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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: CA&R 107/16

Heard On: 20/02/2017

Delivered on: 11/04/2017

In the matter between

JAN NTSHOEU

Appellant/Respondent

And

OOKAME E SMITH

Respondent/Applicant

JUDGMENT ON APPEAL

PAKATI J

[1] The appellant/respondent, Mr Jan Ntshoeu, appeals against an order granted by Magistrate PP Tshweu relating to a mandament van spolie that was brought on urgent basis by the respondent/applicant, Mr Ookame Smith, in the Kuruman Magistrates Court. For the sake of convenience I will refer to the parties by their names.

[2] On 16 October 2015 Mr Smith was granted the following order:

"1. The applicant's [Mr Smith's] non-adherence to this Court's Rules relating to the time periods and service be condoned and the application be heard as a matter of urgency in terms of the provisions of Rule 55 (l);

2. *That the rule nisi be issued calling upon [the} respondent [Mr Ntshoeu] to show cause, if any, on Thursday, 19 November 2015 at 09:00 why the following order should not be granted;*

2.1 *That [Mr Ntshoeu] be ordered to restore possession and control of motor vehicle Renault Kolia 4x4 with registration Number [B....]to [Mr Smith] immediately;*

2.2 *That [Mr Smith] be restrained and/or interdicted from interfering with [Mr Smith] in any manner whatsoever in his possession of the said motor vehicle.*

3. *Directing that prayers 2.1 to 2.2 will serve as an interim interdict with immediate effect pending the outcome of this application.*

4. *That a rule nisi calling upon [Mr Ntshoeu] to show cause (if any) on 19 November 2015 at 09:00 why prayer 2 above shall not be confirmed.*

5. *That [Mr Ntshoeu] pays the costs of this application.*

6 *That the interim order be served on [Mr Ntshoeu] in accordance with Rule 9 of the Court Rules. "*

The application for a *rule nisi* was unopposed and was granted as prayed for.

[3] On 05 November 2015 Mr Ntshoeu filed opposing papers but Mr Smith did not file a Replying Affidavit. On 19 November 2015, after hearing argument, the Magistrate confirmed the rule. Mr Ntshoeu filed a Notice Request Reasons for Judgment on the same day and also requested that execution of the order be suspended in terms of s 78 of the Magistrates Court Act, 32 of 1944, pending the appeal. S 78 provides:

"78 Execution or suspension in case of appeal, etc

Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application "

[4] On 17 February 2016 the Magistrate provided these reasons:

"REASONS FOR JUDGMENT

Please take note that the judgment delivered by the court on the 19/11/15 under case 1467/2015 shouldn't have been given in favour of the owner (Ookame Smith).

After considering the facts of both parties placed before the court I realised an error of judgment was made regarding the remedy of spoliation.

It is not in dispute that [Ookame Smith] is the owner of the [motor vehicle] and still paying it under an instalment sale agreement with Absa.

He handed the [motor vehicle] to (Jan Moncho) for repairs.

At the time when he handed the [motor vehicle} together with the keys possession was then transferred and he later had control, possession and undisturbed use of the said [motor vehicle] for a period of ten months.

Whatever happened during this period is irrelevant.

Looking at the objects of spoliation, despite the fact that he was not the rightful owner he had spoliator rights.

The objects of spoliation are as follows:

- 1 . *To restore the possession of the things possessed.*
2. *To put a stop to unlawfully taking the law into own hands.*
3. *To protect the person who apparently has a possessory right.*
4. *Prevent disturbance of public peace.*

This remedy includes restitution of possession and the performance of acts such as repairs and rebuilding the necessary restoration status quo ante.

This is what happened in this matter, the repairer who is the mechanic must be restored of his control and undisturbed possession of the [motor vehicle] handed to him regardless that he is the owner.

There are other remedies available in law which can be used by a lawful owner to recover what is his.

[The] applicant [Mr Smithj had shown that:

- *He was in possession of the vehicle Renault Kolia registration Number [B....]*
- *He was wrongfully deprived of the [motor vehicle] without consent.*

Costs given at an attorney and client scale. "

[5] It is clear from the reasons above that the Magistrate altered the content of her judgment thereby discharging the rule which she had already confirmed on 19 November 2015. This constitutes an irregularity as she was *functus officio* at the time.

[6] Mr Ntshoeu filed a Notice of Abandonment on 05 May 2016 which records:

"Kindly take notice that [Mr Ntshoeu] hereby abandons the revised judgment given in its favour on the 17'h day of February 2016 as this step was irregular.

[Mr Ntshoeu] is abandoning the said judgment solely to enable himself to lodge an appeal

against the original judgment given by the Honourable Magistrate on 19 November [2015].
"

[7] Mr Ntshoeu filed a Notice of Appeal with the Registrar on 05 May 2016.

In his Notice of Appeal he recorded the following grounds:

"1. That the Honourable Magistrate erred in finding that [Mr Smith] was in undisturbed and peaceful possession of the Renault Koliass 4 x 4 vehicle Registration Numbers and letters [B....], as the said vehicle was in the possession of [Mr Ntshoeu];

2. That the Honourable Magistrate erred in finding that [Mr Ntshoeu] unlawfully deprived [Mr Smith] of possession of [the] said Renault Koliass 4 x 4 vehicle with Registration Numbers and letters BZY 735 NC

as [Mr Smith] gave the vehicle to [Mr Ntshoeu] to do necessary repair work;

3. In the aforementioned [judgment] the Honourable Magistrate erred in granting the application based on the principle of spoliation; and

4. The Honourable Magistrate erred in an attempt to correct his errors in the reasons filed on the 17th day of February 2016 even though correct.

He was functus officio and therefore this attempted correction was irregular. "

The appeal is unopposed.

BACKGROUND FACTS

[8] During November 2014 Mr Smith was involved in an accident while driving his motor vehicle, a 4 x 4 Renault Koliass with Registration Number [B....]. He approached Mr Ntshoeu, a Panel Beater and owner of J's Panel Beaters. By agreement Mr Smith placed the motor vehicle in Mr Ntshoeu's possession by handing over the keys and the motor vehicle for

repairs. They agreed further that Mr Smith would buy all the necessary parts. It took Mr Ntshoeu a period of ten months to fix the motor vehicle. It is common cause that Mr Smith failed to pay the costs of repairs as they could not reach an agreement regarding the amount.

[9] During September 2015 Mr Smith learned that Mr Ntshoeu had fixed the motor vehicle and was driving it around without his knowledge and consent. He went to Mr Ntshoeu's house but did not find him home.

[10] On 25 September 2015 Mr Ntshoeu refused to release Mr Smith's motor vehicle unless he paid the amount of R57 000-00 for storage excluding labour. According to Mr Smith Mr Ntshoeu was unreasonable and charged an exorbitant amount. Mr Smith accordingly approached the Magistrates Court seeking the mandament van spolie. He claimed that he was in peaceful and undisturbed possession of his motor vehicle.

[11] The urgency was based on the following:

10.1 That Mr Smith is the registered owner of the motor vehicle;

10.2 That he was still paying its instalments towards its purchase;

10.3 That Mr Ntshoeu should not have used it for business purposes as he has thereby increased its kilometers and decreased its value;

10.4 That he was using public transport but paying for a motor vehicle driven by Mr Ntshoeu;

10.5 That he is the lawful possessor but has been unlawfully deprived of the use of his motor vehicle; and

10.6 That urgency was not self-created.

[12] Mr Ntshoeu denied that he did not inform Mr Smith of the cost of repairs. He states that he gave him a rough estimate, which is not a quotation. Mr Ntshoeu further says he and Mr Smith agreed that Mr Smith would pay R100-00 per day for storage. To save Mr Smith some costs he obtained cheap parts which cost R 19 590-00 and charged R4 500 for labour. He denied that the amount he demanded was unreasonable. Mr Smith persists in his refusal to pay for the repairs and storage.

[13] Mr Ntshoeu is claiming a lien over the motor vehicle to the repairs he has effected from 21 November 2014.

[14] The issue that falls for determination is whether Mr Smith was in peaceful and undisturbed possession of his motor vehicle. Mr Ntshoeu to the contrary claims that he had in fact been in undisturbed possession and control of the motor vehicle for almost a year and denies that he unlawfully deprived Mr Smith of the possession thereof.

[15] In order to succeed with an application for spoliation an applicant must allege and prove that he or she was in peaceful and undisturbed possession of the property or right. [1] In the **LAW OF SOUTH AFRICA (LAWSA)**[2] it is stated that the spoliation order or mandament van spolie

is available where:

"(a) a person has been deprived unlawfully of the whole or part of his or her possession of movables or immovable;

(b) a joint possessor has been deprived unlawfully of his or her co possession by his or her partner taking over exclusive control of the thing held in joint possession;

(c) a person has been deprived unlawfully of his or her quasi-possession of a servitotal right

(d) a person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights.

In case (c) and (d) the courts have warned that the application of the spoliation principles to incorporeal rights require closer investigation and more subtle treatment and that one must distinguish carefully between rights incidental to the quasi-possession of the right and a mere right to claim specific performance of a contractual or statutory obligation.

Illicit deprivation of possession in any of the ways mentioned above is termed spoliation. "

[16] Mhlantla JA in **IVANOV v NORTH WEST GAMBLING AND OTHERS**^[3] held :

"Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent people from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant - that is why a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute. "

[17] It is common cause that Mr Smith handed over his motor vehicle to Mr Ntshoeu during November 2014 for repairs. The motor vehicle remained with Mr Ntshoeu for more than ten months. Mr Smith cannot therefore claim that he was unlawfully deprived of his motor vehicle, without his consent or without due legal process. Good title is irrelevant. Mr Smith claimed a substantive right to possession based on ownership which cannot stand in these proceedings.

[18] Mr Smith failed to prove the unlawful deprivation of possession by Mr Ntshoeu. The appeal has to succeed.

In the circumstances I grant the following order:

1. The appeal is upheld with costs including the costs in the Magistrates Court.

PAKATI J

NORTHERN CAPE DIVISION

I concur

MAMOSEBO J

NORTHERN CAPE DIVISION

For the appellant: Adv D.C Jankowitz

Instructed by: Hugo Matthewson & Oosthuizen

For the respondents: No appearance

Instructed by: No appearance

[1] Impala Water Users Association v Lourens NO 2008 (2) SA 495 (SCA); Kgosa v Otto
1991 (2) SA 113 (W)

[2] Vol 27 par 94

[3] 2012 (6) SA 67 (SCA) at para 19. See also *Street Pole ads Durban (Pty) Ltd and Another v Ethekewini Municipality* 2008 (5) SA 290 (SCA) at para 15 where Cameron JA stated: "That is because good title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case, 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims'. This is because such an applicant 'in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered."