununu AJ's discretion on the issue of costs. The respondent's primary objective was to regain possession of his vehicle. The appellant duly agreed to return the vehicle to the respondent, without any condition attached to such return, and without incorporating a *rule nisi*. This rendered paragraph 1 of the order of Brooks J final in effect. The respondent had therefore indeed achieved substantial success in the matter.

[22] In the circumstances it is unnecessary for us to determine the factual issue relating to whether or not the respondent's vehicle was unlawfully parked, which is indeed an issue which would be difficult, if at all possible, to decide on the application papers before us.

[23] Although I furthermore doubt that there is merit in the appellant's contention that the provisions of section 20 of the Criminal Procedure Act are in any event applicable herein, it is likewise unnecessary for us to decide this issue.

[24] It might be prudent to mention that, even if the aforesaid issues (relating to the place where the respondent had parked his vehicle and the applicability of section 20 of the Criminal Procedure Act), were determined in the appellant's favour, it would, in my view, not disturb the final order granted by Brooks J in relation to the return of the vehicle.

[25] In the circumstances:

The appeal is dismissed with costs.

J D HUISAMEN

ACTING JUDGE OF THE HIGH COURT

I agree

R E GRIFFITHS

JUDGE OF THE HIGH COURT

I agree

I T STRETCH

JUDGE OF THE HIGH COURT

ATTORNEY FOR APPELLANT

: Mr Zono

INSTRUCTED BY

: A. S. Zono & Associates

COUNSEL FOR RESPONDENT : Mr Malunga

INSTRUCTED BY : Makangela Mtungani Inc.

HEARD ON : 06 August 2018

DELIVERED ON : 21 August 2018